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The European Monetary Union: A Hard Test for the Rule of Law Within the EU Legal System

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FRANCESCO MUNARI*

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I. INTRODUCTION

About ten years have passed since the onset of the so-called sovereign debt crisis and the turbulence that marked the European Monetary Union (“EMU”). EMU stability still appears uncertain despite the laudable efforts made, above all, by the European Central Bank (“ECB”) to prevent irreparable damage to the EMU and the agreement reached in August 2015 over the third Greek bailout; thereby avoiding *Grexit* and its potentially disastrous spill-over effects.

While a general reform of the economic and constitutional foundations of the European Union is advocated for many reasons, certainly the current EMU legal framework needs more than a fine tuning. As a matter of fact, in an effort to safeguard the monetary union, and with it the European Union, the overall consistency of the system has suffered from legal contrivance (bending of the rules) that has weakened the very principles of the rule of law on which the Union’s legal system has been built over decades.¹ This has led to

1. See Gunnar Beck, *The Court of Justice, the Bundesverfassungsgericht and Legal Reasoning During the Euro Crisis: The Rule of Law as a Fair-Weather Phenomenon*, 3 EUR. PUB. L. 539 (2014) (extrapolating how issues pertaining to EU institutions, the European Central Bank in particular, make these institutions out of step with EU treaties); Armin von Bogdandy & Michael Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, 51 COMMON MKT. L. REV. 59, 59 (2014) (arguing that EU Member States

tensions across European institutions, Member States, and EU and national courts.

Part II of this article tries to explain why the EMU legal framework has inherent defects and why they have passed unnoticed for many years.² Part III analyses the main judgments pronounced by the European Court of Justice (ECJ) during the EMU crisis.³ Critical aspects of these judgments are emphasised together with a plausible “political” rationale underpinning them. Part IV assesses the EMU and the Euro Crisis from the national high courts’ viewpoints and considers the implications that such domestic case-law may have had on the decisions adopted by the respective Member States’ governments in trying to rescue or stabilise the EMU.⁴ Part V provides an analysis of the confrontation between the ECJ and the German Constitutional Court concerning the ECB’s Outright Monetary Transactions (“OMT”). This confrontation recently concluded with the latter court surrendering to the ECJ’s position yet claiming a non-persuasive, intrusive role of the judiciary in the fine-line, dividing economic and monetary policies and competences in the EU legal system.⁵

This article will not discuss all the steps in the Euro Crisis⁶ and the

are unable to uphold the rule of law due to corruption, weak institutions, and insufficient resources, further weakening compliance with EU standards). *See generally* ALPHEN AN DEN RIJN, *THE ECLIPSE OF THE LEGALITY PRINCIPLE IN THE EUROPEAN UNION* (Bresselink F. Pennings & S. Prechal eds., 2011) (expounding on how the principle of legality, which protects citizens from the arbitrary use of power, is being jeopardized in the European Union).

2. *See* discussion *infra* Part II.

3. *See* discussion *infra* Part III.

4. *See* discussion *infra* Part IV.

5. *See* discussion *infra* Part V.

6. Mauro A. Megliani, *Verso una Nuova Architettura Finanziaria Europea: Un Percorso Accidentato*, *DIRITTO DEL COM. INT’L*, 67 (2013); *see* Alexandre de Stree, *The Evolution of the EU Economic Governance Since the Treaty of Maastricht: An Unfinished Task*, 20 *MAASTRICHT J. OF EUR. & COMP. L.* 336, 336 (2013) (reviewing how the Economic and Monetary Union developed in response to the Euro Crisis); Gian L. Tosato, *L’Integrazione Europea ai Tempi della Crisi dell’Euro*, 95 *RIVISTA DI DIRITTO INT’L* 681 (2012); Annamaria Viterbo & Roberto Cisotta, *La Crisi Del Debito Sovrano e gli Interventi dell’U.E.: Dai Primi Strumenti Finanziari al Fiscal Compact*, 17 *IL DIRITTO DELL’UNIONE EUR.* 323 (2012) (providing a reflection on the EU monetary crisis, and the possible systemic issues that may emerge as a result). *See generally* GIULIO PERONI, *LA CRISI DELL’EURO: LIMITI E RIMEDI DELL’UNIONE ECONOMICA E MONETARIA* (2012).

medium-term measures adopted from the so-called ‘Six Pack’⁷ to the adoption of the Fiscal Compact and the European Stability Mechanism (“ESM”).⁸ The article will also refrain from addressing

7. Council Regulation 1174/2011, 2011 O.J. (L 306) 8, 9 (EU) (advocating for supplementation of the multilateral surveillance procedure); Council Regulation 1175/2011, 2011 O.J. (L 306) 12, 13 (EU) (requiring the Commission to have a stronger role in surveillance procedure); Council Regulation 1176/2011, 2011 O.J. (L 306) 25, 25 (EU); Council Regulation 1177/2011, 2011 O.J. (L 306) 33, 33 (EU); Council Directive 2011/85/EU, 2011 O.J. (L 306) 41, 41 (EU). *See generally* Council Directive 1173/2011, 2011 O.J. (L 306) 1 (EU) (requiring a medium-term budgetary objective of all Member States utilizing the Euro).

8. Christian Calliess, *From Fiscal Compact to Fiscal Union? New Rules for the Eurozone*, in 14 CAMBRIDGE Y.B. OF EUR. LEGAL STUD. 101, 101 (Catherine Barnard et al. eds., 2012); Tim Middleton, *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 421, 422 (Bruylant ed., 2012) (explaining the origin of the European Financial Stability Facility); C.A. Stephanou, *Building Firewalls: European Responses to the Sovereign Debt Crisis*, in INTERNATIONAL DEBT: ECONOMIC, FINANCIAL, MONETARY, POLITICAL AND REGULATORY ASPECTS 127, 127 (Hieronymi & Stephanou eds., 2013); Roberto Baratta, *Legal Issues of the 'Fiscal Compact' - Searching for a Mature Democratic Governance of the Euro*, IL DIRITTO DELL'UNIONE EUR. 647 (2012); Leonard Besselink & Jan H. Reestman, *The Fiscal Compact and the European Constitutions: 'Europe Speaking German'*, 8 EUR. CONST. L. REV. 1, 1 (2012); Christian Calliess & Christopher Schoenfleisch, *Auf dem Weg in die Europäische "Fiskalunion"? – Europa – und Verfassungsrechtliche Fragen einer Reform der Wirtschafts – und Währungsunion im Kontext des Fiskalvertrages*, 67 JURISTENZEITUNG 477, 481 (2012); Giacinto d. Cananea, *L'Ordinamento Giuridico dell'Unione Europea dopo I Nuovi Accordi Intergovernativi*, 67 COMUNITA INT'L 1, 3 (2012); Carlo M. Cantore & Giuseppe Martinico, *Asymmetry or Dis-integration? A Few Considerations on the 'New Treaty on Stability, Coordination and Governance in the Economic and Monetary Union'*, 19 EUR. PUB. L. 463 (2013); Giuseppe Cogliandro, *L'impatto del Fiscal compact sul sistema di governance europea*, LUISS 337 (2013); Paul Craig, *The Stability, Coordination, and Governance Treaty: Principle, Politics and Pragmatism*, 37 EUR. L. REV. 231, 231 (2012); Enrique B. Crespo & Stuart Holland, *Resolving the Eurozone Crisis and Enhancing Global Governance*, 67 COMUNITA INT'L 13 (2012); *Editorial Comments: Some Thoughts Concerning the Draft Treaty on a Reinforced Economic Union*, 49 COMMON MKT. L. REV. 1, 2 (2012); Ledina Gocaj & Sophie Meunier, *Time Will Tell: the EFSF, the ESM, and the Euro Crisis*, 35 J. EUR. INTEGRATION 239, 239 (2013); Azoulai Kocharov, *Monster? An EUI Debate on the Fiscal Compact Treaty*, EUR. U. INST. 1, 1 (2012); Alberto de Gregorio Merino, *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance*, 49 COMMON MKT. L. REV. 1613, 1613 (2012); Christoph Ohler, *The European Stability Mechanism: The Long Road to Financial Stability in the Euro Area*, 54 GER. Y.B. OF INT'L L. 47 (2012); Matthias Ruffert, *The European Debt Crisis and European Union Law*, 48 COMMON MKT. L. REV. 1777, 1777 (2011); Alexandre de Stree & Judicaël Etienne, *Le Traité sur la Stabilité, la Coordination et la*

the limits to the ECB's responsibilities or on the legitimacy of initiatives that in recent years and months it has adopted, for any comment on whether the ECB has correctly enforced the powers and mission assigned to it by the Treaty on the Functioning of the European Union (TFEU) and, in particular Article 127, which has been open to diverging interpretations, would be outside the scope of this work.⁹

My aim here is to highlight the above referred bending of rules and the response of case law. In this way, I will suggest how such contrivances may condition possible paths to reform and the destiny of the EMU in a context of unchanged legislation.

II. THE VAGUE FORMULAS OF THE EMU PROVISIONS

A. WHY NO ADEQUATE LEGAL ASSESSMENT OF THE EMU RULES WAS DONE DURING THE 'GOOD OLD DAYS' PRECEDING THE EURO CRISIS

Any analysis of the economic governance of the European Union must start with a qualitative assessment of the rules contained in the TFEU with particular emphasis on those that determined the European Monetary Union.

As jurists, perhaps, we thought that since we were talking about rules aimed at regulating predominantly economic processes and, more precisely, macroeconomic ones, our job was essentially to describe or, better still, to narrate. After all, these rules seemed connected to extremely technical (and political) issues about which we were probably ill-equipped to do what is normally expected of us, which is to read the norms rather than necessarily write them. The objective of our work should be, then, to regulate not only events in

Gouvernance au Sein de l'Union Economique et Monétaire, 20 J. DE DROIT EUR. 182 (2012); Jean-Claude Zarka, *Le Traité Sur la Stabilité, la Coordination et la Gouvernance dans l'Union Économique et Monétaire*, in RECUEIL DALLOZ, 893 (2012). See generally Jean-Victor Louis, *The Unexpected Revision of the Lisbon Treaty and the Establishment of a European Stability Mechanism*, in THE EUROPEAN UNION AFTER THE TREATY OF LISBON 284 (Nicola Countouris et al. eds., 2012).

9. Fabio Bassan, *Le Operazioni non Convenzionali della BCE al Vaglio della Corte Costituzionale Tedesca*, 97 RIVISTA DI DIRITTO INT'L 361, 361 (2014).

the past but, above all, those in the present and future on the basis of an analysis of foreseeable scenarios, i.e., on the basis of the possible interpretations and applications available.

So, whilst nearly all the rules of the EU's legal system were put under the microscope, legal analysis on economic and monetary issues appeared more superficial.¹⁰ This approach also applied to core constitutional aspects of the Union, such as the workings of the EMU, the relation between exclusive EU competences established in TFEU Article 3(c) and the coordination of economic policy responsibilities set out in TFEU Article 5(1) as well as the powers assigned to the European System of Central Banks (ESCB).¹¹

Even more serious was the lack of any critical analysis as to the existence of possible solutions – let alone appropriate ones – in the event of system criticalities. First and foremost, as a result, the illusion that the Euro was totally immune to risks and that membership was the gateway to advantages for all spread from Member States down to their citizens. This included the reduction in interest rate charges on public debt, the possibility of acquiring goods and services at better conditions, and the abolition of price instability.¹² Second, evident economic and monetary shortcomings

10. Hugo J. Hahn, *The Stability Pact for European Monetary Union: Compliance with Deficit Limit as a Constant Legal Duty*, 35 COMMON MKT. L. REV. 77, 78 (1998); Matthias J. Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9, 10 (1998); Francis B. Jacobs, *The European Parliament and Economic and Monetary Union*, 28 COMMON MKT. L. REV. 361 (1991); Jean-Victor Louis, *The Economic and Monetary Union: Law and Institutions*, 41 COMMON MKT. L. REV. 575, 575 (2004); Jean-Victor Louis, *A Legal and Institutional Approach for Building a Monetary Union*, 35 COMMON MKT. L. REV. 33, 73 (1998); Jörn Pipkorn, *Legal Arrangements in the Treaty of Maastricht for the Effectiveness of the Economic and Monetary Union*, 31 COMMON MKT. L. REV. 263 (1994); Rene Smits, *The European Constitution and EMU: An Appraisal*, 42 COMMON MKT. L. REV. 425, 467 (2005); Antonio Tizzano, *Qualche Considerazione sull'Unione Economica e Monetaria*, 2 IL DIRITTO DELL'UNIONE EUR. 455 (1997). See generally Luigi Daniele, *Unione Economica e Monetaria, Obblighi Degli Stati Membri e Poteri Sanzionatori delle Istituzioni*, IL DIRITTO DELL'UNIONE EUR. 931 (1996).

11. Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, 2010 O.J. (C 83) 7, 30 [hereinafter Protocol No. 4].

12. But see European Banking Federation, *The Euro Area Will Not be Immune to the Global Slowdown*, 24 EBF ECON. OUTLOOK, 1, 2, 4 (2007), <http://www.ebf->

in the treaties were put down to teething problems already experienced at the launch of the European Union. What was important, as previous events in the history of European integration had shown, was to lay the normative foundations – though incomplete – to enable the system to develop; refinement would occur pragmatically, as usual in such matters, thanks to the help of the Court of Justice.¹³ Even when the first cracks started to appear, it seemed sufficient to define the rules in question as “stupid,” the term then President of the European Commission, Romano Prodi, famously used to describe the rules contained in the Stability and Growth Pact (Articles 1466/97 and 1467/97).¹⁴

The fact that rigorous legal analysis unearthed severe problems with the subject matter was already shown in the first significant dispute referred to the Court of Justice - the Stability Pact Decision of 2004.¹⁵ The court struggled to handle, within a legal framework,

fbe.eu/wp-content/uploads/2014/03/Outlook_n24-2007-02342-01-E.pdf (last visited Mar. 13, 2017) (predicting the decline of the euro in world markets).

13. Corrado Caruso & Marta Morvillo, *Economic Governance and Budgetary Rules in the European Context: A Call for a New European Constitutionalism*, 19 *IL DIRITTO DELL'UNIONE EUR.* 699 (2014); Maria Francesca Cucchiara, *Fiscal Compact e Meccanismo Europeo di Stabilità: quale impatto sull'equilibrio istituzionale dell'Unione?*, 20 *IL DIRITTO DELL'UNIONE EUR.* 91 (2015); Filippo Donati, *Crisi dell'Euro, Governance Economica e Democrazia nell'Unione Europea*, 18 *IL DIRITTO DELL'UNIONE EUR.* 337 (2013); Maria L. Tufano & Sara Pugliese, *Il Nuovo Strumento di Convergenza e Competitività: Verso una "Governance" negoziata per l'UEM?*, 19 *IL DIRITTO DELL'UNIONE EUR.* 317 (2014); Lucia S. Rossi, *"Fiscal Compact" e Trattato sul Meccanismo di Stabilità: Aspetti Istituzionali e Conseguenze dell'Integrazione Differenziata nell'UE*, *IL DIRITTO DELL'UNIONE EUR.* 293 (2012).

14. See Council Regulation 1466/97, 1997 O.J. (L 209) 1 (EC); Council Regulation 1467/97, 1997 O.J. (L 209) 1 (EC).

15. See Case C-27/04, *Comm'n v. Council*, 2004 E.C.R. I-6679 (deciding not to adopt the recommendation of the Commission to allow an excessive debt procedure against France and Germany); P. Diman & M. Salerno, *Sentenza Ecofin: gli equilibri della Corte tra tensioni politiche, Costituzione economica europea e soluzioni procedurali*, in *DIR. PUB. COMP. EUR.* 1842 (2004); Dimitrios Doukas, *The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado About Nothing?*, 32 *LEGAL ISSUES OF ECON. INTEGRATION* 293, 293 (2005); Tomas de la Quadra-Salcedo Janini, *La discrecionalidad política del ECOFIN en la aplicación del procedimiento por déficit excesivo. Reflexiones tras la Sentencia del Tribunal de Justicia de 13 de julio de 2004*, *REVISTA DE STUD. POL.* 151, 151 (2004); Ramon T. Macau, *Cómo gobernar aquello que se desconoce?: El caso de la Comunidad Europea en Tanto que Unión Económica y Monetaria*, 9 *REVISTA DE DERECHO COMUNITARIO EUR.* 47, 47 (2005); Imelda

what was an essentially political issue; deciding to suspend an excessive deficit procedure against two key Member States, Germany and France, thereby distancing itself from the recommendations the Commission had adopted in applying the rules mentioned above.¹⁶

B. THE EURO CRISIS AND THE SUDDEN AWARENESS OF EMU RULES' FLAWS

By the end of last decade, the jurists' ingenuous reliance on the economic foundations forming the EMU backbone disappeared all of a sudden; the 2007 crisis demonstrated that the dogma of the EMU as a system built to withstand any external pressure suffered from an inherent error in design or in forecasting. We jurists found ourselves unprepared to deal with this situation. Only then did we understand the inadequacy of the normative framework, together with the unprecedented puzzle it created at the European law level, incapable of setting priorities between conflicting economic objectives. For example, the incompatibility of the buzzwords "rigour" on the one hand and "growth" on the other, and even greater incapability to provide answers of any kind to face market pressures and speculation, both of which were actually flourishing because of the absence of a precise system of rules.

Spurred by the urgency to react at all costs and often in only a few hours, rules were produced that can only be termed as embarrassing in their improvisation. An emblematic case was the European Financial Stability Fund ("EFSF"), a limited company agreed to by the 17 Eurozone Member States at the time and incorporated in Luxembourg under Luxembourg law in June 2010. Capitalised in the course of a few days with around 190 billion euros, the Fund's aim was to provide financial support to Greece, Portugal, and Ireland by issuing long-term bonds.¹⁷ The legal basis of this solution and other

Maher, *Economic Policy Coordination and the European Court: Excessive Deficits and ECOFIN Discretion*, 29 EUR. L. REV. 831, 831 (2004).

16. Case C-27/04, Comm'n v. Council, at 6680.

17. See *Frequently Asked Questions on the European Stability Mechanism (ESM)*, EUR. STABILITY MECHANISM 3 (July 28, 2014) [hereinafter ESM FAQ], <https://www.esm.europa.eu/sites/default/files/faqontheesm.pdf> (providing that the ESM replaced the EFSF on July 1, 2013, and that its exclusive surviving aim is to manage the financial facilities granted to Greece, Portugal, and Ireland and receive

temporary measures adopted at the time was found in TFEU Article 122(2), a provision actually envisaged to provide financial help to cope with natural disasters or exceptional circumstances, i.e., events that seem very different from those the temporary measures were designed for.¹⁸

Later, Member States and European institutions developed better-thought-out and more stable rules that managed to avert the derailing of the EMU.¹⁹ Nevertheless, a definitive judgement on them has to be postponed for a variety of reasons; primarily because their adoption went largely beyond the bounds of the EU's constitutional system. The Fiscal Compact and the ESM both lie outside the Treaty on European Union (TEU) and the TFEU, and establish an "international agreement" parallel to the EU legal system whose overall coherence must be entirely tested.²⁰ Sadly enough, this decision was mandated because of the strong opposition by the British government to modify the EU Treaties and hence relevant EMU provisions. De facto, it may work as a legal poison pill for the uncertainties it brings in the overall functioning and interpretation of the European economic and monetary system. After *Brexit*, this poison pill may taste even bitterer.

C. WEAK RULES FOR UNCLEAR POLICIES?

This said, the content of these provisions appears 'immature' as rule of law, at least considering the behaviour of the states, but also of the European institutions themselves, after their adoption. Repeatedly, requests are done at a political level to modify or

repayments).

18. See Phoebus Athanassiou, *Of Past Measures and Future Plans for Europe's Exit From the Sovereign Debt Crisis: What is Legally Possible (and What is Not)*, 36 EUR. L. REV. 558, 565 (2011) (discussing objections to the use of Article 122(2) as the basis of the EFSM).

19. See *supra* note 8, and *infra* note 30, (referencing to the Fiscal Compact and the ESM Treaties, as well as regulations quoted).

20. See Paul Craig, *Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, 9 EUR. CONST. L. REV. 263, 266, 268-69 (2013) [hereinafter, Craig, *Pringle and Use of EU Institutions*]; Steve Peers, *Towards a New Form of EU Law?: The Use of EU Institutions Outside the EU Legal Framework*, 9 EUR. CONST. L. REV. 37, 45 (2013); Stéphane Pinon, *Crise Économique Européenne et Crise Institutionnelle à Tous les Étages*, 567 REV. DE L'UNION EUR. 218 (2013).

reinterpret these rules, this implying a call for renegotiation of their overall contents. This hypothesis is garnering support in an increasing number of Member States and European institutions, both from those advocating more flexibility in the apparently stringent regime provided for to avoid excessive deficits and government debts of Member States, and for those claiming for more rigour in their budgetary discipline.²¹

Further cause for suspending judgment on the rules adopted in the aftermath of the Euro Crisis lies in the uncertain effects this new constitutional architecture of the EU and EMU will have. One need only think that, as a result of the ESM Treaty, Italy, which has a stake of just over 17% of the capital, is committed to underwriting shares equivalent to a paid-in capital contribution to the ESM of more than 125 billion euros.²² What is more, in order to maintain a high rating, the ESM established the rule that it will invest only in high-rated, high-quality, and highly-liquid securities.²³ The outcome for Italy is that, through the ESM, it ends up financing less-indebted economies (those commonly referred to as more virtuous) with its own public debt. We can discuss whether this is the right price to pay to have a state bailout fund, but a certain 'cross sightedness' of the rules emerging cannot be ignored.

Meanwhile, after almost six years, the draconian obligation established by Article 4 of the Fiscal Compact onto Member States, whose government debt to gross domestic product exceeds the 60% reference value, has remained practically unapplied to reduce debt at an average rate of one twentieth per year.²⁴

21. Ingolf Pernice, *What Future(s) of Democratic Governance in Europe: Learning From the Crisis*, in CHALLENGES OF MULTI-TIER GOVERNANCE IN THE EUROPEAN UNION EFFECTIVENESS, EFFICIENCY AND LEGITIMACY 12, 25 (2012) (claiming that the existing structures are unable to "achieve . . . economic governance in the EU . . . [but] [c]lear preferences were expressed for unity").

22. *Briefing: European Stability Mechanism (ESM): Main Features, Instruments and Accountability*, EUR. STABILITY MECHANISM, 9 (Jan. 17, 2017) [hereinafter ESM Briefing], [http://www.europarl.europa.eu/RegData/etudes/note/join/2014/497755/IPOL- ECON_NT\(2014\)497755_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2014/497755/IPOL- ECON_NT(2014)497755_EN.pdf).

23. *Id.* ("The ESM operates conservative capital and liquidity management policies to ensure that there is no shortfall of liquid assets to service ESM's own obligations, even if a borrower defaults. The paid-in capital cannot be used in lending operations but has to be invested (together with the reserves) in high-quality and liquid securities.")

24. *See Government Finance Statistics- Quarterly Data*, EUROSTAT 3 (Jan. 23,

Moreover, in the past months the situation seems to have further evolved and the newly established EMU rules underwent functional or even ‘liberal’ interpretations: For instance, it remains unlikely that Greece will be able to reimburse the EU institutions for the loans granted under its three bailouts. In June 2016, ECB announced that Greece may re-use its bonds as collateral in Euro-system monetary policy operations, and hence borrow further money from the ECB.²⁵ In July 2016 the European Commission recommended the Council (Member States’ governments) to cancel fines and to set new fiscal paths for Spain and Portugal even if they are in breach of the Stability and Growth Pact (the set of rules designed to ensure that countries in the EU pursue sound public finances and coordinate their fiscal policies)²⁶ and should therefore be sanctioned with fines up to 0.2% of their respective GDP according to TFEU Article 126(8).²⁷

These new developments are certainly linked to *Brexit* and the need to avoid any further turmoil in European financial markets. And yet, a mid-term, clear direction for European economic and financial policy seems far from being envisaged.

Last, but not least, there are still no details of the rules concerning any possible ‘plan B’ to be applied in the event last-ditch efforts fail to save the euro-zone membership of some states. The irreversibility of membership to the euro is a position which, though insistently repeated, appears no longer unequivocal or even particularly persuasive, especially when some states insist on keeping their national currencies and yet continue to be full members of the European Union. The dogma of irreversibility is even less convincing if we consider that, in the weeks leading up to Greece’s third bail out, informal remedies to allow *Grexist* seemed plausible

2017) [hereinafter Government Finance Statistics], http://ec.europa.eu/eurostat/statisticsexplained/index.php/Government_finance_statistics-quarterly_data#Governmentfinancialbalancesheet (claiming that at the end of the third quarter of 2016 the government debt to GDP ratio reached 90.1%).

25. European Central Bank Press Release, ECB Reinstates Waiver Affecting the Eligibility of Greek Bonds Used as Collateral in Eurosystem Monetary Policy Operations (June 22, 2016) [hereinafter ECB Press Release].

26. See *supra* notes 3 & 8.

27. See European Commission Press Release IP/16/2625, Stability and Growth Pact: Fiscal Proposals for Spain and Portugal (July 27, 2016) [hereinafter European Commission Press Release].

and potentially available from the legal point of view.

Politically it is understandable, justifiable, and indeed appropriate that any 'plan B' should not be regulated by law; as past events have shown, this would trigger speculation and political, economic, and financial opportunism. The following initiatives by Member States and European institutions focusing above all on bolstering the EMU are therefore to be applauded. At the legal level examples include, in addition to the ESM and Fiscal Compact, the European Securities and Markets Authority (ESMA)²⁸ and banking union,²⁹ and,

28. See Council Regulation 1095/2010, 2010 O.J. (L 331) 84 (EU); see also Pedro G. Teixeira, *The Regulation of the European Financial Market After the Crisis*, in EUROPE AND THE FINANCIAL CRISIS 9 (Pompeo Della Posta & Leila Simona Talani eds., 2011); Takis Tridimas, *Financial Supervision and Agency Power*, in FROM SINGLE MARKET TO ECONOMIC UNION: ESSAYS IN MEMORY OF JOHN A. USHER 55, 65-67 (Niamh Nic Shuibhne & Laurence W. Gormley eds., 2012); Mads Andenas & Iris H. Y. Chiu, *Financial Stability and Legal Integration in Financial Regulation*, 38 EUR. L. REV. 335, 339 (2013); Niamh Moloney, *EU Financial Market Regulation After the Global Financial Crisis: "More Europe" or More Risks?*, 47 COMMON MKT. L. REV. 1317, 1332 (2010) [hereinafter Moloney, *EU Financial Market Regulation*]; Niamh Moloney, *Reform or Revolution: The Financial Crisis, EU Financial Markets Law, and the European Securities and Markets Authority*, 60 INT'L & COMP. L.Q. 521, 523 (2011) [hereinafter Moloney, *Reform and Revolution*]; Pierre Schammo, *The European Securities and Markets Authority: Lifting the Veil on the Allocation of Powers*, 48 COMMON MKT. L. REV. 1879, 1879 (2011).

29. See Council Regulation 1024/2013, art. 6(1), 2013 O.J. (L 287) 63 (EU) (establishing the Single Supervisory Mechanism); Council Regulation 806/2014, art.1, 2014 O.J. (L 225) 1 (EU) (establishing the Single Resolution Mechanism); see also Council Regulation 2015/81, 2014 O.J. (L 15) 1 (EU); Jens Dammann, *The Banking Union: Flawed by Design*, 45 GEO. J. OF INT'L L. 1057, 1060-62 (2014); Antonio Di Marco, *Il Controllo delle Banche nell'EUM: la (Problematica) Nascita di un Sistema Integrato di Vigilanza Prudenziale*, 3 IL DIRITTO DELL'UNIONE EUR. 549 (2013); Rosa M. Lastra, *Banking Union and Single Market: Conflict or Companionship?*, 36 FORDHAM INT'L L.J. 1190, 1192-93 (2013); Niamh Moloney, *European Banking Union: Assessing its Risks and Resilience*, 51 COMMON MKT. L. REV. 1609, 1614-25 (2014); Gianni Lo Schiavo, *From National Banking Supervision to a Centralized Model of Prudential Supervision in Europe?: The Stability Function of the Single Supervisory Mechanism*, 21 MAASTRICHT J. EUR. & COMP. L. 110, 111 (2014); Laura Wissink, Ton Duijkersloot & Rob Widdershoven, *Shifts in Competences Between Member States and the EU in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection*, 10 UTRECHT L. REV. 92, 92 (2014); Andreas Witte, *The Application of National Banking Supervision Law by the ECB: Three Parallel Modes of Executing EU Law?*, 21 MAASTRICHT J. EUR. & COMP. L. 89, 95-96 (2014); Benedikt Wolfers & Thomas Voland, *Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank*, 51

operationally the ECB's OMT and quantitative easing programmes.³⁰

Nevertheless, on the basis of what can be seen, the *modus operandi* is unusual and – at a purely legal level – the system leaves too many unresolved questions. In the absence of norms or procedures regulating the departure of a Member State from the EMU this would inevitably create the basis for fiscal union with real integration of economic policy and a collective debt redemption fund, at least in part, that consequently overcomes the ‘no bail out clause’ established by TFEU Article 125.³¹ These solutions are all legally conceivable, but politically controversial.

Yet, the result of this attempt to keep any option available with no clear solutions in sight eventually reveals alarming cracks in the EU's legal architecture. This situation will be the focus of the next sections.

III. THE ECJ TESTING THE EMU RULES

A. THE EMERGENCY JUDGMENT REQUESTED FROM THE ECJ IN THE PRINGLE CASE AND THE APPARENT CLASH BETWEEN THE EMU AND ESM

In the preceding paragraphs I have tried to draw attention to the qualitative inadequacy of economic and monetary rules contained in the EU and TFEU treaties, the limits of the rules rushed-out during the Euro Crisis, and the scarce room for manoeuvring of Member State representatives in terms of their political mandate.

Not surprisingly then, the first time these rules were referred to the ECJ, in *Pringle*, the court's decision raised some concerns.³² In

COMMON MKT. L. REV. 1463, 1466-1468 (2014).

30. See *infra* Part II.

31. See Rainer Palmstorfer, *To Bail Out or Not to Bail Out? The Current Framework of Financial Assistance for Euro Area Member States Measured Against the Requirements of EU Primary Law*, 37 EUR. L. REV. 771, 775-76 (2012); see also Jean-Victor Louis, *The No-Bailout Clause and Rescue Packages: The Guest Editorial*, 47 COMMON MKT. L. REV. 971, 976-77 (2010).

32. Case C-370/12, *Pringle v. Ireland*; see Pieralberto Mengozzi, *Il Trattato sul Meccanismo di Stabilità (MES) e la Pronuncia della Corte di Giustizia nel Caso Pringle*, STUDI SULL'INTEGRAZIONE EUROPEA 129 (2013); see also Stanislas Adam & Francisco Javier Mena Parras, *The European Stability Mechanism Through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle*, 38 EUR. L. REV. 848, 848 (2013); Vestert Borger, *The ESM and the*

particular, alongside a certain relief for a judgment that confirmed the legitimacy of the normative instruments designed to save the EMU and perhaps the European Union itself, the legal pressure the court was under to reach this result did not go unnoticed.

The first concern arising from the *Pringle* judgment relates to the question of competence. The ECJ was asked to determine whether the new TFEU Article 136(3)³³ went beyond monetary policy alone and the coordination of Member State economic policy but instead represented an amendment to the competences in monetary and economic policy arising from giving Member States the possibility to grant financial assistance in ways *other* than those foreseen by the same TFEU (essentially in addition to the, albeit inadequate, provisions of TFEU Article 122 or Article 143 for non-EMU Members).³⁴ If this were the case, the provision would, however, not only have affected TFEU Part 3 but also Part 1 in violation of rules regarding modifications to the treaties: TFEU Article 136 was integrated using the simplified treaty revision procedure established by Article 48(6) implementing the provisions of the TEU regarding simplified revisions contained in Article 48(6), first and second paragraphs TEU, which expressly permits modifications affecting

European Court's Predicament in Pringle, 14 GERMAN L.J. 113, 113 (2013); Paul Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 MAASTRICHT J. EUR. & COMP. L. 3, 7 (2013) [hereinafter Craig, *Pringle: Legal Reasoning*]; Edoardo Gambaro & Francesco Mazzochi, *Le Regole dell'Unione Europea alla Prova della Crisi dei Debiti Sovrani: Il Caso Pringle*, 2 DIRITTO COMMERCIALE INTERNAZIONALE 545, 545 (2013); Pieter-Augustijn Van Malleghem, *Pringle: A Paradigm Shift in the European Union's Monetary Constitution*, 14 GERMAN L.J. 141, 142 (2013); Martin Nettesheim, *Europarechtskonformität des Europäischen Stabilitätsmechanismus*, 66 NEUE JURISTISCHE WOCHENSCHRIFT 14, 14 (2013); Daniel Thym & Mattias Wendel, *Préserver le Respect du Droit dans la Crise: la Cour de Justice, le MES et le Mythe du Déclin de la Communauté de Droit*, 3 CAHIERS DE DROIT EUR. 733, 733 (2012); Bruno de Witte & Thomas Beukers, *The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle*, 50 COMMON MKT. L. REV. 805, 806 (2013).

33. 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 in the Euro, art. 1, 2011 O.J. (C91) 1 (adopting Article 136.3 of the TFEU).

34. *Id.* (providing that “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 and stating that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality.”).

solely the provisions of TFEU Part 3.

The court rejected the applicant's argument as follows: "[H]aving regard to Articles 4(1) TEU and 5(2) TEU, the Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism,"³⁵ implicitly excluding the idea that the ESM was the particular stability mechanism foreseen by TFEU Article 136(3). Indeed, the ECJ was adamant in assessing that the ESM is extraneous to the EMU, hence depriving the new drafting of TFEU Article 136 of any relevance as if this provision were inserted fortuitously.

The consequences for the court after reaching such a conclusion were significant, forcing it to develop a line of reasoning that was not particularly convincing³⁶ above all with regards to the general question of Member States' external competences and particularly to the possibility of their concluding extra-EU agreements on matters regulated by EU law.³⁷ Admittedly, the ESM Treaty was signed exclusively by EU Member States. However, this has little relevance given that, in order to protect EU law vis-à-vis international agreements (inter-state included), in *Pringle* the ECJ drew attention to the duty of Member States to respect EU law when carrying out their respective competences by mentioning the *Elisa Gottardo* case, which however concerned a treaty signed with a non-EU Member

35. Case C-370/12, *Pringle v. Ireland*, ¶ 68.

36. See Roberto Cisotta, *Fiscal Discipline, the EU Financial Stability and Solidarity in Times of Crisis: Some Reconstructive Cues*, 1 IL DIRITTO DELL'UNIONE EUR. 57, 72 (2015) (stating that the court's solution in *Pringle* is "legitimised" by a normative vacuum related to the safeguarding of financial stability in the euro area as a whole, and by the fact that, in this subject matter, the flexibility clause provided for by TFEU Article 352 cannot apply). It may be correct as an *ex post* conclusion, but I believe the court has stretched EU law a little bit too much.

37. See Alberto Malatesta, C. Ricci, *External Relations of the European Community on Monetary Matters*, IL DIRITTO DEL L'UNIONE EUR., 229 (2002) (discussing EU external relations concerning economic and monetary policy); see also Roberto Basso, *On External Relations of the European Community in Matters Relating to Economic and Monetary Union*, 84 RIVISTA DI DIRITTO INT'L. 111, 111 (2001); Christoph W. Herrmann, *Monetary Sovereignty over the Euro and External Relations of the Euro Area: Competences, Procedures and Practice*, 7 EUR. FOREIGN AFF. REV. 1, 1–24 (2002); Norbert Weinrichter, *The World Monetary System and External Relations of the EMU: Fasten Your Safety Belts!*, 4 EUR. INTEGRATION ONLINE PAPERS 10, 10 (2000).

State.³⁸

Hence, to protect the ESM from being judged a violation of EU competences, in *Pringle* the court was forced to allow Member States to sign international agreements that overlap EU competences but are external to the Union provided that the obligations deriving from these agreements respect EU law.³⁹ This undoubtedly is a step backwards with regards to the supposed parallelism of internal and external competences first established in *ERTA* which later became an integral part of EU primary law as illustrated by TFEU Article 3(1) and *ad abundantiam*, TFEU Article 216.⁴⁰

The ESM's independence vis-à-vis those stability mechanisms, nevertheless foreseen by TFEU Article 136(3), forced the court to perform other acrobatics in reasoning, this time on the subject of whether the involvement expressly established in the ESM Treaty of Union Institutions in fact meant an increase in the Union's competences or in those of its institutions.⁴¹ This widening of competences could not have been achieved by the new TFEU Article 136(3) because this provision had been enacted pursuant to the simplified treaty revision procedure which can only be used for amendments to Part 3 of the TFEU.⁴²

Here the court's response is even more elliptical, being based essentially on the idea that, as the ESM is outside EMU rules, the contents of the ESM Treaty, also vis-à-vis the involvement of EU institutions, do not modify their competences.

Alas, the court preferred not to base its legal reasoning on the premise that the ESM is basically an agreement that derives, in some way, from TFEU Article 136 and is subject to it. If it had though, this approach would certainly have required a more detailed analysis in the area of international law and perhaps some further legal

38. Case C-55/00, *Gottardo v. INPS*, 2002 ECR I-413, ¶ 32.

39. See Case C-370/12, *Pringle v. Ireland*, ¶ 69 (noting that strict conditionality under Paragraph 3 of TFEU Article 136 is used to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies).

40. Case 22/70, *Comm'n v. Council*, 1971 E.C.R. 263.

41. See Case C-370/12, *Pringle v. Ireland*, ¶ 71.

42. Treaty on European Union, art. 48, Feb. 7, 1992, 1992 O.J. (C191) 1 [hereinafter EU Treaty].

acrobatics on whether the ESM represented a modification of some competences. It would have, in some way, reined in the ESM within the Union's constitutional framework. Such an approach would also have more effectively confirmed the centrality of the framework over the ESM. It would also have offered an authoritative proposal as to how the ESM's system could in the future be incorporated within the EMU. I believe this solution is the most appropriate for re-compacting the EU's constitutional architecture, especially upon *Brexit's* conclusion (i.e. when the fiercest opponent to the insertion of the ESM within the EU treaties will no longer be in the Union).

Taking further into account that, as we have already seen and will see, the "horizontal" and "parallel" approach instead of the ESM and EMU raises significant doubts, for instance, when the court assumes that the ESM does not exclude measures of financial assistance inside the EU system, based on TFEU Article 122.⁴³ As one stability mechanism is more than enough, such a hypothesis appears somewhat unrealistic.

Similarly unconvincing is the part of the judgment where the court, though having to recognise the significant points of contact between the ESM and EMU, attempts to settle the question simply by stating that "the ESM will, among other tasks, assume the tasks allocated temporarily to the EFSM" (i.e. an instrument of temporary financial support established with the precise aim of implementing TFEU Article 122(2)).⁴⁴

In brief, the court identifies two parallel worlds, one inside the EMU the other outside it, both compatible and able to coexist without having to modify Union competences or those of the Member States. Furthermore, in *Pringle* the ESM would be consistent with EU rules, as Member States cannot contract obligations that contrast with these rules.

Personally, such a line of reasoning appears flawed. It seems difficult to assume that two interchangeable instruments can coexist without the working of one affecting the working of the other. This, however, as we will now see, is also the conclusion reached by the

43. Case 22/70, *Comm'n v. Council*, ¶ 103 (noting "that fact is not such as to affect common rules of the Union or alter their scope").

44. Case C-370/12, *Pringle v. Ireland*, ¶ 103.

court in the *Gauweiler* judgment.⁴⁵

B. THE CONDITIONALITY PRINCIPLE AS A PREREQUISITE TO IMPLEMENT ECONOMIC POLICY MEASURES OR MONETARY POLICY CHOICES

The parallel worlds generated by the coexistence of the ESM with EMU rules and instruments also produces problems concerning the ESM's impact on rules established at the EU level to coordinate economic policy.

On this point, the ECJ declared that “the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism,” in this way, rejecting the view that through the ESM the areas of competence existing amongst Member States and between them and the Union had changed.⁴⁶ The court's reasoning is still less convincing when it regards the conditionality the Member State using the financial assistance is subject to and the impact this conditionality has on the beneficiary's economic policy; an impact the court terms “indirect consequences.”⁴⁷ In fact, economic policy measures are imposed on states by the principle of conditionality, whose application presupposes financial assistance. Strictly speaking, we are talking here of *imposition* rather than *coordination*. However, the TFEU rules on economic policy coordination imply certain discretionary powers on the part of Member States, thus offering them some room for manoeuvre in terms of sovereignty⁴⁸ which is far greater than that offered to states applying for financial assistance.⁴⁹

In fact, leaving aside questions of the system's democratic deficit, it is clear to all, especially to Euro-zone Members, that the rules on economic policy coordination, those of the EMU, have tended to be applied as long as the situation is physiological. When a Member State, however, has to ask for a form of financial assistance, it leaves

45. Case C-62/14, *Gauweiler v. Deutscher Bundestag*, 2015 E.C.R. 400.

46. Case C-370/12, *Pringle v. Ireland*, ¶ 110.

47. *Id.* ¶ 97.

48. See *supra* note 16 & 17 and accompanying text.

49. See Michael Ioannidis, *EU Financial Assistance Conditionality After Two-Pack*, 74 ZAÖRV 61, 100 (2014) (discussing the topic of conditionality).

the world of the EMU to enter that of the ESM, triggering conditionality mechanisms that radically reduce the country's sovereignty.⁵⁰ According to the court, all this conforms to the treaties because the ESM is distinct from the EMU despite the existence of TFEU Article 136(3) that foresees exactly the same tie between financial assistance and conditionality. This must implicitly remain a dead letter, even though formally it can happily coexist with the EMS, because otherwise its operation would alter the structure of intra-EMU competences, an outcome not allowed for by treaty reform mechanisms.

The limits of this line of reasoning become clear when we consider that financial assistance via the ESM is just one of a range of options available and is used to help a Member State in difficulty. One has only to think of the ECB's commanding role in shoring up the situation caused by the Greek crisis. However, in the court's reasoning, this role loses its sense of being complementary and fundamental instrumental in crisis management becoming simply an instrument of monetary policy which almost by chance has effects in other areas as well.

In fact, in *Gauweiler* the court had to address the very same 'indirect consequences' that implementation of the OMT programme might (or should) have on the economic policies of beneficiary states resulting from the purchase of their sovereign bonds on secondary markets by the ECB, in particular as this programme "may, indirectly, increase the impetus to comply with those adjustment programmes and thus, to some extent, further the economic-policy objectives of those programmes."⁵¹ Once again, the court held that all this does not change the nature or confines of the ESCB's competence, which remains restricted to monetary policy.⁵²

Yet, with all the goodwill and understanding that we owe a judge faced with the task of providing solutions distinctly outside the sphere of law, the rule-bending carried out by the ECJ is apparent. Luckily, at least between the lines, I believe that in *Gauweiler* the court tried to anchor its reasoning to some principle of EU law, i.e.,

50. *The European Stability Mechanism*, EUR. CENTRAL BANK (July 2011), https://www.ecb.europa.eu/pub/pdf/other/art2_mb201107en_pp71-84en.pdf.

51. Case C-62/14, *Gauweiler*, ¶ 400.

52. *Id.* ¶¶ 58-68.

the principle of loyal cooperation amongst institutions (here, the ECJ and the ECB). The court uses this principle to confirm the tenet of the ESCB's absolute autonomy: this enables it to avoid entering into a legal review concerning decisions that are essentially technical and discretionary – the OMT programme – for the purposes of assessing whether these decisions go beyond the confines of the competences attributed to the ESCB or to the ECB. Indeed, as we will see, *Gauweiler* has the undoubted merit of re-establishing a basis of legal principles concerning the interpretation and application of programmatic rules such as those relating to the EMU, thereby defusing attacks aimed at delegitimising the ECB and, as a result, at weakening the European legal system overall vis-à-vis alleged constraints stemming from the need to safeguard the prerogatives of Member States.

C. THE CHAMELEONIC RELATIONSHIP BETWEEN ECONOMIC POLICY AND MONETARY POLICY IN THE ECJ RECENT CASE LAW: A GOOD-BYE TO THE RULE OF LAW PRINCIPLE WITHIN THE EU LEGAL SYSTEM?

The court's legal reasoning suffered further bending, in particular on the question of the reach of monetary policy. In its attempt to scale down the ESM and upstream the amended TFEU Article 136, the court in *Pringle* marked out the scope and objectives of monetary policy exclusively in terms of price stability.⁵³ Unequivocal in this sense are, amongst others, paragraphs 56-57 of the judgment, in which the ECJ states that the ESM's objective was "to safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy."⁵⁴ The court continued by saying that,

[e]ven though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the

53. Case C-370/12, *Pringle v. Ireland*.

54. *Id.* ¶ 56.

euro.⁵⁵

Along these lines, the court specifies in paragraph 57 that “[t]he grant of financial assistance to a Member State however clearly does not fall within monetary policy.”⁵⁶

This reasoning is excessively schematic given that economic policy and monetary policy are far more interrelated than the court wants to admit. In fact, the ECB is in no way extraneous to the ESM: in the first place, because it was requested to state an opinion on the compatibility of TFEU amended Article 136 with Article 125 *before* the adoption of decision 199/2011.⁵⁷ Secondly, because the ECB is

55. *Id.*

56. *Id.* ¶ 57; see also *id.* ¶ 136 (“[A]s is apparent from paragraph 5 of the ECB opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.”).

57. Jürgen Bast, *Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review*, 15 GERMAN L.J. 167 (2014); Thomas Beukers, *The Bundesverfassungsgericht Preliminary Reference on the OMT Program: "In the ECB We Do Not Trust. What About You?"*, 15 GERMAN L.J. 341 (2014); Editorial, *An Unintended Side-effect of Draghi's Bazooka: An Opportunity to Establish a More Balanced Relationship Between the ECJ and Member States' Highest Courts*, 51 COMMON MKT. L. REV. 375 (2014) [hereinafter *An Unintended Side-effect of Draghi's Bazooka*]; Udo Di Fabio, *Karlsruhe Makes a Referral*, 15 GERMAN L.J. 107 (2014); Klaus Ferdinand Gärditz, *Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decisions of the Federal Constitutional Court*, 15 GERMAN L.J. 183 (2014); Carsten Gerner-Beuerle et al., *Law Meets Economics in the German Federal Constitutional Court: Outright Monetary Transactions on Trial*, 15 GERMAN L.J. 281 (2014); Matthias Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, 15 GERMAN L.J. 265 (2014); Mattias Kumm, *Rebel Without a Good Cause: Karlsruhe's Misguided Attempt to Draw the CJEU into a Game of "Chicken" and What the CJEU Might Do About It*, 15 GERMAN L.J. 203 (2014); Franz Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, 15 GERMAN L.J. 111 (2014); Dietrich Murswiek, *ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court's Referral Order from 14 January 2014*, 15 GERMAN L.J. 147 (2014); Ingolf Pernice, *A Difficult Partnership Between Courts: The First Preliminary Reference by The German Federal Constitutional Court to the CJEU*, 21 MAASTRICHT J. EUR. & COMP. L. 3 (2014); Niels Petersen,

mentioned as one of the (main) actors within the ESM treaty. From this perspective it also becomes more difficult to base an argument in terms of the confines of the ECB's powers because, if the solution provided by the court in *Pringle* makes sense in terms of saving the institutional and inter-state solutions made necessary by the emergency, the precedent is offered up to the German Constitutional Court in its request for a preliminary ruling in *Gauweiler*⁵⁸ on the legality of the OMT under EU law precisely starting from the basis of the ECJ's restrictive interpretation of monetary policy given in *Pringle*.

On this point and above all *ex post*, perhaps this particular cloud had one silver lining given that in *Gauweiler*, and in marked opposition to the arguments raised by the German *Bundesverfassungsgericht*, the court declared, on the question of the ESCB's competences and the objectives of monetary policy, that “[w]ithout prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union.”⁵⁹

Admittedly, there is nothing new here as the wording tracks that of TFEU Article 127. Moreover, it is right that the ESCB's hands are not tied solely to price stability, as probably some proponents of their own national central-bank model would prefer.

Nonetheless, it is a fact that from this perspective the competences of the ESCB and the EMS do tend to overlap and that consequently

Karlsruhe Not Only Barks, but Finally Bites—Some Remarks on the OMT Decision of the German Constitutional Court, 15 GERMAN L.J. 321 (2014); Asteris Pliakos, et al., *Blind Date Between Familiar Strangers: The German Constitutional Court Goes Luxembourg!*, 15 GERMAN L.J. 369 (2014); Dagmar Schiek, *The German Federal Constitutional Court's Ruling on Outright Monetary Transactions (OMT) – Another Step Towards National Closure?*, 15 GERMAN L.J. 329 (2014); Karsten Schneider, *Questions and Answers: Karlsruhe's Referral for a Preliminary Ruling to the Court of Justice of the European Union*, 15 GERMAN L.J. 217 (2014); Alexander Thiele, *Friendly or Unfriendly Act? The “Historic” Referral of the Constitutional Court to the ECJ Regarding the ECB's OMT Program*, 15 GERMAN L.J. 241 (2014); see *infra* Part IV.

58. Case C-62/14, *Gauweiler v. Deutscher Bundestag*, ¶ 43.

59. Roberto Cisotta, *Disciplina Fiscale, Stabilità Finanziaria e Solidarietà nell'Unione Europea ai Tempi della Crisi: Alcuni Spunti Ricostruttivi*, IL DIRITTO DELL'UNIONE EUROPEA 57 (2015) (offering a more generous interpretation of *Pringle*).

the interpretations of the rules offered in *Pringle* appear to have served exclusively for contingencies.⁶⁰ At the end of the day, the court put *realpolitik* before the rule of law.

The same *realpolitik* can be seen also in *Gauweiler*: Having ascertained that both the OMT programme and the activities of the ESM consist in the purchase of government bonds on the secondary market and that these purchases are subordinate to a programme of macroeconomic adjustment, the court rejected the idea that the OMT programme can be regarded in any way as a measure extraneous to monetary policy, simply specifying that,

the difference between the objectives of the ESM and those of the ESCB is decisive[;] whilst . . . a programme such as that at issue in the main proceedings may be implemented only in so far as is necessary for the maintenance of price stability, the ESM's intervention is intended to safeguard the stability of the euro area, that objective not falling within monetary policy.⁶¹

So, once the ESCB, in carrying out its powers “independently” and “without any political pressure,” has identified price stability as the objective of its actions, this suffices, in the court’s opinion, to block any legal dispute regarding the question of attributed competences.⁶² Once more it is worth signalling the descriptive intent in this part of the judgment, clearly influenced by the strong (political) debate about the limits characterizing ECB powers and prerogatives. As we will fortunately see, in *Gauweiler* the court’s reasoning appears slightly more organic and complete and is grounded on general principles of law typically used in legal reasoning. The overall result, therefore, is without doubt more convincing.

D. THE EUROPEAN STABILITY MECHANISM AND THE TENSIONS IT CREATES ON EU FUNDAMENTAL RIGHTS

Another problem here to be highlighted, though relating only to the *Pringle* judgement, is nevertheless symptomatic of the climate generated by the euro crisis and its effects on the Union. The final

60. See Case C-62/14, *Gauweiler*, ¶ 64 (discussing objectives of the ESCB and EMS).

61. *Id.*

62. Case C-370/12, *Pringle v. Ireland*, ¶ 180.

part of the judgment confirms that the governance systems put in place outside the confines of the Union are not subject to any controls regarding their compatibility with the fundamental rights established by the Charter because

the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where . . . the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.⁶³

The argument is apparently impeccable and logically follows from the *ratio decidendi* of the judgement. However, once again it fails to persuade because, as the ESM and EMU by definition have to work together,⁶⁴ it is difficult to imagine that Member States and institutions which, when in an EMU setting adopt economic or monetary policy measures are expected to abide by the Charter, and may fail to do so when the same or similar measures are adopted in an EMS setting, perhaps as part of a specific bail-out plan for one Member State, as was the case in the Greek crisis.

In this sense, though correctly arguing as to the non-application of the Charter, the Court perplexingly omitted to mention even the possibility, as a minimum in theory, that the EMS system should at least conform to the principles of fundamental rights and freedom that have emerged from the constitutional traditions shared by Member States.

Such an omission cannot be fortuitous. Certainly, reference, had it been there, to the common constitutional traditions and, *a fortiori*, to the European Convention on Human Rights (ECHR) would have evoked and perhaps brought new life to article 6.3 TEU (a provision which lost most of its utility after the coming into force of the Treaty of Lisbon and the formal recognition of the Charter as primary EU law),⁶⁵ so dismissing the idea that the ESM lies somehow outside the EU and FEU Treaties. If the Court had wanted to, it certainly could have developed lines of reasoning similar to those, which from the

63. See *supra* Part II, § A.

64. See Case C-617/10, Åklagaren v. Fransson, 2013 E.C.R. 105.

65. See generally Ornella Porchia, *Il Ruolo della Corte di Giustizia dell'Unione europea nella Governance Economica Europea*, in *CRISIS Y COORDINACIÓN DE POLÍTICAS ECONÓMICAS EN LA UNIÓN EUROPEA* 593 (Marcial Pons ed., 2013).

1970s onwards, progressively integrated fundamental human rights into European law. Therefore, it is realistic to claim that the Court deliberately decided not to express itself on these issues. Why? There are two possible explanations: the first could be out of a form of self-restraint on the part of the Court towards a question that is unprecedented and potentially disruptive to the system of EU law, perhaps preferring to wait for a later and less controversial opportunity to return to the question. In fact, the Court has still to express itself on the rules of economic governance and perhaps also offer an analysis that takes into account principles or fundamental rights.⁶⁶

The second explanation, which is less optimistic and more problematical, lies in the possibility that the Court had already absorbed – in line with indications provided by the doctrine and some national courts⁶⁷ – the inconsistency of these new instruments of financial assistance with some fundamental individual rights.

In particular, this last point is of considerable interest to jurists since it shows how the application of measures designed to safeguard the euro are starting to create problems for the common constitutional values within Member States and upon which the Union should be founded, according to the preamble and article 2 of the EU Treaty, and the principle of the rule of law that we jurists in Europe have been accustomed to for decades.

Here it should be added that, also after *Pringle*, despite repeated requests, the ECJ has declined to address the impact the ‘indirect consequences’ of financial assistance measures adopted as part of the new European instruments will have on fundamental rights and individual freedom. Two cases in point are *Sindicato dos Bancários do Norte and Sindicato Nacional dos Profissionais de Seguros e Afins*, where the Court correctly declared the claims as inadmissible,

66. See Baratta, *supra* note 8, at 673 (elaborating on perspicuous remarks); Massimo Starita, *Il Consiglio Europeo e la Crisi del Debito Sovrano*, 96 RIVISTA DI DIRITTO INTERNAZIONALE 385 (2013); see also *supra* Part III, § B (providing a short outline of the Member States’ courts view on the relationship between EMU measures and fundamental rights).

67. Case C-128/12, *Sindicato dos Bancários do Norte v. Banco Português de Negócios SA*, 2013 E.C.R. 149; Case C-264/12, *Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial—Companhia de Seguros SA*, 2014 E.C.R. 2036.

opted not to consider the issue, and preferred to state technically valid though arid solutions that ultimately provide no opinion *obiter dictum* or otherwise.⁶⁸ In the light of this, the self-restraint explanation mentioned above appears even less convincing. Fortunately, signs of some support on the level of fundamental individual rights appears to have been provided recently by other institutions, while the Court more recently has envisaged some apparent remedies, that are not however quite persuasive. I will shortly touch upon them in the Conclusions.

IV. MEMBER STATES' HIGH COURTS IN THE FACE OF THE EMU

A. THE GERMAN CONSTITUTIONAL COURT APPROACH . . .

It is useful at this stage to understand whether, in these turbulent years, there are other players on the scene. In this regard, I believe that a significant addition to the problems in discussing European economic governance has come from Germany's Constitutional Court. In fact, since the notable *Lissabon-Urteil* judgement of 30th June 2009, establishing from the German constitutional legal viewpoint the conditions under which Germany could ratify the Treaty of Lisbon,⁶⁹ the *Bundesverfassungsgericht* ("BVG") has established the existence of inherent limitations in the German *Grundgesetz* that hinder further forms of European integration.

Several years on, we can now track the course developed by the *BVG*: keeping abreast of the times, it has managed to place several domestic constitutional hurdles in the way of European integration, thereby limiting the bargaining and political power of the Union's most powerful Member (Germany). This solution has been obtained

68. BVerfG [Federal Constitutional Court], 2 BvE 2/08, June 30, 2009, www.bverfg.de/entscheidungen/es20090630_2bve000208.html (Ger.); see Luis Miguel Poiaras Maduro & Giorgio Grasso, *Quale Europa dopo la sentenza della Corte Costituzionale tedesca sul Trattato di Lisbona?*, 1 IL DIRITTO DELL'UNIONE EUR. 503 (2009) (providing an exhaustive analysis of the *Lissabon-Urteil*); see also Enzo Cannizzaro & M. Eugenia Bartoloni, *Continuità, discontinuità e catastrofismo. Sulle reazioni della dottrina al Lissabon-Urteil*, 1 IL DIRITTO DELL'UNIONE EUR. 15 (2010) (analyzing the analysis of German courts on the Lisbon Treaty).

69. BRUNO NASCIMBENE, *COSTA/ENEL: CORTE COSTITUZIONALE E CORTE DI GIUSTIZIA A CONFRONTO, CINQUANT'ANNI DOPO* (2015).

through a significant revival of the theories of “counter-limits,” that had flourished in the seventies as a legacy elaborated in particular by the German and Italian constitutional courts;⁷⁰ such theories had appeared destined to be consigned to the history books of European integration, since the more recent obstacles to further integration had come from the political sphere or in the form of referendums, thereby excluding any technical or legal reasoning.⁷¹

In 2009, the sovereign debt crisis had yet to explode but already the *BVG* saw perhaps more than many others the cracks that were appearing in the EMU and set about erecting defences around the German legal system.

In the *Lissabon-Urteil*, the Court established in a fully-rounded way the workings of the so-called *Einzelermächtigungen*, i.e. a reading of the principle of conferral from the point of view of Member States’ legal systems and Germany’s in particular: as competences are ‘conferred,’ the Union cannot increase them without violating the sovereignty of Member States and their constitutional systems; if the Union wishes to increase these competences, it must ask for specific measures to attribute power to modify them on a case-by-case basis.⁷²

The effects on the EU legal system are evident as they impact the flexibility clause (article 352 TFEU), severely limiting its application potential. And this is why, for instance, two years after the *Lissabon-Urteil*, the Union – or more precisely, its Member States – were forced to change the treaties by amending article 136 TFEU, a norm that provided significant application potential if one reads the argumentation the ECJ was forced to develop in *Pringle*.⁷³

Moreover, the mechanisms that test the constitutionality of German laws repeatedly provide the *BVG* with the opportunity to lay down the conditions to its government and parliament and consequently to EU institutions,⁷⁴ primarily to the European Council

70. *Id.* (making reference to the 2005 French and Dutch referendums that had doomed the so-called treaty establishing a constitution for Europe).

71. BVerfG [Federal Constitutional Court], 2 BvE 2/08, part II. § a (Ger.).

72. *Id.* ¶¶ 105-08.

73. Klaus Ferdinand Garditz, *Beyond Symbolism: Towards a Constitutional Actio Popularis in EU Affairs? A Commentary on the OMT Decision of the Federal Constitutional Court*, 15 GERMAN L.J. 183, 184-85 (2014).

74. BVerfG [Federal Constitutional Court], 2 BvR 1390/12, Sept. 12, 2012,

and Council. Particularly, within the *Verfassungsbeschwerde* the *BVG* can clarify and strengthen domestic constitutional limits *vis-à-vis* the adoption of all the main State bail-out measures coming from both inside and outside the EU system, from the Greek bail-out to the ESM Treaty.⁷⁵ Such a constitutional complaint procedure can be activated (and has been activated in literally thousand of cases, almost all declared inadmissible) by citizens, scholars, organisations and even political parties, including the left socialist party *die Linke*, whose repeated complaints to the *BVG* reveal a strong opposition against financial assistance to Southern Europe countries affecting German citizens' economy, and display another example of decreasing international solidarity also by traditionally socialist parties, whose defence of the weak persons apparently end at the national borders.

In this way, thanks to the assertion of the principle of democracy, protected by the *Grundgesetz*, and consequently of the sovereignty of the German people and their representatives (i.e. the *Bundestag*), the *BVG* intends to maintain control over the main budgetary decisions, and to exert considerable constitutional influence over inter-governmental methods and over the possibility of modifying treaties to establish instruments designed to reform economic governance within the EU. In fact, once excluded the German government's power to introduce bail-out mechanisms that are not ratified by the *Bundestag*, or better, that have not been decided by it, any German statute willing to give legal force to agreements reached inside or

www.bverfg.de/entscheidungen/rs20120912_2bvr139012.html (Ger.) (describing the Greek bail-out); BVerfG [Federal Constitutional Court], 2 BvR 987/10, Sept. 7, 2010, www.bverfg.de/entscheidungen/rs20110907_2bvr098710.html (Ger.); Christian Calliess, *The Future of the Eurozone and the Role of the German Constitutional Court*, DEP'T EUR. L. STUD. 1, 8-12 (2012) (describing the EMS Treaty); Jared Curzan, Comment, *A Critical Linkage: The Role of German Constitutional Law in the European Economic Crisis and the Future of the Eurozone*, 35 FORDHAM INT'L L.J. 1543, 1556 (2012); Susanne Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, 14 GERMAN L.J. 1, 6-7 (2013); Mattias Wendel, *Judicial Restraint and the Return to Openness: The Decision of the German Federal Constitutional Court on the EMS and the Fiscal Treaty of 12 September 2012*, 14 GERMAN L.J. 21, 33-6 (2012); Karsten Schneider, *Yes, but . . . One More Thing: Karlsruhe's Ruling on the European Stability Mechanism*, 14 GERMAN L.J. 45, 60-61 (2013).

75. BVerfG [Federal Constitutional Court], 2 BvE 2/08, June 30, 2009, www.bverfg.de/entscheidungen/es20090630_2bve000208.html (Ger.).

outside EU law, and capable of introducing open-end mechanisms to provide financial assistance to States, becomes subject to an assessment of constitutional legitimacy by the *BVG*, since the economic and financial effects of these mechanisms on the German system end up to be always subject to parliamentary approval.⁷⁶

Therefore, the *BVG*'s consent to the German government and State both on the question of financial assistance to Greece in 2012 and on Germany's capitalisation of the ESM, though at first judged positively, in reality appears to limit possible broader-based solutions. In fact, the domestic constitutional constraint posed by the *BVG* reduces the range of available solutions that Member States' governments (among which the German one) may envisage as necessary to address the current incompleteness both of the EMU and of the EU, and resolve the contradictions of the system described above. Indeed, apart from the obvious domestic political pressure exerted by *BVG* case law, the legal limits of this Court's decisions on the German government in European negotiations and on the Union as a whole are clear.

And what is more, given that in general the search for parliamentary consent on international issues can be exploited for domestic political ends, this indirectly but significantly weakens Member States' institutions and the "Community method" adopted in

76. See Andrea De Petris, *Un Rinvio Pregiudiziale Sotto Condizione? L'Ordinanza del Tribunale Costituzionale Federale sulle Outright Monetary Transactions*, 4 FEDERALISMI.IT 4 (2014), <http://www.federalismi.it/nv14/articolo-documento.cfm?artid=24220>; see also Press Release, European Central Bank, Tech. Features of Outright Monetary Transactions (Sept. 6, 2012), <http://www.ecb.europa.eu/press/pressconf2012/html/is120906.en.html>; Mario Draghi, President of the ECB, Introductory Statement to the Press conference with Q&A (Sept. 6, 2013), <http://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html>; Benoît Cœuré, Member of the Exec. Bd. of the EC, the ECB & its OMT Programme, Speech at the Centre for Econ. Policy Research, German Inst. for Econ. Research & KfW Bankengruppe Berlin (Sept. 2, 2013); Carlo Altavilla et al., *The Financial and Macroeconomic Effects of OMT Announcements* 4-5 (Eur. Cent. Bank, Working Paper No. 1707, 2014), <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1707.pdf>; Tolek Petch, *The Compatibility of Outright Monetary Transactions with EU Law*, 7 L. & FIN. MARK. REV. 13, 19 (2013); Philippine Cour-Thimann & Bernhard Winkler, *The ECB's Non-standard Monetary Policy Measures the Role of Institutional Factors and Financial Structure* 12-13 (Eur. Cent. Bank, Working Paper No. 1528, 2013), <http://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1528.pdf>.

Europe that has for decades represented the real difference between the EU and other international organisations.

Therefore, it came as no surprise if the *BVG*'s first request for a preliminary ruling by the ECJ on article 267 TFEU was assertively and almost rhetorically worded, expressly indicating to the Court the conditions under which the measures announced by the ECB as part of the OMT programme were compatible with EU law.⁷⁷ In actual fact, the *BVG* was asking the Court to declare the OMT programme incompatible with the Treaties, using for this purpose the weaknesses present in *Pringle*, in particular with reference to the scope of monetary policy—and so the very mission of the ECB—as set forth in the TFEU.⁷⁸

The distance between a European institution and the supreme judge of one of the Member States is unprecedented in the history of EU law. In some way, this conflict, let us say, breaches also the principle of loyal cooperation established by article 4.3 TEU, a principle that from the *BVG*'s point of view was perhaps in fact breached by the ECB. And this approach probably wanted to mark a new era of the dialogue between national judges and the ECJ as we have known it for decades in the form of the reference for a preliminary ruling.⁷⁹

However, as we will see, the Court was in no way conditioned by this method and if anything wanted to reaffirm, first, its exclusive prerogative as interpreter of EU law and, second, the binding nature of its decision on any national court.⁸⁰ Such a stance has significant consequences: the first and most immediate is the legitimisation of the OMT programme under EU law. The Court however also indicated the systematic control it intended to exercise on the instruments chosen by the ECB to carry out its mandate;⁸¹ the second and considerably more complicated outcome potentially concerned

77. BVerfG [Federal Constitutional Court], 2 BvE 2/08, June 30, 2009, www.bverfg.de/entscheidungen/es20090630_2bve000208.html (Ger.).

78. Thiele, *supra* note 57, at 246–47.

79. Case C-62/14, Gauweiler v. Deutscher Bundestag, 2015 E.C.R. 400.

80. BVerfG [Federal Constitutional Court], 2 BvE 2/08, June 30, 2009, www.bverfg.de/entscheidungen/es20090630_2bve000208.html (Ger.).

81. See Kumm, *supra* note 57 (assuming that because of *BVG*'s rigidity on these issues, Germany could be in breach of the EU law rules with the related consequences).

Germany, and its Constitutional Court, which after *Gauweiler*, had to face the dilemma of, on one hand, respecting EU law as interpreted by the ECJ's preliminary rulings whilst, on the other, overcoming the constitutional rigidity produced by its case law.⁸²

B. THE RESPONSE BY THE SOUTHERN AND EASTERN EUROPEAN STATES' HIGH COURTS

However, it is not only the *BVG* that is weakening Member States' shared constitutional traditions. In fact, an interpretation of national primary laws in support of a political stance grounded on rigour in interpreting European decisions on financial assistance for Member States in difficulty, runs up against an interpretation of the constitutional laws of those States opposed to the application of measures adopted by them in implementing the 'strict conditionality' required by financial assistance programmes.

So, whilst in *Pringle* the ECJ rejected the admission of fundamental rights and individual freedom as a yardstick for the legality of financial assistance measures, Greece's Court of Audit and Supreme Court judged the Greek government's public spending cuts unconstitutional.⁸³ A few months later, Portugal's Constitutional Court declared that provisions contained in the 2013 Budget Law passed by the Portuguese parliament once more as part of the austerity measures made necessary by the 'new normative instruments' adopted to save monetary union violated the principles of equality and of fundamental social rights.⁸⁴ Later, this Court confirmed such judgment three more times.

82. Nomos (2012:4093) [Approval of the Medium Term Fiscal Strategy 2013-2016], EFIMERIS TIS KIVERNISSEOS, 2012, A:222 (Greece), http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=99876 (issuing a negative decision on the raising of the retirement age and on the cuts to pensions and to the allowances provided to Greek retired workers. On 7 November 2012, the Supreme Court declared cuts to Greek judges' salaries unconstitutional. On 27 February 2013, again, the Court of Audit declared the rules retroactively adopted by the Greek legislator to cut public salaries and wages unconstitutional.).

83. Roberto Cisotta & Daniele Gallo, *Il Tribunale Costituzionale Portoghese, i Risvolti Sociali Delle Misure di Austerità ed il Rispetto dei Vincoli Internazionali ed Europei*, 7 DIRITTI UMANI E DIRITTO INTERNAZIONALE 465 (2013).

84. Federico Fabbrini, *The Euro-crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 BERKLEY J. INT'L L. 64, 92 (2014).

In this conflict between Courts and their respective founding values, worthy of note are two judgements (numbers 223/2012 and 116/2013)⁸⁵ of the Italian Constitutional Court, which declared unconstitutional cuts to judges' salaries carried out by the Berlusconi government in 2010 and to 'fat cat' pensions decided by the Monti government in the second half of 2011, i.e., at the height of turbulence when the spread of Italian bond yields over comparable German *bunds* ballooned to over 500 basis points.⁸⁶ Although both judgements, particularly the second, were seen by some as an inappropriate defence of the unacceptable benefits of a privileged few, here I would like to highlight how also the Italian Constitutional Court revealed an evident conflict between, on one hand, the application of austerity measures decided by Member States in an EMU setting and the founding principles of the Italian constitution on the other.⁸⁷ The same Court's judgement no. 70/2015 can be seen in a similar vein: though basing its argument on the inadequacy of the reasoning offered by the Italian legislator, the Court declared the Italian government's decision to block pension upgrades unconstitutional despite the fact that the measure was taken as part of cost containments required to meet euro-zone convergence parameters "imposed" by the EU.⁸⁸

85. Corte Cost., 8 ottobre 2012, n. 223, GIUR. IT. 2012, 1 (It.); Corte Cost., 3 giugno 2013, n. 116, GIUR. IT. 2012, 1, 9 (It.).

86. See Decreto Legge, 6 luglio 2011, n.98, G.U. July 6, 2011, n.155 (It.) (referencing urgent provisions for financial stabilization); see also Decreto Legge, 15 luglio 2011, n.111, G.U. July 16, 2011, n.164 (It.); see also Decreto Legge, 6 dicembre 2011, n.201, G.U. Dec. 6, 2011, n.284 (It.) (referencing urgent provisions for growth, fairness and consolidation of public finances).

87. See Paola Ivaldi, *Diritto Dell'Unione Europea e Processo Costituzionale*, IL DIRITTO DELL'UNIONE EUR. 191 (2013); see also Allan Rosas, *The National Judge as EU Judge; Some Constitutional Observations*, 67 SMU L. REV. 717 (2014); see also Christoph Grabenwarter, *National Constitutional Law Relating to the European Union*, in PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW 83, 85-86 (Armin von Bogandy & Jürgen Bast eds., 2010); Antonio Tizzano, *Ancora Sui Rapporti tra Corti Europee: Principi Comunitari E c.d.Controlimiti Costituzionali*, IL DIRITTO DELL'UNIONE EUR. 734 (2007).

88. See Decreto Legge, n.201/2011, ¶ 25 (describing urgent provisions for growth, fairness and consolidation of public finances); see also Legge, 22 dicembre 2011, n.214, G.U. Dec. 27, 2011, n.300 (It.) (referencing a statute which was declared in breach of articles 3, 36 ¶ 1 and 38 of the Italian Constitution, however, the Constitutional Court did not uphold the theories advocated by the Italian referring judges; rather, the contested rules were considered further

Fortunately, not all constitutional courts are antagonistic with regards to EMU or ESM rules or more precisely with regards to the implications these rules have at national level.⁸⁹ In an overview of the positions taken by national constitutional courts, the judgment of the Estonian Supreme Court is significant. This Court was asked whether the 85% majority foreseen within the ESM Board of Governors was compatible with the Estonian constitution, on the basis of the fact that only three Member States (Germany, France and Italy) can exercise a veto, meaning that the other members have to comply with the Board's decisions.⁹⁰

The Estonian Supreme Court had no hesitation in judging this rule consistent with the principle of proportionality and therefore legitimate even though it restricts the financial competence of the Estonian parliament, the principle of rule of law and the sovereignty of Estonia.⁹¹ Without overemphasizing the significance of this judgment, it does nevertheless show that, at least on economic issues, the most recent EU Member States – and their judges – believe in European Monetary Union and in the “community” method perhaps more than others.

V. THE LEGALITY OF THE OMT PROGRAMME UNDER EMU RULES: A CONFRONTATION BETWEEN THE ECJ AND THE *BVG*

A. THE LIKELY STRUCTURE OF THE EMU LEGAL SYSTEM AFTER THE *GAUWEILER* JUDGEMENT BY THE ECJ

Amongst the varying opinions on the constitutional effects determined by the shortcomings of the EMU, the ECJ has had, at least so far, the last word in *Gauweiler*. Clearly, the ECJ judgement⁹² was the product of a solely EU perspective. And admittedly, few

detrimental to fundamental rights as provided by the European Convention on Human Rights).

89. See Cucchiara, *supra* note 13, at 110 (providing a short overview of the internal constitutional case-law on ESM).

90. See Treaty Establishing the European Stability Mechanism art. 4 ¶ 4, Feb. 2, 2012, Eur. Comm'n, http://europa.eu/rapid/press-release_DOC-12-3_en.htm.

91. Supreme Court of Estonia, Judgment No. 3-4-1-6-12 (July 12, 2012), riigikohus.ee/?id=1347.

92. Case C-62/14, *Gauweiler*, ¶ 9.

doubted that the Court would have delegitimised the OMT programme and, by doing so, sound the death knell of monetary union.

However, apart from the outcome, a reading of the judgement motivation suggests that the Court had no intention of obtaining a minimum result, but instead bravely – and at least on the political level persuasively – sought to offer a system-wide indication and at the same time halt perhaps once and for all repeated attempts to delegitimise and weaken the ECB, i.e. the institution that, over the last few years, had more than any other taken on the task of saving the euro and the EU against a backdrop of political (and has we have seen, for some, also legal) paralysis characterised by the actions of Member States.

The Court's *iter decidendi* is not perfect, nor totally persuasive when it attempts to create a continuum between its judgement and *Pringle*. Also because, as I have already pointed out, it was by no means easy to counter the *BVG*'s astute referrals on the basis of the weaknesses inherent in the *Pringle* judgement.

The ECJ, however, clarified point by point the issues raised in the referral, so providing a structured defence of the workings of the ESCB, which can be summarised as follows.

First and foremost, a “strong” legal review of ESCB and ECB measures is not allowed as these institutions enjoy absolute autonomy and independence with regards to any form of political pressure and consequently a considerable margin of discretion in making technical decisions.⁹³ The only limit they have in performing their institutional mission concerns the motivations of the decisions they take, which can be subject to judicial review where there is a “manifest error of assessment.”⁹⁴ On this question, a reading of ECB

93. *Id.* ¶ 40.

94. *Id.* ¶ 74; *see id.* ¶ 75 (implying that even more emblematic – and symptomatic of the Court's will to keenly reply to *BVG* is,

the fact, mentioned by the referring court, that that reasoned analysis has been subject to challenge does not, in itself, suffice to call that conclusion into question, since, given that questions of monetary policy are usually of a controversial nature and in view of the ESCB's broad discretion, nothing more can be required of the ESCB apart from that it use its economic expertise and the necessary

documents regarding the transmission of monetary policy in the euro area, made up by all “the various channels [and I include the OMT programme as one of them] through which monetary policy actions affect the economy and the level of prices in particular”⁹⁵ will suffice to show, also jurists, how difficult it is to interpret and categorise in a rigid way (and in doing so, mistakenly) measures that are extremely complex and variable. In this sense, the ECJ is to be commended for those parts of the judgement motivation where, clarifying that the objective of the OMT programme is to remedy instabilities in the monetary policy transmission mechanism, it recognises that assessments made by the ECB should be respected even though these may concern selective measures that have indirect consequences on the economic policy objectives established in parallel adjustment programmes agreed on (or imposed) as part of the EFSF or ESM.⁹⁶

Having made this clarification, the Court had little difficulty in reaching further conclusions that strengthened the EMU and consequently the Union as a whole. Above all, we have already seen how the ECJ’s preference for an analysis of relevant treaty norms that does not seek the rigid compartmentalisation of economic policy and monetary policy measures implies also its preference for a more flexible interpretation of the principle of conferred competences. It is here, I believe, that the greatest divergence emerges between the ECJ and the principles of conferral theorised by the *BVG* already seen in the *Lissabon-Urteil* judgement. Indeed, in *Gauweiler*, the ECJ sought to take this opportunity to stress, in contrast to the rigidity of the German judgements, the need for and legal correctness of a flexible approach *vis-à-vis* the interpretation of rules assigning powers to institutions, particularly those of the ECB. Such flexibility is fully consistent with the principle of loyal cooperation and presupposes the need to allow the ECB to be able to assume the role and the responsibility also institutional which, in the current critical situation, the ECB itself has marked out.

technical means at its disposal to carry out that analysis with all care and accuracy).

95. European Central Bank, *Monetary Policy Transmission in the Euro Area*, EUR. CENT. BANK MONTHLY BULL. 43 (July 2000).

96. Case C-62/14, *Gauweiler*, ¶ 55.

Furthermore, and once more in contrast with the *BVG*'s line of reasoning, the ECJ clarified that the bond-purchase programmes established for certain Member States and for categories of bonds issued (such as the OMT programme) are already "circumscribed and limited," so making it unnecessary and indeed wrong to set "a quantitative limit . . . prior to its implementation, such a limit being likely, moreover, to reduce the programme's effectiveness."⁹⁷

Obviously, we are a long way from the legitimisation of any open-end measure, which puts the ECB's independence and capacity to act at risk and infringes therefore article 123 or article 125 TFEU. Nevertheless, there is an unmistakable similarity between the Court's judgement and Mario Draghi's famous "whatever it takes" declared during the announcement of the OMT programme as an instrument to counter speculative attacks on certain euro-zone States' public debt. So, the assessment in terms of proportionality made by the Court with regards to a programme that does not have quantitative but rather methodological limits takes on an importance that goes beyond the specific case in question and can help to design further instruments to be used by EU institutions as part of an overhaul of the EMU.

It is of little importance if this discretionary action includes "generally, the possibility of the ESCB purchasing from the creditors of such a State, bonds previously issued by that State." If this in fact occurs with a series of "sufficient safeguards to ensure that the latter does not fall foul of the prohibition of monetary financing in Article 123(1) TFEU," this decision also appears legitimate.⁹⁸

In the analysis of the *Gauweiler* judgement, a question, perhaps of little real importance, does come to mind: did the Court want to challenge the *BVG*, or at least a part of it, for having over-played their role as defenders of German democracy? Certainly more important, also for the European cause, is to view positively the position the Court took with regards to the *BVG*, i.e. as a natural part of the dialogue between courts and the essence of preliminary ruling referrals. In this sense, if the obligations arising from EU-membership mean a community-oriented reading of certain *Grundgesetz* rules, then this is simply how relations between national

97. *Id.* ¶ 88.

98. *Id.* ¶ 95.

and EU laws normally work and is part and parcel of what jurists have studied since *Van Gend en Loos*,⁹⁹ which has also conditioned the constitutional structure of all Member States, with the landmark *Frontini* judgement of the Constitutional Court as an example from Italy.¹⁰⁰ Alas, as we shall see, the *BVG* did not entirely catch the option offered by the ECJ.

B. THE *BVG* REPLY TO THE ECJ *GAUWEILER* JUDGMENT: NO HAPPY END FOR THE EMU BUT RATHER AN ARMISTICE BETWEEN COURTS

One year after the ECJ preliminary ruling judgment, the turn was for the *BVG* to eventually close the complaints made by Mr. *Gauweiler et al.* against the OMT programme: in June 2016 the *BVG* judgment was rendered and it was an endorsement of the ECJ position also from the German constitutional legal viewpoint.¹⁰¹

The *BVG* has in particular established that,

If the conditions formulated by the Court of Justice of the European Union in its judgment of 16 June 2015 (C-62/14) and intended to limit the scope of the OMT programme are met, the complainants' rights . . . are not violated by the fact that the Federal Government and the *Bundestag* have not taken suitable steps to revoke or limit the effect of the policy decision of the European Central Bank of 6 September 2012 concerning the OMT programme. Furthermore, if these conditions are met, the OMT programme does not currently impair the *Bundestag's* overall budgetary responsibility. If interpreted in accordance with the Court of Justice's judgment, the policy decision on the OMT programme does not

99. Case 26/62, *Van Gend En Loos v. Nederlandse Administratie der Belastingen*, 1963 E:C.R. 1, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61962CJ0026>; see Ingolf Pernice, *The Autonomy of the EU Legal Order: Fifty Years After Van Gend*, in *50TH ANNIVERSARY OF THE JUDGMENT IN VAN GEND EN LOOS: 1963-2013 55-57* (Antonio Tizzano et al. eds., 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/201312/qd30136442ac002.pdf>. (providing a reinterpretation of this judgment fifty years later).

100. Corte Cost., 18 dicembre 1973, n. 183, GIUR. IT. 1 (It.).

101. BVerfG [Federal Constitutional Court], 2 BvR 2728/13, June 21, 2016, http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2016/06/rs20160621_2bvr272813.html (Ger.); BVerfG [Federal Constitutional Court], Press Release No. 34/2016, *Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful*, BVERFG (June 21, 2016), <http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2016/bvg16-034.html> [hereinafter Press Release No. 34/2016].

“manifestly” exceed the competences attributed to the European Central Bank. Moreover, if interpreted in accordance with the Court of Justice’s judgment, the OMT programme does not present a constitutionally relevant threat to the German *Bundestag*’s right to decide on the budget.¹⁰²

This being the core of the judgment, by no way the endorsement of the ECJ was unconditional nor enthusiastic.

In fact, the *BVG* was keen in restating its theory on the constitutional limits to transfer powers to the EU and its institutions, which is the prerequisite to allow EU law precedence of application *vis-à-vis* national law, since

limits for the opening of German statehood derive from the constitutional identity of the Basic Law . . . and from the European integration agenda, which is laid down in the Act of Approval¹⁰³ and vests European Union law with the necessary democratic legitimacy for Germany.¹⁰⁴

The *BVG* restated again the non-negotiable nature of the principles of democracy and of people’s sovereignty established by the *Grundgesetz*, which would be infringed “if institutions, bodies, offices and agencies of the European Union that are not adequately democratically legitimised through the European integration agenda laid down in the Act of Approval exercise public authority.”¹⁰⁵

It further stressed the role of German constitutional organs (among them the *BVG*) to protect and promote the citizens’ rights, if the citizens are not themselves able to ensure the integrity of their rights. According to the *BVG*, this is exactly the case as regards the OMT programme, or any other measure adopted by EU institutions affecting the German budget. When exercising their constitutional right as voters and thus implementing their “right to democracy,” German citizens acquire as well the right to be protected by German constitutional organs “to ensure that the drop in influence (*Einflussknick*) . . . that come with the implementation of the

102. *Id.*

103. Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union [Law of Cooperation of the Federal Government and German Parliament Concerning the European Union], March 12, 1993 (BGBl. I, 311) (Ger.).

104. Press Release No. 34/2016, *supra* note 101.

105. *Id.*

European integration agenda do not extend further than is justified by the transfer of sovereign powers to the European Union.”¹⁰⁶

These being the premises to the *BVG* reasoning on the merits of the OMT programme, the German Court then passed on evaluating the ECJ judgment: in essence, rather than accepting the conclusions offered by the ECJ, thus closing the matter once and forever, the *BVG* decided to maintain its confrontational approach.

On the one hand, it acknowledged that the ECJ has set some “framework conditions” in analysing the OMT programme, and attached to these conditions the reasons why they have been legitimised by the ECJ.¹⁰⁷ On the other hand, however, it raised “serious objections” to the analysis made by the ECJ on “the way the facts of the case were established, the way the principle of conferral was discussed, and the way the judicial review of acts of the European Central Bank that relate to the definition of its mandate was conducted.”¹⁰⁸

This stated, since the judicial review concerning the OMT programme was essentially to measure whether the ECB had acted *ultra vires*, and since the ascertaining of an act to be *ultra vires* requires – irrespective of the area concerned – that it “manifestly exceeds the competences transferred to the European Union,” the alleged mistakes committed by the ECJ appeared to be, in the end, “acceptable because on the level of the exercise of competences the Court of Justice had essentially performed the restrictive interpretation of the policy decision that the [*BVG*’s] request for a preliminary ruling . . . held to be possible.”¹⁰⁹

106. *Id.*

107. See *Constitutional Complaints and Organstreit Proceedings Against the OMT Programme of the European Central Bank Unsuccessful*, GERMAN LAW ARCHIVE (June 22, 2016), <http://germanlawarchive.iuscomp.org/?p=1223> [hereinafter *German OMT Case*] (articulating that the Court of Justice bases its view to a large extent on the objectives of the OMT programme, on the means employed to achieve those objectives, and on the programme’s effects on economic policy, which, according to the Court of Justice, are only indirect in nature, and explaining that that this review is based not only on the policy decision of 6 September 2012 concerning the technical details, but derives further framework conditions from the principle of proportionality which set binding limits for any implementation of the OMT programme).

108. *Id.*

109. *Id.*

Yet, in order to guarantee that the ‘framework conditions’ defined by the ECJ continue to be met, without allowing that the OMT programme actually turns into an *ultra vires* act, the *BVG* concluded that “the German *Bundesbank* – i.e. one of the members of the ESCB – may only participate in the programme’s implementation if and to the extent that the prerequisites defined by the Court of Justice are met;” and this can take place only if six conditions hold true, which were listed in detail by the *BVG*.¹¹⁰

Thus, like in the request for preliminary ruling, in which questions were posed assertively and rhetorically,¹¹¹ the *BVG* did not abandon its intent to address the ECJ with its specific point of view on the interpretation to be given to the relevant rules and powers governing the EMU and the functioning of its institutions. Indeed, the *BVG* expressly admits it cannot challenge the legality of acts adopted by the ECB (being the ECB a EU institution, which cannot be subject to any scrutiny by Member States’ courts, even of constitutional nature); and yet, through the conditioning imposed to the *Bundesbank*, i.e. the German Central Bank, which is a member of the European System of Central Banks (ESCB), the will to condition the implementation of the EU monetary policy is evident.¹¹²

Thus, the *BVG* does not seem to have been sensitive to the signals of uneasiness that, in its *Gauweiler* judgment, the ECJ had manifested in respect both of the stance adopted by the *BVG* in its

110. See *id.* (pointing out that, per the *BVG*, this is particularly the case when (i) purchases are not announced, (ii) the volume of the purchases is limited from the outset, (iii) there is a minimum period between the issue of the government bonds and their purchase by the ESCB that is defined from the outset and prevents the issuing conditions from being distorted, (iv) the ESCB purchases only government bonds of Member States that have bond market access enabling the funding of such bonds, (v) purchased bonds are only in exceptional cases held until maturity and (vi) purchases are restricted or ceased and purchased bonds are remarketed should continuing the intervention become unnecessary).

111. See Case C-62/14, *Gauweiler v. Deutscher Bundestag* ¶ 16 (June 16, 2015), <http://curia.europa.eu/juris/liste.jsf?num=C-62/14&language=EN> (asserting that, per the settled case law of the Court, a preliminary ruling is binding on the national court, as regards the interpretation or the validity of the acts of the EU institutions in question).

112. See Treaty on the Functioning of the European Union, art. 282.1, March 25, 1957, 298 U.N.T.S. 3 [hereinafter T.F.E.U.] (establishing, pursuant to art. 282.1, the ECB, together with national central banks of Member States, conduct the monetary policy of the Union).

request for preliminary ruling, and of the didactic “response” it had clearly tried to give to all (national courts included, first of all the *BVG*), in particular as regards the opportunity of a strong judicial restraint in the assessment of the contents and of the boundaries of very technical matters such as the monetary policy transmission mechanisms, like the OMT programme, for whose implementation other institutions are competent.

On the contrary, the *BVG* stretched (apparent) domestic constitutional constraints with the intent to accommodate the monetary policy of the Union. And it did so in a way that does not seem persuasive under different viewpoints: in the first place, because of the explicit criticism the *BVG* formulates on the contents of the ECJ judgment. Considering the importance of the two courts, and of the systemic effects their case-law has on the entire EU legal sphere, such a resentful reply could and honestly should be avoided. Secondly, and above all, the six detailed conditions¹¹³ which the *BVG* considers mandatory for an implementation of the OMT programme consistent with the intent to avoid *ultra vires* acts by the ECB, in my view go beyond the role of the judiciary in monetary matters. Moreover, they are capable of creating undesirable tensions in the very delicate inter-institutional equilibrium characterizing the EMU and, in fact, the EU. To be honest, in this historic moment of crisis of the Union, no real need is felt for further disturbances to its overall credibility and to the accountability of the acts adopted – or to be adopted – by its institutions. Thirdly, and from a pure legal point of view, the suspicion remains that the *BVG* continues to be in breach of the duty of sincere cooperation established by article 4.3 TEU.¹¹⁴

Wisely enough, the “political” outcome of the *BVG* judgment was that it legitimised the OMT programme, without much attention being paid to the caveats and warnings contained in the *BVG* reasoning. And as far as my knowledge goes, even more wisely has the ECB totally ignored – at least in official communications – the

113. See *id.* (enumerating the six criteria under which the Bundesbank may participate in the OMT program, in accordance with the reality that the program constitutes an *ultra vires* act).

114. See *supra* Part II(B) (elaborating on the Conditionality Principle and issues that arise regarding the coordination of economic policy between Member States).

BVG judgment.

This said, the turbulent legal conditions characterizing the EMU become rather evident if one considers that (i) the OMT programme has not been implemented yet (and at this stage might never be implemented), but was simply announced by the ECB some four years ago, (ii) this announcement has been done with a press release, and the ECB never produced a structured legal document to describe terms and conditions under which the OMT programme would be implemented, and (iii) this press release has given both the ECJ and the *BVG* the opportunity to display rather different views on paramount legal issues concerning the EMU.

VI. CONCLUSIONS

Apart from the political aspects, from the legal viewpoint the obvious shortcomings of rules concerning the EMU and financial assistance to States that I have described represent a threat to the overall stability of the European system.

Some, optimistically, characterise the current phase of European integration as being “semi-intergovernmental” in method.¹¹⁵ However, the effect at a technical-juridical level determined by positions taken by national supreme courts is evident. In fact these courts, working from the perspective of their own domestic legal systems, limit room for political negotiation or to in anyway uphold constitutional values (no longer common) in the name of safeguarding the interpretation and application of EU or ESM rules.

This situation of political but also legal uncertainty may enhance the occurrence of further serious systemic risks, even though European institutions and Member States have managed, some more than others, to stave off the danger and avert the disintegration of the European legal system.

It is true that recent important works by scholars have sought to go beyond a mere reassessment of the constitutional system of the EU

115. See generally Koen Lenaerts, *EMU and the European Union Constitutional Framework*, 39 EUR. L. REV. 753, 756 (2014) (noting that EU institutions have adopted a series of measures aimed at preventing future financial crises and that reinforcing intergovernmental cooperation has been deployed with an aim to reinforce fiscal discipline).

and EMU;¹¹⁶ it is also true that over the last few years legal studies on economic and monetary union have occupied considerable space in specialised journals after years of relative disinterest.¹¹⁷

Given the present impracticality of further ‘constitutional’ reforms at EU level (for many of which also prior constitutional reforms at Member States’ level might be necessary), it is, nevertheless, worth pointing out those legislative initiatives aimed at formally linking the EMU and ESM systems, such as Regulation 472/2013, which establishes the conditions to be complied with by Member States in serious financial difficulties or which have applied for financial assistance.¹¹⁸ Interestingly, and a fact not missed by the doctrine,¹¹⁹

116. See *id.* at 753 (noting that the EMU has undergone a “dramatic overhaul” affecting the EU’s constitutional framework, and noting further that in order to avoid future financial crises the EMU must be grounded in the principles of financial solidarity and fiscal authority); see also Edoardo Chiti & Pedro Gustavo Teixeira, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, 50 COMMON MKT. L. REV. 697 (2013) (noting that the ESM is a “properly constitutional mechanism” but that its legal status and fundamental rules may be unable to meet the challenges because of the lack of any accountability tools available in the structure of EU agencies); cf. Jonathan Tomkin, *Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy*, 14 GERMAN L.J. 185 (2013) (asserting that the Union’s response to the euro-crisis has significantly altered the Constitutional balance upon which the Union’s stability is premised); Miguel Poiars Maduro et al., *The Democratic Governance of the Euro*, *Glob. Governance Programme* (May 20, 2012), <http://globalgovernanceprogramme.eui.eu/wp-content/uploads/2012/06/Policy-Report10May20121.pdf> (explaining that one of the consequences in democratic terms for the Union was the rejection of the constitutionalization of the Stability Pact); Leszek Balcerowicz et al., *Governance for the Eurozone: Integration or Disintegration?*, EUR. UNIV. INST. (2012), <http://finance.wharton.upenn.edu/FIC/FICPress/goveuro.pdf> (emphasizing an element of learning from the Dutch Referendum and suggesting that opposition to European authoritarianism is alive and well); see generally Päivi Leino & Janne Salminen, *Should the Economic and Monetary Union Be Democratic after All? Some Reflections on the Current Crisis*, 14 GERMAN L.J. 853 (2013) (pointing out that while the constitutional rearrangement that took its final form in the Treaty of Lisbon provided for opportunities for the rewriting of various Treaty provisions, no amendments were made to the fundamental asymmetry that is characteristic of the EMU).

117. See *supra* Part II(A).

118. See Council Regulation 472/2013, art. 1, 2013 O.J. (L 140) 1, 3 (EU) (laying out provisions for strengthening the economic and budgetary surveillance of Member States that utilize the Euro as their currency).

119. See Lenaerts, *supra* note 115, at 757 (explaining that under the ESM Treaty and in accordance and compatibility with EU law, financial assistance is subject to

the economic adjustment programmes (the so-called Memoranda of Understanding) signed by Member States' asking for financial assistance subject to conditionality, are applied by the Council, the Commission and Member States, which 'shall take into account national rules and practice and Article 28 of the Charter of Fundamental Rights of the European Union.'¹²⁰ The reason why reference is made only to the social rights contained in the Charter, i.e. article 28, is not fully clear unless in the sense of referring exclusively to acts (e.g. MOUs) still considered outside the EU system and so not subject to article 51 of the Charter.

In regard to the Court of Justice, *Gauweiler* represents a major step forward after *Pringle*, despite the fact that some questions remain unanswered, and notwithstanding the piqued endorsement it received by the *BVG*. The danger of not implementing real mechanisms of financial assistance for Member States has been averted. Judgements, like *Pringle*, I would define as emergency decisions that raise doubts and generate conflicts in the system which need to be resolved by normative reforms. If these reforms are not forthcoming, the Court risks becoming an institution that is more political than it should be, with critical effects on the entire EU legal system.

With this in mind, the *Gauweiler* judgement offers up one final point that deserves attention. This can be found in the part already referred to that establishes the jurisdictional limits to the Court's review of the ESBC's activities: the recognition of these limits with regards to the activities of highly technical institutions like the ESBC, ECB and, in the future, also other bodies and agencies charged with managing the euro-zone, is consistent with an increasingly complex legal environment¹²¹. This situation is yet

three cumulative conditions).

120. Council Regulation 472/2013, art. 1 (providing also that "the application of this Regulation and of those recommendations does not affect the right to negotiate, conclude and enforce collective agreements or to take collective action in accordance with national law").

121. When this article was in its revision and printing phase, further judgments have been adopted by the Court of Justice dealing with (a) the effects of ESM decisions and policies onto individual rights, and (b) the obligations of EU institutions, even when acting outside the scope of the TFEU and TEU as "agents" within the ESM. In particular, the court affirmed that (i) when adopting a decision as agent for the ESM, the Commission nevertheless retains its role of "custodian"

another example of the distance between citizens' political representatives, the rules adopted where these representatives sit, and the "government choices," which I have attempted to show are certainly not limited to the economy or the currency.

The constitutional consequences in the history of European integration appear episodic, driven by different contingencies and without the attention and legitimisation, also democratic, that should instead be fundamental.

Not by chance, some proposals for euro-zone reforms doing the political rounds put forward the idea of a parliamentary institution made up by euro-zone representatives with specific and more effective powers than they have at present on the issue of reform.¹²² In this perspective, also the quest by the *BVG* for a more active role of the democracy principle within the EU paramount choices should

of the EU treaties as established by TEU Article 17; (ii) the EU institutions are bound by Article 51 of the Charter of Fundamental Rights of the EU even when they act outside the scope of the EU treaties (i.e. the duty to "respect the rights, observe the principles and promote the application [of the Charter] in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties"); and consequently (iii) breach of the above obligations exposes the EU institutions (and member states in their jurisdictions) to liability rules *vis-à-vis* the individual, and hence to the duty to reimburse any damage resulting to them under the conditions laid down by TFEU Article 340, second and third paragraphs (see joined cases C-8/15 P to C-10/15 P, *Ledra Advertising and others v. Commission and European Central Bank*, 2016 E.C.R. 701, ¶ 59-69). As I have argued elsewhere (see Francesco Munari, *La Corte di giustizia e i nuovi soggetti istituiti nel quadro dell'unione economica e monetaria*, *IL DIRITTO DELL'UNIONE EUR.*, (2018), ; the manuscript is on file by the author), this decision is criticisable: the right of individuals to claim for damages, albeit theoretically affirmed, seems *de facto* generally not available to anybody, because of the strict conditions established at EU level to trigger the EU institutions' responsibility in cases like those concerning the conditions established by the ESM to grant financial assistance in favour of member states. This is clear both in the *Ledra Advertising* case and in parallel cases meanwhile decided by the Court, such as C-526/14, *Tadej Kotnik e a. v. Državni zbor Republike Slovenije*, E.C.R. 2016, 570, ¶ 50 and C-41/15, *Gerald Dowling and others v. Minister for Finance*, 2016 E.C.R. 836, in particular ¶ 48.

122. See generally Justin Huggler, *French Economy Minister Calls for Full Fiscal Union in Eurozone*, TELEGRAPH (Aug. 31, 2015), <http://www.telegraph.co.uk/finance/economics/11835614/Frencheconomyministercallsforfullfiscalunionineurozone.html> (quoting the French Minister for the Economy Emmanuel Macron, calling for the Commissioner to be given new authority, and proposing that a new economic government should be held to account by a new "Euro Parliament").

not go totally unnoticed among European leaders, for it might eventually reduce the distances between the “German” and the “Luxembourgian” reading of the EMU.