Evolving Europe: Voices of the Future

Loughborough, 8-9 July 2013

www.uaces.org

The ESM Treaty: a new form of intergovernmental differentiated integration to the benefit of the EMU?

Gianni Lo Schiavo
PhD candidate, King's College, London

Abstract

The European Stability Mechanism (ESM) is one of the many responses of the European Union to the financial crisis and to the enduring crisis of the Eurozone. The ESM took the form of an intergovernmental international agreement, outside the boundaries of the Lisbon Treaty, which has established an international organization supposed to provide financial assistance to Member States in the Eurozone. This article examines the feasibility of the ESM under the Lisbon Treaty. It considers the questions on a beneficial use of intergovernmentalism for the Economic and Monetary Union, and the extent to which the ESM would be capable of creating stronger financial solidarity in the European Union, in particular through the use of EU institutions or the use of the simplified amendment procedure.

Introduction

The outbreak of the financial crisis has had many consequences for the European polity system. Exceptional and unconventional reactions were needed in the current process of crisis with a view to stabilize the markets and the Member States.[1] New forms of financial assistance were needed and, to a certain extent, these have gone beyond the established Treaty rules and the Union framework. In particular, the Member States of the Eurozone had to come with a new arrangement that could make permanently available financial resources in order to guarantee the financial position of Member States in distress. The European

[1] A. G. Kokott view, presented on 26 October 2012, paragraph 1: "Europe is experiencing a public debt crisis. To deal with the crisis the European Union and the Member States are adopting measures which are not wholly conventional".

Stability Mechanism (hereafter "ESM")[2] constitutes the new *permanent* financial assistance arrangement which aims to safeguard the stability of the euro area as a whole and which allows Member States in distress to seek financial assistance from other Member States.

The ESM has produced two main consequences. First, the Member States have concluded and ratified an intergovernmental international Treaty (thereafter the "ESMT") beyond the Treaty rules on the EMU with a view to assure financial stability of the euro area as a whole. Second, the ESM has pushed the Member States to insert a new indent in article 136 paragraph 3 TFEU through the use of the simplified amendment procedure under article 48 paragraph 6 TEU. Under special conditions which will be analysed further, this provision allows to establish mechanisms of financial assistance between Eurozone Member States beyond the Union framework.

This article assesses the ESM in light of the European legal order by looking at the many open and unresolved questions that this new international treaty poses for the integrity of EU law. Special attention will be devoted also to the European judicial response in the *Pringle* judgment.[3] The main question that this contribution aims to tackle is whether the ESM creates a form of intergovernmental differential integration that benefits the Economic and Monetary Union (hereafter the "EMU"). More in particular, this contribution attempts to answer the following questions: How does the ESM place itself in the context of the Treaty rules on (non-)financial intervention of the Member States? Can the intergovernmental path be an effective response to reinforce the EMU whenever the Treaty rules are insufficient to provide such responses? Does the ESM Treaty strengthen the idea of financial solidarity in the Eurozone?

This article is structured as follows. The first part will describe the main measures that have been adopted to assure financial assistance between Member States in crisis times before the creation of the ESM. The second part will refer to the ESM by recalling its main structure and will summarize the main aspects of the *Pringle* case. The third part will assess the adoption of the ESM, an intergovernmental agreement, to assist the EMU in the wider debate on flexibility of EU law. This part will be divided in two sub-sections that, in turn, will take into account the use of the intergovernmental option and the feasibility of the ESM under the Treaty rules.

---

[2] The text of the European Stability Mechanism Treaty is available at http://www.esm.europa.eu/pdf/esm_treaty_en.pdf

[3] Case C-370/12, *Thomas Pringle v. Governement of Ireland, Ireland and The Attorney General*, [2012] nyr.

1. The impact of the crisis on the EMU: overview on the first measures to assist Member States in distress

The imbalance between monetary and economic policy and the inefficient Treaty framework on economic policy have been stigmatized by the outbreak of the financial crisis. The limited competences of the Union to control and supervise Member States' budgets have had a clear impact on the EMU framework. Member States have been obliged to recur to special arrangements to assure liquidity to weaker Member States in the short run. Before the creation of the ESM, these were, in turn, the bilateral loans to Greece, the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF).[4]

1.1 The bilateral loans to Greece

Towards the end of 2009 Greece changed government and it was shown that the figures on the estimated deficit were not as estimated earlier.[5] The consequences for such a divergence in the data collected by Greece generated a great mistrust in the markets on the solvency and sustainability of the public finances of Greece. At the margin of an informal meeting between the Heads of State or Government of the European Union on 11 February 2010, the euro area Member States agreed to take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole.[6] Later, on 25 March 2010 the Heads of State or Government of the Eurozone Meet again and agreed to establish a mechanism of assistance to be granted to Greece.[7] These would take the form of "coordinated bilateral loans" under strict conditionality. On 23 April 2010 Greece officially requested assistance.

On 8 May 2010 two intergovernmental bilateral agreements were signed. They established the special loan facility to Greece. The first consisted of an inter-creditors agreement among the lenders, the second consisted of a loan facility agreement between the lending Member

[4] The EFSM, adopted with Council Regulation 407/2010 establishing a European financial stabilization mechanism, OJ 2010, L 118/1, had a lending capacity of €60 billion, whereas the EFSF was set up by the Eurozone Member States and had a lending capacity of €440 billion. See more extensively, A. de Gregorio Merino, "Legal developments in the Economic and Monetary Union during the debt crisis: the mechanisms of financial assistance", 49 CMLRev, 5, 2012, 1613-1645, at 1615-1621.

[5] See Report of the Commission on Greek Government deficit and debt statistics, COM(2010) 1 final, 08.01.2010.

[6] See informal meeting of Heads of State or Government, 11.02.2010, text available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/112856.pdf

[7] See Statement of the Heads of State and Government of the euro area, 25.03.2010, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf

States and Greece. Eurozone Member States would loan 80 billion euro to Greece whereas the International Monetary Fund would contribute with 30 billion euro.

Soon after the activation of the loan facility, it was realized that the measures taken were not enough. The participation of the private sector was needed in order to assure financial assistance. The modalities of intervention were agreed at a summit of the Heads of State or Government 21 July 2011.[8] Thus participation was made on a voluntary basis and resulted in the Greek public debt being restructured of around 53.5 percent of the original value of the Greek bonds.

1.2 The European Financial Stability Mechanism (EFSM) and the European Financial Stability Facility (EFSF)

The public debt crisis was not limited to Greece, but it spread over other Member States. Creditworthiness progressively fell down in other Eurozone countries such as Portugal and Ireland. An extraordinary meeting of the heads of State or Government of the euro area met on 7 May 2010 and stated that "taking into account the exceptional circumstances, the Commission will propose a European stabilization mechanism to preserve financial stability in Europe".[9]

These attempts resulted in the Eurozone Member States establishing the EFSM and the EFSF. These two facilities were different in nature and require some analysis.

The EFSM was adopted under regulation 407/2010.[10] Article 122 (2) TFEU was the legal basis used for the regulation. The regulation provided for the possibility to grant assistance to Member States in the form of loans or credit lines, with a view to preserving the stability, unity and integrity of the euro area as a whole. The EFSM is a Union instrument which makes use of the Union own resources ceiling for the payment.[11] The total amount of financial assistance was set at around 60 billion euro. The Member State requesting assistance would have to respect economic policy conditionality.

---

[8] See Statement of the Heads of State and Government of the euro area, 21.06.2011 available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf

[9] Statement of the Heads of State or Government of the Euro area, 7.05.2010, available at http://ec.europa.eu/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf

[10] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118.

[11] *Ibidem*, article 2 paragragh 2.

The EFSF was created as an intergovernmental mechanism by the Heads of Government and State in the Council 'wearing their intergovernmental hats'[12] as a public company registered in Luxembourg between the Eurozone Member States.[13] The shareholders are the Eurozone Member States which may grant assistance up to 440 billion euro. The mechanism is temporary in nature and makes available financial loans by issuing bonds in the markets. Each guarantor is liable only for the part it has subscribed and not for the whole debt. The Eurozone Member States decided to conclude on 8 June 2010 a framework agreement with the EFSF which contained the basic rules and arrangements for the financial grants and for the loans as well as the procedure to be followed. Soon after, on 21 July 2011, the Heads of State or Government decided to reinforce the EFSF's nature and powers.[14] The new arrangement assured that the EFSF would intervene in primary and secondary markets, that it would provide precautionary programmes and established the rules to finance the recapitalisation of financial institutions through governmental loans. Furthermore, the new agreement provided that the EFSF's lending capacity would be increased from the initial 440 billion euro to 780 billion euro.

At the moment of writing, Portugal and Ireland have been granted assistance from the EFSM and the EFSF. Similarly, the second Greek bailout was assured with assistance coming from the EFSF.[15]

2. The European Stability Mechanism (ESM): an international intergovernmental agreement to grant financial assistance to Eurozone Member States

The creation and functioning of the EFSM and the EFSF contributed to assure financial stability in the Eurozone to a certain extent. However, it proved to be only temporary solutions to sustain government debts. In order to ensure balance and sustainable growth, during the European Council meeting of 28 and 29 October 2010, the Heads of State and of Government convened on the need for Member States to create a *permanent* crisis

[12] B. de Witte, "The European Treaty Amendment for the Creation of a Financial Stability Mechanism" (2011) 6 European Policy Analysis 1, 6;

[13] EFSF Framework Agreement, available at http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf

[14] See Statement of the Heads of State or Government of the euro area and EU institutions, 21.07.2011, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/123978.pdf

[15] See further, A. De Gregorio Merino, *op. cit.*

mechanism in order to safeguard the financial stability of the euro area,[16] namely the European Stability Mechanism (ESM). This required the conclusion of an intergovernmental agreement.

The President of the European Council agreed to undertake consultations for the amendment of the Treaty required to that effect. The European Council agreed that, as this permanent mechanism would be designed to safeguard the financial stability of the euro are as a whole, art. 122 paragraph 2 TFEU would no longer be needed to that effect. Hence, the Belgian Government submitted a proposal for the review of article 136 TFEU, pursuant to the simplified amendment procedure under art. 48 paragraph 6 TEU, with a view to add a paragraph 3 to article 136 TFEU. This resulted in European Council Decision 2011/199 being adopted on 25 March 2011.[17]

Decision 2011/199 states that a third paragraph should be added to article 136 TFEU. Article 2 of the said decision states that Member States shall proceed with the completion of procedures for the approval of the Decision in accordance with their respective constitutional requirements. The amendment eventually entered into force on 1 January 2013 after all Member States approved the Decision.

At the same time, Member States whose currency is the euro concluded the ESMT two times. The first agreement was signed on 11 July 2011. After a reopening of the negotiations, the second one was signed 2 February 2012 as the first one did not appear to be effective enough. The new agreement has provided stronger powers to the ESM.[18] The ESM entered into force formally on 27 November 2012 after the ratification of signatories whose initial subscriptions represent no less than 90% of the total subscriptions.[19]

The ESM is a Luxembourg-based international organisation composed of a Board of Governors, a Board of Directors and a Managing Director. The ESM would provide, where needed, financial assistance to euro area Member States.[20] Following the adoption of the

---

[16] See conclusions of the European Council 30 November, doc. No EUCO 25/1/10, REV 1, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf, paragraph 2.

[17] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 L 91, p. 1),

[18] On the establishment, structure and arrangements of the ESM see J-V. Louis, "The unexpected revision of the Lisbon Treaty and the establishment of a European Stability Mechanism", in D. Ashiagbor, N. Countouris and I. Lianos, *The European Union after the Treaty of Lisbon*, Cambridge CUP 2012, 289-320.

[19] ESMT, Article 48.

[20] A. De Gregorio Merino, *op. cit.*, 1621 ff.

ESMT, all the euro area Member States have proceeded with the ratification of the ESMT according to their constitutional.

The final ESMT provides for a number of instruments of financial assistance to the Eurozone Member States in financial difficulties, subject to the requirement of strict conditionality. When a Eurozone Member State in distress need financial assistance, the parties involved would prepare and sign a Memorandum of Understanding (MoU) which shall reflect the severity of the weaknesses to be addressed in order to receive assistance.[21] The ESMT also provides for a number of options to assist Eurozone Member States. Financial assistance might be used to recapitalize the financial institutions of a specific Member State.[22] The ESM can provide precautionary financial assistance when the economic condition of a Member State is sound enough to retain access to the market, but financial aid is necessary in order to avoid a crisis.[23] Further, the ESM can grant loans to Eurozone Member States who have lost access to financial markets either through excessive costs or lack of lenders. The Primary Market Support Facility ("PMSF") allows the ESM to buy bonds in the primary bond market of the Eurozone Member State either to facilitate that it returns to the financial markets or to increase the efficiency of other ESM financial aid.[24] Intervention in the secondary bond markets is designed to reduce interest rates in the secondary market and to help Eurozone Members struggling with the refinancing of their banking systems.[25]

The ESM entrusts the EU institutions with crucial tasks in the process of granting and supervising financial assistance. The European Commission and the ECB assess the financing needed[26] as well as the sustainability of the Member State's public debt and the corresponding risk of financial stability to the Eurozone as a whole.[27] Following the decision to grant aid and in liaison with the ECB, the Commission negotiates the MoU with the Member State concerned.[28] Thereafter, the Commission signs the MoU on behalf of the ESM.[29] In the implementing phase, the Commission and the ECB monitor compliance with the conditionality laid down in the MoU.[30] The European Court of Justice ("ECJ") is

---

[21] ESMT, Article 13(3).
[22] *Ibidem*, Article 15
[23] *Ibidem*, Article 14
[24] *Ibidem*, Article 17
[25] *Ibidem*, Article 18
[26] *Ibidem*, Article 13
[27] *Id*.
[28] *Ibidem*, Article 13.3
[29] *Ibidem*, Article 13.4
[30] *Ibidem*, Article 13.7

entrusted with the task of adjudicating disputes between the ESM and a Member State or among several Member States relating to the interpretation and application of the ESMT when a decision of the Board on the matter is contested.[31]

At the time of writing, Spain has been the first Eurozone Member State to make use of the ESM funds. It has been granted financial assistance to recapitalize the country banking sector.[32] Similarly, Cyprus has been granted financial assistance through the ESM in the aftermath of its banking crisis in early 2013.[33]

2.1 The ESM and the European judiciary at stake: the *Pringle* case

The establishment of the ESM has been object of legal and judicial challenges.[34] The ECJ *Pringle* judgment delivered on 27 November 2012 is the most interesting case to our purposes as it is the ECJ response to the feasibility of the ESM. Some authors have already analysed the most interesting points of the judgment.[35] For the sake of our analysis we will briefly recall the most interesting issues of the judgment.

During the process of ratification of the ESMT Mr. *Pringle* brought an action before the High Court of Ireland. Following the claims brought forward by Mr. *Pringle*, the Irish High Court dismissed his action in its entirety. Mr. *Pringle* appealed before the Supreme Court of Ireland which decided to refer a number of questions to the Court of Justice for preliminary ruling.[36] The Court's judgment comprises three questions.

---

[31] *Ibidem*, Article 37.3.

[32] Relevant information on the Spanish financial assistance programme can be found at http://www.esm.europa.eu/about/assistance/spain/index.htm

[33] Relevant information on the very recent Cypriot financial assistance programme can be found at http://www.esm.europa.eu/about/assistance/cyprus/index.htm

[34] Before delivering the Pringle judgment, other national constitutional court judgments have been delivered: the German Constitutional Court has delivered two judgments on the ESM: both decisions can be found on http://www.bundesverfassungsgericht.de/en/update.html . The Estonian Constitutional Court has delivered one judgment available at http://www.riigikohus.ee/?id=1347 .

[35] See V. Borger, "The ESM and the European Court's Predicament in *Pringle*" and P. Van Malleghem, "*Pringle*: A Paradigm Shift in the European Union's Monetary Constitution", German Law Journal 1/2013; P. Craig, "Guest Editorial Article", Maastricht Journal on Comparative and European Law, 1/2013.

[36] See *Pringle v. Ireland*, [2012] IESC 47, paragraph 5 (S. C.) (Ir.) available at http://www.courts.ie/ 80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,*Pringle*,~language_en

2.1.1 The first question: the validity of Decision 199/2011 and the amendment of article 136 TFEU

The first question concerns the validity of the Treaty amendment of article 136 TFEU and the use of the simplified revision procedure under article 48 paragraph 6 TEU.

The Court scrutinises the impact of the amendment to the TFEU and ascertains whether the effects of such amendment concern solely provisions of Part Three of that Treaty and whether such amendment increases the competences attributed on the Union in the Treaties. The Court observes that it is clear that the establishment of the ESM does not encroach on the monetary policy as an economic policy measure "cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effect on the stability of the euro". [37] Further, it specifies that the ESM has the primary objective of managing financial crises which might arise and does complement the new regulatory framework for strengthened economic governance of the Union as envisaged in a number of new measures.[38] It follows that the establishment of that mechanism does not encroach upon the exclusive competence of monetary policy held by the Union and does not affect the restricted role of the Union in the area of economic policy.[39] The Court concludes that Decision 2011/199 satisfies the conditions established under article 48 paragraph 6 TEU by means of a simplified revision procedure.

According to the Court, Decision 199/2011 does not establish any new competence on the Union as the Treaty amendment does not create any legal basis for the Union and is silent as to any possible role for the Union's institutions in the field.[40]

2.1.2 The second question: the right to conclude and ratify the ESMT and EU law

The Court subsequently focuses on the question whether a certain number of Treaty articles allow the Member States whose currency is the euro the possibility to conclude and ratify the ESMT.

On substance, the Court analyses the provisions relating to the exclusive competence of the Union in the monetary policy and the power to conclude international agreement. With regard

---

[37] Case C-370/12, *Pringle*, cit., paragraph 56.
[38] *Ibidem*, paras 58 and 59.
[39] *Ibidem*, paras 63 and 64.
[40] *Ibidem*, paras 73-75.

to the monetary policy competence, the ECJ excludes that the role and the tasks of the ESM would fall within the monetary policy under the TFEU. According to articles 3 and 12(1) of the ESMT, the ESM is not entitled to set the key interest rates for the euro area or to issue euro currency, but it seeks to provide financial assistance entirely granted by the ESM from paid-in capital or by the issue of financial instruments.[41] Furthermore, the Court recalls that even if the activities of the ESM might have an influence on the rate of inflation, such influence would constitute "only indirect consequence of the economic policy measures adopted".[42]

As to article 3 paragraph 2 TFEU on the exclusive power to conclude international agreements, the Court states that the conclusion on the part of Member States of the ESM does not affect common rules or alter their scope. The Court puts forward two arguments: first, the predecessor of the ESM, the EFSF was assumed as an instrument that did not affect or alter the scope of common rules of the EU;[43] second, the provision of article 122 paragraph 2 TFEU is not affected by the ESMT because the former provides *ad hoc* financial assistance to a Member State whereas the latter establishes a permanent financial assistance mechanism.[44]

Further, the Court conducts an extensive analysis on the interpretation of various provisions of the ESMT with the EMU provisions.

In particular, the Court interprets the ESM in light of articles 123 and 125 TFEU. First, the Court specifies that article 123 TFEU is addressed specifically to the ECB and to the central banks of the Member States and not to Member States as a whole which are entitled to create mechanisms of financial stability and are not covered by that provision.[45]

Second, the Court examines more in details the spirit of the provision of art.125 TFEU. Even if not examining the said provision in such an extensive way as the Advocate General did,[46] the Court stresses that "the ESM will not act as guarantor of the debts of the recipient Member State by referring to the spirit of the article inserted by the Treaty of Maastricht. In fact, the latter will remain responsible to its creditors for its financial commitments".[47] Hence, the ECJ concludes that the no bail out clause "is not infringed by establishing a stability

[41] *Ibidem*, paragraph 96.
[42] *Ibidem*, paragraph 97.
[43] *Ibidem*, paragraph 102.
[44] *Ibidem*, paragraph 104.
[45] *Ibidem*, paragraph 125.
[46] A.G. Kokott View, paras 100-166.
[47] *Pringle* judgment, paragraph 138.

mechanism which guarantees that a defaulting Member State remains bound to pay its part of the capital and that the other ESM Members do not act as guarantors of the debt of it".[48]

Further, the judgment is devoted to the interpretation of article 13 TEU which provides that each institution act within the limits of the powers conferred on it by the Treaty. First, the Court examines the role allocated to the Commission and to the ECB. It recalls that in cases of non-exclusive competences of the Union, Member States can confer powers to the Union institutions, on condition that the Member States do not alter the essential character of the powers conferred on those institutions by the Treaties. It reaffirms that the duties and tasks conferred on the Commission and the ECB by the ESMT do not alter the essential character of their powers. Moreover, the provisions of the Treaty do not establish a specific competence to establish a permanent stability mechanism and thus article 20 TEU on enhanced cooperation does not preclude a role for the Commission and the ECB in the ESM.[49]

As to the role allocated to the Court, the judgment confirms that article 273 TFEU does not preclude the possibility to confer a judicial role to the Court in cases of international agreement outside the Union framework. On the contrary, the conditions laid down in the ESMT under article 37 appear consistent with the provision under article 273 TFEU.[50]

In conclusion, the Court affirms that the Treaty provisions invoked do not preclude the conclusion or the ratification by the Member States whose currency is the euro of an agreement such as the ESM Treaty.

2.1.3 The third question: whether the Member States may conclude and ratify the ESM Treaty before the entry into force of Decision 2011/199

Finally, the Court assesses whether the Member State can conclude and ratify the ESM Treaty before the entry into force of Decision 199/2011. Very succinctly, the Court states that that decision does not confer any new power to the Member States and, thus, concludes that the ESM Treaty is not subject to the entry into force of Decision 2011/199.[51]

---

[48] *Ibidem*, paragraph 145.
[49] *Ibidem*, paras 168-169.
[50] *Ibidem*, paras 171-177.
[51] *Ibidem*, paras 184-185.

3. The ESM: truly differentiated integration to the benefit of the EMU?

After having recalled the development of the crisis-related financial instruments, in particular the creation of the ESM, as well as the *Pringle* judgment, this part of the paper aims to evaluate the ESM in the wider context of the process of differentiated integration in the EMU.

First, I will assess whether the ESM is compatible with the Treaty rules and what role the amendment to article 136 TFEU shall have in future. Second, I will appraise the use of an intergovernmental instrument to provide financial assistance to Member States. Finally, I will argue whether the ESM is a useful tool that would provide further financial solidarity between Member States.

3.1 Between the goodness and the 'evils' of intergovernmentalism: the use of an intergovernmental agreement to reinforce the Economic and Monetary Union

3.1.1 Intergovernmentalism and the Union legal order: what is at stake?

The ESMT has been established outside the Union legal framework. The ESM takes the form of an intergovernmental treaty that is framed in accordance with the rules of international law. Member States of the Eurozone are free to adopt a Treaty of this kind. This results as one of the main powers States have in international law *id est* the freedom to contract and conclude international Treaties between each other.

The new provision under article 136 paragraph 3 TFEU and some clauses of the ESMT show that Eurozone Member States intended to make use of their freedom to conclude international agreements to provide mechanisms of financial assistance to safeguard the stability of the Union as a whole. It is clear that the ESMT was concluded as an international agreement, thus going beyond the EU Treaty provisions. This is because the EU budget does not have sufficient funds to provide the required financial assistance to create a strong system of financial assistance. Hence, the Heads of Government and State decided to conclude an international agreement acting in their power as international law Treaty makers.

If the ESMT is the typical example of an intergovernmental agreement outside the realms of the Union legal order, it does not mean that the ESM is not completely unrelated to the law of the European Union. On the contrary, Member States have made use of an international instrument precisely because they were not capable, under the Treaty rules and the budgetary

constraints, of adopting an instrument of the ESM-kind. This shows that Union law matters even if we refer to an intergovernmental agreement.

Some authors have considered the use of international law treaty making powers as an instrument of cooperation for the Member States acting in the EU context.[52] De Witte argued that before the Treaty of Lisbon a considerable number of complementary agreements or subsidiary conventions were concluded by Member States.[53] These were mainly based on the now repealed article 293 EC Treaty which allowed Member States to enter into negotiations with each other with a view to the abolition of double taxation within the Community.[54] This provision allowed Member States to make use of international agreements to adopt laws for the uniformity and the harmonisation of the internal market.

Similarly, over time, the Treaties have not excluded the use of intergovernmental agreement in order to proceed further in Treaty-related cooperation between a limited number of Member States. The Brussels Convention[55] and the Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises [56] were the most relevant precedents invoked. Moreover, art K.7 of the Maastricht Treaty, now repealed, explicitly authorised intergovernmental cooperation within the third Pillar of Justice and Home Affairs.

The Treaty of Amsterdam, first, and the Treaty of Lisbon, then, repealed provisions allowing for the use of the intergovernmental option. However, these Treaty changes have not prevented Member States from making use of international agreements in order to attain the objectives of the Treaty and to regulate matters which are important to achieve the objectives

[52] See B. De Witte, "Using international law for the European Union's domestic affairs", in E. Cannizzaro, P. Palchetti, R. Wessels, *International law as law of the European Union*, Martinus Nijohff Publishing, 2012.
[53] *Ibidem*, p.143.
[54] The former article 293 TEC stated that "[m]ember States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: — the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals, — the abolition of double taxation within the Community, — the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries, — the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards".
[55] Convention of 27 September 1968 on jurisdiction and enforcement of judgments in civil and commercial matters O. J. 1972, L299/32.
[56] The Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises, O. J. 1990 L225/10

of the Treaty. The most evident example is the conclusion of the Prüm Convention concluded in 2005.[57]

Arguably, De Witte has been the most proactive defendant on the use of the intergovernmental option in the post-Amsterdam environment for Member States.[58] He sustained that the use of intergovernmentalism appears fashionable as "i) the legal conditions for taking the "outside" route are less onerous than the conditions set for intra-EU closer cooperation and ii) Member States preserve, when acting under international law, complete control over the negotiation process and almost complete control over the implementation and enforcement of the obligations which they accept in the agreement".[59]

If intergovernmentalism between Member States appears a practicable solution in some circumstances, it is still questionable whether the Member States shall still respect the rules attaining to the Union legal order. If they are free to conclude international agreements, they shall respect the principle of loyal cooperation under article 4 paragraph 3 TEU and the principles of primacy and supremacy under EU law.[60] The case law supports such view and requires Member States to abide to the principle of loyal cooperation and supremacy of EU law.[61]

This is the general picture on the use of intergovernmental agreements between Member States. As shown earlier, the financial crisis has proved to make use of intergovernmentalism to reinforce the EMU. This can be seen in the main intergovernmental agreements that have been agreed upon. The ESM and the former ESFM and the bilateral Greek bail-out are clear examples of such choice. Similarly, the Treaty TSCG is another expression on the use of crisis-related intergovernmentalism, although with different reasons and consequences that cannot be fully analysed.

It remains to be seen if the ESMT as an intergovernmental agreement respects the Union framework. Recital 4 of the ESMT states that "strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and

---

[57] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic the Grand Duchy of Luxembourg and the Republic of Austria on the stepping-up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal immigration, 6 December 2006, Council of European Union Doc 16382/06.

[58] B. de Witte, 'Old-fashioned Flexibility: International Agreements between Member States of the European Union' in G de Búrca and J Scott (eds), Constitutional Change in the EU – From Uniformity to Flexibility (Hart Publishing, Oxford 2001), 42.

[59] *Ibidem*, 33.

[60] See B. De Witte, "Using international law for the European Union's domestic affairs", *op. cit.*, p.146.

[61] Case C-55/00, *Elide Gottardo v Istituto nazionale della previdenza sociale (INPS)*, [2002] ECR p.I-00413, paragraph 33-34.

Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area". This reference is important as it shows that the ESMT gives much attention to the economic framework established to assure the stability of the euro area. Similarly, Article 13 paragraph 3 states that "the MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU". This is a consistency clause which requires that the conditions to adopt the MoU shall comply with the conditionality requirements that are imposed in the European framework on budgetary discipline for Member States. Accordingly, the ESM concerned Member State shall duly respect the Treaty and secondary law provisions on the economic policy. As recently argued, the reference to consistency is "to avoid building a rival universe of economic coordination outside the EU Treaties to the detriment of the competence of economic coordination under EU Treaties".[62] In other words, the intergovernmental nature of the ESM does not exclude that the rules on economic coordination in the EU need to be respected.

The ESMT shall not be seen as an initiative impinging on exclusive or shared competences of the Union, id est monetary policy. It is true that the ESMT can be considered within economic policy, but this area is not a common policy within the meaning of article 3 paragraph 2 TFEU. On the contrary, economic policy is a series of measures to coordinate Member States budgetary rules. This argument, however, does not exclude any duty on the part of Member States. In fact, as *Pringle* shows, the Court reaffirms the *Gottardo* case law according to which, even when concluding international agreements outside EU competences, Member States need to comply with EU law when exercising their competence in their reserved competence area.[63]

If the use of an intergovernmental agreement shall be considered a last resort means to overturn the limits contained in the Treaties, some concerns as to its democracy and involvement of the main actors are still open.

First, it is undisputable that the use of an intergovernmental agreement limits the possibility to involve European democratic institutions in the process of conclusion and ratification of such Treaty. It is the Council that decided to conclude the ESMT. Furthermore, the ECB, the Commission and the IMF compose a troika where democratic legitimacy lacks. The

---

[62] A. De Gregorio Merino, *op. cit.*, 1635-1636.

[63] Case C-55/00, *Elide Gottardo v. Istituto nazionale della previdenza sociale (INPS)*, [2002] ECR I-00413, paragraph 32.

European Parliament, the main democratic institution in the EU, has not had any involvement. Its influence on the decision-making process has been non-existent. With that said, the European Parliament emphasised that the creation of a ESM shall "respect the core principles of democratic decision-making such as transparency, parliamentary scrutiny and democratic accountability" and that "the mechanism must not give rise to a new model of European governance which falls short of the level of democratic standards achieved in the Union".[64] Here we see that the financial crisis and the establishment of the ESM show a clear democratic deficit as compared to the use of the Union instruments. However, the intergovernmental nature of the ESMT does not lack democracy *tout court* as the national Parliaments have still been involved in a way or another on the process of ratification of the ESMT. The negotiation, the conclusion and the ratification of the ESM still require that the contracting states conclude a treaty respectful of their national ratification procedures which involve the national parliament. The German Constitutional Court's judgment on the preliminary injunction against the ratification of the ESM held that the budgetary responsibility of the Bundestag required that liability could not be expanded without the approval of the German Parliament.[65] This means that national parliamentary involvement in the decision-making process is still relevant. However, national parliamentary decisions can take more time and effort than a single European voice.

Second, the ESMT raises the question of the effective involvement of the ESM-concerned Member State. The ESM refers to strong conditionality as the main criterion to grant financial assistance to the Member State. Article 12 ESMT states that "conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions". The MoU is then concluded after the troika (ECB, Commission and IMF) supervises the conditionality attached to the financial assistance facility.[66] The ESMT shows that the ESM-concerned state has limited powers in negotiating and concluding the MoU as well as in assuring that proper monitoring takes place. The ECB, the Commission and the Board of Governors have a leading power to decide the conditions attached to the ESM intervention. It is submitted that the ESMT does not take into account the position of the ESM-concerned state, but reflects predominantly the decisions of the Boards of Governors and the Troika.

---

[64] European Parliament Resolution (2012/C 247 E/08), paragraph 8.
[65] German Constitutional Court judgment para 165.
[66] ESMT, article 13.

Overall, this paragraph has shown that the ESM is an intergovernmental institution that reflects the limitation of the Union framework to grant robust financial assistance to Member States in difficulties. It is the result of a wider recourse to intergovernmentalism that has been initiated in the aftermath of the financial crisis. Notwithstanding some concerns on the use of the intergovernmental option, the ESMT is aimed to assure consistency with EU law.

3.1.2 The ESM and the use of European institutions: a pretty sight

The role of EU institutions in the ESM is another aspect that requires scrutiny.[67] The ESMT makes reference to the role of the European institutions in various provisions and some positive remarks shall be made on this approach.

Article 13 of the ESMT confers important powers to the Commission and the ECB to proceed with the granting of stability support. These include the appraisal of the appropriateness of the financial assistance and the actual or potential financial needs of the Member State concerned, the negotiation of the MoU with the concerned Member State.[68] Further, both the Commission and the ECB will monitor the compliance with the conditionality measures attached to the financial assistance facility.[69] Finally, members of the Commission and the ECB participate as observers in the meetings of the Boards of Governors.[70]

Following the EFSF, the ESMT gives considerable powers to the European institutions. These have been analysed also in *Pringle*. The judgment upholds the use of European institutions in the ESM and outside the Union framework. The ECJ reinforces the use of Union institutions also in international agreements which are concluded solely by Member States. The Court refers to the *Bangladesh* case law[71] and assesses the use of the Commission, the ECB and the Court itself. It states that the:

"Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institution, outside the framework of the Union (...) provided

[67] On more general terms see S. Peers, "Towards a new form of EU law? The use of EU institutions outside the legal framework", EConstLR 1/2013, 37-72, in particular at 46-55 and 61-65.
[68] ESMT, article 13
[69] *Ibidem*, article 13 paragraph 7.
[70] *Ibidem*, article 5.
[71] Cases C-181 and 248/91, *Parliament v. Council and Commission (Bangladesh aid)*, [1993] ECR I-3865, in particular paragraph 20. The case concerned the constitution of a fund of aid to Bangladesh as an extra-EU instrument. The Commission was given a number of powers that were exercised outside the Union framework.

that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties."[72]

This paragraph confirms that the *Bangladesh* case law is still good law and that Member States can confer additional tasks to the Union institutions also when they use the intergovernmental means or they act outside the Union framework. However, one may argue whether the *Bangladesh* case law still acts as a useful parameter to confer additional tasks to the European institutions. Some conditions need to be respected: the Union shall not have exclusive competence; the tasks conferred to EU institutions shall not entail any power to make decision of their own; and the additional tasks shall not alter the essential character of the powers conferred to them by the Treaties. In the ESM the Board of Governors plays a central role in the ESM. It acts as the main body to take decisions to grant financial assistance to Member States in difficulty.[73] The Commission and the ECB should only play a role of assistance. However, the ESMT suggests that both the Commission and the ECB can exert some quasi-decisional powers. A careful reading of the ESMT would suggest that these powers would run counter the second condition mentioned by the Court. In particular the Commission has considerable powers that might go beyond a strict reading of the *Bangladesh* case law.

The ESMT confers also some powers to the ECJ when a dispute between an ESM Member State and the ESM arises.[74] It is not the first time that an international agreement confers the ECJ role to settle a dispute arising from an international agreement concluded between Member States.[75] However, the ESM is the clearest example on how Member State can confer jurisdiction to the ECJ on the dispute arising outside the Union legal order. The former instruments did not explicitly refer to article 273 TFEU. On the contrary, the ESMT at Recital 16 expressively refers to article 273 TFEU as the provision to confer jurisdiction to the Court in such cases.

Pringle makes some interesting remarks on the interpretation of article 273 TFEU. This provision affirms that the Court "shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under

---

[72] *Pringle*, paragraph 158.
[73] ESMT, article 5.
[74] ESMT, article 37.
[75] This happened also for the Internal Agreement on the measures and procedures required for the implementation of the fourth ACP-EEC Convention and for the Convention setting up the European University Institute.

a special agreement between the parties". It serves to avoid a divergent interpretation of EU law by other jurisdictions and to assure unity in the interpretation of EU law.[76]

Overall, I surely support the use of EU institutions made in the ESMT. This is for a number of reasons. First, the adoption of an intergovernmental agreement that does not depart from the established functions of the EU institutions is welcome. A different solution would have distanced too much the objectives of the ESM from the institutional bodies serving for such purposes. Second, the use of the EU institutions also outside the European legal order does not appear in contrast with the overall purpose of assuring unity and stability of the euro area. On the contrary, the use of the EU institutions and, in particular, the role of the ECJ in deciding the disputes arising in the ESM, shall be considered as an institutional guarantee that the Member States have assured in order not to distance themselves too much from the established Union legal order. Third, the ESM arrangements on the use of EU institutions reinforces the powers they have also beyond the Treaty legal basis and shows that EU institutions can still play a leading role also outside the Union framework.

3.1.3 The ESM and the use of the simplified amendment procedure: sound to the purposes of future EMU law reforms?

The creation of the ESM has paved the way to amend the Treaty by including article 136 paragraph 3 TFEU. It is submitted that the establishment of the intergovernmental ESM might prove to be useful to promote future Treaty amendments under the simplified revision procedure under article 48 TEU for the benefit of the EMU.

Revision procedures are contained in article 48 TEU. The Treaty provides for an ordinary and a simplified revision procedure. As underlined above, the first question concerned the possibility to amend the Treaty through the simplified revision procedure of article 48 TEU paragraph 6 by inserting a third indent to article 136 TFEU.

The option of the simplified revision procedure is to avoid the recourse to the ordinary revision procedure where a Convention composed of the members of the Member States' governments would be convened. The proposed amendment will be adopted directly by the European Council acting by unanimity of its members. However, two essential conditions are necessary to make use of article 48 TEU: first, whether the amendment concerns solely the

[76] See, more extensively, K. Lenaerts, D.Arts and I. Maselis, *Procedural law of the European Union*, Sweet and Maxwell, 2006, 502 et seq.

provisions of Part Three of the TFEU on Union internal policies and actions (articles 26-197 TFEU); second, whether the revision does not increase competences conferred on the Union by the Treaties.[77] *Pringle* sheds light on the use of the simplified revision procedure. This allows us to make some comments on the use of simplified amendment procedures to grant financial assistance to Member States.

First, it is important to note that the content of the article amendment refers to the possibility to allow the conclusion of an international treaty, such as the ESM and not a Union arrangement. This shows that the simplified amendment procedure can also be used to insert provisions that do not necessarily concern EU law. The Treaty rules allow for amendments to Treaty provisions that can confer powers to Member States to create financial assistance mechanisms.

Second, and more interestingly, the use of article 48 paragraph 6 TEU allows for its use within the economic policy provisions. It is well known that the EMU is composed of two "pillars": monetary policy and economic policy.[78] The former is an exclusive competence; the latter is a "peculiar" competence reserved to Member States through a system of coordination of economic policies.[79] As to the Treaty amendment, the Court's conclusion is clear cut: the mechanism put in place by the ESMT and, thus, the amendment of article 136 TFEU concern solely economic policy and not monetary policy which therefore is not altered by the new provision.[80] This reasoning is important as it allows for future use of the simplified revision procedure in the EMU Title whenever the envisaged revision does not impinge on monetary policy *stricto sensu*. Otherwise, the simplified revision procedure would impinge on provisions in other parts of the Treaty. Even if financial assistance measures "may have *indirect* effects on the stability of the euro" (emphasis added), it can be argued that paragraph 56 gives ground to reform economic policy measures through the simplified revision procedure. The simplified revision procedure can be used even if the amendment has some effects on the stability of the euro, and only indirectly on monetary policy. An example could be the use of the simplified revision procedure to put forward amendments to article 123 or 125 TFEU to overcome the ECB non-intervention clause or the

[77] More generally on the simplified revision procedure see S. Peers, "The future of EU Treaty Amendments", in T. Tridimas and P. Eeckhout, (2012) *Yearbook on European law*, 31-42.
[78] See *supra* 1.
[79] R. 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", European Law Review, 2012, pp.771-784, 773.
[80] *Pringle* judgment, paragraph 56.

no bailout provision by adding new indents that derogate from the general prohibitions.[81] Further, the simplified amendment procedure could be used to create the Banking Union as long as the amendment does not directly impinge on monetary policy. Admittedly, it is difficult to believe that the procedure under article 48 paragraph 6 TEU may be used to reform the Treaty on prudential supervision of credit institutions. Article 127 paragraph 5 TFEU, which refers to the role of the ECSB to "contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system", is a provision contained in the monetary policy chapter. A restrictive reading of the article 48 paragraph 6 TEU conditions would exclude the use of the simplified amendment provision to change the Treaty on the role of the ESCB in banking supervision. However, one might argue whether article 127 paragraph 5 TFEU does really refer to the core of monetary policy or rather to the "indirect" effects of the ECSB's activities on monetary policy. If we follow the second interpretation, we could argue that article 48 paragraph 6 TEU could be used to such purposes. However, one might still contend that the amendment increases new competences to the Union, it would infringe one of the conditions on the simplified amendment procedure. On the contrary, if it relates to institutional issues, which are also mentioned in article 48 paragraph 6 TEU itself – "institutional changes in the monetary area" – a simplified amendment would be possible.

Finally, the ESM raises the question whether the simplified revision procedure might be used to create new mechanisms or measures that do not strictly confer new competences on the Union in the Treaties. Both article 48 paragraph 6 TEU and *Pringle* would opt for a "no". The Treaty article speaks by itself, the answer of the Court gives limited ground for conferring new competences. The judgment limits to say that the Treaty amendment does not confer any new competence on the Union because it does not establish any legal basis or extend the role of the Union's institutions.[82] In substance, The judgment means that article 48 paragraph 6 TEU shall not be used to create a new legal basis in the Treaties. It does not mean that article 48 paragraph 6 TEU cannot be used to confer new powers that are functional or instrumental to reinforce existing competences in the EU, in particular monetary policies. Arguably, the judgment does not create any clear limit as to the use of the simplified amendment procedure to confer new tasks to allow the smooth functioning of monetary policy or to safeguard the euro are as a whole. What if a new provision confers additional

[81] On articles 123 and 125 TFEU see *infra*.
[82] *Pringle*, paras 73-74.

tasks of supervision or assistance to Eurozone Member States to assure the stability single currency or of the euro as a whole?

Overall, the ESMT and the Pringle judgment have shed light on use of the simplified revision procedure under article 48 paragraph 6 TEU, a Treaty provision. *Pringle* has opted for a broad reading of this article that could allow for future revisions in the EMU Title as long as the revision does not touch the core of monetary policy. It might be argued that the ESMT could prove to be a beneficial example to foresee simplified amendment procedures so long as the conditions of article 48 paragraph 6 TEU are respected.

3.2 The European Treaties and the ESM: reconcilable rules?

As stated earlier, the Treaty contains a number of provisions that limit the possibility of granting financial assistance to Member States in distress. These are in particular articles 123 and 125 TFEU. Before the entry into force of article 136 para.3 TFEU, the Treaties did not contain any specific provision that allowed the establishment of *permanent* financial assistance mechanisms between Eurozone Member States. Although having a different scope, articles 122 paragraph 2 TFEU and 143 TFEU were the only provision that could be used to that effect.

3.2.1 The ESM and the Treaty provisions that limit financial assistance

The provisions that oppose the grating of financial assistance to Member States are articles 123 and 125 TFEU. Following the *Pringle* judgment, it is argued that the ESM does not infringe both articles, but rather reinforces a restrictive reading of them.

Article 123 TFEU prohibits "Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (...) in favour of (...) Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments". The ESM does not refer primarily to this article as a source of conflict to grant financial assistance. This is because the article refers specifically to financial instruments deriving directly from the ECB or central banks and not from other Member States. The ESM is a system that grants financial assistance from Member States loans. As such, *Pringle* simply excludes that financial assistance between Member States of the ESM kind is covered by that provision. The choice of the Court is cautious. The judgment does not give any indication on the terms used in article 123 TFEU nor does it indicate what limits this article entails. Thus, it still cannot be

inferred whether the borrowing of capital from the ECB to the ESM[83] would be compatible with article 123 TFEU.

More importantly, the ESM shall be considered under the bail-out provision under article 125 TFEU. Article 125 TFEU contains the explicit ban to the assumption of financial commitments by Member States. It states that the "Union shall not be liable for or assume the commitments (...) of any Member State, (...). A Member State shall not be liable for or assume the commitments (...) of another Member State, (...)". This provision was inserted in the Treaty of Maastricht to ensure that the Member States would follow a sound budgetary discipline.[84]

So far article 125 TFEU has proven to be the real "evil" for any possible mutualisation of public debt. Doctrinal positions have been divergent over time. Shortly after the entry into force of this provision, Smits argued that the no bail out clause is an essential element of the budgetary code if the Union and, thus, Member States are "on their own" as to their budgetary commitments. He underlined that "the rationale for the prohibition is (...) the application of full market rigour to the activities of Governments".[85] More recently, in the context of the current financial crisis, different positions have arisen on the recent crisis measures taken in Europe. Ruffert argued that the bilateral loans to Greece in 2010 and the establishment of the ESFS were in breach of EU law because they would run counter article 125 TFEU.[86] Some others have tried to give a narrower interpretation of the provision as "it aims to force Member States to comply with their budgetary discipline following the logics of the markets when incurring public debts".[87] Louis sustained that in exceptional circumstances the no bail out can be potentially overturned "if the situation (...) degenerates into an asymmetric shock or a shock common to a number of Member States".[88] Nonetheless, as affirmed by the more cautious position of Palmstorfer, the wording and the systematic reading of the provision "covers and bans all forms of financial assistance given by the European Union or through a Member State to another". Thus, the Greek loan facility, the ESFS and the ESM would run counter article 125 TFEU.[89] However, Athanassiou has argued

---

[83] See the ESMT, article 21.
[84] Pringle judgment, cit., paragraph 135 where the Court mentions the Bulletin of the European Communities, Supplement 2/91, pp.24 and 54 to retrace the origin of the no bail out rule.
[85] R. Smits, *The European Central Bank*, Kluwer International 1997, 76-77.
[86] M. Ruffert, "The European debt crisis and European Union law", 2011 CMLR, 1777-1805, 1785.
[87] A. De Gregorio Merino, *op. cit.*, 1625.
[88] J.-V. Louis, *Editorial Guest Article*, (2010) CMLR, 984.
[89] Palmstorfer, *op. cit.*, 784.

in favour of a more restrictive interpretation of article 125 TFEU to grant financial assistance to Member States in distress.[90] Overall, the doctrinal position appears divergent as to the implications of article 125 TFEU.

It is important to consider what the ECJ has stated in *Pringle*. The judgment has offered the Court the chance to express itself for the first time on article 125 TFEU and, in particular, to interpret the ESM in light of article 125 TFEU. The Court considers that article 125 TFEU does *not* preclude the adoption and ratification of the ESMT. This is made through a number of arguments.

First, the Court conducts a literal interpretation of article 125 TFUE and concludes that Member States are not prohibited from granting any form of financial assistance whatever to another Member State.[91] It is an important point as the Court considers that, notwithstanding the no bail out clause, financial assistance between Member States is possible.

Second, the Court examines the objective of article 125 TFEU. Paragraph 135 affirms that this article "ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline". This equals to say that article 125 TFEU serves as a provision to guarantee the budgetary discipline of the Member States and *not*, strictly speaking, to ban financial assistance between them. The Court requires, however, that such financial assistance be "indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions".[92] In other words, article 125 TFEU is not violated if the Member States establish a financial mechanism for assistance on condition that such assistance is indispensable to the "financial stability of the euro area as a whole" and that it is subject to strict conditionality.

Indeed, one might take two different views. On the one hand, it can be argued that the Court has clearly set the maximum limits on the possible exceptions to article 125 TFEU. Member States cannot be liable for debts of other Member States, but they can only provide loans or similar means on condition that the beneficiary rests fully liable with its commitments. The core reasoning of the Court confirms, on a rather clear-cut line, that the Member State's debt is not assumed by (an)other Member State(s), but financial assistance "amounts to the creation of a new debt, owed to the ESM by that recipient Member State, which remains

---

[90] P. Athanassiou, *"*Of past measures and future plans for Europe's exit from the sovereign debt crisis: what is legally possible (and what is not)*"* in E.L. Rev. 2011, 36(4), 558-575, at 575.
[91] *Pringle*, cit., paragraph 130.
[92] *Ibidem*, para. 136.

responsible for its commitments to its creditors in respect of the existing debts".[93] On the other hand, it can be argued that, provided that assistance is given to the benefit of the "financial stability of the euro as a whole" and that strict conditionality is respected, Member State can make use of financial assistance instruments without infringing article 125 TFEU. The consequence is that, in such way, the Court legitimizes Member States' money transfers to bail out other Member States in distress without infringing EU law. It is true that the recipient Member State remains fully responsible to its creditors for any financial commitments[94]. We are still not in a transfer Union with a mutualisation of public debts.[95] Nonetheless, it can be argued that the Court legitimizes, if not even invites, Member States to bail out each other without necessarily infringing the Treaty. This is because the purpose of article 125 TFEU is essential to assure that "the incentive of the recipient Member State to conduct sound budgetary policy is [not] diminished"[96] and not to prohibit financial assistance between Member States. Article 125 TFEU is not infringed as long as a threat to the "financial stability of the euro as a whole" is found and the beneficiary Member State respects the European rules on sound budgetary policy. It may still be questioned whether "financial stability of the euro as a whole" and "strict conditionality" are insurmountable conditions to foresee more "ordinary" instruments of financial assistance.

In sum, to the purposes of our analysis, the establishment of an instrument of financial assistance such as the ESM does not infringe the no bail out provision. Article 125 TFEU does not impede Member States from adopting intergovernmental agreements which create a system of financial assistance with a view to safeguard the stability of the euro as a whole. Hence, the Court's reading on article 125 TFEU is welcome as it gives some leeway to assure financial assistance between Member States beyond a strict reading of article 125 TFEU. Such interpretation reinforces the idea that differentiated integration, through an intergovernmental agreement, is permissible and even "invited" under EU law.

[93] *Ibidem*, para. 139.
[94] *Ibidem*, paras 139, 145.
[95] See more extensively de Gregorio Merino, *op. cit.*, 1630-1632.
[96] *Pringle*, para.136.

3.2.2 The ESM and the Treaty provisions that allow (or will allow) financial assistance

This part will assess the ESM in the context of the provisions which allow, to some extent, financial assistance between Member States. In particular, I will appraise article 122 paragraph 2, article 143 TFEU and the new article 136 paragraph 3 TFEU. It is argued why and how the first two provisions were and will not be suited for mechanisms of financial assistance in the Eurozone, while the latter would allow the adoption of future intergovernmental instruments that can be beneficial for the EMU.

Article 122 paragraph 2 TFEU provides that "where a Member State is in difficulties or is seriously threatened with severe difficulties (...), the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. (...)". The use of this provision is limited to natural disasters or similar occurrences. Article 122 paragraph 2 allows for the use of special "Union financial assistance" to the benefit of a Member State "in difficulties or is seriously threatened with severe difficulties". The crisis has made use of this provision in a wider sense than its strict reading to provide *ad hoc* financial assistance to Member States in distress.[97] In particular, as stated earlier, it was used to establish the EFSM.[98]

The special nature of the provision cannot act as a *carte blanche* to provide any kind of financial support, given the special conditions set out in that article. *Pringle* confirms a strict reading on the limits of article 122 TFEU. The judgment states that "article 122 (2) TFEU does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged in [Decision 199/2011]."[99] The line taken by the Court follows what the European Council stated in the meeting of 16 and 17 December 2010 according to which the Heads of State or Government agreed that article 122 TFEU should not be used for the purpose of establishing financial assistance mechanisms.[100] Contrarily, the Commission's position appeared more prepared to make use of article 122 paragraph 2 TFEU in future cases. This disagreement can be inferred from Decision 199/2011/EU where recital 4 distinguishes between the European Council and the Heads of State or Government without the Commission President.

---

[97] See among others J.-V. Louis, *op. ult. cit.*, 984 and R. Palmstorfer, *op. cit.*, 779.
[98] Council Regulation 407/2010, cit..
[99] *Pringle*, para. 65.
[100] See http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf

Some authors argued that article 122 TFEU has a limited scope and cannot give ground to the establishment of permanent mechanisms of the kind envisaged.[101] *Pringle* excludes that article 122 paragraph 2 TFEU can come into play as a legal basis to create other forms of financial assistance under Union law. Hence, article 122 paragraph 2 TFEU will not be used for future initiatives aiming at safeguarding the stability of the euro area.

Article 143 TFEU is another provision which, theoretically, could have been relied upon to create financial assistance mechanism. However, this provision applies only to Member States with a derogation, *id est* Member States that have not yet adopted the single currency. The provision could not be used to create financial mechanisms such as the ESM as it applies only for mutual financial assistance from the EU to deal with "balance of payments" difficulties of non-Eurozone Member States.

If articles 122 and 143 TFEU do not provide enough legal basis to introduce a stability mechanism such as the ESM, the new article 136 paragraph 3 TFEU serves these purposes. Article 136 TFEU is inserted in the chapter dealing with provisions specific to member states whose currency is the euro. As stated above, this new provision entered into force after the ESM and, strictly speaking, was not necessary to create the ESM. Nonetheless, the new paragraph 3 of article 136 TFEU requires closer scrutiny in our analysis. This new provisions allows the "[t]he Member States whose currency is the euro [to] establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

Article 136 paragraph 3 TFEU allows a number of critical remarks. First, this provision has been included to allow the creation of stability mechanisms through the action of the Member States which have adopted the euro. It means that the intergovernmental option is legitimate to establish financial mechanisms in the Eurozone. It appears that the use of such provision is useful to create a stronger link between Member States in the Euro area without necessarily recurring to the Union framework and rules. The use of intergovernmental means can reinforce the Eurozone Member States far more than the provision under article 122 paragraph 2 TFEU.

Second, the provision specifies that the mechanism would be for the benefit of the euro-area as whole. It allows Member States of the Eurozone zone to take advantage from financial

[101] See also A. de Gregorio Merino, *op. cit.*, 1632.

assistance through such mechanism. However, the question remains open whether also other non-Eurozone Member States would benefit from a stability mechanism of the kind. In principle, nothing precludes non-euro are Member States from making use of a mechanism of the kind envisaged in the provision. However, article 136 TFEU is inserted in the specific provisions on the Member States which have adopted the euro. Thus, it is debatable whether this provision can be invoked also to integrate other non-eurozone Member States.

Third, the provision makes reference to create a mechanism which is "indispensable to safeguard the stability of the euro area as a whole". This expression comes already from the first declaration on Greece on 11 February 2010 and introduces a new paradigm to assess the feasibility of financial mechanisms in the Eurozone. The stability of the euro area as a whole implies that the Member States shall have very serious reasons to adopt ESM-kind mechanisms. This expression does not help the introduction of other mechanisms once indispensability is not required. What if stronger financial mechanisms are established in a situation where these are not indispensable to "safeguard the stability of the euro area as a whole"? Arguably, new Treaty changes will have to be made in order to reduce the very high threshold of this expression.

Fourthly, the existence of the element of "conditionality" was already present in the bilateral instruments to Greece in 2010. It implies that a number of "stringent programmes of economic and fiscal policy adjustments to be implemented by the affected Member State and ensuring debt sustainability"[102] are required. Conditionality is emerging as an essential condition to offset the granting of financial assistance to Member States. It acts as the opposing force to grant financial assistance.

Finally, the provision refers to the expression "any financial assistance". This allows to believe that any possible form of intervention and is possible and no real limits exist on the possible means to grant financial assistance to Member States.

Overall, the content of the new article 136 paragraph 3 TFEU justifies further action on the part of Member States in the euro area to reinforce financial assistance among each other. However, it is argued that the provision has more of a political nature. The paragraph seems more a political justification to the use of international arrangements that could provide for financial assistance mechanisms in the Eurozone than a true Member State legal basis to enter into international agreements to establish financial assistance mechanisms.

---

[102] Statement by the Eurogroup, 28.11.2010 available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ecofin/118050.pdf

Conclusion

To sum up, it has been demonstrated that the ESM is unique in its nature as an international intergovernmental agreement between the Eurozone Member States. The ESM comes out as a necessary response to counteract the effects of the financial crisis and to assure that the stability of the euro area.

A number of conclusions can be made. First, the ESM has promoted a thorough analysis on the current limits to establish financial mechanisms of financial assistance under EU law. The debate on the interpretation of the no bail out and the non-intervention clauses under articles 123 and 125 TFEU is only at the beginning and it is submitted that new policy developments will follow the ESM. For instance, it will be interesting to see how the ESM will relate to the establishment of the European Banking Union with a view to recapitalize European banks. It is argued that some solutions to bypass the strict reading of the no bail out clause will be found in future. To some extent, the ESM is already bypassing a broad interpretation of the no bail out clause.

Second, the ESM has shown that intergovernmentalism can be used in order to reinforce the idea of integration beyond the limits established in the Treaty. Intergovernmentalism shall not be interpreted in a negative way so long as it is required to improve integration outside the Union framework. The Treaty rules do not allow for the creation of a reinforced financial or fiscal union which could transform the EU into a perfect OCA. It has been submitted that so long as a substantial revision of the Treaties is not undertaken, intergovernmentalism still acts as a necessary tool to provide financial assistance to Member States in the Eurozone. Furthermore, the limited amount of EU budget does not guarantee that European financial resources can be used robustly to assist big Member States in financial difficulties.

The intergovernmental nature of the ESM has opened a new era in the process of European integration. A new paradigm to cope with the daunting effects of the financial crisis through unconventional intergovernmental means will hopefully assure that financial stability in the Eurozone is achieved. It is hoped that new interesting perspectives on deepening the EMU will be presented by the European Council in June 2013.