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A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation*

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A MEMORANDUM OF MISUNDERSTANDING – THE DOOMED ROAD OF THE EUROPEAN STABILITY MECHANISM AND A POSSIBLE WAY OUT: ENHANCED COOPERATION

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Abstract

The European Stability Mechanism (ESM) stands pars pro toto for how the EU and the Member States have confronted what allegedly started out as a sovereign debt crisis and has turned into an existential crisis of the EU. Attempts to get Europe back on track rely too heavily on technocratic governance and abandon some of the EU's core values. This paper proposes an alternative, more legitimate route. It argues that ESM-like financial assistance should be integrated into the framework of the EU's legal order, by using the legal instrument of enhanced cooperation under Article 20 TĒU. A critical analysis is given of economic governance under the ESM, addressing and assessing its shortcomings in terms of human rights protection, the rule of law ideal and lack of input legitimacy. The feasibility of using enhanced cooperation for the ESM is examined.

1. Introduction

A spectre is haunting Europe and all the powers of the old and the new Europe have entered into a holy alliance to exorcise this spectre, or what they take for it: Merkel and Sarkozy/Hollande, Lagarde and Draghi, French neo-Keynesians and German austerity-fetishists. The spectre, it is said, has produced a real, large-scale economic crisis, arguably the most severe in the history of Europe since the Second World War. In the wake of the economic maelstrom came an existential crisis, questioning the core of the European integration project, its very *raison d'être*.¹ Apparently, the European Stability

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1. For the centrality of the purposive vision and rationale of European integration for current efforts as well as long-term legitimacy, see De Búrca, "Europe's *raison d'être*", in Kochenov and Amtenbrink (Eds.), *The European Union's Shaping of the International Legal*

Mechanism (ESM) stands *pars pro toto* for how the EU and the Member States – notably the euro area members – have confronted the crisis. While being keenly aware of the existential nature of the crisis in economic terms, crisis management thus far has largely avoided the existential dimension regarding the political domain.² This trend continues, since even after the first brunt of the crisis the manifold attempts to bring Europe back on track rely heavily on technocratic governance and intergovernmentalism. As this paper seeks to demonstrate, the ESM is a case in point: it creates a financial facility that, as will be argued, to a great extent circumvents the Union's own institutional structure including its procedural safeguards and political ideals.

This paper sets out to propose an alternative, and in my view more legitimate, route arguing that ESM-like financial assistance should be integrated into the framework of the European Union's legal order, namely by means of facilitating the legal instrument of enhanced cooperation according to Article 20 TEU. Prior to presenting the core of the argument, the article first expounds the formal structure and legal procedures of the ESM to the degree necessary (2). Following this rather technical prefatory exercise, which is intended to cast some light on the nuts and bolts of crisis management through the ESM, I offer a critical analysis of economic governance under the ESM regime, addressing and assessing its shortcomings in terms of human rights protection, the rule of law ideal and input legitimacy (3). In the final part of the paper I then turn to examining the legal feasibility of integrating the financial assistance scheme of the ESM into the EU's legal order via enhanced cooperation, and conclude by arguing why this would present a superior alternative to the current facility (4).

2. The legal structure and procedures of the ESM

As a preliminary point, it should be noted that the following snapshot of the ESM's legal structure and procedures is deliberately selective. It focuses solely on the ESM's distributive function; it ignores issues of acquisition of

Order (CUP, 2013), pp. 21–37; see further on the existential dimension of the crises von Bogdandy and Guérot, “Eine neue Leitidee – Die europäische Republik”, *Frankfurter Allgemeine Zeitung*, 19 Sept. 2013, available at <www.faz.net/aktuell/politik/staat-und-recht/europaeische-union-und-deutschland-eine-neue-leitidee-die-europaeische-republik-12581462.html> (last visited 17 Dec. 2013). The history of responses to the crisis can be traced at <ec.europa.eu/economy-finance/crisis/> (last visited 19 Feb. 2014).

2. Perceptively on the depoliticization and intergovernmentalism in crisis management see Chiti and Teixeira, “The constitutional implications of the European responses to the financial and public debt crisis”, 50 *CML Rev.* (2013), 686, 705–708.

capital through capital calls and borrowing, and leaves aside the managing and investment of ESM capital and the coverage of losses deriving from ESM operations. These aspects of the ESM framework are worth further investigation but lie outside the purpose and go beyond the scope of this paper. Essentially, the brief and technical outline of the ESM's legal framework is intended to visualize its functioning to the degree necessary for the subsequent critical analysis. The inchoate sketch of the ESM will thus be supplemented with the missing parts as far as they seem viable for our analysis.

The ESM was established on the basis of an international agreement adopted by the 17 euro area members on 27 September 2012 and commenced its operations on 8 October 2012.³ The Treaty Establishing the European Stability Mechanism (ESMT)⁴ set up the ESM as an international organization based in Luxembourg, whose purpose is to “mobilise funding and provide stability support under strict conditionality . . . to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States” (Art. 3 ESMT). By contrast to its forerunners, the European Financial Stability Facility (EFSF) and the European Financial Stability Mechanism (EFSM), the ESM is intended to operate as a permanent international financial facility to alleviate financial straits threatening the financial equilibrium in the euro area at large. To this end, it may provide aid in the form of discrete support programmes, detailed and conditioned as part of bilateral agreements between the ESM and the ailing Member State. Such agreements are directed at ameliorating the country's situation and restoring the financial stability of the entire euro area. To that aim, the ESM is endowed with two governing bodies, the Board of Governors and the Board of Directors.⁵

Formally, the Board of Governors must be considered the most influential body of the ESM. Governors are appointed by the parties to the ESM and must

3. Estonia, the last of the parties to ratify the ESMT, ratified the treaty on 3 Oct. 2012.

4. The re-negotiation of the first version of the treaty of 11 July 2011 (see the commentary by Ohler, “The European Stability Mechanism: The long road to financial stability in the euro area”, 54 *German Yearbook of International Law* (2011), 47–74), resulted in the final version of 2 Feb. 2012, text available at <www.esm.europa.eu/pdf/esm_treaty_en.pdf> (last visited 27 Dec. 2013).

5. Remarkably, the ESM adopts the IMF model more or less to the letter, see Louis, “The unexpected revision of the Lisbon Treaty and the establishment of a European Stability Mechanism”, in Ashiagbor, Countouris and Lianos (Eds.), *The European Union after the Treaty of Lisbon* (CUP, 2012), pp. 298 and 319, who predicts: “This is more than symbolic. It is an embryo of the regional sui generis EMF (European Monetary Fund) that will be born”. In the same vein, Ruffert, “The European debt crisis and European Union law”, 48 *CML Rev.* (2011), 1783, 1789 (“European mirror image of the IMF”; “regional copy of the IMF”).

be cabinet members of the members' governments with responsibilities for finance (Art. 17(1) ESMT). In fact, the Board of Governors comprises the 17 Member States' ministers of finance and is chaired by the Dutch minister of finance and President of the Eurogroup Jeroen Dijsselbloem. The Board of Governors adopts decisions by "mutual agreement", i.e. unanimity, unless otherwise stated. Among the decisions to be taken by unanimous vote are those related to the provision of stability support to an ESM member (Art. 5(6)(f) ESMT) and the decision to delegate the tasks of the Board of Governors listed in Article 5 ESMT to the Board of Directors.

Thus, nominally speaking, all decisions adopted by the Board of Governors granting or denying stability support to an ESM Member have to be taken unanimously,⁶ which gives every Governor a right to veto the decision; that is, if the Governor participates in the vote, as abstentions do not preclude the adoption of a decision by mutual agreement.⁷ Although the ailing members' right to political self-determination within the ESM lending scheme appears to be safeguarded by the formal unanimity requirement and the resulting veto power, one must bear in mind that a euro area member requesting financial aid arguably stands with its back against the wall, which raises some doubts concerning the autonomy of the decision in terms of symmetrical distribution of bargaining power when negotiating the conditions of financial support. For consent to truly express the choice of the parties to the agreement it must be based on autonomous decision making which only takes place against the background of fair bargaining conditions. This begs the question: what is the real bargaining power of a Member State on the edge of the financial cliff?⁸

Moreover, in accordance with Article 4(4) ESMT, "an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance . . . would threaten the economic and financial sustainability of the euro area". The emergency voting procedure does away with the unanimity requirement. The threshold for the qualified majority with regard to the emergency procedure is 85 per cent of the votes cast pertaining to requests for stability support.⁹ However, the qualified majority voting procedure comes not only at the expense of unanimity but equally diminishes equality among

6. Art. 5(6)(f), (g), (i) ESMT.

7. Art. 4(3) ESMT; at least as long as "a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights" are present (Art. 4(2) ESMT).

8. To give an example, in the case of Portugal, all parties partaking in the general election with chances of success were required to abide by the conditions laid out in the MoU to ensure its implementation regardless of the outcome of the general election, see Scharpf, "Legitimacy intermediation in the multilevel European polity and its collapse in the euro crisis", 6 *Max-Planck-Institut für Gesellschaftsforschung Discussion Paper* (2012), p. 25.

9. Art. 5(6)(f), (g) ESMT.

the ESM members as it leaves intact the independent veto positions of the three largest contributors (Germany, France and Italy). It is the consequence of market rationality intruding in the political sphere, as the impact of the formal voting right of each ESM member is tied to “the number of shares allocated to it in the authorized capital stock of the ESM”.¹⁰ Under a voting scheme abiding by the egalitarian principle of “one State, one vote” only an alliance of three members could obstruct a decision and no single member could retain veto power.¹¹ This structural bias reflects the asymmetric economic power relations in the euro area. It translates the economic power of most creditor States into formal voting rights attributing more weight to them relative to their economic power and thus cements the status quo.¹² As a consequence, the democratic “principle of congruence” or “all-affected principle”¹³ is compromised in two ways. First, it potentially exacerbates the disparities between the preferences of the constituency and their representatives’ decisions, driving a wedge between the government and the people. Second, non-egalitarian decision-making procedures may lead to neglect of the concerns of those citizens most severely affected by the decisions. The high political salience of the negotiated¹⁴ conditionalities under the circumstances just described, i.e. where a polity’s value-consensus may be at stake, do not

10. Art. 4(7) ESMT. 15% of 7,000,000 total shares equals 1,050,000 shares. Only Germany (1,900,248), France (1,427,013) and Italy (1,253,959) hold more than the required minimum to veto a decision of the Board under the emergency voting procedure, see figure in Annex II to the ESMT.

11. As 15% of 17 votes equals 2.55 votes.

12. Where, as Chiti and Teixeira (op. cit. *supra* note 2, 701) note, the “*de facto* division between creditor and debtor Member States, which would need to be mediated by democratically legitimated EU political institutions”, aggravates the legitimacy issue; see further discussion *infra* section 4.

13. See e.g. Gould, *Globalizing Democracy and Human Rights* (CUP, 2004), p. 175. With regard to European politics see e.g. Schmidt, *Demokratietheorie – Eine Einführung*, 4th ed. (Verlag für Sozialwissenschaften, 2008), pp. 405, 408; Bohman, *Democracy across Borders – From Dēmos to Dēmoi* (MIT Press, 2007), pp. 92–97 (with regard to domination), pp. 145 et seq., pp. 172–173. For critical views of the “all-affected principle”, see e.g. Schaffer, “The boundaries of transnational democracy: Alternatives to the all-affected principle”, 38 *Review of International Studies* (2012), 321–342; Song, “The boundary problem in democratic theory: Why the demos should be bounded by the State”, 4 *International Theory* (2012), 39–68.

14. Sceptical about whether the Member States signing the adjustment agreements do indeed act autonomously, Pernice, “Solidarität in Europa – Eine Ortsbestimmung im Verhältnis zwischen Bürger, Staat und Europäischer Union”, in Calliess (Ed.), *Europäische Solidarität und nationale Identität – Überlegungen im Kontext der Krise im Euroraum* (Mohr Siebeck, 2013) pp. 47, 53. This further implies the question whether the internal logic of the ESM allows for normative arguments such as solidarity, or whether at the end of the day the purely strategic rationalities of the economic sphere prevail.

allow for such variations of majority rule.¹⁵ The “strict conditionality” requirement obfuscates the driving forces behind the unjustified scapegoat rhetoric and risks ignoring the political cost of externally mandated reforms side-stepping the democratic constraints. This makes for a rather strong case of European “soft-domination” of a demos attempting to plea for a “reasonable veto”.¹⁶ In this regard, the suspension of voting rights of any “ESM member who fails to pay any part of the amount due in respect of its obligations”¹⁷ is equally unacceptable. The market rationale behind this deviation from the all affected principle is challengeable for its degradation of the equality principle.¹⁸

The other principal body of the ESM, the Board of Directors, should be composed of 17 “people of high competence in economic and financial matters” appointed by the Governors. Likewise, the Managing Director, who chairs the Board of Directors and directs the day-to-day business of the ESM, must be a person who embodies “relevant international experience and a high level of competence in economic and financial matters” (Art. 7(1) ESMT). The Managing Director is elected by the Board of Governors by qualified majority vote (Art. 5(7)(e) ESMT). The position is currently held by Klaus Regling, the former CEO of the EFSF. Unless otherwise stated, the Board of Directors reaches its decisions by qualified majority voting (80 per cent of votes cast; Arts. 6(5), 4(5) ESMT).

The nominal institutional bodies of the ESM are complemented by genuine EU institutions and the International Monetary Fund (IMF). The Board of Governors and Board of Directors as well as their respective chairmen are encouraged to harness the expertise of the IMF and to collaborate closely with the European Commission, the European Central Bank and even the Court of Justice. As the following remarks will demonstrate, with regard to the ESM’s primary mission – the deployment of financial support programmes to its members –, the tasks of the ESM are indeed carried out by a broad institutional network comprising a multitude of supranational, international and national actors, which raises numerous questions concerning the substantive authorship of acts formally attributed to the ESM as an

15. Cf. Schmidt, *op. cit. supra* note 13, p. 270. Under enhanced cooperation, this would have to be reconciled with Art. 4(2) TEU.

16. See Nicolaïdis, “European democracy and its crisis”, 51 *JCMS* (2013), 358, 362–363; see also Kundnani, “Europe and the return of history”, 11 *Journal of Modern European History* (2013), 282.

17. Art. 4(8) ESMT.

18. For the argument from fairness and the argument from corruption of non-market values as two objections to the colonization of the political realm through market rationalities see Sandel, *What Money Can’t Buy – The Moral Limits of Markets* (Penguin Books, 2012), pp. 110–114.

independent legal body and, correspondingly, the political accountability for such actions.

The array of instruments of financial support available to the ESM ranges from pre-emptive measures, such as precautionary financial assistance (Art. 14 ESMT), to emergency strategies such as the recapitalization of banks (Art. 15 ESMT) or market support facilities, where the ESM arranges to purchase State bonds of the respective ESM member on either the primary or the secondary market (Arts. 17, 18 ESMT). The disbursement of ESM loans, arguably the instrument best known to the broader public, completes the portfolio. However, the issuance of ESM loans to ailing States is intended as an *ultima ratio* measure (Art. 16 ESMT).

In general, the initiation of any type of support scheme (Art. 13 ESMT) depends on the formal request by a troubled ESM member. The claim for stability support, indicating the kind of assistance sought after, is then assessed by the Commission and the ECB, who may be joined by the IMF. The request will be granted according to whether the member's public debt is sustainable and imposes a sufficiently severe risk to the stability of the euro area as a whole or of its members. The assessment further includes an estimate of the concerned member's actual or potential financial needs. On the basis of this evaluation the Board of Governors may decide to grant financial stability support "in principle".¹⁹ Such a sweeping resolution signs over the task to draft the proposal of the financial assistance facility agreement (FFA) to the ESM's Managing Director. The FFA sets out the modalities, e.g. the instalment schedule and the time of disbursement regarding the first tranche. The general *placet* further entrusts the Commission and the ECB – if possible, joined by the IMF –, to enter into negotiations with the applicant to conclude a memorandum of understanding (MoU) detailing the conditionality attached to the FFA.²⁰ The strict conditionality, to be embedded in the memorandum as

19. A first "in principle" decision was taken by the Board of Directors on 24 Apr. 2013 granting Cyprus stability support in the form of a financial assistance facility of up to €10 billion to cover its fiscal needs, redeem its medium and long term debt and to recapitalize its banks, see the ESM press release No. 3/2013, available at <www.esm.europa.eu/pdf/ESM%20Press%20Release%20ESM%20Board%20of%20Governors%20grants%20stability%20support%20to%20Cyprus1.pdf> (last visited 5 Jan. 2014). For a critical view, holding that in the case of Cyprus the indispensability requirements (Art. 12 ESMT) are not satisfied, see Murswiek, "Das Zypern-Rettungspaket ist unrechtmäßig", *Süddeutsche Zeitung*, 18 Apr. 2013, available at <www.sueddeutsche.de/politik/bundestag-zur-euro-krise-das-zypern-rettungspaket-ist-unrechtmassig-1.1651846> (last visited 5 Jan. 2014).

20. The wording of Art. 13(3) ESMT somewhat misleadingly suggests an automatic delegation of the power to negotiate the MoU to the Commission and the ECB ("shall entrust"). As becomes apparent by reference to Art. 5(6)(g) ESMT, this decision is to be taken by mutual agreement (unanimity).

set forth in Article 12(1) ESMT, is aimed at enhancing the effectiveness of financial aid and counteracting potential “financial contagion”.²¹ Conditionality may range from a formal reminder to respect the “pre-established eligibility conditions” to the proliferation of “macro-economic adjustment” programmes. The only “normative” standard that applies to the conditionality imposed is its appropriateness with regard to the selected support scheme.²² In the case of ESM loans, the available range of conditionality-instruments is restricted to the implementation of macro-economic adjustment policies (Art. 16(2) ESMT). To be sure, this must be read against the backdrop of the recently introduced Article 136(3) TFEU, which requires the granting of financial assistance under the ESM to be made subject to “strict conditionality”, and the ECJ’s *Pringle* judgment. In *Pringle*, the Court inferred “strict conditionality” as a general prerequisite for the disbursement of financial assistance, as it aids the attainment of the “higher objective” at the Union level, which is “maintaining the financial stability of the monetary union”.²³ In this manner, strict conditionality as a legal condition seeks to avoid the alleged moral hazard problem caused by Member States who have been living beyond their means and free-ride on the merits of those members who managed to maintain budgetary discipline. Following the Court’s rationale, strict conditionality aims at preempting the potentially devastating effects on the common currency area that could result from such free-riding. To this effect, strict conditionality warrants that 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”.²⁴ Given that maintaining Member States’ responsiveness to market incentives marks the objective pursued by Article 125 TFEU, granting financial assistance in order to square with the “no-bailout” clause must ensure that the recipient Member State remains subject to market forces to keep budgetary discipline, which demands strict conditionality to uphold such incentives.²⁵

21. See recital 3 preamble to ESMT; further, recital 12 of the preamble notes that conditionality is in accordance with IMF practice.

22. Stated rather indirectly, conditionality has to chime with the rest of EU law as Art. 13(3)(2) ESMT requires the MoU “to be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned”.

23. Case C-370/12, *Pringle*, judgment of 27 Nov. 2012, nyr, para 135.

24. *Ibid.*, para 135. Critical with regard to the functional equivalence of disciplining effects of market mechanisms and the regulatory effects aimed at by conditionality requirements, Nettekheim, “Europarechtskonformität des Europäischen Stabilitätsmechanismus”, 66 NJW (2013), 16, who refutes a suggested congruence between the two measures.

25. *Pringle*, cited *supra* note 23, para 136.

Following the approval of the Board of Governors, the Commission signs the MoU on behalf of the ESM. In parallel to the approval of the MoU, the Board of Directors must approve the FFA. Concomitantly, the Commission, in collaboration with the ECB and, if possible, the IMF, are entrusted with the task of monitoring compliance with the conditionality provisions attached to the FFA.

3. Critical analysis of the ESM distribution scheme

3.1. *Human rights protection*

The “strict conditionality” restrictions imposed on ESM Members by virtue of the negotiated MoUs potentially cover a vast range of macro-economic adjustment instruments (Art. 12(1) ESMT), ranging from sovereign debt consolidation and the implementation of fiscal reforms to programmes aiming at a restructuring of the national financial sector or fostering sustainable economic growth and international competitiveness.

The recent ESM assistance for Cyprus is a case in point. While the original conception, aspiring to oblige every Cypriot citizen with more than € 100,000 in the bank to contribute to the efforts of averting the crisis by levying a lump sum fee, was muted due to political resistance, the MoU’s conditionality requirements envisage significant tax increases alongside far-reaching spending cuts in the social sector and reforms of the welfare system. Among the numerous conditionality-imposed reforms are cutbacks in social services, apportionments of public health care benefits demanding patients to individually bear higher costs for health services and an increase in VAT from 17 to 18 per cent in 2013, to be followed by another increase of general VAT to 19 per cent taking effect in 2014.²⁶ Frequently increases in VAT asymmetrically affect high spenders with expenditures close to their net incomes. This systemic disadvantage has a particularly negative impact on consumer groups whose expenses are typically inevitable, namely families. Moreover, as a consequence of the MoU the general minimum retirement age in Cyprus will be raised by six months or two years for civil servants.²⁷

26. See European Commission, *The Economic Adjustment Programme for Cyprus*, Occasional papers 149 (May 2013), 66–103, available at <ec.europa.eu/economy_finance/publications/occasional_paper/2013/op149_en.htm> (last visited 5 Jan. 2014).

27. Several Cypriot citizens brought actions before the General Court on 4 June 2013, (see Joined Cases T-328, 329 & 330/13, O.J. 2013, C 252/55) to challenge the decision of the Eurogroup of 25 March 2013 launching the conditioned financial assistance programme for Cyprus to be provided by the ESM. The applicants urge the General Court to annul the decision and simultaneously declare that the decision of the Eurogroup in essence constitutes a decision

It is a commonplace that fiscal policy measures regarding taxation and government expenditures exert substantial re-distributive effects and are hence not to be conceived of as value-neutral.²⁸ The structural changes the MoU-based adjustment programmes intend to bring about in areas of economic and fiscal policy can hardly be limited to the policy fields they were meant to target. As the Cypriot example illustrates, austerity measures will significantly affect the national social constitutions as well,²⁹ more or less directly causing cutbacks in welfare expenditures, e.g. pension funds, social insurance schemes, health care or education. Retrenchment in social spending can come at a high political price, as such measures may engender grave social upheaval eventually widening the abyss between citizens and their government, which could undermine the entire project – even more so, if the strict conditionality allowed for by Article 12(1) ESMT in conjunction with Articles 125, 136(3) TFEU exceeds the conditionality of Union measures adopted under Article 126 TFEU.³⁰ The events of the recent past following the Troika measures concerning Greece confirm that scenarios of this kind are not at all fictional. The strict conditionality contained in the MoUs may very well and very directly impinge on the social and economic rights of EU citizens.³¹

In that vein, member of the Irish Dáil Thomas Pringle, the applicant in the national proceedings which led to the reference for a preliminary ruling on the establishment of the ESMT, invoked the insufficient level of protection of the EU citizens' social and economic rights as enshrined in Title IV of the Charter of Fundamental Rights of the EU (e.g., fair and just working conditions, social security and material assistance, access to health care and services of general economic interest) and their complementary right to an effective legal remedy pursuant to Article 47 of the Charter, as legal grounds for his contestation of the legality of the ESMT.³² The counterargument put

of the ECB and/or the Commission “irrespective of the shape or form in which it was dressed”. The applicants' pleas are mainly grounded in the argument that the ECB/Commission as the true authors of the decision overstepped their competences, i.e. acted *ultra vires*; in addition, the decision is said to violate their fundamental right to property; see also *infra* section 4.4.

28. For redistribution and public provision as the two distinct functions of taxation see Murphy and Nagel, *The Myth of Ownership – Taxes and Justice* (OUP, 2002), pp. 76–95.

29. Cf. Tuori, “The European financial crisis – Constitutional aspects and implications”, 28 *EUI Working Papers Law* (2012), p. 49.

30. De Witte and Beukers, annotation of *Pringle*, “The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*”, 50 *CML Rev.* (2013), 840.

31. Similarly Tomkin, “Contradiction, circumvention and conceptual gymnastics: The impact of the adoption of the ESM Treaty on the state of European democracy”, 14 *German Law Journal* (2013), 187; Tuori, *op. cit. supra* note 29, 49.

32. *Pringle*, cited *supra* note 23, para 28.

forward by the Commission held that the measures adopted by the ESM fall outside the scope of the Charter as the Member States acting within the structure of the ESM were not “implementing European Union law” as required by Article 51(1) of the Charter.³³ The ECJ concurred and concluded that as a consequence of its inapplicability neither the Charter nor the residual general principle of effective judicial protection precluded the Member States whose currency is the euro from entering into an agreement such as the ESM.³⁴ Advocate General Kokott remained silent on the applicability of the Charter in general, but concluded that the matter is ultimately irrelevant, as the right to an effective legal remedy is not conditioned upon the applicability of the Charter:

“The compatibility with European Union law of the acts of the Member States within the ESM are subject under the ordinary procedure of Article 267 TFEU to review by the Court of Justice and the national courts and tribunals. The Member States have to that extent under the second subparagraph of Article 19(1) TEU provided for the required legal remedies to secure effective legal protection at least with regard to the national application of the conditions”.³⁵

Although this is certainly true, it does not, however, render the issue of an appropriate human rights standard for measures implementing MoU-induced conditionality obsolete, for at least two reasons. First, the European Convention of Human Rights, which in the absence of the applicability of the EU Charter remains the last common human rights regime universally applicable to socio-economic adjustment measures, does not guarantee social and economic rights corresponding to the rights under Title IV of the Charter.³⁶ As a result, EU citizens rely on socio-economic rights insofar as

33. View of A.G. Kokott in *Pringle*, cited *supra* note 23, para 193.

34. *Pringle*, cited *supra* note 23, paras. 180–182.

35. View of A.G. Kokott in *Pringle*, cited *supra* note 23, para 194. On the role of Art. 19(1) TEU see also Case C-583/11 P, *Imuit*, judgment of 3 Oct. 2013, nyr, paras. 90, 101–106.

36. A recourse to the European Social Charter (ESC), guaranteeing fundamental social and economic rights meant to supplement the civil and political rights laid down in the ECHR, arguably, also falls short of providing for an adequate standard relative to that of the EU Charter. The ESC lacks a judicial body *stricto sensu* and does not entail a procedure for individual complaints; the ESC instead relies on supervision of Member State practices on the basis of the regular reports submitted to the European Committee of Social Rights (ECSR). Since the introduction of collective complaints procedure in 1995 (Protocol ETS No. 158), social partners and NGOs are eligible to lodge complaints if the complaint is declared admissible by the ECSR. For a critical and rather pessimistic evaluation of the functioning of the system of collective complaints under the ESC see Churchill and Khaliq, “The collective complaints system of the European Social Charter: An effective mechanism for ensuring compliance with economic and social rights?”, 15 EJIL (2004), 417–456. But see e.g. the ECSR’s decision of 23 May 2012, Complaint No. 66/2011, *General Federation of employees of the national electric power*

these are contained in their national constitutions. In addition to this restriction in substance, procedurally, the ESM regime by and large renders the residual civil liberties pursuant to the ECHR and the national constitutions irrelevant. Pursuant to Article 32(3) ESMT the ESM cloaks itself under a mantle of judicial immunity, which may only be lifted by means of a unanimously adopted waiver. Likewise, all board members and the ESM staff enjoy full judicial immunity with respect to acts performed by them in their official capacity,³⁷ unless waived by qualified majority vote by the Board of Governors.³⁸ In sum, this puts a first big question mark behind the ESM's legitimacy claim. I will return to this issue more acutely when discussing to what extent the incorporation of the ESM scheme into the EU legal order via enhanced cooperation and the ensuing applicability of the Charter may augment its legitimacy in terms of enhanced human rights protection in section 4.4.

3.2. *Input legitimacy and the rule of law*

In the opinion of Fritz W. Scharpf – commenting on the euro crisis at large – the recent events and measures taken to master the existential challenges the crisis has brought in its wake mark a turning point insofar as “practically for the first time in the history of European integration, European policies have a direct and massive impact on the lives and concerns of citizens or on their highly salient preferences, while European policy-makers are perfectly visible as the authors of these policies”.³⁹ As a consequence, the pervasive impact on the lives of citizens in debtor countries, triggered predominantly by the strict conditionality requirements entailed in the MoUs, calls for increased standards of legitimacy both in terms of input and output. However, despite the demand for further (democratic) legitimacy, the ESM, by following the short-term intergovernmental emergency strategies of the past, perpetuates the shortcomings of previous rescue attempts which widely ignored the existential dimension of the debt crunch in political terms. By virtue of its being established as an international organization largely beyond the bite of the EU legal order,⁴⁰ the ESM is broadly detached from any real democratic

corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v. Greece, available at <www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC66Merits_en.pdf> (last visited 5 Jan. 2014).

37. Art. 35(1) ESMT.

38. Art. 5(7)(k) ESMT.

39. Scharpf, *op. cit. supra* note 8, 25; consenting Schmidt, “A sense of déjà vu? The FCC's preliminary European Stability Mechanism verdict”, 14 *German Law Journal* (2013), 15.

40. The ECJ in *Pringle* does however remind the Member States of the limitations to cooperation under international law deriving from Union's legal order. Multilateral

accountability. In the wake of its reliance on non-representational expert knowledge and intergovernmentalism, it embodies yet another specimen of depoliticized technocratic governance with its strong inclination toward prioritizing the logic of the market over democratic values and surrendering some of the core constitutional standards of European integration to the siren calls of global market imperatives.⁴¹

In a recent lecture, Jürgen Habermas, referring to the Commission's proposals in its "Blueprint for a deep and genuine Economic and Monetary Union",⁴² fervently refuted the EU's propensity for technocracy at the expense of political acts of collective self-determination. In Habermas's view, the EU is caught up in a dilemma, because it strives to meet the market imperatives to preserve the euro on the one hand and aims at facilitating closer political integration on the other. The Commission's plan, spelled out in the Blueprint, attempts to bridge this gap "in a technocratic manner" by catering to the economic requirements and focusing on the politically feasible, but does so "apart from the people". Hence the increased regulatory powers are not backed up democratically. So "[u]nder the pull of this technocratic dynamic", Habermas admonishes, "the European Union would approach the dubious ideal of a market-conforming democracy that would be even more helplessly exposed to the imperatives of the markets because it lacked an anchor in a politically irritable and excitable civil society".⁴³

This general tendency to favour market rationalities and forms of technocratic government is readily visible in the institutional set-up of the ESM. The job profile for the ESM's Board of Directors, as described in Article 6(1) ESMT, is a telling example. It makes no pretence of its preference for technocrats to fill the positions, devoid of democratic accountability and secured by rules guaranteeing far-reaching immunities (Art. 35 ESMT). This

international treaties between the Member States must respect Union law, particularly the EU's competences and the primacy of EU law (*Pringle*, cited *supra* note 23, paras. 68–69, 101). On the EU law limitations with regard to the "satellite treaties" in detail, see Thym and 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", 48 CDE (2012), 733–758; Thym, "Anmerkung zu C-370/12", 68 JZ (2013), 260–261.

41. Cf. Chiti and Teixeira, *op. cit. supra* note 2, 705–708.

42. COM(2012)777 final.

43. Habermas, "Democracy, solidarity and the European crisis", lecture held at KU Leuven on 26 Apr. 2013, full text available at <www.kuleuven.be/communicatie/evenementen/evenementen/jurgen-habermas/democracy-solidarity-and-the-european-crisis> (last visited 5 Jan. 2014); see also Habermas, *In the Riptide of Technocracy* (Polity Press, forthcoming 2014). Christian Joerges concurs: "The practice of European crisis policy, which certainly reflects Germany's influence, is seeking refuge in a technocratic model.... One can find elements of a kind of economic managerialism with an authoritarian flavour", see Joerges, "Law and politics in Europe's crisis: On the history of the impact of an unfortunate configuration", 9 *EUI Working Papers Law* (2013), 8; see also Tuori, *op. cit. supra* note 29, 45, 48.

trend is further instantiated by allotting to the European Commission and the ECB, two widely independent EU bodies, a decisive role in shaping economic policies in debtor countries as the primary negotiators of the MoUs, imbued with extensive reform requirements under the lending regime of “strict conditionality”.

But, not so fast, please! Would this criticism not have to yield to the ultimate decision-making power of the Board of Governors, staffed with the Member States’ ministers of finance, who are to represent the interests of their domestic constituency and whose actions are subject to national parliamentary scrutiny and who, in addition, can be held accountable by the national media and the public at home? Does the Board of Governors not indeed have the final word regarding decisions dispatching ESM C.A.R.E. packages, and does not the ESMT prescribe unanimity on all these matters, which leaves every Member State with a right to veto, precluding the forced submission to the will of the majority? The answer is: somehow it does and somehow it doesn’t.

A major strand of criticism questions the *de facto* accountability of the ESM Governors in the domestic political domain. This concerns the effectiveness of domestic parliamentary scrutiny in real terms. Serious doubts in this matter stem from the far-reaching immunity provisions and confidentiality clauses in the ESMT, which make for an additional obstacle to national parliamentary control and hamper public control by civil society, the media and academia.⁴⁴ The German Federal Constitutional Court (FCC) rightly addressed this subject in its *ESM* interim judgment, making the Bundestag’s access to information an irrevocable condition for the constitutionality of the ESMT according to the German Basic Law.⁴⁵ In order to safeguard the German Bundestag’s overall budgetary autonomy and, on the reverse, its budgetary responsibility,⁴⁶ the FCC ruled that the Bundestag must retain a right to be sufficiently informed and therefore have access to all relevant documents and other pieces of information crucial to assess the factual and legal state of affairs and the potential consequences, so that it can reach an informed decision whether to authorize the German representative on the Board of Governors to vote in favour of the proposed measure. In the opinion of the Court, a constitutionally sound status can be obtained by

44. Tuori, *op. cit. supra* note 29, 47; Ruffert, *op. cit. supra* note 5, 1790.

45. FCC, judgment of 12 Sept. 2012, paras. 241, 254–260, available at <www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012en.html> (last visited 5 Jan. 2014). On this, see Wendel, “Judicial restraint and the return to openness: The decision of the German federal constitutional court on the ESM and the Fiscal Treaty of 12 September 2012”, 14 *German Law Journal* (2013), 37–40.

46. As required by Arts. 38(1), 20(1) and (2) and, for the first time, in conjunction with the “eternity clause”, i.e. Art. 79(3) of the Basic Law.

interpreting the provisions Articles 32(5), 34, 35(1) ESMT in conformity with the Basic Law.⁴⁷ However, as this is but one possible interpretation of the ESMT, the constitutional right of the Bundestag qua interpretation must be ensured at ratification.⁴⁸ It seems plausible that several other national parliaments face similar difficulties. In practice, time and again national parliamentarians are dictated economic imperatives disguised as factual necessities to combat the crisis, which hampers in-depth engagement with such convoluted issues of political economy. Moreover, it arguably favours either rhetorical and therefore meaningless floor debates, which end up rubber-stamping the proposals or promotes the equally unsatisfactory transfer of issues of high political salience to the parliamentary budgetary committees and away from the general debate in order to expedite the process.⁴⁹

In sum, these obstacles to external parliamentary control indicate a pervasive marginalization of the national parliamentary bodies in the domain of fiscal and economic governance.⁵⁰ Along with the lack of transparency and the diffuse accountability⁵¹ this harbours the risk of undermining the ESM's overall input legitimacy. Finally, the legal option to delegate all decision-making powers to the ESM's Board of Directors⁵² further jeopardizes the facility's accountability and input legitimacy. In this, democratically

47. FCC, cited *supra* note 45, paras. 241, 254–260.

48. *Ibid.*, para 259. In the meantime, the interpretative declaration has been issued and the ESMT was ratified. However, this reveals yet another democratic weakness of the process leading to the establishment of the ESMT. The ESMT concretizes the modalities of financial aid disbursement in accordance with EU law. In this regard, the international agreement serves as a functional equivalent for legislative decision-making, see Callies, “Der Kampf um den Euro: Eine ‘Angelegenheit der Europäischen Union’ zwischen Regierung, Parlament und Volk”, 31 *Neue Zeitschrift für Verwaltungsrecht* (2012), 5. By and large, the national parliamentary bodies do not participate in the treaty negotiations but only later either approve or reject the negotiated treaty in its entirety. In light of its deficit regarding input legitimacy this procedure seems totally inappropriate for issues of such high political saliency and so intimately intermeshed with EU affairs.

49. This issue was addressed in an earlier decision adjudicating on Germany's commitment to the Euro Rescue Fund, see FCC, judgment of 7 Sept. 2011, available at <www.bundesverfassungsgericht.de/entscheidungen/rs20110907_2bvr098710en.html> (last visited 5 Jan. 2014); see also FCC, judgment of 28 Feb. 2012, available at <www.bundesverfassungsgericht.de/entscheidungen/es20120228_2bve000811en.html> (last visited 5 Jan. 2014).

50. The marginalization of national parliaments is a recurring theme common to most attempts to rescue the euro and the EMU. With regard to the ESMT, the *Pringle* case before the ECJ is a case in point. There, the ESM members did not seem to take great interest in the constitutional intricacies the ratification of the ESMT caused in Ireland – which, of course, also raised questions pertaining to EU primary law. Consequently, ESM members were not prevented from starting ESM operations prior to the Court's decision.

51. Maduro, “A new governance for the European Union and the euro: Democracy and justice”, *Robert Schuman Centre for Advanced Studies Policy Paper* No 11, 2012, pp. 6, 17; De Witte and Beukers, *op. cit. supra* note 30, 847–848; Tuori, *op. cit. supra* note 29, 47.

52. Art. 5(6)(m) ESMT. See also the discussion *infra* section 4.4.

speaking, worst case scenario, the strand of input legitimacy continues to shrivel until there is nothing left but a single thread and we must ask ourselves if what's left will be durable enough to hold the sword of Damocles dangling over Europe's citizens.

Thirdly, the ESM's capacity to perform well and redeem the promise of mobilizing funding and providing stability support to the benefit of ESM Members experiencing or threatened by severe financing problems (Art. 3 ESMT), so to produce output legitimacy in the future, remains an open question. At this early stage ESM performance evaluation hardly extends beyond the realm of speculation. However, since structurally the ESM can be perceived of as, by and large, an exact copy of its predecessors (EFSF, EFSM), adopting the IMF model of "strict conditionality", and it further substantively involves the Troika as key actors in its operations, scepticism looms large that it is bound to carry forth the shortcomings of the past emergency crisis management relying too heavily on depoliticized intergovernmentalism,⁵³ which *ab ovo* has cast a shadow over the ESM's anticipated output legitimacy. In light of the aforementioned loss of input legitimacy, the additional lack of output legitimacy may lead to a potentially catastrophic "negative-sum integration", the repercussions of which could not only destabilize the EMU but also weaken the entire project of European integration.⁵⁴

4. Enhanced cooperation: A feasible, more legitimate alternative?

4.1. Circumvention strategy or path-dependency?

As is contended by some commentators, establishing the ESM as a separate international organization rather than incorporating it into the Union's legal framework, seemed, in effect, inevitable. Consider the statement by two observers commenting on the ECJ's *Pringle* judgment:

53. See Scharpf, *op. cit. supra* note 39, 26. Scharpf arrives at the conclusion that "[o]utput-oriented justifications of present rescue measures have lost most of their plausibility after having failed over the course of more than two years". Maduro, *op. cit. supra* note 51, 12, concurs with this with regard to the Troika negotiated programmes. See also Weiler, "Europe in crisis – On 'political messianism', 'legitimacy' and the 'rule of law'", (2012) *Singapore Journal of Legal Studies*, 255: "The worst way to legitimize a war is to lose it, and Europe is suddenly seen not as an icon of success but as an emblem of austerity, thus – in terms of its promise of prosperity – a failure. If success breeds legitimacy, failure, even if wrongly allocated, leads to the opposite".

54. Schmidt, *op. cit. supra* note 39, 16–17. For a detailed account of the different stages of crisis responses and their substantive inconsistencies see Menéndez, "The existential crisis of the European Union", 14 *German Law Journal* (2013), 497–511.

“The choice of establishing the permanent stability mechanism by means of an international treaty followed logically from the TFEU amendment discussed above [i.e. Art. 136(3) TFEU, M.S.]. The fact that the amendment indicated that the mechanism would be established ‘by the Member States whose currency is the euro’ left no other choice than the use of an international agreement”.⁵⁵

What’s puzzling about this explanation is that it presents the establishment of the ESM outside the Union’s legal order quasi as an inevitable consequence of the Treaty amendment introducing Article 136(3) TFEU. Taken literally, the appraisal therefore seems consequentially questionable and a-historical. Chronologically, the judicial sanctioning of the ESM asserting its conformity with the EU’s legal order followed more than two months after the entry into force of the ESMT.⁵⁶ Due to a delay caused by the Czech Republic – which eventually ratified the Council Decision introducing Article 136(3) TFEU triggering the process of setting up the ESM as a permanent facility on 23 April 2013⁵⁷ – the Treaty amendment entered into force on 1 May 2013, that is four months after the target date and more than half a year after the ESM had started its operations. One thing the ECJ did clarify in *Pringle* was that the amendment to Article 136 TFEU by means of the simplified revision procedure pursuant to Article 48(6) TEU was merely declaratory.⁵⁸ In the wake of this verdict rebuffing the claim of the constitutive character of the Treaty revision the logical connection in the relationship between the status quo and the status quo ante either takes the form of a genuinely strategic political move or presents itself as resulting from path-dependency.⁵⁹ In terms

55. De Witte and Beukers, op. cit. *supra* note 30, 812.

56. *Pringle*, cited *supra* note 23, paras. 68, 72, 109.

57. The text of the Council decision is available at <www.consilium.europa.eu/policies/agreements/search-the-agreements-database.aspx?command=details&id=&lang=en&aid=2011030&doclang=EN%22> (last visited 5 Jan. 2014).

58. *Pringle*, cited *supra* note 23, paras. 29–76.

59. See, again, De Witte and Beukers, op. cit. *supra* note 30, 813: “The reason why the ESM was established as a separate international organization rather than as an EU agency is path-dependent on the preceding events. As the ESM was constructed as the ‘natural successor’ of the intergovernmental EFSF (which will now be discontinued), it followed closely the latter’s mode of operation”. What carries more weight, in my view, than the alleged lack of legal instruments to stay inside the Union’s institutional framework is the authors’ reference to the obvious lack of financial resources at the EU level to equip the facility with sufficient funds (*ibid.*, 813); see also De Witte, “Using international law in the euro crisis”, *ARENA Working Paper* No. 4, 2013, 4. Therefore, if the facility was moved inside the Union’s framework, the EU would have to accumulate the necessary financial resources to effectively operate the financial stability facility. As De Witte rightly submits, the requisite resources for replenishing the funds must not bootleg the general EU budget. Instead, it would have to rely on contributions coming from the Member States whose currency is the euro. Hence, ultimately this is not a deadlock argument against hedging in the ESM, e.g. via setting up a regime of enhanced cooperation, but

of “real politics” and the rationality of economic efficiency, the argument from path-dependency might have proved sensible. However, it certainly does not account for the inevitability of the path ultimately chosen by the political actors invested with the power to negotiate a permanent stability facility. On the other hand, a grand solution, i.e. one involving a structural change surpassing the minimally invasive techniques under the simplified revision procedure and/or a substantive reform affecting all, at the time, 27 Member States, including those whose currency is not the euro, is partly convincing but at the same time does not exclude the proposed alternative route facilitating enhanced cooperation.

Therefore, my objection to the argument from path dependency goes beyond the criticism voiced against placing the ESM outside the Union’s legal order, as I constructively venture an alternative to the intergovernmentalism emblematic of so many attempts in the recent past to get a grip on the enduring crisis. As intimated above, the alternative I want to propose is enhanced cooperation according to Article 20 TEU. My argument proceeds in three steps. First, I will briefly outline the rules governing enhanced cooperation in the Treaties, thereby highlighting the subtle changes the Lisbon Treaty brought about, focusing on the relevant requirements and limits to this mode of differentiated integration (4.2.). Second, in doctrinal perspective I attend to the compatibility of the ESM regime with the institutional legal framework of enhanced cooperation ascertaining the feasibility and possible modifications incumbent on the institutional design to suit the obligations of transposing the scheme under the roof of supranationalism (4.3.). The third step then is evaluative as I will attempt to argue why, in my view, this road not (yet) taken presents a superior alternative to the existent intergovernmental cooperation outside the Treaties (4.4.).

4.2. *Enhanced cooperation after Lisbon*

Since the introduction of enhanced cooperation in the Treaty of Amsterdam⁶⁰ as an alternative, more flexible institutional framework, lending a group of Member States leeway to thicken their bonds in specific policy areas by setting up a common scheme of closer integration under the auspices of the

perceptively points to the questions of just institutional design, so that liability attaches exclusively to the euro area States.

60. Ex Arts. 43 to 45 TEU. At its christening, enhanced cooperation was named “closer cooperation”. See, generally, Philippart and Edwards, “The provisions on closer co-operation in the Treaty of Amsterdam: The politics of flexibility in the European Union”, 37 *JCMS* (1999), 87–108. For an overview tracking the changes the Lisbon Treaty brought about, see Groenendijk, “Enhanced cooperation under the Lisbon Treaty”, in Dosenrode (Ed.), *The European Union after Lisbon: Polity, Politics, Policy* (Ashgate, 2012), pp. 95–110.

Union's institutions and pursuant to its procedures, the rules governing enhanced integration have undergone numerous changes. On balance, these changes have successively lowered the barriers for Member States to avail themselves of this mode of differentiated integration.⁶¹ The latest, minor amendments induced by the Treaty of Lisbon adopted the proposals of the failed Treaty establishing a Constitution for Europe (TCE).

According to Article 20 TEU Member States wishing to establish a legal regime of enhanced cooperation between themselves within the framework of the EU's non-exclusive competences⁶² may make use of the Union's institutions and exercise the supranational competences by applying the relevant provisions of the Treaties in accordance with the specific limitations and requirements spelled out in Article 20 TEU and Articles 326 to 334 TFEU. Of the latter, Articles 326 and 327 constitute the most general provisions, stipulating that any enhanced cooperation shall comply with the Treaties⁶³ and secondary EU law⁶⁴ and that any regime of enhanced cooperation shall respect the competences, rights and obligations of non-participating Member States, the so-called *outs*.⁶⁵ Conversely, the *outs* shall not impede the implementation of enhanced cooperation among the participating Member States. Enhanced cooperation shall aim to further the objectives of the Union,⁶⁶ protect the EU's interests, reinforce the integration

61. However, it took more than a decade until enhanced cooperation was utilized for the first time. Council Regulation (EU) no. 1259, O.J. 2010, L 343/10, implemented enhanced cooperation in the area of law applicable to divorce and legal separation, see Peers, "Divorce, European style: The first authorization of enhanced cooperation", 6 *EuConst* (2010), 339–358.

62. See the detailed discussion *infra* section 4.3.

63. Regarding the ESM, the *Pringle* judgment held that the Council Decision 2011/199/EU to amend Art. 136 TFEU by recourse to the simplified revision procedure (Art. 48(6) TEU), complied with the Treaties. On the genesis of the treaty amendment, see De Witte, "Treaty games – Law as instrument and as constraint in the euro crisis policy", in Allen, Carletti and Simonelli (Eds.), *Governance for the Eurozone: Integration or Disintegration?* (FIC Press, 2012), p. 154.

64. Compliance with the Treaties and secondary EU law (Art. 326 TFEU) replaces ex Art. 43(b), (c) EU, which obliged the Member States participating in enhanced cooperation to "respect" the Community *acquis*. Craig, *The Lisbon Treaty – Law, Politics, and Treaty Reform* (OUP, 2010), p. 441, reads this as possibly "signify[ing] a greater willingness to encourage enhanced cooperation".

65. This obligation, however, does not add another substantive hurdle to the establishment of enhanced cooperation; rather, it imposes a duty that is detailed in the provisions on the inclusion of the *ins* (Arts. 328 et seq. TFEU) and aims at the consistent integration of the specific enhanced cooperation scheme into the general legal and institutional framework of the EU order at the operational level, see Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Nomos, 2004), p. 75.

66. It is debatable, to what extent this rule can be made subject to judicial review. Nevertheless, in *Pringle* the ECJ, when assessing the legality of the Commission's involvement in ESM operations outside the EU legal order, recognized on the basis that "the objective of the

process (Art. 20(1) TEU) and, in that spirit, be open to accession by any Member State willing to join the club at all times (Art. 328 TFEU).

Contrary to occasional observations, the threshold for the initiation of enhanced cooperation was not significantly lowered with the entry into force of the Lisbon Treaty. According to Article 20(2) TEU no less than nine out of 28 Member States must agree to jointly embark on enhanced integration,⁶⁷ whereas the Nice Treaty required at least eight out of 15 Member States. After the two rounds of enlargement in 2004 and 2007, the eight out of 27 requirement, valid prior to the Lisbon Treaty, was indeed more favourable to the establishment of enhanced cooperation than the new rule. What remains in place is the categorization of enhanced cooperation as *ultima ratio*. Enhanced cooperation is to be harnessed only as a legal instrument of last resort and after it has been established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole. Further, acts adopted in the framework of enhanced cooperation do not bind non-participating Member States and do not constitute part of the *acquis communautaire* which has to be recognized by candidates for accession to the EU. This, however, is merely a declaratory statement, which does not add another substantive constraint.

4.3. *The legal feasibility of enhanced cooperation: Establishing the ESM as intrinsic to EMU*

It is evident from the *Pringle* judgment, that “enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation”.⁶⁸ In this passage, the Court resorts to the distinction between a prospective expansion of EU competences and the exhaustion of existing legal competences. It follows from Article 20 TEU that the Treaties prohibit the expansion of existing EU competences via enhanced cooperation while the existence of a non-exclusive competence is a legal

ESM Treaty is to ensure the financial stability of the euro area as a whole” that the “borrowing” of “the Commission promotes the general interest of the Union” (*Pringle*, cited *supra* note 23, para 164). The same accounts for the involvement of the ECB, which “supports the general economic policies in the Union, in accordance with Article 282(2) TFEU” (*ibid.*, para 165); further Peers, *op. cit. supra* note 61, 45–46.

67. All 17 Member States whose currency is the euro joined the ESM, which remains open to accession for all future euro area members (Art. 2 ESMT). As Beukers rightly asserts, Art. 136 TFEU limits openness and future membership in two ways: first, enhanced cooperation must be pursued by all Member States whose currency is the euro; second, it precludes membership of non-euro area members, see Beukers, “The Eurozone crisis and the legitimacy of differentiated integration”, in De Witte, Héritier, Trechsel (Eds.), *The Euro Crisis and the State of European Democracy* (EUI, 2013), p. 12.

68. *Pringle*, cited *supra* note 23, para 167.

prerequisite for Member States wishing to align their interests in a joint venture.⁶⁹ Thus, the dependence on a non-exclusive EU competence marks the Achilles heel of the proposal. Solely the existence of a non-exclusive competence puts the issue within the ambit of the Union's legal order and renders enhanced cooperation a legally viable option. To that effect, I proffer three arguments to support the claim, first, that the establishment of an ESM-like facility within the legal domain of the EU institutional framework by means of enhanced cooperation is legally feasible. Second, but inextricably linked with the first proposition, I will give reasons why we should think of the ESM as intrinsic to EMU. First, I sketch why the ESM epitomizes an instrument of economic coordination that falls within the ambit of the Union's legal competences (4.3.1.). Second, I will deploy an analogy pertaining to Article 143(2) TFEU in order to buttress the first argument (4.3.2.). Third, I will attend to the flawed design of the EMU as a shared responsibility of all euro area members to facilitate the pertinent narrative of burden-sharing as a normative reason to think of the ESM as a remedy for the EMU's incipient mal-construction and thus to conceive of the ESM as intrinsic to EMU (4.3.3.).

4.3.1. *ESM-induced conditionality as a means of economic coordination*

The Court concluded in *Pringle* that the Treaties did not confer upon the EU any specific competence to establish a permanent stability mechanism such as the ESM.⁷⁰ The scope of Article 3(1)(c) TFEU, the EU's exclusive competence concerning monetary policy for the Member States whose currency is the euro, does not match the objective of the ESM – which is “to safeguard the stability of the euro area as a whole”, nor do Articles 127 to 138 TFEU explicitly permit the use of the instruments harnessed to achieve them (“grant[ing] of financial assistance to a Member State”).⁷¹ Having arrived at

69. The partial elimination of ex Art. 43(d) TEU, which provided that the proposed enhanced cooperation “remains within the limits of the powers of the Union or of the Community ...”, did not affect the scope within which enhanced cooperation is possible. A close reading of Art. 20(1) TEU confirms the Court's ruling: Member States can establish enhanced cooperation “within the framework of the Union's non-exclusive competences [and] may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties” (emphasis added); the competences mentioned in the tail end of the sentence can only refer to the Union's non-exclusive competences. Thus, in hindsight, Tuyschaever, “EMU and the catch-22 of EU constitution-making”, in De Búrca and Scott (Eds.), *Constitutional Change in the EU – From Uniformity to Flexibility?* (Hart, 2000), p. 190, was right when identifying this as a legal obstacle to the development of the EMU's economic dimension on the basis of enhanced cooperation.

70. *Pringle*, cited *supra* note 23, para 168.

71. *Ibid.*, paras. 56–57, 96; concurring, but with a different take on determining the scope of Art. 3(1)(c) TFEU, A.G. Kokott, *Pringle*, cited *supra* note 23, para 82.

the conclusion that the establishment of the ESM does not curtail the Union's exclusive competences with regard to the euro area's monetary policy, the Court goes on to reject the objection lodged by the applicant in the main proceedings which pertains to the ESM encroaching on the EU's competences in economic policy according to Articles 2(3) TFEU, 5(1) TFEU and Articles 120 to 126 TFEU. In the opinion of the Court, the ESM is "not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism", the purpose of which is "to mobilize funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems".⁷² In what follows, the Court continues to elaborate that the requirement of strict conditionality (Arts. 3, 12, 13 ESMT and Art. 136(3) TFEU), which may take the form of macro-economic adjustment programmes not defined in more detail, does not yield the conclusion that the prescribed constraints under strict conditionality constitute an instrument for the coordination of the economic policies of the Member States. That is because conditionality is (merely) intended to ensure the compatibility of the ESM activities with the Treaties and EU law, especially the "no bailout" clause (Art. 125 TFEU) and the coordinating measures adopted by the Union.⁷³ Further, Article 122(2) TFEU does not suffice as a legal basis since the operation of the ESM as a permanent stability mechanism does not dovetail with any of the scenarios stated in the provision, which in any case governs financial assistance granted by the Council, not the Member States.⁷⁴ But we may ask: does this mark the end of the line? Not at all.

Evidently, the Treaties do not entail any express provision conferring upon the EU the power to establish an ESM-like facility⁷⁵ with the ability to distribute loans and other financial support to euro area members. However, in *Pringle* the Court also pronounced that the "no bailout" clause does not constitute a default position. Instead, the scope and content of Article 125 TFEU must be determined with recourse to the objective of that provision, which is to "ensure that the Member States follow a sound budgetary policy [which in turn, M.S.] contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary

72. *Pringle*, *ibid.*, para 110.

73. *Ibid.*, para 111.

74. *Ibid.*, para 118.

75. Cf. Tomkin, *op. cit. supra* note 31, 184. Tomkin argues that the absence of a specific legal basis for a facility like the ESM does not entail that such an instrument should be established outside the scope of the Union's legal order "once the mechanism relates to a matter that is of intimate concern" to the Treaties, notably if it deems feasible to establish it under the more general powers conferred upon the EU.

union”.⁷⁶ In the Court’s assessment, as long as the Member States “remain subject to the logic of the market when they enter into debt”, Article 125 TFEU does not prohibit the EU and the Member States from granting “any financial assistance whatever” to another Member State.⁷⁷

However, some paragraphs later in the judgment, the Court seemingly has changed its mind as to the purposive nature of the strict conditionality requirement. The purpose of strict conditionality, “to which all stability support provided by the ESM is subject”, as the Court recognizes, “is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the *coordination of Member States’ economic policies*”.⁷⁸ Bearing in mind the gravitas of the argument which was derived earlier through teleological interpretation of the Treaties, at this juncture the Court’s line of reasoning appears to become ambivalent regarding the function of strict conditionality. The Court now views the principle of strict conditionality as consistent with the general system of economic coordination within the EMU. Therefore strict conditionality speaks in favour of conceiving such actions implementing a permanent financing mechanism as instantiations of economic coordination that fall within the ambit of the Union’s non-exclusive competences pursuant to Articles 2(3), 5(1), 120 to 126 and 136 TFEU. The Court’s assessment that Article 20 TEU does not preclude the conclusion or ratification of an agreement such as the ESM does not, in turn, put a stop to enhanced cooperation in that matter.⁷⁹ In fact, it should be read as acknowledging that the issue can be dealt with either way.

Coordination as a mode of (economic) governance pertains to means of non-hierarchical organization that attempt to realize the federal principle of unity in diversity by obliging the Member States to cooperate to attain common objectives⁸⁰ through convergence policies, and to accommodate their actions dedicated to a wide range of ideological standpoints in economic matters by means of informational and communicative exchange.⁸¹ To this end, coordination as an umbrella term covers a wide spectrum of both *ex ante* and *ex post* measures to reconcile diverging national claims and economic

76. *Pringle*, cited *supra* note 23, para 135.

77. *Ibid.*, paras. 135, 131.

78. *Ibid.*, para 143 (emphasis added).

79. *Ibid.*, para 169.

80. Common objectives may, of course, include interim goals that apply to a subgroup or individual actors.

81. From a purely instrumental vantage point, the MoUs as part and parcel of the ESM agreements could be conceived of as giving the deviant Member States incentives to coordinate their policies better with the group of economically powerful and politically dominant Member States (esp. Germany: cf. Kundnani, *op. cit. supra* note 16, 284–285).

policies. With the significant sanctioning mechanisms the ESMT affords, taken in combination with the structural hierarchy mirroring the Member States' economic power, the ESM far exceeds typical forms of soft law coordination, such as under the general OMC. In this regard, conditionality aims at promoting the same ends as measures adopted by the Council under the excessive deficit procedure, which are part and parcel of the Union's arsenal of coordinating measures.⁸² Disbursing loans under strict conditionality, as the Court concedes,⁸³ is intended precisely to coordinate the economic and fiscal policies of the ailing Member States with the "common" standard of the economically powerful members for the sake of economic prosperity in the euro area at large. Conditionality is utilized to bring the deviant Member States in line with the fortunate few in order to restore and preserve – on their terms – financial stability in the euro area as a whole. Moreover, coordination via conditionality is itself coordinated with Council measures pursuant to Article 126(2) to (12) TFEU in two ways. On the one hand, MoU-conditionality ensures that the ESM agreements square with actions taken by the Council, creating a great area of overlap; on the other hand, external conditionality feeds back to the Council decisions under the so-called "two-pack" regime.⁸⁴

4.3.2. *By analogy: Member States with derogations*

In addition to the argument from coordination, let me point to a suggestive analogy. Article 143 TFEU provides that the Council shall grant mutual assistance to "Member States with a derogation"⁸⁵ when they experience difficulties regarding their balance of payments either as a result of an overall disequilibrium in their balance of payments, or as a result of the type of currency at their disposal, and where such difficulties are liable in particular to jeopardize the functioning of the internal market or the implementation of the common commercial policy. Pursuant to Article 143(2)(c) TFEU, if mutual

82. De Gregorio Merino, "Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance", 49 CML Rev. (2012), 1635–1636.

83. *Pringle*, cited *supra* note 23, paras. 111, 121, 143.

84. Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, O.J. 2013, L 140/11; and Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, *ibid.* Cf. De Gregorio Merino, *op. cit. supra* note 82, 1637.

85. Member States with a derogation are Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro (Art. 139(1) TFEU) despite their commitment to join the single currency area, e.g. Lithuania, Sweden.

assistance is granted by the Council, it may take the form of limited credits by other Member States, subject to their agreement. Apart from the formal distinction that Member States with a derogation are not yet members of the euro-club and therefore could not join the ESM, what they do have in common with Member States whose currency is the euro and which find themselves in a position which forces them to request financial assistance from the ESM is that they both do not fulfil the convergence criteria since *de facto* it is highly improbable that a Member State complies with the strict conditions of the ESMT for granting financial support (Arts. 11, 12 ESMT) and could meanwhile retain a budget that meets the convergence criteria (Art. 140 TFEU). In other words, under the circumstances intimated above, the EU is invested with a legal competence to establish a credit scheme for ailing Member States with a derogation in order to secure the overall stability of the EMU and avert severe threats to the proper functioning of the internal market and the common commercial policy. The ESM as a means to coordinate economic policies of the euro area members strives to attain the same end with respect to Member States whose currency *is* the euro and who find themselves in a very similar situation.⁸⁶ The deployment of financial assistance by the ESM is instrumental to the objectives of the Union and the EMU in particular.⁸⁷ The new Article 136(3) TFEU recognizes the said instrumentality when referring to the function of the stability mechanism, which consists in its being “activated if indispensable to safeguard the stability of the euro area as a whole”. If this in isolation does not suffice as the basis for an analogy, Article 143(2) TFEU in conjunction with Article 121 TFEU makes a strong case for a possible future implementation via Article 352 TFEU to include the granting of loans by the Union to euro area Members if compatible with the requirements of Article 125 TFEU as interpreted by the ECJ in *Pringle*.

4.3.3. *Shared responsibility*

Yet, there is an additional, normative link between a common scheme for financial assistance and the objectives as well as the institutional structure of the EMU, one that exposes the ESM as a quasi-“corrective justice” reason for burden-sharing and corroborates the thesis that the ESM should be viewed as intrinsic to EMU. Space does not permit to recapitulate here the events of the

86. In *Pringle* the Court mentions Art. 352 TFEU only in passing when we are told that: “As to whether the Union could establish a stability mechanism comparable to that envisaged by Decision 2011/199 on the basis of Article 352 TFEU, suffice it to say that the Union has not used its powers under that article and that, in any event, that provision does not impose on the Union any obligation to act”, see *Pringle*, cited *supra* note 23, para 67; see also Beukers, *op. cit. supra* note 67, 17, who notes that the “flexibility clause (possibly combined with enhanced cooperation) can function as a genuine alternative” to treaty amendment.

87. De Gregorio Merino, *op. cit. supra* note 82, 1635.

crisis and the measures taken to ameliorate the damage thus far, or even to thoroughly discuss the two competing narratives as to the sources of the crisis. Suffice it that the alternative link proposed in this paper defies the dominant but untenable thesis that the irresponsible fiscal and macro-economic misbehaviour of the deficit countries in the past is solely to blame as precipitating the current crisis. Instead of national mismanagement, the alternative narrative stresses the unfettered stream of capital from north to south, the failures of both creditors and debtors blindly trusting the self-regulating forces of the market and exploiting the artificially low interest rates due to the common currency which created the well-known credit and real-estate bubbles which had to burst eventually.⁸⁸ The report of a group of economic experts gathered by the Institute for New Economic Thinking (INET) cuts right to the core of the matter. The expert study shows that “the problems that the deficit countries are struggling with were not caused by these countries in isolation, but were the result of a flawed euro zone design that encouraged both reckless borrowing (in the deficit countries) and reckless lending (in the surplus countries). Hence, *all countries* that signed up to this design, and took part in the lending and borrowing boom, *bear responsibility for the crisis*”.⁸⁹

The “flawed euro zone design” pertains to the basic asymmetry⁹⁰ built into the EMU and the deep economic divide between different politico-economic convictions, i.e. (mostly northern) countries with export-oriented growth strategies and (mostly southern) countries with growth strategies oriented towards the domestic demands and at the same time badly equipped for competition with the northern States, ignoring the Jeremiah warnings about the euro area forming a conglomerate of domestic markets far from an optimal single currency area, and hence the firm but false belief that no capital transfers of the sort deployed over the past three years would be necessary to maintain its functioning.⁹¹ Over the course of the first ten years since the

88. See Maduro, op. cit. *supra* note 51, 3–5; Hall, “The economics and politics of the euro crisis”, 21 *German Politics* (2012), 357–362; Enderlein, “Die Krise im Euroraum: Auslöser, Antworten, Ausblick”, 43 *Aus Politik und Zeitgeschichte* (2010), 8; see also Buti and Carnot, “The EMU debt crisis: Early lessons and reforms”, 50 *JCMS* (2012), 901–905.

89. INET Council on the euro zone crisis, “Breaking the deadlock: A path out of the crisis” (Institute for New Economic Thinking, 23 July 2012), para 8 (emphasis added); report available at <ineteconomics.org/sites/inet.civicaactions.net/files/INET%20Council%20on%20the%20Euro%20Zone%20Crisis%20-%202013-7-12.pdf> (last visited 5 Jan. 2014).

90. On the inherent asymmetry of the EMU’s institutional design see Snyder, “EMU – Integration and differentiation: Metaphor for European Union”, in Craig and De Búrca (Eds.), *The Evolution of EU Law*, 2nd ed. (OUP, 2011), pp. 694–702; Menéndez, op. cit. *supra* note 54, 484–497; Nettesheim, “‘Euro Rettung’ und Grundgesetz – Verfassungsgerichtliche Vorgaben für den Umbau der Währungsunion”, 46 *EuR* (2011), 765–766.

91. Hall, op. cit. *supra* note 88, 359, 367.

launch of Economic and Monetary Union with the Maastricht Treaty the mentioned inherent defects of the EMU, particularly the co-existence of regions with diverging economic cycles pertaining to growth and inflation rates operating under the same official interest rates in a single monetary regime on the basis of the euro area average,⁹² produced two camps: one camp was characterized by low inflation rates, high interest rates in real terms, slow growth and higher unemployment rates (especially Germany); the other camp was characterized by high inflation, low interest rates in real terms, rapid growth and close to full employment (e.g. Ireland, Portugal, Spain).⁹³ The sequence of decisions to launch a mal-constructed EMU, to perpetuate and exacerbate the initial structural mistakes by means of operating a flawed system must be regarded, in reference to the expert study mentioned above, as a common fault for which all euro area countries must bear responsibility.⁹⁴ The flawed EMU design has become patently visible in the course of the crisis. The damage suffered as result of the crisis until today is to a large degree home-made. The Union is charged with the task of establishing an economic and monetary union whose currency is the euro,⁹⁵ but neither its composition nor the methodical and instrumental arsenal at its disposal enables it to master this task.⁹⁶

In light of this analysis, the function of financial assistance granted by facilities such as the ESM appears much less philanthropic or altruistic and the role of the creditors less authoritative and disabusing. On this view, financial assistance serves as a means to alleviate the immediate sufferings in the crisis-struck economies on the one hand,⁹⁷ on the other hand, and more

92. For the ECB's monetary policy strategy see European Central Bank, *The Monetary Policy of the ECB* (2011), pp. 63–65 (focus on euro area as a whole), esp. on the implications of inflation differentials see *ibid.*, p. 67, available at <www.ecb.europa.eu/pub/pdf/other/monetarypolicy2011en.pdf> (last visited 3 Jan. 2014).

93. Enderlein, *op. cit. supra* note 88, 7–8.

94. See Lindseth, "Power and legitimacy in the Eurozone: Can integration and democracy be reconciled?", in Adams, Fabbrini and Larouche (Eds.), *The Constitutionalization of European Budgetary Constraints* (Hart, forthcoming 2014); Lindseth, "Fault, not solidarity: A normative argument to save the Eurozone?", blog entry of 30 July 2012, available at <eutopia.law.com/2012/07/30/fault-not-solidarity-a-normative-argument-to-save-the-eurozone/> (last visited 5 Jan. 2014).

95. Art. 3(4) TEU.

96. Undoubtedly, this also pertains to the asymmetric division of competences between the EU and the Member States in matters of monetary and economic governance.

97. The INET report stresses the fact that the argument from burden-sharing cannot yield a permanent solution or back a system of open-ended transfers in the future, but is in effect restricted to solving the legacy costs: "[T]he critical requirement for tackling the crisis is to separate the solution of the 'legacy problem' ... from the problem of fixing the structural flaws of the euro zone for the long term. The former requires significant burden sharing. But it does not follow that the latter requires permanent transfers or jointly and severally issued debt".

pressingly, by virtue of “strict conditionality” it aims at restoring the balance⁹⁸ and closing the gap between the creditor and debtor States for the benefit of the euro area and *all* its members.⁹⁹ In both instances, financial assistance should be perceived of as an instrument of corrective justice, a remedy rather than a punishment inflicted upon the debtor countries for their wrongful acts, where by contrast the punishment analogy is the only intelligible way to make sense of the MoUs against the backdrop of the dominant scapegoat-narrative.

As we have observed, the incipient mal-construction of the EMU has distorted the logic of the market. Under these circumstances, market outcomes considered in isolation can hardly vindicate attributing responsibility to a Member State based on autonomous agency which may exclude that member from financial assistance or serve as a valid criterion for the institutional design of an ESM-like scheme for as long as the birth defect persists.

Moreover, negotiating the economic and fiscal future of the various debtor States outside the scope of the Union’s legal order for the sake of efficacy does not square with the present-day aspirations of EMU integration and will not do justice to the EU’s proclaimed self-understanding as a political union. This proposition is corroborated by Article 5(1) TFEU, which holds that the Member States “shall coordinate their economic policies *within the Union*” (emphasis added). To this end, all Member States shall conceive of their national economic policies as matters of common concern (Art. 121(1) TFEU) and align their domestic efforts in order to promote the objectives of the Union as set forth in the Treaties and concretized in the Council guidelines on economic coordination (Art. 120(1) TFEU), notably economic, social and territorial cohesion, and solidarity among the Union’s members (Art. 3(3) TEU).¹⁰⁰

See INET Council on the euro zone crisis, *op. cit. supra* note 89, para 7. However, the study, in my view, rightly holds that burden-sharing regarding the legacy costs of the EMU does cover the measures necessary “to establish and backstop” the ESM (see *ibid.*, para 14). Certainly, it does not follow that the ESM scheme may supplant the structural changes necessary to remedy the flawed institutional design of the EMU. Therefore, whether it is construed as an international organization or implemented via enhanced cooperation, the permanent nature of the ESM is relative. It will need to persist until the deeper structural imbalance is realigned.

98. A balance that, of course, never existed.

99. Cf. *supra* section 4.3.1. To avert the danger of being misinterpreted: I do not justify the strict conditionality inherent in the ESM scheme. The opposite is true: the possible scope and depth of conditionality measures included in the MoUs according to the ESMT is alarming. A new take on a financial stability mechanism must restrict such means of trans-border domination by integrating the ESM into the Union’s legal order, which will inevitably cut short the possibly scope and amplitude of conditionality, not least because of Art. 4(2) TEU.

100. Cf. Pernice, Wendel, Otto, Bettge, Mlynarski and Schwarz, *A Democratic Solution to the Crisis – Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe* (Nomos, 2012), pp. 115–137.

A fortiori, the demand to coordinate the relevant policies within the Union's legal framework,¹⁰¹ while such policies formally have their roots in national budgetary and macro-economic decisions, must be viewed as applying specifically to the Member States whose currency is the euro. Indisputably, the adoption of the common currency has created a common destiny among the euro area members. The crisis has brought to the surface just how intimately the economies of the euro area members are intertwined. The common currency as the heart of the EMU has dramatically exacerbated the trans-border impact of domestic policy decisions. First, the fact that negative externalities created by the interconnectedness of the national domains are not sufficiently legitimized, as the Member States have largely ignored the commands of Articles 120(1) and 121(1) TFEU, and, second, the structure of the EMU, which did not provide for the appropriate means to internalize the negative externalities, both argue urgently in favour of integrating the ESM into the EU legal order.¹⁰² As Poiars Maduro points out, the inherent challenges to fiscal and economic policy autonomy as well as associated questions of distributive justice deriving from unbridled capital flows and the unbound exit-options of capital holders and economic actors across the EU should be addressed, deliberated and championed at the Union level.¹⁰³ For these reasons, the euro area Members have even better reasons to conduct their economic policies under the common institutional roof of the EU. In what follows in the last section I wish to wrap up the argument by emphasizing the potential value added through enhanced cooperation in terms of human rights protection, the rule of law and democratic legitimacy.

4.4. *The value added through enhanced cooperation*

What, then, argues on behalf of the chronologically obsolete alternative to establish a stability mechanism via enhanced cooperation, or prospectively transforming the ESM into a regime of enhanced cooperation in addition to the concerns voiced in the previous section and along the lines of the ESM's critical evaluation in terms of human rights protection, the rule of law ideal and input legitimacy?¹⁰⁴

Enhanced cooperation takes place within the legal and institutional framework of the European Union. The legislative acts adopted within its

101. Art. 5(1) TFEU.

102. This move may herald the even bolder step to institutionally transform the entire eurozone regime into an enhanced cooperation scheme, which has become a real option by now, see Beaumont and Walker, "The Euro and the European legal order", in Beaumont and Walker (Eds.), *Legal Framework of the Single European Currency* (Hart, 1999), pp. 193–194.

103. Maduro, *op. cit. supra* note 51, 4.

104. See *supra* section 3.

framework are ordinary EU regulations, directives and decisions subject to the same procedures and constraints, and prompting the same legal effects with regard to the participating Member States as ordinary EU law and thus do not, in general, allow the *ins* to depart from the principles of the Community method.¹⁰⁵ This bears significant implications for the legitimacy of the decisions adopted via enhanced cooperation with regard to the ESM's legitimacy shortcomings as intimated above.

The first step in presenting enhanced cooperation as a superior alternative to the intergovernmentalist ESM scheme operating outside the scope of the EU's legal order pertains to how enhanced cooperation may strengthen human rights protection. ESM-like financial assistance under enhanced cooperation would be bound to the EU's Charter of Fundamental Rights by virtue of its being ordinary EU law. In a previous section (see *supra* 3.1) it was implied that the applicability of the Charter adds some substantive value in this regard, as the Charter makes accessible the socio-economic rights laid down in its Title IV, which the ECHR and some national legal orders lack. This stipulation is subject to several objections purporting that the added value of rendering the Charter applicable is a merely symbolic move which has no bite. In this vein, it can be argued that rendering available the socio-economic rights listed in the Charter does not make a real difference since for the most part these provisions constitute principles which are judicially cognizable only in the interpretation of legislative or executive acts implementing Union law that concretizes these principles (Art. 52(5) Charter). Following the distinction in Article 51(1) of the Charter, rights must be respected while principles are to be observed and remain in need of further elaboration through legislative acts which give them meaning and determine their scope. The majority of provisions in Title IV of the Charter fall within the category of principles with limited justiciability. However, as the explanations relating to the Charter of Fundamental Rights¹⁰⁶ indicate, some provisions may contain elements both of a right and of a principle. Listed among the provisions with a dual nature are Articles 33 and 34 Charter¹⁰⁷ which guarantee the legal, economic and social protection of family life and entitlement to social security benefits and social services providing protection in cases such as illness, loss of employment, dependency

105. Thym, "‘United in diversity’ – The integration of enhanced cooperation into the European constitutional order", in Dann and Rynkowski (Eds.), *The Unity of the European Constitution* (Springer, 2006), pp. 362, 373–374.

106. O.J. 2007, C 303/17. According to Art. 6(1) TEU and Art. 52(7) of the Charter, the explanations shall be given due regard when interpreting the Charter provisions.

107. It seems plausible, from the wording of the provision, to include Art. 35 of the Charter, which explicitly grants the *right* to access to preventive health care; Case C-544/10, *Deutsches Weintor eG*, judgment of 6 Sept. 2012, nyr, paras. 45–47, can be read as supporting this conclusion.

or old age, all of which are highly relevant regarding conditionality-induced socio-economic changes.¹⁰⁸ It is clear that to the extent the Charter provisions in Title IV establish rights, the applicability of the Charter does make a difference. But even in the case of principles, the Charter provisions exert noticeable legal force since ultimately in the context of ESM measures the legal nature of the Charter provision, as the standard against which the strict conditionality of financial assistance will be assessed, may not prove as significant as the distinction intimates. After all, national measures implementing the conditionality requirements imposed on ailing Member States, which under enhanced cooperation would take the form of Union law (adopted by the Eurogroup acting in accordance with its powers under EU law), would be subject to judicial review by both national courts and the ECJ; this would entail taking into account the principles as well as the fundamental rights established in the Charter.¹⁰⁹

Prima facie, the coherent protection of social and economic rights under application of the Charter solely improves substantive human rights protection with respect to actions of the Member States. EU institutions, after all, are invariably bound in their actions to respect the rights and observe the principles contained in the Charter. As the Advocate General in *Pringle* accurately notes when discussing the involvement of the Commission in ESM operations: “The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of European Union law, including the Charter of Fundamental Rights”.¹¹⁰ The boundedness of the Commission is no exception: the human rights obligations set out in the Treaties and the Charter apply to all institutions, bodies, offices and agencies of the Union regardless of the function they carry out. This raises the following question: if EU institutions are legally bound by the Charter when acting within the current ESM framework and national legislative and executive authorities are bound by their national human rights standards when transposing conditionality requirements, would not this parallel standard *in praxi* suffice to guard individual rights?

108. In the case of loss of employment, Art. 34(1) of the Charter qualifies recognition and respect for the entitlement as being in accordance with the rules laid down by Union law and national laws and practices.

109. Another objection that can only be mentioned in passing within the scope of this paper is the telling observation that the ECJ seems to be reluctant to adjudicate social and economic rights. Recent case law gives the impression that the Court eschews to approach this admittedly delicate topic, see Pech, “Between judicial minimalism and avoidance: The Court of Justice’s sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*”, 49 CML Rev. (2012), 1841–1880.

110. A.G. Kokott, *Pringle*, cited *supra* note 23, para 176.

In view of the current scheme, notwithstanding the non-applicability of the Charter to actions of the Member States those individuals affected by the conditionality may lodge judicial complaints against the national measures implementing the MoUs before national courts pursuant to national law as, for instance, the constitutional action against the 2013 Portuguese budget demonstrates.¹¹¹ Any sound reply to this assumption must broaden the evaluative scope of the inquiry to accentuate the structural benefits that would result from a financial assistance scheme under enhanced cooperation within the confines of the EU legal order, in terms of improving judicial review and accountability and strengthening human rights protection. Pursuant to the legal regime currently in force, the Commission and the ECB play a decisive role in the negotiations of the MoUs. Legally, at least in the formal sense, the Board of Governors has the final say in sanctioning financial assistance requests as negotiated between the Member State and the ECB/Commission. Unfortunately, the type of organ borrowing facilitated under the ESM does not legally acknowledge the pivotal role of the EU institutions in ESM operations – based on the fact that they do not ultimately authorize the sought for conditioned financial assistance. Yet, this structural shortcoming will soon be subject to judicial scrutiny. In the actions for annulment of the Eurogroup decision of 28 March 2013, which granted stability support to Cyprus, the legal pleas brought forward by a number of Cypriot citizens explicitly request the Court to acknowledge that the decision of the Eurogroup “in essence constitutes a decision of the European Central Bank and/or of the European Commission jointly irrespective of the shape or form in which it was dressed”.¹¹² As a consequence, the EU institutions borrowed to operate the ESM may be legally bound by the Charter and the rest of EU law, including the principle of conferral; however, since their actions do not take immediate effect but rely on the formal authorization by the Board of Governors to put the

111. See the Portuguese Constitutional Court’s judgment no. 187/13 of 5 Apr. 2013. The court’s ruling struck down several articles of the Portuguese national budget for 2013 implementing austerity measures in compliance with the objectives of the adjustment programme as negotiated in May 2011 between Portugal and the Troika. The court found the suspension of the additional holiday month of salary for public administration staff and the partial suspension of the holiday month for pensioners in breach of the principle of equality which requires a just distribution of public costs; it further held that the norm requiring contributions to unemployment and sickness benefits violated the principle of proportionality, because in absence of any safeguard clause the contributions in practice may reach a level whereby material assistance provided for by the State could fall below the minimum level guaranteed under the Constitution. English summary of the decision available at <www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html> (last visited 27 Dec. 2013).

112. See *supra* note 27. On 27 Dec. 2013 the General Court announced that it admitted the 12 applications for legal review, see e.g. the report in *Cyprus Mail*, 27 Dec. 2013, available at <cyprus-mail.com/2013/10/18/eu-court-to-examine-applications-for-annulment-of-eurogroups-decision-on-cyprus/> (last visited Dec. 27, 2013).

decision into practice, the legal constraints, as it were, grasp at nothing. Furthermore, the ESMT provisions warranting comprehensive judicial immunity exempting the ESM, all of its staff as well as the Board members from all judicial proceedings with respect to all acts performed by them in their official capacity hampers attempts to effectively adjudicate its actions. Hence, the Board of Governors acts more or less in a legal vacuum.¹¹³ Integrating the ESM into the EU's legal order as a legal regime of enhanced cooperation would render it susceptible to the common procedures of judicial review, eradicating the barriers of immunities under the ESMT, as such privileges are not compatible with the EU's core principles of transparency and (democratic) accountability as set forth in Articles 9 to 11 TEU.¹¹⁴ The diffuse accountability of the switching hats and legal immunities at the basis of the ESM scheme does not square with the foundational values alluded to in Article 2 TEU and common to all Member States. Under these premises, the formal attribution of decision-making power to the ESM and its lack of political responsibility as an independent legal body marks a step in the wrong direction. This practice misses the essential involvement of the EU institutions in negotiating the far-reaching conditionality agreements. If such measures were to be adopted as regular EU law under enhanced cooperation, legal complaints could more effectively address and hold liable all key actors acting as EU institutions and adjudicate their actions by a uniform EU standard, including the Charter provisions. It seems plausible to recognize the legal actions lodged by the Cypriot citizens as the desire for a more powerful and comprehensive judicial control, holding all political actors responsible according to a uniform standard of review.¹¹⁵ Creating a legal regime based on the principle of shared responsibility that acknowledges and weighs the contributions of both the EU institutions (ECB, Commission and Eurogroup) and the national government negotiating and implementing the conditionality measures on the other hand better suits the distribution of power in matters of

113. See the provisions on immunity in Arts. 32(3), 35(1) ESMT; see also *supra* section 3.1.

114. Apart from Art. 343 TFEU.

115. Regarding human rights protection, the additional uniform EU standard does not render obsolete the national provisions (see the recent ECJ decisions: Case C-617/10, *Åkerberg Fransson*, judgment of 26 Feb. 2013, nyr, para 29 and Case C-399/11, *Melloni*, judgment of 26 Feb. 2013, nyr, para 60, where the Court holds that “in a situation where action of the Member States is not entirely determined by European Union law . . . national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised”); therefore the applicability of the EU Charter rather overcomes fragmentation, secures a common irreducible standard of protection and may adapt this standard to the specific challenges of EMU integration, particularly the realization and internalization of negative externalities of national fiscal decisions.

granting stability support to ailing Member States¹¹⁶, calling all MoU-authors to account, and shifts the focus from the national implementing measures to the crucial first stage, which is the negotiation of the conditionality. It ensures the control of this process legally and politically.

To the extent that the European Parliament is involved under enhanced cooperation, for instance, when legislation is passed through the ordinary legislative procedure (Arts. 289(1), 294 TFEU), in matters relating to financial assistance for Member States its role should be that of an arbiter, i.e. it should voice the concerns of those affected by the decisions, carve out spaces for political deliberation, infuse a heightened scepticism against deference to market imperatives into the political debate and expedite the internalization of domestic decisions' negative externalities with regard to the common objectives of the Union.¹¹⁷ The past practice has made evident that Member States have largely neglected to “regard their economic policies as a matter of common concern” (Art. 121(1) TFEU). On behalf of those affected by the decisions and in light of the commonality of the objective, the European Parliament must establish itself as an admonishing, anti-technocratic political counterweight against national interests.

In addition, when making decisions under enhanced cooperation, the Council must do away with the two-class society among the Member States and irreducibly attribute equal voting power to each Member State's representative, regardless of economic capacity and grant the right to a reasonable veto in light of Article 4(2) TEU.¹¹⁸ In the absence of a derogation clause,¹¹⁹ voting is to be executed by high national officials accountable to their respective national parliaments. National parliaments under enhanced cooperation shall be enabled to contribute actively to the good functioning of EMU related financial assistance as a manifestation of the common concern such measures embody in accordance with Article 12(a), (b), (f) TEU.

As a matter of course, none of the intimated changes to the structure of ESM financial assistance can guarantee good economic governance *per se*, as numerous issues relating to the distribution of financial assistance in the context of the EMU remain unresolved even under enhanced cooperation. For instance, in recalling the “common fault” version of the two narratives as to

116. Likewise, it chimes with the shared responsibility narrative as explicated above, see *supra* section 4.3.3.

117. Generally on the democratic value of European integration regarding negative externalities within the EU public order, see Neyer, *The Justification of Europe – A Political Theory of Supranational Integration* (OUP, 2013), pp. 4–5, 8–9.

118. On the function and scope of Art. 4(2) TEU see Von Bogdandy and Schill, “Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty”, 48 CML Rev. (2011), 1–38.

119. Cf. Art. 5(6)(m) ESMT.

the causes of the crisis, justification for strict conditionality attached to financial support remains highly questionable in itself.¹²⁰ In isolation, legal forms and procedures will not save the euro nor the EMU nor the European Union as a whole. However, the political character of enhanced cooperation unfolds when we perceive it as a legal instrument by which we attempt to resolve the federal “unity in diversity” conundrum and regard enhanced cooperation as a means that seeks to accommodate diversity within the supranational legal order.¹²¹ In response to the alarming analysis of the current ESM regime, what this proposal aims at is to draw attention to the depoliticized intergovernmentalism of the past and to suggest an exit-option that presents measures deploying financial assistance in a different light. It attempts to consolidate economic governance in the euro area with the ideals of democratic accountability and collective self-determination, the rule of law and human rights protection by proposing a legal structure that commits the EU political actors to the key values, goals and responsibilities that have shaped and strengthened European integration since its inception.

120. See e.g. the concerns yielded by Armstrong, “The new governance of fiscal discipline: Law, legality and legitimacy”, in Adams et al., *op. cit. supra* note 94.

121. Cf. Thym, “The political character of supranational differentiation”, 31 *EL Rev.* (2006), 781–799.