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ACCOUNTABILITY IN EMU'S INTERGOVERNMENTAL SPHERE

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The issue addressed in this thesis is the legal and political accountability in the governance of the intergovernmental area of the Economic and Monetary Union (EMU), the related case law of the Court of Justice of the European Union (CJEU), and whether there is a 'democratic deficit' in the EU. A review of the CJEU's case law over the past ten years establishes that the Commission, when acting in the intergovernmental area of EMU governance, has an obligation to ensure compliance with EU law in this area. The Court has essentially extended the Commission's role as 'guardian of the Treaties' under Article 17(1) TEU to EMU's intergovernmental sphere. Finally, the thesis considers the CJEU's case law in terms of accountability in EMU governance which is often criticised as lacking, resulting in a 'democratic deficit'.

KEYWORDS

European Court of Justice, Democratic Deficit, EMU, Accountability, Intergovernmental Instruments

CONTENT

1 Introduction

The wider subject area of this thesis is the economic governance of the EU's Economic and Monetary Union. The EMU started operating in 1999 based on provisions in the Maastricht Treaty and the two regulations in the so-called Stability and Growth Pact. The EMU is a case of differentiated integration in the EU since not all Member States have been participating fully from the outset. Therefore, part of the EMU's governance was placed outside the EU legal order from the beginning, most notably in the Eurogroup which is an intergovernmental body for Member States whose currency is the euro.

The intergovernmental sphere of EMU governance was significantly expanded after the European sovereign debt crisis erupted in 2009 and exposed shortcomings in EMU's architecture. To address them, a number of instruments were established in the early 2010s in a somewhat unsystematic way and on an intergovernmental basis outside the EU legal framework (the 'Fiscal Compact' and the European Stability Mechanism).[1] As a consequence, EMU governance became highly convoluted and intransparent. This, in combination with the emphasis on 'fiscal austerity' to address the debt crisis, resulted in widespread dissatisfaction with EMU governance, particularly in the so-called 'programme countries' which had received financial assistance and felt they had been put under foreign administration. Against this background, a political debate started about creating a more coherent and possibly more democratic governance structure for EMU. But when the economic strains subsided in the middle of the decade, these discussions lost someimpetus.

In the context of the Covid-19 pandemic, EU's fiscal rules were practically suspended in 2020 allowing Member States to use expansionary fiscal policy to revive their economies. [2] As a consequence, public deficits and debt have surged. Eventually these deficits and debts will have to be reined in again which is likely to be politically unpopular. This might be the context in which the reform of EMU's economic governance will receive renewed urgency and in

[1] An insightful analysis of EMU's history has been provided by Ashoka Mody, *Euro Tragedy: A Drama in Nine Acts*, Oxford University Press, 2018

[2] Council of the EU, "Statement of EU ministers of finance on the Stability and Growth Pact in light of the COVID-19 crisis", 23 March 2020

which the issues addressed in this thesis will become particularly relevant.

EMU's economic governance is a vast subject and this thesis will therefore focus on a more limited aspect, namely accountability its intergovernmental area. Towards that end, the roles of the EU instituitons in this area are toroughly researched. The results indicate that compared to the Council, the European Parliament and the European Central Bank, the Commission's role is more significant and particularly interesting from a constitutional point of view. The Council has been effectively side-lined by the Eurogroup, the European Parliament plays only a marginal role, and the ECB has exclusive competence on the monetary side and is only associated on the economic side of EMU's governance. The Court of Justice of the EU (CJEU) as the judicial branch in the EU legal framework is obviously not directly involved in EMU's economic governance, but plays an important role via its case law. The thesis will seek to answer the question what CJEU case law has to say about the role of the EU institutions in the intergovernmental sphere of EMU and its compatibility with the EU Treaties.

The first chapter will identify the and describe the intergovernmental sphere of EMU and separate it from the part which is based on EU law. The second chapter will provide an account of the European institutions' role in the Eurogroup, the ESM and the Fiscal Compact. This will involve the analysis of relevant CJEU rulings, which will include some cases from the early 1990s in the field of development aid (the Bangladesh and Lomé cases) which had a bearing on more recent rulings dealing directly with EMU's intergovernmental sphere. The third and final chapter will consider the CJEU's case law in a discussion on the accountability of the intergovernmental structures in EMU's economic governance. Legal and political accountability is a key requirement for a democratic order and is also widely used as an indicator of 'good governance'. Reflecting on this normative aspect of EMU's governance, will allow the study to conclude that the best way to improve legal and political accountability is to move EMU's intergovernmental sphere to the maximum extent possible into the EU legal framework.

2 The intergovernmental sphere in EMU governance

In the Maastricht Treaty (Article 3 in TFEU), monetary policy was made an exclusive competence of the Union for the Member States whose currency is the euro. The treaty chapter on monetary policy

(Articles 127 – 133 in TFEU) assigns the conduct of monetary policy clearly and exclusively to the European System of Central Banks (ESCB) and the European Central Bank (ECB). On the other hand, economic policies relating to EMU do not fall clearly into one or the other of the three types of competencies listed in Articles 2-6, TFEU. It has been called *"a peculiar mixture of supporting and shared competences"*.[3]

The economic policy part is not only a non-exclusive competence, but also a mixture of EU law (the SGP and the six-pack and two-pack legislative acts) and intergovernmental agreements concluded under international law between subsets of EU Member States. EMU's intergovernmental sphere also includes the Eurogroup which has been the key decision-making body at ministerial level regarding the economic policy part of EMU since its inception. At senior official level, the Eurogroup is supplemented by the Eurogroup Working Group (EWG) and since 2008 by the Euro Summit at the level of Heads of State and Government. This chapter describes first these bodies before focussing on the two structures created by international treaties, viz. the ESM and the TSCG.

2.1 Eurogroup

The Eurogroup is an informal body with very large discretionary powers at the centre of the intergovernmental sphere of EMU's governance. It was created in December 1997 by a European Council resolution which stipulated that *"the Ministers of the States participating in the euro area may meet informally among themselves to discuss issues connected with their shared specific responsibilities for the single currency."*[4] Its creation was the consequence of the fact that not all Member States would use the euro as their currency from the outset. If that had been the case, the Council in its Ecofin configuration (i.e. economic and finance ministers from all Member States) would have been the obvious forum for ministers to discuss euro-related matters.

The Eurogroup met for the first time in June 1998. In the first years, the chairmanship of the Eurogroup rotated on a six-monthly basis among the participating finance ministers similar to the principle of the rotating presidency in formal Council bodies. In 2004, it was

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[3] Bruno de Witte, *'EMU as Constitutional Law'* in Amtenbrink, Fabian and Herrmann, Christoph, *The EU Law of Economic and Monetary Union*, Oxford, *Oxford University Press*, 2020

[4] European Council, Presidency conclusions, Luxembourg, 12-13 December 1997

decided to select a President of the Eurogroup for a two-year term among the Eurogroup's members.

Until the Lisbon Treaty entered into force on 1 December 2009, the Eurogroup had no legal basis. Since then, Article 137/TFEU acknowledges the Eurogroup's existence by saying that "Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group." The protocol (no. 14) has two articles, stipulating only the most essential provisions for its operation:

Article 1

The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission.

Article 2

The Ministers of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States.

The protocol's preamble makes it clear that the Eurogroup should be considered a temporary forum for EMU governance *"pending the euro becoming the currency of all Member States of the Union"*.

Since 2011, it has been discussed whether the governance of the euro area should be strengthened by making the presidency of the Eurogroup a full-time post.[5] In practice, the Eurogroup presidents have so far been elected from the circle of euro area finance ministers who have performed the role in addition to their duties as national ministers. The Eurogroup's current working methods – which are agreed informally by the group itself – foresee that candidates for the office of president must hold the position of national minister of

[5] At their meeting in October 2011, the Heads of State and Government of the Euro Area referred to the possibility of turning presidency of the Eurogroup into a full-time post at a later stage. The Commission has argued in 2017 that a Commission Vice-President should be made Eurogroup president and function as a proper European Minister of Economy and Finance (European Commission, COM (2017) 823 final).

finance. The Treaty protocol would allow for someone else, like a member of the European Commission, to hold the office.

The Eurogroup's main task is to ensure close coordination of economic policies among euro area Member States. This coordination is separate from and has to happen in full respect of the powers formally attributed to the Council under Article 121 TFEU. In practice, the Eurogroup typically meets prior to, but in conjunction with the meetings of the Ecofin Council where euro area finance ministers are joined by their colleagues from non-euro area Member States.

The Eurogroup's informal nature was laid down by the European Council's resolution in 1997 and later formalised in the TFEU. This status has been confirmed by the CJEU which has ruled that the Eurogroup cannot be equated with a Council configuration and cannot be classified as a body, office or agency of the EU within the meaning of Article 263 TFEU.[6] In a more recent judgment, the Court has upheld this ruling and has confirmed that the Eurogroup is not an EU entity established by the Treaties with powers of its own in the EU legal order, but merely an intergovernmental body for informally coordinating economic policies of euro area Member States.[7]

2.2 Eurogroup Working Group (EWG)

The Eurogroup's meetings are being prepared by the Eurogroup Working Group (EWG) consisting of the representatives of the Eurogroup members as stipulated in the Treaty Protocol on the Eurogroup. These representatives are senior officials from the euro area finance ministries, the Commission and the ECB. In 2011, the Heads of State or Government of the euro area countries agreed that the EWG would be chaired by a full-time president.

The EWG is the euro area configuration of the Economic and Financial Committee (EFC) which is a formal EU committee provided for in Article 134 TFEU to promote policy coordination among the Member States for the functioning of the internal market. It provides opinions at the request of the Council or the Commission. Its preparatory work for the Council includes assessments of the economic and financial situation, the coordination of economic and fiscal policies,

[6] Joined Cases C-105/15 P to C-109/15, *Mallis and Others*, paragraph 61

[7] Joined Cases C-597/18 *P Council v K. Chrysostomides & Co. and Others*, C-598/18 P *Council v Bourdouvali and Others*, C-603/18 P *K. Chrysostomides & Co. and Others v Council* and C-604/18 P *Bourdouvali and Others v Council*

contributions on financial market matters, exchange rate polices and relations with third countries and international institutions.

The election of the EWG president takes place, in principle, at the same time as the election of the EFC president and is therefore regulated in the Statutes of the EFC.[8] The election is for a renewable two-year term. Although the presidents of the EFC and the EWG do not necessarily have to be the same person, double-hatting has been the practice so far.

The EFC and the EWG are assisted by a Secretariat supplied by the Commission.

The relationship between the EWG and the EFC resembles to a large extent the relationship between the Eurogroup and the Ecofin Council. The EWG/EFC are at senior official level whereas Eurogroup/Ecofin Council are at ministerial level. The EWG serves the Eurogroup while the EFC serves the Ecofin Council. The EWG is an informal forum just like the Eurogroup whereas the EFC is a Treaty-based formal EU committee linked to the Ecofin Council.

2.3 Euro Summits

Euro Summits were initiated in 2008 during the global financial crisis as an informal gathering of Heads of State or Government of those EU countries whose currency is the euro. As such, it mirrors the composition of the Eurogroup at the highest political level. In the following years, Euro Summits took place with irregular intervals to deal with the financial and sovereign debt crisis and to ensure the stability of the euro area. Euro Summits have often served as a crisis management tool to break deadlocks when no solution could be found at the level of the Eurogroup.

The Euro Summits are clearly outside the EU legal order, but received their own intergovernmental legal basis with the Treaty on Stability, Coordination and Governance in the EMU (TSCG), which entered into force on 1 January 2013. Its Title V, on the governance of the euro area, defines rules applicable only to the euro-area countries, and formalises Euro Summit meetings.

The TSCG stipulates that the president of the Euro Summit is appointed by the Heads of State or Government of the euro area countries at the same time as the European Council elects its President and for the same term of office. In practice, the President of the

[8] Council Decision of 26 April 2012

European Council has always been the President of the Euro Summit as well.

According to the TSCG and the rules for the organisation of the proceedings of Euro Summits, adopted in 2013, Euro Summit meetings should take place when necessary, but at least twice a year. This has, however, not always been respected. Although Euro Summits are primarily intended for the political leaders from the euro area countries and the Commission President, the leaders of non-euro-area countries that have ratified the TSCG are invited take part in Euro Summit meetings for specific discussions. Recently, Euro Summits also take place in an inclusive format, i.e. including all 27 Heads of State or Government.

2.4 European Stability Mechanism (ESM)

When the Greek sovereign debt crisis erupted in 2009 and spread to other vulnerable euro area countries, large financing facilities were soon created in the EU to support the affected states and to safeguard financial stability. In May 2010 Greece received financial assistance from the so-called Greek Loan Facility which consisted of hastily assembled bilateral loans from the other euro area countries (€80 billion) and was managed by the Commission. In the same month, an emergency fund (€60 billion), the European Financial Stabilisation Mechanism (EFSM), was created which was run by the Commission, financed over the EU budget and backed by all Member States. The EFSM has provided financial assistance to Ireland, Portugal and Greece between 2011 and 2015.

A much larger fund (€440 billion), the European Financial Stability Facility (EFSF), was set up by euro area Member States in June 2010 for a three-year period. The EFSF has provided financial assistance to Ireland, Portugal and Greece financed through the issuance of EFSF bonds and other debt instruments on capital markets. The EFSF does not provide financial assistance anymore, but has retained its existence as a legal entity and continues to operate in order to receive loan repayments from the beneficiary countries, to make interest and principal payments to bond holders, and to roll over outstanding bonds, as the maturity of loans provided is longer than the maturity of bonds issued. In contrast to the EFSM, the EFSF was designed as a 'special-purpose vehicle' outside the EU legal order and created by an intergovernmental agreement among the euro area Member States.

In 2012, the European Stability Mechanism (ESM) was set up as a successor to the temporary EFSF. The ESM's creation was preceded by

an amendment to Article 136 TFEU agreed by the European Council[9]. The amendment of the TFEU could be adopted under the simplified treaty revision procedure mainly because the competences of the EU were not being increased.[10] The following text was inserted under Article 136, para. 3:

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

The amendment gave legitimacy under EU primary law to establishing the ESM outside the EU framework on the basis of an intergovernmental treaty between all euro area members. The ESM Treaty entered into force in September 2012 and the ESM began operating formally in the following month. ESM members are the EU Member States whose currency is the euro. Membership in the EMS is open to other EU Member States when they join the euro area. The institution is based in Luxembourg and has 190 staff which also handle the remaining operations of the EFSF.

The purpose of the ESM is to mobilise funding and provide stability support under strict conditionality to euro area states which are experiencing severe financing problems and to safeguard financial stability. The ESM's maximum lending is set at €500 billion under the Treaty, but can be increased by its governing bodies if appropriate. Together, the EFSF and ESM have so far disbursed €254.5 billion to five so-called programme countries (Greece, Ireland, Portugal, Spain and Cyprus). All of these countries had exited their EMS programmes by the end of 2018.

The ESM is governed by a Board of Governors, which is the highest decision-making body, and a Board of Directors. The Board of Governors is composed of mostly finance ministers from the euro area Member States (currently 19) and its chairman is the President of the Eurogroup. Additionally, the European Commission and the European Central Bank (ECB) may send observers to the meetings, which occur at least once a year. The Board of Directors also consists of representatives at senior official level from each ESM Member, each appointed by their corresponding Governor. The Commission and the ECB are represented by observers. Decisions taken by the Board of Directors follow the ESM Treaty guidelines and are decided

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[9] European Council Decision 2011/199/EU

[10] B. De Witte, *'The European Treaty Amendment for the Creation of a Financial Stability Mechanism', SIEPS, European Policy Analysis*, June 2011

by qualified majority. Their meetings are chaired by the ESM Managing Director who, with the assistance of the Management Board, is responsible for the running of the organisation's current business under the direction of the Board of Directors. His appointment falls within the discretion of the Board of Governors.

2.5 Fiscal Compact

In addition to the common instruments of financial assistance described in the previous section, the euro area's debt crisis also gave rise to a review of the economic governance arrangements for EMU, in particular the fiscal rules. A first result was the adoption of the so-called 'Six-Pack' (five regulations and one directive) in 2011. The main thrust of the 'Six-Pack' was to reform the fiscal rules in the Stability and Growth Pact which had been in force since the euro's introduction, but had turned out to be insufficient to maintain fiscal discipline in all euro area Member States. The aim was to ensure greater budgetary discipline. The 'Six-Pack' also introduced an early warning system and correction mechanism for excessive macroeconomic imbalances. This reform remained fully within the EU's legal order as indicated by the legislative instruments used, i.e. regulations and a directive.

As the euro area crisis persisted in the early 2010s, it became clear that a more profound response was needed. Germany, in particular, felt that the Stability and Growth Pact needed to be complemented by provisions at the national level in order to better achieve sound budgetary policies in all Member States. It was explored whether an amendment to the TFEU could be introduced thereby making EU primary law underpin such national rules, but Member States failed to agree on this, particularly because the idea was opposed by the United Kingdom. Instead, the Member States in favour (all 27 except the UK and the Czech Republic) agreed to proceed on an intergovernmental basis. The result was the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) which was formally concluded in March 2012 and entered into force at beginning of 2013. [11]

The TSCG is better known as the 'Fiscal Compact' although the compact constitutes only part of the overall treaty (Title III). Its core principle is to bring national budgets in balance or surplus. It obliges Member States to transpose the compact's provisions on budgetary discipline into their national legal order, and to impose limits on the

[11] European Commission, *'The Fiscal Compact: Taking Stock'*, COM (2017) 1200 final

size of public debt and the structural deficit. The Fiscal Compact also aims at strengthening the so-called excessive deficit procedure which was laid down in the Stability and Growth Pack and amended by the 'Six-Pack'. Outside the Fiscal Compact, the TSCG reinforces economic policy coordination and the governance of the euro area, particularly by codifying the Euro Summit meetings (see section 1.3. above).

The link between the intergovernmental Fiscal Compact and EU rules-based governance of EMU was strengthened by the adoption of the so-called 'Two-Pact' in 2013. The 'Two-Pact' consists of two regulations introducing additional coordination and surveillance of budgetary processes for euro area Member States. Its provisions integrate some elements of the Fiscal Compact into EU law, for instance the obligation to have independent bodies monitoring compliance with national fiscal rules and the requirement for ex-ante coordination of Member States' debt issuance plans. Apart from that, the TSCG itself includes safeguards to ensure its consistency with EU law. First, Article 2 stipulates that the TSCG must be applied and interpreted in conformity with the EU Treaties. Secondly, the Fiscal Pact's balanced budget rule was made compatible with the fiscal deficit objectives in the SGP. Thirdly, Article 16 provides that the substance of the TSCG should be incorporated into the EU legal framework within five years of the Treaty entering into force (which eventually was not respected).

Furthermore, the TSCG is linked to the EU's legal order by its Article 8 which gives the CJEU jurisdiction over the monitoring of the Member States' compliance in transposing the Fiscal Compact's provisions into their national legal order.

3 The role of EU institutions, particularly the European Commission

EMU's economic governance is a vast subject and this thesis will therefore focus on a more limited aspect, namely the role of the European Commission in its intergovernmental area. Compared to the Council, the European Parliament and the European Central Bank, the Commission's role is more significant and particularly interesting from a constitutional point of view. The Council has been effectively side-lined by the Eurogroup, the European Parliament plays only a marginal role, and the ECB has exclusive competence on the monetary side and is only associated on the economic side of EMU's governance. The Court of Justice of the EU (CJEU) as the judicial branch in the EU legal framework is obviously not directly involved in EMU's economic governance, but plays an important role via its case law. This chapter will also seek to answer the question what CJEU case

law has to say about the role of the Commission in the intergovernmental sphere of EMU and its compatibility with the EU Treaties.

3.1 The Commission's role in Eurogroup, EWG, and Euro Summit

As mentioned in section 1.1., the Eurogroup was created by the European Council's resolution from December 1997 which stipulated that *"The Ministers of the States participating in the euro area may meet informally among themselves to discuss issues connected with their shared specific responsibilities for the single currency."*

Concerning the Commission's role, the resolution said *"The Commission, and the European Central Bank when appropriate, will be invited to take part in the meetings."* [12] This wording gave the Commission the status as a guest and optional participant in Eurogroup discussions, rather than a fully-fledged member. When the Treaty protocol on the Eurogroup came into force in 2009, the Commission's status a Eurogroup participant was strengthened because it was now stipulated that "*The Commission shall take part in the meetings.* The ECB's participation remained optional, but was enhanced by deleting *"when appropriate"*.

The Eurogroup had been conceived as an informal forum for euro area finance ministers *"to discuss questions related …. to the single currency"*. It had not been provided with any formal decision-making authority. The adoption of measures specific for euro area members regarding economic policy coordination and surveillance of budgetary discipline remained with the Council in accordance with Article 136 TFEU. This article provides that measures specific for euro area members are adopted in the Council, but *"only members of the Council representing Member States whose currency is the euro shall take part in the vote"*.

In reality, the Eurogroup decides on the substance of decisions specific for euro area members which then are adopted formally by the Council. This is revealed by numerous statements by the Eurogroup issued after their meetings[13], for instance:

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[12] European Council, *'Resolution of the European Council on Economic Policy Co-ordination in Stage 3 of EMU'*, Luxembourg, 12-13 December 1997

[13] European Council press releases: https://www.consilium.europa.eu/en/press/press-releases/

- *The Eurogroup expects the Council to consider these proposals as a matter of urgency ….*
- *The Eurogroup approved the next EFSF disbursement of EUR 0.8 billion and looked forward to the adoption by the Ecofin of the legal texts paving the way for the EFSM disbursement of EUR 2 billion.*
- *Today, the Eurogroup gave its support to the candidacy of Frank Elderson to become the new member of the European Central Bank's Executive Board. ……The Council will adopt a recommendation putting forward the candidacy of Mr Elderson to the European Council ….*

In one sense the transfer of decision-making from the Council to the Eurogroup does not matter because the euro area minister in the Eurogroup are identical to the ministers in the Ecofin Council who represent Member States whose currency is the euro. But it matters in the sense that decision-making has been shifted from an EU body to an intergovernmental structure without the checks and balances of the EU legal order. One important aspect of this shift is that the Commission's role is quite different in the Eurogroup than in Council meetings where its role is based on the EU Treaties, i.e. it is independent, has the right of initiative, has to promote the general interest of the Union, and act as the guardian of the Treaties. These competences are not legally assured when the Commission participates in the intergovernmental Eurogroup. As long as the Eurogroup only discussed questions related to the single currency – as it mainly did up to the sovereign debt crisis – it may not have mattered so much. But at least since the euro area's debt crisis, the Eurogroup functions as the centre of decision-making on the economic side of EMU and this makes the issue of the Commission's role in EMU's economic governance highly interesting from an EU constitutional point of view.

The financial assistance to Greece and the establishment of the EFSF and the ESMs have expanded the Eurogroup's role. This can also be illustrated with the Eurogroup's own public statements, for instance:

- *Ministers unanimously agreed today to grant financial assistance …. The financial assistance will be provided by the EFSF until the ESM becomes available, then it will be transferred to the ESM.*
- *The Eurogroup formally approved the second disbursement under the second economic adjustment programme for Greece …. On that basis, Member States have authorised the EFSF to release the next instalment ….*

- *The Eurogroup ministers ……. have agreed to an adjustment of the maturities of the EFSF loans*
- *The Eurogroup expects that the ESM Board of Governors will be in a position to formally approve the proposal for a financial assistance facility agreement ….*
- *The Eurogroup has reached an agreement with the Cypriot authorities on the key elements necessary for a future macroeconomic adjustment programme.*
- *The Eurogroup expects that the ESM Board of Governors will be in a position to formally approve the proposal for a financial assistance facility agreement by the third week of April 2013 subject to the completion of national procedures.*
- *Today, the Eurogroup has agreed to proceed with the reform of the European Stability Mechanism (ESM), to sign the revised Treaty in January 2021 and launch the ratification process.*

The above excerpts show that the Eurogroup decides on the substance of important ESM and EFSF matters. This is possible, because the ESM's Board of Governors is identical to the Eurogroup, and because the ESM's Board of Directors consists of senior officials from euro area finance ministries who are subordinates of the Eurogroup ministers. The ESM's managing director, who chairs the ESM Board of Directors, attends Eurogroup meetings.[14]

Probably the most important example of how the Eurogroup dominates decision-making in EMU's economic governance is the activation of the general escape clause in the Stability and Growth Pact (SGP) in March 2020. On 16 March the Eurogroup issued a statement on the economic policy response to the COVID-19 pandemic, saying that *"the Eurogroup held an in-depth discussion today, together with non-Euro Area Members ……we agreed that the budgetary effects of temporary fiscal measures taken in response to COVID-19 will be excluded when assessing compliance with the EU fiscal rules, targets and requirements. …….. We welcome the readiness of the Commission to activate the general escape clause, allowing for further discretionary stimulus, while preserving medium-term sustainability."* Four days later, the Commission presented its communication to the Council on the activation of the general escape clause of the Stability and Growth Pact[15] which was followed on 23 March by the formal decision in the

[14] Transparency International, *'Vanishing Act: The Eurogroup's Accountability'*, 2019
[15] COM (2020) 123 final, 20 March 2020

Ecofin Council. This decision relaxed the budgetary rules so that national governments could inject fiscal stimulus into the economy and support companies hit by the sudden shock of the COVID-19 pandemic. Formally, the Commission and the Council had maintained their Treaty-based competences, but the initiative and the decision were *de facto* taken in the Eurogroup.

The Commission's role regarding the Eurogroup is twofold. On the one hand, it wields considerable influence based on its input to the proceedings of the Eurogroup via the Eurogroup Working Group (EWG). On the other hand, it acts as an agent or operating arm of the Eurogroup in the follow-up to its decisions. Regarding the first aspect, it has to be recalled that Eurogroup meetings are prepared by the EWG. The EWG is served by a Secretariat consisting of about 12 staff which institutionally are part of the Commission's Directorate-General for Economic and Financial Affairs and physically located at the Commission. Approximately half the staff, including its director, are drawn from the ranks of the Commission while the other half are seconded from national finance ministries and central banks. The Secretariat's director does not report to the Commission's hierarchy, but to the EWG's President who institutionally and physically is located at the General Secretariat of the Council. The Secretariat's organisational setup suggests that it is not entirely independent from the Commission. More importantly, the Commission – primarily via the EWG Secretariat – is the main source of input in the form of analytical papers and policy briefings for the meetings of the EWG and the Eurogroup, providing about 80 per cent of internal papers on economic policy issues. The ESM provides the bulk of the remaining 20 per cent.[16] In this function, the Commission provides intellectual input and shapes the Eurogroup's discussion.

The Commission's role as an agent of the Eurogroup started with the euro area's debt crisis in 2010, when the euro area's finance ministers entrusted the Commission with overseeing the conditions attached to financial assistance to Greece and later to Ireland, Portugal, Spain and Cyprus, the so-called programme countries. Some Member States were concerned that the Commission would go 'soft' on the programme countries and insisted that the IMF with its longstanding experience in overseeing loan conditionality should be involved in the surveillance missions. The ECB was also asked to join the missions on account of its expertise in euro area economic developments and its responsibility for the currency area's monetary policy. Together,

[16] The information is this paragraph is drawn from a 2019 report by Transparency International (*Vanishing Act: The Eurogroup's Accountability*, pp.25-27). The authors of the report have interviewed key staff involved in the Eurogroup and EWG.

these three institutions formed the so-called 'Troika' which negotiated loan agreements with the programme countries and followed the implementation of the attached conditions. The following excerpts from the Eurogroup's published statements demonstrate, how the Commission, alone or as a member of the Troika, became an agent of the Eurogroup:

- *We (i.e. Eurogroup ministers) therefore invite the Commission to significantly strengthen its Task Force for Greece, in particular through an enhanced and permanent presence on the ground in Greece ….*
- *The Eurogroup requests the Cypriot authorities and the Commission, in liaison with the ECB, and the IMF to finalise the MoU at staff level in early April.*
- *Once the institutions (i.e. Commission, ECB, IMF) reach an agreement at staff level on the conclusion of the current review, the Eurogroup will decide on the possible disbursements of the funds outstanding under the current arrangement.*
- *….the institutions (i.e. Commission, ECB, IMF) would be entrusted with the task of swiftly negotiating a Memorandum of Understanding (MoU) detailing the policy conditionality attached to the financial assistance facility.*
- *Compliance with the conditionality of the MoU will be monitored by the Commission in liaison with the ECB and together with the IMF, as foreseen in Article 13(7) of the ESM Treaty.*
- *The Eurogroup thus invites the Commission to assess developments in this field within its usual surveillance processes, with a view to allowing periodic monitoring by the Eurogroup.*
- *The Eurogroup calls upon the institutions and Greece to swiftly resume negotiations in order to reach staff-level agreement as soon as possible, based on a shared conditionality, as agreed in August 2015, and mandates the EWG to assess this.*

3.2 The Commission's relationship with the ESM

The Commission's relationship with the ESM is directly addressed in several parts of the ESM Treaty. According to Article 5, the Member of the European Commission in charge of economic and monetary affairs may participate in the meetings of the EMS' Board of Governors

as an observer. Article 6 provides that the Commission is allowed to appoint an observer to the EMS' Board of Directors.

The Commission's most important role in the ESM concerns the granting of stability support. Article 13 stipulates that, when the ESM has received a request for stability support from an ESM member, the Commission, in liaison with the ECB, is entrusted with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;

(c) to assess the actual or potential financing needs of the ESM Member concerned.

If the ESM's Board of Governors decides, in principle, to grant stability support, the Commission is entrusted – *in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility*. The European Commission signs the MoU on behalf of the ESM. The MoU is required to remain consistent with EU law, such as legal acts addressed to the ESM Member State concerned, or the TFEU's measures of economic policy coordination. Once the financial assistance facility is in place, the Commission is entrusted with monitoring compliance with the conditionality attached to the financial assistance facility in liaison with the ECB and, wherever possible, together with the IMF.

MoUs concluded by the Commission may also contain the conditions for granting other types of financial assistance detailed in Articles 14-18 of the Treaty (precautionary financial assistance, financial assistance for the re-capitalisation of financial institutions of an ESM Member, EMS loans, primary and secondary market support facility). Financial assistance under these schemes are granted by the ESM Board of Directors *after having received a report from the European Commission.*

In addition to the provisions in the ESM Treaty, a Memorandum of Understanding on the working relations between the Commission and

the ESM was signed in April 2018.[17] It built on the existing working relations between the two parties and was intended to ensure that all phases of the financial assistance programmes are efficiently overseen. It did not modify or affect in any way the legal framework governing the two sides. It contains principles of cooperation, working arrangements under ESM financial assistance programmes and post-programme surveillance, operational arrangements on exchanges of information and confidentiality, and an agreement on training programmes and staff exchange. Furthermore, the two institutions issued an agreement in November 2018 entitled "Future cooperation between the European Commission and the European Stability Mechanism"[18] which gave the ESM a somewhat stronger role in the development and monitoring of financial assistance programmes.

The Commission has a well-defined role in post-programme surveillance pursuant to Article 14 of Regulation (EU) 472/2013. Post-programme surveillance occurs once a Member State has repaid at least 75% of its debt to the ESM. Together with the ECB, the Commission must then conduct bi-annual assessments of the economic, fiscal and financial situation of the Member State. The findings of the Commission's assessment are communicated to the European Parliament, the EFC and to the Member State's parliament in order to determine the necessity of corrective measures.[19]

3.3 EU institutions and the Fiscal Compact

Most of the rules in the Fiscal Compact replicate the fiscal rules in EU law, particularly the regulations and directive in the revised Stability and Growth Pact ("Six-Pack" and "Two-Pack"). That is why the TSCG has been considered "not necessary in any legal sense."[20] While the Compact's criteria for public debt are identical to the SGP, there is a difference regarding the deficit criteria. The budgetary position in public finances is solely determined in structural rather than in nominal terms in the Compact which raises the importance of the structural deficit compared to the SGP. But this does not change the

[17] Memorandum of Understanding on the working relations between the Commission and the European Stability Mechanism, 2018

[18] ESM, *'Future Cooperation between the Commission and the European Stability Mechanism'*, 14 November 2018

[19] Regulation 472/2013, Article 14, para. 3

[20] Steve Peers, *'The Stability Treaty: Permanent Austerity or Gesture Politics?'*, *European Constitutional Law Review*, vol.8, No.3, 2012, p.441

role of the Commission. The Compact uses the same monitoring and reporting instruments already created for the SGP. This means that the Commission has a key role in the surveillance of the Compact's rules, but it coincides with the role it plays anyway within the EU-law based monitoring and reporting of fiscal rules. For instance, Article 4 TSCG states: *"The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union."* Similarly, Article 5 states: *"... monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact."*

Apart from the above, the Commission also plays a role regarding another aspect of the TSCG. As mentioned in section 1.5., the intention with the Fiscal Compact was to complement the SGP with provisions at the national level. Article 8 TSCG *invites* the Commission to present in due time a report on the transposition of the Fiscal Compact into national legislation. The Commission complied with this request in February 2017 with a report on the transposition of the Compact into national legislation.[21] According to the Commission's review, all countries had complied with the requirements. However, in some cases the positive assessment was subject to the future adoption of complementary or amended provisions. The Commission's review focused on the question of whether the main elements of the Compact were sufficiently enshrined in national provisions. Neither their practical implementation nor their effectiveness were discussed.[22]

Overall, the Commission's role regarding the Fiscal Compact, and the TSCG in general, is rather limited.

3.4 Relevant case law of the Court of Justice (CJEU)

Over the past ten years a growing number of rulings by the Court of Justice of the European Union (CJEU) have addressed the role of the Commission in the intergovernmental sphere of EMU. On the other hand, this case law does not further deliberate over the roles of the Parliament or of the Council

[21] European Commission, *'The Fiscal Compact: Taking Stock'*, COM (2017) 1200 final

[22] ECB Economic Bulletin, Issue 4/2017 -Boxes, '*The fiscal compact: The Commission's review and the way forward'*

The *Pringle* case[23] in 2012 was the first to address the role of the Commission in this context. It concerned the lawfulness of European Council Decision 2011/199, which approved an amendment to Article 136 TFEU allowing for the ESM to be established.[24]

The case's background was Ireland's ratification of the Fiscal Compact Treaty and the ESM Treaty.[25] A referendum in May 2012 paved the way for Ireland's ratification of the Fiscal Compact Treaty, while the Irish government planned to ratify the ESM Treaty without a referendum. They considered that the ESM Treaty did not require prior amendments to the Irish Constitution, and therefore made a referendum unnecessary. However, Thomas Pringle, an independent member of the Irish parliament, sought to prevent the ESM Treaty's ratification by challenging the government before the High Court. His claim for a court injunction, to prohibit the government from pursuing the parliament's approval of the ESM Treaty and of Decision 2011/199, was heard on the ground that the Irish Constitution would be violated. He also argued that this amendment constituted an excessive alteration to the EU's exclusive competences in the area of monetary policy and was inconsistent with the powers conferred by the TFEU.

Most of Mr. Pringle's claims were rejected in the High Court's judgement, and his appeal before the Supreme Court followed a similar fate in July 2012. The Irish Supreme Court based its decision on Irish constitutional law and ultimately rejected Mr. Pringle's arguments, but referred questions about the validity of Decision 2011/199 and about the ESM's compatibility with EU law to the CJEU by way of preliminary ruling.

The CJEU's judgement in the *Pringle* case was presided by all 27 judges of the Court in October 2012, an exceptionally rare occurrence which highlighted the case's importance. The governments of eleven Member States intervened in the proceedings by submitting observations to the Court, emphasizing the significance of the outcome. The primary legal issue was whether EU law had been breached by the 17 EU Member States who had concluded the ESM Treaty among themselves. Had the Court found a breach of EU law, the sovereign debt crisis that afflicted the euro area and the European Union in general could have come back with a vengeance.[26] However, the CJEU rejected all of the claimant's arguments and maintained the

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[23] Case C-370/12 *Pringle v Ireland*

[24] See section 1.4.

[25] B. De Witte, *'Using International Law in the Euro Crisis: Causes and Consequences'*, Arena Working Papers, 2013, p. 14

[26] B. De Witte (2013), p. 15

legality of the ESM as an intergovernmental body in the sphere of EMU governance on condition that EU law was respected.

Regarding the Commission's role, the discussion revolved around the question whether the tasks discharged by the Commission on behalf of the ESM were compatible with the Commission's duties according to Article 17(1) TEU to promote the general interest of the Union and to oversee the application of EU law. As previously mentioned, the Commission's tasks under Article 13 ESM Treaty consist of assessing requests for financial assistance, negotiating an MoU with the applying Member State that details the conditionality attached to the financial assistance facility, signing the MoU on behalf of the ESM, and monitoring that the conditionality is complied with. The Commission's functions according to Article 17(1) TEU are the following: it must take appropriate aims to promote the general interests of the Union; it is responsible for ensuring that the EU Treaties are applied and for overseeing this application; it has to execute the budget and to manage programmes; it shall exercise coordinating, executive and management functions; it has to ensure the Union's external representation (with the exception of the common foreign and security policy); and it shall initiate the Union's annual and multiannual programming [27]

Reviews of the Commission's role in preceding case law from the early 1990s concerning international agreements served as a basis for the CJEU's reasoning in *Pringle*. The Court referred to the landmark *'Bangladesh aid'* [28] and the *Lomé* cases. [29] The former concerned an action for annulment by the European Parliament against a European Council act. [30] The 'contested act', which was meant to grant special financial aid to Bangladesh, was challenged on the grounds that in its adoption the Council and the Commission had infringed prerogatives conferred on the European Parliament. [31] The European Parliament also argued that the Commission's tasks of administering the act's special aid was incompatible with EU law. [32] However, the action for annulment was declared inadmissible and the Court dismissed the claims against the Council and the Commission. Importantly, the Court also held that EU law did not prevent the Member States from entrusting the Commission with the task of coordinating an action which they undertake collectively on the basis of an act produced by

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[27] Treaty on European Union, Article 17(1)

[28] Joined Cases C-181/91 and C-248/91 *European Parliament v Council of the European Communities and Commission of the European Communities* (Bangladesh Aid)

[29] Case C-316/91 *Parliament v. Council* [1994] ECR I-625 (*Lomé*)

[30] *Bangladesh aid*, para. 1

[31] Ibid., para. 10, 26

[32] Ibid., para. 19

their representatives meeting in the Council.[33] This particularly significant point was confirmed again in the same year in the CJEU's *Lomé* case.

The *Lomé* case also concerned an action for annulment by the European Parliament lodged against the Council's Financial Regulation 91/491/EEC applicable to development finance cooperation under the Fourth ACP-EEC Convention (Lomé Convention), a trade and aid agreement between the EU and APC countries. On the 16th of July 1990, the Internal Agreement 91/401/EEC[34] was adopted by the representatives of the Member States in a Council meeting, and served as a legal basis for the financial regulation. The European Parliament argued that that Article 209 EEC Treaty should have been used as a legal basis, and that the Council had infringed its prerogative by using the Internal Agreement instead.[35] The Parliament also claimed that in its tasks, for the financial assistance provided for in the Convention, the Commission was acting within the EU legal order. The Court did not accept this and referred to *'Bangladesh aid'*, affirming that no provisions of EU law prevent Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up.[36] Ultimately, the Court rejected the Parliament's claims and dismissed its application as unfounded.

The *'Bangladesh aid'* and *Lomé* cases have thus established that Member States are entitled in areas, such as economic policy, which do not fall under the exclusive competence of the Union, to entrust tasks outside the EU legal framework to the EU institutions provided that the essential character of the powers conferred to those EU institutions by the Treaties is not altered by those tasks.[37] Hence, in *Pringle*, the CJEU concluded that the Commission's duties under Article 17(1) TEU were indeed compatible with its tasks delegated on behalf of the ESM. Specifically, the CJEU recalled the ESM Treaty's objective of ensuring financial stability within the whole euro area, which is a general interest of the EU and which the Commission is therefore promoting through its involvement in the ESM Treaty.[38]

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[33] Ibid., para. 20

[34] Internal Agreement 91/401/EEC on the financing and administration of Community aid under the Fourth ACP-EEC Convention

[35] *Lomé*, para. 4

[36] Ibid., para. 41

[37] *Pringle*, para. 158-159; *Bangladesh aid*, para. 16, 20, 22; *Lomé*, para. 26, 34, 41

[38] *Pringle*, para. 164

Additionally, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4), to ensure that the MoUs concluded by the ESM are consistent with EU law.[39]

In the *Ledra Advertising* case[40] from 2015, the CJEU confirmed its opinions expressed in *Pringle*. The background was the Cypriot government's request for financial assistance to the ESM in 2013. In a statement, the Eurogroup had indicated that an MoU had been drafted by the Commission and ECB, which included conditions for the restructuring of the banking sector in Cyprus.[41] Uninsured depositors of two large Cypriot banks suffered significant losses as a result of this restructuring. They brought actions for damages against the Commission for the losses suffered on account of the adoption of the MoU and for the annulment of the relevant conditions attached to the MoU, on the basis that they were incompatible with EU law. The ESM Treaty requires the conditionality attached to financial support in the MoU to be fully consistent with EU law. *Pringle* had determined that it is the Commission's duty to ensure this legal compliance despite ESM governance falling outside the EU legal order and the Commission's role largely being an agent of the ESM.[42] In *Ledra Advertising* the CJEU explicitly clarified that the Commission maintains its Article 17(1) TEU duty as guardian of the Treaties within the ESM and should therefore avoid concluding and signing MoUs where inconsistencies with EU law are suspected.[43]

In the *Ledra Advertising* case, the applicants also argued that the Commission, in the context of performing its tasks under the ESM Treaty, had breached their right to property pursuant to Article 17(1) of the Charter of Fundamental Rights of the EU. The Charter is addressed to the EU institutions and enshrines a full range of civil, political, economic and social rights for EU citizens and residents in the EU subject to EU law. While the CJEU dismissed the applicants' claim in this specific case, it held that the Commission, when concluding MoUs on behalf of the ESM, must ensure their consistency with the fundamental rights guaranteed by the Charter. More generally, the CJEU essentially clarified that, when operating outside the EU legal framework, the Commission must not act in breach of the Charter of Fundamental Rights of the EU.[44]

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[39] Ibid., para. 164

[40] Joined Cases C-8/15 P to C-10/15 P (*Ledra Advertising*)

[41] Eurogroup Statement on Cyprus, 25 March 2013

[42] *Ledra Advertising*, para. 57-60

[43] Ibid., para. 59

[44] Ibid., para. 67

The general principle in the CJEU's judgements in the *Pringle* and *Ledra Advertising* cases is the Commission's obligation, when acting in the intergovernmental sphere of EMU, to ensure consistency with EU law on the basis of its role as guardian of the Treaties. The Commission's signature on ESM MoUs is essentially an instrument to uphold EU law.[45]

Subsequently, in the 2016 *Mallis and Others* case the CJEU addressed the Commission's role in the Eurogroup for the first time. Closely related to the facts of *Ledra Advertising, Mallis and Others* concerned an action for annulment against the Eurogroup Statement on Cyprus of the 25 March 2013. In the statement at issue, the Eurogroup stated that it had reached an agreement with the Cypriot authorities concerning the restructuring of the Cypriot banking sector, and called for the finalisation of the MoU detailing the conditionality for ESM financial assistance.[46] The applicants claimed that the statement was in essence a joint decision of the ECB and of the Commission irrespective of the shape or form in which it was dressed.[47] Both the General Court and the CJEU, following an appeal, dismissed the application and ruled that the Eurogroup Statement could not be regarded as a joint decision of the Commission and the ECB. The CJEU's judgement held that, in the context of financial assistance, the role of the Commission as a participant in the Eurogroup (as defined in Article 1 of Protocol No 14, TFEU) cannot be wider than the role accorded to it by the ESM Treaty.[48] Additionally, whilst the ESM Treaty entrusts certain tasks to the Commission relating to the attainment of the objectives of the Treaty, the duties conferred on the Commission within the ESM Treaty do not entail the exercise of any power to make decisions of their own. [49] Furthermore, it was said that the Commission's participation in Eurogroup meetings does not signify that the Eurogroup's statements on financial assistance are to be considered as an expression of the Commission's decision-making powers.[50]

In *Mallis and Others,* the CJEU also went on to clarify the Eurogroup's informal nature as described in Protocol No 14 TFEU by confirming,

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[45] K. Croonenborghs, *'The European Commission's role in the intergovernmental sphere of EMU: reflections on the CJEU's case-law after Chrysostomides and Bourdouvali'*, EU Law Live, 2021

[46] *Mallis and Others*, para. 9

[47] Ibid., para. 23

[48] Mallis and Others, para. 53

[49] Ibid., para. 53

[50] Ibid., para. 57

in agreement with the Advocate General's Opinion, that the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU.[51] The fact that the Eurogroup is solely an intergovernmental body that informally coordinates the economic policies of euro area Member States, instead of an EU entity established through the EU Treaties and with its own powers within the EU legal order, was confirmed in the 2020 judgement of the joint *Chrysostomides* and *Bourdouvali* cases[52], in which the CJEU upheld the ruling of *Mallis and Others*. Rather, the CJEU views the Eurogroup as a bridge between the national level and the EU level for the purpose of coordinating the economic policies of the Member States whose currency is the euro.[53] Importantly, the CJEU also pointed out that the Eurogroup's functions do not affect the role of the Council, which constitutes the fulcrum of the EU's decision-making process in economic matters, nor does it affect the independence of the ECB.[54]

The *Chrysostomides* and *Bourdouvali* cases once more addressed actions for damages that resulted from the restructuring of the Cypriot banking sector required for the ESM's financial assistance. The actions for damages were dismissed by the CJEU, as EU Courts do not have jurisdiction to hear actions for damages brought against intergovernmental bodies such as the Eurogroup, under Article 340 (2) TFEU, in respect of alleged actions taken by it .[55] The CJEU held that the Commission also retains its role as guardian of the Treaties in the context of its participation in the activities of the Eurogroup, thus building on the case law established by *Pringle* and *Ledra* regarding the Commission's role in EMU's intergovernmental sphere of governance.[56] The CJEU also brought up that, under Article 340 (2) TFEU, the Commission's failure to ensure ('check') the conformity with EU law of political agreements concluded within the Eurogroup could result in incurring EU non-contractual liability.[57] This can be interpreted as a duty imposed on the Commission to legally monitor and scrutinise the activities of Eurogroup Member States. The ESM as an institution and the Member States' activities in the ESM could accordingly also be subject to such scrutiny. This idea is arguably reinforced by the CJEU's references in *Pringle,* that EU law must be complied with during ESM operations, and in *Ledra Advertising*, that

[51] Ibid., para. 61
[52] *Chrysostomides* and *Bourdouvali*, para. 84
[53] Ibid.
[54] Ibid., para. 88
[55] Ibid., para. 107
[56] Ibid., para. 96
[57] Ibid., para. 96

the Commission is precluded from concluding MoUs on behalf of the ESM if there are doubts on its consistency with EU law.

In its growing body of case law, the CJEU's stance on the Commission's role in the intergovernmental sphere of EMU has remained consistent in its expansion. The main finding from examining CJEU case law in this area is the Commission's obligation to uphold EU law in view of its duty under Article 17(1) TEU to be the guardian of the Treaties. It is not surprising that the CJEU case law does not make references to the Fiscal Compact, or the TSCG in general, considering the different nature of this intergovernmental treaty and its overlap with EU law. However, insofar as the Eurogroup and the ESM are concerned, the Commission has the significant role of watchdog in ensuring that EU law is complied with in the EMU's intergovernmental sphere.

4 Accountability in EMU's intergovernmental sphere

Since the European debt crisis EMU's architecture for economic governance has been criticised for lacking accountability. The Eurogroup in particular has often been portrayed as the prime manifestation of an alleged 'democratic deficit' in the EU.[58] The notion of accountability is central to most definitions of democracy[59] and is also widely used as an indicator of 'good governance'. There are many different forms of accountability, for instance political, financial, legal, bureaucratic. The underlying principle is that when decision-making power is transferred from a principal (e.g. the citizens) to an agent (e.g. the government), there must be a mechanism in place for holding the agent accountable for its decisions and tools for sanction. Staffan I. Lindberg has discussed the concept of accountability and provided a taxonomy of its subtypes. [60] Legal and political accountability are the two subtypes which are relevant in the discussion of EMU governance as demonstrated by Mark Dawson.[61]

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[58] For instance, by Transparency International, *'Vanishing Act: The Eurogroup's Accountability'*, 2019.

[59] Schmitter, Philippe, and Terry L. Karl, *'What Democracy Is... and Is Not', Journal of Democracy 3(1)*, 1991, pp. 75-88.

[60] Staffan I. Lindberg, *'Mapping accountability: core concept and subtypes', International Review of Administrative Sciences*, Volume 79, Issue 2, June 2013, pp. 202–226

[61] Mark Dawson, *'The Legal and Political Accountability Structure of 'Post-Crisis' EU Economic Governance', Journal of Common Market Studies*, 2015, vol. 53, no. 5, pp. 976-993

This chapter will offer some reflections on what the CJEU's case law, as analysed in the preceding chapter, means for the legal and political accountability of EMU's economic governance. The reason for focusing on this aspect is that EMU's legitimacy rests on the accountability of its decision-making bodies. If the electorate in a euro area Member State perceive EMU's economic governance as undemocratic, because unaccountable, there is a risk that this Member State may eventually withdraw from EMU which in turn might endanger EMU's long-term survival. This risk has been apparent in Italy where some large political parties have advocated – at least intermittently - a withdrawal from the euro area.

4.1 Legal accountability

As demonstrated in section 2.4., the CJEU has repeatedly ruled that the Commission must protect EU law in EMU's intergovernmental sphere due to its role as guardian of the Treaties. Related to this, the Commission, as a participant in the Eurogroup, is obliged to actively monitor and legally scrutinise the activities of Member States in the Eurogroup (and by extension in the ESM). The Commission should raise its legal concerns with Member States in case it sees risks of non-compliance with EU law in their activities in the Eurogroup and the ESM. In extremis, the Commission could decide, on the basis of Article 258 TFEU, to pursue infringement proceedings against all euro area Member States to let the CJEU establish non-compliance with EU law. In view of this possibility for judicial review, it cannot be claimed that there is no legal accountability for decisions made in the intergovernmental area of EMU economic governance.

However, the question is whether this specific aspect of legal accountability has the same quality outside as inside the EU legal order. When acting as an agent of the Eurogroup, the Commission is practically subordinated to euro area Member States which is in contrast to its status and role inside the EU legal order. It is not unreasonable to expect that this quasi-subordination to the Eurogroup may make the Commission a less assertive guardian of the Treaties in spite of the explicit backing by CJEU's case law. At least there has been no case where the Commission has started infringement proceedings against the euro area Member States for decisions taken in the Eurogroup. It is, of course, possible that the Commission is acting as a legal watchdog by advising against potentially unlawful decisions in the Eurogroup. If such advice is heeded, infringement procedures become unnecessary.

The CJEU's rulings in the *Pringle* and *Ledra* cases have important implications for another aspect of legal accountability in EMU's

intergovernmental area, namely the possibility for citizens to seek legal redress at the EU level for losses incurred by decisions of the Eurogroup/ESM. As pointed out in a report by the think tank *Transparency International*[62], the Court's rulings shield measures which implement MoUs entered between the Commission (on behalf of the ESM) and a Member State from judicial review. The conditions included in those MoUs have sometimes required measures that affected citizen's rights protected under EU law, especially the Charter of Fundamental Rights. However, the Court ruled in the two cases that the ESM was established outside of EU law, and that the Charter of Fundamental Rights did therefore not apply to actions undertaken by a national government when implementing such an MoU.

In the *Mallis and Others,* claimants sought compensation for losses incurred by bail-ins of bank deposits when two Cypriot banks were restructured in 2013. The Eurogroup escaped judicial review because the CJEU ruled that "as the Eurogroup is not a decision-making body, a statement by it cannot be regarded as a measure intended to produce legal effects with respect to third parties."[63] Although this is formally correct, it is a rather legalistic view considering that the Eurogroup actually does take decisions.[64] The ESM's Managing Director has publicly stated that the Eurogroup "already works as a government of sorts".[65] It seems fair to say that the Court has decided to ignore the political reality of the Eurogroup's dominance in EMU's economic governance. Following *Mallis and Others,* the consensus among legal scholars is that the Court has shown exceptional "judicial restraint when faced with situations of economic emergency".[66] As mentioned above, the Court's ruling regarding the Eurogroup's status in *Mallis and Others* has been confirmed in 2020 in *Chrysostomides* and *Bourdouvali.*

It can be concluded that the CJEU has clarified the legal accountability of EMU's intergovernmental sphere in two important ways. On the one hand, the Commission's competence to ensure compliance with EU law has been strengthened. On the other hand, decisions indirectly affecting citizens have been shielded from judicial review. In sum, this leaves the legal accountability of EMU's economic governance short of what it would have been inside the EU legal order.

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[62] Transparency International, *'Vanishing Act: The Eurogroup's Accountability'*, 2019

[63] *Mallis and Others*, para. 49

[64] Transparency International, 2019, p. 34

[65] R. Berschens, *'Die Euro-Gruppe funktioniert ja schon wie eine Art Regierung', Interview mit Klaus Regling, Handelsblatt*, 12 July 2017

[66] A.H. Parga, *'The Euro Area Crisis in Constitutional Perspective', Oxford, Oxford University Press*, 2015, p. 135

4.2 Political accountability

The Eurogroup was conceived in the late 1990s as an informal intergovernmental body where euro area finance ministers could discuss euro-related issues. If the Eurogroup's role had not increased extensively since then, its political accountability would not be an issue, because the concept is only meaningful in relation to decision-making powers. But when the Eurogroup became the centre of managing the euro area's sovereign debt crisis in 2010, its accountability started to be questioned.

The above-mentioned report by the *Transparency International* (TI) provides a thorough analysis of the Eurogroup's so-called 'accountability gap'. It starts with the fundamental principle that "democratic control and accountability should occur at the level at which the decisions are taken".[67] For the Eurogroup this would mean accountability towards the European Parliament. In the first years of its existence the Eurogroup did not interact with the Parliament at all. Since 2006, the President of the Eurogroup has been invited to hearings in the Parliament's Committee on Economic and Financial Affairs (ECON) every six months on an informal basis. However, the Eurogroup president is not obliged to accept the invitation and once, in 2017, he refused to attend a hearing on Greece. In the context of the annual cycle of economic policy coordination ('European Semester') introduced in 2011, the Parliament participates in 'economic dialogues' with the Commission and the Council, but these dialogues are largely limited to information and consultation. TI concludes that the empowerment of the Eurogroup during the euro area's sovereign debt crisis "has not been matched by a concomitant increase in the participation rights of the European Parliament".

EMU's intergovernmental sphere in general and the Eurogroup in particular are only politically accountable in a decentralised way, according to TI. This means that finance ministers and their governments can only be held to account by national parliaments in euro area Member States and ultimately to voters in national elections. But even this decentralised accountability is not fit for purpose because the conditions for it to function properly are not fulfilled. The main reason, according to TI, was the emergence of a structural asymmetry between creditor and debtor countries in terms of bargaining power in the context of the debt crisis. In creditor countries, governments could still be responsive to the concerns of

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[67] This principle was stated by the Presidents of the major EU institutions in their report *'Towards a Genuine Economic and Monetary Union'*, Brussels, European Council, 5 December 2012, p. 16.

their parliaments and electorates, but in debtor countries this link had broken down. Apart from the extreme option of leaving the euro area, debtor countries had no choice but to accept the obligations and conditionalities agreed within the Eurogroup. National parliaments and electorates had effectively no way to sanction their government for measures agreed as part of rescue programmes.

An additional reason why decentralised accountability does not work properly in EMU's intergovernmental sphere is the varying strength of national parliaments in the euro area. TI points out that - for reasons unrelated to the debt crisis - national parliaments are more powerful vis-à-vis their governments in creditor countries like Germany, Austria and Finland than in debtor countries like Cyprus, Greece, Portugal and Spain. This difference exacerbates the power asymmetry between creditor and debtor countries because the governments in creditor countries can use strong parliaments at home to leverage their bargaining position in Brussels. TI concludes that decentralised accountability may still work in creditor countries, but that the mechanism has broken down for debtor countries during the euro area's debt crisis leaving the EMU with a large "accountability gap".

The ESM is characterised by the same lack of political accountability at the EU level as the Eurogroup due to its intergovernmental nature.[68] It is not accountable to the European Parliament and its interconnections with the Commission and the ECB - which are subject to accountability through mechanisms provided in EU law - do not establish any form of indirect accountability. TI points out that the ESM could be accountable to the Eurogroup, if the Eurogroup were not an informal body with an identical composition to the ESM Board of Governors. The ESM is also not accountable to the European Court of Auditors - it only allows internal audits through its own auditing board. TI suggests that external European audits by the European Court of Auditors would complement internal audit arrangements and add an additional layer of performance audits that would look at the efficiency and appropriateness of procedures.

Like for the Eurogroup, there is some degree of decentralised accountability also in the case of the ESM. Its Board of Governors has the same composition as the Eurogroup and is therefore also accountable to national parliaments and electorates in the same

[68] Transparency International, *'From Crisis To Stability: How To Make The European Stability Mechanism Transparent And Accountable'*, 2017, p.32

indirect manner. But this accountability suffers from the same shortcomings as in the Eurogroup's case.

4.3 Proposals to strengthen accountability in EMU governance

As mentioned above, the CJEU has clarified the limits of the legal accountability relating to the Eurogroup and, by extension, the other elements in EMU's intergovernmental economic governance. In particular, the Court has fortified the Commission's role as guardian of the EU Treaties. The analysis has demonstrated that political accountability at the European level is tenuous considering the marginal role played by the European Parliament. Decentralised accountability may work in creditor countries with strong parliaments, but less in debtor countries with weaker parliaments. The CJEU's case law has not had any bearing on political accountability and this cannot be otherwise because it is not within the Court's competence to change the 'rules of the game' in EMU's economic governance.

The main implication of the above analysis is that the CJEU may have some room to strengthen legal accountability in EMU's economic governance by recognising the Eurogroup's key role in decision-making. But a fundamental shift towards more legal and particularly political accountability in EMU's economic governance requires a reform of EMU's institutional setup. By moving the EMU's intergovernmental sphere, fully or partly, into the EU legal framework, accountability could be strengthened both legally and politically.

Recommendations to develop EMU into this direction have been made by the EU institutions in a number of reports, communications and resolutions. Already during the height of the sovereign debt crisis, in December 2012, the presidents of the European Council, the Commission, the ECB and the Eurogroup issued a report entitled "Towards a genuine Economic and Monetary Union" which came to be known as the "Four Presidents' Report".[69] To a large extent it was based on input provided by the Commission in its communication "A Blueprint for a deep and genuine EMU – Launching a European Debate"[70] from November 2012 which had proposed to strengthen

[69] European Parliament, *'Towards a genuine Economic and Monetary Union'*, Resolution, 5 December 2012

[70] European Commission, 'A Blueprint for a deep and genuine EMU – Launching a European Debate', COM (2012) 777, 28 November 2012

democratic accountability in EMU in the context of a Treaty reform. Specifically, it suggested to extend the competences of the Court of Justice. The "Four Presidents' Report" - which had more weight than a Commission communication - called for strong mechanisms to ensure EMU's democratic legitimacy and accountability and said that democratic control and accountability should occur at the level at which the decisions are taken. According to the report, this implied the involvement of the European Parliament as regards accountability for decisions taken at the European level. The intergovernmental arrangements, which had been created as a result of the shortcomings of the previous architecture, would ultimately need to be integrated into the legal framework of the European Union. It was recalled that the Treaty on Stability, Coordination and Governance (the Fiscal Compact), which had been concluded earlier in 2012, provided for the incorporation of its substance into the EU legal framework. The "Four Presidents' Report" stated that this approach could be envisaged also for "other cases". [71]

The timeframe and a stage-based process for developing EMU did not take off as envisaged by the European leaders in the "Four Presidents' Report". To give new impetus to the project, they issued a follow-up report entitled "Completing Europe's Economic and Monetary Union" in June 2015.[72] This time, the European Parliament was more involved in drafting the report and it was therefore named the "Five Presidents Report", i.e. including the Parliament's president. Again, a roadmap for further deepening of the EMU was outlined. Regarding accountability, the "Five Presidents Report" was somewhat more explicit than its predecessor. In addition to the Fiscal Compact, the Euro Plus Pact and the Single Resolution Fund were mentioned as intergovernmental arrangements that should be integrated into the EU's legal framework. The ESM was mentioned as an intergovernmental structure with complex and lengthy decision-making processes which therefore should be fully integrated within the EU Treaties in the medium term.[73]

Two years later, in May 2017, the Commission issued a "Reflection Paper on the Deepening of the Economic and Monetary Union" which built on the Five Presidents' Report. Under the heading "How to reinforce democratic accountability" the reflection paper said:

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[71] EP, 20 November 2012, p. 27

[72] Five Presidents Report, 'Completing Europe's Economic and Monetary Union', European Commission, June 2015

[73] Ibid., p. 18

"Completing the EMU also means greater democratic accountability and higher transparency about who decides what and when at every level of governance. The European Parliament and national parliaments need to be equipped with sufficient powers of oversight, following the principle of accountability at the level where decisions are taken.

Currently, the EU Treaties do not provide much detail about democratic accountability on euro area matters. The Commission has developed a very effective regular dialogue with the European Parliament on these matters, including on matters related to the European Semester and the Stability and Growth Pact. As an immediate improvement, these practices could be formalised by the two institutions before the end of 2018. Such arrangements could be further extended to other institutions and bodies taking decisions on or acting on behalf of the euro area, starting with the Eurogroup whose members would also remain accountable to their national parliaments.

These arrangements could be translated into an agreement on the democratic accountability of the euro area, signed by all the above mentioned actors in time for the next European Parliament elections in June 2019. Further down the road, this agreement could be integrated into the EU Treaties."[74]

The Commission has also suggested to establish a European Minister of Economy and Finance who could serve as Vice-President of the Commission and chair the Eurogroup. A legal basis for establishing such a role in fact already exists in the TFEU under Article 2 of Protocol No 14 (on the Eurogroup), which mentions that "the Ministers of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States".[75] This new role would combine existing functions and available expertise at EU level in order to create synergies and thus contribute to a more efficient framework of EMU governance. As President of the Eurogroup, a European Minister of Economy and Finance would take into account the interests of the euro area as a whole. By helping to balance and align the points of view of national ministers with the shared priorities pursued at euro area and EU level, the Minister would articulate and seek consensus on the broad policy direction and the overarching strategy for the euro area.[76]

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[74] European Commission, 'Reflection Paper on Deepening the EMU', COM (2017) 291, 31 May 2017, p. 31-32

[75] TFEU, Protocol No.14 Article 2

[76] European Commission, 'A European Minister of Economy and Finance', COM (2017) 823, 6 December 2017

The European Parliament has repeatedly pushed for strengthening democratic legitimacy and accountability in EMU governance. Being excluded from the drafting of the Four Presidents' Report it adopted a lengthy resolution in November 2012 with the same title as the Four Presidents' Report (Towards a genuine Economic and Monetary Union).[77] The resolution called for placing EMU governance within the institutional framework of the Union and for excluding the option of new intergovernmental agreements in this area. It also argued that an increased role of Parliament was an absolute necessity to improve substantially the democratic legitimacy and accountability of EMU governance at Union level.[78]

In the following year, the Parliament adopted an even stronger worded resolution on strengthening European democracy in the future EMU.[79] Parliament criticized the Council for showing lack of ambition and for postponing all decisions on the future architecture of the EMU. The resolution reiterated that any further steps towards completing EMU "must imperatively be established in accordance with the Community method". It also reiterated that Parliament "cannot accept any further intergovernmental elements in relation to the EMU" and "that the future architecture of the EMU must recognise that Parliament is the seat of accountability at Union level".[80]

In June 2015, coinciding with the release of the Five Presidents' Report, the Parliament adopted a resolution entitled "Review of the economic governance framework: stocktaking and challenges".[81] Since the Parliament's president had by now been included in the circle of EU leaders releasing EMU reform proposals, the new resolution was phrased more moderately. Nevertheless, it demanded "that the ESM and the Fiscal Compact be fully integrated into the community framework .... and consequently made formally accountable to Parliament".[82] It also requested that a reassessment of the Eurogroup's decision-making process should be conducted so as to provide for appropriate democratic accountability. It welcomed that the Eurogroup President had by then regularly participated in the meetings of the Parliament's ECON committee in the same way as the

[77] European Parliament, 'Towards a genuine Economic and Monetary Union', Resolution, 20 November 2012

[78] Ibid., p.27

[79] European Parliament, 'Democratic decision making in the future EMU', Resolution, 12 June 2013

[80] Ibid., para. 10

[81] European Parliament, 'Review of the economic governance framework: stocktaking and challenges', Resolution, 24 June 2015

[82] Ibid., para. 51

chairman of the ECOFIN Council, thus contributing to a similar level of democratic accountability.[83]

The various official proposals for reforming EMU governance demonstrate the awareness that a fundamental shift towards more accountability requires institutional reform which can only be achieved by changing the various treaties relating to EMU's economic governance, including the TFEU. EU leaders are reluctant to enter this course in view of the enormous political difficulties encountered on previous occasions when treaty change has been on the agenda. More accountability in EMU's economic governance seems therefore to be a long-term project.

5 Conclusion

This thesis has addressed legal and political accountability in the intergovernmental area of EMU's economic governance by examining the role of the EU institutions in this context and relevant CJEU case law. Among the various EU institutions, the Commission was singled out for examination because it plays a major part in EMU's economic governance and because its role outside the EU legal framework raises the constitutional question about its compatibility with EU law.

The study has first described the intergovernmental sphere in EMU's economic governance and separated it from the part which is based on EU law. The monetary side was not part of the study because it is an exclusive EU competence (in the euro area) and assigned to the ECB. The economic side of EMU governance, on the other hand, is a non-exclusive competence and, at the same time, a mixture of EU law and inter se agreements and structures. The Eurogroup, the European Stability Mechanism (ESM) and the Fiscal Compact have been identified as the main intergovernmental elements.

In a second step, the EU institutions' roles in the intergovernmental sphere were examined based on the relevant legal texts and the actual practice in EMU governance. In particular, the research showed that the Commission stands out in this regard. For instance, the Commission's role concerning the Eurogroup is twofold. Firstly, it wields considerable influence on the Eurogroup's proceedings, particularly via the input provided to the Eurogroup Working Group. Secondly, it acts as the Eurogroup's agent in the follow-up to its decisions, particularly in implementation and supervision. In the

[83] Ibid., para.53

operations of the ESM, the Commission is assessing financial assistance requests, negotiating MoUs with applying Member States, and performing post-programme surveillance. Regarding the Fiscal Compact, the Commission's role is limited to the surveillance of the Compacts' rules and its transposition into national legal orders.

Having described the EU institutions' roles in the intergovernmental sphere of EMU governance, the study turned to the analysis of the CJEU's case law on the subject. In the past decade, the Commission's role and its compatibility with the European Treaties has been clarified by a number of CJEU rulings starting with the landmark Pringle case in 2012. The main finding from examining CJEU case law was the Commission's obligation to ensure overall compliance with EU law when it is operating outside the EU legal order based on its role as guardian of the EU Treaties. Since Pringle, this obligation has been consistently reaffirmed and built upon by the CJEU. The case law also shows that Court considers the Eurogroup as solely an intergovernmental body that informally coordinates the economic policies of euro area Member States and cannot be equated with a configuration of the Council or be classified as a body, office or agency of the EU. This is a rather restrictive interpretation of the Eurogroup's status in view of the fact that it has turned into the centre of decision-making within EMU's economic governance since the euro area's debt crisis erupted in 2009. The Court's interpretation narrowly circumscribes the possibility for citizens to seek legal redress at the EU level for losses incurred by decisions of the Eurogroup/ESM.

Finally, the thesis reviewed legal and political accountability in EMU's economic governance in light of the CJEU's case law. The Court's rulings have clarified legal accountability which nevertheless remains short of what it would have been within the EU legal framework. Political accountability at the EU level is shown to be rudimentary and decentralised accountability at the national level has serious limitations. This is considered to be a challenge for the democratic legitimacy of EMU governance and risks to erode the political support for EMU in at least some euro area countries. The study concludes that institutional reform, including Treaty changes, are required to strengthen legal and political accountability and to improve the overall coherence of EMU's architecture. Ideally, EMU's economic governance would be fully consolidated within the EU legal framework.

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Stability and Growth Pact

Treaty on the Functioning of the European Union

Euro Plus Pact

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2. Regulation 1177/2011 amending Regulation 1467/97: On speeding up and clarifying the implementation of the excessive deficit procedure.

3. Regulation 1173/2011: On the effective enforcement of budgetary surveillance in the euro area.

4. Directive 2011/85/EU: On requirements for budgetary frameworks of the Member States.

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