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The role of the Court of Justice of the European Union (CJEU) within the New European Economic Governance Framework.

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Introduction

Considering the ratio and genesis of the Economic and Monetary Union (EMU) in the late 1980s and early 1990s, it is considered to be a continuation of the achievements of the single market which has had factor mobility as its core aim, while transfers of money are concentrated on common projects in the framework of social and structural funds as reflected in the Treaty.1 Additionally, EMU follows a model underlining Member States' responsibility for their budgetary performance.2

Before the 2008 crisis, the EU's economic governance focused on the sustainability of fiscal policies according to the rules of the Stability and Growth Pact (SGP). It was essentially limited to keeping public deficit and debt under control. EU governance for non-fiscal policies was limited to the Treaty provisions on soft coordination of economic policies (Articles 121 and 148 of the Treaty for the Function of the European Union (TFEU). However, the economic growth in some Member States relied on unsustainable drivers, inducing large private and public debt, macroeconomic imbalances and divergent competitiveness. The 2008 crisis highlighted these vulnerabilities and the fact that the SGP alone was insufficient to guarantee economic stability. Consequently, over the last decade, the EU has started a process to substantially reform and strengthen economic governance.

Within the European Union (EU) legal order and the EMU, responsibilities for economic policy are allocated among the Member States and the EU institutions. EMU governance is neither more supranational nor more intergovernmental, it is both at once[3]. The national governments are responsible for fiscal policies - but also for labour and welfare policies - whereas the monetary policy is decided, for euro area countries, by the independent European Central Bank (ECB).

[1] Art. 125(1) and (2)TFEU, 2nd half sentence, respectively: "[...] without prejudice to mutual financial guarantees for the joint execution of a specific project.".

[2] Art. 119(3)TFEU specifies stable prices, sound public finances and monetary conditions, and a sustainable balance of payments as guiding principles for the activities of the Member States (see also Art. 120). The economic policies of the Member States are declared to be a matter of common concern, and their broad guidelines are to be co-ordinated and regulated by means of a recommendation from the Council (Art. 121(1)TFEU).

[3] ALLEMAND Frederic, Democracy in the EMU in the Aftermath of the Crisis, Springer International Publishing AG and G. Giappichelli Editore 2017, More or Less Intergovernmental Cooperation Within the New EMU?, p. 73.

It is commonly said that EMU is based on a "dynamic balance" or a "systematic asymmetry" between two pillars[4]. The two pillars serve the common purpose of achieving the economic and social objectives of the Union as defined in Article 3 of the Treaty for the European Union (TEU)[5]. The nature and distribution of powers within EMU reflect distinct, or indeed opposite, approaches: in response to the supranational integration of monetary policy comes intergovernmental cooperation[6] in the coordination of economic policies, while foreign exchange policy adopts a hybrid approach.

However, as European economies are becoming increasingly interdependent, some decisions taken by one Member State may have an impact throughout the euro area and the EU. In these cases, according to Article 121 (1) of the TFEU, "Member States shall regard their economic policies as a matter of common concern and shall coordinate them". To do so, decisions taken by Member States must conform to rules set at EU level.

The EU's economic governance, therefore, is the set of rules and processes to coordinate the Members States' economic policies at EU level. Effective governance arrangements are essential for the EU and EMU to function well. Over the last decade, following the 2008 financial and economic crisis, the EU started to reform and strengthen economic governance in the Union. Since the outburst of the Euro-crisis, legal measures adopted by the Member States and the institutions of the EU have produced a major centralisation of powers in the field of economic governance. Powers in high-salience areas such as budgetary-making and fiscal policy has been transferred from the Member States to the EU institutions. Both the EU institutions and the Member States enacted a swath of legal measures aimed at strengthening budgetary constraints at all levels of Government.

The EU has undertaken a range of measures to reform the SGP and has extended the European Semester, which, before being enshrined in the "Six-pack" legislative package adopted in November 2011, was implemented on the basis of a modification of the code of conduct on

[4] LEINO P., SAARENHEIMO T., Fiscal Stabilisation for EMU: Managing incompleteness, European Law Review, Vol. 43, No. 5, October 2018, p. 624.

[5] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 18.

[6] SCHARPF F.W., Problem Solving Effectiveness and Democratic Accountability in the EU, Political Science Series, February 2006, p. 12-13.

the content and presentation of stability and convergence programs[7]. Hence, it encompasses budgetary surveillance, the implementation of the economic and employment guidelines, and it has introduced a new surveillance tool, the Macroeconomic Imbalance Procedure (MIP).

In other words, the new European Economic Governance Framework that emerged during the 2011 reform, relates to three policy dimensions, a) Fiscal Policy (Stability and Growth Pack), b) Micro-economic and Structural Policy (Strategy Europe 2020), c) Macro-economic Policy (Macroeconomic Imbalances Procedure).

Therefore, within the Economic and Monetary Union, European Union law has been attributed a completely novel and fundamental task: to regulate the relationship between the Union and its Member States and above all between the Member States in a crucial political field—their economic opportunities and their financial performance[8].

This core role of EU law is reflected also in the crisis-related jurisprudence of the ECJ, which has delivered two important judgments so far: Pringle[9] and Gauweiler[10]. In the Pringle judgment, the Court of Justice confirms that treaties negotiated by the Member States cannot alter the competences which the TEU and TFEU confer on the EU institutions. Where new tasks are assigned to the EU institutions by international treaty, these must be consistent with the tasks conferred by the TEU and TFEU[11].

The ECJ's judgment in Pringle was, therefore, most welcome for clarification and for the manifestation of the EU's ability to clarify legal uncertainties within its institutional framework. Nevertheless, the judgment provided legal certainty at a crucial stage in the development of the

[7] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 41-42.

[8] RUFFERT M., The EMU in the ECJ: A New Dimension of Dispute Resolution in the Process of European Integration, Democracy in the EMU in the Aftermath of the Crisis, Springer International Publicing 2017, p. 335.

[9] ECJ Judgment of 27 November 2012, Case C-370/12, Thomas Pringle versus Irish Government, Ireland and General Advocate (preliminary ruling), ECLI:EU:C:2012:756.

[10] ECJ Judgment of 16 June 2015, Case C- 62/14, Gauweiler etc., (preliminary ruling), ECLI:EU:C:2015:400.

[11] ECJ Judgment of 27 November 2012, Case C-370/12, Thomas Pringle versus Irish Government, Ireland and General Advocate (preliminary ruling), ECLI:EU:C:2012:756. , paragraph 165.

EMU[12]. On the other hand, the judgment helped setting aside, together with the amendment in Article 136, para. 3,TFEU, the talk on "permanent breach of the law" which was and still is popular in some parts of the general debate in Germany and elsewhere[13].

Without the preliminary ruling of the ECJ of 14 January 2014 in Gauweiler regarding the legitimacy of the Outright Money Transactions (OMT) programme, there would have been no limitation to the purchase of assets in the principle of proportionality and the necessary temporal distance between emission and purchase on secondary markets[14]. The ECJ thus, had the institutional strength to formulate limits for European Central Bank (ECB) action.

The role of the CJEU within this context could therefore be described as twofold, as it ensures on the one hand the cohesion of the New European Economic Governance Framework within EU's legal order, while at the same time it adopts an interventionist stance towards Member States' sovereignty in the sensitive and still reserved economic policy area.

In the meantime, a trend was developed among struggling Eurozone member states that resorted in the use of international law treaties. These treaties are built together upon the political and legal equation of solidarity through the Treaty of establishing the European Stability Mechanism (ESM-Treaty) and fiscal discipline under the Treaty on Stability, Coordination and Governance (TSCG) and in particular the Title III Fiscal Compact. However, compliance with the principle of institutional balance does not prohibit the establishment of new institutions, within or outside the framework of the EU Treaties, or even amendments to the powers of the existing EU institutions. Such institutional developments must not although lead to a revolution in the distribution of powers—unless it is in order to decide to alter the very nature of the EU.

This was the case of TSCG, where the planned incorporation of the treaty into EU law requires the principle of its compatibility with the Treaty for the European Union (TEU) and the

[12] HINAREJOS A., The Court of Justice of the EU and the Legality of the European Stability Mechanism, Cambridge Law Journal, Volume 72, Part 2, July 2013, p. 240.

[13] The speech of former Commission Vice President Viviane Reding at the 69th Deutscher Juristentag in Munich (18 September 2012), which deals with this matter, caused a lot of debate.

[14] RUFFERT M., The EMU in the ECJ: A New Dimension of Dispute Resolution in the Process of European Integration, Democracy in the EMU in the Aftermath of the Crisis, Springer Publishing International AG and G. Giappichelli Editore 2017, p. 339, 340, 341, 342.

Treaty for the Function of the European Union (TFEU) to be written into its Preamble[15]. Therefore, the Member States may assign new tasks to the EU institutions, on condition that they do not in any way affect the tasks and powers derived by EU Law for the EU institutions. Recognition for the informal meetings of the Heads of State or Government of the Euro area is accepted, because those meetings have no legal effect on the institutional balance within the EU and are without prejudice to the powers of the European Council.

Thus, the CJEU acted as intermediary in order to ensure the internal constitutionality of the Union's responses to the Eurozone financial crisis. The Court has pragmatically accepted this legal reality, while at the same time it has reaffirmed the primacy of EU law over such separate agreements, and its own jurisdiction to control whether the Member States respect their EU law obligations when concluding separate international agreements[16].

At the same time, these inter se agreements of Member States recognised the "constitutional" role of CJEU in EU legal order, by conferring to it additional judicial functions outside the realm of EU law. (under ESM Treaty and under TSCG[17]). More specifically, pursuant to Article 37, para. 2, of the ESM Treaty, the Board of Governors is to decide "on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty". Under Article 37, para. 3, the dispute is to be submitted to the Court of Justice, if an ESM Member State contests the decision of the Board of Governors. As is clear from recital 16 of the ESM Treaty, the Parties to the ESM Treaty based this role for the ECJ on Article 273 TFEU.

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[15] Also Article 16 of the Treaty on Stability, Coordination and Governance of economic and monetary union between Belgium, Bulgaria, Denmark, Germany, Estonia, Ireland, Greece, Spain, France, Italy, Cyprus, Latvia, Lithuania, Luxembourg, Hungary, Malta, the Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland and Sweden, of 2 March 2012, "*indicates as an objective the integration of its content in the legal framework of the European Union"*.

[16] DE WITTE B., Using International Law in the Euro Crisis, Causes and Consequences, ARENA WP 4/2013, available in www.arena.uio.no., p. 23.

[17] However, the ESM Treaty, by granting of financial assistance to Member States that are experiencing severe financing problems, is in legal terms more innovative than the Fiscal Compact. By imposing a strict fiscal discipline, the latter is meant to reduce the risk of public debt crises but reflects to a large extent the normative content of EU secondary law. Yet they are linked because it was agreed that the granting of financial assistance in the framework of the new programmes under the ESM, is conditional, as of 1 March 2013, in the ratification of the Fiscal Compact by "the ESM Member concerned", as provided in recital 5 of the ESM Treaty.

It could be argued that, the need to maintain the dispute as a strictly intergovernmental matter clashed with the political desire to involve the Commission in assessing the correct implementation of the balanced (or in surplus) budget rule (Article 3(1)(a)) in domestic law, according to Article 3(2)[18], which is the only dispute falling under the power of the ECJ pursuant to Article 8 of that agreement[19]. This explains the crucial, but limited role given to the Commission in issuing a report on whether a Contracting Party implements the balanced budget rule into domestic law properly, and on the other hand, the automaticity of the ECJ involvement, should the Commission report negatively against a party (in that situation "[. . .] the matter will be brought to the Court of Justice [...] by one or more Contracting Parties").

The common denominator for involving the ECJ can be identified in the need to safeguard the consistency of those international Treaties with the fundamental role the ECJ enjoys in the EU legal order under Article 19 TEU ("it shall ensure that in the interpretation and application of the Treaties the law is observed"). The reference to the ECJ, both for solving disputes between themselves and for protecting individual rights as guaranteed by EU law (or by provisions which are identical in substance to it), is not just in line with the principle of institutional conferral. It is also a route the Contracting Parties are bound to take in order to respect the autonomy of EU law[20].

In other words, increasing the role of the jurisdiction of the ECJ by virtue of inter se agreements seems to be a means to ensure the full effect of EU law, its autonomy and, ultimately, the particular nature of the law established by the Treaties, even when the EU law is deemed to apply beyond its original architecture.

For that reason, the juxtaposition of the EU legal framework and an international instrument ratified by a limited number of Member States should be accepted on a temporary

[18] Article 3 (2), stipulates that *"the rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties at the latest 1 year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or other- wise guaranteed to be fully respected and adhered to throughout the national budgetary process".*

[19] BONICHOT J. - C., Governance économique, financière et monétaire dans l'Union européenne: le role de la Cour de justice, Journal 08 September 2014, European Court of Auditors, p. 22.

[20] BARATTA R., The Role of the ECJ Beyond EU Law, Democracy in the EMU in the Aftermath of the Crisis, Springer Publishing International AG and G. Giappichelli Editore, 2017, p. 353.

basis only. Such a mixture may reinforce the fragmentation and uncertainty of the legal framework, and, as far as the ESM Treaty and the Fiscal Compact are concerned, the division between the Euro area and non-euro area States. Although inter se agreements remain at Member States' disposal, and this intergovernmentalism might be the best means to achieve a supranational end[21], as the ECJ held in Pringle, "Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope"[22], since they raise legal issues and concerns not always easy to fit in the legal framework of primary law.

[21] PEERS ST., Towards a new form of EU law? The use of EU institutions outside the EU legal framework, European Constitutional Law Review 2013, p. 40.

[22] ECJ Judgment of 27 November 2012, Case C-370/12, Thomas Pringle versus Irish Government, Ireland and General Advocate (preliminary ruling), ECLI:EU:C:2012:756. , paragraph 101.

A. The CJEU as guardian of the cohesion of New European Economic Governance Framework within EU's legal order

Chapter 1: The limited adjudicative functions of the CJEU in the EMU before the Eurozone crisis.

Paragraph 1: The choice of national policies coordination in EMU matters.

Policy co-ordination seeks to promote policy learning through the exchange of information, best practices and policy effectiveness, as well as the achievement of certain policy goals or adherence to rules through multilateral surveillance and peer review. The forms of European economic governance associated with policy coordination are described as more "intergovernmental in nature and opposing to the Community method which is often treated as synonym for rules-based governance[23].

Indeed, compliance with Council guidelines and recommendations in the fields of fiscal and employment policy cannot be taken for granted in the same way as in the case of EU regulations and directives, where non-compliant member states can be taken to the ECJ under the treaty infringement procedure[24].

In order to achieve their aims effectively, the new instruments of policy co-ordination require either explicitly or implicitly a high degree of openness, trust and co-operation from political actors; changes in the way administrations engage in policy-making processes and which procedures and institutions they use; and finally they expect from civil society and the public at large a receptiveness towards information, ideas, arguments and criticism from the EU and its member states.

Therefore, policy co-ordination does not produce directly binding supranational law and lacks hard sanctions elements, except in the case of the excessive deficit procedure (EDP) of the Stability and Growth Pact (SGP). Member states have not shed their competences in fiscal and

[23] ARMSTRONG K. A. The New Governance of EU Fiscal Discipline, Forthcoming European Law Review (2013/14), p. 1, 2.

[24] MEYER C.O. and UMBACH G., Europeanisation of National Economic Governance Through Policy Coordination? Gains and Pains of a New Policy Instrument, Economic Government of the EU, Macmillan Publishers Limited 2007, p. 91.

employment policies, but are nevertheless subject to three types[25] of adaptation pressures arising from the legal provisions of policy co-ordination.

This method comprises common objectives set out on a central level and on the other hand national action for the completion of the relative purposes. As introduced by the Treaty of Maastricht, policy coordination was based in a more 'relaxed' self-discipline which due to the European debt crisis had to be reinforced[26]. In other words, it relies primarily on voluntary action on the part of national and subnational decision-makers and intermediary actors, backed up by reporting to time-tables, peer review, information exchange, benchmarking and public naming and shaming.

Paragraph 2: The TFEU provisions in EMU matters - Treaty of Maastricht (1992).

The Treaty on European Union, also known as the Maastricht Treaty, which entered into force on 1 November 1993, established the principles of the EMU and led ultimately to the euro as a common currency in 19 out of 28 Member States. The proper functioning of EMU required the introduction of a mechanism to safeguard the soundness of public finances and to reduce the risk of spillover from Member States pursuing unsuitable fiscal policies.

The objective of ensuring the sustainability of Member State budgets was already enshrined in the Stability and Growth Pact (SGP) originally enacted in two Council Regulations in 1997, and currently attached as Protocol No. 12 to the TFEU[27]. It requires the Member States

[25] MEYER C.O. and UMBACH G., Europeanisation of National Economic Governance Through Policy Coordination? Gains and Pains of a New Policy Instrument, Economic Government of the EU, Macmillan Publishers Limited 2007, p. 93, According to them, policy co-ordination *comprises reporting requirements to be executed by national administrations, which ought to submit reports and information to other member states, the EU Commission and the Council according to certain time-tables, provide statistical data and review other member states; substantive policy requirements in the sense of striving for qualitative or quantitative targets set for the Union as a whole (guidelines and so on) and for individual member states through their own commitments or Council recommendations and decisions and finally ideational requirements regarding the willingness of different actors within the policy co-ordination cycle to be open about mistakes, critique of others, 'best practices" and other kinds of information*.

[26] MILIONIS N., European Economic Governance and national policies: from fiscal self-discipline to enhanced surveillance, The Court of EU as safeguard of the easy functioning of the Union and citizens' rights, Publications Sakkoula, Athens-Thessaloniki 2016, p. 265-283 (in Greek).

[27] Protocol No. 12 on the Excessive Debt Procedure, OJEU C 115, 9 May 2008, p. 279.

of the EMU to maintain their public deficit below the yearly ratio of 3% of the GDP and the total public debt below 60% of the GDP. The weaknesses of the enforcement mechanisms of the SGP, however, allegedly ensured widespread non-compliance by EMU countries with the SGP. To address this situation, therefore, the EU institutions and the Member States pushed for a tightening of budgetary constraints at a supranational level.

After the amendments of 2005, following the failure to take effective action against Germany and France[28], excessive deficit procedure has lost much of its significance and credibility. Furthermore, the procedure only kept an eye on one of the two reference values alluded to in Art 126 TFEU, namely the budgetary deficit, under the assumption that low deficits would entail reduction of public debt.

The Treaty of Lisbon did not change the basic construction of the EMU as it was introduced by the Treaty of Maastricht, which is characterised by an asymmetry[29]. Whilst the Monetary Union is a supranational one, the Economic Union remains intergovernmental. This division is in line with the traditional rather technocratic EU policy approach: Discipling national democracies by a common monetary policy instead of replacing their decisions by a common economic and fiscal policy.

National economic and fiscal policies should be aligned with certain policy goals set at EU level but without any legally binding mechanism. They should be disciplined by the markets based on the assumption that, as long as the position of a Member State on the financial markets is the same as of any other private institution, markets will indicate, in form of decreasing or increasing the interest rates on government bonds, whether a national economic and fiscal policy is convincing or not. Therefore, the coordination of Member States' economic and fiscal policies was depoliticised at EU level by definition.

This basic construction of the EMU cannot be changed outside a formal Treaty change procedure. This sets the limits for secondary law such as the Six Pack or the Two Pack Regulations as well as for the international treaties concluded by a subset of Member Stares such

[28] ECJ Judgment of 13 July 2004, Case C-27/04, Commission v. Council of the EU, ECLI:EU:C:2004:436 (recognising wide discretion to the Council whether to impose sanctions under the SGP or held in abeyance the excessive deficit procedure against two Member States recommended by the Commission).

[29] European Parliament Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy, Study for the AFDO Committee 2016.

as the Treaty on Stability, Coordination and governance in Economic and monetary Union (TSCG) and the Treaty establishing the European Stability Mechanism (ESM-Treaty).

The Court has effectively interposed itself alongside the EU legislature as direct policymaker[30]. Its policymaking functions are typically activated using the preliminary reference procedure, which empowers and/or compels Member State courts to make references to the Court to rule on, inter alia, the interpretation of provisions of Union Law. The Court's assertion of direct policymaking functions has had a transformative impact on the development of substantive EU law, so much that in specific instances the Union legislature has subsequently done little more than transpose the Court's interpretative choices into secondary legislation.

The CJEU's contribution to the EU integration process through the exercise of its conferred judicial functions, is widely acknowledged. Exercising its interpretative functions, the Court of Justice has radically recast the nature of the EU legal order and, in particular, the relationship between EU and Member State law[31]. There is an enduring impact of the Court's interpretative choices on both the vertical and horizontal balance of competences within the EU legal order.

The CJEU has also played a critical role in determining the internal constitutionality of the Union's responses to the Eurozone financial crisis. Thus, it has been repeatedly requested to determine whether specific political and legal measures adopted in response to the Eurozone crisis as intra or ultra vires the European legal order. The Treaty framework was therefore employed, without question, to measure the constitutionality of acts of the EU legislative and administrative institutions as well as the activities of the Member States.

i) The soft law Council recommendations for each country in multilateral surveillance procedure.

The act of delivering national stability/convergence programmes to the Commission starts the surveillance process[32]. The Commission assesses whether the economic assumptions where the programme is based are plausible, whether the adjustment path towards the medium-

30 HORSLEY T., 'Institutional Dynamics Reloaded: The Court of Justice and the Development of EU Internal Market', In P. Koutrakos, & J. Snell (Eds.), Research Handbook on the Law of the EU's Internal Market (Edited by P. Koutrakos and J. Snell), 2017, p. 414-422, Elgar.

31 HORSLEY T., The Court of Justice as an Institutional Actor, Judicial Lawmaking and its Limits, Cambridge Studies in European Law and Policy, 2018, p. 13-14.

32 ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p. 1338.

term budgetary objective is appropriate and whether the measures being taken and/or proposed to respect that adjustment path are sufficient to achieve the medium-term objective over the cycle. Then the Council, based on a recommendation from the Commission, delivers its opinion on the programme. It may either accept it or invite the Member State concerned to submit adjustments.

Before the 2011 reform of the SGP in which we will refer later, the Council was required to address the non-compliant Member State with a (warning) recommendation advising necessary adjustment measures if that institution identified significant divergence of the budgetary position from the medium-term budgetary objective, or the adjustment path towards it in the implementation of the stability/convergence programmes

In the final step of the process, the Council was obliged to make a recommendation to the Member States concerned to take prompt corrective measures, if the divergence of the budgetary position or the adjustment path towards the Medium Term Objective (MTO) was persisting or worsening".

Therefore, recommendation, as a non-legally binding act (Article 288(4)TFEU), plays a pivotal role in the surveillance process[33]. On the one hand, it has a guiding function as a means of providing advice to States on the basis of the broad economic policy orientations and the assessment of national stability or convergence programs. On the other hand, it has a sanctioning function to the extent it is defined as one of the acts that can be adopted by the Council in the event of non-compliance.

The extensive use of recommendations as non-legally binding measures in order to set policy goals for the Member States depicts a restricted role of the ECJ since non-compliance with those recommendations does not result into a breach of Union law[34]. The legal obligation, classically studied as the rule of law, appears as an example, among others, of regulation of human behaviour[35]. Following this conception, which stipulates the importance of soft law

[33] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 165 (in Greek).

[34] European Parliament Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy, Study for the AFDO Committee 2016, p. 38.

[35] LEFEVRE S., Les actes communautaires atypiques, Bruylant / CERIC, 2006, p. 117.

instruments such as recommendations in regulating human behaviour, the boundaries of jurisdiction are thus expanding.

In the Grimaldi case[36], the Court affirmed that a recommendation was certainly not binding, but not without legal effect. Since more interpretations of national rules are possible, the duty of loyal cooperation seems to require that national courts follow the interpretation which best corresponds to the purpose of the recommendation. In addition, the Community judicature has not hesitated to use non-binding instruments to delimit the areas covered by a Community policy and thus to allocate its competences between Member States and Community institutions- that without being binding, however, they have sufficient effect to be qualified as legal[37].

ii) The hard law Council decisions in the excessive deficit procedure (EDP).

The primary legal basis for the EDP is Article 126 TFEU and Protocol No 12 annexed to that Treaty. These specify the different steps in the procedure and the reference thresholds. They are complemented by secondary legislation in the form of the SGP, which was introduced in 1997 and provides operational clarifications on the circumstances in which an EDP should be launched.

The EDP has undergone several reforms (in 2005, 2011 and 2013) aimed at improving its implementation by strengthening reporting requirements and sanctions and introducing the flexibility to adapt the procedure to a changing economic environment.

The main parties to an EDP in order to maintain the soundness of public finances, are the Member State concerned, the Commission (DG Economic and Financial Affairs and Eurostat) and the Council[38]. Firstly, the Member State is required (a) to report statistical data to Eurostat twice a year (before 1 April and 1 October), (b) to correct the excessive deficit situation by the deadline given by the Council, (c) to deliver the fiscal effort required in the respective EDP recommendation, and (d) to report on action taken. The Eurostat on the other side is responsible for assessing the quality both of actual data reported by Member States and of the underlying government sector accounts. The DG Economic and Financial Affairs is responsible for

[36] ECJ Judgement of 13 December 1989, C-322/88, Grimaldi v Fonds des maladies professionnelles, ECLI:EU:C:1989:646.

[37] LEFEVRE S., Les actes communautaires atypiques, Bruylant / CERIC, 2006, p. 127.

[38] Special Report 10/2016, Further improvements needed to ensure effective implementation of the excessive deficit procedure, European Court of Auditors, p. 17.

assessing the Member State's compliance with the debt and deficit thresholds and monitoring its action to correct the excessive deficit situation. Finally, the Council, on the Commission's proposal, decides to launch, to step up or to abrogate the EDP.

When adopting legally binding decisions within the budgetary surveillance procedure, according to Article 126 (10) TFEU, the action for infringement under Articles 258 and 259 TFEU is excluded with regard to all decisions (based on Article 126 (1) to (9) TFEU), except for the decisions imposing sanctions. However, it is necessary to mention that the action for annulment, the action for failure to act and the preliminary reference procedure are not excluded, although, in practice, it would be difficult for the Court to overcome the issue of admissibility in such cases.

Recently, on 21 October 2015, the Commission adopted the communication on steps towards completing economic and monetary union[39] in order to implement the guidelines presented in the so-called 'Five Presidents' Report' in June 2015, towards a strengthened and more streamlined budgetary surveillance procedure[40]. The communication, along with a White paper on the future of Europe[41] and a Reflection paper on the Deepening of the EMU[42], adopted by the Commission in March and May 2017 respectively, are intended to take forward the process of deepening the EMU and boost competitiveness. The package of measures includes improved tools for economic governance, including the creation of national competitiveness boards and an advisory European Fiscal Board. The latter is supposed to provide a public and independent assessment at European level, of how budgets and their execution perform against the economic objectives and recommendations set out in the EU fiscal governance framework[43][44]. Since the steps proposed are both ambitious and pragmatic, concerted action from all actors involved will deem to be necessary.

[39] European Commission Communication, COM(2015) 600 final of 21 October 2015 'On steps towards completing Economic and Monetary Union'.

[40] Completing Europe's Economic and Monetary Union', Report by Jean-Claude Juncker, in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, (Five Presidents Report, 22 June 2015.

[41] White paper on the future of Europe (March 2017): https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en.

[42] Reflection Paper on Deepening of the EMU, May 2017, https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en.

[43] Five Presidents' Report, Jean-Claude Junker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, "Completing Europe's Economic and Monetary Union, Brussels, 22 June 2015, p.14.

Paragraph 3: The Stability and Growth Pact's (SGP) original form (1997).

The Stability and Growth Pact (SGP)[45] has established a system of multilateral surveillance over fiscal policies in Member States. It is implemented by the European Commission and Council of the European Union with the objective of ensuring fiscal discipline in Member States. The rationale for the surveillance is that one country's fiscal policies can adversely affect others, which constitutes a phenomenon particularly pronounced in monetary unions.

This mechanism comprises two arms, one preventive and the other corrective. The preventive arm aims to ensure sound budgetary policies in the medium-term and avoid excessive deficit situations. The corrective arm addresses excessive deficit situations and is known as the excessive deficit procedure (EDP). Member States that breach the ceiling on budgetary deficit or debt (respectively 3 % and 60 % of GDP) may be subject to an EDP.

The main objective of the preventive arm, as set in Council Regulation No 1466/97, was to ensure that Member States rapidly converged towards a close-to-balance or surplus budget position, which would then allow them to deal with normal cyclical fluctuations without breaching the 3 % limit on headline deficit[46].

In 2005, the target position for each Member State was recast in terms of a structural balance[47], which has to converge towards their country-specific medium-term objective (MTO). The MTOs, which are updated every three years, are targets for cyclically-adjusted budget positions net of one-off and other temporary measures (i.e. targeted structural balances). MTOs should be set so as to: (i) provide a safety margin with respect to the 3% of GDP deficit

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[44] In its 2017 Annual Report, the European Fiscal Board stated in this context: *"While flexibility is desirable, the growing number of flexibility provisions under the SGP is increasingly perceived as lacking transparency and, at times, to be determined in an ad hoc manner including in response to political considerations"*.

[45] The SGP is based on Articles 121 and 126 of the Treaty on the Functioning of the European Union (the "Treaty") and Protocol No 12 annexed to it, while Article 136 is the basis for measures specific to euro area Member States. The preventive arm was established by Council Regulation No 1466/97 of 7 July 1997 (further amended in 2005 and 2011).

[46] IMF Working Paper, "Playing by the Rules: Reforming Fiscal Governance in Europe"; WP/15/67.

[47] Budget balance and the deficit are equal in absolute value, but have opposite sign. The deficit of 3 % equals balance of - 3 %.

limit for each Member State; (ii) ensure convergence of debt ratios towards prudent levels; and (iii) allow room for budgetary manoeuvre and public investment requirements.

According to the Regulation, the MTO cannot be below -1 % of the gross domestic product (GDP) for euro area Member States. Signatories of the TSCG have committed to MTOs of at least -0.5 % of GDP – unless their debt is below 60 % of GDP, in which case the limit remains -1 %[48].

With growth of the EU economies having slowed since 2007 and public debt ratios having increased sharply in many Member States, the preventive arm has gained importance beyond the need to create fiscal space for operation of automatic stabilisers and for discretionary anticyclical fiscal policy[49].

Fast convergence towards the MTOs has become crucial to reduce excessive debt ratios[50]. Even the most indebted Member States would quickly put their debt ratios on a declining path as soon as they reached their MTOs. This prompted the Commission to acknowledge that compliance with the preventive arm is an essential condition for not triggering the debt-based excessive deficit procedure (EDP)[51].

Chapter 2: The participation of the CJEU after the Eurozone crisis.

Paragraph 1: Under the Preventive and the Corrective Arm of the SGP (2011 reform).

Side-by-side with efforts to ensure financial stability through financial assistance to individual euro-area states and building up a 'firewall'[52] credible enough to prevent the crisis

[48] REPASI R., The EU Economic Governance Framework and the Issue of Debt, Governance and Security Issues of the European Union, ASSER PRESS Springer 2016, p. 137.

[49] Special Report 18/2018, Is the main objective of the preventive arm of the Stability and Growth Pact delivered?, European Court of Auditors, p. 16.

[50] Audit Planning Memorandum, Audit of the European Semester, European Court of Auditors, 02.08.2016, 16FEG202, p. 16, In more detail, "*the key indicators used to coordinate sound fiscal policies under the preventive arm are: a) the target level of structural deficit/GDP ratio to be achieved referred to as 'medium term objective' (MTO); b) the annual rate of deficit adjustment necessary to reach the MTO referred to as the 'adjustment path'; and c) the annual rate of government expenditure growth referred to as the 'expenditure benchmark' (EB) introduced in 2011 as a complementary constraint".*

[51] Report prepared in accordance with Article 126(3) of the Treaty on Italy, Commission 2016, Brussels, 22.2.2017 COM(2017) 106 final.

[52] TUORI K., The European Financial Crisis - Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, Department of Law, p. 17.

from spreading, European economic governance has gradually been reinforced with a view to tightening fiscal policy discipline in Member States and intensifying coordination of their macro-economic policies. The first step on this path consisted of the legislative package which the Commission introduced in autumn 2010 and which finally entered onto force in December 2011.

The package, composed of five Regulations and one Directive and generally referred to as the "Six Pack"[53], has profoundly modified the architecture of EU economic governance and enhanced the capacity of EU institutions to prevent and correct Member States deviations from the SGP standards. Its primary objective was to increase the efficacy of both the preventive and the corrective am of the Stability and Growth Pact: that is, the mutual surveillance procedure under Art 121 and the excessive deficit procedure under Article 126 TFEU.

On the one hand, the "Six Pack", improved the so-called "preventive arm" of the SGP, strengthening the reporting commitments of Member States with respect to their fiscal performance and introducing a new "macro-economic imbalance procedure" run by the European Commission to alert Member States of the destabilising elements of their economies. In doing so, it strengthens the economic governance in the EU and the euro region since the introduction of economic and monetary union.[54]

On the other hand, the "Six Pack" overhauled the so-called "corrective arm" of the SGP, empowering the Commission to sanction Member States for breaches of the deficit and also debt rules, depriving the Council of most discretion in the application of fines against States subject to the EDP.

Moreover, the "Six Pack" introduced minimum requirements for the design and operation of State budgetary laws, and gave formal recognition to a new governance framework—the so-

[53] Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, Regulation (EU) No. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, Regulation (EU) No. 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances, Council Regulation (EU) No. 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.

[54] BARBA N., Elements of Fiscal Law, Z΄edition, Publications Sakkoula, Athens-Thessaloniki, 2014, p. 374 (in Greek).

called "European Semester", informally set up in 2010[55]—in which Member States submit their draft budgets to the Commission for evaluation and discussion about their compliance with the broader economic forecasts of the EU[56].

The European Semester starts with the publication by the Commission of an Annual Growth Survey which is supposed to provide a basis for integrating macroeconomic and fiscal surveillance. In its spring meeting, the European Council then issues policy orientations covering fiscal and macroeconomic structural reform as well as growth enhancing areas, and advises on linkages between them. The legal form for this guidance is provided by the integrated broad economic and employment-policy guidelines, invoked by Article 121 TFEU, as well as their National Reform Programmes, introduced by the new macroeconomic imbalances procedure.

The annual European Semester, which consists the synthesis of the instruments of the coordination and surveillance in EU[57], culminates in the Commission's proposal to the Council of country-specific recommendations (CSRs) in all of these areas. Following their approval by the Council, Member States are expected to implement the recommendations. In particular, in June or July, on the basis of the Commission's assessment, the Council issues country-specific guidance which is supposed to influence Member States when these finalise their draft budgets for the following year[58].

Besides reinforcing the existing mutual surveillance and excessive deficit procedure, the Six-pack introduced a new Excessive Imbalances Procedure (EIP), which exceeds the limits of fiscal policy and reaches out to general economic policy. The new procedure was established through the Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances, issued under Article 121(6) TFEU[59].

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[55] European Council Conclusions of 17 June 2010, EUCO 13/10, p. 5.

[56] LEROY M., Le gouvernement européen par la rigueur budgétaire, GFP No 4-2018, July-August 2018, p. 23.

[57] MARTUCCI F., L'ordre économique et monétiser de l'Union européenne, Bruylant, 2016, p. 312, according to whom "le semestre européen (…) consiste la synthèse des instruments de coordination et de surveillance dans l'Union", p. 448.

[58] European Commission, 'Making it Happen - the European Semester' (announcement on the Commission's website), available at http://ec.europa.eu/europe2020/making-it-happen/index_en.htm assessed 19 October 2012.

[59] In the preamble to the Regulation, (n. 58), the new procedure is justified by reference to the need to broaden *'surveillance of the economic policies of the Member States … beyond budgetary surveillance to include a more detailed and formal framework to prevent macroeconomic imbalances and to help the Member States affected to establish corrective plans before divergences become entrenched';* '*such broadening of the surveillance of*

The procedure includes an alert or early-warning system, which is based on ten indicators covering the major sources of macro-economic imbalances and is managed by the Commission. The Commission and the Council may adopt preventive recommendations under Article 121(2) of the TFEU at an early stage before imbalances become large.

In more serious cases, there is also a corrective area where an excessive balance procedure can be opened for a Member State. The Member State concerned will have to submit a corrective action plan with a roadmap and deadlines for implementing corrective action. The Commission will step up surveillance in the basis of regular progress reports submitted by the Member State.

Lastly, the Directive (EU) No 2011/85 on requirements for Member State budgetary frameworks, epitomises a new intrusion in Member States budgetary sovereignty[60]. A central objective of the Directive is to ensure that national fiscal planning is consistent with the Stability and Growth Pact. The Preamble to the Directive stresses that this requires multi annual perspective and pursuit of medium-term budgetary objectives (Recital 19). Each Member State should have in place numerical fiscal rules which effectively promote compliance with its obligations deriving from the TFEU in the area of budgetary policy over a multi annual horizon for the general government as a whole. In particular, these rules should promote compliance with the reference values on budget deficit and public debt set in accordance with the TFEU.

Moreover, the rules are expected to facilitate adoption of a multi annual fiscal planning horizon, including adherence to Member States' MTO, as defined in their stability programme under the mutual surveillance procedure. (Art. 5) The same objective is pursued by Member States' obligation to 'establish a credible, effective medium-term budgetary framework proving for the adoption of a fiscal planning horizon of at least 3 years, to ensure that national fiscal planning follows a multi annual fiscal planning perspective' (Art. 9(1)).

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economic policies should take place in parallel with a deepening of fiscal surveillance' (Recital 7). It is argued to be '*appropriate to supplement the multilateral surveillance procedure referred to in paragraphs 3 and 4 of Art 121 TFEU with specific rules for the decision of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union'* (Recital 9).

[60] TUORI K., The European Financial Crisis - Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, Department of Law, p. 18.

Following on this line of reform, a second set of EU Regulations, generally referred to as the "Two-Pack"[61], was adopted in May 2013, further tightening European control of national budget processes and making further incursions into national budgetary autonomy.

Along with a general tightening up, a characteristic of the incremental reinforcement of the European Economic Governance, and having as legal basis Article 136 TFEU, this mechanism has increased harmonisation and control of national budgetary processes as well as further differentiation of the legal framework applicable to the euro area.

Euro-area states are therefore required to introduce a common budgetary timeline and common budgetary rules, such as independent macroeconomic forecasts and independent fiscal councils, that monitor the implementation of national rules. Pursuant to this innovation, national Governments are required to present to the Commission a draft of their budget bills in September of every year, even before the text is tabled for debate and approval in national Parliaments. In other words, European Semester includes the monitoring of national and Community policies in the first half of the year, while enforcement by the Member States of the guidelines or recommendations adopted at the EU level takes place during the second semester or the so-called "national semester"[62].

The Commission then may demand Member States to introduce changes to their budgetary bills within 3 weeks, if these appear to be grossly in deviation from EU standards of budgetary performance, and specifically their obligations under the SGP and the recommendations the Council has issued within the European Semester.

The Two-pack aims to anchor the economic adjustment programmes in legislation, while at the same time seeks to harmonise the specific conditions and monitoring processes attached to financial assistance with the general procedures under Articles 121 and 126 TFEU and the SGP, thus integrating the specific monitoring connected to financial assistance within the general framework of European Economic Governance.

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[61] Regulation (EU) No. 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, Regulation (EU) No. 472/2013 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.

[62] DELORS J. S., Fernandes et E. Mermet, The European Semester: only a first step, Notre Europe, Paris, Policy Brief, February 2011, no 22.

Article 126(9) TFEU has functioned as a bridge between the EDP and economic adjustment programmes conditioning financial assistance as set out in Memorandums of Understanding. This provision authorises the Council to give notice to a Member State to take, within a specified time limit measures for deficit reduction when that Member State persists in failing to put into practice previous recommendations the Council has issued under the EDP. The Council may also request the Member State to submit reports in accordance with a specific timetable in order to examine the adjustment.

Hence, a particular monitoring regime for Member States confronting difficulties is being created. Regulation (EU) No 472/2013 includes provisions on graduated monitoring for states subject to EDP. In turn, Regulation (EU) No 473/2013 sets out explicit rules for enhanced surveillance for those Member States facing severe difficulties with regard to their financial stability; in other words, those in receipt of financial assistance on either a precautionary basis or as part of a full-scale assistance programme, as well as those in the process of exiting such assistance. European responses to the fiscal crisis have consequently led to a plethora of monitoring and coordination processes which need to be mutually integrated. In doing so, the European Semester, which was first introduced in 2010 for the broad coordination of economic and fiscal policies across the EU and subsequently formalised through Regulation 1175/2011, as a part of the so-called 'Six-Pack', is considered to be according to Professor Kaarlo Tuori, an effort at meta-level coordination of those diverse monitoring and coordinating processes[63].

i. The new role of Council decisions in multilateral surveillance procedure.

The surveillance is co-ordinated within the European Semester process, which was introduced in 2011 by Regulation (EU) No 1175/2013 which amended the Regulation on the surveillance of budgetary positions and coordination of economic policies (No 1466/97). The political debate on improving the EU level fiscal and economic governance framework is continuously evolving[64].

The objective of the European Semester is spelt out in Article 2a (1) of Regulation 1466/97 as amended by Regulation 1175/2011[65]: "In order to ensure closer coordination of economic policies and sustain convergence of the economic performance of the Member States,

[63] TUORI K., The European Financial Crisis - Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, Department of Law, p. 20.

[64] Audit Planning Memorandum, Audit of the European Semester, 16FEG202, European Court of Auditors, p. 8.

[65] Article 2a (1) of Regulation 1466/97 as amended by Regulation 1175/2011.

the Council shall conduct multilateral surveillance as an integral part of the European Semester for economic policy coordination in accordance with the objectives and requirements set out in the Treaty on the Functioning of the European Union (TFEU)."

The main work coordinated under the European Semester includes[66]: a) issuing guidelines for economic policies of the Member States and of the EU (the so called 'broad economic policy guidelines' BEPGs) and employment guidelines; b) the submission by Member States and assessment by the Commission of stability or convergence programmes (SCPs) and national reform programmes (NRPs); c) the surveillance of macroeconomic imbalances; and d) issuing guidance and recommendations to the Member States.

At the EU level, the steering role under the European Semester pertains to the Commission, the European Council, the Council and the European Parliament. Together they contribute to setting EU priorities, guidelines, rules and targets, such as those in the Europe 2020 strategy for growth and jobs. The European Parliament has a legislative as well as a consultative role through the 'Economic Dialogue'.

Examining the European Semester process in more detail, Member States are required to submit their Stability and Convergence Programmes (SCPs) in spring. The act of delivering national SCPs to the Commission starts the surveillance process and those SCPs are assessed by the Commission. The Commission then produces its assessment of whether the economic assumptions on which the programmes are based are plausible, whether the adjustment path towards the medium-term budgetary objective is appropriate and whether the measure being taken and/or proposed to respect that adjustment path are sufficient to achieve the medium-term objective over the cycle[67]. The results of these assessments are published in Commission Staff Working Documents (SWDs).

Then the Council, on the basis of the Commission's recommendation, issues its opinion on the programme. (Arts 5(2) and 9(2)). It may either accept or invite the Member State concerned to submit adjustments. The Commission can address the non-compliant Member State

[66] Article 2a (2) of Regulation 1466/97 as amended by Regulation 1175/2011.

[67] See Art. 5(1) and 9(1) of Regulation 1466/97, as amended by Regulation 1175/2011. The benchmark annual improvement of the cyclically-adjusted budget balance, net of one-off and other temporary measures, was first-in 2005- set at 0,5% GDP (with further corrections depending on the general position of the economic cycle), to finally become 0,5% GDP or more (the latter may be chosen in respect of countries exceeding the convergence debt level or demonstrating risks of debt sustainability) pursuant to the 2011 reform.

with a warning, while the Council, acting on a recommendation by the Commission, addresses the Member State concerned its recommendation devising the necessary policy measures and setting a deadline for addressing the deviation. (Art. 6(2)).

In the last step of the process, the new Art. 6(2)(4), provides for the possibility of the adoption by the Council of a "revised recommendation" or/and a formal "no effective action" decision, with which the Council notes that the State has not taken any substantive action. When the Commission recommends the aforementioned decision, the Council has a chance to adopt it first by qualified majority. If it fails and the non-compliance persists, the Commission is required to submit its proposal again and the Council may reject it during the next ten days, by simple majority and without a vote of the Member State concerned.

The introduction of a binding legal act such as the Decision (Article 288 (4) TFEU), which is one of the acts which may be challenged by an action for annulment before the ECJ (Article 263 (1) TFEU), in an area that until then was only operated by soft law, is an important development that somehow shifts the multilateral surveillance into the field of legal enforcement[68]. It should be noted, however, that the above decision is of a confirmatory nature and, in that sense, the very adoption of that decision constitutes a sanction[69].

However, while the basic idea of structuring the procedure in a such a way in order for national governments to be able to shape their budgetary plans accordingly in the second half of the year is undoubtedly decisive, it does not change the previous balance of powers between the actors involved in the surveillance process. Better timing may give national governments a better chance to shape their budgets responsibly, but in no way does it legally bind them towards that direction[70].

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[68] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 166 (in Greek).

[69] One type of hard EU act, i.e. , a Decision, may contain rules of soft law insofar as it is not accompanied by sanctions. PAPADOPOULOU R.-E., The Soft Law within the European Union legal order, Nomiki Bibliothiki, Athens, 2012, p. 154-155(in Greek).

[70] As the Commission summarised the result: "*In spite of the urgency of the situation, progress by Member States in implementing the guidance of the 2011 Annual Growth Survey is below expectations. There is not yet full ownership, at national level, of the radical changes which have been decided in terms of future economic governance. There is sometimes a disconnection between what is decided at EU level and the length of time it takes to come through in national policy decisions*"; Communication from the Commission Annual Growth Survey 2012, vol. 1/5, COM(2011) 815 final, 23 November 2011.

ii. The exception of judicial control - Council decisions initiating EDP (Article 126 (10) TFEU).

The role of the CJEU is, within EMU, in particular within the economic coordination framework, a restricted one[71]. This is because of the extensive use of recommendations in order to set policy goals for the Member States. As non-legally binding measures (Art. 288(4) TFEU) non-compliance with them does not result into a breach of EU law.

Furthermore, when adopting legally binding decisions within the budgetary surveillance procedure, according to Article 126(10) TFEU, the action for infringement under Articles 258 and 259 TFEU is excluded with regard to all decisions (based on Art. 126(1) to (9) TFEU), except for decisions imposing sanctions. Thus, the action for annulment, the action for failure to act and the preliminary reference procedure are not excluded.

Any attempt to strengthen the role of the CJEU either by replacing recommendations with legally binding decisions or by allowing the action for infringement within the budgetary surveillance procedure requires a formal Treaty change. This can not be achieved also with respect to a subset of Member States (e.g. such as the Euro area member States), since all means of an enhanced cooperation of a subset of Member States (either under Art. 20 TEU, Art. 136 TFEU or by concluding intergovernmental Treaties) may not violate Primary law and, by that, may not modify it.

Beside the limits set out in the Treaties in order to extend the action for infringement under Articles 258 and 259 TFEU to measures adopted under Article 126(1) to (9)TFEU, one may also question the effectiveness of such an extension. Among legal scholarship in particular, the budgetary surveillance procedure under Article 126 TFEU is considered to be a more political procedure rather a judicial one. Although non-compliant Member States are assessed by the Commission, they are entitled to justify themselves in front of the Council, which can always overrule the Commission. If that is the case, the Commission may either seek an annulment of the Council's decision under Article 263 TFEU, or initiate against non-compliant Member States an action for infringement. While the latter is excluded by Article 126(10) TFEU, the first possibility will most likely fail because of the broad discretion conferred upon the Council and

[71] European Parliament Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy, Study for the AFDO Committee 2016, p. 38.

because the Commission would have to prove arbitrariness of the Council, a difficult task in practice.

Against this background, a conceptual deletion of Article 126(10) TFEU means that the discretion of the Council on establishing the existence of an excessive deficit and on deciding whether the necessary adjustment measures were adopted by the Member State, would be replaced by the judicial discretion of the Court. Whether courts, however, are better equipped for assessing complex economic situations and for taking such technocratic decisions, if requested by the Commission, remains doubtful.

The Court itself is aware of its lack of expertise in cases relating to "complex assessments". With regard, for example, to the assessments by the European Commission in the area of state aid law, the CJEU has stated that the review by the European Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers.

The Court therefore, examines only whether the Union institution or agency that has the necessary technical, economic or scientific expertise, used its discretionary powers relating to the complex assessments properly and did not commit any manifest errors in its assessment or misused its powers.

Applying this reasoning to matters relating to the budgetary surveillance procedure, the CJEU would not make an own assessment as to whether there is an infringement by the non-compliant Member State, but it would follow the Commission's assessment, unless it was to find manifest errors in the Commission's assessment of violation. In the end, a conceptual deletion of Article 126(10) TFEU would lead to a situation in which, in principle, the political discretion of the Council is replaced by the political discretion of the Commission.

At this point another issue regarding the effectiveness of a possible transformation of the mere political procedure in front of the Council to a judicial one should be taken into account. In terms of legal effect, a judicial judgement stating the non-compliance of a Member State is confined to the manifestation that this Member State has failed to fulfil an obligation under the Treaties.

Pursuant to Article 260(1) TFEU, "the State shall be required to take the necessary measures to comply with the judgement of the Court". Therefore, continuous non-compliance of

a Member State would only entitle the Commission to bring against it an action for failure to fulfill its obligations requested by a Court decision under Article 260(2) TFEU. In case the Court finds that the Member State concerned has not complied with its judgment, it may impose a lump sum or penalty payment on it. Hence, the CJEU in case of persistent non-compliance, has the same means of enforcement as the Council under Article 126(11) TFEU.

It is quite controversial also, whether an extension of the action for infringement to Article 126 (1) to (9) TFEU could solve issues relating to voluntary non-compliance[72]. The main difference between the current political procedure and a judicial one is the addressee of a decision. Whilst a Council decision is addressed to the government of a Member State, a judgment of the CJEU is mainly addressed to the national courts. Therefore, an extension of the Court's jurisdiction for actions for infringement towards matters relating to budgetary surveillance, could be understood as the establishment of a compliance mechanism aiming at "legal internalisation"[73] in order to overcome the political will of a non compliant Member State, by making use of its national judicature.

In addition, it appears quite doubtful whether the argument regarding the success of the CJEU in achieving and guaranteeing compliance of internal market law (fundamental freedoms and internal market regulations and directives), can be repeated with regard to economic policy coordination. In contrast to internal market law, in the area of economic policy coordination and of budgetary surveillance there are no directly applicable individual rights that could be invoked in front of national courts against a non-compliant Member State in order to enforce the EU rules.

Therefore, serious doubts are raised on whether the lack of compliance in affairs relating to the economic policy coordination framework can be effectively tackled by strengthening the role of the CJEU. The expected outcome of the EDP decision is that the Member State will restore budgetary discipline, and hence, the sustainability of its public finances, by correcting its excessive deficit within a reasonable deadline. The EDP decision is also intended to foster the implementation of structural reforms in the Member State, which contributes to public finance stability both in the medium and long term.

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[72] European Parliament Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy, Study for the AFDO Committee 2016, p. 38, 39.

[73] XRYSOMALLIS M. D., European Economic Governance, Nomiki Bibliothiki, 2018, p. 82 (in Greek).

Paragraph 2: Under Macroeconomic Imbalances Procedure74(MIP).

Before 2008-2009 crisis, the EU's economic governance framework focused on the sustainability of fiscal policies. It was essentially limited to keeping public deficit and debt figures under control. EU governance for non-fiscal policies was limited to the Treaty provisions on soft coordination of economic policies[75].

The crisis and its aftermath showed that the existing framework had not detected or prevented the build-up of macroeconomic imbalances. In several Member States large capital inflows and unsustainable private sector credit expansion had resulted in a deterioration in external balances and competitiveness, over-investment in certain areas of the economy and excessive debt accumulation in the private sector. At the same time though, ahead of the crisis, an unsustainable economic boom distorted the assessment of the underlying fiscal position, often making the situation appear better than it actually was.

The consequent imbalances eventually triggered a painful adjustment, that spilled over to other Member States, thus jeopardising the financial stability and economic performance of the entire EU. Aiming at preventing similar developments in the future by supporting policies for reducing imbalances stemming from the pre-crisis boom, a new mechanism known as the Macroeconomic Imbalance Procedure (MIP) was introduced in 2011 as part of that year's legislative 'Six pack'.

This institutional response at the EU level consists of two instruments, the Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances, and the Regulation (EU) No. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area. Together they form a process essentially emulating the strengthened preventive arm of the SGP[76]. This resemblance is understandable if one considers that both sets of instruments share the same Treaty basis: Article 121(6) TFEU, as to the multilateral surveillance procedure, and Article 136(1) TFEU when it comes to sanctions for euro area Member States.

[74] Special Report 3/2018 Audit of the Macroeconomic Imbalance Procedure (MIP), European Court of Auditors.

[75] Articles 121 and 148 of the TFEU.

[76] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p. 1319.

Broadly speaking, the distinction between the MIP and the SGP focuses on the fact that the MIP is about macroeconomic imbalances in general, while the SGP stops at fiscal sustainability. Moreover, once a Member State has satisfied the debt and deficit requirements, the SGP ceases to provide guidance on fiscal policy. For its part, the Regulation (EU) No. 1176/2011 envisages that policy responses to imbalances identified under the MIP may include fiscal and wage policy measures[77].

However, the two policy instruments are similar in that they give the Commission an enforcement role and that they both have a preventive and a corrective element. The MIP applies to all Member States, except those receiving assistance from the EU under economic adjustment programmes. It has been applied since 2012 embedded in the European semester, thus constituting a part of the annual cycle of coordination and surveillance of economic policies.

At this point it should be noted that the European Semester, apart from the MIP, comprises also structural policies aiming at booming long-term growth in the context of the strategy Europe 2020. In particular, the Union's strategy for growth and jobs Europe 2020 puts forward three priorities[78]: knowledge-based economic development, sustainable development based on greener, more competitive and more resource efficient policies and more inclusive growth based on high employment, social and territorial cohesion.

Underlying the strategy for growth and jobs, there is a broader set of benchmarks and indicators, in order to achieve the desirable results by following the broad economic policy and employment guidelines of the European Council. Member States report annually on their implementation of Europe 2020 in their respective SCPs and mainly in their NRPs, while the Commission assesses the submitted reports, however, without having, a decisive enforcement role in the implementation of that strategy. Therefore, it can be concluded that the European Semester' inputs, analysis and output reports at different stages of the annual cycle, provide integrated reporting of fiscal, as well as macroeconomic and structural reforms, including those in relation to the objectives of the strategy Europe 2020.

[77] Recital 20 to the Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances.

[78] The strategy sets out also five important headline targets (employment rate, investment in R&D, greenhouse gas emission reduction, reducing early school leavers and increasing participation in higher education, and reducing poverty), and seven flagship initiatives, Table 1 of Communication by the Commission titled 'EUROPE 2020 - A strategy for smart, sustainable and inclusive growth; COM(2010) 2020 final; Brussels, 3.3.2010. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:2020:FIN:EN:PDF.

Paragraph 3: The introduction of sanctions as an effective coordination tool.

i. Council decisions under the SGP.

Restriction of the Union's competence to coordinate policies Member States' economic and budgetary policies resorts to sanction as the primary instrument to ensure achievement of the objectives to the benefit of surveillance and dialogue. The SGP aims at to help the Member States rather than to sanction them[79]. After the modest performance of the revised SGP for the period 2005-2008, as well as the Greek crisis, the legislator reconsider the role of sanction within the economic pillar of EMU.

The 2011 reform removes the principle of administrative sanction from the framework in which it was contained in Article 126 (11) TFEU: it is not more limited in the event that a Member State refuses to comply with the notice referred to it by the Council pursuant to Article 126, paragraph 9, TFEU. The concern to strengthen the credibility of the supervisory Union budget framework[80] requires action whenever the discussion alone does not allow or does not seem to change the behaviour of a Member State.

In order to remedy past malfunctions in determining MTOs, Regulation (EU) No.1175/2011 requires that Member States rely on a broader set of macroeconomic factors in their explanations of national fiscal trajectories contained in stability or convergence programmes (Art. 3(2) 1466/1997 as amended by Regulation 1175/2011). They are also expected to give reasons for "significant differences between the chosen macrofiscal scenario and the Commission's (Art. 3(2a)), to demonstrate continuity of the picture (Art.3(3)), as well as to frame it within the national budgetary process. (Art. 3 (4)).

For non euro area countries the process within the preventive arm ends at the Council decision for no effective action, while for non-complying euro area Member States this decision triggers another, and previously non existing, stage of imposing financial sanctions.

Pursuant to Article 4(1) of Regulation (EU) No. 1173/2011, the Commission shall, within 20 days of adoption of the Council's no effective action decision, recommend that the Council, by a further decision require the Member State in question to lodge with the Commission an interest-bearing deposit amounting to 0,2% of its GDP in the preceding year.

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[79] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 71-72.

[80] Recital (13) of Council Regulation (EU) No 1173/2011.

The aforementioned two decisions, the no effective action one and that on sanctions, give the CJEU its footing in the process. While judicial review remained impossible as long as the procedure was based on non-binding acts, the Court will now be able to control the final stages of the preventive arm (pursuant to Art. 263 TFEU). This will leave more scope for the Community type of legal accountability and should be better placed to counteract past mistakes of leaving the procedure into the hands of national politics[81].

The Council though, comprising euro area countries only, if it disagrees with the Commission, may successfully reject the sanction by a qualified majority vote cast within ten days (Art 4(2) Regulation 1173/2011).

However, it is worth noting at this point that the no effective action decision can not be easily reached within the Council due to structural and political deficiencies. Firstly, the reformed preventive arm assumes that the Council "shall adopt" recommendations on national adjustment measures when the Commission concludes that a divergence exists (Arts 6(2) and 10(2)). But the Treaty (121(4) TFEU) makes it clear that the Council is authorised and consequently not obliged to issue this recommendation. The institution could not therefore, be held accountable for blocking the procedure at this stage.

All the more so, it could not be brought before the Court that the wording of such a recommendation was excessively vague and meaningless[82]. Finally, the process can also be blocked by simple majority at the stage of the "no effective action" decision.

It is widely argued that the Council can not come up with any better economic analysis than the Commission does in its recommendation. Therefore, if it deviates, it does so essentially due to political trading between national governments. In such a case, which involves extremely complex economic calculations that are alien to the Court, the CJEU is confined to supervise

[81] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p. 1340.

[82] As commentators who studied the 2011 round of the European semester summarised their findings: "our review of the evidence is that the Council's country specific recommendations at the end of the cycle water down many of the Commission's recommendations": Marzinotto, Wolff, Hallerberg, "How effective and legitimate is the European semester? increasing the role of the European Parliament", Sept. 2011, available from www.bruegel.org, p. 10.

only the procedural fairness of the process, a task too shallow to elicit a substantial improvement of the decision-making[83].

Furthermore, even if deemed semi-automatic, sanctions for euro area Member States are much more "semi" than "automatic". First, they may not be triggered without the "no effective action" decision, and that decision, as mentioned above is not easy to reach. Second, the Commission may, following a reasoned request by the Member State concerned addressed to the Commission within 10 days of the adoption of the "no effective action" decision, recommend that the Council reduce the amount of the interest-bearing deposit or cancel it (Art.4(4) 1173/2011).

However, if the Commission is not susceptible to arguments of Member States concerned, they have very good chances to garner the majority voting support in the Council, especially as the Member State concerned is not excluded from voting on sanctions. Therefore, the discretion of the Commission's authority regarding the enforcement of those sanctions is questionable.

One possible reason for this phenomenon could be the fact that financial sanctions in economically bad times seem undeniably inaccurate and ineffective[84]. When sovereign states face liquidity problems, even the overall soft financial sanction of an interest-bearing deposit would fuel the problem it aims to remedy. In other words, curtailed liquidity translates into growing borrowing costs and, in consequence, worsens the fiscal position of the punished Member State.

In parallel to the preventive arm, the Member States are also able to shun the excessive deficit procedure, if, either the deficit/ratio has declined substantially and continuously and reached a level that comes close to the reference value, or, alternatively, if the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value (Art. 126(2)(a)TFEU). By the same token, debt exceeding the reference value should not be considered excessive, if the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace (Art. 126(2)(b)TFEU).

[83] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p. 1341.

[84] RUFFERT M., The European Debt Crisis and European Union Law, CMLR 48, 2011, p. 1803.

In order to eliminate the ambiguities stemming from the aforementioned Treaty provisions, Regulation 1467/97 was enacted to clarify when the excessive deficit procedure should be triggered and when it can be avoided, providing in particular guidance on how to understand the "exceptional and temporary excess" of deficit. The 2011 reform went a step further and defined the "substantial and continuous decline" (new Art. 2(1a)). Apart from those delinquencies, the fiscal governance has been aggregated, as in other areas of macroeconomic governance, because of the possible reliance on national politics and the ensuing poor enforcement of law[85].

At this point the dissuasive function of the sanctions proves its importance. These administrative sanctions are included in a collective perspective and no longer individualistic. The sanction is generalised and sought not only to the purpose of inciting and punishing the defaulting State, but also to prevent financial instability and to strengthen the credibility of the euro area. This change of approach is expressed in the change of allocation of interest on deposits and fines. This one is no longer redistributed to the euro area Member States that are not in a excessive deficit position, but it is assigned to the EFSF and then to the EMS, when the latter entered into force[86].

ii. Sanctions for the effective application of MIP by Member States.

The Regulation (EU) No. 1174/2011, as reiterated before, provides for the dual objective of tackling imbalances affecting individual Member States' economies, while also addressing the spillover effects on other Member States of the euro area and the EU. Designed to address macroeconomic imbalances in the EU as a response to the absence of policy tools to prevent the build up of these imbalances prior to the 2008 crisis, it operates on an annual cycle.

Specifically, the MIP targets the detection, prevention and correction of 'imbalances' and 'excessive imbalances". Imbalances means any trend giving rise to macroeconomic developments which are affecting adversely or have the potential to affect the proper functioning of the economy of a Member State or the economic and monetary union, or the Union as a

[85] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p. 1343-1344.

[86] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 75.

whole. Excessive imbalances means severe imbalances, including imbalances that jeopardise or risk jeopardising the proper functioning of the economic and monetary union. Regarding the nature of imbalances, internal imbalances are defined as those that can arise from public and private indebtedness, financial and asset market developments, including housing, the evolution of private sector credit flow, and the evolution of unemployment. In contrast, external imbalances, include those that can arise from the evolution of current account and net investment positions of Member States, real effective exchange rates, export market shares, changes in the price and cost developments, and non-price competitiveness, taking into account the different components of productivity[87].

The annual process of identifying imbalances, assessing their severity and initiating corrections breaks down into three stages. It begins with the publication by the Commission of an economic and financial assessment, known as the Alert Mechanism Report (AMR), (Stage one) which identifies Member States at risk of imbalances that require further analysis in the form of an in-depth-review (IDR) (Stage two). The purpose of IDRs is to conclude whether imbalances are present in selected Member States, and whether they should be deemed excessive. The AMR uses a scoreboard of indicators chosen to highlight existing internal and external imbalances[88]. The Commission gathers the necessary information in the course of visits to Member States, while at the same time is obliged to consider any other information that the Member States have communicated as relevant.

The Regulation 1174/2011 specifically requires IDRs to evaluate whether the Member State in question is affected by imbalances and, if so, whether these are excessive. The spillover effects of national economic policies must also be considered. If the Commission identifies no imbalances, the MIP process ends for that Member State in that year. If imbalances are identified, depending on their severity, the Commission will place the Member State in either the preventive or the corrective arm of the MIP.

[87] Article 4(3) of the Regulation (EU) No. 1174/2011.

[88] Article 3(2) of the Regulation 1174/2011 makes it clear that the decision to launch an IDR should not flow "from a mechanical reading of the scoreboard". IDRs consist of a detailed analysis of country-specific circumstances using a broad range of analytical tools (such as measures of trade linkages and exposures between Member States), country-specific information (such as product specialisation and wage-bargaining mechanisms) and, in many cases, variables different from those in the AMR scoreboard, Special Report 3/2018 Audit of the Macroeconomic Imbalance Procedure (MIP), European Court of Auditors, p. 12.

Since 2015, IDRs have become part of the Commission's annual European Semester country reports. These include wide-ranging analytical assessments of the main structural issues affecting a Member State in areas such as taxation and expenditure, employment, public administration and the business environment, as well of the progress the Member State has made in the implementation of the CSRs towards the Europe 2020 targets.

Finally, on the basis of the IDR analysis, the Commission should propose country-specific recommendations (CSRs), which eventually will be adopted by the Council and issued to Member State to address its imbalances. More specifically, if the Commission considers that a Member State has macroeconomic imbalances, it must inform the Council and the European Parliament.

Acting on a proposal from the Commission, the Council may then address CSRs to the Member State to correct imbalances and prevent them from becoming 'excessive" ('the MIP-CSRs'). If the Commission is unhappy with the progress in correcting imbalances, it should recommend the Council to take a non-compliance decision setting new deadlines for taking corrective action. The Council may refuse by reverse qualified majority, voting within 10 days since the Commission has issued its recommendation.

In respect of euro area Member States, the first non-compliance decision should trigger an interest-bearing deposit amounting to 0,1% of the censured country's GDP (Art. 3(1) and (5) Regulation 1174/2011), while second non-compliance decision or the second recommendation requiring a new corrective action plan should translate into a fine of the same amount (Art. 3(2) and (5) Regulation 1174/2011).

However, in each case the Commission may waive the sanctions "on grounds of exceptional economic circumstances or following a reasoned request by the Member State concerned" (Art. 3(6) Reg.1174/2011).

The CSRs are adopted in July and are been reviewed and adjusted annually if necessary. To this end, there is a systematic and public assessment of progress in the implementation of CSRs published as an annex to the corresponding country report in February. To monitor the implementation of MIP-CSRs, the Commission is required to maintain permanent dialogue with

the Member States' authorities and the social partners by carrying out information visits, usually once a year[89].

If the Commission considers the imbalances "excessive", it is again required, by Article 7 to inform the European Parliament and the Council. Acting on a Commission proposal, the Council may then decide to activate an "excessive imbalance procedure" (EIP), exposing Member State to stricter requirements and monitoring. This enhanced surveillance mechanism includes also the possibility of financial sanctions for euro-area Member States[90] (Stage three: Corrective action).

It is important to mention the cumulative nature of the system of the aforementioned administrative sanctions[91]. In other words, the pronouncement of sanctions under the excessive deficit procedure does not preclude the imposition of sanctions under the MIP. Neither the pronouncement of a fine pursuant to Article 126 (11) does exclude other sanctions taken even in the context of the economic and social cohesion policy[92].

The limitation on the amount of the sanctions ensures that the cumulative total of deposits or fines remains under the "glass ceiling" of 0.5% of GDP. In order for fines to be credible, they should not be punitive but dissuasive and practicable, as much as possible, without compromising the capacity of the Member State to get back on track.

[89] Special Report 3/2018 Audit of the Macroeconomic Imbalance Procedure (MIP), European Court of Auditors, p. 8-9.

[90] Regulation 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306, 23. 11. 2011, p. 8).

[91] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 74

[92] The suspension of Structural Fund commitments due to the inaction of a Member State with an excessive deficit, was implemented for the first time regarding Hungary in March 2012. (Executive Decision 2012/156/EU Council of 13 March 2012 suspending part of the commitments made under the Cohesion Fund for Hungary with effect from 1 January 2013, OJ L78, 17 March 2012, p. 19.)

B. The interventionist stance of the CJEU regarding Member States' sovereignty in the context of New Economic Governance.

Chapter 1: The ex post Eurozone crisis possibility for greater judicial scrutiny of sanctions by EU institutions.

Paragraph 1: The full adjudicative functions of the CJEU.

The financial, fiscal and economic crisis that originated in 2008 showed that financial, fiscal and macroeconomic imbalances are strictly interrelated, not only within the national boundaries, but also at EU level, and even more so for the euro area countries. Therefore, the preinforced economic governance system, which was set up in 2011 and is still under further development, refers to several economic areas, including fiscal policies, macroeconomic issues, crisis management, macro-financial supervision and investments[93].

As emphatically stated in European's Commission Communication, "the architecture of the Economic and Monetary Union has been significantly strengthened over the past years to enhance economic governance and to achieve financial stability. Nevertheless, the EMU's resilience neiiis to be further reinforced in order to relaunch a process of upward convergence, both between Member States and within societies, with increasing productivity, job creation and social fairness at its core"[94].

The crisis therefore, has taught us about the need for more prudent fiscal policymaking throughout the economic cycle[95]. The Six-Pack reforms to the SGP added new requirements for Member States in terms of budgetary policy, notably new fiscal rules. This is not the case of the Two-Pack, which focuses on coordination[96].

The crisis has also shown the need for further improvements to budgetary coordination and surveillance for euro area Member States, given their greater interdependence and susceptibility to spillover effects from each other's fiscal decisions. This has led to an increased willingness to reinforce mutual surveillance and consider budgetary decisions as a matter of common concern. Through strengthened cooperation and integration in the euro area, including

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[93] European Parliament, Fact Sheets on the European Union - 2018, Alice Zoppè, 04/2018, www.europarl.europa.eu/factsheets/en, p. 2.

[94] Communication by the European Commission to the European Parliament, the Council and the European Central Bank, On steps towards Completing Economic and Monetary Union, Brussels, 21.10.2015 COM(2015) 600 final, p. 2.

[95] SCHELCKE W., EU fiscal governance: hard law in the shadow of soft law? ColJEurL 2007, p.705.

[96] European Commission Press Release MEMO/13/457, 27 May 2013, p. 2-3.

gradual and closer monitoring, the Two-Pack will help to strengthen the economic aspect of the Economic and Monetary Union.

According to the Blueprint for "a deep and genuine Economic and Monetary Union: Launching a European debate", that the European Commission adopted on 28 November 2012[97], "*In a deep and genuine EMU, all major economic and fiscal policy choices by Member States would be subject to deeper coordination, endorsement and surveillance at the European level"*. Commenting on the Blueprint, José Manuel Barroso, President of the European Commission, said: "*We need a deep and genuine Economic and Monetary Union in order to overcome the crisis of confidence that is hurting our economies and our citizens' livelihoods. We must give tangible proof of the willingness of Europeans to stick together and move forward decisively to strengthen the architecture in the financial, fiscal, economic and political domains that underpins the stability of the Euro and our Union as a whole*."

The Blueprint sets out the path towards a deep and genuine EMU, which involves incremental measures taken over the short, medium and longer term. Part of the agenda can be delivered on the basis of the current Treaties, though part of it requires Treaty change. In the short term (within 6 to 18 months), immediate priority should be given to implementing the governance reforms already agreed (Six pack) or those that were about to be agreed at that time. (Two pack).

In the aforementioned framework, the role of the CJEU has been strengthened. However, charges of outcomes bias such as integrationist bias[98], in favour of centralisation of power at the expense of national sovereignty, are common in normative critiques of the Court. In fact, it has been widely argued that the Court has demonstrated a decades-long bias in favour of European integration, interpreting the treaties in a teleological fashion that goes far beyond what the member states intended in their drafting of the original Treaties, thus undermining national sovereignty[99].

The requirement for example that Member States submit their budget draft to the EU institutions for supranational validation prior to approval by national Parliaments, coupled with

[97] European Commission Press Release "Blueprint for a deep and genuine Economic and Monetary Union: Launching a European debate", 28 November 2012, p. 1.

[98] POLLACK M. A., The legitimacy of the European Court of Justice, Normative Debates and Empirical Evidence, Available at htttp://www.cambridge.org/core/terms, p. 153-154.

[99] RASMUSSEN H., On Law and Policy in the European Court of Justice, (Boston: Martinus Nijhoff, 1986), p. 3.

the obligation to enshrine fiscal targets in higher laws policed by supranational institutions, produced a relevant compression on the ability of the Member States to have autonomous deliberations on their budgets. As Alicia Hinarejos has pointed out, the EU is drifting towards a "surveillance model" in which the center has invasive oversight power on the budgetary policies of the Member States because the EU has no fiscal resources of its own.[100]

Whereas some form of supranational control over state budgetary policies seems inevitable in the EMU, there is a plausible argument that the EU Member States ought to enjoy some degree of autonomy in decisions about their budget. Acknowledging this point, the Report "Towards a Genuine Economic and Monetary Union" delivered in December 2012 by the President of the European Council, underlined that decisions on national budgets are at the heart of Member States' parliamentary democracies.[101]

In that context, increased democratic accountability must accompany any Treaty change conferring further supranational powers on the EU level. Arguably, this indispensable need to strengthen the EU's legitimacy, is reflected in the recent developments regarding the system of reinforced sanctions that was introduced in the overall enhanced budgetary surveillance procedure[102]. The deepening of EMU should, therefore, build on the institutional and legal framework of the Treaties.

Paragraph 2: Sanctions against Member States before the CJEU following the course of European Semester.

*i) Under fiscal coordination process***.**

The reform of the "Stability and Growth Pact" in 2011 and 2013, as well as the agreement on the "Fiscal Compact", reinforced the fiscal framework in order to prevent the building up of large fiscal imbalances in the future. The monitoring of expenditure developments became more important under the preventive arm and the procedures in the preventive and corrective arm were strengthened by new and gradually increasing sanctions.

One major lesson from the crisis was the need to introduce a numerical debt benchmark aiming to ensure convergence towards sound debt ratios below the Maastricht reference value of

[100] HINAREJOS A., Fiscal federalism in the European Union: evolution and future choices for EMU, Common Market Law Review 50, 2013, p. 1621.

[101] President of the European Council, Final Report (2012) Towards a genuine EMU, 5 December 2012.

[102] European Commission Press Release "Blueprint for a deep and genuine Economic and Monetary Union: Launching a European debate", 28 November 2012, p. 3.

60 % of GDP. The introduction in the Council of the reverse qualified majority voting modalities (RQMV) for decisions under the excessive deficit procedure, was also intended to increase the quasi-automaticity of the procedures[103].

Pursuant to Article 2a (3) (β) of Regulation (EU) No 1175/2011, Member States shall take due account of the guidelines addressed by the Council for the development of their economic, employment and budgetary policies. It is clear from this wording that it introduces an obligation on Member States to comply with the Council's recommendations, which is confirmed by the fact that any possible failure can lead to the adoption of measures in the form of sanctions[104].

The Commission is in charge to follow up the evolution of the situation. The surveillance takes place within the framework of Article 6 of Regulation (EC) No 1466/97 as amended by Regulation (EU) No. 1177/2011 for budgetary aspects and of Article 10 of Regulation (EU) No 1176/2011 for macroeconomic aspects. Thus, multilateral surveillance is emerging as a multiparametric process, which no longer focuses exclusively on the fulfillment of fiscal criteria, but aims to address globally the issues that arise in the various Member States in such vital sectors as economy and employment. Such a response can, if implemented in a consistent and coherent way, lay the foundations for effective coordination of national economic policies and, consequently, for a quasi-harmonisation of them in a common direction[105].

The adoption of a recommendation by the Council noting the absence of budgetary or macroeconomic corrections by the Member State concerned triggers the application of financial penalties, in accordance to Regulations (EU) No.1175/2011, (EU) No.1173/2011, (specifically for euro area Members States) and No. 1174/2011 within the MIP. However setting financial penalties is not an automatic procedure.[106]

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[103] Analytical Note "Preparing for Next Steps on Better Economic Governance in the Euro Area", (Four Presidents Report), Jean-Claude Junker in close cooperation with Donald Tusk, Jeroen Dijsselboem and Mario Draghi, Informal European Council, 12 February 2015, p. 5.

[104] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 158 (in Greek).

[105] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 159 (in Greek).

[106] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 54.

On the one hand, sanction is only a possibility. Article 2a (3) of Regulation 1175/2011 states that any failure of a Member State to react to the received recommendations may result in a series of measures against it. Punishment intervenes only after a first phase of persuasion marked by the adoption of new recommendations by the Council taken on the basis of Article 2a (3). Where appropriate, the failure of Council intervention is compensated by the adoption of warnings by the Commission.

However, sanctions within the preventive arm are, at least in theory, more automatic than those in the corrective arm, which is a quite reasonable assumption[107]. The corrective arm penalties are harsher than the interest-bearing deposit, while the more severe the financial sanctions, the more acute the liquidity problem they propel. Furthermore, financial sanctions are very problematic when applied to countries suffering from low growth rate, which is the case of almost all the euro area Member States under the excessive deficit procedure, since they freeze or take away national resources which could otherwise be used to stimulate investment and growth.

The Commission would thus be quite right were it to choose the less evil of poorer enforcement. However, in the less possible event of the selective enforcement, which can be highly questionable as arbitrary, due to the legal binding of the decision imposing a sanction, the judicial review of the legality of this decision can not be ruled out. Although the Regulation only refers to the level of financial penalties imposed, this does not mean that a Council decision that imposes sanctions is given a kind of "presumption of legality"[108].

It is therefore possible to challenge a possible decision on a fine by an action for annulment before the CJEU. The Member State may then invoke the objection of the amount of the fine, as defined in Article 6 (1) of Regulation 1173/2011, in respect of the principle of proportionality, while the CJEU is required to check incidentally the lawfulness of that Regulation.

Furthermore, the Council may block the Commissions's recommendation to impose a sanction only by a reverse qualified majority vote cast within ten days since the Commission's proposal has been laid down (Art. 5(2) and 6(2)). However, the introduction of inverse qualified

[107] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, Common Market Law Review, 2012, p. 1347.

[108] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 191 (in Greek).

majority voting for the adoption of the surveillance measures or new penalties laid down by the Six Pack was rather a sign of both a concern for effectiveness and mistrust of the Council[109].

On the other hand, the Council's decision either stating that an excessive deficit exists or requiring corrective measures, still does not impose strict legal commitments on the State concerned. In other words it is a decision exempting from the judicial review procedure under Article 126 (10) TFEU. With regard to the final stage of the excessive deficit procedure, for example, the stage where sanctions are imposed by the Council against a State which has not complied with a previous decision, the Article 11 of 1467/1997 as amended by the 1177/2011 Regulation stipulates that, the imposition of a fine on the Member State with the possibility of obtaining also other complementary measures between those provided for in paragraph 11 of Article 126 TFEU, is now the norm. The new Article 12 specifies how to impose the fine, setting a maximum amount of 0.5% of GDP. The decision to impose a fine is a "hard" legal act of "hard" content[110] and therefore such an act may trigger judicial review both in an action for annulment and in an action for failure to fulfill obligations if the State does not comply with it.

The recital 11 of Regulation (EC) No 1177/2011 by stating that "it is appropriate to strengthen the application of the financial penalties provided for in Article 126 (11) TFEU in order to provide a real incentive to comply with Article 126 (9) TFEU notifications", reinforces the notion that the main purpose of the corrective arm of coordination is not the punishment of countries which deviate from the EMU guiding principles, but their incitement to respect these principles and to avoid the so-called moral hazard. The imposition or the threat of sanctions, is a feature of the rules described as "hard law" and is intended to ensure the compliance of their recipients as an element of their legal obligation.

Thus, the imposed fine, has the function of an incentive for compliance or otherwise a disincentive for non-compliance with the Council's recommendations. This position of the EU legislature has also been confirmed by the case-law of the Court of Justice in the case Pringle, that gave the non-bail out clause of Article 125 TFEU the role of an incentive for the exercise of sound fiscal policies.

[109] ALLEMAND F., More or Less Intergovernmental Cooperation Within the New EMU?, Democracy in the EMU in the Aftermath of the Crisis, Springer International Publishing AG and G. Giappichelli Editore, 2017, p. 87.

[110] PAPADOPOULOU R.-E., The Soft Law within the European Union legal order, Nomiki Bibliothiki, Athens, 2012, p. 154 (in Greek).

The suffocating surveillance framework for euro area countries under the adoption of the Two Pack, is complemented by the strengthened system of sanctions provided by Regulation 1173/2011 in relation to these states.

In the preventive arm, if the Council takes a decision not to take action from the Member State to which it has issued a recommendation, the procedure for imposing the sanction is mandatory within 20 days with the Commission recommendating the imposition of the sanction foreseen (Article 4(1)). The same applies to the corrective arm where the timing of the enforcement procedure is the Council's decision on the existence of an excessive deficit or the Commission's finding of a serious breach of the State's fiscal policy obligations (Article 5 (1)).

At the same time, in the preventive part, an autonomy is also introduced for the decisions leading to the imposition of sanctions, since the Council's “no effective action” decision follows a two-stage procedure. If the Commission's initial recommendation is not taken, the Commission shall repeat it within one month and the decision shall be deemed adopted if it is not rejected by the Council by a simple majority within 10 days. In conclusion, the ratification mechanisms introduced by this regulation, are gradually starting from the preventive, reaching ultimately the corrective arm of coordination.

Sanctions for euro area Member States are to be more moderate (0.2% both in respect of non-interest deposits and fines) but more automatic. The non-interest deposit is to be imposed either as a proximate consequence of excessive deficit decision, if an interest-bearing deposit was imposed earlier on the preventive arm, or- at any stage of the corrective arm- when the Commission has identified particularly serious non-compliance with the budgetary obligations laid down in the SGP (Art. 5(1) Regulation 1173/2011). Such deposit will be returned to the Member State once the situation is resolved. However, so far no such measure has been imposed.

The Regulation 1173/2011 states that the objective of "establishing a system of sanctions to strengthen the implementation of the preventive and corrective part of the Stability and Growth Pact (Recital 27). This system will cover the need to improve economic governance in Union, which must be based on a more resolute national ownership of the rules and policies agreed jointly and in a more robust Union-wide framework for oversight of national economic policies.

Therefore, the sanction mechanism within Regulation 1173/2011 for the euro area as well as the general system of sanctions set out in Regulations 1175/2011 and 1177/2011 for non euro area Member States are considered to be a means of ensuring the effective enforcement of

budgetary surveillance. The penalties imposed on States in this context, although classified in Article 9 of the Regulation as "administrative in nature"[111], appear to go beyond the scope of the public announcement of the Council's recommendations. However those sanctions are not transformed to political ones as for example, the deprivation of the voting rights in the Council for the disobedient States.

An important parameter of promoting sanction as a coordination tool is its quasi-automatic implementation, which is linked to the reverse-qualified majority mechanism[112]. As the Commission's decision to impose sanctions is deemed to have been adopted by the Council, unless the latter decides by a qualified majority to reject it within 10 days, this clearly limits the scope of the Council's discretion[113].

Additional reporting on measures taken by Member States in EDP comes on top of the existing requirements they face under the SGP rules, without overlapping or replacing these. Nonetheless, this complementary information increases the responsibility of the Commission in delivering timely guidance on a breach of EDP recommendations. Beyond the limits of pecuniary sanctions, inherent deficits of economic governance should not be overlooked[114]. Therefore, the preventive role of the EU should be enhanced in that respect, and supplement the strengthening of the enforcement mechanisms in the euro area, in the form of gradual financial sanctions.

*ii) **Under MIP against Member States before the CJEU.***

The recital 7 of the Regulation 1176/2011 states that "oversight of the economic policies of the Member States should be broadened beyond fiscal surveillance to include a more detailed and formal framework to prevent excessive macroeconomic imbalances and to help the affected Member States to draw up corrective plans before deviations are consolidated. A balancing between the fiscal and macroeconomic policies by monitoring diverse parameters such as competitiveness and labor market situation, contributes to a more accurate depiction of the real situation of national economies.

[111] As provided in Article 9 of Regulation No 1173/2011, headed 'Administrative nature of the sanctions', the sanctions imposed pursuant, inter alia, to Article 8 are to be of an administrative nature.

[112] LOUIS J.V., The "Enforcement" of economic governance, in Lepoivre, M. Keller-Noellet, J. and Verhelst, S.(eds), the European Union and Economic Governance, Studia Diplomatica 64(4), p. 58-61.

[113] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 186-187 (in Greek).

[114] RUFFERT M., The European debt crisis and European Union Law, CMLR 2011, p. 1803.

Despite the strong link between SGP's preventive and corrective arm and MIP, these procedures retain their autonomy as they are two mechanisms with different targeting, but both are in the service of the effectiveness of multilateral surveillance[115]. More specifically, in the frame of a MIP, if the Commission is unhappy with the progress in correcting imbalances, it should also recommend the Council to take a non-compliance decision setting new deadlines for taking corrective action, as stated in Art. 10(4) of the Regulation 1176/2011. The Council may refuse by reverse qualified majority, voting within 10 days since the Commission has issued its recommendation (Article 3 (3)).

A necessary complement to this new procedure was the introduction, with Regulation 1174/2011, of a sanction system that ensures the effective correction of the macroeconomic imbalances identified in the Member States and described as "excessive". The penalties provided for are graduated and in respect of euro area Member States, the first non-compliance decision should trigger an interest-bearing deposit amounting to 0,1% of the censured country's GDP (Art. 3(1) and (5) Regulation 1174/2011), while the second non-compliance decision or the second recommendation requiring a new corrective action plan should translate into a fine of the same amount (Art. 3(2) and (5) Regulation 1174/2011). For euro-area states therefore, a two-step enforcement regime has been established. In parallel with the new rules on the excessive deficit procedure, decision-making in the excessive imbalances procedure is streamlined by prescribing the use of reverse qualified majority voting to take all the relevant decisions leading up to sanctions[116].

However, the fact that for the activation of the fine, two successive recommendations or decisions by the Council are required, somewhat reduces the "automatic" nature of the procedure. In other words, the temporal interval between these two acts employs States with a margin of political negotiation. But even in case that the political negotiation leads to state correction measures, the threat of sanction will once again have achieved its objective, this time indirectly and reflexively as a disincentive for non-compliance by that State[117].

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[115] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 51.

[116] TUORI K., The European Financial Crisis - Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, Department of Law, p. 18.

[117] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 195 (in Greek).

It should also be noted that the Commission may propose to reduce or cancel the interest-bearing deposit or the annual fine, or even may waive the sanctions, "on grounds of exceptional economic circumstances or following a reasoned request by the Member State concerned" (Article 3 (6))[118]. Despite that possibility, the Court has, at any case, full jurisdiction to examine the aforementioned sanctions. In addition to the legality of those decisions, it may also check the appropriateness of the sanction imposed and, if necessary, modify it[119].

iii) Under the surveillance of the budgetary frameworks of Eurozone states.

In addition to the timetables of the European Semester, Regulation 473/2013 as a part of the Two Pack specifically applicable to euro area Member States, introduced provisions aiming at improving and strengthening the monitoring of the budgetary policies of these countries. Their budgetary draft plans must be made public by 15 October and national budgets should be adopted by 31 December (Art. 4 (1) to (3)).

The Two-Pack is therefore designed to fit seamlessly into the SGP and to complement it[120]. As part of the European Semester, in the spring of every year, Member States present their medium-term fiscal plans (called Stability Programmes for euro area Member States and Convergence Programmes for the others). For euro area Member States, the Two-Pack adds an autumn counterpart to the spring exercise, but focuses only on the budgetary plans for the forthcoming year. Member States by 15 October should submit their draft budgetary plans for the following year to the Commission and the Eurogroup (Art. 6 (1)), while the Commission by 30 November should issue its opinion (Art. 7 (1)). These draft budgetary plans are subject to assessment by the Commission. The opinions of the latter and not the drafts themselves, are examined by the Eurogroup.

The Commission will issue an opinion within one week (Art. 7 (2)), on whether or not a draft budget is in line with the requirements of the SGP and the country-specific recommendations in the area of budgetary policy, before the budget is adopted, and if that is the case, requests the submission of a new revised plan. Therefore, the enforcement by the Member

[118] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p. 1352-1353.

[119] XRYSOMALLIS M. D., European Economic Governance, Nomiki Bibliothiki, 2018, p. 80 (in Greek).

[120] European Commission Press Release MEMO/13/457 27 May 2013 p. 3-4.

States of the guidelines or recommendations adopted at the EU level nion takes place in the second semester the so called "national semester"[121].

Although the aforementioned timetables outline a strict framework, derogations are still possible. Thus, for example, states are allowed to establish a substitution budget procedure if the budget can not be adopted or made public until 31 December "for objective reasons beyond the control of public administration" (Art. 4 (3)).

It is important to stress, however, that the Two-Pack does not give the Commission the right to change draft national budgets, nor does it create the obligation for Member States to strictly follow the Commission's opinion. The added value of this exercise is the direct guidance that it introduces within the budgetary procedure, thereby equipping all stakeholders in the national budgetary process with the information they need before they make their decision on the budget.

In addition, no sanction is imposed against the State concerned, except for the publication of the request of the Commission, which leads to an indirect accusation for the State. Thanks to these new reporting procedures, the Two-Pack strengthens the SGP by adding to the Commission's toolbox for making recommendations. For example, if the Commission considers that a draft budget is not in line with its SGP obligations and that the Member State in question does not take measures to correct it, this can be used later to form part of the evidence in deciding, for instance, whether to place the Member State under an EDP, if its deficit or debt is not consistent with SGP rules.

This could be the potential outcome of the non-compliance of Italy's budgetary plan with EU fiscal rules. In accordance with the provisions of Regulation 473/2013, the Commission's opinion proposing changes to the national budget plans is equipped to such an extent that it becomes almost impossible to not comply with it. In particular, Recital 22 of the Regulation, stipulates the extent to which a Member State's budget law has been taken into account should be included in the assessment, if and when the conditions are met, for the adoption of a decision on the existence of an excessive deficit in the Member State concerned.

In this case, failure to comply with the Commission's early warning should be considered as an aggravating factor firstly when the Commission when draws up a report based

[121] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 49.

on Article 126 (3) on the assessment of the financial position and the public debt of a Member State and secondly when it makes a recommendation to the Council to impose sanctions on the corrective arm of the SGP in accordance with Article 5 of Regulation 1173/2011[122]. The same applies for the Council too, when deciding whether there is an excessive deficit under Article 126 (6) TFEU. Therefore, strong prudence permeates the methods for correcting the differences between the proposed budget projects and the fiscal obligations of the States[123].

Chapter 2: Sanctions due to falsification of statistical elements provided by Member States.

Paragraph 1: The regime of Council Regulation (EU) No 1173/2011-Full jurisdiction of the CJEU.

The Treaty (Art. 126 (14) TFEU) empowers the Council to lay down detailed rules and definitions for the application of the Protocol on the excessive deficit procedure. This issue has been governed by the general legislation on statistics[124] and by specific provisions determining the analytical framework on how "government", "deficit", "debt", and other related terms that should be understood[125].

More specifically, the Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, aims to further clarify basic concepts used in the excessive deficit

[122] XRYSOMALLIS M. D., European Economic Governance, Nomiki Bibliothiki, 2018, p. 221 (in Greek).

[123] ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, CDE 2012/1, 30 October 2012, p. 54.

[124] Regulation No 223/2009 of the European Parliament and of the Council of 11 Mar. 2009 on European statistics and repealing Regulation No 1101/2008 of the European Parliament and of the Council on the transmission of data subject to statistical confidentiality to the Statistical Office of the European Communities, Council Regulation (EC) No 322/97 on Community Statistics, and Council Decision 89/382/EEC, Euratom establishing a Committee on the Statistical Programmes of the European Communities, O. J. 2009, L 87/164.

[125] Council Regulation No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community, O. J. 1996, L 310/1, as subsequently amended. The Regulation establishes the so-called European System of Accounts ESA-95, and in particular: "Member States are required to compile EDP data in accordance with the European System of Accounts (ESA) and the Manual on Government Deficit and Debt (MGDD), as well as Eurostat's decisions and guidance notes, in order to ensure the quality of data used to calculate the level of deficit and debt", Special Report 10/2016, Further improvements needed to ensure effective implementation of the excessive deficit procedure, European Court of Auditors.

procedure (Arts. 1-2), as well as the rules on national reports submitted to the Commission (Arts. 3-7). Moreover, in its arguably most important element[126], the Regulation lays down obligations of national governments, and corresponding duties of the Commission, with respect to the quality of data (Arts. 8-13).

These data, reported in standardised 'notification' tables and related questionnaires, are sent to Eurostat together with other government finance statistics (GFS), data and an inventory of sources and methods. Eurostat also makes 'dialogue visits' to Member States to verify and assess the EDP data and reporting processes, including whether they comply with the accounting rules. Where significant risks and problems in the quality of data are identified, Eurostat may carry out methodological visits.

Following its quality assessment, Eurostat forwards the data to the Directorate - General of Economic and Financial Affairs (DG) for economic analysis. Firstly, the objective of the analysis is to assess whether a Member State has breached the deficit and/or debt criteria, taking account of any particular circumstances (severe economic downturn, recent trends and forecasts for indicators, adjustment for potential output, etc.). If a breach of either the deficit or the debt criteria is identified in a Member State, the DG prepares a report under Article 126(3), which considers in detail a series of aggravating and mitigating factors, and assesses the case for launching an EDP and sends it to the Economic and Financial Committee (EFC) for an opinion.

On a second level, if an excessive deficit situation is recognised, the DG informs the Member State and the Council and recommend that the latter launch an EDP with deadlines for the Member State to take corrective action.

However, where there is evidence that the data reported by a Member State do not comply with the accounting rules, Eurostat may express a reservation as to the quality of the actual data or make amendments. It may also initiate an investigation into manipulation of statistics. Therefore, in compliance with Art. 136(1)(a) TFEU the Regulation 1173/2011, went one step further by producing a legal basis for imposing fines up to 0,2% of national GDP on Member States manipulating statistical data[127].

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[126] ADAMSKI D., National power games and structural failures in the European macroeconomic governance, CMLR 2012, p.1348, 1349

[127] Article 8 of Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306, 23.11.2011, p. 1), and the

In more detail, the regulation 1173/2011 introduces a mechanism for imposing sanctions in the form of a fine against states which intentionally or through gross negligence present inaccurate data on their deficit and debt (Article 8 (1))128. The fine, as the highest form of sanction, demonstrates the importance that the EU legislator attaches to the question of the falsification of statistical data, given that these are the basis upon which the coordination mechanism is being built as a whole. Preliminary, the ratification process is not triggered automatically, but it is at the discretion of the Council, which "may decide to impose a fine...".

However, this discretion of the Council is delimited by two fundamental parameters. On the one hand, it is stipulated that these fines must be "effective, dissuasive and proportionate to the nature, gravity and duration" of the violation (Article 8 (2))129, however setting at most

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Commission Delegated Decision 2012/678/ EU on investigations and fines related to the manipulation of statistics (OJ L 306, 6.11.2012, 21).

[128] More specifically, recitals 16, 17 and 25 of Regulation (EU) No. 1173/2011 state: (*16) "In order to deter against the misrepresentation, whether intentional or due to serious negligence, of government deficit and debt data, which data is an essential input to economic policy coordination in the Union, fines should be imposed on Member States responsible", (17) "In order to supplement the rules on calculation of the fines for manipulation of statistics as well as the rules on the procedure to be followed by the Commission for the investigation of such actions, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of detailed criteria for establishing the amount of the fine and for conducting the Commission's investigations", (25) "The power to adopt individual decisions for the application of the sanctions provided for in this Regulation should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the measures adopted by the Council in accordance with Articles 121 and 126 TFEU and Regulations [No 1466/97 and No 1467/97].' Upon completion of its investigation, and before submitting any proposal to the Council, the Commission shall give to the Member State concerned the opportunity of being heard in relation to the matters under investigation. The Commission shall base any proposal to the Council only on facts on which the Member State concerned has had the opportunity to comment".*

[129] Article 8 of Regulation No 1173/2011, headed 'Sanctions concerning the manipulation of statistics', provides: *(1) "The Council, acting on a recommendation by the Commission, may decide to impose a fine on a Member State that intentionally or by serious negligence misrepresents deficit and debt data relevant for the application of Articles 121 or 126 TFEU, or for the application of [Protocol No 12] on the excessive deficit procedure annexed to the TEU and to the TFEU; (2) The fines referred to in paragraph 1 shall be effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation. The amount of the fine shall not exceed 0.2% of [the gross domestic product] of the Member State concerned; (3) The Commission may conduct all investigations necessary to establish the existence of the misrepresentations referred to in paragraph 1. It may decide to initiate an investigation when it finds that there are serious indications of the existence of facts liable to constitute such a misrepresentation. The Commission shall investigate the putative misrepresentations taking into account any comments submitted by the Member State concerned".*

0.2% of the GDP of the Member State. This sanction complies with both the principle of proportionality and also its nature as a disincentive for adopting delinquency.

On the other hand, Article 8 (5) of the Regulation expressly gives full jurisdiction to the ECJ for the judicial review of decisions imposing a fine, a review that can lead to both to the cancellation and the reduction or even the increase of the fine imposed[130].

Paragraph 2: Observations in the case Kingdom of Spain v Council (C-521/15).

On 7 May 2015, the Commission adopted a report in which it concluded that the Kingdom of Spain had misrepresented data relating to its deficit, as referred to in Article 8(1) of Regulation No 1173/2011.

More specifically, it took the view that the Kingdom of Spain had been guilty of serious negligence in submitting in the notification of 30 March 2012, incorrect data relating to the accounts of the Autonomous Community of Valencia, even though the Court of Auditors of that Community has pointed out each year that the Audit Office of the Community validated accounts containing irregularities connected with a failure to record certain health expenditure as well as a failure to comply with the accrual principle. On that ground, the Commission recommended that the Council adopt a decision imposing a fine on the Kingdom of Spain.

On 13 July 2015, the Council adopted the contested decision[131], with which it concluded that the Kingdom of Spain had been seriously negligent in providing Eurostat with misrepresentations in March 2012 (recital 5) establishing the amount of the fine to be imposed upon it (recitals 6 to 13). For that purpose, the Council found, first of all, that in the light of the impact of the misrepresentations at issue, the reference amount for the fine had to be set in accordance with Article 14 (2) of Delegated Decision 2012/678[132] at EUR 94.65 million.

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[130] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 191 (in Greek).

[131] Council Implementing Decision (EU) 2015/1289 of 13 July 2015 imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia (OJ 2015 L 198, p. 19, and corrigendum at OJ 2015 L 291, p. 10).

[132] The Commission adopted, on the basis of Article 8(4) of Regulation No 1173/2011, the Delegated Decision 2012/678/EU of 29 June 2012 on investigations and fines related to the manipulation of statistics as referred to in Regulation No 1173/2011 (OJ 2012 L 306, p. 21), which entered into force, in accordance with Article 16 thereof,

It then took the view that that amount should be reduced to take account of various mitigating circumstances, relating in particular to the fact that a single regional authority was responsible for those misrepresentations and the fact that the national statistical authorities had, for their part, cooperated in the investigation.

The Court ruled in favour of its jurisdiction to hear the action by the Kingdom of Spain for annulment of the contested decision of the Council imposing the aforementioned fines. In particular, in paragraph 53 of its judgment, it stated that since Regulation (EU) No. 1173/2011 is based on Articles 121 and 136 TFEU, the conferral upon the Council on the basis of those articles of the power whose exercise is given concrete form by the contested decision, is not justified by the need to ensure that this regulation is implemented uniformly. Therefore, the Council has not an implementing power pursuant to Article 291 (2) TFEU[133] and consequently, the General Court does not have jurisdiction over this dispute, in accordance with the exception provided in Article 51 (1) (a) (3rd) of the Organisation of the CJEU.

In contrast, as recitals 16 and 25 thereof state, the objective of this Regulation is to deter Member States from misrepresenting data that are essential for the discharge of the responsibilities which Articles 121 and 126 TFEU confer on the Council, so far as it concerns the coordination and surveillance of the Member States' economic and budgetary policies.

In relation to the first plea of the alleged infringement of the rights of the defense[134], the Court, in paragraph 71 of its decision noted that regarding the question whether the gathering of information relating to the existence of possible misrepresentations is authorised by Regulation No 479/2009, it must be pointed out that Article 3(1) of that regulation requires the Member States to report to the Commission twice a year data relating to their planned and actual government deficit and level of government debt, in order to enable both the Commission and

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on the 20th day following that of its publication, on 6 November 2012, in the *Official Journal of the European Union*, that is to say, on 26 November 2012.

[133] Article 291 (2) TFEU: "*Where uniform conditions for implementing legally binding Union acts are needed, those acts shall confer implementing powers on the Commission, or, in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union, on the Council".*

[134] Article 8 of Regulation No 1173/2011 "Sanctions concerning manipulation of statistics" provides: *(3) The Commission shall fully respect the rights of defence of the Member State concerned during the investigations. (4) The Commission shall be empowered to adopt delegated acts in accordance with Article 11 concerning (a) detailed criteria establishing the amount of the fine referred to in paragraph 1; (c) detailed rules of procedure aimed at guaranteeing the rights of the defence, access to the file, legal representation, confidentiality and provisions as to timing and the collection of the fines referred to in paragraph 1.*

the Council to fulfill their respective responsibilities under Articles 121 and 126 TFEU and Protocol No 12. It is specifically when that data is misrepresented by a Member State that Article 8(1) of Regulation No 1173/2011 permits the Council to attribute an infringement to it and to impose a fine upon it, as the Advocate General has noted in point 66 of her Opinion[135]".

It is also worth noting that there is a different treatment of companies defense rights under competition law, as Advocate General Kokott also stipulated in paragraph 93 of her Opinion[136]. While undertakings may not be compelled to provide answers which might involve an admission on their part of the existence of an infringement, Member States, on the other hand, if suspected of having misrepresented deficit or debt data, have an obligation to cooperate even if they incriminate themselves in doing so. This follows from the duty of loyalty to the European Union imposed on the Member States by Article 4(3) TEU.

In addition, the Court rejected the second plea of an alleged infringement of the right to good administration as unfounded, by stating that the visits held by Eurostat, on the one hand, and the Commission's investigation procedure, on the other, fall within separate legal frameworks and have different purposes[137]. In particular, the visits which Eurostat may carry out in the Member States on the basis of Articles 11 and 11a of Regulation No 479/2009, have the purpose of enabling that Commission department to assess, in accordance with Article 8(1) of that regulation, the quality of the government debt and deficit data reported twice a year by the Member States. On the contrary, the investigation procedure which is governed by Article 8(3) of Regulation No 1173/2011, has the purpose of enabling the Commission to conduct all investigations necessary to establish the existence of misrepresentations of that data, made either

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[135] "*After all, the data the misrepresentation of which is sanctioned by Article 8(1) of Regulation No 1173/2011 is the deficit and debt data which the Member State must report to the Commission in accordance with Article 3 of Regulation No 479/2009. Where there are doubts as to the quality of the reported data, the Commission is empowered under the second sentence of Article 11(1) of the latter regulation to carry out dialogue visits and, in exceptional cases, (24) methodological visits in the Member State concerned. These are designed to identify any errors in the collection and reporting of data (25) and to assist the Member State concerned in correcting those errors. The Commission may make recommendations to that end".* Opinion of Advocate General KOKOTT delivered on 1 June 2017 (1)Case C-521/15 Kingdom of Spain v Council of the European Union, paragraph 66, ECLI:EU:C:2017:420.

[136] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 193 (in Greek).

[137] ECJ Judgment of 20 December 2017, (Grand Chamber), Kingdom of Spain v Council, C-521/2015, paragraph 96, ECLI:EU:C:2017:982.

intentionally or by serious negligence, should it finds that there are serious indications of the existence of facts liable to constitute such a misrepresentation[138].

Following this argumentation, the Court reached the conclusion that, "in the light of those separate legal frameworks and different purposes, it must be held that, even though the data which is the subject of, first, those visits and, second, that investigation procedure may partially coincide, the assessments which Eurostat and the Commission are respectively called upon to make in respect of that data are, on the other hand, necessarily different. Consequently, the assessments made by Eurostat as to the quality of some of that data, following the visits made in a Member State, do not, in themselves, prejudge the view that might be taken by the Commission regarding the existence of misrepresentations relating to the same data, should it subsequently decide to initiate an investigation procedure in that regard"[139].

Regarding the third plea that there was no infringement, the Court pointed out that the wording of Article 8(1) of Regulation No 1173/2011 includes all misrepresentations by the Member States, without limiting the scope of that provision to certain types of statements or errors. Furthermore, the Recital 16 of Regulation No 1173/2011 sets out the objective pursued by that provision, which intends to deter the Member States from making misrepresentations, without although distinguishing between the various types of misrepresentation.

Thus, the Court stipulated that the scope of Article (1) of Regulation No 1173/2011, read in the light of recital 16 thereof, encompasses all misrepresentations by the Member States of data relating to their deficit and their debt which must be reported to Eurostat under Article 3 of Regulation No 479/2009, including misrepresentations regarding data of a provisional nature, as the ones at issue before the Court.

Additionally, it stated, regarding Article 6 of Regulation 479/2009, that this article is not designed to give the Member States the power to inform Eurostat should they revise provisional data following the discovery of a misrepresentation as referred to in Article 8(1) of Regulation No 1173/2011, but to oblige them, generally, to inform Eurostat of all instances of major revision of previously reported data.

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[138] ECJ Judgment of 20 December 2017, (Grand Chamber), Kingdom of Spain v Council, C-521/2015, paragraphs 97 and 98, ECLI:EU:C:2017:982.

[139] ECJ Judgment of 20 December 2017, (Grand Chamber), Kingdom of Spain v Council, C-521/2015, paragraphs 99 and 100, ECLI:EU:C:2017:982.

It concluded, therefore, that Article 6 of Regulation 479/2009 obliges the Member States to report both instances of revision of provisional data as well as instances of revision of actual data, irrespective of the power conferred upon the Council to impose a sanction on them if the data at issue has been misrepresented. The inclusion of misrepresentations relating to provisional data within the scope of Article 8(1) of Regulation No 1173/2011 accordingly, has no effect on the operation of Article 6 of Regulation 479/2009.

It was concluded also that neither the fact that the misrepresentations at issue concern only the deficit of a single autonomous community within the entire government deficit, nor the fact that the Kingdom of Spain cooperated in the investigation concluded by the Commission after spontaneously reporting the irregularities at issue to it, is capable of calling onto question the classification of serious negligence adopted by the Council. Nonetheless, the Court, in paragraph 130 of its judgment, noted that "whilst the fact that the Member State concerned cooperates in the detection of the misrepresentation, it may be taken into consideration as a mitigating circumstance when calculating the fine".

As to the final plea of the disproportionality of the fine, and more specifically that of the alleged breach of the general principle of law that penal provisions may not have retroactive effect, it must be noted that according to previous case law[140], this principle is also applicable to fines of an administrative nature as the one imposed at issue[141]. Therefore, Member States are also entitled to rely on that general principle in order to call into question the legality of the fines imposed upon them if they fail to comply with EU law[142].

After rejecting this argument as unfounded, the Court proceeded to the examination of the proportionality of the imposed fine. Following a teleological approach of Article 8(1) of Regulation No 1173/2011, it concluded that this article is aiming at deterring Member States from making misrepresentations, by permitting the Council to impose penalties in respect of them, while paragraph 2 of that Article 8 states that the fines referred to paragraph 1 must be effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation.

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[140] ECJ Judgment of 28 June 2005, Dansk Rørindustri and Others v Commission, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, paragraph 202, EU:C:2005:408.

[141] ECJ Judgment of 20 December 2017, (Grand Chamber), Kingdom of Spain v Council, C-521/2015, paragraph 146, ECLI:EU:C:2017:982.

[142] ECJ Judgment of 11 December 2012, Commission v Spain, C-610/10, paragraph 51, EU:C:2012:781.

As the Advocate General has observed at point 165 of her Opinion[143], if the concept of "larger impact" in Article 14(2) of Delegated Decision 2012/678 were to be understood as meaning that a fine must be calculated on the basis of the impact that misrepresentations had in a single year, although they concern a number of years, the fine would be neither proportionate to the period covered by those misrepresentations, nor, therefore, dissuasive[144].

Following the above observations, it is quite obvious that the new system of sanctions will fill a loophole of coordination, to which the inefficiency of this mechanism and the derailments of the budgets of several Member States are largely attributable. The sanctions are expected to give the mechanism the legal commitment necessary to act as an incentive to comply with the rules of the Stability and Growth Pact[145].

[143] "*Furthermore, the interpretative conclusion that is inherent in the wording is also consistent with the objective of establishing a sanction that is reasonable. A misrepresentation that affects only one year is clearly less unlawful than one that affects a number of years. Consequently, it would be unreasonable to treat both cases in the same way by taking into account only one year when calculating the sanction",* Opinion of Advocate General KOKOTT delivered on 1 June 2017 (1) Case C-521/15 Kingdom of Spain v Council of the European Union, paragraph 165, ECLI:EU:C:2017:420.

[144] ECJ Judgment of 20 December 2017, (Grand Chamber), Kingdom of Spain v Council, C-521/2015, paragraphs 160 and 161, ECLI:EU:C:2017:982.

[145] PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017, p. 194 (in Greek).

Concluding remarks

Among the current weak economic environment in the euro area as a whole, and the remaining vulnerabilities and rigidities in a number of individual countries, emerges the need to move gradually towards concrete mechanisms for stronger economic policy coordination, convergence and solidarity[146]. Given the deeper interdependence of euro area countries and the higher potential for spillover effects among countries which share the single currency, enhanced coordination and stronger surveillance of the budgetary processes and economic policies of all euro area Member States is necessary.

Therefore, in the short run it would be important to implement a consistent strategy around the "virtuous triangle" of structural reforms, investment and fiscal responsibility, and in this context, move towards more effective commitments and growth-enhancing structural reforms in the euro area.

The SGP was intended to keep the fiscal position of Member States at prudent levels, so as to prevent negative spillovers and ensure the fiscal sovereignty of Member States for the operation of automatic stabilisers and possibly discretionary expansion at the time of recession.

The lesson, however, learned from the crisis is twofold. Firstly, inadequate national fiscal and economic policies and financial supervision can cause huge economic and social hardship. Secondly, the euro area as a whole is not immune to the risks of large and destabilising economic and financial shocks. Hence, while sound national policies would go a long way to reduce the chances of a crisis, there is also a case to monitor and analyse closely the aggregate fiscal, economic and social situation of the euro area as a whole, and consider this analysis in the formulation of national policies.

Therefore, as the Eurozone became entangled in a protracted recession, the Commission has started to take position on aggregate fiscal stance of the euro zone. The Council makes several references to the EU fiscal stance in its recommendations to the Euro area since 2012. The Treaty, however, does not provide the Commission and the Council with an explicit legal

[146] Analytical Note "Preparing for Next Steps on Better Economic Governance in the Euro Area", Jean-Claude Junker in close cooperation with Donald Tusk, Jeroen Dijsselboem and Mario Draghi, Informal European Council, 12 February 2015, p.7.

basis for taking position on the aggregate fiscal stance of the euro zone. This is probably the reason that the recommendations were addressed to the Eurogroup. A case for such mandate could be made under the coordination mandate given within the European Semester over fiscal policies of Member States.[147]

As the Commission stated in its Communication [148] published in 21.10.2015, the European Semester includes an overall euro area dimension, in particular in the annual assessment of Draft Budgetary Plans of euro area Member States and the resulting overall fiscal stance in the euro area, as well as in the euro area recommendations. The process is about setting priorities together and acting on them with a euro area perspective.

However, this process is still based on a strong country-by-country approach, and only takes into account the overall euro area dimension in an indirect way. The European Semester should be structured so that discussions and recommendations about the euro area take place first, ahead of country-specific discussions, so that common challenges are fully reflected in country-specific action. In other words, it must be about setting priorities together and acting on them in a European perspective with a clear sense of the common interest[149].

To this end, the European Semester should be structured into two successive stages, a European and a national one. This means that discussions and recommendations concerning the euro area as a whole should take place first, ahead of country-specific discussions, so that common challenges are fully reflected in country-specific action.

Facilitating the functioning of the Single Market, in particular in areas that are vital to increase the adjustment capacity of the euro area economies and targeting towards growth-enhancing structural reforms, would potentially contribute to the smooth functioning of the EMU in the short term (within the next 18 months), provided, however, that a strong political backing will buttress conclusively that endeavour.

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[147] Special Report 18/2018, "Is the main objective of the preventive arm of the Stability and Growth Pact delivered?", European Court of Auditors, p. 70.

[148] Communication by the European Commission to the European Parliament, the Council and the European Central Bank, On steps towards Completing Economic and Monetary Union, Brussels, 21.10.2015 COM(2015) 600 final, p. 4.

[149] Five Presidents' Report, Jean-Claude Junker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, "Completing Europe's Economic and Monetary Union", Brussels, 22 June 2015, p. 9.

Therefore, it could be noted that, EMU governance and in a broader sense EU governance, is at the same time intergovernmental and supranational. It cannot be otherwise, so long as the EU bears the imprint of a twofold requirement: to achieve unity while respecting diversity[150]. Any development in intergovernmental cooperation takes place with proper regard for the institutional balance and the complex system for distribution of powers within the EMU. In tandem with the affirmation of the political responsibility of the European Council and Euro Summits[151] there is a concomitant tightening up of the powers of the supranational institutions, including the Commission and the European Court of Justice.

Rather than being a new method for running the EU, this interlinking of intergovernmentalism and supranationalism reflects the subtlety of the integration process. It could be argued that the challenge now is to strengthen coordination, by opening up more to the supranational approach, without, however, slipping into integration[152].

Arguably, there has been severe criticism by legal scholars over the unreliability of the fiscal and economic policy coordination, since fiscal rules have been violated, and the inflexibility of the whole process, as it seems that it cannot be deliberately adapted to meet differing national conditions and circumstances. Although states have surrendered sovereignty to EU institutions, not all of that sovereignty has been effectively transferred to or pooled in EU institutions. According to Michael Longo and Philomena Murray, *"there is a power shortfall, the result of both failure and leakage"*[153].

It is worth noting that the resolution of 7 May 2009 of the European Parliament considered that the Treaty of Lisbon transforms the former "Community method" into a "Union method". This adaptation is based on the essential principles that the European Council defines the general political directions and priorities, the Commission promotes the general interest of the Union and takes appropriate initiatives to that end, and the European Parliament and the Council jointly exercise legislative and budgetary functions on the basis of the Commission's

[150] ALLEMAND F., More or Less Intergovernmental Cooperation Within the New EMU?, Democracy in the EMU in the Aftermath of the Crisis, Springer International Publishing AG and G. Giappichelli Editore, 2017, p. 73.

[151] LOUIS J.V., Les réponses a la crise, Cahier de Droit Européen 2011/2, 1 March 2012, p. 357.

[152] ALLEMAND F., Nicolas Sarkozy's voluntarism in international relations. In: Arvanitopoulos C, Botsiou K (eds) The Constantinos Karamanlis Institute for democracy yearbook, Springer, 2009, Berlin.

[153] LONGO M. and MURRAY P., Europe's legitimacy crisis, From Causes to Solutions, Palsgrave Pivot, 2015, Chapter 3:The sources of the crisis in Europe, p. 53.

proposals. While welcoming this new balance between the institutions, Parliament demanded that each institution play its role in permanent cooperation with the other institutions[154].

Implicitly, the institutions were reminded that they must respect the principle of conferral of powers and loyal cooperation[155]. The exercise of powers must be capable of adapting to the demands of the moment or it could cause the EU to become obsolete. In other words changes in the powers or tasks conferred on one institution must not be made at the expense of another institution.

As to what comes after, the challenge for future reforms will be precisely at strengthening the democratic legitimacy of the EMU's decision-making process[156]. The European Parliament and the national Parliaments are still marginalised institutions in EMU, participating only during the economic dialogue which substitutes for the parliamentarisation of EMU, even when the decisions taken are of major economic and social importance[157].

The need for more democratic legitimacy has been pointed out also by the European Economic and Social Committee of the European Parliament in its opinion on the 'Communication from the Commission to the European Parliament, the Council and the European Central Bank on Steps towards completing Economic and Monetary Union' (COM(2015) 600 final). Resting in strict SGP and fiscal compact rules designed to enhance economic policy coordination and enforce budgetary rigour, austerity has virtually become a permanent feature of the Eurozone[158]. In addition to the contribution of the aforementioned institutions, the long-term strategy of the European Court of Auditors, as the EU's independent auditor pursuant to Art. 285 TFEU, could be also used effectively in order to strengthen

[154] European Parliament Resolution of 7 May 2009 on the impact of the Treaty of Lisbon on the development of the institutional balance of the European Union. P6_TA (2009) 038.

[155] ALLEMAND F. , Democracy in the EMU in the Aftermath of the Crisis, More or Less Intergovernmental Cooperation Within the New EMU?, Springer International Publishing AG and G. Giappichelli Editore, 2017, p. 96, 97.

[156] MADURO M. P., La Crise de l'Euro et l'Avenir Institutionnel de l'Union Européenne- Capacité Budgétaire et Reforme Politique dans l'Union Monétaire Européenne, La Cour de justice de l'Union Européenne sous la présidence de Vassilios Skouris (2003-2015), Liber amicorum Vassilios Skouris, Bruylant, 2015, p. 416.

[157] Five Presidents' Report, Juncker J-C, Tusk D, Dijsselbloem J, Draghi M, Schulz M (2015) Completing Europe's economic and monetary union. Brussels, 22 June 2015, p.17.

[158] LEROY M., Le gouvernement européen par la rigueur budgétaire, GFP No4-2018, July-August 2018, p.

European citizens' confidence in European institutions by stepping up financial management, accountability and transparency[159].

Therefore, the issue of democratic supervision is the core issue at the heart of European public debate and general concerns, as the future of the euro area and of the EU depends on it, and for that reason it should be tackled seriously by the Commission in its operational proposals[160].

At this point it is important to mention the targets towards an integrate budgetary framework that the former President of the European Council Herman Van Rompuy posed in his Report "Towards a Genuine Economic and Monetary Union"[161] in 26.06.2012. In particular, he stipulated emphatically that in the context of greater pooling of decision making on budgets that commensurate with the pooling of risks, within the euro area, effective mechanisms to prevent and correct unsustainable fiscal policies in each Member State are essential.

Towards this end, upper limits on the annual budget balance and on government debt levels of individual Member States could be agreed in common. Under such rules, the issuance of government debt beyond the level agreed in common would have to be justified and receive prior approval. Subsequently, the euro area level would be in a position to require changes to budgetary envelopes if they are in violation of fiscal rules, keeping in mind the need to ensure social fairness. Such reflexions have been confirmed by the recent developments in the political

[159] KARAKATSANIS G., The notion of accountability in a changing public sector and the curious case of the European Union, Journal ECA March 2015, p. 11.

[160] Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council and the European Central Bank on Steps towards completing Economic and Monetary Union' (COM(2015) 600 final) and on the 'Commission Decision (EU) 2015/1937 of 21 October 2015 establishing an independent advisory European Fiscal Board' (C(2015) 8000 final), (2016/C 177/05),Rapporteur: Carmelo CEDRONE, p. C 177/29, As emphatically stated in page C 177/33 para. 3.5.3.: *"Taking this opportunity to launch a sincere and genuine discussion on the common values (civic, ethical and religious) that underpin our identity and that we are afraid to display and defend: the real basis for the rebirth of the euro area and/or any countries which desire this. This is a unique form of integration which is open not just to the 19 member countries but also to all the other EU Member States, including the new members, that wish to join a political core group. This will grow steadily, as did the first European Economic Community (1957), which comprised the six founding countries, which acted so boldly at the time and without which there would be no Europe and no 28 Member States today"*.

[161] "The European Parliament and the national Parliaments must be given a key part to play", Report by President of the European Council, "Towards a Genuine Economic and Monetary Union", Brussels, 26 June 2012, EUCO 120/12, PRESSE 296, PR PCE 102, p. 5-6.

scene, where the capitals of Paris and Berlin have agreed to press ahead with plans for creating a common eurozone budget after several governments indicated willingness to work on a blueprint they have initiated[162].

In a medium term perspective, the issuance of common debt could be explored as an element of such a fiscal union and subject to progress on fiscal integration[163]. However, steps towards the introduction of joint and several sovereign liabilities could be considered only as long as a robust framework for budgetary discipline and competitiveness is in place to avoid moral hazard and foster responsibility and compliance.

Arguably, within that framework, the CJEU could play a prominent role in the effort towards more democratic accountability. Pursuant to Article 13 TEU, the Court is formally designated an institution of the Union, and as such, along with the Union's political institutions, it is irrefutably subject to compliance with the EU Treaties. Indeed, as the CJEU has repeatedly stated, the Union is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the Treaties. The internal constitutionality and in other words legality, is therefore necessary in order to strengthen the legitimacy of the Court's institutional role within the Treaty framework as a Union institution.

Legitimacy however, may be assessed, not only in terms of legality, but also from a range of political, sociological and moral perspectives. Although the CJEU has historically enjoyed a high degree of normative legitimacy, recent decades have witnessed the emergence of a vigorous debate featuring overlapping charges of bias, of judicial activism and poor legal reasoning, and of opacity of the Court. Despite its broad support, it is a fact that CJEU is subject to both greater normative criticism and lower levels of public support than in the past[164].

Due to the narrow intercorrelation and interaction between the two branches of EMU, it is unavoidable to gear eventually towards an enhanced integration in the long term, inasmuch as the necessary political will and reform procedure takes place. The further enlargement of the CJEU's functions as a judicial body is undoubtedly necessary, in order to ensure EU's

[162] Financial Times, 20 November 2018, p. 2.

[163] L'Union Economique et Monétaire face a la reforme, Cahier de Droit Européen, Bruylant, 2017/3, 17 August 2018, p. 593-594.

[164] POLLACK M. A., The legitimacy of the European Court of Justice, Normative Debates and Empirical Evidence, Available at htttp://www.cambridge.org/core/terms, p. 162-170.

legitimacy and public accountability, in conjunction with a possible strengthening of the role of the European Parliament within the new economic governance framework.

In conclusion, due to the fact that the euro area is confronted with a rapidly evolving international environment characterised by the rise of large emerging economies, a more resilient and integrated EMU would buffer euro area countries against external economic shocks, preserve the European model of social cohesion and maintain Europe's influence at global level. Consequently, all the aforementioned economic and political challenges underscore the fact that 'More Europe' is not an end in itself, but rather a means for serving the citizens of Europe and increasing their prosperity[165].

[165] Herman Van Rompuy in close collaboration with Jose Manuel Barroso, Jean-Claude Junker, Mario Draghi, Four Presidents' Report, "Towards a Genuine Economic and Monetary Union", 5 December 2012, p.3.

References

ADAMSKI D., National power games and structural failures in the European macroeconomic governance, Common Market Law Review 2012, p.1319-1364.

Analytical Note "Preparing for Next Steps on Better Economic Governance in the Euro Area", Jean-Claude Junker in close cooperation with Donald Tusk, Jeroen Dijsselboem and Mario Draghi, Informal European Council, 12 February 2015.

ALLEMAND FR. / MARTUCCI FR., La nouvelle gouvernance économique européenne, Cahier de Droit Européen 2012/1, 30 October 2012, p. 17-99.

ALLEMAND F., Democracy in the EMU in the Aftermath of the Crisis, More or Less Intergovernmental Cooperation Within the New EMU?, Springer International Publishing AG and G. Giappichelli Editore, 2017.

ALLEMAND F., Nicolas Sarkozy's voluntarism in international relations. In: Arvanitopoulos C, Botsiou K (eds) The Constantinos Karamanlis Institute for democracy yearbook, Springer, 2009, Berlin.

ARMSTRONG K. A., The new governance of EU fiscal discipline, JMWP 29/13, Available at www.JeanMonnetProgram.org.

Audit Planning Memorandum, Audit of the European Semester, European Court of Auditors, 02.08.2016, 16FEG202.

BARATTA R., The Role of the ECJ Beyond EU Law, Democracy in the EMU in the Aftermath of the Crisis, Springer Publishing International AG and G. Giappichelli Editore, 2017,

BARBA N., Elements of Fiscal Law, Z΄edition, Publications Sakkoula, Athens-Thessaloniki, 2014, p. 374 (in Greek).

BONICHOT J. - C., Governance économique, financière et monétaire dans l'Union européenne: le role de la Cour de justice, Journal 08 September 2014, European Court of Auditors, p. 13-22.

DELORS J. S., Fernandes et E. Mermet, The European Semester: only a first step, Notre Europe, Paris, Policy Brief, February 2011, no 22.

DE WITTE B., Using International law in the Euro Crisis, Causes and Consequences, ARENA WP 4/2013, Available at www.arenauio.no.

European Commission Communication from the Commission to the European Parliament, the Council and the European Central Bank, On steps towards Completing Economic and Monetary Union, Brussels, 21.10.2015 COM(2015) 600 final.

European Commission, 'Making it Happen - the European Semester' (announcement on the Commission's website), available at http://ec.europa.eu/europe2020/making-it-happen/index_en.htm assessed 19 October 2012.

European Parliament Directorate-General for Internal Policies, Policy Department C, Citizen's Rights and Constitutional Affairs, Implementation of the Lisbon Treaty Improving functioning of the EU: Economic and Monetary Policy, Study for the AFDO Committee 2016.

European Parliament Resolution of 7 May 2009 on the impact of the Treaty of Lisbon on the development of the institutional balance of the European Union. P6_TA (2009) 038.

Financial Times, 20 November 2018.

Four Presidents' Report, Herman Van Rompuy in close collaboration with Jose Manuel Barroso, Jean-Claude Junker, Mario Draghi, "Towards a Genuine Economic and Monetary Union", 5 December 2012.

Five Presidents' Report, Jean-Claude Junker in close cooperation with Donald Tusk, Jeroen Dijsselbloem, Mario Draghi and Martin Schulz, "Completing Europe's Economic and Monetary Union, June 2015.

FABBRINI F., Euro-Crisis, EMU and the perils of Centralisation, Democracy in the EMU in the Aftermath of the crisis, Springer International Publishing, 2017, p. 121.

GELPERN A., Financial crisis containment, Connecticut Law Review, 2009, p. 493.

GROSSMAN N., Legitimacy and International adjudicative bodies, George Washington International Law Review, 41(1), 2009, 107-80.

HINAREJOS A., The Court of Justice of the EU and the Legality of the European Stability Mechanism, Cambridge Law Journal, Volume 72, Part 2, July 2013, p. 237-240.

HINAREJOS A., Fiscal federalism in the European Union: evolution and future choices for EMU, Common Market Law Review 50, 2013, p. 1621.

HORSLEY T., Institutional Dynamics Reloaded: The Court of Justice and the Development of EU Internal Market', In P. Koutrakos, & J. Snell (Eds.), Research Handbook on

the Law of the EU's Internal Market (Edited by P. Koutrakos and J. Snell), 2017, p. 401-426, Elgar.

HORSLEY T., The Court of Justice as an Institutional Actor, Judicial Lawmaking and its Limits, Cambridge Studies in European Law and Policy, 2018.

IMF Working Paper, "Playing by the Rules: Reforming Fiscal Governance in Europe"; WP/15/67.

KARAKATSANIS G., The notion of accountability in a changing public sector and the curious case of the European Union, Journal ECA March 2015, p. 11.

LEFEVRE S., Les actes communautaires atypiques, Bruylant / CERIC, 2006.

LEINO P., SAARENHEIMO T., Fiscal Stabilisation for EMU: Managing incompleteness, European Law Review, Vol. 43, No. 5, October 2018.

LEROY M., Le gouvernement européen par la rigueur budgétaire, GFP No4-2018, July-August 2018.

LONGO M. and MURRAY P., Europe's legitimacy crisis, From Causes to Solutions, Palsgrave Pivot, 2015, Chapter 3:The sources of the crisis in Europe.

LOUIS J.V., Les réponses a la crise, Cahier de Droit Européen 2011/2, 1 March 2012, p. 353-367.

LOUIS J.V., The "Enforcement" of economic governance, in Lepoivre, M. Keller-Noellet, J. and Verhelst, S.(eds), the European Union and Economic Governance, Studia Diplomatica 64(4), p. 58-61.

L'Union Economique et Monétaire face a la reforme, Cahier de Droit Européen, Bruylant, 2017/3, 17 August 2018, p. 589-610.

MADURO M. P., La Crise de l'Euro et l'Avenir Institutionnel de l'Union Européenne- Capacité Budgétaire et Reforme Politique dans l'Union Monétaire Européenne, La Cour de justice de l'Union Européenne sous la présidence de Vassilios Skouris (2003-2015), Liber amicorum Vassilios Skouris, Bruylant, 2015.

MEYER C.O. and UMBACH G., Europeanisation of National Economic Governance Through Policy Coordination? Gains and Pains of a New Policy Instrument, Economic Government of the EU, Macmillan Publishers Limited 2007, p. 91-118.

MILIONIS N., European Economic Governance and national policies: from fiscal self-discipline to enhanced surveillance, The Court of EU as safeguard of the easy functioning of the Union and citizens' rights, Publications Sakkoula, Athens-Thessaloniki 2016 (in Greek).

TRIDIMAS T. The ECJ and the national courts. In: Arnull A, Chalmers D (eds) European Union Law. Oxford University Press, Oxford, 2015, p. 412.

TUORI K., The European financial crisis: Constitutional aspects and implications, EUI Working Paper 2012/28, p. 5.

TUORI K., The Eurozone crisis: a constitutional analysis. Cambridge University Press, 2014, Cambridge.

Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council and the European Central Bank on Steps towards completing Economic and Monetary Union'(COM(2015) 600 final) and on the'Commission Decision (EU) 2015/1937 of 21 October 2015 establishing an independent advisory European Fiscal Board'(C(2015) 8000 final), (2016/C 177/05), Rapporteur: Carmelo Cedrone.

PAPADOPOULOU R.-E., The Soft Law within the European Union legal order, Nomiki Bibliothiki, Athens, 2012 (in Greek).

PAPADOPOULOU R.-E., The coordination of economic policies in EU and the economic crisis, Studies of European Union Law, Nomiki Bibliothiki, 2017 (in Greek).

PEERS ST., Towards a new form of EU Law? The use of EU institutions outside the EU legal framework, European Constitutional Law Review 2013, p. 37-72.

POLLACK M. A., The legitimacy of the European Court of Justice, Normative Debates and Empirical Evidence, Available at htttp://www.cambridge.org/core/terms.

RASMUSSEN H., On Law and Policy in the European Court of Justice, (Boston: Martinus Nijhoff, 1986).

Reflection Paper on Deepening of the EMU, May 2017, https://ec.europa.eu/commission/publications/reflection-paper-deepening-economic-and-monetary-union_en.

REPASI R., The EU Economic Governance Framework and the Issue of Debt, Governance and Security Issues of the European Union, ASSER PRESS Springer 2016, p. 129-147.

Report prepared in accordance with Article 126(3) of the Treaty on Italy, Commission 2016, Brussels, 22.2.2017 COM(2017) 106 final.

Report by President of the European Council, "Towards a Genuine Economic and Monetary Union", Brussels, 26 June 2012, EUCO 120/12, PRESSE 296, PR PCE 102

RUFFERT M., The EMU in the ECJ: A New Dimension of Dispute Resolution in the Process of European Integration, Democracy in the EMU in the Aftermath of the Crisis, Springer International Publicing 2017, p. 335.

RUFFERT M., The European Debt Crisis and European Union Law, Common Marker Law Review 48, 2011, p.1777-1805.

SCHELCKE W., EU fiscal governance: hard law in the shadow of soft law? ColJEurL 2007, p.705.

Special Report 10/2016, "Further improvements needed to ensure effective implementation of the excessive deficit procedure", European Court of Auditors.

Special Report 18/2018, "Is the main objective of the preventive arm of the Stability and Growth Pact delivered?", European Court of Auditors.

Special Report 3/2018 "Audit of the Macroeconomic Imbalance Procedure (MIP)", European Court of Auditors.

The speech of former Commission Vice President Viviane Reding at the 69th Deutscher Juristentag in Munich,18 September 2012.

XRYSOMALLIS M. D., European Economic Governance, Nomiki Bibliothiki, 2018 (in Greek).

White paper on the future of Europe (March 2017): https://ec.europa.eu/commission/white-paper-future-europe-reflections-and-scenarios-eu27_en.