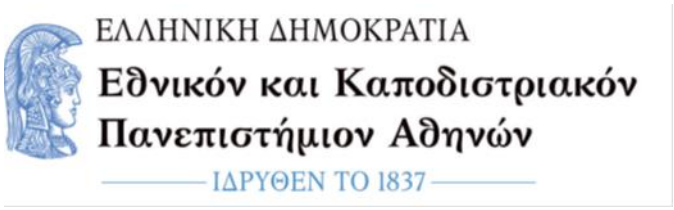

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The application of the EU law primacy principle in national legal orders; are there particularities in the economic policy area?

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Introduction

The present Thesis attempts to examine the application of the EU law primacy principle in national legal orders and the particularities, if any, in the economic policy area. While, there is no reference to the principle of primacy of EU law in the EU Treaties, this principle is well-established by the CJEU. In few words, the EU primacy principle pertains that in case of conflict between national law and EU law, the second prevails. However, the highest national courts have had difficulties in coming to terms with this principle. In addition, the EU law principle of primacy is protecting the competences of the EU. Therefore, if EU law fully adjusts a particular area, the conflicting national legislation is unacceptable. But what happens with regard to areas that do not fall within the EU competence, but the competence remains to the member States, like the economic policy area? Before examining the particularities in the economic policy area and the application of the EU law principle of primacy, a reference will be made to some introductory remarks regarding the EU law primacy principle.

In the economic policy field, there are no directly applicable individual rights that could be invoked before national courts against a non-compliant Member State in order to enforce the EU rules, albeit the use of preliminary references by national courts is an available option. The Economic and Monetary Union is an area where the EU has exclusive competence with regard to monetary policy, while member states retained competence in economic policy. The EU has not been granted competences by the Treaties, but has a coordinating role. Coordination of national economic policies between the member states and the Union is needed so that the objectives set in the Treaties could be attained. However, it is not always easy to categorize measures adopted within the economic or the monetary policy, because most of the times, monetary measures may have an impact on economic policy or vice versa and the two areas of policy are closely interlinked. In this regard, the CJEU has clarified some important issues in the cases *Pringle*, *Gauweiler* and *Weiss*.

The recent economic and financial crisis found the EU unprepared to deal with the situation and as a result the Member states adopted intergovernmental mechanisms outside the EU legal framework which played an important role in order to face the challenges, and new forms of governance came to the scene. In parallel, the EU adopted measures at the supranational level in order to enhance economic policies convergence, raising concerns for possible disruption of the balance of powers allocated by the Treaties between EU institutions and Member States.

This thesis will focus on the legal framework within which economic policy coordination is being conducted, the measures that have been adopted with regard to economic and fiscal policy during the financial crisis at Union level and by the member states, and the tasks granted upon the EU institutions. Further, the present thesis aims to illustrate the particularities of the economic policy area, by considering its differences and relations to the monetary policy, the evolving use of intergovernmental instruments requiring also the evolvement of EU institutions, the measures adopted during the crisis and the reactions of the Member States before the CJEU, the role of the European Commission, the ECB and the CJEU, the new form of a multi-level governance, its legitimacy and implications, with an overall objective to conclude whether the principle of primacy of the EU Law is applicable or *de facto* inapplicable in this specific area of economic policy.

I. Introductory observations

1. National sovereignty and the EU principle of primacy

1.1.The concept of sovereignty

The emergence of the modern state, which is essentially identical in the sense of the nation-state, is the product of political, social, cultural as well as economic processes, which took place gradually from the 16th century.[1] The concept of sovereignty emerged in the 16th century in order to justify the powers of princes against the previous power structures and it was closely related to the territory, while gradually, sovereignty apart from the element of the territory, included also the idea of a government and a population.[2] Today, in its classical view, sovereignty constitutes one of the constituent elements of the existence of the state and is further divided into external and internal sovereignty: external sovereignty is liked to its non-subordination and interdependence towards other bodies or actors of power other than the state itself; internal sovereignty is linked to the state's power to regulate exclusively with regard to all matters and policies in the internal affairs, namely the "competence of competence" ("Kompetenz-Kompetenz").[3]

In the modern era of globilisation and the evolution of international and European law, sovereign states inevitably interact with other equally sovereign states, conclude international treaties, are bound by them, join international organizations or new supranational legal entities like the EU. Although, the state remains legally sovereign, in the sense that voluntarily and willingness is joining the above, the traditional understanding of the conceptual content of state sovereignty has been altered. This is more evident, in the context of the functioning of the European Union and the process of European integration. The classic conception of sovereignty has been faced with new challenges in the process of European integration, and the member states were defending their sovereignty with the theoretical debate from the foundation of the European Community until the Treaty of Maastricht, towards three different trends to reconcile national sovereignty with European integration: the federalist, the functionalist and the intergovernmental.[4] The adoption of the Maastricht Treaty, brought again into surface the national resistance towards further integration, mostly expressed by national constitutional courts.[5] At that period, the theoretical proposals of reconciliation of national sovereignty with European integration were the theory of constitutional pluralism, the idea of 'constitutional tolerance', and the idea of 'a union of peoples that governs together'.[6] Lisbon Treaty by which the EU acquired legal personality and the EU competences have been considerably expanded,

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[1] Foucault, M., Burchell, G., Gordon, C., & Miller, P. (1991). *The Foucault effect: Studies in governmentality: with two lectures by and an interview with Michel Foucault*. Chicago: University of Chicago Press, Chapter Four "Govermentality", pp. 87 – 104. Polanyi, K. (2001). *The great transformation: The political and economic origins of our time*. Boston, MA: Beacon Press.

[2] *Ibid*., Raffaele Bifulco Alessandro Nato, The concept of sovereignty in the EU – past, present and the future, Work Package 4 – Deliverable 3, 30.04.2020, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, available at: https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf, p. 8.

[3] Raffaele Bifulco Alessandro Nato, The concept of sovereignty in the EU – past, present and the future, Work Package 4 – Deliverable 3, 30.04.2020, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, available at: https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf, p. 9-10.

[4] *Ibid*., p. 22.

[5] *Ibid*, p. 26.

[6] *Ibid*., p. 31-36., Brack, N., Coman, R. & Crespy, A. (2019). Sovereignty conflicts in the European Union. *Les Cahiers du Cevipol*, 4, 3-30. https://doi.org/, p. 5.

and the post-Lisbon regime revealed multiple crises, and multiple conflicts on sovereignty in the European Union (the financial crisis, the rule of law crisis, the refugee crisis, the Brexit, and the pandemic crisis).[7] The theories of integration are being currently focused on neofunctionalism, liberal intergovernmentalism, multilevel governance, rational choice institutionalism and constructivism.[8]

The main question is whether, and to what extent, the membership of a state in the European Union and the conferral of some competences on it are compatible with its sovereignty, since the Member States, although sovereign and on an equal footing, have partially lost to a large the competence to shape their own policies in various fields. Unavoidably, a variety of conflicts and contradictions arose between the different legal orders over the claim of the principle of primacy.

1.2.The particularities of the EU legal order

The law of the European Union emerged with the creation of the EU by the Treaty on European Union, which came into force in 1993. Before then, European Community law (EC law) was the law of the three Communities established in the 1950s: The European Coal and Steel Community (ECSC, expired in 2002), the European Economic Community (EEC) and the Atomic Energy Community (Euratom). After the Treaty on European Union, the EEC became the 'European Community' and this term was used to refer to all three Communities. From 1993 to 2009, the European Community was one of the three 'pillars' of the EU, but it ceased to exist by the ratification of the Lisbon Treaty.

The EU was created upon the notion of economy, of a common market which later on developed into an internal market. It is an economic unification; an integration of law, having a market-based aspect and a law-based aspect. Its economy is unique in a sense that economic relations go beyond states, beyond their national borders in a binding way. Member states have to follow binding legal rules concerning the economy. In other words, the market was an instrument towards integration as a holistic phenomenon (ordoliberal theory). Starting from the market, the EU expanded its policies to other various fields and has acquired competence to decide on extremely important and complex matters.

Although the member states of the EU are sovereign states which are exercising powers above their territories, the EU does not constitute either a super-state, nor a federal state and it does not have territory of its own. Rather it is a Union of liberal sovereign states with a transnational aspect. The EU as a transnational community, is based on law which adheres to and promotes a set of common values between the Member States, the preservation of which is pivotal to the success of European integration and the well-being of the individuals within it.

The EU is an autonomous legal order and not a mere set of rules of law. It has its origins in international law, but departs substantially from it, as the EU's own judicial body has expressly stated.[9] In other words, it is established as a distinct and autonomous legal order, and as any

[7] Raffaele Bifulco Alessandro Nato, The concept of sovereignty in the EU – past, present and the future, Work Package 4 – Deliverable 3, 30.04.2020, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, available at: https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf, p. 31-36.
[8] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 26-29.
[9] European Court of Justice Judgement of 5 February 1963, van Gend en Loos, C-26/62, EU:C:1963:1.

other legal order, that of the EU provides a system of legal protection for the purpose of recourse to and enforcement of Union law. Union law also defines the relationship between the EU and the Member States. The Member States must take all appropriate measures to ensure fulfilment of the obligations arising from the treaties or resulting from action taken by the institutions of the Union. They must facilitate the achievement of the EU's objectives and interests and abstain from any measure that could jeopardise the attainment of the objectives of the Treaties.

By establishing the Union, the Member States have limited their legislative sovereignty and, in so doing, they have created a self-sufficient body of law that is binding on them, their citizens and their courts.[10] The autonomy of the EU legal order is of fundamental significance for the nature of the EU, since it is the only guarantee that Union law will not be watered down by its interaction with national law and that it will apply uniformly throughout the Union. This is why the concepts of Union law are interpreted in the light of the aims of the EU legal order and of the Union in general.

However, in the complexity of the EU system, the questions: how to govern equal subjects and how sovereign states can be governed since there is no superior authority, lead to the concept of heterarchical structure which enables different legal orders to flexibly function together without predetermining any hierarchical relation between them. Therefore, within the EU the principles of hierarchy and heterarchy complement one another in order to properly function.

1.3. The conferral of powers to the Union

In principle, the EU can only act within the limits of the competences conferred upon it by the Treaties. Article 5 (2) TEU enshrines the principle of conferral, which sets limitations upon the exercise of power by EU. Competences not conferred upon the Union in the Treaties remain with the Member states (Article 5 (1) and 4 (1) TEU).

The Lisbon Treaty inserted in Article 2 TFEU the categories of competences. The competence of the EU is divided into exclusive competence (Article 3 (1) TFEU), shared competence with the Member States (Article 4 TFEU), and limited competence to support, coordinate or supplement action in the sphere in specific fields (Article 6 TFEU), while there is also a separate distinct category, the one of co-ordination of economic policies which is predominantly done within the auspices of the Council (Article 5(1) TFEU). The specific and restrictive competences referred to in the law of the Treaties granted to the European Union, especially those which are classified as exclusive, are no longer exercised in the name and on behalf of the individual national Member States, but in the name of the Union, despite the fact that it exercises them by delegation (principle of conferral of powers). By the transfer of competences, it is generally accepted that certain decisive powers, which traditionally belonged to the state, have been transferred to the supranational level.

However, the same Treaties set the limits upon the Union on the exercise of its competences. In this regard, Article 5 par. 1 TEU specifies that the use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity[11], in areas

[10] *Ibid*., European Court of Justice Judgement of 15 July 1964, Flaminio Costa contro E.N.E.L., C-6/64, EU:C:1964:66.
[11] See Article 5(3) TEU.

which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, but rather can be better achieved at Union level. Under the principle of proportionality[12], the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The assessment to be made under the principle of proportionality binds also the EU institutions.[13]

In addition, pursuant to Article 4(2) TEU, the Union shall respect the national identities of member states, inherent in their fundamental, political and constitutional structures. The protection of national identity, if understood as a balance to be made between the rights and values that form part of supreme national laws and the principles of the EU, could constitute a limit to the primacy of EU law.[14]

Therefore, the Union is structured on the basis of the competences conferred on it by the Member States and their relationship is governed by the principle of conferral of powers, according to which the Union has given powers, specific and delimited, and its action cannot extend beyond them. Thus, the Member States retain their sovereignty, which is limited to a certain extent, but is not always affected, since the States retain the power to define and redefine state competences, while the Union has certain competences without being sovereign itself. Indeed, the member states can modify the Treaties to increase or reduce competences attributed to the EU (Article 48 para. 2 and Article 5 TEU). The concession of powers, of course, has limits and cannot reach the point of a total surrender of sovereignty, which cannot happen via agreements as it would affect the ability of the people to define themselves.

2. The principle of primacy as one of the core principles of EU law

2.1.The establishment of the principle of primacy by the CJEU

As mentioned above, from the first years of the establishment and operation of the Communities and later on of the Union, it was understood that its survival would inevitably depend on the relationship it would develop with its Member States. The principle of primacy plays a decisive role in this relationship between domestic and supranational law. The principle of primacy is one of the core principles of EU law.[15] While, there is no provision mentioning the principle of primacy of EU law in the EU Treaties, this principle is well-established by the CJEU, first laid down in 1964 and further elaborated through its case law.[16] In the Treaty establishing a Constitution for Europe, which did not enter into force, there was an explicit provision concerning the principle of primacy.[17] At the moment, there is a Declaration annexed

[12] See Article 5(4) TEU.
[13] See Article 5(4) TEU and Protocol on the application of the principles of subsidiarity and proportionality.
[14] Raffaele Bifulco Alessandro Nato, The concept of sovereignty in the EU – past, present and the future, Work Package 4 – Deliverable 3, 30.04.2020, RECONNECT – Reconciling Europe with its Citizens through Democracy and Rule of Law, available at: https://reconnect-europe.eu/wp-content/uploads/2020/05/D4.3.pdf, p. 40.
[15] Trstenjak, V. (2013). National sovereignty and the principle of primacy in eu law and their importance for the member states. Beijing Law Review, 4(2), 71-76, p. 71.
[16] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 304. Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 744. Trstenjak, V. (2013). National sovereignty and the principle of primacy in eu law and their importance for the member states. Beijing Law Review, 4(2), 71-76, p. 71.
[17] Article I-6 of the Treaty establishing a Constitution for Europe, titled "Union law", provided: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy over the law of the Member States."

to the Lisbon Treaty concerning primacy[18], and an Opinion of the Legal Service of the Council annexed to Declaration 17 which refers to the principle of primacy as a cornerstone of EU law and declares its existence and the existing case law of the CJEU despite its non-inclusion in the Treaty of Lisbon.[19]

In 1963, in *Van Gen den Loos*[20] the Court established the autonomy of the EU legal order[21] and pronounced that Treaty provisions produce direct effects[22] in the legal relationship between member states and their subjects. In the Court's words: "*the community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals".* The autonomy of the EU legal order is of fundamental significance for the nature of the EU, since it is the only guarantee that Union law will not be watered down by interaction with national (or international[23]) law and that it will apply uniformly throughout the Union. This is why the concepts of Union law are interpreted in the light of the aims of the EU legal order and of the Union in general.

A year later, in *Costa v. ENEL*[24], the Court stated that EU law should have primacy[25] over national law. In the Court's words "*the law stemming from the treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question".*[26] The Court made clear that a decision should be given by the European Court not upon the validity of a national law in relation to the Treaty, but only upon the interpretation of the Treaty; that must be done by the national courts.

In its following case law, the Court clarified that the validity of measures adopted by the institutions of the Union can only be judged in the light of EU law and that EU law, stemming from the Treaties, cannot because of its very nature be overridden by rules of national law, whatever framed.[27] The Court, in *Internationale Handelsgesellschaft* expressed the view that not even a fundamental rule of national constitutional law could be invoked to challenge the principle of primacy of EU law and the validity of an EU law measure or its effect within a

[18] Consolidated version of the TFEU, 17. Declaration concerning primacy OJ C 202, 7.6.2016, p. 344–344. Declaration 17 states: "The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law."

[19] Opinion of the Council Legal Service of 22 June 2007, 11197/07 (JUR 260), published in the OJ if the EU C202/344. It states: "*It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641*) *there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice."*

[20] Case 26/92 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration. ECLI:EU:C: 1963:1.

[21] Recently, Opinion 2/13 EU:C:2014 :2454, paras. 166-170; Opinion 1/17 EU:C:2019: 341, paras. 109-111.

[22] On direct effect, see recently e.g. Case C-573 /1 7 Poplawski EU:C:2019: 530.

[23] Joined Cases C-402/05 P & 415/05 P, Kadi and Al Barakaat International Foundation v. Council, 2008 E.C.R. I-6351, para. 308. The autonomy of EU law also governs the relationship between EU law and international law. At the Kadi cases, the Court clearly stated that international law contradicted certain norms of EU law.

[24] Case 6/64 Flaminio Costa v E.N.E.L. ECLI:EU:C: 1964:66.

[25] On primacy, see also Case C- 39 9 /11 Melloni EU:C:2013:107.

[26] Case 6/64 Flaminio Costa v E.N.E.L. ECLI:EU:C: 1964:66.

[27] Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel.

member state cannot be affected by allegations that run counter to either fundamental rights as formulated by the constitution of that state or principles of its constitutional structure.[28]

In *Simmenthal*[29], the Court made clear that EU law has primacy over national law that pre-date or post-date EU law. In particular, the Court held that any recognition that national legislative measures which encroach upon the field within which the Union exercises its legislative power or which are otherwise incompatible with the provisions of EU law had any legal effect would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member states pursuant to the Treaty and would thus imperil the very foundations of the Union.[30] In such a case, the national court is obliged to set aside the conflicting national legal provisions, irrespective of their form and time of entry into force, and apply EU law.[31] The Court further clarified that the principle of primacy is not about the invalidation of national provisions, but rather about disapplication of those national provisions conflicting with EU law.[32]

The *Simmenthal* ruling has been affirmed many times and it is settled case law that the primacy principle requires national courts to interpret, to the greatest extent possible, their national law in conformity with EU law and that in case that this is not possible, to give full effect to EU law, if necessary refusing of their own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means.

Further, according to Dougan, the "trigger" view requires the dependence of the principle of primacy on direct effect, in the sense that an EU norm fulfills the criteria of invocability.[33] It comes through logic that if an EU norm does not produce direct effect and cannot be invoked by anyone before the national courts or authorities against the national provisions, then there is no conflict.

In a recent case[34], the Court reaffirmed the above by considering that the essential characteristics of EU law shall be taken into account and regarding the fact that only some of the provisions of that law have direct effect, it stated that the principle of primacy of EU law cannot have the effect of undermining the essential distinction between provisions of EU law which have direct effect and those which do not and ruled that the national court is not required in such a case to set aside a provision of national law which is incompatible with a provision of secondary EU law which does not have direct effect.

Further, in some cases, the Court required a removal of the conflicting national legislation, not on the grounds of primacy of EU law, but on the basis of EU law requirements of legal certainty and effectiveness.[35]

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[28] *Ibid*, para. 3.
[29] *Ibid*.
[30] *Ibid*, para. 18.
[31] *Ibid*., para. 21.
[32] Case 10-22/97, IN.CO.GE.' 90 Srl [1998] ECR 1-6307, para 21. Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 751.
[33] M. Dougan, 'When Worlds Collide! Competing Visions of the Relationship between Direct Effect and Supremacy', (2007) 44 Common Market Law Review 931, p. 932-935, as mentioned at Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 308-309 and Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 751.
[34] Case C-573/17, Judgment of the Court (Grand Chamber) of 24 June 2019, Criminal proceedings against Daniel Adam Popławski, ECLI:EU:C:2019:530, paras. 57-63.
[35] Case 367/98, Commission v Portugal [2002] ECR 1-4731, para 41.

According to Craig[36], the Court's teleological interpretation in establishing the principle of primacy of all binding EU law over national law is based on the following arguments: First, the autonomous legal system of the EU which became an integral part of the member states' legal orders. This autonomy presupposes that EU law, and more specially the ECJ, can only determine its own validity and not national law. In this regard, states agreed to establish and join the EU, and therefore should respect the principle of *pacta sunt servanda* and the obligations deriving under EU law, including the limit on their sovereign rights due to the transfer of competences to the Union, a body of law which binds both their nationals and themselves. Second, the aims of the Treaties could not be achieved unless primacy was accorded to the EU. The integration of EU law into national laws would not be possible if member states accord precedence to a unilateral and subsequent measure of national law. Third, there should be uniformity in the application of EU law, and member states cannot act unilaterally since this could lead to jeopardizing the attainment of the objectives of the Treaty and give rise to discrimination in the application of EU law between the member states. Fourth, the obligations undertaken under the Treaty establishing the Union would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories.

2.2. The perception of the principle of primacy: legal theories and related principles

The scope and extent of EU principle of primacy is variously discussed by the academic community and there have been developed three models of structural principles of European integration: the hierarchical model which claims absolute and unconditional supremacy, the conditionally hierarchical model which put some limits to the supremacy of EU law, including the national (constitutional) courts' willingness to comply with EU law, its application only within the scope of the EU competences, the national identity clause, non-application to international agreements prior to the state's accession to the EU, and the heterarchical model, according to which the national and the EU legal orders are both autonomous and each one follows a hierarchical structure within its set of legal norms, while at the same time there is no hierarchy between them, there is a heterarchical relationship governed by the principle of primacy.[37]

In the analysis and comparison made by Avbelj regarding the theoretical and practical application of the above three models, and the importance of making a choice[38], it seems that the heterarchical model is preferable and that national constitutional courts shall be more open-minded towards the authority of the CJEU. In other words, the relationship between Union law and national law shall not be regarded as a situation in which the EU legal order and the legal systems of the Member States are imposed on one another in a hierarchical way. The fact that they are applicable to the same people, who thus simultaneously become citizens of a national state and of the EU, negates such a rigid demarcation of these legal orders.

Further, EU law invoked before a national court or authorities, must be validly adopted within the scope of EU competences, as provided for by the principle of conferral in Article 5 (2) and 4(1) TEU.[39] In this regard, the EU law principle of primacy is protecting the competences of the Union and if European law fully adjusts a particular area, the conflicting national legislation

[36] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 305. See also Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 177.

[37] See in general for an analysis Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763.

[38] Ibid., p. 760-763.

[39] Ibid., p. 751.

is unacceptable. This can, however, raise a question of who decides, which competences have been transferred to the EU and who is to decide where their scope ends (Kompetenz-Kompetenz).[40] The Lisbon Treaty for the first time provides for the categories and areas of Union competence in Articles 2-6 TFEU, however there is nothing in the Treaties regulating who is the ultimate decider in such cases.[41] The CJEU claims to be the ultimate decider in such cases as being competent to adjudicate on the issue whether the EU has competence to act[42] and its general jurisdiction to interpret EU law in Article 19 TEU.[43]

From the heterarchical perspective there is no one to hold who has competence over competence (Kompetenz-Kompetenz)[44], and at the same time, in the autonomous EU legal order, the CJEU is certainly the decider about the limits of the EU competences[45] and in the national legal order, national constitutions usually entrusts the equivalent task to the constitutional courts.[46] Therefore, each authority is thus supreme within its own sphere, within its own legal order, without having the pretension to extend its EU or national constitutional supremacy to the other legal order. In this regard, it is expressed that integration is not about subordination of the national to the supranational, but it is a Union of member states which chose to establish a Union on a voluntary basis and the supranational level is based on the mutual recognition of each other's legal autonomy working towards further integration as a whole.[47] The principle of loyalty or sincere co-operation[48] is therefore central to the heterarchical model. The principle of loyalty or sincere co-operation comes as a duty on both national and supranational actors[49] and the Treaty itself functions as a shield for both the autonomy of the Member States' legal orders and the EU legal order.[50]

The Union wishes to protect its core values and national legal orders their national identities. This means that national constitutional courts are setting the boundaries of their legal orders and determine what the identity of their legal orders ultimately is.[51] In case that EU law or practices have an impact on their national identity, the national court by using its claim to be the ultimate legal authority as a means of defense of its legal order's autonomy, the contentious

[40] Ibid., p. 751. Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 315. Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 162.
[41] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 315.
[42] Case 314/85 Foto Frost v. Hauptzollamt Lubeck-Ost, EU:C:1987:452 (claiming Kompetenz Kompetenz for the Court of Justice by establishing the Court of Justice's exclusive competence to invalidate acts of EU institutions)
[43] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 315.
[44] Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 752.
[45] Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 162.
[46] Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 752.
[47] Ibid, p. 752.
[48] Article 4 (3) TEU.
[49] Mendez-Pinedo, M. (2021). The principle of effectiveness of EU law: a difficult concept in legal scholarship. Juridical Tribune, 11(1), 5-29, p. 12.
[50] Article 4 (2) TEU. E.F. Hinton, 'Strengthening the Effectiveness of Community Law: Direct Effect, Art 5 EC, and the European Court of Justice', (1998) 31 Journal of International Law and Politics 307, p. 309.
[51] Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 753.

EU legal provision will remain fully valid, but it will not be applied in the territory of that Member State (*ultra vires* doctrine and constitutional identity review of EU law).[52]

However, if a Member State feels that its membership in the Union continuously strains or even threatens its very irreducible epistemic core, the Treaty also allows for its lawful withdrawal from the Union in accordance with its constitutional requirements.[53] Similarly, the EU by its institutions, in case a Member State seriously breaches the Union's core values, could trigger the mechanism to suspend the membership rights of that Member State.[54]

The principle of primacy entails that EU law is not hierarchically supreme over national law and consequently cannot pre-empt it.[55] Indeed, the CJEU does not endorse the principle of pre-emption to be part of EU law.[56] In its absence, the exercise of shared competences has been governed by the principles of subsidiarity and proportionality. The CJEU decides about the limits of the EU competences and the national courts follow its decision as long as it does not detract from their irreducible epistemic cores.[57]

The principle of direct effect, which triggers primacy, is supplemented by the principle of consistent interpretation. The latter is not a requirement due to the EU law's hierarchical status, rather it stems from the duty of loyalty or sincere co-operation of the Member States and their commitment to integration, the rule of law and the effectiveness of EU law (*effet utile*[58]).[59] In the cases in which the principle of consistent interpretation cannot apply, it is supplemented by the principle of state liability.[60] The CJEU has not based the principles of consistent interpretation and state liability on the principle of primacy, rather it grounded them on the duty of sincere co-operation or loyalty of the Member States to integration, informed by the requirements of rule of law and by the concerns for sufficient effectiveness of EU law.[61] In its case law, the CJEU traditionally uses loyalty, primacy and effectiveness as justifications to problems arisen through the application and enforcement of EU law, and in recent case law[62]

[52] Ibid., p. 753.
[53] Article 50 TEU.
[54] Article 7 TEU.
[55] Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 753.
[56] Case 10-22/97, IN.CO.GE.' 90 Srl [1998] ECR 1-6307 para 18, 19. "[The] Commission infers that a Member State has no power whatever to adopt a fiscal provision that is incompatible with Community law, with the result that such a provision and the corresponding fiscal obligation must be treated as non-existent. That interpretation cannot be accepted".
[57] Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 753.
[58] Mendez-Pinedo, M. (2021). The principle of effectiveness of EU law: a difficult concept in legal scholarship. Juridical Tribune, 11(1), 5-29, p. 13. "Since there is no legal basis in the Treaties for the concept, some authors point that effectiveness stems from the loyalty clause (pacta sunt servanda) as a fundamental general principle of European law. But effectiveness is also strongly related to the authority and primacy/supremacy of EU law over national law".
[59] Avbelj, M. (2011). Supremacy or primacy of EU law: (Why) does it matter? European Law Journal, 17(6), 744-763, p. 753.
[60] Joined Cases 6/90 and 9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic [1991] ECR 1759, paras 30-37.
[61] Case 14/83, von Colson and Kamann v Land Nordrhein- Westfallen [1984] ECR 1891, para. 26, and in joined Cases 6/90 and 9/90, Andrea Francovich and Danila Bonifaci and others v. Italian Republic [1991] ECR 1759, para 30-37.
[62] Case C399/11 Melloni, judgment of 26 February 2013. ECLI:EU:C: 2013:107, paras 60 and 61, where the ECJ ruled that "Member States are free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the [ECJ], and the primacy, unity and effectiveness of EU law are not thereby compromised".

refers to primacy, effectiveness and unity of EU law.[63] The justification behind is that member States chose to enter the EU, and their membership means not only to enjoy the benefits of the EU, but also to comply with their obligations stemming from EU law in order for the latter to be effective. That is not because their EU membership has put them in a hierarchically inferior position, but simply because they have agreed to it when entering the Union. In case of non-compliance, member states will be subject to legal sanctions in the form of pecuniary penalties.

Professor Lindeboom argues that "the autonomy of EU law is intrinsically connected to its effectiveness: there would be no EU legal system if no one applied it".[64] Fabbrini, in favour of the supremacy of EU law (in the sense of absolute primacy of EU law over national law), argues that it can also be based on equality between the member states.[65] He claims that "the struggle for supremacy should not be interpreted within a bilateral framework - opposing the ECJ to the highest court of a single member state: in casu, Germany. Rather, it should be appraised in a multilateral context, where action by one member state ('s highest court) affects also the other member states (and their courts)"[66].

From all the above, a common conclusion, irrespective which theory or arguments prevail, could be that the autonomy and primacy of EU law are two of the most important characteristics of the European legal order. For the proper functioning of the Union, uniform interpretation and application of EU law is needed. Otherwise, the EU will not be possible to guarantee the rights of its people, and their equality before the law and pursue its values and mainly respect for the rule of law.

2.3.The perception of the principle of primacy by national courts

The perception of the principle of primacy of EU law is surrounded by ambiguity and mostly hesitation by the national legal orders, and in particular national constitutional courts. Something which is understandable since within the domestic legal order, constitutional courts are empowered to respect and apply their own constitutions in order to protect their nationals.[67]

Almost all national constitutional or supreme courts do not accept the absolute primacy of EU law, and some that do so is due to the monist nature of their own constitution, whereas the majority of national constitutional courts accept the primacy of EU law, but limited by the same constitution, or fundamental rights or national identity.[68] This happens mainly due to the fact that member states were used to the relationship between national and international law and the latter's incorporation into the national legal orders, something which created confusion compared to the sui generis EU legal order.[69] It shall also be noted that the primacy of EU law

[63] Mendez-Pinedo, M. (2021). The principle of effectiveness of EU law: a difficult concept in legal scholarship. Juridical Tribune, 11(1), 5-29, p. 13.
[64] Lindeboom, J. (2021). The autonomy of EU law: A Hartian view. European Journal of Legal Studies, 13(1), 271-308, p. 306.
[65] Fabbrini, F. (2015). After the omt case: The supremacy of eu law as the guarantee of the equality of the member states. German Law Journal, 16(4), 1003-1024, p. 1005.
[66] Ibid, p. 1005.
[67] Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 178.
[68] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 317. See also Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 178-179.
[69] Traser, J., Beres, N., Marinkas, G., & Pek, E. (2020). The principle of the primacy of eu law in light of the case law of the constitutional courts of italy, germany, france, and austria. Central European Journal of Comparative Law (CEJCL), 1(2), 151-176., p. 153.

over non-constitutional national law is generally accepted, and even when there might be a 'conflict' due to important principles being at stake, that is usually avoided.[70]

National constitutional courts have put on limits to the principle of primacy and therefore to the effectiveness of EU law by conducting their own review in accordance with the respect of fundamental rights, the safeguard of the limits conferred to the Union (*ultra vires*) acts and the protection of national identity, claiming their national legal autonomy and sovereignty as opposed to the autonomy of the EU legal order.[71]

The open conflicts so far, where national constitutional courts have openly declared a judgment of the CJEU *ultra vires*, is the *Landtova*[72] judgment of the Czech Constitutional Court, which concerned the sensitive issue of pensions after the dissolution of Czechoslovakia into the Czech Republic and Slovakia, the recent judgment of the German Federal Constitutional Court (GFC)[73] which declared the judgment of the CJEU in *Weiss*[74] regarding the ECB's Public Sector Asset Purchase Programme (PSPP) as partly *ultra vires*, and the *K3/21*[75] judgment of the Constitutional Tribunal of Poland which declared *ultra vires* the judgment of the Court of Justice (of 15 July 2021) finding that Polish law on the disciplinary regime against judges is not compatible with EU law.

It shall be noted that national courts are called upon to rule on whether states, by entering the EU, lost their sovereignty, by questioning the primacy of their national constitution as being the fundamental rule of law of the state and by accepting other rules of law as hierarchically superior. This question was raised more strongly, in view of the ratification of the Maastricht Treaty, the European Constitutional Treaty and the Treaty of Lisbon. National constitutional courts were also called to rule upon the international agreement introduced by the member states to face the financial challenges. The main question was whether the international agreements concluded were in violation of their constitution.[76] This unavoidably triggered

[70] See also Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 178-179.

[71] Ingolf Pernice, The Autonomy of the EU Legal Order — Fifty Years After Van Gend, included in the 50th Anniversary of the Judgment in Van Gen en Loos 1963-2013, Conference proceedings, 13 May 2013, pp. 55-80, available online at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/qd30136442ac_002.pdf, p. 58.

[72] Judgment of 31 January 2012, Landtova Pl. ÚS 5/12.

[73] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Case No. 2 BvR 859/15, (May 5, 2020), at paras. 118–178, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html

[74] Case C-493/17, Judgment of the Court (Grand Chamber) of 11 December 2018, Proceedings brought by Heinrich Weiss and Others, Request for a preliminary ruling from the Bundesverfassungsgericht

[75] K 3/21, Judgment of the Constitutional Tribunal of Poland, 7 October 2021.

[76] See Judgment of the Supreme Court of Estonia en Banc from 12 July 2012, in the case 3-4-1-6- 12 (English translation provided by the Court), available at: https://www.riigikohus.ee/en/constitutional-judgment-3-4-1-6-12, para. 202. The Supreme Court of Estonia held that Article 4(4) of the ESM Treaty did not violate the Estonian Constitution. In doing so, the Estonian Supreme Court adopted a pragmatic approach by recognizing that a threat to the economic and financial sustainability of the euro area is at the same time a threat to the economic and financial sustainability of Estonia and therefore as a member to the Eurozone, Estonia should endorse the common purpose as an obligation to guarantee fundamental rights arises from its Constitution

See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-653DC, Aug. 9, 2012, Rec, available at: https://www.conseil-constitutionnel.fr/en/decision/2012/2012653DC.htm

In July 2012, the President of the Republic asked the French Constitutional Council (*Conseil Constitutionnel*) to decide whether the ratification of the Fiscal Compact may only be granted after the Constitution has been amended. The Constitutional Court held that the Fiscal Compact does not contain any unconstitutional provisions.

judicial review by national courts regarding their consistency with the respective constitutions, especially in the fiscal area.[77]

Lastly, it shall be noted that the dialogue between the national courts and the European Court via the preliminary reference procedure is of crucial importance. Dialogue and cooperation are needed in order to ensure the coherence of the judicial system. This dialogue within the EU, takes place primarily through the preliminary ruling mechanism and contributes to ensuring the uniform interpretation and application of Union law, the safeguarding of the autonomy of the legal order, the protection of the EU citizens and the equality of the member states.

II. Main Part

Part A: The particularities in the economic policy area

Chapter 1: An asymmetric policy architecture in the EMU: the legal framework regarding economic policy

Paragraph 1: The allocation of power: Exclusive EU competence regarding monetary policy v. Retained competence of economic policies

(i) The establishment of the EMU

An Economic and Monetary Union (EMU) is an additional tool for the integration process of the EU and in particular it is the result of the progressive economic integration and the expansion of the internal market.[78] On the one hand, a monetary union has been created when Member States transferred monetary policy to the EU by establishing a common currency, the euro, while, on the other hand, Member States retained competence of their economic policies and there is no economic union at the EU level.[79] Instead, Member States "shall coordinate" their economic policies.[80] Before discussing how the co-ordination of economic policies is taking place, it is important to look back in time and understand the context within which the Member States chose not to confer economic policies to the European Union.

The first attempts for the creation of an EMU are traced back to 1970s and 1980s. The Werner Report[81] was issued as a result of The Hague Summit in 1969 where the Heads of States mandated a committee to develop a plan concerning the EMU.[82] That plan proposed the establishment of an EMU by 1st January 1981 following three stages and requiring the transfer of monetary and economic competences to the EU and the stabilization of the Member States'

[77] Fabbrini, F. (2014). The euro-crisis and the courts: Judicial review and the political process in comparative perspective. Berkeley Journal of International Law, 32(1), 64-123, p. 64-65.
[78] See Articles 3 (2) and 4 TEU.
[79] See Articles 5 (1) and (2) TEU and 4 (1) TEU.
[80] See Articles 5 (1) and 2 (3) TFEU.
[81] The Werner Report, Luxembourg 8 October 1970, available at: https://ec.europa.eu/economy_finance/publications/pages/publication6142_en.pdf
[82] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 761, and Cuyvers, A. (2017). Free Movement of Capital and Economic and Monetary Union in the EU. In A. Cuyvers, E. Ugirashebuja, J. E. Ruhangisa, & T. Ottervanger (Eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 410–432). Brill, p. 417.

currencies.[83] The 1971 Council Resolution[84] incorporating the Werner plan was never implemented and the EMU project was put to a halt, due to the collapse of the Bretton Woods system and the decision of the US Government to float the dollar in 1971.

Another mechanism, known as "Snake" was the result of the Paris Summit in 1972. It was a mechanism for the management of floating currencies within narrow margins of fluctuation against the dollar (the exchange rates of two Member States should never exceed 2.25%).[85] However, in few years most members withdrew from the project since there was no progress made. Apart from the economic problems at the time, the failure of the above attempts was also due to the political resistance and unwillingness of the Member States to transfer the control over their economic policies to the EU level.[86] Considering that economic policy lies within the heart of a state's sovereignty, it is understandable that Member States did not want to loose such power and the postponement of the EMU deemed to be the only option.

Further, following the Brussels Summit in 1978[87], the European Monetary System (EMS) emerged, establishing the Exchange Rate Mechanism (ERM) and the European Currency Unit (ECU), based on the concept of fixed, but adjustable exchange rates.[88] Over a 10-year period, the EMS did much to reduce exchange rate variability and the flexibility of the system, combined with the political resolve to bring about economic convergence, and achieved currency stability. However, as a result of speculative attacks against several currencies in 1993, the fluctuation margins were expanded to 15% and certain currencies were devaluated.[89]

With the adoption of the Single Market Program in 1985, it became increasingly clear that the potential of the internal market could not be fully achieved as long as monetary stability could not be assured.[90] The Hanover European Council of 1988 set up a committee to study EMU under the chairmanship of Jacques Delors. The "Delors report"[91], which was submitted to the Madrid Summit in 1989, proposed a three-stage introduction of EMU. This project was set into motion by the Maastricht Treaty in 1992.

The Delors Report was seen as an opportunity for the realization of the EMU since, considering economic policies, it pertains to closer economic convergence, while member states still retain their competence in this field. The first stage (1990-1993) introduced the establishment of the free movement of capital between Member States and therefore the completion of the internal

[83] Cuyvers, A. (2017). Free Movement of Capital and Economic and Monetary Union in the EU. In A. Cuyvers, E. Ugirashebuja, J. E. Ruhangisa, & T. Ottervanger (Eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 410–432). Brill, p. 417.
[84] [1971] OJ C28/01, available at: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=OJ:C:1971:028:FULL&from=PT
[85] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 761, and Cuyvers, A. (2017). Free Movement of Capital and Economic and Monetary Union in the EU. In A. Cuyvers, E. Ugirashebuja, J. E. Ruhangisa, & T. Ottervanger (Eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 410–432). Brill, p. 417.
[86] Cuyvers, A. (2017). Free Movement of Capital and Economic and Monetary Union in the EU. In A. Cuyvers, E. Ugirashebuja, J. E. Ruhangisa, & T. Ottervanger (Eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 410–432). Brill, p. 417.
[87] EC 12-1978, available at: http://aei.pitt.edu/1458/1/Paris_march_1979.pdf
[88] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 761, and Cuyvers, A. (2017). Free Movement of Capital and Economic and Monetary Union in the EU. In A. Cuyvers, E. Ugirashebuja, J. E. Ruhangisa, & T. Ottervanger (Eds.), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (pp. 410–432). Brill, p. 417.
[89] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 761-762.
[90] Ibid., p. 762.
[91] Report on Economic and Monetary Union in the European Community (EC Commission, 1988).

market. The second stage (1994-1998) required coordination of economic and monetary policies and cooperation of the national central banks within the European System of Central Banks (ESCB). The third stage, which started in 1999 and is still ongoing, introduced the common currency and the criteria to be fulfilled by the Member States in order to join the euro, centralized monetary policy under the auspices of the EU and left economic policies to the competence of the Member States.

Indeed, the Maastricht Treaty introduced the foundations for EMU and entailed the necessary provisions for the second and third stages of the Delors Report. Member States conferred monetary powers to the EU and retained their competence with regard to economic policy. The asymmetric policy architecture in the EMU was evident and remained untouched also in the Lisbon Treaty.

Looking at the steps followed until the insertion of the EMU provisions in the Maastricht Treaty, the reluctance of the member States to confer powers over their economic policy to the EU was more than obvious. The main reason is that economic policy is central to national politics. It is understandable that Member states did not want to loose control over fiscal authority for national budget, the ability to raise taxes and distribute resources. While, it is undisputable that the integration is the biggest success of the EU, it is also true that throughout the process of integration, as Luca Lionello mentioned "the EU has not overcome the primacy of national states, which remained the engine of the integration process and the source of political aggregation".[92] Member states chose not to confer powers over their economic policies to the EU. This was a deliberate choice. Transferring to EU's exclusive competence monetary and not economic policy ends up to the creation of a *de facto* asymmetric EMU.[93] Therefore, considering that Member States wished to keep their economic sovereignty, the drafters of the Maastricht Treaty continued with the initiation of the EMU, hoping that the integration process will eventually cover also the economic policy.[94] Upon conclusion of the Maastricht Treaty, Member States, acknowledging that economic policies may affect monetary policy, agreed to accept their coordination.[95]

The Lisbon Treaty did not alter the principal provisions regarding economic policy, although the recent financial crisis made clear that closer co-ordination of national economic policies is needed in order to limit the impact on the valuation of the euro.[96] However, member States were looking with reluctance policy decisions concerning national budgets and did not wish to change the balance of competence and give too much control to the EU over such polices.[97] It was only when the financial crisis boomed that members States unavoidably accepted some control over national economic policy.[98] During the economic crisis, the Maastricht framework

[92] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja*, *37*, 281–298, p. 283.
[93] Ibid., p. 283, K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 5.
[94] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja*, *37*, 281–298, p. 285.
[95] Ibid., p. 283.
[96] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 763, Paul Craig, The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility, Indiana Journal of Global Legal Studies, Vol. 22, No. 2 (Summer 2015), pp. 243-267, p. 256. K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 8.
[97] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 763.
[98] Paul Craig, The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility, Indiana Journal of Global Legal Studies, Vol. 22, No. 2 (Summer 2015), pp. 243-267, p. 257.

failed to control fiscal and macroeconomic policies of Member States and it was characterized as governance failure.[99] Tighter centralized control by the EU (reform of the Stability and Growth Pact Six-Pack and Two-Pack), and Member States (ESM and Fiscal Compact) in order to strengthen coordination was the way forward.[100]

Recently, discussions on the architecture of EMU focus on the completion of its design by 2025 through formalizing and making more binding the convergence process with regard to the economic union, setting up a macroeconomic stabilization function for the euro area concerning the fiscal union and integrating the ESM into the EU law framework.[101]

(ii) The allocation of competences in the EMU

The Maastricht Treaty of 1992 established the euro as the common currency, entailed provisions with regard to the monetary union and set the basic principles for the coordination of national economic policies, which remained unchanged under the Lisbon regime. As stated above, the EU acquired exclusive competence of monetary policy. However, acknowledging that economic policies may affect monetary policy, Member States agreed to accept their coordination.[102]

The Lisbon Treaty entails the categories and areas of Union's competence.[103] The principle of conferral enshrined in Article 5(2) TEU provides that the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties. Monetary policy is an exclusive EU competence, has as its primary objective price stability, and is formulated by the European Central Bank.[104] The Treaty provisions were influenced by the German ordoliberal thought, especially regarding monetary policy, pertaining to independence of the ECB and price stability as well as budgetary discipline enshrined in Article 126 TFEU.[105] In this regard, the Eurozone member states have lost their competence to exercise monetary policy according to Article 3 par. 1 TEU, whereas member states still outside the Eurozone have exclusive competence of monetary policy.

The coordination of economic policies is referred to in Article 2 (3) TFEU, which states that *"The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treat, which the Union shall have competence to provide."* The emphasis is on the Member States that are responsible for the coordination of their economic policies and such coordination is a stand-alone power, differentiated from exclusive EU competences and shared competences between the EU and the Member States.[106] Article 5 (1) TFEU also emphasizes that *"The Member States shall coordinate their economic policies*

[99] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 2., Paul Craig, The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility, Indiana Journal of Global Legal Studies, Vol. 22, No. 2 (Summer 2015), pp. 243-267, p. 257.

[100] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 2.

[101] J.-C. Juncker et al., Five Presidents' Report: Completing Europe's Economic and Monetary Union (22 June 2015), p. 21.

[102] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja*, *37*, 281–298, p. 283.

[103] See Articles 2-6 TFEU.

[104] See Articles 127 TFEU (ex Article 105 TEC), Article 3(c) TFEU.

[105] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 2. Paul Craig, The Financial Crisis, the European Union Institutional Order, and Constitutional Responsibility, Indiana Journal of Global Legal Studies, Vol. 22, No. 2 (Summer 2015), pp. 243-267, p. 255.

[106] van den Brink, T., & van Rossem, J. (2015). Sovereignty and the shaping of economic governance in the European Union. Irish Journal of European Law, 18(1), 13-32, p.23. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 19-20.

within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies." This is a sui generis competence of co-ordination. The Union has the responsibility to adopt the framework of coordination, which takes places by the general guidelines adopted within the Council.[107] As it will be discussed later on, the Council enjoys a broad discretion regarding the adoption of measures within the excessive deficit procedure, something that indicates the strong political element that characterizes the co-ordination of economic policies.[108]

Economic policy remains within national competence and the Member States regard their economic policy as a matter of common concern.[109] Article 121 TFEU which provides for a multilateral surveillance regime expresses to a large extent the French thought pertaining to a form of coordination of economic policies.[110] The EU is to guide the way Member States conduct economic policies, i.e. fiscal and macroeconomic policies, which remain in national competence.[111] Such coordination is regulated by primary law in the EU Treaties and the Stability and Growth Pact. The Stability and Growth Pact (SGP) first introduced in 1997, and subsequently amended in 2005 and 2011, supplemented the primary law provisions.[112]

Within this context, policy coordination means that supranational rules agreed by all Member States confine the limits on the discretion that Member States enjoy in shaping their national economic policies.[113] On the other hand, as the CJEU held in its ruling in *Pringle*,[114] *"Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures".*

Member States are competent to form their national economic policies, however, in doing so, they are required to regard their economic policies as a matter of common concern, to coordinate them within the Council[115] and to conduct them with a view of contributing to the achievement of the objectives of the Treaty as defined in Article 3 TEU and in the context of the broad guidelines economic guidelines of the economic policies and the Union (BEPG).[116]

The activities of the member states and the Union shall include the adoption of an economic policy based on the close coordination of member States' economic policies, on the internal

[107] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 20-21.
[108] Case C-27/04 Commission v. Council, ECLI:EU:C:2004:436.
[109] See Article 121 (1) TFEU (ex Article 99 TEC), Article 5 (1) TFEU, K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 3. Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 35.
[110] Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 34-35.
[111] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 2.
[112] The Stability and Growth Pact first introduced in 1997, includes two legal acts: Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17th June 1997), Regulation (EC) n. 1466/97 "on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies"; Regulation (EC) n. 1467/97 "on speeding up and clarifying the implementation of the excessive deficit procedure. It was further amended in 2005 and 2011. Under the Lisbon Treaty, the SGP is attached as Protocol No. 12 on the Excessive Debt Procedure, OJEU C 115, 9 May 2008.
[113] See Articles 5 (1) and (2) TEU and 4 (1) TEU. Iain Begg, Dermot Hodson and Imelda Maher, Economic policy coordination in the European Union, National Institute Economic Review, January 2003, No. 183 (January 2003), pp. 66-77 Published by: Cambridge University Press, p. 66. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 21.
[114] Pringle (C-370/12) EU:C: 2012:756, para. 64.
[115] See Article 121 (1) TFEU (ex Article 99 TEC).
[116] See Article 120 TFEU (ex Article 98 TEC) and Article 121 (2) TFEU (ex Article 99 TEC).

market and on the definition of common objectives conducted in accordance with the principle of an open market economy with free competition.[117] The co-ordination of economic policies among the Member States and between the Member States and the Union takes a negative form, in the sense that the Member States shall refrain from breaching the set principles and objectives.[118] This also comes from the reference in Article 121 (1) TFEU to the co-ordination of national economic policies as a matter of common concern, which unavoidable brings to our mind the principle of sincere cooperation, enshrined in Article 4 (3) TFEU. In general, according to the principle of sincere cooperation, Members States shall, in full mutual respect assist each other in carrying out tasks which flow from the Treaties and at the same time are obliged to facilitate the achievement of the Union's tasks and at the same time refrain from any measure which could jeopardize the attainment of the Union's objectives.[119]

Considering the expression used in Article 121 (1) TFEU "as a matter of common concern", makes us wandering what can be defined as "a matter of common concern" with respect to the co-ordination of national economic policies and how this can affect the sovereignty of the member states. Price stability and the stability of the Eurozone as a whole could be the most obvious examples. Can price stability be regarded as a common good?[120] It is possible that there might be a conflict with principles of social justice in various Member States and it is possible that a crisis may lead to price stability being more widely accepted as a public good, requiring for more economic convergence.[121] Although in EU law, the content of the "general interest" and the "common concern" is not specified, it is usually ascertained in a particular context.[122] This means that in case that a conflict arises among the Member States with regard for example measures affecting their sovereignty over the shaping of their economic policies, then the CJEU will have to examine the issue and make a balance regarding the Union's interest and the national interests.[123] It is settled case law that the Union's interest takes precedence over national interests. Since 1973, the Court held that "for a state unilaterally to break, according to its own conception of national interest, the equilibrium between advantages and obligations flowing from its adherence to the community brings into question the equality of member states before community law and creates discriminations at the expense of their nationals, and above all of the nationals of the state itself which places itself outside the community rules".[124]

Finally, it shall be noted that some provisions of coordination apply to all EU Member States, while others are only applicable to those that have adopted the euro (Articles 136-138 TFEU).[125]

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[117] See Article 119 (1) TFEU (ex Article 4 TEC).

[118] Dermot Hodson & Imelda Maher (2002) Economic and monetary union: balancing credibility and legitimacy in an asymmetric policy-mix, Journal of European Public Policy, 9:3, 391-407, DOI: 10.1080/13501760210138804, p. 391.

[119] Article 4 (3) TEU.

[120] Μανώλης Περάκης, Η δημοσιονομική σταθερότητα ως έννομο αγαθό στην κοινοτική έννομη τάξη», *Ευρωπαίων Πολιτεία*, Τεύχος 1/2009, σελ. 115-134.

[121] Dermot Hodson & Imelda Maher (2002) Economic and monetary union: balancing credibility and legitimacy in an asymmetric policy-mix, Journal of European Public Policy, 9:3, 391-407, DOI: 10.1080/13501760210138804, p. 402.

[122] Ευγενία Ρ. Σαχπεκίδου, Ευρωπαϊκό Δίκαιο, 2η έκδοση, 2013, Εκδόσεις Σάκκουλα Αθήνα – Θεσσαλονίκη, p. 105.

[123] Ibid.

[124] Case 39-72, Judgment of the Court of 7 February 1973, Commission of the European Communities v Italian Republic. - Premiums for slaughtering cows, para. 24.

[125] Iain Begg, Dermot Hodson and Imelda Maher, Economic policy coordination in the European Union, National Institute Economic Review, January 2003, No. 183 (January 2003), pp. 66-77 Published by: Cambridge University Press, p. 67.

Paragraph 2: The legal framework of co-ordination of economic policies

(i) The Co-ordination of national economic policies

(a) Primary law provisions

The coordination of national economic policies is regulated by primary law as provided for in the EU Treaties and secondary law, namely the Stability and Growth Pact (SGP). The Treaty provisions introduce the soft law mechanism of multilateral surveillance and the binding rules of the excessive deficit procedure, which are further elaborated in the SGP first introduced in 1997, and subsequently amended in 2005 and 2011, supplemented the primary law provisions.[126]

Such coordination of economic policies is based on the open method of coordination and the closed method of coordination.[127] The open method coordination entails cooperation through the adoption of non-binding rules, namely the broad guidelines of macroeconomic policy and the multilateral surveillance (Article 121 TFEU) that Member States shall respect under the supervision of the Commission and the Council.[128] In a policy area that member states retain competence, the objective is not a uniform result, which is the case in fields that the Union enjoys exclusive or shared competence.[129] This is the reason why economic policy is mostly guided by soft-law instruments, like the BEPG. The BEPG address polices regarding price stability, sound public finances, structural reforms and macroeconomic policy.[130] These guidelines constitute the basis for multilateral surveillance by the Council. The emphasis is on peer review in order to monitor economic developments in each of the Member States, the consistency of the economic policies with the BEPG and an overall assessment in order to avoid any disturbance of the proper functioning of the EMU.[131] Non consistency with the BEPG or identification of a risk jeopardizing the proper functioning of the EMU may lead to a warning by the Commission to the Member State concerned and the Council, on a recommendation from the Commission, may address recommendations to the Member State concerned or on a proposal from the Commission, may decide to make its recommendations public.[132] A recommendation is a type of an EU legal act which does not have binding force, as explicitly mentioned in Article 288 TFEU. Thus, the worst scenario under multilateral surveillance may lead to soft sanctions consisting of naming and shaming.[133] In the economic policy field where member states retain competence, the objective is not to punish, but rather

[126] The Stability and Growth Pact first introduced in 1997, includes two legal acts: Resolution of the European Council on the Stability and Growth Pact (Amsterdam, 17th June 1997), Regulation (EC) n. 1466/97 "on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies"; Regulation (EC) n. 1467/97 "on speeding up and clarifying the implementation of the excessive deficit procedure. It was further amended in 2005 and 2011. Under the Lisbon Treaty, the SGP is attached as Protocol No. 12 on the Excessive Debt Procedure, OJEU C 115, 9 May 2008.

[127] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja, 37*, 281–298. http://www.jstor.org/stable/24919939, p. 284.

[128] Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 38-39.

[129] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 27.

[130] Dermot Hodson & Imelda Maher (2002) Economic and monetary union: balancing credibility and legitimacy in an asymmetric policy-mix, Journal of European Public Policy, 9:3, 391-407, DOI: 10.1080/13501760210138804, p. 395.

[131] Ibid., p. 395.

[132] See Article 121 (4) TFEU. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 30-32.

[133] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 34.

motivate them to formulate their economic policies in a sound way via soft law, namely the BEGP and the Council recommendations.[134]

Further, the closed method of coordination concerns binding rules under the excessive deficit procedure (Art. 126 TFEU), and non-compliance with such rules may trigger economic sanctions (Art. 126 (11)). Protocol 12 to the Lisbon Treaty[135] specifies that member states shall maintain public deficit below the yearly ratio of 3% of GDP and the total public debt below 60% of GDP. The Commission is encompassed with the monitoring of the budgetary situation and of the stock of government debt in the Member States with a view to identify gross errors. The Commission prepares a report in two cases: (a) obligatory, when a member state does not fulfill the criteria mentioned in Article 126 (2) TFEU by taking also into account all relevant factors, including the economic and budgetary position of the member state concerned, and (b) when it is of the view that there is a risk of an excessive deficit in a member state.[136] After obtaining the opinion of the Economic and Financial Committee and the member state concerned, the Commission, if it considers that an excessive deficit exists or may occur in a member state, addresses an opinion to the former and notifies also the Council.[137] The Council, after consideration of the Commission's proposal and the position of the concerned member state, decides whether an excessive deficit exists (Article 126 (6) TFEU). It seems logical that within a policy area that member states retain competence, the Council consisting of the representatives of the member states and representing the intergovernmental aspect of the Union, plays the decisive role under the excessive deficit procedure and not the Commission, an institution that promotes the general interest of the Union.[138] Paragraphs 7 to 11 of Article 126 TFEU prescribe the steps to be followed for the imposition of sanctions according to the excessive deficit procedure. The Council takes recommendations or decisions following a softer to a harder escalation in character, depending on the member's state compliance with the respective proposed each time action or measure or in other words the progress made towards the correction of the excessive deficit in the member state concerned.[139] The last resort in case of persistent non-compliance is the imposition of sanctions which, however, depends on the political constraints of the Council and so far the provisions regarding sanctions have not been triggered.[140] Certainly, the role of the Council is major throughout the whole procedure, and regarding the role of the other two institutions, the Commission is evolved through the issuing of recommendations to the Council, while the European Parliament is completely absent.[141] It is also important to add that non-compliance of a member state with the decisions issued by the Council under paragraphs 1-9 of Article 126 TFEU cannot lead to infringement proceedings provided for in Articles 258 and 259 TFEU.[142] This indisputably weakens the whole procedure and its enforcement.[143]

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[134] Ibid., σελ. 41.
[135] Protocol No. 12 on the Excessive Debt Procedure.
[136] Article 126 (3) TFEU.
[137] Article 126 (5) TFEU.
[138] See Article 16 (1) and 17 (1) TEU. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 40.
[139] See Article 126 paras. 7-11. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 42.43.
[140] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja, 37,* 281–298, p. 284.
[141] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 43.
[142] Article 126 (10) TFEU.
[143] Ibid., σελ. 43.

Primary law provides for rules which prevent the commixture of economic and monetary policy in order to ensure the objective of price stability and push Member States to provide sound public finances.[144]

Article 122 (2) TFEU provides for Union financial assistance to a member state which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. This provision provides for an emergency clause, depicting that within the spirit of coordination of economic policies, member states are not left alone and a form of solidarity is available in case that despite a member state's sound public finances, exceptional occurrences beyond its control lead it to face economic difficulties.[145]

Article 123 (1) TFEU prohibits direct purchase of EU institutions, bodies, offices or agencies, as well as national governments and public authorities from the ECB and national central banks. At the same time, Article 124 TFEU prohibits any measure, not based on prudential considerations, establishing privileged access to financial institutions by European and national administrations, bodies and authorities.

Finally, the Treaty foresees the so-called 'no bail out clause' in Article 125 (1) TFEU which precludes liability for the debts of any member State by the Union or Member States and each member state in distress is liable for its own debts. The purpose of this clause is to oblige Member States to ensure the soundness of their public finances[146], otherwise the state at issue would be left to default.[147] Within a field of policy that member states retain competence, it seems logical that the states themselves remain responsible for any public debt.[148] The no bail out clause finds a balance in the solidarity clause, which allows Member States and the European Union to provide financial support under strict conditionality to Member States experiencing certain difficulties [149] and also in the preservation of national economic sovereignty by not sharing the failure of a member state in conducting sound public finances.[150]

(b) The Stability and Growth Pact

The Stability and Growth Pact was introduced in June 1997 as a political statement of the Heads of States of the Member States and turned into legislation by the adoption of European Parliament's Resolution of 17.06.1997, and Regulations (EC) 1466/97 and 1467/97. Its primarily aim is twofold. On the one hand, it put in place an early warning monitoring system (multilateral surveillance) in order to prevent fiscal policies from heading into problematic situations. This constitutes the preventive arm, a soft law instrument based on negotiation, advice and peer pressure in order to comply with the objectives of a budget close to balance or in surplus.[151] On the other hand, it put in place a corrective mechanism (budgetary discipline)

[144] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja, 37*, 281–298, p. 284.
[145] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 61-62.
[146] Ibid., σελ. 60.
[147] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 10.
[148] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 56.
[149] LIONELLO, L. (2015). THE CRISIS OF FUNCTIONALISM AND THE REFORM OF EUROPEAN ECONOMIC GOVERNANCE. *Politeja, 37*, 281–298, p. 285.
[150] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 57.
[151] Maher, I. (2007). Economic governance: Hybridity, accountability and control. Columbia Journal of European Law, 13(3), 679-704, p. 686. Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 43.

in order to correct excessive budget deficits or excessive public debt burdens.[152] The corrective mechanism constitutes a mixture of soft and hard obligations with the objective to respect both the national competence to formulate economic policies and the co-ordination of national economic policies by preserving limits of public debt and deficit, agreed by all Member states.[153] In general terms, policy coordination through the SGP aims to converge national economic policies so as to avoid spillover effects on others and reduce possible problems for monetary policy.[154]

Under multilateral surveillance, the Commission and the Council are empowered to monitor whether the Member States maintain their public deficit less than 3% of GDP and the total public debt below 60% of GDP in the medium-term. Under the budgetary discipline, Member States that exceed the public deficit or debt threshold may be subject to an excessive deficit procedure (EDP) and the application of a sanction.

The enforcement mechanisms of the SGP proved to be weak, since member States and in particular France and Germany failed to meet the set objective of budget deficit less than 3% of GDP, and the Council failed to reach the needed majority in order to oblige the two countries within a fixed timeframe to remedy their deficits.[155] The CJEU was requested to adjudicate on the matter on a case brought before it by the Commission.[156] The Court held that the Council by holding the excessive deficit procedure in abeyance, departed from the procedural stages of the EDP (para. 54) and it was made clear that the requirement of voting majority could underestimate the objective of the procedure. The Court also stated that: "Nevertheless, it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 104 EC and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions."[157] In other words, the Court highlighted the importance of the corrective arm of the excessive deficit procedure by recognizing at the same time the difficulties in its enforcement and the broad discretion that the Council enjoys during the procedure.[158]

The revision of SGP in 2005[159] focused on multilateral surveillance, mainly on peer review and its conduct on a stricter basis and added greater discretion to the EDP, moving towards

[152] Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 43.
[153] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 48.
[154] Iain Begg, Dermot Hodson and Imelda Maher, Economic policy coordination in the European Union, National Institute Economic Review, January 2003, No. 183 (January 2003), pp. 66-77 Published by: Cambridge University Press, p. 70.
[155] Maher, I. (2007). Economic governance: Hybridity, accountability and control. Columbia Journal of European Law, 13(3), 679-704, p. 686.
[156] Case C-27/04 Commission v. Council, ECLI:EU:C:2004:436.
[157] Ibid., para. 81 of the Judgment.
[158] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 50.
[159] Council Regulation 1056/2005 amending Regulation 1467/97 on Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure, 2005 O.J. (L 174) 5; Council Regulation 1055/2005 amending Regulation 1466/97 2005 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 2005 O.J. (L 174) 1.

extended discretion and softer norms.[160] An important development, depicting the move away from the "one-size-fits-all" approach, was that the Commission when preparing a report under Article 104(3) TEC (current Article 126 TFEU) shall take into account all relevant factors as indicated in that Article, putting emphasis on the diversity of economic and budgetary positions of the Member State under review.[161] With regard to the loosening of the imposition of sanctions, the Council highlighted that the purpose of the EDP is to assist, rather than to punish, and to provide incentives for budgetary discipline through enhanced surveillance, peer support, and peer pressure.[162] The overall result of the reform was that the excessive deficit procedure lost much of its significance and credibility. Nevertheless, it follows from the wording and the broad logic of the system established by the Treaty that the Council cannot break free from the rules laid down by Article 126 TFEU (ex Article 104 TEC) and those which it set for itself in Regulation No 1467/97. Thus, it cannot have recourse to an alternative procedure, for example in order to adopt a measure which would not be the very decision envisaged at a given stage or which would be adopted in conditions different from those required by the applicable provisions.

Chapter 2: The financial crisis and the evolution of economic policy co-ordination in EMU

Paragraph 1: Wider coverage of co-ordination during and after the financial crisis

(i) Measures taken at Union level

(a) The 'six-pack' and the 'two-pack'

The revision of SGP in 2011 introduced the six-pack[163] with the objective to improve budgetary discipline and economic surveillance, and also only for euro-area states the two-pack[164] with the objective to strengthen economic and budgetary surveillance of euro states experiencing or threatened with serious difficulties with respect to their financial stability and the monitoring and assessing draft budgetary plans in order to ensure the correction of excessive deficit of the euro area Member States.[165]

The most important change brought in the six-pack concerned the preventive arm providing for guidance to Member States in order to conduct sound fiscal policy without breaching the set limits in the form of a country-specific Medium-Term objective, giving at the same time

[160] Maher, I. (2007). Economic governance: Hybridity, accountability and control. Columbia Journal of European Law, 13(3), 679-704, p. 687. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 52.

[161] Maher, I. (2007). Economic governance: Hybridity, accountability and control. Columbia Journal of European Law, 13(3), 679-704, p. 687.

[162] See ECOFIN, IMPROVING THE IMPLEMENTATION OF THE STABILITY AND GROWTH PACT: COUNCIL REPORT TO THE EUROPEAN COUNCIL, in Presidency Conclusions, Brussels European Council 21 (Mar. 22-23, 2005)

[163] The six-pack includes Regulation 1175/2011 amending Regulation 1466/97 on the surveillance of Member States' budgetary and economic policies [2011] OJ L306/12; Regulation 1177/2011 amending Regulation 1467/97 on the EU's excessive deficit procedure [2011] OJ L306/33; Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L306/1; Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8; and Directive 2011/85 on requirements for the Member States' budgetary frameworks [2011] OJ L306/41.

[164] The two-pack includes Regulation 472/2013 on the strengthening of economic and budgetary surveillance of euro states experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1, and Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the euro area Member States [2013] OJ L140/11.

[165] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 17.

the EU competence to enforce its fulfilment. The six-pack legislation strengthened fiscal surveillance and extended EU co-ordination by the introduction of the macroeconomic Imbalances Procedure (MIP).[166] In this regard, under the MIP, almost all areas of Member States' economic policies could become subject to EU scrutiny, advice and, in the case of "excessive" imbalances in a euro area Member State, even sanctions (under the Excessive Imbalances Procedure, EIP)[167]. Therefore, the possibility to impose sanctions that was available before only under the EDP, it is now extended to the preventive arm of the SGP and the MIP.[168] For euro-area states, the enforcement regime foresees first, the imposition of an interest-bearing deposit after one failure to comply with the recommended corrective action, and after a second compliance failure, the conversion of this interest-bearing deposit into a fine of up to 0.1% of GDP, and in addition sanctions can be imposed.[169] Another innovation of the six-pack was the introduction of the reverse qualified majority voting rule (RQMV) into the SGP. Under the RQMV, the Commission's proposal will stand unless it is voted down by a qualified majority within the Council.

The two-pack proposed that Member States, whose currency is the euro, were to "consider their budgetary plans to be of common concern and submit them to the Commission for monitoring purposes in advance of their becoming binding" (Preamble, Recital 19). It applies to euro-area states and further tighten European control over national budget by requiring that in case that a draft budget deviates too much from the Council recommendations under the SGP, the Commission could request that a Member State revise its budget.[170] The Commission and the Council are steering the national budgetary process via an annual cycle of reporting by the member states which has been organized as the European Semester.

The above mentioned reforms of the SGP transformed it from an emergency tool into a broad mechanism for guidance to Member States to conduct sound fiscal policies on a continuous basis.[171] If they do not do so, the Commission adopts guidelines to set the framework of assessing compatibility with the objectives of SGP. Although this intervention is within the ambit of soft law, this might lead to strict obligations. If, for example, a recommendation is intended to produce binding effects, then it is not an easy task to distinguish between guidance or a reminder to follow up binding EU rules.[172]

Therefore, the powers of the Commission are also expanded through the establishment of the MIP as well as the insertion of the RQMV. Within the new legal framework, what was earlier only peer pressure, now entails the possibility of imposition of sanctions. The Commission acquires an important role, since it has discretion while reviewing the situation of macroeconomic policies within member States.[173] The RQMV shows that enforcement of the MIP and SGP in general will overcome the political motives within the Council that weakened the enforcement in the past. Questions arise as to how the Commission will exercise its discretion over sovereign Member States in a field of policy which belong to national

[166] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 5.
[167] Ibid..
[168] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 18.
[169] Ibid.
[170] Ibid.
[171] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 4.
[172] Ibid. p. 5.
[173] Ibid., p. 6.

competence and whether it is legitimate granting the Commission the role of enforcement under the RQMV.

(b) The European Semester

Since 2011, fiscal and macroeconomic coordination has been brought together in the European Semester of Macroeconomic Governance, introduced by Regulation 1175/2011 of the six-pack. According to Tuori, "*The introduction of the European semester is an effort at meta-level coordination of the diverse monitoring and coordinating processes."* [174] The European Semester[175] consists of an annual cycle of interactions between Member States and EU actors regarding economic and fiscal policy coordination. The Commission first publishes an Annual Growth Survey which is supposed to provide a basis for integrating macroeconomic, thematic and fiscal surveillance, and in its spring meeting, the European Council issues policy orientations covering fiscal, macroeconomic structural reform and growth enhancing areas, and advises on linkages between them. The legal form for this guidance is provided by integrated broad economic and employment-policy guidelines, provided for by Articles 121(2) and 148(2) TFEU. In April, Member States send to the Commission for assessment their Stability and Convergence Programmes, as presupposed by the mutual surveillance procedure under Art 121 TFEU, as well as their National Reform Programmes, introduced by the new economic imbalances procedure. In June or July, on the basis of the Commission's assessment, the Council issues country-specific guidance that is supposed to influence Member States when finalising their draft budgets for the following year.

(c) The European Financial Stabilisation Mechanism

At the outbreak of the financial crisis, in May 2010, the Council adopted, on the legal basis of Article 122 (2) TFEU, a temporary mechanism, the European Financial Stabilisation Mechanism (EFSM)[176] with the view the Union to provide financial assistance to any member state experiencing or being threatened by severe financial difficulties. In this regard, the EFSM was used to provide for financial assistance conditional on the implementation of reforms to Ireland and Portugal between 2011 and 2014, and to provide for short-term bridge loans to Greece in July 2015.[177] Today, the EFSM, remains in place and can be used if a need arises, however, euro area countries in need of financial assistance are expected to turn to the European Stability Mechanism (ESM), a permanent intergovernmental institution which was set up by and for euro area countries.[178] The EFSF assisted three countries, Ireland, Portugal, and Greece (for the period 2010 – 2012).[179]

[174] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 20.

[175] See https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/european-semester_en

[176] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010.

[177] https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en#legal-basis

[178] https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en#legal-basis

[179] See the programmes at: https://www.esm.europa.eu/about-us/history#headline-the_context

(ii) International Agreements

(a) The European Stability Mechanism

In order to face the economic crisis, in October 2010, the European Council decided on the establishment of a permanent mechanism to be able to provide for financial assistance.[180] In doing so, the European Council adopted Decision 2011/199[181], in order to add a 3rd paragraph to art. 136 TFEU, by using the simplified revision procedure of article 48(6) TEU.[182] The new paragraph of article 136 (3) TFEU reads as follows: "*The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."* Thus, on the legal basis of this additional paragraph and not on Article 122 (2) TFEU that was the case for the adoption of the EFSM which was adopted under EU legislation.

On 2.2.2012, the Eurozone member states concluded an international agreement establishing the European Stability Mechanism (ESM), a permanent intergovernmental institution which was set up by and for euro area countries,[183] which entered into force on 08.10.2012, following its ratification by the Eurozone member states.[184] On 27 January and 8 February 2021, ESM member countries signed the Agreement Amending the ESM Treaty[185] which provides a legal basis for a set of new tasks assigned to the ESM and will come into force when ratified by the parliaments of all 19 ESM Members.[186]

The ESM mandates the Commission, the ECB and the IMF to negotiate an international agreement and a Memorandum of Understanding (MoU) annexed to it, laying down a programme for the needed reforms or fiscal consolidation to be implemented in order to restore financial stability.[187] The ESM has a lending capacity of 500 billion euros, an amount for which the contracting parties act as guarantors.[188] ESM issues bonds to increase its capital and be able to lend. When the Euro area's stability requires it, it provides financial assistance – subject to strict conditionality - to a Member state in distress in the form of direct credit line (loan), purchase of Member state's bonds on the primary market, purchase of Member state's bonds on the secondary market.[189]

The ESM assisted Spain in December 2012, Cyprus in May 2013, and Greece which got a third assistance programme in August 2015.[190]

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[180] EUCO 25/10, available at: https://data.consilium.europa.eu/doc/document/ST-25-2010-INIT/en/pdf and EUCO25/1/10 REV1, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf

[181] 2011/199/EU: European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro *OJ L 91,* 6.4.2011

[182] EUCO 30/1/10 REV1, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf

[183] https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/financial-assistance-eu/funding-mechanisms-and-facilities/european-financial-stabilisation-mechanism-efsm_en#legal-basis

[184] The ESM Treaty is available at: https://www.esm.europa.eu/sites/default/files/migration_files/20150203_-_esm_treaty_-_en.pdf

[185] The agreement proposing amendments to the ESM Treaty is available at: https://www.esm.europa.eu/sites/default/files/migration_files/esm-treaty-amending-agreement-21_en.pdf

[186] https://www.esm.europa.eu/about-esm/esm-reform

[187] See Article 13 of the ESM Treaty

[188] https://www.esm.europa.eu/about-us/history#headline-the_context

[189] See Articles 14 – 21 of ESM Treaty

[190] See the programmes at: https://www.esm.europa.eu/about-us/history#headline-the_context

It is important to note that the amendment for the addition of the above mentioned 3rd paragraph to Article 136 entered into force on 01.01.2013, after its ratification by the member states in accordance with the provisions of their national law. The ESM was created before the amendment coming into force, which makes this amendment superfluous, indicating that the member states were already competent to conclude such an agreement. On this issue, the Court stated that the amendment to article 136 TFEU by the insertion of the 3rd paragraph, only confirmed a power already held by member states and did not confer any new power.[191] Accordingly, a member state's right to ratify the ESM Treaty was not subject to the amended TFEU provision's prior entry into force.

(b) The Euro-Plus Pact

In March 2011, within the framework of the European Council, the euro-area member states plus eight other member states (Bulgaria, Denmark, Latvia, Lithuania, Hungary, Poland, Sweden and Romania) reached a political agreement named Euro-Plus Pact.[192] It was introduced as a soft law document expressing the willingness of the participating member states to include additional information in their annual "Stability" or "Convergence" Programs, as well as in their "Reform Programs" (only for Eurozone member states) under the coordination of their economic policies.[193]

The Euro-Plus Pact was aimed at "further strengthen the economic pillar of EMU and achieve a new quality of economic policy coordination, with the objective of improving competitiveness and thereby leading to a higher degree of convergence reinforcing our social market economy"[194]. However, this political agreement deemed to be inadequate for the achievement of the above objectives due to the lack of imposing strict obligations upon the member states.[195]

(c) The Fiscal Compact

The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), widely known as the Fiscal Compact,[196] is an international agreement governed by public international law, signed by 25 out of 27 Member States (apart from the UK and the Czech Republic) on 02.03.2012 and entered into force on 1 January 2013 after being ratified by 12 participating states.

Member states once again chose the international route and the rules governing fiscal discipline took the form of an international agreement.[197] The main objectives of this agreement, as stated in its Article 1, are to "foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby

[191] Pringle, paras. 183-184.
[192] EUCO 10/1/11 REV1, available at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf
[193] EUCO 10/1/11 REV1, para. 12.
[194] EUCO 10/1/11 REV1, para. 11.
[195] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 108.
[196] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union', signed on 2 March 2012, available at http://www.consilium.europa.eu/european-council/pdf/Treaty-on-Stability-Coordination-and-Governance-TSCG/
[197] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 108. Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 94. DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 9.

supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion".[198]

In particular, the contracting parties, in order to ensure that national budgets are balanced or in surplus, must keep their annual structural deficits at 0.5% of GDP or lower.[199] Governments must put in place an automatic correction mechanism triggered by any departure from the fiscal "golden rule".[200] If the budget balance deviates from the projected line, corrective measures are taken automatically.[201] States may be temporarily exempted from the fiscal "golden rule" in exceptional circumstances, such as a case of an unusual event outside the control of the state concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact.[202] Moreover, if a government's public debt is well below the Stability and Growth Pact's reference value (60% of GDP), it may be granted a higher structural deficit of up to 1% of GDP.[203]

It is important that Article 3(2) of this agreement states that "the rules mentioned under paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes". In this regard any contracting party or the Commission may bring before the CJEU those states that do not comply with the implementation of the Fiscal Compact rules, and the CJEU could impose fines in case of persistent non-compliance.[204] This means that the signatories states may be brought before the CJEU if they fail to abide themselves by the rules prescribed in Article 3 (1). The Court may impose financial sanctions, consisting of a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product on countries that do not comply with its judgments.[205]

To improve coordination of national economic policies[206], the TSCG requires governments to report ex-ante on their debt issuance plans to the Commission and Council of the EU (Article 6). They have to ensure that their plans for major economic policy reforms are discussed or coordinated among themselves in advance (Article 11). The agreement also covers governance of the euro area.[207] Summits of the heads of state or government of the euro area countries, widely known as Euro summits, should be held at least twice a year.

The Fiscal Compact has been criticized especially due to its international character as a document that was not needed, in the sense that the main priority of the member states was a reminder to comply with the rules already existing at the EU legal order and in particular in the

[198] See Article 1 (1) of the TSCG.
[199] See Article 3 (1) b of the TSCG.
[200] See Article 3 (2) of the TSCG
[201] See Article 3 (1) e of the TSCG
[202] See Articles 3 (1) c and 3 (3) b of the TSCG
[203] See Article 3 (1) d of the TSCG
[204] Article 8(1) and 8(2) of the TSCG. K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 20.
[205] Article 8(2) of the TSCG.
[206] Articles 9-11 of the TSCG.
[207] Articles 12 and 13 of TSCG.

TFEU and the SGP.[208] It was also argued that the member states could have followed the option of enhanced cooperation[209], rather than the conclusion of an *inter se* international agreement.[210]

The Fiscal Compact has also raised concerns regarding the evolution of economic policy coordination for euro-area states having as a result the transfer of part of national economic sovereignty, namely control over national budgetary processes, to the supranational level.[211] As it will be further discussed at the following chapter, concerns arose about the legitimacy of the expansion of the powers of the EU regarding economic policy due to the "increased intrusion into the procedural and substantive budgetary autonomy of Member States" from the side of the EU institutions.[212]

Paragraph 2: The relation and distinction between economic and monetary policy as held by the CJEU

Regarding practical implications of the measures adopted, their categorization under the monetary or economic policy and the relation and distinction between these policy areas, the CJEU shed some light during the examination of preliminary references from national courts in the cases *Pringle*, which concerns the establishment of a permanent European Stability Mechanism (ESM), *Gauweiler* about the Outright Monetary Transactions, announced by the ECB, and *Weiss* about the PSPP.

(i) *Pringle* case: ESM belongs economic policy

The *Pringle* judgment[213] was issued on 27.11.2012 following a preliminary reference under Article 267 TFEU from the Supreme Court of Ireland. The CJEU was requested to examine the compatibility with EU law of the European Council's Decision 2011/199 amending article 136 TFEU and the Irish law ratifying the international agreement establishing the ESM. Under this section, the focus will be on the finding of the Court regarding the relation between monetary and economic policy. The question addressed to the Court whether a member state whose currency is the euro breached EU law by the conclusion of an agreement such as the ESM Treaty, is examined under another chapter of this thesis.

First, the Court examined whether the amendment of Article 136 TFEU envisaged by Decision 2011/199 meets the criteria of the simplified revision procedure as stated in Article 48(6) TEU. According to that Article, the amendment shall concern solely provisions of Part Three of the TFEU Treaty and, shall not increase the competences conferred on the Union in the Treaties. In essence, the Court had first to determine whether the ESM, which will be established on the

[208] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 112. DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 11.

[209] See Articles 20 TFEU and 326-334 TFEU.

[210] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 110. Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 96.

[211] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 188. K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 20.

[212] K Tuori and K. Tuori, The Eurozone Crisis: A Constitutional Analysis (Cambridge University Press, 2014), p. 105, as mentioned at Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 189.

[213] Case C-370/12, Pringle v. Ireland, ECLI:EU:C:2012:756.

basis of the new par. 3 of Article 136 TFEU, is a mechanism of monetary or economic policy, and then whether the ESM increase the competences conferred on the Union.[214]

The Court held that the ESM's objective is "to safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy."[215] The court continued by saying that, "even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro".[216] The court explicitly specifies in paragraph 57 that "the grant of financial assistance to a Member State however clearly does not fall within monetary policy."[217]

Further, the Court stated that the ESM "serves to complement the new regulatory framework for strengthened economic governance of the Union"[218] and its establishment on the basis of the addition of paragraph 3 to Article 136 TFEU does not affect either the Union's exclusive competences in the area of monetary policy[219], or its competence in the area of the coordination of the Member States' economic policies[220]. With regard to Union's competence, the Court stated that the granting of financial assistance by the Union to a member State provided for in Article 122(2) TFEU concerns an emergency case, when a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, and not under a permanent basis like the ESM, and that Article's 143(2) TFEU provision, subject to certain conditions, for mutual assistance to a Member State, covers only Member States whose currency is not the euro[221].

The Court also clarified that "the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism"[222], and therefore the competences amongst Member States and between them and the EU remain unchanged.

During the examination of the various provisions of primary EU law relating to economic policy, which were, according to the applicant, breached by the content of the ESM treaty and in particular, concerning the argument that the ESM Treaty violates the no-bail-out clause of Art 125 TFEU, the Court held that "the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU"[223]. The Court based its thought on the fact that stability support provided by the ESM is subject to strict conditionality and in any case the ESM provides that where a Member State that is an ESM Member fails to pay the sum called for, the ESM Members do not act as guarantors for the debt of the defaulting ESM Member, and the defaulting ESM Member State remains bound to pay its part of the capital.[224]

Considering the last point of Court's clarification, there might be a potential conflict there, depending on one's interpretation of Art 125 TFEU. Indeed, Art 125 TFEU states that EU

[214] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 100.
[215] Case C-370/12, Pringle v. Ireland, para. 56.
[216] Ibid., para. 56.
[217] Ibid., para. 57.
[218] Ibid., para. 58.
[219] Ibid., para. 63.
[220] Ibid., para. 64.
[221] Ibid., paras. 65-66.
[222] Ibid., para. 110.
[223] Ibid., Para. 146.
[224] Ibid., Paras. 129-147.

member states shall not be liable for the financial commitments of other member states, and one of the basic reasons for the creation of the ESM is precisely to make euro countries liable for each other's debts, although only indirectly and potentially (if the loans cannot be paid back) and only to the extent of each country's contribution to the mechanism.[225] Another consideration is that member states in order to escape from the no bail-out clause, can exit the EU framework and enter the world of the ESM, which has been clarified that lies outside the EU, where they can be granted financial assistance under conditionality mechanisms.[226]

The TFEU provides the legal framework for the monetary (exclusive EU competence) and economic policy (co-ordination of economic policies, member states' competence) as two distinct areas of competence in the EMU, and indeed they are distinct. In practice, the measures adopted in the two fields of policy, especially to deal with the economic crisis, have shown that they are interrelated, despite their distinct and asymmetric structure within the EMU.

In *Pringle*, it seems that the Court tried to draw a distinctive line between the monetary policy and economic policy. However, things seem to be complex, and the involvement of the ECB in the ESM blurred further the picture. Munari talks about "*realpolitik* before the rule of law", in the sense that the interpretation given in the *Pringle* was affected by the urgency of the financial crisis as regards a clear distinction of the two policy areas.[227] Overall, it is quite clear that there is an interrelation between economic policy and monetary policy.[228]

(ii) *Gauweiler* case: OMT belongs to monetary policy

The *Gauweiler* judgment[229] was issued in June 2015, following a preliminary reference[230] from the German Constitutional Court (Bundesverfassungsgericht (BverfG), hereinafter GCC). The preliminary reference, which was the first ever made by the GCC, requested the CJEU to review the validity of the Outright Monetary Transactions Program (OMT) announced by the ECB[231] as a potential tool of monetary policy to safeguard the stability of the single currency. According to the ECB's announcement, the program entailed the ECB's activity in secondary sovereign bond markets of Eurozone member states in distress, subject to strict and effective conditionality attached to an appropriate EFSF/ESM programme, aiming at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. The OMT program was announced a few weeks after the famous statement of Mario Draghi, the then President of the ECB, that "the ECB is ready to do whatever it takes to preserve the euro"[232], and further it was quite obvious that during the economic crisis, the ECB attempted to interpret its powers broadly and its restrictions narrowly, in order to deal with the problems despite its lack of weapons. Considering that the OMT program was planned to be used (although it was never used) as a financial assistance programme to Greece, which was already under financial assistance programmes under the ESM, it makes sense the confusion of being a weapon under

[225] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 17. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 103.
[226] Francesco Munari, The European Monetary Union: A Hard Test for the Rule of Law Within the EU Legal System, American University International Law Review, 2017, Volume 33, Issue 2, Article 3, p. 363.
[227] Ibid., p. 367.
[228] Ibid., p. 365.
[229] Case C-62/14 *Gauweiler and Others*, ECLI:EU:C:2015:400.
[230] Case 2 BvR 2728/13 et al., order of 14 January 2014, available in English at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/01/rs20140114_2bvr272813en.html
[231] Press release of the ECB "Technical features of the Outright Monetary Transactions", 6 September 2012, available at: https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html
[232] Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London 26 July 2012, available at: https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html

the umbrella of economic policy. Its resemblance with already existing financing mechanisms in the field of economic policy, under the EFSM and the ESM, which provide for the purchase on the secondary market of bonds issued by the members to the respective treaties, makes the border lines between economic and monetary policy blurred.[233] The difference is that the existing financial mechanisms were backed up by the member states and their obligations undertaken under the concluded international agreements, whereas the OMT is an activity organized by the ECB.[234]

As formulated by the GCC, the preliminary reference, instead of just raising questions to be examined by the CJEU, dictated the interpretation of EU law considered by the GCC as the lines that the referred court should follow[235] and implied that its final judgement could deviate from the CJEU's judgment if under the ultra vires review, the GCC conclude that the ECB exceeded its conferred powers[236]. The GCC indicates that it considers OMT incompatible EU law for four reasons: (1) transgression of the ECB's mandate which is limited to monetary policy according to articles 119 and 127 TFEU and Article 17 et seq. of the ESCB Statute, the OMT is an economic policy measure, (2) violation of the prohibition of monetary financing of the budget as enshrined in Article 123 TFEU, (3) irrelevance of the ECB's reference to a "disruption to the monetary policy transmission mechanism" with regard to the above two points, and (4) possibility of an interpretation in conformity with EU law.[237]

The *Gauweiler* case touched upon the following issues: the limits of powers and competences of the ECB and the interpretation of the prohibition of Article 123 TFEU, which can be seen as further clarification by the CJEU in the aftermath of the *Pringle* judgment, and the institutional framework of the EMU and the relations between the CJEU and the BVerfG, especially regarding the latter's claim of powers of ultra vires and identity review.[238]

In *Gauweiler* judgement, the Court held that the OMT falls within the monetary policy, and in doing so it analyzed the objectives and instruments of the monetary policy. Regarding its objectives, the Court pointed out that "the primary objective of the Union's monetary policy is to maintain price stability", and that "the ESCB is to support the general economic policies".[239] In guaranteeing price stability, the ESCB may adopt measures on the basis of Article 127 (1) TFEU that are intended to avoid any disruption of the transmission of the 'impulses' across the money market to the various sectors of the economy.[240] Regarding its instruments, the Court held that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in euro[241] and clarified

[233] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 127.
[234] Ibid., σελ. 127.
[235] Mayer, F. C. (2014). Rebels without cause: critical analysis of the german constitutional court's omt reference. German Law Journal, 15(2), 111-146, p. 119, Dariusz Adamski, Economic constitution of the euro area after the Gauweiler preliminary ruling, (2015), 52, Common Market Law Review, Issue 6, pp. 1451-1490, p. 1451, Fabbrini, F. (2015). After the omt case: The supremacy of EU law as the guarantee of the equality of the member states. German Law Journal, 16(4), 1003-1024, p. 1004.
[236] Fabbrini, F. (2015). After the omt case: The supremacy of EU law as the guarantee of the equality of the member states. German Law Journal, 16(4), 1003-1024, p. 1004, Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 129.
[237] Case 2 BvR 2728/13 et al., order of 14 January 2014, paras. 55-100.
[238] Dariusz Adamski, Economic constitution of the euro area after the Gauweiler preliminary ruling, (2015), 52, Common Market Law Review, Issue 6, pp. 1451-1490, p. 1452.
[239] Ibid., paras. 43.
[240] Ibid., paras. 50.
[241] Ibid., paras. 54.

that there was no change with regard to competences and that this specific programme concerned monetary policy.[242]

With regard to the "indirect consequences" that the implementation of a programme, such as the OMT, might have on the economic policies of beneficiary states resulting from the purchase of their sovereign bonds on secondary markets by the ECB, in accordance with its reasoning in *Pringle*[243], the Court stated that the fact that the OMT programme "might also be capable of contributing to the stability of the euro area, which is a matter of economic policy…, does not call that assessment into question"[244] and added that "such indirect effects do not mean that such a programme must be treated as equivalent to an economic policy"[245].

The CJEU further applied the proportionality test to assess whether the measures entailed in such a bond-buying programme are proportionate to the objectives of monetary policy and concluded that they are appropriate and necessary, and the principle of proportionality is respected.[246] It highlighted that "since the ESCB is required, when it prepares and implements an open market operations programme of the kind announced in the press release, to make choices of a technical nature and to undertake forecasts and complex assessments, it must be allowed, in that context, a broad discretion"[247] and therefore, only a manifest error of assessment can be judicially reviewed, and in the present case there was not any[248].

Further, the Court examined the legality of the OMT programme with Article 123(1) TFEU which prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.[249] It took an analogous stance as the one for the no-bail-out clause in Article 125 TFEU examined in *Pringle*[250], and stated that "the aim of Article 123 TFEU is to encourage the Member States to follow a sound budgetary policy, not allowing monetary financing of public deficits or privileged access by public authorities to the financial markets to lead to excessively high levels of debt or excessive Member State deficit."[251]

According to the Court, this specific programme provides for the purchase of government bonds "only in so far as is necessary for safeguarding the monetary policy transmission mechanism and the singleness of monetary policy and that those purchases will cease as soon as those objectives are achieved"[252], and since the ESCB may purchase only the government bonds of Member States which are undergoing a macroeconomic adjustment program and which have access to the bond market again[253], therefore it does not lessen the impetus of the Member States concerned to follow a sound budgetary policy[254].

According to the reasoning and the conclusions of Court's judgment in *Gauweiler*, which used as basis *Pringle* and considering that the Court had the opportunity to clarify things further, while not being under the pressure of an ongoing economic crisis, we can conclude that the

[242] Ibid., paras. 58-68.
[243] Case C-370/12, Pringle v. Ireland, para. 56.
[244] Case C-62/14, Gauweiler para. 51.
[245] Ibid., para. 59.
[246] Ibid., paras. 66-92.
[247] Ibid., para. 68.
[248] Ibid., paras. 74, 81 and 91.
[249] Ibid., para. 59.
[250] *Pringle*, C-370/12, para. 135.
[251] Case C-62/14, Gauweiler para. 100.
[252] Ibid., para. 112.
[253] Ibid., para. 116.
[254] Ibid., para. 121.

purchase of government bonds on the secondary market subject to conditions of compliance with a macroeconomic adjustment programme could be regarded as falling within economic policy when the purchase is undertaken by the ESM[255], and when that instrument is used by the ESCB in the framework of a programme, such as the OMT programme, this falls within monetary policy. Following the Court's reasoning, we can conclude that economic and monetary policy, while being distinct, are closely interrelated since the implementation of measures adopted within the monetary framework may lead to indirect consequences to the economic and vice versa.[256]

(iii) *Weiss* case: PSPP belongs to monetary policy

The *Weiss* judgment[257] was issued in December 2018, following a preliminary reference from the German Constitutional Court (Bundesverfassungsgericht (BverfG), hereinafter GCC). This case has many similarities with the *Gauweiler*. This time, the CJEU was requested to review the validity of the ECB's Decision (EU) 2015/774 on a secondary markets public sector asset purchase program (PSPP) n the light of Article 119, Article 123(1), Article 127(1) and (2) and the second paragraph of Article 296 TFEU and of Articles 17 to 24 of the Protocol on the ESCB and the ECB. The PSSP launched in March 2015 by the ECB which started buying member states bonds from commercial banks as part of its non-standard monetary policy measures. These asset purchases, also known as "quantitative easing", support economic growth across the euro area and help us return to inflation levels below, but close to, 2%.

As in *Gauweiler,* the Court once again that Article 123 TFEU prohibits the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States and from purchasing directly from them their debt instruments.[258] With regard to the purchase of bonds on the secondary market the Court concluded that they are not prohibited, unless the circumstances of the purchase make it "direct", or the incentive of the Member state to conduct a sound budgetary policy is diminished, which was not the case according to the Court with the PSSP since the ECB was found as being sufficiently reasoned with the objective pursued by the PSPP, which a tool of monetary policy, and the principle of proportionality has been respected.

Following the preliminary ruling of the CJEU's judgement, the GCC, on 05.05.2020 delivered its judgement on the matter and for the first time in its history, declared the Decisions of the ECB, *ultra vires* and not applicable in Germany. [259] Although *ultra vires* review to be conducted by the GCC is not something new, it is the first time that Germany turns down a decision of the CJEU. However, the GCC in a European-friendly manner even if declaring openly its disagreement, complied with the Court's decisions. According to Snell, "*Sovereignty and democracy, as interpreted by the German Court, demand that a policy that has been critical for the functioning and even the survival of the euro be discontinued or at least modified"*[260]. This is true. The GCC has adopted a critical stance towards further economic and fiscal integration at the recent cases *Weiss*. In April 2021, the GCC rejected two requests seeking an order of execution for the judgment of 5 May 2020. This tense certainly questions

[255] see Case C-62/14, Gauweiler para. 63 and *Pringle*, C-370/12, para. 60.
[256] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 31.
[257] Case C-493/17, *Weiss and Others*, ECLI:EU:C:2018:1000.
[258] Ibid., paras. 102.
[259] BVerfG, Judgment of the Second Senate of 5 May 2020 - 2 BvR 859/15 -, paras. 1-237, available at: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html
[260] Snell, J. (2016). The trilemma of european economic and monetary integration, and its consequences. European Law Journal, 22(2), 157-179, p. 173.

the EU law primacy principle, but the most important element is the breach of EU law by the disregard of the Court's judgement, which will lead to the initiation of an infringement procedure by the Commission.[261]

Part B: Is the EU law primacy principle applicable in the economic policy area?

Chapter 1: A return to intergovernmentalism

Paragraph 1: The reason that member states followed the international law route

Sergio Fabbrini states that *"the apex of the intergovernmental moment was reached between 2009 and mid-2012",* when "*French and German governments converged toward an intergovernmental interpretation of the integration process"*.[262] Within this spirit, during the financial crisis, Member States took measures following the intergovernmental path to face the challenges in the field of economic policy since it is a decision-making regime, primarily based on national governments' coordination.[263] When collective action was needed to face the challenges posed by the crisis, the intergovernmental path seemed to be the only way to achieve it without transferring competences to the EU level. Following the intergovernmental regime, the major decisions are taken by national prime ministers within the auspices of the European Council or the Euro Summits, or national finance ministers in the Council of Ministers or via informal discussions in the Eurogroup. Therefore, Member states are taking the lead instead of the Commission.[264]

The Treaty on the European Stability Mechanism (ESM) was signed in July 2011, following a European Council's decision to amend Article 136 TFEU by inserting a 3rd paragraph. The ESM operates as an international organization outside the framework of the EU, created by an international agreement signed by all the EU Member States. In March 2012, the Treaty on Stability, Coordination, and Governance in the EMU, known as Fiscal Compact, was signed by 17 euro-area member states plus non-euro area member states (apart from the UK and Czech Republic). In addition, the conclusion of international agreements, concerning the coordination of national economic policies, like the European Financial Stability Facility (EFSF), the European Stability Mechanism (ESM) and the Fiscal Compact is another example of the Member States keeping control over their national competences by using instruments of public international law, outside the EU legal order. These agreements are categorized as *inter se* agreements because they were signed by some of the EU member states.[265]

Pursuant to European integration, EU member states mainly conduct their cooperation within the auspices of the EU's institutional framework by using the enhanced cooperation mechanism, provided for in the Treaty, which could have well been an alternative option. However, *inter se* agreements remain an available tool for the member states, as being sovereign states that retain the capacity to conclude international agreements.[266] De Witte argues that *"in the case of the euro crisis treaties the main purpose seems to have been to*

[261] See https://ec.europa.eu/commission/presscorner/detail/en/inf_21_2743
[262] Fabbrini, S. (2013). Intergovernmentalism and its limits: Assessing the european union's answer to the euro crisis. Comparative Political Studies, 46(9), 1003-1029, p. 1010-1011.
[263] Ibid., p. 1017-1018.
[264] Snell, J. (2016). The trilemma of european economic and monetary integration, and its consequences. European Law Journal, 22(2), 157-179, p. 168.
[265] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 2.
[266] Ibid., p.2.

repair the damage caused by the failings of existing EU law" and not an "*intergovernmental plot designed to exclude the supranational institutions of the EU"*.[267] He argues that in the cases of the EFSF and the ESM, *"EU law did not offer any suitable instruments because of the insufficiency of the EU's financial resources"*[268], plus the unwillingness of non-euro area member states to share the economic burden. In the case of the Fiscal Compact, the member states indeed could have followed another decision-making process, however they chose the form of an international agreement in order to avoid a TFEU amendment and a possible veto during the process, and to avoid the lengthy procedures of EU legislation and also to satisfy the preference of concluding an agreement, mainly expressed by Germany.[269]

Paragraph 2: International agreements and primacy of EU law

Acknowledging that choosing the international law route entails issues regarding the ratification process and the enforcement of the treaty, the most important issue that arose was whether such a choice is compatible with EU law. In principle, EU member states can conclude *inter se* treaties between themselves, but they can do so within the set limits by EU law. The principle of primacy of EU law shall be respected when concluding *inter se* agreements. It shall be noted that *inter se* agreements are in conflict with EU law in case that they concern an area which belongs to the exclusive competence of the EU, since member states are not allowed to conclude such agreements.[270] In case that member states retain competence in a specific area, they can in principle conclude an international agreement as sovereign states.[271] With regard to economic policy, as stated above, the Treaties provide that Union's economic policy competencies are regulated outside the division of exclusive and shared competences, forming a separate category of just co-ordination.[272] Therefore, the doctrine of pre-emption, part of the principle of primacy of EU law, is not relevant in the case of international agreements in the field of economic policy.[273] It is important whether the ESM concerns monetary policy (exclusive EU competence) or economic policy (Member States' competence) and whether its conclusion may affect common rules or alter their scope. The latter is important as to who is competent to conclude such an agreement, the EU or the Member States, and if the answer is that the Member States are allowed to conclude such agreements between themselves, then the main question to be answered is whether they are restricted by the duty of loyalty or sincere cooperation to act without violating primary or secondary EU law.[274]

International agreements shall not violate EU law, and in this regard Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. This restriction flows, not from pre-emption, as this is defined in Art 2(2) TFEU and the Protocol on shared competences, but from Member States' duty of loyalty or sincere cooperation, as enshrined in Article 4(3) TEU: "the Member States shall facilitate

[267] Ibid., p. 3 and 1.
[268] Ibid., p. 9.
[269] Ibid., p. 9.
[270] Article 2 (1) TFEU. K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 33.
[271] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 33. Tuori argues that as is expressly stated in Arts 4(1) and 5(2) TEU, competences remain with the Member States, and no pre-emption exists.
[272] Art 2 (3) TFEU.
[273] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 34.
[274] See Articles 3 (2) and 216 (1) TFEU. K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 35.

the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives".[275]

Basically, what is under review is whether the international agreement is in conformity with the EU Treaties. Such an audit may be carried out by the CJEU if the European Union is a party to the international agreement under consideration. In our case, the international agreements were not signed under the EU's competence, since economic policy is a field that member states retain competence. However, it is settled case-law of the CJEU that the Member States, even when acting in their field of exclusive competence, do not have unlimited discretion. They are required when concluding international agreement to respect Union law, and abstain from the conclusion of an international agreement which is contrary to EU law and the general interest of the Union, on the basis of the principle of primacy. In particular, Member States when concluding international treaties should not breach EU law, or deviate from the regime of competences as enshrined in the Treaties and therefore circumvent the application of provisions of Union law through international treaties. It follows that, if such an infringement were to occur, either the Commission or a Member State could bring an action against a member state for breaching EU law. In case that a Member State or the Commission decides to bring a procedure before the CJEU under Article 258 et. seq. TFEU, for a breach of EU law by the conclusion of an international agreement, then the CJEU would not apply EU law for the interpretation of the international agreement, but will examine the form of the agreement, its scope and content in order to rule whether the international agreement is compatible with EU law. If the CJEU holds that it is not compatible, then the international agreement is declared void (ex nunc).

The Fiscal Compact contains a provision in Article 2 (2) recognizing the primacy of EU law. The ESM Treaty does not include such a rule, but this does not underestimate the precedence of EU law over conflicting provisions in *inter se* treaties.[276] In its case law, the Court of Justice has consistently held that the primacy of EU law extends not only to measures of national law but also to agreements between two or more Member States, which must be disapplied by national courts if they are inconsistent with EU law.

The Court examined the compatibility of the conclusion of the ESM Treaty under a preliminary reference from the Irish Supreme Court in the *Pringle* case. In *Pringle case*[277] the Court examined whether the ESM interferes with exclusive EU competences and whether it is acceptable to use EU institutions for the implementation of an international agreement. The main question was whether by concluding the ESM, the Member States breached EU law.

(i) Pringle case

In the *Pringle* judgment, the Court examined those EU Treaty provisions which were argued by Mr. Pringle to preclude Member States to conclude an agreement like the ESM Treaty and whether its operation may affect the common rules on economic and monetary policy.[278]

Firstly, the Court recalled that the Union has, under Article 3(1)(c) TFEU, exclusive competence in the area of monetary policy for the Member States whose currency is the euro.[279] The Court stated in para. 56 of its judgement that the objective pursued by ESM, "which is to

[275] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 35.
[276] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 13.
[277] Case C-370/12, Thomas Pringle v Government of Ireland, Ireland, The Attorney General, Judgment of the Court of Justice (Full Court) of 27 November 2012.
[278] Ibid., paras. 93-107.
[279] Ibid., Para. 94.

safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy" and concluded that "even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro".[280] According to the Court, the purpose of the ESM is to meet the financing requirements of ESM members who are experiencing or are threatened by severe financing problems.[281] Therefore, the ESM, according to the Court, concerns economic policy, an area where Member States have retained competence and preserved the right to develop their own policies. Thus, the Court held that in principle the Member States whose currency is the euro can conclude an *inter se* agreement such as the ESM.[282] The Court also held that the establishment of the ESM does not affect common rules of the Union or alter their scope, and therefore the Member States whose currency is the euro can conclude such an agreement.[283]

Further, since the Court established that the ESM concerns economic policy and does not affect common rules of the union or alter their scope, and therefore the member states were competent to conclude such an agreement, it continued to examine the various provisions of EU law relating to economic policy, which were, according to the applicant, breached by the content of the ESM treaty. In particular, concerning the argument that the ESM Treaty violates the no-bail-out clause of Article 125 TFEU, the Court held that "the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU"[284]. The Court based its thought on the fact that stability support provided by the ESM is subject to strict conditionality and in any case the ESM provides that where a Member State that is an ESM Member fails to pay the sum called for, the ESM Members do not act as guarantors of the debt of the defaulting ESM Member, and the defaulting ESM Member State remains bound to pay its part of the capital.[285]

Considering the last point of Court's clarification, there might be a potential conflict there, depending on one's interpretation of Art 125 TFEU. Indeed, Art 125 TFEU states that EU member states shall not be liable for the financial commitments of other member states, and one of the basic reasons for the creation of the ESM is precisely to make euro countries liable for each other's debts, although only indirectly and potentially (if the loans cannot be paid back) and only to the extent of each country's contribution to the mechanism.[286]

With regard to the amendment of Article 136 by the insertion of an additional 3rd paragraph as stated, such amendment was not indeed necessary since the ESM Treaty entered into force before the official Treaty amendment, which was pending for ratification by the member states in accordance with the provision of their national law. On this issue, the Court in *Pringle* stated that the amendment to article 136 TFEU by the insertion of the 3rd paragraph, only confirmed a power already held by member states and did not confer any new power.[287] Accordingly, a member state's right to ratify the ESM Treaty was not subject to the amended TFEU provision's prior entry into force. In this regard, it is of great concern whether such an

[280] Ibid., Para. 56.
[281] Ibid., Para. 96.
[282] Ibid., Para. 98.
[283] Ibid., Paras. 99-107.
[284] Ibid., Para. 146.
[285] Ibid., Paras. 129-147.
[286] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 17.
[287] Pringle, paras. 183-184.

unnecessary treaty amendment is the growing impression that the Eurozone rescue measures are undermining the Union's legal order.[288] In fact, the financial crisis is weakening the power and influence of the Court itself since "it is international law, rather than European law, that is being used as a tool for the development of the European integration process."[289]

(ii) MoUs providing for financial assistance by the ESM

A Memorandum of Understanding (MoU) detailing the conditionality attached to the financial assistance facility cannot be seen as being EU law. The Court in *Ledra Advertising*[290] has already confirmed that a MoU is an international agreement and not EU law and even though the Commission and the ECB participated in the negotiations and the signing of the MoU between the ESM and Cyprus, their role was consultative and the Commission signed the MoU on behalf of the ESM, and therefore their actions did not produce legal effects in the EU legal order. In this case, the MoUs are considered to be instruments of international law, they are incorporated in national law, and the national measures adopted can only be examined before national courts.

Several cases were brought before national courts in countries that participated in the ESM and were obliged to take up austerity measures. The national courts endorsed a wide discretion to national governments to deal with the economic crisis and in most cases rejected the claims that the measures taken were violating fundamental rights.

A remarkable decision is the one of April 5, 2013 of the Portuguese Constitutional Court which ruled that several of the austerity measures included in the government's 2013 budget were unconstitutional. The government had adopted the impugned measures in order to meet targets negotiated with the troika as part of Portugal's bailout, and their rejection by the Court caused considerable consternation in both Lisbon and Brussels.[291] The European Commission issued a pointed reminder about the importance of Portugal fulfilling its obligations: "Any departure from the [adjustment] programme's objectives, or their re-negotiation, would in fact neutralise the efforts already made and achieved by the Portuguese citizens, namely the growing investor confidence in Portugal, and prolong the difficulties from the adjustment. … The Commission reiterates that a strong consensus around the programme will contribute to its successful implementation. In this respect, it is essential that Portugal's key political institutions are united in their support".[292]

[288] Nicole Scicluna, Politicization without democratization: How the Eurozone crisis is transforming EU law and politics, *International Journal of Constitutional Law*, Volume 12, Issue 3, July 2014, Pages 545–571, https://doi.org/10.1093/icon/mou043, p. 561-562.
[289] Bruno de Witte, The European Treaty Amendment for the Creation of a Financial Stability Mechanism, Eur. Pol'y Analysis 1, 5 (2011), p. 8.
[290] Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB), Judgment of the Court (Grand Chamber) of 20 September 2016.
[291] Raphael Minder, Portugal Warns Citizens of More Economic Pain, N.Y. Times, Apr. 8, 2013.
[292] Statement by the European Commission on Portugal, Memo 13/307 (Apr. 7, 2013).

Chapter 2: A return to supranationalism

Paragraph 1: An assessment of the legal framework

(i) The Open Method of Coordination - The use of soft law instruments

The Lisbon Treaty extended the integration process to policy fields, including economic and financial policies, which were considered to be sensitive to national sovereignty of the Member States and new forms of governance appeared at the EU level, based on the open method of coordination, benchmarking, peer review and in general intergovernmental coordination, as opposed and distinct to the supranational way of decision-making.[293] The key elements of the OMC as presented in 2000 by the European Council at its Lisbon Summit [294] are the following: fixing guidelines for the Union combined with specific timetables for achieving the goals which they set in the short, medium and long terms; establishing, where appropriate, quantitative and qualitative indicators and benchmarks against the best in the world and tailored to the needs of different Member States and sectors as a means of comparing best practice; translating these European guidelines into national and regional policies by setting specific targets and adopting measures, taking into account national and regional differences; periodic monitoring, evaluation and peer review organised as mutual learning processes.

The OMC as a new form of governance shifts away from hierarchical governance and encompasses a fully decentralised approach which is to be applied in line with the principle of subsidiarity in which the Union, the Member States, the regional and local levels, as well as the social partners and civil society, will be actively involved, using variable forms of partnership.[295] It further moves away from the adoption of complete prescriptive policies with the objective to promote flexibility and openness and is focused on the setting of general guidelines or goals which will facilitate the framing and developing of national policies at the national or regional level.[296] Lastly, in most of the policy areas of this method of governance, soft law instruments are adopted which are not to be considered as binding and therefore legal enforcement is not compulsory.[297]

Within the context of the co-ordination of economic policies as presented above, the open method coordination entails cooperation through the adoption of non-binding rules, namely the broad guidelines of macroeconomic policy and the multilateral surveillance (Article 121 TFEU) that Member States shall respect under the supervision of the Commission and the Council.

Both the multilateral surveillance and the budgetary discipline (with the exception of the excessive deficit procedure) as provided for in the Treaty provisions and further clarified by secondary law are based on the issuing of recommendations which belong to soft law and therefore are not binding.[298]

Fiscal policy coordination (Article 126 TFEU) on the other hand is being conducted by more intrusive powers by the EU institutions.[299] Within the closed method of coordination of

[293] Fabbrini, S. (2013). Intergovernmentalism and its limits: Assessing the european union's answer to the euro crisis. Comparative Political Studies, 46(9), 1003-1029, p. 1007-1008.
[294] Lisbon European Council, Presidency Conclusions 24 March 2000, paras. 37-38.
[295] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 202.
[296] Ibid., p. 761.
[297] Ibid., p. 202.
[298] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 66.
[299] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 184.

economic policy, the excessive deficit procedure may lead to binding rules and legal enforcement plays a role.[300] This is certainly the case under the excessive deficit procedure (Art. 126 TFEU) when non-compliance of a member state to take measures for the deficit reduction in accordance with the Council's decision, may trigger economic sanctions (Art. 126 (11)). Indeed, the excessive deficit procedure can lead to sanctions, however their enforcement depend to a large extent to the member states themselves.[301]

The choice made by the member states for economic policy in the EMU to be restricted to coordination has as a result the creation of an institutional framework based on intergovernmentalism characterized by soft law obligations and a hardly enforceable regime.[302]

(ii) Stricter co-ordination of national economic policies: Hard law – no enforcement

Overall, the EU had to undertake a difficult task. Contribute to the effective economic policy coordination and at the same time respect national economic sovereignty.[303] Economic sovereignty may still remain in the hands of the member states, however many economic competencies shifted to the supranational level.[304] Macroeconomic policy coordination (Article 121 TFEU) is being conducted via the open method of coordination.[305] It was expected that the open method of coordination will bring convergence of economic policies without intruding into members states' competence.[306]

However, the financial crisis and the asymmetry between monetary and economic policy, especially concerning Eurozone Member States, showed that stricter coordination of national economic policies at the European level was needed and the provisions of the Treaty (Article 5(1) TFEU and 136 (3) TFEU) permit such an interference at the cost of national economic sovereignty.[307]

Fiscal policy coordination (Article 126 TFEU) on the other hand is being conducted with more intrusive powers by the EU institutions.[308] Within the closed method of coordination of economic policy, the excessive deficit procedure may lead to binding rules and legal enforcement plays a role.[309] This is certainly the case under the excessive deficit procedure (Art. 126 TFEU), non-compliance of a euro-area member state to take measures for the deficit reduction in accordance with the Council's decision, may trigger economic sanctions (Art. 126 (11)). The excessive deficit procedure can lead to sanctions, however their enforcement depend to a large extent to the member states themselves.[310]

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[300] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 202.
[301] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 66.
[302] Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 45.
[303] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 180.
[304] Ibid., p. 180.
[305] Ibid., p. 182.
[306] Ibid., p. 182.
[307] Ibid., p. 186. Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 53.
[308] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 184.
[309] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 202.
[310] Ρ.-Εμ. Παπαδοπούλου, Ο συντονισμός των οικονομικών πολιτικών στη Ευρωπαϊκή Ένωση και η οικονομική κρίση, Νομική Βιβλιοθήκη, 2017, σελ. 66.

Article 126 (14) TFEU provides that "The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions" for implementing agreed-upon economic guidelines. However, while being required to consult the European Parliament on some legislative proposals concerning economic and financial policy, the Council is not bound by the latter's position.[311] In a nutshell, the following instruments were adopted: The ECOFIN Council of May 2010 adopted a regulation creating the European Financial Stability Mechanism (EFSM). In 7 September 2010, the Council approved the European Semester. In 2011, the Six-Pack was adopted. The two-pack consisted of two regulations was approved through the co-decision procedure.

The measures introduced by the six-pack and the two pack showed that there is a tension of substantive interference of the EU in national economic policies and the balance of powers between the EU and the Member States has been changed.[312] In this regard, the European Semester is supplemented with intensified systems of monitoring in case of problems: the excessive deficit procedure (EDP) and the excessive (macroeconomic) imbalances procedure (EIP).[313] Leino and Saarenheimo states that *"In many economic policy areas where secondary legislation has granted the EU coercive powers, the basis of these powers remains contested in view of the limited economic policy competence enshrined in the Treaties".*[314]

The new strategy of the EU in the economic policy calls for more convergence and the use of the community method for legislation in this field. Hence, member states will probably have no other option than continue with the integration process, possibly towards a political union which is, however, not the case so far.[315]

At the moment, EU decisions do definitely have an impact on sovereign Member States, and it is a matter of concern whether in particular the Member States of the Eurozone still retain sovereignty on shaping their economic policies freely without considering or even being bound by the soft law recommendations issued by the Union Institutions.[316] The principle of conferral indicates that competences not explicitly conferred to the Union, remain with the Member States. If a Member State feels that its sovereignty is too restricted by the decisions taken at EU level, it can always leave the EU, an extreme option which is though available.[317] Indeed, Member States lost their monetary policies when entering to the monetary union, an area where the ECB is conducting monetary policy regarding the euro, and further as a result of the SGP, national governments lost to a large extent their fiscal policy.[318]

Under the current legal framework although EU institutions more directly and concretely influence national economic policies, the overall EU economic governance is based on the provision of guidance via soft law towards better coordination and governance of national

[311] Fabbrini, S. (2013). Intergovernmentalism and its limits: Assessing the european union's answer to the euro crisis. Comparative Political Studies, 46(9), 1003-1029, p. 1009.
[312] van den Brink, T., & van Rossem, J. (2015). Sovereignty and the shaping of economic governance in the European Union. Irish Journal of European Law, 18(1), 13-32, p.23.
[313] Ibid., p.23.
[314] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 10.
[315] Iain Begg, Dermot Hodson and Imelda Maher, Economic policy coordination in the European Union, National Institute Economic Review, January 2003, No. 183 (January 2003), pp. 66-77 Published by: Cambridge University Press, p. 75.
[316] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 11.
[317] Ibid., p. 11.
[318] Otto Holman, Asymmetrical Regulation and Multidimensional Governance in the European Union, Review of International Political Economy, Oct., 2004, Vol. 11, No. 4, Global Regulation (Oct., 2004), pp. 714-735, p. 726.

economic policies with the objective to avoid the conduct of economic policies which could have a negative impact on the stability of the Eurozone. [319]

There is the view that the operation of the MIP and the EDP and the extension of powers of the Commission, may result to powers which cannot be legitimized under the current regime, and this is probably the reason why the EU has not used so far these powers of coercion that are in place and has rather focused on negotiation and persuasion to encourage Member States to conduct better policies.[320] There is also the opposite view expressed by Federico Fabbrini that "*a comprehensive and systematic constitutional reading of the treaties suggests that the EU is empowered to act in the field of economic policy including by establishing a budgetary instrument to improve the functioning of EMU*"[321].

There were legal and political reactions that the coordination of economic and fiscal policies through the European Semester, although characterized by soft coordination, breaches the sovereignty of the member states and especially their budgetary control.[322] However, the way the European Semester has unfolded from 2013 on, constitutes the best evidence of why economic coordination, despite all legislative and political efforts, has remained to the ambit of the Member States.[323] In April 2013, the Commission announced that 11 Member States were "experiencing macroeconomic imbalances, which deserve monitoring and policy action". It should be added that countries receiving fully fledged financial assistance at that time, i.e. Greece, Ireland, Portugal and Cyprus, were excluded from the review process.[324] Two other Member States, Slovenia and Spain, were, according to the Commission's assessment, experiencing not only macroeconomic imbalances, but excessive macroeconomic imbalances. In such case, although there is legislation in place and the Commission may recommend to the Council to issue "a recommendation establishing the existence of an excessive imbalance and recommending that the Member State concerned take corrective action"[325], it did not issue such a recommendation. As Adamski states "*It is hard to escape the conclusion that the main reason why the Commission restrained itself from acting was the legitimacy equation of economic policy"*. [326] Instead, the Commission issued specific recommendations to the countries concerned under the realm of soft law, which means that national governments may avoid their implementation.[327]

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[319] van den Brink, T., & van Rossem, J. (2015). Sovereignty and the shaping of economic governance in the European Union. Irish Journal of European Law, 18(1), 13-32, p.23, and Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 11.

[320] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 13-14.

[321] Federico Fabbrini, A Fiscal Capacity for the Eurozone: Constitutional Perspectives, in-depth analysis requested by the AFCO committee, Policy Department for Citizens' Rights and Constitutional Affairs
Directorate General for Internal Policies of the Union, February 2019, This document is available on the internet at: http://www.europarl.europa.eu/supporting-analyse

[322] Μ. Χρυσομάλλης, Ευρωπαϊκή Οικονομική Διακυβέρνηση, Οικοδόμηση, Εμβάθυνση, Ζητήματα Δημοκρατίας και Κράτους Δικαίου, Σεπτέμβριος 2018, Νομική Βιβλιοθήκη, σελ. 78.

[323] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 190.

[324] European Commission, 'Communication from the Commission to the European Parliament and the Council and to the Eurogroup. Results of in-depth reviews under Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances', Brussels, 10 April 2013, COM(2013)199, available at http://ec.europa.eu/economyjfinance/publications/occasional-paper/2013/pdf/com(2013)_199_jinal-en.pdf

[325] Article 7(2) of Regulation 1176/2011.

[326] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 191.

[327] Ibid., p. 192.

So while there is a piece of legislation in force establishing, according to its title, "common provisions ... ensuring the correction of excessive deficit of the Member States in the euro area", the SGP, as Commission's President Juncker said, "has never been applied in a more flexible way"[328]. In the way in which the six-pack and the two-pack have actually been implemented, they hardly impinge upon national economic sovereignty. Of course, this does not rule out the possibility that these provisions will eventually be applied in a rather strict form in the future.[329]

Recently, discussions on the architecture of EMU focus on the completion of its design by 2025 through formalizing and making more binding the convergence process with regard to the economic union, setting up a macroeconomic stabilization function for the euro area concerning the fiscal union and integrating the ESM into the EU law framework.[330] The Five Presidents' Report clearly acknowledges the failure of the 2011 Euro Plus Pact due to its inter-governmental, non-binding nature, shows the community method as the suitable one to move forward, highlights that "instead of further 'pacts', concrete progress on the basis of EU law is needed to move towards an Economic Union of convergence, growth and jobs", and proposes four pillars: "the creation of a euro area system of Competitiveness Authorities; a strengthened implementation of the Macroeconomic Imbalance Procedure; a greater focus on employment and social performance; and on stronger coordination of economic policies within a revamped European Semester".[331]

Paragraph 2: The involvement of EU institutions

A return to supranationalism avoidably raises questions concerning whether the EU has the power to legislate in this field, and whether there is an interference with national sovereignty. Could the imposition of sanctions be seen as an interference with national sovereignty? The answer can be affirmative if we think that economic policy is an area of Member States' competence, and the principle of conferral enshrined in Article 5(2) TEU provides that the EU can only act within the limits of the competences conferred upon it by the Member States in the Treaties. The question then is whether the coordination of economic policies is covered by the principle of conferral. As presented above, the coordination of economic policies is a stand-alone power, differentiated from exclusive EU competence and shared competence between the EU and the Member States.[332] Certainly, this special category of coordination of economic policies paved the way to the change of macroeconomic policies from a light regime to the current much more strict regime as a result of the adoption of the six-pack and the two-pack.

In terms of substance, the EU involvement is also an issue since economic surveillance includes many areas of national policy which have been excluded from the sphere of the EU's legislative competences.[333] Therefore, issues covering pension and health care come into the realm of the EU. It shall be noted though, that the last word of shaping national policies still remains with the Member States. The EU continues to provide for guidance as to how the Member States will construct their national economic policies, although in a much stricter way than before. I

[328] Juncker says Italy "can't complain"', ANSA, 11 December 2014, available at: http://www.ansa.it/english/news/2014/12/1 1/juncker-says-italy-cant-complain_2cb65dde-cf3b-4d40-9646-fa97b89293a0.html

[329] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 195.

[330] J.-C. Juncker et al., Five Presidents' Report: Completing Europe's Economic and Monetary Union (22 June 2015), p. 21.

[331] Five Presidents' Report: Completing Europe's Economic and Monetary Union (22 June 2015), p.7.

[332] van den Brink, T., & van Rossem, J. (2015). Sovereignty and the shaping of economic governance in the European Union. Irish Journal of European Law, 18(1), 13-32, p.23.

[333] Ibid., p.29.

agree with the view expressed by van den Brink & van Rossem that *"The development of economic policies is as such not transferred to the EU level; rather the national development of economic policies acquires a European dimension that contributes to their legitimacy"*.[334]

The Delors Report found that *"uncoordinated and divergent national budgetary policies would undermine the monetary stability and create imbalances … in the Community"*. Hence, *"[i]n the budgetary field, binding rules are required"*.[335] Therefore, in times of peace, the decisions of economic policy are a responsibility of Member states, however, in times of crisis, when a Member State's finances are possible to jeopardize the proper functioning of the monetary union, the EU would intervene by regulating fiscal rules.[336]

The six-pack and two-pack are the most notable examples of a return to supranationalism. The form of regulations and directives that the "packs" took is the characteristic of the Community method, where legislation is taking place at a supranational level and is treated as a synonym to rules-based governance.[337] This turning point comes to an opposition with other forms of EU governance used under the coordination of economic policy, namely intergovernmental instruments or policy coordination through the open method of coordination.[338] In this regard, the Six-Pack and the Two-pack have strengthened the supranational side, since they consisted of regulations and one directive approved mainly following the co-decision procedure, without the exclusion of the Commission from the process.[339]

(i) The role of the Commission

The powers of the Commission and the ECB have been strengthened not only via the six-pack and two-pack, but also by the fact that international agreements like the ESM and the Fiscal Compact, gave specific roles to the EU institutions.

The fact that the ESM Treaty, whilst not being an EU-law instrument, nevertheless gives specific roles to the EU institutions, was examined in the *Pringle* case. It was one of the most controversial issues of the case whether EU institutions can acquire tasks when Member States implement an international agreement concluded outside the EU legal framework. The Commission and the ECB are entrusted with specific tasks provided for in the ESM Treaty. The Commission was assigned to assess requests for stability support (Article 13(1)), assess their urgency (Article 4(4)), negotiate a MoU detailing the conditionality attached to the financial assistance granted (Article 13(3)), monitor compliance with the conditionality attached to the financial assistance (Article 13(7)), and participate in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)). The tasks allocated to the ECB consist of assessing the urgency of requests for stability support (Article 4(4)), participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)) and, in liaison with the Commission, assessing requests for stability support (Article 13(1)), negotiating a MoU (Article 13(3)) and monitoring compliance

[334] van den Brink, T., & van Rossem, J. (2015). Sovereignty and the shaping of economic governance in the European Union. Irish Journal of European Law, 18(1), 13-32, p.29.
[335] Committee for the Study of Economic and Monetary Union: Report on economic and monetary union in the European Community (April 1989) as stated at Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 1.
[336] Päivi Leino and Tuomas Saarenheimo, Sovereignty and subordination: on the limits of EU economic policy coordination, Sweet and Maxwell, European Law Review, 2017, 42(2), p. 166-189 (version p. 1-22), p. 3.
[337] Kenneth A. Armstrong, The New Governance of EU Fiscal Discipline, Jean Monnet Working Paper 29/13, available online at: https://jeanmonnetprogram.org/paper/the-new-governance-of-eu-fiscal-discipline/, p. 1.
[338] Ibid., p. 1-2.
[339] Fabbrini, S. (2013). Intergovernmentalism and its limits: Assessing the european union's answer to the euro crisis. Comparative Political Studies, 46(9), 1003-1029, p. 1017.

with the conditionality attached to the financial assistance (Article 13(7)). The CJEU is granted jurisdiction to judge on appeal a decision issued by the Board of Governors regarding interpretation and application of the ESM Treaty (Article 37 (3) ESM Treaty).

Concerning the role allocated to the Commission and the ECB, the Court reiterated its previous case law (case *Bangladesh* and *Lomé*) and stated that "*the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance, … provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties."*[340] The Court added that "*the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own"*[341] and that they "*do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties"*[342].

As De Witte correctly argues the Court's reasoning can be understood if we see the role allocated to EU institutions in an intergovernmental framework by distinguishing "between "powers" and "tasks"".[343] According to Article 13 (2) TEU, each EU institution acts within the limits of the powers conferred on it in the Treaties. This shall not be conceived as excluding the allocation to the institutions of extra tasks that are conferred by the member states and fit within its given powers without altering the context of their powers. It seems that the tasks given to the Commission and the ESB by the ESM Treaty are similar to those they have under the EFSM Regulation.[344] There are also the counter-arguments that the tasks assigned to the Commission are wider than those assigned to it in the cases *Bangladesh* or *Lomé*[345] or that despite the fact that an EU institution has a power under the Treaties, this cannot legitimize the use of the same or analogous powers under an international treaty.[346]

Regarding the respect of the constitutional aspects of the EU, the fact that the Commission and the ESM do not acquire any decision-making powers under the ESM Treaty, and that their activities lie outside the EU legal order, where still EU law have primacy over the ESM Treaty, do not raise any questions of intrusion to the integrity of the EU legal order and the institutional balance.[347]

Tasks were also allocated to EU institutions in the framework of the Fiscal Compact. This *inter se* agreement was signed by 25 member States and therefore it remains unclear whether the two non-participating states, namely the UK and the Czech Republic, which did not give their authorization to allow the use of the EU institutions, will make any difference, a matter that was not raised by the Court in the *Pringle* judgment.[348]

Taking into account the reasoning of the Court, although the above *inter se* agreements deemed to be compatible with EU law, it is possible in the future that a conflict may arise if the EU

[340] Pringle judgment, Para. 158.
[341] Ibid., Para. 161.
[342] Ibid., Para. 162.
[343] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 20.
[344] Ibid., p. 20.
[345] Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 37.
[346] P. Craig, The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism, (2012) 37 European Law Review, pp. 231-248, p. 243.
[347] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 21.
[348] Ibid., p. 21.

adopts respective legislation.[349] In that case, it is clear that the principle of primacy indicates that EU law will have precedence over the above mentioned international agreements.

It shall be noticed that apart from the compatibility of the above *inter se* agreements, many authors have criticized the choice of using international law instruments for the autonomy and integrity of EU law. Tuori argues that "*Stability mechanisms, such as the EFSF and the ESM, operate as separate financial institutions outside the Treaty framework with their own intergovernmental decision-making bodies and behind the shield of far-going immunity and confidentiality. Intergovernmental stability mechanisms remain outside the scope of application of both Treaty provisions on the principle of transparency and complementary secondary legislation. Such an institutional development makes any control by the European parliament or national parliaments, not to mention civil society and the citizenry, extremely difficult.*"[350] Certainly this is true, however we shall consider that at the time of the conclusion of the ESM, EU law did not provide for any alternative due to the lack of budgetary resources and the only available option for the euro-area member states was to create a rescue mechanism outside the EU legal framework. In addition, we shall see this turn to international law as not an attempt to circumvent the EU law legal order, since the signatories to the ESM clearly recognize the primacy of EU law over the *inter se* agreement, while trying to preserve links with the EU by using EU institutions throughout its implementation.[351]

It is also important to mention that in *Ledra Advertising* case[352], while the Court dismissed an action for annulment on the grounds that MoUs under the ESM Treaty are an international agreement and not EU law, it stated that an action for non-contractual liability under Article 340 TFEU can be incurred even if the Commission exercise advisory competences under the ESM Treaty. The Court held that the EU institutions are obliged to compensate for any damages they cause by their actions or omissions, regardless of whether these produce legal effects or whether they took place inside or outside the EU legal order. Especially the Commission is burdened with the duty to guarantee, throughout its activities, respect for fundamental rights and EU fundamental principles, even in the case of signing a MoU on behalf of the ESM, outside the EU legal order and without adopting a legally binding act, and in such a case non-contractual liability may incur if by its action, the Commission violated EU law and caused damages. However, it is still needed to be proved that indeed the actions or omissions of the EU institutions violates EU law, the applicant has suffered damages, and there is a direct causal link between the damage suffered and the illegal act.

(ii) The role of the ECB

As far as the ECB is concerned, its involvement in the stability and support mechanisms by exercising specific powers raises an even more complex issue than the involvement of the Commission. The ECB is responsible for supporting the Union's general economic policies, something that it also does in the context of international conventions. The Court held that in order to achieve the objectives of the ESCB and to carry out its tasks, as provided for in primary law, the ECB and the national central banks may, in principle, operate in the financial markets by buying and selling outright marketable instruments in euro[353] and clarified that there was no change with regard to competences and that this specific programme concerned monetary

[349] Ibid., p. 21.
[350] K. Tuori, The European Financial Crisis – Constitutional Aspects and Implications, EUI Working Papers, LAW 2012/28, p. 47.
[351] DE WITTE, Bruno, *Using international law in the Euro crisis : causes and consequences*, Oslo: ARENA, 2013 ARENA Working Papers, 2013/04, available online at: uio.no, p. 23.
[352] Joined Cases C-8/15 P to C-10/15 P, Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB), Judgment of the Court (Grand Chamber) of 20 September 2016.
[353] Case C-62/14, Gauweiler paras. 54.

policy.[354] In fact, according to its statutes, its participation in international organizations is permissible. Thus, the Court concluded that there is no question of violating the Treaties, as there is no distortion of the established competences.

However, it should be stressed that, under the legislative framework of the EMU, it is of paramount importance to ensure the institutional independence of the ECB. The idea of the independence of all national central banks and at the same time the existence of a fully independent European central bank is at the heart of the system for the functioning of the EMU. Around this fundamental concept and in order to protect its independence, a system of rules of law has been established in the Treaties. Pursuant to Article 130 TFEU "When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks." Upon this logic, the Court recognized the ECB's wide discretion and independence in matters of monetary choices and economic estimations.

(iii) The role of the CJEU

Many of the international agreement concluded by the member states during the economic crisis expressly grant exclusive jurisdiction to the CJEU over any disputes arising therefrom. As far as this institution is concerned, such an agreement is less problematic. In its judgment in the *Pringle* case, the Court regarding the role allocated to the Court itself, held that according to Article 273 TFEU, the Court has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement and that in this specific case the jurisdiction to the Court to interpret and apply the provisions of the ESM treaty satisfies this condition.[355]

Regarding whether the CJEU has jurisdiction to interpret provisions of the ESM Treaty, because it is an international treaty to which the EU is not a party, the CJEU circumvented this issue by stating that the real question to be answered was whether EU treaty law supported the creation of a stability mechanism by member states whose currency is the euro and as such, the Court was only required to interpret provisions of the TEU and TFEU.[356] The CJEU offered no comment on its jurisdiction, or lack thereof, in relation to the provisions of the ESM and so the question remains open.

Paragraph 3: Union instruments and the principle of primacy

(i) The use of soft law instruments and the principle of primacy

For the purposes of this thesis, it is important to examine the nature and scope of these soft law instruments in order to conclude whether they indeed bind the member states or not. As discussed above, coordination of national economic policies is conducted to a large extent via recommendations, opinions, namely soft policy instruments, which aim to provide for guidance with the objective to better policy making instead of the imposition of coercive measures.[357]

[354] Ibid., paras. 58-68.
[355] Pringle judgment, Para. 170-177.
[356] Ibid., paras. 78-81.
[357] Iain Begg, Dermot Hodson and Imelda Maher, Economic policy coordination in the European Union, National Institute Economic Review, January 2003, No. 183 (January 2003), pp. 66-77 Published by: Cambridge University Press, p. 69.

Soft policy coordination is distinct from hard policy coordination which has a top-down formulation, from the supranational to the national, with the latter being responsible for its implementation, otherwise a failure to do so may lead to the activation of enforcement mechanisms or the imposition of sanctions.[358]

Article 288 TFEU clearly states that recommendations and opinions are not having binding force. It is settled case law[359] that when the institutions of the Union do not have power under the Treaty to adopt binding measures or when they consider that it is not appropriate to adopt more mandatory rules, they generally adopt recommendations which are not intended to produce binding effects and they create rights upon which individuals may rely before a national court. In *Grimaldi*, the Court also stated that since recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU law provisions.

The coordination of economic and fiscal policy is taking place under the open method of coordination by the use of soft law instruments by the EU Institutions. As presented above, the broad guidelines of the economic policies of the member states and of the Union are issued by recommendations by the Council (Article 121 (2)). Within the European Semester, during the annual cycle of interactions between the Member States and EU actors regarding economic and fiscal policy coordination, the Commission issues soft policy documents and specific country recommendations after analyzing the budget targets (Medium-Term Objectives - MTO) and the National Reform Programmes submitted by the member states as well as the stability and convergence programmes submitted by the euro-area member states, the Council issues recommendations, when necessary, as provided for in Articles 121 and 126 TFEU. The member states who retained competence in the field of economic policy, are fully aware of the issuance of recommendations and that they will be the ones responsible to take the national measures to fulfill their obligations. In most of the cases, they do produce legal effects, since the nature of such instruments was chosen because the Union only has competence to coordinate with the member states their national economic policies. On the one hand, there are the recommendations setting broad guidelines with regard to the shaping of economic policies and the member states remain competence to choose what measures to adopt and how to follow the set objectives (to be analogous to directive) and on the other hand country specific recommendations addressed to a member state (to be compared to regulation). Under the duty of sincere cooperation of Article 4 (3) TEU, member states are obliged to implement them to the best of their abilities.

In *Grimaldi* case, the Court also stressed that national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding EU law provisions. Does this mean that the EU law principle of primacy applies and the national judge is under an obligation to see this soft law instrument producing legal effects as "binding" EU law? In the economic policy field, there are no directly applicable individual rights that could be invoked before national courts against a non-compliant Member State in order to enforce the EU rules. However, this does not mean that soft law documents are excluded from the judicial process.[360] They can be indirectly

[358] Ibid., p. 69.

[359] Case C-322/88, Salvatore Grimaldi v Fonds des maladies professionnelles, Judgment of the Court (Second Chamber) of 13 December 1989, ECLI:EU:C:1989:646.

[360] Paul Craig and Gráinne de Búrca (2020), EU Law: Text, Cases, and Materials (7th edn), Oxford University Press, p. 140.

reviewed through the preliminary reference from a national court to the CJEU according to Article 267 TFEU.

In order to answer the above question, depending on the perspective approaching the matter, both a negative and an affirmative answer could stand. One perspective is that since economic policy is being conducted within a complex multilevel structure and the Union's mechanism of coordination of national policies is based on soft law and non-binding acts issued by the EU institutions, it is widely accepted that within some policy areas, like the economic policy, Commission initiative for legislation; full judicial review; primacy and direct effect in the domestic legal orders, are undermined.[361] In addition, EU's hybrid form of governance tends to involve political actors and blur the separation of competences.[362] In this regard, since it is generally accepted that such soft law instruments are not legally binding, and according to the Court's settled case law they do not have direct effect, which is the "trigger" for the EU law principle of primacy, then it is not applicable in this case or at least at the moment we cannot go that far, since economic policy is already a hard core area and member states have discretion on how to shape their national policies, and even national judges leave discretion to governments to form their policies. Another perspective is that the EU has exceeded its conferred powers, or in softer words, the EU is using them in a way that the EU institutions are more directly and concretely influencing national economic policies, as mentioned in the previous sub-paragraph, although by the use of soft law instruments, and thus, especially concerning fiscal policies, these soft law instruments have limited to a large extent the discretion of the member states, indicating that there is no other way, but to conform with the indications by the Union. In this sense, the soft law documents intent to produce real legal effects and despite the fact that they do not have direct effect, the national courts shall consider them when examining respective disputes.[363]

(ii) The use of MoUs under financial assistance from the EU

Contrary to the MoUs signed under the ESM Treaty examined above which are to be treated as international agreements and not EU law acts, the MoUs signed under the framework of EU legislation are to be considered as EU legal acts. That was the case with Romania which received loans as a member state with a derogation, outside the Eurozone, pursuant to Article 143 TFEU. On this basis, the Council issued two decisions in 2009, including a MoU of obligations that Romania had to fulfill. Romania adopted national legislation which included cut in pensions. The Court in *Florescu* case[364] held that the MoU in this case is a legal act in the sense of Article 267 TFEU because it was included in the Council Decisions. Further it

[361] De Witte, B. (2015). Euro crisis responses and the eu legal order: Increased institutional variation or constitutional mutation. European Constitutional Law Review, 11(3), 434-457, p. 455-456.

[362] Otto Holman, Asymmetrical Regulation and Multidimensional Governance in the European Union, Review of International Political Economy, Oct., 2004, Vol. 11, No. 4, Global Regulation (Oct., 2004), pp. 714-735, p. 717.

[363] András Kovács, Tihamér Tóth, Anna Forgács, The Legal Effects of European Soft Law and Their Recognition at National Administrative Courts, ELTE Law Journal, 2016, pp. 53-70. In this article, it is expressed the opposite view that "We argued that in the course of the national law enforcement, soft law documents are not intended to produce binding effects; consequently, they cannot create rights upon which individuals may rely before national courts. However, national courts are bound to take them into consideration in order to decide disputes. Even if a national judge would believe that a soft law rule has real legal effects, and it should be annulled, the national judge must take it into consideration as long as the European Court of Justice has not annulled it. This derives from that logical necessity that if a soft law document can be the subject of an action for annulment, when it intends to have legal effects, then this means the implied acknowledgement of its binding effect, otherwise an annulment would not be necessary."

[364] Case C-258/14, Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others, Judgment of the Court (Grand Chamber) of 13 June 2017.

held that Romania is obliged to implement the goals set in the MoU even though they were vague.

Final Concluding remarks

The EU is characterised by complexity. So does the EMU. An Economic and Monetary Union is an additional tool for the integration process of the EU. By its establishment, Member States conferred monetary powers to the EU and retained their competence with regard to economic policy. The asymmetric policy architecture in the EMU was evident and remained untouched also in the Lisbon Treaty. As long as economic policy remains within national competence it retains its legitimacy, *prima facie* at least, through the usual democratic mandate. Co-ordination of economic policy through the open method of co-ordination such as the Broad Economic Policy Guidelines, soft law instrument, peer-review and in general intergovernmental coordination, appeared at the EU level, as opposed and distinct to the supranational way of decision-making. The enforcement mechanisms of the SGP were not effective due to the broad discretion that the Council enjoys during the underlined procedures. In the same vein, the way in which the six-pack and the two-pack have been actually implemented under the European Semester, hardly impinges upon national economic sovereignty. Of course, this does not rule out the possibility that these provisions will eventually be applied in a rather strict form in the future.

With regard to euro-area member states, they lost their monetary policies when entering to the monetary union where the ECB is conducting monetary policy regarding the euro, and further as a result of the SGP, national governments lost to a large extent their fiscal policy due to the interrelated field of economic and monetary policy and the "indirect" consequences that measures adopted within one area have to the other.

The emphasis on monetary credibility in the design of EMU has led to the creation of an asymmetric policy architecture. Such asymmetry poses a threat to both the credibility and legitimacy of the EMU. Traditionally, monetary policy has been deemed to be technical, whereas economic policy has been considered to lie within the realm of politics. The open method of co-ordination leads to an interlinkage between national and supranational actors. EU's adopted measures at the supranational level to enhance economic policies convergence, raise concerns for possible disruption of the balance of powers allocated between EU institutions and Member States. Notably, economic and fiscal integration during and after the financial crisis evolved in a way that EU institutions are granted a significant margin of autonomy, also protected by the principle of primacy of EU law. EU's competence is not unlimited and its limitations are provided for in the Treaties. The Treaties set the background of the areas that the EU has competence as well as its limitations on the basis of the principles of conferral and subsidiarity. However, on the one hand issues may arise with regard to the categorization of the powers regarding EU's competence and non-competence, and on the other hand it seems that member states have lost their competence in various areas of matters either willingly or as a necessary consequence. Is the loss of competence of economic policy a necessary consequence for an approach to do "whatever it takes to save the euro"?

For a long time, economists[365] are dictating that the solution to this systemic problem of the EMU would be the establishment of a political union, which nevertheless is not the case at the moment due to the unwillingness of the member states towards this direction. In De Grauwe's words *"The fact that while monetary policy is fully centralized, the other instruments of economic policies have remained firmly in the hands of the national governments is a serious*

[365] Paul De Grauwe, The Governance of a Fragile Eurozone, CEPS Working Document No. 346, May 2011, available online at: https://www.ceps.eu/wp-content/uploads/2011/05/WD%20346%20De%20Grauwe%20on%20Eurozone%20Governance.pdf, p. 11.

design failure of the eurozone."[366] He argues that *"the ECB is not only responsible for price stability but also for financial stability."*[367] Legal scholars also tend to agree that there is a growing asymmetry between monetary policy and economic policy and that the reason is not the way in which economic policy is being conducted, but the lack of a political union.[368] Adamski is of the view that the asymmetry between monetary and economic policy within the EMU is not sustainable and must be eliminated, indicating that the most likely scenario is by the transferring of national economic policies competences to the EU level.[369]

The Eurozone crisis put primacy of politics over law and urgency of the state of exception in a way that was normalized when national and European courts were ruling upon the legitimacy of the austerity measures adopted in the sacrifice of fundamental rights.[370] For the past few years, as Joerges states *"the Community method has been superseded, even disregarded, by new forms of intergovernmental cooperation that are potentially illegal."*[371] The form of governance during the crisis, was a mixture of, on the one hand, a new intergovernmentalism where the Member States, in particular their prime ministers and finance ministers, have emerged as key decision-makers and on the other hand, those EU institutions that lack a firm democratic pedigree, namely the Commission and the ECB, have seen their powers strengthened. The economic crisis certainly altered the constitutional framework of the Eurozone, mainly by the transformation of the monetary policy conducted by the ECB. Judge Lenaerts correctly concludes that *"the law on Economic and Monetary Union ... has undergone a dramatic overhaul"* and that the changes *"have also altered the constitutional balance on which the EU is founded".*[372] However, there is also the opposite view[373] that the changes to the legal framework governing economic policy coordination have had limited consequences in the EU constitutional practice.

Member states adopted intergovernmental mechanisms outside the EU legal framework which played an important role in order to face the challenges due to the fact that the Union was not ready and did not have in place the necessary means to deal with the financial crisis, especially due to budgetary implications. It is highly criticized and raises concerns whether the ESM is a tool for member states to escape from the no bail-out clause, exit the EU framework and enter the world of the ESM, which has been clarified that lies outside the EU, where they can be granted financial assistance under conditionality mechanisms. It is also remarkable that the member states involved the ECB, the Commission and the CJEU, something that is a standard practice showing as well the willingness of the member states not to disregard the EU legal order, and justify their choice to turn to intergovernmentalism as the only available option. The EU institutions (with the exception of the European Parliament whose role is quite limited in the EMU) are granted a significant margin of autonomy, also protected by the principle of primacy of EU law. The ECB's discretion and independence in matters of monetary choices

[366] Paul De Grauwe, The Governance of a Fragile Eurozone, CEPS Working Document No. 346, May 2011, p. 15.
[367] Ibid., p. 16.
[368] Adamski, D. (2016). Economic policy coordination as game involving economic stability and national sovereignty. European Law Journal, 22(2), 180-203, p. 200.
[369] Ibid., p. 201-202.
[370] Nicole Scicluna, Politicization without democratization: How the Eurozone crisis is transforming EU law and politics, *International Journal of Constitutional Law*, Volume 12, Issue 3, July 2014, Pages 545–571, https://doi.org/10.1093/icon/mou043, p. 563.
[371] Christian Joerges, Europe's Economic Constitution in Crisis, ZenTra Working Papers in Transnational Studies, No. 06/2012, (2012), p. 14-16.
[372] K. Lenaerts, 'EMU and the European Union's Constitutional Framework', (2014) 39 European Law Review, 753-769, p. 753.
[373] De Witte, B. (2015). Euro crisis responses and the EU legal order: Increased institutional variation or constitutional mutation. European Constitutional Law Review, 11(3), 434-457.

and economic estimations is extremely wide in undertaking initiatives in order to save the euro as confirmed by the CJEU. The Court confirmed the legitimacy of the tasks given to the Commission and the ECB and also stated that when exercising even advisory tasks, EU istitutions are still bound by EU law in order to provide for legal certainty. Whilst the legal, binding character of an EU institution's act is a requirement for an action of annulment (Article 263 TFEU), an action for compensation (Article 340 TFEU) may stand. At the same time, the measures and acts of the EU institutions are still under scrutiny, indirectly via the preliminary reference procedure of Article 267 TFEU.

With regard to the principle of primacy, international agreements concluded by member states shall not violate EU law, and in this regard Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. This restriction flows, not from pre-emption, as this is defined in Art 2(2) TFEU and the Protocol on shared competences, but from Member States' duty of loyalty or sincere cooperation, as enshrined in Article 4(3) TEU. The Court confirmed that the conclusion of the ESM Treaty was not in breach with EU law provisions.

The EU took measures at the supranational level and the member states concluded international agreements with a view to incorporate them in the future in the EU law *acquis.* The MoUs under financial assistance provided for by the EU constitute EU law. Further the indication that Romania is obliged to implement the goals set in the MoU even though they were vague, shows that it concerns a hard law obligation even if it is formed in soft wording. The MoUs signed under the ESM regime are not considered EU law, whilst the Commission's indication to Portugal depicts that the concerned state should not deviate from the adjustment programme's objectives. The legal effect under both categories of the MoUs is the same, the concerned member state has to comply with the set objectives, but the difference is at the categorization as an EU legal act or not.

Regarding the soft law instruments adopted within the Union framework in case that they do produce legal effects and aim to restrict the discretion of the member state to an extent that there is no other option than to follow the specific guidance, they should be viewed as implying that the principle of primacy is applicable, and the national judge shall take then into consideration.

In the economic policy field, there are no directly applicable individual rights that could be invoked before national courts against a non-compliant Member State in order to enforce the EU rules. Cuyvers correctly argues that *"EU law can only have direct effect and supremacy in those cases where it applies in the first place"*[374]. It is quite clear that all actions by EU institutions and bodies fall under the scope of EU law in the sense that they have to comply with EU law.[375] Regarding member states actions falling under the scope of EU law, three categories can be distinguished: actions of implementation or application of EU measures, actions derogating from EU rules, actions falling in a generic sense within the scope of EU law.[376] In this regard, as explained above the principle of primacy is not completely excluded

[374] Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 162.
[375] Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 163.
[376] Armin Cuyvers, Chapter Title: The Scope, Nature and Effect of EU Law, in Ugirashebuja, E., Ruhangisa, J. E., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Brill, p. 163-164.

from this field, considering the institutional and substantive changes that the economic and financial crisis brought into the surface.

At the same time, member states aiming to protect their national sovereignty, reacted to the process of integration in the EMU and some constitutional courts expressed their position to put limits to further integration in the economic policy field. There is a tense between the EU and national legal orders especially concerning the principle of primacy of EU law and the preservation of national sovereignty in core policy areas. The German Constitutional Court has adopted a critical stance towards further economic and fiscal integration at the recent cases *Gauweiler* and *Weiss*. A possible clash of the principle of primacy of EU law in the context of the EMU is emerging by the *ultra vires* doctrine and constitutional identity review.

The Union-specific interpretation is indispensable, since particular rights are secured by Union law and without it they would be endangered, if each Member State could interpret provisions in different ways and decide individually on the substance of the freedoms of Union law. Union law can become operational only if it forms part of the legal orders of the Member States since supranational and national law are applicable to the same people, who simultaneously become citizens of a national state and of the EU. The truth is that the EU legal order and the national legal orders are interlocked and interdependent. The EU model of governance is following the hierarchical typology which remains until today the current preferred method of governing in the EU. The concept of hierarchical governing in the EU implies that policies come from above or the centre following a top-down direction. The policies are obligatory and binding to those that they apply, allowing for legal enforcement. In the open method coordination regime, however, the way policies are being conducted moves away from the hierarchical model of governance. In this case, by establishing or entering to the Union, and the same goes also for the establishment of the EMU, the Member States are obliged to take all appropriate measures to ensure fulfilment of the obligations arising from the treaties or resulting from actions taken by the institutions of the Union and facilitate the achievement of the EU's objectives and interests, while at the same time abstain from any measure that could jeopardise the attainment of the objectives of the Treaties. The autonomy of the EU legal order is of fundamental significance for the nature of the EU, and it is the only guarantee that Union law will not be watered down by its interaction with national law and that it will apply uniformly throughout the Union. This is why the concepts of Union law are interpreted in the light of the aims of the EU legal order and of the Union in general. Even if in cases that the EU principle of primacy is not applicable, the uniform interpretation and application of EU law is needed for the proper functioning of the Union. Otherwise, the EU will not be possible to guarantee the rights of its people and their equality before the law and pursue its values and respect for the rule of law.

Lastly, it shall be noted that the dialogue between the national courts and the European Court of Justice via the preliminary reference procedure is of crucial importance. A dialogue and cooperation is needed in order to ensure the coherence of the judicial system. This dialogue, within the EU, takes place primarily through the preliminary ruling mechanism and contributes to ensuring the uniform interpretation and application of Union law, the safeguarding of the autonomy of the legal order, the protection of the EU citizens and the equality of the member states. We have seen that such a dialogue is present within the EMU, even if there might be tense tones by some constitutional courts.

To my view, the allocation of powers and competences between the Member States and the EU became a bit blurred during the financial crisis. When the ECB is granted wide discretion to employ the tools for the saving of the Eurozone, which unavoidably have an impact on the distribution of balances, and most importantly when the Commission is reviewing the budgets of the member states, it seems that the balances have changed and that although the Treaties

remained unchanged, the reality is different. One can easily notice that although the competence of the EU has limitations, in practice EU's actions cover almost all fields of interests either directly or indirectly and it is not always easy to find areas that are left aside. I tend to agree with the view that the asymmetric architecture of the EMU and the way that economic governance is being conducted are the reasons that there is this overlap in competences. Snell is right by pinpointing that "*Rodrik's trilemma also applies to European economic and monetary integration: you cannot have at the same time a well-functioning EMU, mass politics and nation states"*[377].

Discussions on the architecture of EMU focus on the completion of its design by 2025 through formalizing and making more binding the convergence process with regard to the economic union, setting up a macroeconomic stabilization function for the euro area concerning the fiscal union and integrating the ESM into the EU law framework. 2025 is not too far in time to see whether such developments will officially "legitimize" also in the eyes of European citizens the austerity measures taken during the crisis. The economic crisis showed that the EU was unprepared and that sometimes the choices made triggered criticism towards its legitimacy. The urgency of the state of exception exposed the limitations of the Union's legislative mechanisms and it remained to be seen in the future whether the asymmetry of the economic and monetary policies will become a symmetry.

[377] Snell, J. (2016). The trilemma of european economic and monetary integration, and its consequences. European Law Journal, 22(2), 157-179, p. 158.

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