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# Debt Crisis as a Global Emergency: The European Economic Constitution and other Greek Fables

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## I INTRODUCTION

The Economic and Monetary Union is characterised by insufficient checks and balances, encapsulated in the misnomer of the Growth and Stability Pact (GSP).[1] Even before the weakening of the GSP,[2] and depending on the prevailing political and economic conditions, it was envisaged that if a Member State were to face bankruptcy, such bankruptcy might prove contagious, lead to the need for a bail-out, and affect the internal/external strength of the Euro.[3] In the first few months of 2010, this, previously unlikely, scenario became probable. The dramatic outlook in the financial press was not inexplicable. It was commonplace that, in the aftermath of the 2008 financial crisis, the world's largest economies committed large amounts in order

* Legal Officer, European Ombudsman. The opinions expressed in the present contribution are personal and the usual disclaimer applies. The contribution takes account of the developments until 30 June 2010.

[1] See, Article 126 TFEU (ex Article 104 TEC). The main texts which comprise the GSP are: Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [1997] OJ L209/1; Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, [1993] OJ L332/7; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, [1997] OJ L209/6.

[2] In the aftermath of Case C-27/04 *Commission v. Council* [2004] ECR I-6649, the GSP was amended by Council Regulation 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [2005] OJ L174/1; Council Regulation 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, [2005] OJ L174/5.

[3] Fabian Amtenbrink and Jacob de Haan, 'Economic Governance in the European Union: Fiscal Policy Discipline versus Flexibility' (2003) 40 *Common Market Law Review* 1075, 1089-1095, in particular, 1093.

to support the financial institutions and inject liquidity into the market.[4] This, in conjunction with the expansive fiscal policies of the past decade and the economic downturn, led many of them to a dire budgetary position. In this climate, the financial markets started questioning whether certain states would be able to continue servicing their debt. A debt crisis emerged possessing all the characteristics of a global emergency.[5]

The Euro area debt crisis started in Greece. In October 2009,[6] the newly elected Greek government announced that its fiscal position was worse than previously expected.[7] By April 2010, the rising concern about the Greek economy entered the state of alarm. The crisis of confidence became apparent on the financial markets: yield spreads on Greek bonds widened, insurance premiums on credit default swaps rocketed while the Greek economy was continuously being demoted in the successive reviews of international credit-rating agencies. As a result, there was widespread speculation that Greece was going to default on its creditors or be forced to restructure its debt. Given that Greece could no longer borrow on the financial markets to service its debt, bankruptcy appeared like a self-fulfilling prophecy. Despite the Greek economy counting for about 2% of the Euro area, a Greek default could be contagious and likely candidates were identified in Portugal, Ireland and Spain.[8] Even if neither of these Member States went bankrupt, an ongoing debt crisis would most likely disrupt the recovery of the global economy from the 2008 financial crisis.[9] The continuing existence of the Euro was reportedly in jeopardy.[10] In spring

[4] See, Jan Wouters, Steven Sterkx and Tim Corthaut, 'The European Union, the International Financial Crisis and Global Governance', Chapter 7 of this book. For the role of the Commission in the financial crisis, see Eric White, 'The Constitutional Apparatus of the European Union: The Perspective of the European Commission', Chapter 13, Section VI of this book.

[5] See, Introduction of this book.

[6] A timeline of the Greek crisis is available at http://www.guardian.co.uk/business/2010/may/05/greece-debt-crisis-timeline.

[7] Its budget deficit for 2009 was predicted to reach at 12.7% instead of 3.7% originally provided in its Stability Programme adjusted to 6% by the previous government.

[8] Together with Greece the four Member States have been referred to in financial reporting under the acronym PIGS. See, Éditorial, 'L'Union économique et monétaire dans la tourmente de déficits publics' (2010) 46 *Revue Trimestrielle de Droit Européen* 1.

[9] Financial Times, *Volatility persists amid eurozone fears*, 28 May 2010. Olli Rehn, the Economic and Financial Affairs Commissioner, likened Greece of 2010 to Lehman Brothers of 2008.

[10] Niall Ferguson, 'The End of the Euro', *Newsweek*, 7 May 2010.

2010, the exchange rate of the Euro hit consecutive four year lows against the US dollar.

A fully-fledged EU response to address the debt crisis has not unravelled yet. However, important emergency measures and policy initiatives have been taken and a clear sense of direction begins to emerge. Two main strands of action may be identified in this respect: first, the emergency measures taken to contain the crisis and, second, the policy initiatives to reform the Union economic governance and avert such crisis from happening again in the future. The focus of the present analysis will be on the emergency measures taken by the EU. These may be divided into two categories, which will be examined in the corresponding sections: the specific measures taken to deal with the Greek crisis, and the measures taken to defend the Euro and appease the financial markets.[11] The overview of the emergency measures raises a number of questions which merit examination from an EU constitutional perspective excluding any meta-constitutional aspects.[12] The principal question is whether the EU is equipped with the necessary tools to address the challenges caused by an emergency of such timing, nature and intensity. The twin sets of instruments to deal with the Greek debt crisis and the defence of the Euro add a layer of complexity to the discussion and pose a number of interesting questions both as regards the construction of EU economic policy internally as well as its external dimension. In its final section, the chapter will discuss briefly the

[11] In this regard, see, Statement of the Heads of State or Government of the Euro area, Brussels, 7 May 2010.

[12] That is, whether the Union constitution enables it to adopt the missing tools. The obvious answer to this question is that it can but, at the same time, it cannot for the following reasons. First, which is rather obvious, the debt crisis comes at a time when, after a decade-long process of constitutional change there is a common perception driven by constitutional fatigue and, ironically, the financial and debt crisis that we have reached some sort of constitutional *finalité* in the EU. Any Treaty change to deal with the emergency in hand must be ruled out despite the simplified procedure provided in Article 49(6) TEU. Although it would be premature to pass judgement on the impact of the simplified procedure, it is unlikely that the European Council will apply this procedure to anything other than innocuous or necessary changes. In fact, at the time of writing, the TFEU was amended, subject to approval by the parliaments of the Member States in accordance with their own constitutional requirements, to adjust the number of seats of the European Parliament (see, European Council Decision 2010/350 of 17 June 2010 on the examination by a conference of representatives of the governments of the Member States of the amendments to the Treaties proposed by the Spanish Government concerning the composition of the European Parliament and not to convene a Convention, [2010] OJ L160/5). An amendment of the provisions of economic policy would be politically extremely sensitive and the political capital (*sic*) is clearly missing.

institutional architecture of EU economic policy as it emerges from the combined effect of the entry into force of the Treaty of Lisbon and the emergency measures taken to counteract the debt crisis.

## II EMERGENCY INSTRUMENTS TO BAIL OUT GREECE: THE FLIGHT OF ICARUS

The Greek crisis was long forthcoming. Lax fiscal policy, inadequate reaction to mounting imbalances, structural weaknesses and statistical misreporting are contributing factors to the crisis.[13] More precisely, besides the well-known fiscal imbalances and structural weaknesses of the Greek economy, it was revealed, soon after a change of government following general elections in Greece, that the budgetary situation in Greece was much worse than expected.[14] In the following months, the Greek government announced a series of austerity measures, in addition to those already provided in its Stability Programme, in order to regain investor trust.[15] The austerity measures failed to impress the markets.[16] The reaction of the financial markets, which was characterised as opportunistic speculation,[17] meant that interest rates at which Greece was borrowing from the markets rocketed.[18] The downgrading of the Greek debt rating continued and reached rock bottom in the end

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[13] Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions: Reinforcing Economic Policy Coordination, COM(2010)250 final, Brussels, 12.5.2010.

[14] Eurostat Report on Greek Government Deficit and Debt Statistics, COM(2010) 1 final, Brussels, 8 January 2010, available at http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/COM_2010_REPORT_GREEK/EN/COM_2010_REPORT_GREEK-EN.PDF.

[15] The Guardian, *Papandreou unveils radical reforms to salvage Greece's public finances*, 14 December 2009. Two further sets of austerity measures were announced on 2 February and 3 March 2010.

[16] Council Decision 2010/291 of 19 January 2010 establishing whether effective action has been taken by Greece in response to the Council Recommendation of 27 April 2009, [2010] OJ L125/50.

[17] Speech by Prime Minister Papandreou before the European Parliament, Brussels, 18 March 2010.

[18] On 1 February 2010, 2-year bond spreads reached 347 basis points; 10-years bond spreads reached 270 basis points. See, European Commission, Directorate-General for Economic and Financial Affairs, The *Economic Adjustment Programme for Greece*, Occasional Paper No. 61, May 2010, p. 11.

of April 2010, when a leading credit-rating agency downgraded Greek debt to 'junk' status.[19]

In view of the persistence of the markets to bank on Greece defaulting, the Greek government tried to mobilise its partners and arrive at a 'European' solution to address the problem. The aim of that effort was not a financial bail-out[20] but a strong political commitment in the form of 'a loaded gun on the table'[21] which would enable Greece to meet its refinancing needs by borrowing from the markets. The Greek government's initiatives were met with strong resistance from Germany which ruled out the option of a bilateral loan.[22] When a (promise of) financing mechanism became inevitable, Germany insisted on the involvement of the International Monetary Fund (IMF) and its stringent policy conditionality.[23] At first, the involvement of the IMF was not greeted with enthusiasm in the Euro Group;[24] however, it was later acknowledged that it may have a role to play.[25]

The foundations of the Greek bail-out can be traced at the European Council meeting of 25 March 2010.[26] In the statement which followed, the Heads of State and Government of the Euro area praised the Greek authorities for the 'ambitious and decisive action' which should allow Greece to regain the full confidence of the markets. The Euro Group reaffirmed its preparedness to take determined and coordinated action, if needed, to safeguard the financial stability in the Euro area. To this end, a financing mechanism would be established involving a substantial IMF financing and a majority of European financing and taking the form of bilateral loans

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[19] New York Times, *Cuts to Debt Rating Stir Anxiety in Europe*, 27 April 2010. On the same day, bond spreads reached unprecedented heights (2-year bond spreads reached 1552 basis points; 10-years bond spreads reached 755 basis points).

[20] BBC News, *Greece told to make more spending cuts*, 16 February 2010. Available at http://news.bbc.co.uk/2/hi/business/8517499.stm.

[21] Speech by Prime Minister Papandreou before the European Parliament, Brussels, 18 March 2010.

[22] Daily Mail, *'We will not offer Greece a cent': German economy minister deals hammer blow to Athens as rioters attack police on the streets*, 6 March 2010.

[23] For an excellent comprehensive analysis of the IMF's role in past crises, see Andreas F. Lowenfeld, *International Economic Law*, (Oxford: Oxford University Press, 2003), 565-616.

[24] Éditorial, 'L'Union économique et monétaire dans la tourmente de déficits publics' (2010) 46 *Revue Trimestrielle de Droit Européen* 1, 6.

[25] EUObserver, *Juncker concedes IMF role possible in Greek bail-out*, 22 March 2010.

[26] Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf.

from the Member States. The mechanism would be considered as *ultima ratio* and would be conditional on insufficiency of market financing. The financing would be tied to strong conditionality while setting incentives to Greece to return to the financial markets. Interest rates would not contain any subsidy element.[27] The mechanism would remain inactive until the Greek government requested financial support.

The 'gun on the table' proved insufficient to turn the financial markets around.[28] In a letter sent to the IMF, the European Commission and the European Central Bank (ECB) on 15 April 2010, the Greek government requested discussions so as to clarify the technical terms on the basis of which the aid would be granted. To this end, a joint IMF/Commission/ECB mission visited Athens from 21 April to 3 May 2010. On 2 May 2010, agreement on the terms of the financing was reached at staff level and, on the same day, the Euro Group took the decision to activate the stability support mechanism.[29] By 18 May 2010, the first instalment was disbursed.[30]

The Greek bail-out takes the following legal form. First, a Memorandum of Understanding (MoU) signed between Greece, on the one hand, and the European Commission, on behalf of the Member States whose currency is the Euro, on the other.[31] The MoU outlines the challenges faced by the Greek economy and the policy reforms which need to take place in order to address them, details specific fiscal measures, including the deadline for their introduction and the fiscal benefit they are expected to yield, and sets out the applicable performance criteria and indicative

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[27] Statement by the Heads of State and Government of the Euro area, Brussels, 25 March 2010, p. 1.

[28] It could be said that the markets called the EU's bluff as to whether the gun was actually loaded. On 8 April 2010 the 2-year bond spreads reached 652 basis points while 10-years bond spreads reached 430 basis points.

[29] Statement by Euro Group, Brussels, 2 May 2010. Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/114130.pdf.

[30] European Commission, Directorate-General for Economic and Financial Affairs, The *Economic Adjustment Programme for Greece*, Occasional Paper No. 61, May 2010.

[31] The MoU comprises a Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding.

targets. Disbursement of instalments under the loan is made subject to quarterly reviews of conditionality.[32]

Second, an Intercreditor Agreement[33] and a Loan Facility Agreement[34] between Greece and the Member States whose currency is the Euro.[35] The Agreements provide stability support to Greece in an intergovernmental framework of pooled bilateral loans.[36] The Loan Facility Agreement specifies that the loans are granted in conjunction with funding from the IMF.[37] The Commission takes a coordinating role on behalf of the Member States in consultation with the ECB.[38] The Agreements specify their *modus operandi*[39] and the applicable interest rate.[40] Among the many interesting features of the Agreements, one can distinguish the choice of English law as the applicable law of the Agreements and the exclusive jurisdiction to the Court of Justice to settle any dispute arising.[41]

Conditionality is ensured by making the support granted to Greece dependent on compliance with the terms to be defined in a Council Decision addressed to Greece

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[32] The MoU is available at http://www.imf.org/external/pubs/ft/scr/2010/cr10111.pdf.

[33] The English text of these agreements has been retrieved from the Irish Parliament website at http://www.oireachtas.ie/documents/bills28/bills/2010/2210/b2210d.pdf.

[34] In the Loan Facility Agreement, KfW (Kreditanstalt für Wiederaufbau, a German state-owned banking group) was designated by Germany to act as the Lender on its behalf, subject to the instructions of and with the benefit of the guarantee of the Federal Republic of Germany.

[35] The European Commission signed the Agreements on behalf of the Euro area Member States.

[36] Article 1(1) of the Intercreditor Agreement.

[37] 3rd preambular clause of the Loan Facility Agreement.

[38] The Council considered it necessary to clarify that the 'role entrusted to the Commission is limited to the tasks specified in the inter-creditor agreement and not extend beyond tasks associated with the management of the stability support to Greece', Doc. 9544/10 (Presse 104), *Council sets out measures to be taken by Greece to reduce its government deficit*, Brussels, 10 May 2010. The Council on went on to detail the specific tasks entrusted to the Commission under the Intercreditor Agreement.

[39] The Intercreditor Agreement lays down the provisions concerning disbursement of the loan and its repayment. In particular, Article 3 of the Agreement authorises the Commission to open an account with the ECB, in the name of the Lenders. Under the TARGET2 (Trans-European Automated Real-time Gross settlement Express Transfer) system (Decision of the European Central Bank ECB/2007/7 of 24 July 2007 concerning the terms and conditions of TARGET2-ECB, [2007] OJ L237/71) only central banks, European and international organisations could open a cash account with the ECB. Its rules were amended (Decision of the European Central Bank ECB/2010/4 of 10 May 2010 concerning the management of pooled bilateral loans for the benefit of the Hellenic Republic and amending Decision ECB/2007/7 [2010] OJ L119/24.

[40] Pursuant to Article 5 in conjunction with Annex 5 of the Loan Facility Agreement the interest rate is calculated on the basis of the EURIBOR rate plus 300 basis points for the first three years and 400 for any subsequent period.

[41] Section 14 of the Intercreditor Agreement and Section 14 of the Loan Facility Agreement.

in accordance with Articles 126(9) and 136 TFEU *and* the measures set out in the MoU.[42] As far as the first set of conditions is concerned, the Commission submitted a recommendation to the Council one day after the agreement was struck.[43] The Council's Decision of 10 May 2010 provides a mixture of fiscal measures, to include both revenue increases and expenditure cuts, and structural reforms which fully correspond to the requirements of specific policy conditionality under the MoU.[44] It comes as no surprise that the measures in the Council Decision and the MoU are identical.

Third, an Agreement between Greece and the IMF in the form of Exchange of Letters.[45] In its Letter of Intent to the IMF requesting financial assistance under the Stand-By Arrangement, the Greek government undertook to fully implement the Council Decision[46] and the MoU.[47] Moreover, it expressed its preparedness to take any further measures that may become appropriate for this purpose. On 9 May 2010, the IMF Executive Board approved the financing under the Stand-By Arrangement.[48] Beyond the formal agreement it should be underscored that the IMF played a dominant role in the drafting of the MoU. In this respect, largely because of

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[42] Article 3(5)(c) of the Loan Facility Agreement.

[43] Commission Européenne, Recommandation en vue d'une Décision du Conseil adressée á la Grèce en vue de renforcer et d'approfondir la surveillance budgétaire et mettant la Grèce en demeure de prendre des mesures pour procéder á la réduction du déficit jugée nécessaire pour remédier á la situation de déficit excessif, SEC(2010)560 final, Bruxelles, 4.5.2010.

[44] Council Decision 2010/320 of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, [2010] OJ L145/6.

[45] On the legal status of Stand-By Arrangements see, Lowenfeld, above note 23, 517-519. It is submitted that Lowenfeld correctly argues that the exchange of letters in question constitutes an international agreement. Should this not be the case, then the Greece-IMF arrangement would be an act in implementation of an agreement of the Member States which predates the entry into force of the Treaties. In such eventuality, the considerations applicable to prior agreements will need to be taken into account. See Article 351 TFEU (ex Article 307 TEC). For an excellent analysis, Robert Schütze, 'EC Law and International Agreements of the Member States—An Ambivalent Relationship?' (2007) 9 *Cambridge Yearbook of European Legal Studies* 387.

[46] The Letter of Intent refers to the Council Recommendations of 16 February (Council Decision 2010/190 of 16 February 2010 with a view to ending the inconsistency with the broad guidelines of economic policies in Greece and removing the risk of jeopardising the proper functioning of the economic and monetary union, [2010] OJ L83/65). The Recommendation contains ambitious structural and fiscal reforms but contained no detail of the kind the May 2010 Decision and MoU specify.

[47] IMF Country Report No. 10/110, May 2010.

[48] IMF Executive Board Approves €30 Billion Stand-By Arrangement for Greece, Press Release No. 10/187, May 9, 2010, available at http://www.imf.org/external/np/sec/pr/2010/pr10187.htm.

Germany's insistence, the IMF was instrumentalised and used as a damoclean sword in order to achieve enormous fiscal consolidation and promise of structural reform, which could have never been achieved within the framework of EU economic policy coordination alone.

The Greek bail-out is currently in the process of being implemented. The ECB has adopted extraordinary measures so as to support Greece and its financial institutions.[49] Euro area Member States have ratified the Agreements. A small upset has been caused by Slovakia, which refused to ratify the Agreements.[50] While this has limited impact on the Greek bail-out in economic terms it is not without political and legal consequences.

## III EMERGENCY INSTRUMENTS TO SUPPORT THE EURO: DAEDALUS SHOULD HAVE KNOWN BETTER

The short-term fix of Icarus wings, namely the Greek bail-out, cannot by itself ensure the viability of the Euro area. In fact, the risk of contagion looked increasingly likely in the Member States of the European south. The ink had not dried on the Greek bail-out instruments when the Commission announced on 8 May 2010 that it would present to the Council a concrete proposal for a European Stabilisation Mechanism to preserve financial stability in Europe.[51] The following day, the extraordinary ECOFIN Council announced that it had agreed on a comprehensive package of measures to preserve financial stability in Europe (European stability mechanism), to include a European Financial Stabilisation Mechanism (EFSM)[52] and a European Financial Stability Facility (EFSF).[53] The total amount earmarked for the operation

[49] Decision of the European Central Bank ECB/2010/3 of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek government, [2010] OJ L117/102.

[50] See, EUObserver, *Slovakia to join EU-IMF fund, reject Greek loan*, 15 July 2010.

[51] José Manuel Durão Barroso, President of the European Commission, Statement following the meeting of the Heads of States and Government of the Euro Area, SPEECH/10/224, Brussels, 8 May 2010.

[52] Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, [2010] OJ L118/1, hereafter the EFSM Regulation.

[53] Terms of reference of the Eurogroup, European Financial Stability Facility, Luxembourg, 7 June 2010. EFSF Framework Agreement, Execution Version, 7 June 2010. Retrieved from

was set at €500 billion (€60 billion under the EFSM and €440 billion under the EFSF) while provision was made for additional IMF stability support of at least half the total amount.[54]

As regards the EFSM, its development is inspired by an existing mechanism providing medium-term financial assistance to non-Euro area Member States in serious balance of payments (BOP) difficulties.[55] Under the BOP Regulation, assistance takes the form of medium-term loans provided by the Commission in conjunction with financing provided by the IMF and other multilateral lenders.[56] Recent experience under the BOP Regulation was in conjunction with funding from the IMF.[57] The assistance aims to ease the external financing constraints and restore the viability of the balance of payments of the beneficiary Member State. The economic policy conditions which need to be met by the Member State in BOP difficulties are agreed by the Commission and the Member State and enshrined in a MoU. Before the disbursement of any instalment under the loan can be made, the implementation of adjustment measures designed to remedy these difficulties needs to be verified.

Compared to the BOP Regulation, the EFSM explodes the scope of financial assistance offered to address not only balance of payments but any kind of financial

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http://www.bundesfinanzministerium.de/nn_83228/DE/Wirtschaft__und__Verwaltung/Europa/20100609-Schutzschirm-Euro-Anlage-1-eng,templateId=raw,property=publicationFile.pdf.

[54] Doc. 9596/10 (Presse 108), Extraordinary Council meeting, Economic and Financial Affairs, Brussels, 9/10 May 2010, p. 6.

[55] Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1. Lending operations are facilitated by the ECB in accordance with Decision of the European Central Bank ECB/2003/14 of 7 November 2003 concerning the administration of the borrowing-and-lending operations concluded by the European Community under the medium-term financial assistance facility, [2003] OJ L297/35.

[56] Although no mention of the other lenders is made in the BOP regulation, such lenders include the EIB, the EBRD or the World Bank, or bilateral assistance from Member States. See, 3rd preambular clause of Council Decision 2009/459 of 6 May 2009 providing Community medium-term financial assistance for Romania, [2009] OJ L150/8.

[57] Council Decision 2010/183 of 16 March 2010 amending Decision 2009/459/EC providing Community medium-term financial assistance for Romania, [2010] OJ L83/19; Council Decision 2009/459 of 6 May 2009 providing Community medium-term financial assistance for Romania, [2009] OJ L150/8; Council Decision 2009/592 of 13 July 2009 amending Decision 2009/290/EC of 20 January 2009 providing Community medium-term financial assistance for Latvia, [2009] OJ L202/52; Council Decision 2009/290 of 20 January 2009 providing Community medium-term financial assistance for Latvia, [2009] OJ L79/39.

difficulty. At the same time, it also increases the number of potential beneficiaries to include Euro area Member States. Its activation will be in the context of joint EU/IMF support and subject to strong conditionality.[58] A Member State seeking financial assistance under the EFSM shall discuss with the Commission in liaison with the ECB and make an assessment of its financial needs.[59] When granting the loan, the Council will determine the modalities as well as the main policy conditions attached to the support.[60] Such conditions will be detailed in a MoU between the Commission and the Member State concerned.[61] Once the decision on a loan has been made, the Commission shall be authorised to borrow on the financial markets or from credit institutions so as to optimise the cost of funding.[62] The release of funds and subsequent disbursements shall be subject to verification by the Commission that the beneficiary Member State accords with its adjustment programme and the conditions laid down by the Council.[63]

While the EFSM was made immediately available in order to cover any urgent financing needs, the EFSF was established by an intergovernmental agreement of the Euro area Member States to provide possible financial assistance to a Euro area Member State in difficulty as soon as possible.[64] The EFSF was established in the form of a 'Special Purpose Vehicle' (SPV) and registered as a limited liability company under Luxembourg law.[65] The shareholding of each Member State in the EFSF corresponds to its respective share in the paid-up capital of the ECB.[66] The Euro area Member States have concluded a Framework Agreement with the EFSF which details the modalities of this special Member State-backed form of stability support.[67] In essence, the EFSF, backed by the guarantees offered by the Euro area Member

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[58] 6th and 7th preambular clause of the EFSM Regulation.
[59] Article 3(1) of the EFSM Regulation.
[60] Article 3(3) of the EFSM Regulation.
[61] Article 3(5) of the EFSM Regulation.
[62] Article 6(3) of the EFSM Regulation.
[63] Article 4(2) and 5(2) of the EFSM Regulation.
[64] MEMO/10/173, The European Stabilisation Mechanism, Brussels, 10 May 2010.
[65] http://www.efsf.europa.eu/index.htm.
[66] Terms of reference of the Eurogroup, European Financial Stability Facility, Luxembourg, 7 June 2010.
[67] EFSF Framework Agreement, Execution Version, 7 June 2010.

States, will issue bonds and obtain funding on the financial markets.[68] The funds obtained will then be used to provide stability support to a Member State in financial difficulty caused by exceptional circumstances.[69] The financial support to Euro area Member States shall be provided by the EFSF in conjunction with the IMF and shall be on comparable terms to the stability support loans advanced by Euro area Member States to Greece.[70] The Commission will ensure the consistency between EFSF and other operations of assistance to Euro area Member States. The Commission, in liaison with the ECB, is also tasked to negotiate the policy conditions attached to any loans provided by the EFSF and to assess compliance with these conditions.[71]

## IV EMERGENCY INSTRUMENTS OF EU ECONOMIC POLICY: A PRELIMINARY COMPARISON

The Greek bail-out and the European stability mechanism present many similarities and differences. As regards similarities, it should be noted that, first, the nature of financial assistance is that of medium-term loans. Second, the modalities of financing are similar in terms of interest payable, borrowing and lending operations, administration of the loan etc. Third, they are all subject to conditionality which is agreed between the Member State in difficulty and the European Commission in consultation with the ECB and the IMF and enshrined in a MoU. Fourth, all mechanisms provide for financial support in conjunction with international institutions, predominantly, the IMF.[72]

There are however significant differences in the construction of the Greek bail-out and the EFSM and EFSF. First, the former provides stability support in the form of

[68] 4th preambular clause of the EFSF Framework Agreement.
[69] 2nd preambular clause of the EFSF Framework Agreement.
[70] 1st preambular clause of the EFSF Framework Agreement.
[71] Terms of reference of the Eurogroup, European Financial Stability Facility, Luxembourg, 7 June 2010.
[72] 1st preambular clause of the EFSF Framework Agreement.

bilateral loans which come from the coffers of the Member States,[73] while the latter provides for two types of loans, an EU loan under the EFSM and an EFSF loan.[74] Second, the EFSM pays less deference to the IMF than the Greek bail-out and provides that 'the Commission shall examine the possibilities available under the Union financial assistance facility and the compatibility of the envisaged economic policy conditions with the commitments taken by the Member State concerned for the implementation of the Council recommendations and Council decisions adopted on the basis of Article 121, Article 126 and Article 136 of the TFEU'.[75]

It is questionable what will happen when the Greek bail-out arrangement runs its course. An early exit from the bail-out would only be conceivable if Greece were able to return to the financial markets earlier than anticipated. If Greece can borrow on the markets, there will be no need to have resort to the EFSM. In theory, it would still be possible, linked, of course, to the political and economic climate at the time when the question is asked but, in view of the temporary character of both the EFSM and the EFSF, such possibility is slim.[76]

## V EMERGENCY INSTRUMENTS OF EU ECONOMIC POLICY: A CRITIQUE

The answer to the question asked in the introduction to this chapter as to whether the EU constitution is equipped with the tools to deal with the debt crisis is simple. Until May 2010, the EU did not have a mechanism to deal with a debt crisis and could not possibly have one.[77] It could hardly be otherwise given that the entire

[73] Given their own budgetary positions, the Lenders are expected to borrow on the financial markets. An ethical question arises for those Member States which will borrow at a lower interest rate to that they will lend Greece (EURIBOR plus 3%).

[74] In both cases, the Commission and the EFSF will borrow on the financial markets to obtain the necessary funds.

[75] Article 3(8) of the EFSM.

[76] Article 11(2) of the EFSF Framework Agreement provides that the Member States shall liquidate the EFSF after 30 June 2013. In the same vein, Article 9(1) of the EFSM Regulation makes its maintenance subject to the continuation of the exceptional occurrences that justify it.

[77] The emergency measures taken to deal with the debt crisis evince that a crisis resolution mechanism as such is missing in the European Union and the EU leaders are aware of that. See, Statement of the Heads of State or Government of the Euro area, Brussels, 7 May 2010, p. 3. Also, Olli Rehn European Commissioner for Economic and Monetary Policy Debate on the euro area, Speech/10/217 European Parliament, Brussels, 5 May 2010.

edifice of the Economic and Monetary Union is constructed on the basis of a no deficit-no debt assumption. Therefore, the availability of a mechanism to deal with debt crisis, which was not supposed to happen in the first place, would represent a Greek paradox.

In this regard, for Euro area Member States, stable finances are not simply a Treaty principle (Article 4(3) TEC, before Lisbon) and a rule of economic and monetary policy (Article 119(3) TFEU, after Lisbon) but a *conditio sine qua non* of the monetary union. In order to ensure that the Member States comply with this obligation, EU economic policy comprises three main areas of coordination: broad economic policy guidelines, multilateral surveillance and the excessive deficit procedure.[78] The latter finds expression in the GSP which is intended to ensure budgetary discipline.[79] The GSP contains a variety of measures to achieve the budgetary discipline objective which escalates to the payment of a fine of an appropriate size.[80]

In parallel, the Treaty lays down rules to ensure that the stable finances principle may not be circumvented or compromised.[81] In a nutshell, the ECB may not provide an overdraft or other credit facility and may not purchase government bonds.[82] In

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[78] Amtenbrink and de Haan, above note 3.

[79] Article 126 TFEU. The main texts which comprise the GSP are: Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [1997] OJ L209/1; Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, [1993] OJ L332/7; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, [1997] OJ L209/6; Council Regulation 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, [2005] OJ L174/1; Council Regulation 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, [2005] OJ L174/5.

[80] Article 126(11), fourth indent TFEU.

[81] For an overview, Koen Lenaerts and Piet van Nuffel, *Constitutional Law of the European Union,* 2nd edition, (Sweet & Maxwell, 2005), 279-298.

[82] Article 123 TFEU (ex Article 101 TEC). See also, Council Regulation 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty [1993] OJ L332/1. Article 7 of the Regulation states: 'The financing by the European Central Bank or the national central banks of obligations falling upon the public sector vis-à-vis the International Monetary Fund or resulting from the implementation of the medium-term financial assistance facility set up by Regulation (EEC) No 1969/88 shall not be regarded as a credit facility within the meaning of Article 104 of the Treaty.' Regulation 1969/88 which it refers to has been replaced by the

addition, neither the Union[83] nor a Member State[84] nor financial institutions[85] may bail out another Member State. The link between budgetary discipline, the no-bailout clauses and market financing becomes apparent. In essence, 'the prohibition of privileged access to financial institutions ... forms an essential element of the submission of the public sector in its financing operations to the discipline of the market mechanism and so makes a contribution to the strengthening of budgetary discipline'.[86]

However, even before the common currency was introduced the efficacy of the existing policy instruments to address major political or economic shocks was questioned.[87] The gist of the argument was that the unavailability of traditional instruments of monetary policy, such as currency devaluation, coupled with tight controls over public finances, left little scope for individual Member States to deal with severe economic disturbances. At the same time, since the ECB makes no overdraft facilities available to the Member States,[88] borrowing on the markets may become more difficult or more expensive should the Council decide to take any of the measures provided in case of non-compliance with the Council Recommendations to reduce the excessive deficit.[89] In this respect, market-induced budgetary discipline might backfire.

It is against this backdrop that the emergency measures taken to counteract the debt crisis should be examined. Inevitably, a political dimension should also be added to the equation. In this respect, one can hardly disagree with the political will to concoct a solution to address the Greek debt crisis, thereby giving tangible meaning to the

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BOP Regulation (Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L53/1).
[83] Article 125 TFEU(1), first sentence (ex Article 103 TEC).
[84] Article 125 TFEU(2), second sentence (ex Article 103 TEC).
[85] Article 124 TFEU (ex Article 102 TEC).
[86] Council Regulation (EC) No 3604/93 of 13 December 1993 specifying definitions for the application of the prohibition of privileged access referred to in Article 104a of the Treaty, [1993] OJ L332/4.
[87] Francis Snyder, 'EMU Revisited: Are We Making a Constitution? What Constitution Are We Making' in Paul Craig & Gráinne de Búrca, *The Evolution of EU Law*, (Oxford: Oxford University Press, 1999), 417, 449-450 and the academic writing quoted there.
[88] Article 123(1) TFEU.
[89] Article 126(11), first indent TFEU.

concept of solidarity, enshrined in several places in the Treaties since the entry into force of the Treaty of Lisbon.[90] However, solidarity is not a constitutional norm that could render instruments, considered *a priori* incompatible with the EU constitutional order,[91] less offensive. The present analysis makes no assumptions in this respect.

As mentioned above, the Treaties do not provide the necessary powers to deal with the debt crisis as such. Consequently, it must be determined what powers the Union does have in the domain on economic policy and how do those relate to the powers of the Member States. Pursuant to Article 3(1)(c) TFEU, monetary policy is an exclusive competence of the Union. At the same time, EU economic policy enjoys a special status in the competences catalogue of the Treaty alongside employment and social policy. Long before the entry into force of the Treaty of Lisbon, it was argued that EU economic policy is a disguised shared competence.[92] This argument has a stronger claim today having regard to Article 4(1) TFEU which reads: 'The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.'[93] Economic policy is a Union competence provided for in Articles 2(3)[94] and 5(1) TFEU[95] and hence it is neither an exclusive Union competence nor a complementary competence. Its specificity in relation to the shared competences provided in Article 4 TFEU is also established. It may be inferred that economic policy, alongside employment and social policies, is narrower in scope than the shared competences under the Treaty, the role of the Union being to coordinate national policies. At the

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[90] Article 122 TFEU, Article 222 TFEU and Article 42(7) TEU. See, W.T. Eijsbouts, 'Scratch the Currency and You Will Find the Deal' (2010) 37 *Legal Issues of Economic Integration* 181.
[91] Eijsbouts states 'In addition, if, as in these days, the deal is struck at the expense of the existing legal norm, so be it. Each true creation, as the artist tends to know better than the lawyer, is also a violation.'
[92] René Smits, 'The European Constitution and EMU: An Appraisal' (2005) 42 *Common Market Law Review* 425, 430.
[93] Article 3 TFEU deals with exclusive competence and Article 6 TFEU with complementary competences.
[94] 'The Member States shall coordinate their economic and employment policies within arrangements as determined by this Treaty, which the Union shall have competence to provide.'
[95] 'The Member States shall coordinate their economic policies within the Union. To this end, the Council shall adopt measures, in particular broad guidelines for these policies.
Specific provisions shall apply to those Member States whose currency is the euro.'

same time, it should go beyond the complementary policies and harmonisation should not be excluded. It is only when and in so far as a measure of economic policy, which is taken on EU level and which harmonises national law, that the pre-emptive effect of Article 2(2), 2nd sentence TFEU applies.[96] In all other instances, consistently with Article 2(2), 1st sentence,[97] in the field of EU economic policy, a large measure of competence is vested in the Member States which they are not precluded from exercising either in the Council or outside it.[98] However, the Court's pronouncement in *Bangladesh* that '... the Community does not have exclusive competence in the field of humanitarian aid, and that consequently the Member States are not precluded from exercising their competence in that regard collectively in the Council or outside it' may no longer be extended to fields of shared competence other than those provided in Article 4(3) and 4(4) TFEU.[99]

Let's take stock of the EU competences analysis in the field of economic policy and move on the analysis of the Greek bail-out which, as mentioned earlier, is based on Member State instruments. In this regard, the Euro area Member States took the decision to react to the debt crisis in Greece by means of an Intercreditor Agreement and a Loan Facility Agreement between Greece, on the one hand, and the other fifteen Euro area Member States on the other.[100] This makes a total of three agreements: the *sui generis* decision of the Member States meeting within the Euro Group formation of the Council to grant the loan as well as the Intercreditor and

[96] 'The Member States shall exercise their competence to the extent that the Union has not exercised its competence.'

[97] 'When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area.'

[98] Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission (Bangladesh)* [1993] ECR I-3685, paragraph 16. Panos Koutrakos, *EU International Relations Law*, (Oxford and Portland, Oregon, Hart Publishing, 2006), 155-160. For a criticism of the Court's approach, see, Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law*, (Oxford, Oxford University Press, 2009), 320.

[99] In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.
In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

[100] Statement by Euro Group, Brussels, 2 May 2010. Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/114130.pdf. The present chapter will focus on the latter. See, Schütze, above note 98, 313-320.

Loan Facility Agreements between the Member States. In principle, this is perfectly compatible with the competences analysis above. *Inter se* agreements of the Member States are permitted in EU constitutional law, they are nevertheless subject to limitations. In this respect, it must be ensured that the *inter se* agreements do not circumvent the procedure for Treaty amendment, that they respect the institutional framework set by the Treaties and do not affect existing policies.[101]

There are major question marks set in relation to all the three conditions.[102] As outlined above, EU economic policy is constructed on the basis of a no debt-no deficit assumption. The only exceptions the Treaty recognises can be found in Article 122 TFEU and concern supply of energy, a natural disaster or exceptional occurrences beyond a Member State's control. It follows that, if debt crisis falls within the scope of Article 122 TFEU, then any financial assistance must be granted via Union channels; if not, it should not be granted at all. By granting financial assistance in the form of pooled bilateral loans, Member States appear to circumvent an explicit prohibition set out in Article 125 TFEU. Moreover, loans at an interest rate, lower than that available to Greece on the financial markets and the acceptance, pursuant to an ECB decision, of Greek debt instruments as collateral, regardless of the rating of the Greek debt,[103] constitute examples of privileged access to financial institutions prohibited by Article 124 TFEU.

Similar, albeit more complex, considerations apply to the EFSF. It must be pointed out however that, only if and when the EFSF exercises its powers, its role as the agent of the financing operations of the Euro area Member States will be fully comprehended. The main difference lies in the absence of the *inter se* agreements of

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[101] Bruno de Witte, 'Future Paths of Flexibility: Enhanced Cooperation, Partial Agreements and Pioneer Groups' in Jaap W. de Zwaan, Jan H. Jans and Frans A. Nelissen (eds.), *The European Union - An Ongoing Process of Intergration: Liber Amicorum Alfred E. Kellermann*, (The Hague, TMC Asser Press, 2004), 141, 148-151. For a more detailed analysis, see, Bruno de Witte, 'Old-fashioned Flexibility: International Agreements between the Member States of the European Union' in Gráinne de Búrca and Joanne Scott (eds.), *Constitutional Change in the EU - From Uniformity to Flexibility?* (Oxford, Hart Publishing, 2000), 31.

[102] It is immensely ironical that such constitutional *coup d'état* took place on the 60th anniversary of the Schuman Declaration as hinted in Eijsbouts, above note 90.

[103] Decision of the European Central Bank ECB/2010/3 of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek government, [2010] OJ L117/102.

the Member States. A Framework Agreement has been concluded instead which has been ratified by all Euro area Member States with a private body, the EFSF. If financial assistance under the EFSF is requested, a loan agreement will be concluded between the EFSF and the requestor Member State, with policy conditionality agreed in consultation with the Commission and the ECB. As regards its compatibility with the Treaties substantively, the crux of the problem remains, that is, financial assistance to a troubled Member State and privileged access to funds.[104] Constitutionally, it is paradoxical that this *sui generis* private body will be the final arbiter of policy conditionality, including compliance with any Council Recommendations under Article 126 TFEU. Furthermore, the constitutional guarantees offered by the Union institutional framework are also missing.[105]

The EFSM is the only debt crisis emergency instrument to be adopted under the TFEU Treaty. The question whether the EFSM can sufficiently be based on Article 122(2) TFEU depends on whether the debt crisis constitutes 'exceptional occurrences beyond [a Member State's] control'. It is submitted that the purpose of this provision is to enable the Union to come to the assistance of a Member State in severe difficulties caused in spite of the stable finances dogma, or, maybe, because of it; a systemic interpretation of the provision is therefore required. Albeit an exceptional norm, the inherent dynamism of this provision – 'seriously threatened with severe difficulties' – militates in favour of a wide scope of Article 122(2) TFEU. The operation of the mechanism (lending operations, policy conditionality, role of the institutions, relations with the IMF[106]) does not raise additional competence concerns. In fact, the introductory sentence of Article 122 TFEU which reads, '[w]ithout prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States...' may be interpreted to introduce an exception to all other economic policy restrictions under the Treaty in relation to any financial assistance to a Member State,

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[104] The guarantee by the Member States ensures that the bonds issued by the EFSF will have an excellent credit rating.
[105] For instance, Article 15 TFEU.
[106] See, next section.

including, most importantly, privileged access to financial institutions (Article 124 TFEU) and the no-bail-out clause (Article 125 TFEU).

The EFSM lays down common rules on a Union level concerning EU financial assistance to a Member State in financial difficulties. How does this relate to the Greek bail-out package and the EFSF, which cover the same field? In accordance with the principle of pre-emption, outlined above,[107] Member States would be pre-empted from exercising their competences unilaterally, if common rules were laid down by the Union.[108] Consequently, the existence of common rules in the form of the EFSM, pre-empt the Member States from bailing-out a Member State in financial difficulty outside the Union framework. In fact, because the Member States have, on this occasion, exercised their competences collectively in the form of an *inter se* agreement, they should be subject to a stricter pre-emption control.[109] This is because, if Member States agreed to cooperate on a policy initiative which falls within Union competence, they should do so within the Union framework and not the intergovernmental one.[110] A possible argument, influenced by the case-law of the Court in the field of development co-operation,[111] that Member States may grant financial assistance in the form of bilateral loans may not be upheld in the current Treaty framework. As mentioned briefly above, the combined reading of Articles 2(2),second sentence, 2(3) and 5(1) TFEU juxtaposed with Article 4 leads to the following proposition: the Union has the competence to the coordinate the economic policies of the Member States and determine the necessary modalities[112] which shall be exercised by the Council; when the Union exercises its competence in the field Member States will, unlike research, technological development, space, development cooperation and humanitarian aid, be prevented from exercising their own competences.

[107] See, the text surrounding footnote 96.
[108] For a detailed analysis see, Robert Schütze, 'Supremacy Without Pre-emption? The Very Slowly Emergent Doctrine of Community Pre-emption' (2006) 43 *Common Market Law Review* 1023.
[109] de Witte, above note 101, 41-45.
[110] de Witte, above note 101, 42.
[111] Joined cases C-181/91 and C-248/91 *European Parliament v Council and Commission (Bangladesh)* [1993] ECR I-3685; C-316/91 *European Parliament v. Council (EDF)* [1994] ECR I-625.
[112] I prefer the term 'modalités' taken from the French version of Article 2(3) TFEU over 'arrangements' in the inelegantly drafted English version.

In the case at hand, the only question that remains is whether the Greek bail-out package was adopted before the Union had exercised its competence in the form of the EFSM.[113] If common rules were not in place, the Member States could not have been pre-empted from exercising their competence. In such case, however, Member State action would not be completely unhindered in constitutional terms but would be limited by the duty of cooperation.[114] In the context of EU external relations, the Court has held that Member States ought to abstain from exercising their competences from the moment the Commission was issued directives to negotiate with third countries on the same subject-matter.[115] It is submitted that *mutatis mutandis* the duty of cooperation warrants an interpretation to the effect that Member States should abstain from concluding an *inter se* agreement if the Union is at the departure point of adopting common rules on the same subject-matter.

Returning to the doctrine of pre-emption, it is clear that Member States may no longer grant financial assistance in the form of an *inter se* agreement but should do so under the EFSM. Taking a look at the relationship between the EFSM and the EFSF, it should be noted that the EFSF owes its establishment to the Member States' intention to avoid the most important limitation of the EFSM, which is the amount that could be made available under the latter instrument, an amount clearly insufficient to deal with a debt crisis of such volume.[116] Otherwise, the *modus operandi* of the EFSF, as may be inferred from the Framework Agreement, will not differ from that of the EFSM. In fact, as regards policy conditionality, if a MoU has been agreed between a Member State and the Commission under the EFSM, the same MoU shall be applicable to financing requested under the EFSF.[117] This represents evidence of the awkward symbiosis expected between the EFSM and the EFSF and lends support to

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[113] Agreement on the Greek bail-out was reached first, then the EFSM was adopted, ratification of the Intercreditor and Loan Facility Agreements was swiftly concluded a week later.

[114] Article 4(3) TEU (ex Article 10 TEC). de Witte, above note 101, 42; Eleftheria Neframi, 'The Duty of Loyalty: Rethinking its scope through its application in the field of EU external relations' (2010) 47 *Common Market Law Review* 323.

[115] Case C-246/07 *Commission v. Sweden*, judgment of 20 April 2010, not yet reported, paragraph 74; Case C-266/03 *Commission v. Luxembourg* [2005] ECR I-4805, paragraph 59.

[116] Article 2(2) of the EFSM.

[117] Section 2(1) of the EFSF Framework Agreement.

the argument that Member States were pre-empted from setting up a private financing channel mirroring the Union one.[118]

On the basis of the above, it may be concluded that the EFSM comes nearer to satisfying the constitutional limitations set by the Treaties and constitutes the only instrument which should remain on the Union rulebook after the crisis is over.

## VI EMERGENCY INSTRUMENTS OF EU ECONOMIC POLICY: THE INTERNAL LOOKING OUT

The emergency instruments analysed above have in common that they envisage EU and Member State stability support in conjunction with funding obtained from other bodies. The IMF takes a dominant place in the construction of the post-crisis EU economic policy. However, there are numerous legal questions as regards IMF's role both in procedural and substantive terms.

More specifically, in the case of the Greek bail-out, the rescue package was based on joint EU/IMF funding up to the amount of €80 billion and €30 billion respectively over a period of three years. While Articles 21(1) TEU and 220 TFEU (ex Articles 302 to 304 TEC) provide for the establishment and maintenance of appropriate relations between the European Union and international organisations, this close policy coordination can be difficult to accommodate in such vague diplomatic language.[119]

Furthermore, any future bail-out under the European stabilisation mechanism (EFSM or EFSF) will be funded by the IMF with an amount of up to €250 billion.[120] As mentioned in the previous section, there remains a lot to be surmised about the

[118] Schütze, above note 108, 1040-1041 would probably classify this as 'field pre-emption'.

[119] Twice a year, the Euro Group exchanges views with the IMF on euro-area policies, known as Article IV consultations. In the context of the debt crisis, it should be noted that the Managing Director of the IMF attended several crisis management meetings of the Euro Group and the ECOFIN Council.

[120] 5th preambular clause to the EFSM Regulation. Given that the amount roughly equals the total subscribed capital of the IMF (SDR 217 billion ≈ €250 billion, see, http://www.imf.org/external/np/sec/memdir/members.htm), the presumption that the IMF will actually approve this level of financial support under the Stand-By Arrangement is astonishing.

constitutional orthodoxy of this arrangement. That said, this section addresses the abundant unanswered questions about the relations between the IMF and the European stabilisation mechanism. The first concerns the presumed agreement of the IMF to contribute to such mechanism. Obviously, there does not seem to be any international agreement, even of simplified form, which establishes the IMF consent.[121] A related question is whether such an agreement would be possible, or even, desirable. Moreover, it is questionable whether the contribution of the IMF is a compulsory element of the European stabilisation mechanism even if a Member State would be against its involvement. The ongoing social crisis in Romania, a Member State which received joint financial assistance by the IMF and the EU under the BOP facility, represents fresh illustration of how unpopular IMF policy conditionality can be.[122] Third, however unlikely, what if a Member State wishes to ask for support from the IMF and not the EFSM/EFSF?

There is no easy answer to the above questions. To start with, Article 219(4) TFEU (ex Article 111(5) TEC) which provides 'Without prejudice to Union competence and Union agreements as regards economic and monetary union, Member States may negotiate in international bodies and conclude international agreements' seems to be at odds with Article 3(2) TFEU. The most obvious way to reconcile them is to state that '[*w*]*ithout prejudice to Union competence*' excludes exclusive Union competence. Any other interpretation would lead to the conclusion of having an exclusive internal Union competence (monetary policy) and a *sui generis* shared internal competence (economic policy) find external expression in a complementary external competence (economic and monetary policy).

In any event, it is clear that, in the field of economic policy, a Member State may conclude an international agreement, such as an agreement for stability support under the Stand-By Arrangement. From an EU constitutional perspective, however, a

[121] Obviously, such undertakings may have been given on the highest political level by the leaders of the IMF members with the highest amount of capital subscription.
[122] Council Decision 2009/459 of 6 May 2009 providing Community medium-term financial assistance for Romania, [2009] OJ L150/8.

Euro area Member State should not be allowed to request financial support under the Stand-By Arrangement in the absence of authorisation from the Council. Having regard to the duty of cooperation, it is clear that IMF conditionality has such a profound impact on the economic policy of a Member State that the future direction of EU policy coordination, particularly of Euro area Member States, would certainly be affected. [123]

The full agreement of the EU and the IMF on Member State policy conditionality, which is evident in the current conjuncture, may not be presumed in the future. The Greek bail-out package is not static; progress thereunder is subject to quarterly reviews. In its Letter of Intent to the IMF, Greece undertook to take further measures as necessary. Should disagreements arise in the implementation of the Greek bail-out, EU constitutional law and economic and monetary policy risk getting sandwiched between, on the one hand, an agreement between a Member State and the IMF and, on the other, an *inter se* agreement (the Loan Facility and Inter-Creditor Agreements) of the Member States. While, in theory, the primacy of EU law will apply,[124] it would be unwise to test it in practice.

In the interest of ensuring the unity of the Union's identity on the international scene, it would be imperative that the present situation finds remedy in the form of a framework agreement between the EU and the IMF.[125] Broader issues, such as unity of representation in the IMF's Governing Board, may also be addressed within the

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[123] See to this effect, the Opinion of Advocate General Maduro in the *Commission v Austria* and *Commission v Sweden* cases, paragraph 40 who stated 'I wish to make it clear, however, that the problem lies not in the possibility of any future conflict with the Community legislation and its objectives. If every such possibility had to be eliminated there would no longer be a shared competence, but an exclusive one. The problem only arises where the national measures or the international obligations of Member States are liable to jeopardise the effectiveness of possible future Community legislation and, in doing so, *de facto* restrict the freedom which the Treaty confers on the Community to act in those areas. That will depend on the nature of both the national measures or international obligations and the Community competences affected, for example the urgency of the measures to be adopted under such competences.'

[124] Marise Cremona, 'Defending the Community Interest: the Duties of Cooperation and Compliance' in Marise Cremona and Bruno de Witte (eds.), *EU Foreign Relations Law: Constitutional Fundamentals*, (Oxford and Portland, Oregon: Hart Publishing, 2008), 125, 142. See also, Case C-308/06 *Intertanko and others* [2008] ECR I-4057, paragraph 52.

[125] Article X of the IMF Articles of Agreement could lend itself as the legal basis from the IMF's perspective.

context of such agreement,[126] maybe in the form of an attached Code of Conduct.[127] An EU - IMF agreement should be the solution that would formalise the coordination which has already taken place both as regards the Greek bail-out[128] and the European stabilisation mechanism.

Transparency and efficiency militate in favour of such an arrangement. Besides these considerations, it could be argued, on the basis of a competences analysis, that there is a legal requirement to do so. In this respect, the quiver of EU external relations law contains the doctrine of necessity.[129] From a combined reading of Articles 216(1) and 3(2) TFEU it follows that the Union has the competence to conclude an international agreement when it is necessary in order to achieve one of the objectives referred to in the Treaties. Such competence will be exclusive when it is necessary to conclude an international agreement to enable the Union to exercise its internal competence.[130] While the reasons behind the argument that 'it would be difficult to imagine a case in which the objectives of such a loosely co-ordinated economic policy would make it necessary for the Community to enter into international agreements'[131] are perfectly consonant to the circumstances before the crisis, it is argued that the activation of a Stand-By Arrangement with the IMF represents a rare opportunity in which the strict conditions set by the Court in its case-law[132] might actually be fulfilled. Moreover,

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[126] Article 138 TFEU provides the necessary legal basis for this. Smits, above note at p. 454 also considers such a step necessary.

[127] Arrangement between the Council and the Commission regarding preparation for Codex Alimentarius Meetings and statements and exercise of voting rights, ANNEX III to Council Decision 2003/822 of 17 November 2003 on the accession of the European Community to the Codex Alimentarius Commission, [2003] OJ L309/14.

[128] Co-ordination at the implementation of that the Greek bail-out package was exemplary and took the form of joint missions to Greece or joint statements. See, for instance, Joint Statement on Greece by EU Commissioner Olli Rehn and IMF Managing Director Dominique Strauss-Kahn, IP/10/484, Brussels, 2 May 2010.

[129] The doctrine originates in Opinion 1/76 *(Re Laying-up Fund)* [1977] ECR I-741.

[130] Antonis Antoniadis, 'The EU's Implied Competence to Conclude International Agreements after the Reform Treaty: Reformed Enough?' in Finn Laursen (ed.), *The EU in the Global Political Economy*, (Brussels, PIE Peter Lang, 2009), 67, 80-83.

[131] Chiara Zilioli and Martin Selmayr, *The Law of the European Central Bank*, (Oxford-Portland Oregon: Hart Publishing, 2001), 185.

[132] Opinion 1/76 *(Re Laying-up Fund)* [1977] ECR I-741; Opinion 1/94 *(Re WTO)* [1994] ECR I-5267; Case C-466/98 *Commission v. UK*, Case C-467/98 *Commission v. Denmark*, Case C-468/98 *Commission v. Sweden*, Case C-469/98 *Commission v. Finland*, Case C-471/98 *Commission v. Belgium*, Case C-472/98 *Commission v. Luxembourg*, Case C-475/98 *Commission v. Austria*, Case C-476/98 *Commission v. Germany (the Open Skies cases)* [2002] ECR I-9427 and Opinion 1/2003 *(Re Lugano Convention)* [2006] ECR I-1145.

following the adoption of the EFSM, it follows, in a straightforward application of the *AETR* doctrine,[133] that the Union enjoys a corresponding external competence in this field.[134] The content of such agreement would be limited to the scope of the internal measures[135] but given, the breadth, depth and level of detail of the Council Recommendations to Greece, this should not be too restrictive.[136]

Even in the absence of a framework agreement, inaction or a bilateral agreement between the IMF and an individual Member State does not offer a constitutionally optimal solution to deal with debt crisis in a Member State.[137] In particular, if recourse to the European stabilisation mechanism in conjunction with funding from IMF becomes necessary, then it would be more appropriate for a Euro area Member State to make a joint request with the EU for financial assistance under the Stand-By Arrangement from the IMF. Such agreement will share many characteristics of the mixed agreements.

An EU-IMF framework agreement or the EU involvement in requesting activation of the Stand-By Arrangement for a Member State would certainly touch sensitive cords on many levels. First, the design of EU economic policy, even if this were to be exhausted to broad economic policy guidelines, multilateral surveillance and the excessive deficit procedure would no longer be independent from the IMF. Without necessarily putting a straightjacket on EU economic policy, EU fiscal consolidation would no longer have to take place as a preventive measure to earn the confidence of the financial markets[138] but as a matter of legal obligation. Moreover, an agreement of

[133] Case 22/70 *Commission v. Council (Re AETR)* [1971] ECR 263.
[134] The unsuccessful codification of the doctrine in Article 216(1) TFEU (implied shared competence) and Article 3(2) TFEU (implied exclusive competence) makes it more likely that such competence will not be exclusive. For an analysis and critique, see, Antoniadis, above note 130, 67-90.
[135] Opinion 1/2003 *(Re Lugano Convention)* [2006] ECR I-1145. For an analysis in the field of EU economic policy, see, Zilioli and Selmayr, above note 131, 186. See also, Protocol (No 25) on the exercise of shared competence, [2008] OJ C115/307.
[136] Council Decision 2010/320 of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, [2010] OJ L145/6.
[137] Smits, above note 92, 454-455 makes similar demands already in pre-crisis conditions.
[138] Fiscal consolidation measures were either taken or announced in May 2010 by Spain, Portugal, Italy, the United Kingdom and Denmark.

this kind would inevitably lead *de facto* to closer economic policy coordination, going, in the medium term, even beyond the recently tabled proposals.

## VII EU ECONOMIC POLICY IN EMERGENCY MODE: THE NEW INSTITUTIONAL ARCHITECTURE

The institutional architecture of the EU economic constitution appears to have gone through transformation in a short period of time as a combined result of the entry into force of the Treaty of Lisbon and the emergency measures taken to deal with the debt crisis.

First and foremost, the Union institutional framework has seen an important addition in the European Council whose status has been formalised by the Treaty of Lisbon. Its remit has been broadly defined 'to provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof'.[139] The European Council President is a central figure to co-ordinate the Union's response and drive the agenda forward. In response to the debt crisis, the President of the European Council has been asked to chair the Task Force on economic governance, a body which was established by the March 2010 European Council and which consists of Member State representatives, the Commissioner of Economic and Financial Affairs, the ECB President and the President of the Euro Group.[140] In fact, the Task Force is entrusted with the task of presenting a crisis resolution framework to the October 2010 European Council.[141]

Second, as regards the Council, the previously informal Council formation of the Member States whose currency is the Euro, the Euro Group,[142] has been, since the entry into force the Treaty of Lisbon, formalised.[143] In addition, the ECOFIN

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[139] Article 15 TEU.
[140] Remarks by Herman Van Rompuy, President of the European Council, following the first meeting of the Task force on economic governance, PCE 102/10, Brussels, 21 May 2010.
[141] PCE 101/10, Brussels, 20 May 2010
[142] Annex I to the Conclusions of the Luxembourg European Council, 12 and 13 December 1997.
[143] Article 137 TFEU and Protocol (No 14) on the Euro Group, [2010] OJ C115/283.

Council's role in formulating and adopting the broad economic policy guidelines[144] has been greatly enhanced by the nature of the guidelines issued to a Member State in financial trouble which are unprecedented in terms of reach and intrusiveness.[145] On another point, the EFSM confers on the Council implementing powers to act.[146]

The Commission's role is instrumental in the management of the debt crisis instruments. Subject to subtle differences in each instrument, this role includes the management of all loans under the emergency instruments analysed above, including the promulgation of the agreed policy conditions and the monitoring of the performance of the Member State in severe difficulty for the duration of the loan. Moreover, the Commission has capitalised on the political environment created by the debt crisis to take a number of legislative initiatives in the field of EU economic policy.

The ECB comes out of this crisis in a very controversial position. On the one hand, its role has been enhanced. On the other hand, however, it appears that the price for it has been to set a question mark on the ECB's independence.[147] In this respect, it should be recalled that the discussion on the status of the ECB has been rigorous and detailed.[148] While the ECB's independence has been juxtaposed to other central banks - most importantly, the Bundesbank - and acclaimed,[149] it appears that full ECB

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[144] John Usher, 'The Evolution of Economic and Monetary Union - Some Legal Issues' in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, (Oxford, Oxford University Press, 2008), 297, 306.

[145] Council Decision 2010/320 of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit, [2010] OJ L145/6.

[146] 6th preambular clause of the EFSM Regulation.

[147] Article 130 TFEU. See also, Article 7 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank, [2008] OJ C115/230.

[148] The theoretical discussion could indeed convince the reader that the ECB enjoys a legally autonomous status and that only certain Treaty obligations actually apply to it. For an academic analysis following Case C-11/00 *Commission v. ECB* [2003] ECR I-7147 see, Chiara Zilioli and Martin Selmayr, 'The Constitutional Status of the European Central Bank' (2007) 44 *Common Market Law Review* 355; Bernd Krauskopf and Christine Steven, 'The Institutional Framework of the European System of Central Banks: Legal Issues in the Practice of the first ten years of its existence' (2009) 46 *Common Market Law Review* 1143. For an earlier treatise, Zilioli and Selmayr, above note131, 398.

[149] G.F. Mancini, 'The Euro: A Currency in Search of a State' in Judge G.F. Mancini, *Democracy and Constitutionalism in the European Union: Collected Essays*, (Oxford – Portland Oregon, Hart Publishing, 2001), 67, 71.

independence in now a memory of the past. The ECB took an active role in the development and management of the Greek bail-out and the European stabilisation mechanism, and, more importantly, provided the necessary supporting measures to guarantee their success. However, in doing so, the ECB appears to have served the will of the Member States in the Euro Group and not the Treaties. The decision to accept the Greek debt instruments as collateral[150] not only infringes Article 125 TFEU but defies universal financial logic. At the same time, the decision to establish a securities market programme[151] to buy Member State bonds on the secondary market and private bonds in both primary secondary markets also circumvents, in an inelegant manner, the Treaty limitations.[152] These remarkable changes, fuelled by political consensus on the highest level, did not even warrant a Treaty amendment.

Other actors make their presence felt in the Union's economic and monetary architecture. Most importantly, the EFSF represents a novelty whose significance it would be premature to assess at this stage. It is not doubted that it will raise questions as regards its relations with the Union's institutions.

## VIII CONCLUDING REMARKS

The above analysis demonstrates that the Union now possesses (some sort of) emergency constitution in the field of economic and monetary policy. Its immediate objective is to ensure that the Union is equipped with the instruments to deal with the debt crisis. More important, however, is to ensure that such crisis will not happen again in the future. In this respect, it has been amply understood that the EU may no longer pursue an EMU under which a strong monetary body will be supported by

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[150] Decision of the European Central Bank ECB/2010/3 of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek government, [2010] OJ L117/102.

[151] Decision of the European Central Bank ECB/2010/5 of 14 May 2010 establishing a securities markets programme, [2010] OJ L124/8. Pursuant to Article 1 of the Decision, 'Under the terms of this Decision, Eurosystem central banks may purchase the following: (a) on the secondary market, eligible marketable debt instruments issued by the central governments or public entities of the Member States whose currency is the euro; and (b) on the primary and secondary markets, eligible marketable debt instruments issued by private entities incorporated in the euro area.'

[152] Article 123(1) TFEU (ex Article 101 TEC).

atrophic economic limbs. The manner in which EU economic policy was tested during the debt crisis demonstrates that the distinction is artificial. While further integration may sound as an anathema to some, the debt crisis evinces that this represents the most credible solution.[153] It would not be an exaggeration to state that, as soon as the emergency mode was switched on, the Union economic constitution changed irreversibly.[154]

A stronger economic union is emerging from the ashes of the debt crisis. It is noteworthy that more legislative initiatives have been taken in the field of EU economic governance than ever before. Following a Communication on stronger economic governance[155] and a new Directive on hedge funds, which is currently *ante portas*,[156] the Commission also addressed the issue of credit-rating agencies and the reform of corporate financial governance.[157] More initiatives are coming.[158] In general terms, the coordination of economic policies of the Member States is entering a new era. In many ways, the initiatives already undertaken - and those to follow - reverse the cautious steps taken in the course of Treaty amendment when establishing the competences catalogue in this field.[159]

It seems that, with a couple decades delay, EU monetary policy paves the way for a broader integrationist strategy. EU closer co-ordination will have a great impact

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153 Niall Ferguson, 'The End of the Euro', *Newsweek*, 7 May 2010.

154 Financial Times, *French Minister says bail-out alters EU Treaty*, 27 May 2010. The French Minister to which the title alludes is none other than Pierre Lellouche, France's Europe Minister.

155 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Enhancing Economic Policy Coordination for Stability, Growth and Jobs – Tools for Stronger EU Economic Governance, COM(2010) 367/2.

156 The latest available compromise Proposal for a Directive of the European Parliament and of the Council on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC can be found in Document 6795/3/10 REV3, 10 March 2010. The proposal represents the Council common position and was sent to the European Parliament on 18 May 2010, Press Release 7500/10.

157 Commission proposes improved EU supervision of Credit Rating Agencies and launches debate on corporate governance in financial institutions, IP/10/656, Brussels, 2 June 2010.

158 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions: Reinforcing Economic Policy Coordination, COM(2010)250 final, Brussels, 12.5.2010

159 Smits, above note 92, 431 referring to Kapteyn, 'The EMU and Central Bank: Chances Missed' (2004) 1 *European Constitutional Law Review* 123, 125.

where the EU currently punches well below its weight like, in addition to the IMF, the OECD, the G8 and the G20.[160] The Union should entrust confidence to multilateral institutions but should not be seen as dragging its feet or being unable to take the lead within those.[161]

Now more than ever, however, it is necessary to address grassroots problems too. The continuing existence of the Euro is not solely dependent on political will and high-level decisions. A populist agenda ran alongside the crisis which was based on fear and intolerance.[162] The wounds that campaign left are deep and may be more difficult to repair than the Union's economic troubles. And, if that falters, the fate of Icarus awaits not only the Euro but the Union as such.

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[160] For an indication of the direction EU participation in these *fora* takes see, Informal Meeting of EU Heads of State or Government, Agreed Language for the Pittsburgh G-20 Summit, Brussels, 17 September 2009. See, also the contribution from Jan Wouters, Steven Sterkx, and Tim Corthaut, 'The European Union, the International Financial Crisis and Global Governance', Chapter 7 of this book.

[161] See statement of Extraordinary Meeting of Ministers of Transport, 19 April 2010, related to a European response to volcanic eruption of Eyjafjalla.

[162] Focus, *Betrüger in der Euro-Familie*, 22 February 2010.