

The Economic Crisis within the EU- The European Stability Mechanism as a current legal challenge

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1. Introduction

The Eurozone crisis was triggered by the US subprime crisis and later evolved into a Global Crisis² which hit the European Union (EU), especially the Eurozone, without warning in 2009. In comparison to the EU the United States (US) recovered much faster due to the institutions that already existed³ which took up the role of lenders of last resort⁴. The first EU countries to be affected by the crisis were Portugal, Ireland, Italy, Greece and Spain.

Some experts argue that the causes of the crisis lay within the asymmetric structure of the EMU. The crisis can be seen as an asymmetric shock itself that hit the Member States differently due to their structural differences.⁵ Foreign lenders stopped investing during the Global Crisis thus triggering the rising risks within the periphery nations. The balance of payment crisis turned into a public debt crisis due to the fact that these periphery countries were producing big deficits and some governments had to take over their bank's debt.⁶

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² Baldwin/Beck/Bénassy-Quéré/Blanchard/Corsetti/De Grauwe/den Haan/Giavazzi/Gros/Kalemli-Ozcan/Micossi/Papaioannou/Pesenti/Pissarides/Tabellini/Weder di Mauro, Rebooting the Eurozone: Step1-agreeing a crisis narrative, CEPR Policy Insight No 85, 2015, 7; they argue that the crisis became a Global Crisis after Lehman Brothers failed.

³ Such as the US Federal Reserve and Treasury, which established crisis resolution measures.

⁴ Contrary to the Eurozone governments in trouble which had no lender of last resort; see Baldwin/Gros, What caused the eurozone crisis?, CEPS Commentary 2015, 3: According to Baldwin and Gros the Eurozone Membership was also a crisis amplifier; see also Talani, Introduction: Europe in Crisis: A structural Analysis, 3 in Talani, Europe in Crisis- A Structural Analysis 2016: argues that the US came out of the crisis much stronger in monetary, economic and political terms than the EU and the Eurozone.

⁵ See Talani, Introduction: Europe in Crisis: A structural Analysis, 4-5 in Talani, Europe in Crisis- A Structural Analysis 2016; see also <http://voxeu.org/article/causes-eurozone-crises>: This asymmetric structure can be outlined by the fact that core countries (such as Germany France and Netherlands) were investing heavily in periphery countries (such as Ireland, Portugal, Spain and Greece); see Baldwin/Gros, What caused the eurozone crisis?, CEPS Commentary 2015, 2; see also Nelson/Belkin/Mix/Weiss, The Eurozone Crisis: Overview and Issues for Congress, Congressional Research Service 2012, 4: They argue that this would not state an issue unless the periphery countries were relying on the foreign lenders.

⁶ Baldwin/Gros, What caused the eurozone crisis?, CEPS Commentary 2015, 2; see also Baldwin/Beck/Bénassy-Quéré/Blanchard/Corsetti/De Grauwe/den Haan/Giavazzi/Gros/Kalemli-Ozcan/Micossi/Papaioannou/Pesenti/Pissarides/Tabellini/Weder di Mauro, Rebooting the Eurozone: Step1-agreeing a crisis narrative, CEPR Policy Insight No 85 November 2015.

According to some scholars the closer interconnection between banks and national governments within the Eurozone led to a further spread of the crisis as they argue that after the entry into the euro area borrowing costs were lower due to the large intra-eurozone capital flows.⁷ Furthermore, this strong interconnection between banks and governments had a strong potential for a vicious cycle between these two actors. This vicious cycle also operated the other way round as the banks heavily lend to their governments.⁸

Another reason to be outlined is the issue of responsibility of regulation which was left at the national level, while monetary policy was an issue of the ECB. At that time no supervision or resolution mechanisms for banks existed.⁹

Scholars argue that the crisis was caused by common challenges, like the ones mentioned above, as well as by factors specific to each country.¹⁰ Concluding, we can say that the crisis did not evolve out of one specific reason but was caused by several, general and specific reasons.

As we know now, the efforts made before were not sufficient and the criteria were frequently violated.¹¹ Therefore a strong necessity grew for further mechanisms and institutions.

The crisis exposed that it was necessary to enforce fiscal discipline more effectively, so to say, by adopting more fiscal rules which were both stricter and more likely to be enforced.¹²

The Six-Pack¹³, the Two-Pack¹⁴ and the Treaty on Stability, Coordination and Governance in the EMU (also called the Fiscal Compact¹⁵) brought improvements in regard to fiscal policies within the EMU.¹⁶

⁷ see <https://economics.rabobank.com/publications/2015/december/the-eurozone-debt-crisis--causes-and-crisis-response/>; <http://voxeu.org/article/causes-eurozone-crisis> (02.01.17); Mundell, A Theory of Optimum Currency Areas, The American Economic Review 1961: OCA developed by Robert Mundell in 1961 argues that the optimum area for a common currency is to be highly economically integrated, which means free flows of goods and services, financial and physical capital and workers/labor; see also McKinnon, Optimum Currency Areas and the European Experience, Economics of Transition 2002, 343-364: Frankel argues that there is a loss of ability to respond to national economic conditions via an independent monetary policy which leads us to the assumption that the common currency is taken as one of the reasons why some Member States are hit harder by the crisis than others. Another reason can be found in the fact that the Eurozone Member states do not meet the criteria for an optimum currency area.

⁸ Baldwin/Beck/Bénassy-Quéré/Blanchard/Corsetti/De Grauwe/den Haan/Giavazzi/Gros/Kalemli-Ozcan/Micossi/Papaioannou/Pesenti/Pissarides/Tabellini/Weder di Mauro, Rebooting the Eurozone: Step1-agreeing a crisis narrative, CEPR Policy Insight No 85 November 2015, 2.

⁹ <http://voxeu.org/article/causes-eurozone-crisis> (03.01.17); see also Baldwin/Beck/Bénassy-Quéré/Blanchard/Corsetti/De Grauwe/den Haan/Giavazzi/Gros/Kalemli-Ozcan/Micossi/Papaioannou/Pesenti/Pissarides/Tabellini/Weder di Mauro, Rebooting the Eurozone: Step1-agreeing a crisis narrative, CEPR Policy Insight No 85 November 2015, 12.

¹⁰ Nelson/Belkin/Mix/Weiss, The Eurozone Crisis: Overview and Issues for Congress, Congressional Research Service 2012, 3-4.

¹¹ <http://voxeu.org/article/causes-eurozone-crisis> (03.01.17): Member States did not stick to the rules established by the Maastricht Criteria, furthermore, did not stick to the Stability and Growth Pact as it did not have any teeth and credibility.

¹² Hinarejos, Fiscal Federalism in the European Union: Evolution and Future Choices for EMU, CMLR 2013, 1629.

¹³ Regulations 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011 and Directive 2011/85/EU.

Additionally, several crisis resolution mechanisms have been inaugurated along with these rules.

The first mechanism to be established was the Greek loan facility agreement. As it became clear that Greece was downgraded and could not finance itself any more on the markets the Head of States or Governments decided to assist Greece with coordinated bilateral loans which were supplemented by the IMF.¹⁷

Soon it became clear that this crisis was not confined to Greece but that other Member States were also affected. On the Commission's initiative the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF) were established in 2010.¹⁸ The EFSM was based on Art 122(2) TFEU. The money available for this mechanism was limited to the money available within the Union's budget. This led to the establishment of the EFSF outside the legal framework of the EU. It was incorporated as a public company under Luxembourg law. Within this mechanism, as shareholders, the euro area Member States might grant assistance of up to 440 billion euro. Together the EFSM and the EFSF formed the rescue umbrella which was established for a special period of time and expired in 2013.

2. The ESM as a crisis resolution mechanism

Contrary to the EFSM and the EFSF the European Stability Mechanism (ESM) was established as a permanent crisis resolution mechanism. It was created by the Member States outside the legal framework of the EU as an intergovernmental organization under public international law, located in Luxembourg.

Its purpose "*shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen to the benefit of ESM*"

¹⁴ Regulation 473/2013 and Regulation 472/2013.

¹⁵ The Treaty on Stability, Coordination and Governance in the EMU, also called the Fiscal Compact was established as an intergovernmental treaty outside the EU legal order. It sets further rules on fiscal stance that states should implement on national level; The Fiscal Compact was signed by all EU Member States except the UK and the Czech Republic; The full Treaty can be found at: http://europa.eu/rapid/press-release_DOC-12-2_de.htm (09.01.17); An analysis of this treaty can be found in: Griller, Zur verfassungsrechtlichen Beurteilung des Vertrages über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion ("Fiskalpakt"), JRP 2012; Fabbrini, The fiscal compact, the golden rule and the paradox of European federalism, Boston College International and Comparative Law Review 2013; Editorial, The fiscal compact and the European constitutions: Europe speaking German, EuConst 2012.

¹⁶ Juncker/Tusk/Dijsselbloem/Draghi/Schulz, Completing Europe's Economic and Monetary Union, „Five-Presidents Report“, 14.

¹⁷ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113563.pdf (09.01.17); see Baldwin/Wyplosz, The Economics of European Integration 2012, 533: In May 2010 the Council decided to joint rescue organization, consisting of IMF, EU and ECB (the Troika).

¹⁸ European Commission, Communication from the Commission, A blueprint for a deep and genuine economic and monetary union Launching a European Debate 2012, 8.

members which are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States".¹⁹

Up until now, Spain, Cyprus and Greece have profited from financial assistance by the ESM.

3. The ESM under discussion

Manifold legal queries in regard to this mechanism needed clarification. Within the Court judgment *Pringle*²⁰, the CJEU made the attempt to solve several legal questions. Still, we have to outline that some issues do not seem to be solved due to fact that the Court's argumentation has to be challenged and due to the ongoing discussion among legal scholars.

Within this paper we will elaborate on two major issues, on the one hand the consistency of the ESM with Art 125 TFEU and on the other hand the problem of borrowing institutions.

a. The ESM and Art 125 TFEU

i. Argumentation in Pringle

When the Member State enters into debt Art 125 TFEU should ensure the maintenance of budgetary discipline. According to the Court this budgetary discipline will contribute "*to the attainment of a higher objective, namely maintaining the financial stability of the monetary union*". This interpretation was derived from preparatory work relating to the Treaty of Maastricht, which the CJEU explicitly mentioned within its judgment.²¹

To pursue this higher objective, it was made clear that any assistance granted should be consistent with Art 125 TFEU by fulfilling the requirements as outlined by the Court: safeguarding of the euro area, strict conditionality and the responsibility for own debts.²²

¹⁹ See Art 13 ESM Treaty.

²⁰ CJEU 27.11.2012, C-370/12, Thomas Pringle v Government of Ireland and Others.

²¹ See CJEU 27.11.2012, C-370/12, para 135: Here the Court took also the Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, Bulletin of the European Communities, Supplement 2/91, para 24, into account, where it states: "*It is therefore proposed that two rules should feature in the Treaty:[...] (b) no bailing-out; in the case of imbalances, a Member State could not benefit from an unconditional guarantee concerning its public debt either from the Community or from another Member State [...]*"

²² See CJEU 27.11.2012, C-370/12, para 129-147; see also Smulders/Keppenne in von der Groeben/Schwarze/Hatje (ed.), *Europäisches Unionsrecht Art 125 AEUV* para 15 (2015).

ii. The ESM and Art 125 TFEU - a critique

1. Argumentation of CJEU

Within this section we will test the requirements the CJEU demands on the ESM and the assistance already granted by it.

Ad safeguarding of the euro area as a whole

When interpreting Art 125 TFEU the Court formed this criterion through the ECB's opinion on the draft of the Council's decision amending Art 136 TFEU and not through Art 125 TFEU itself. Therefore, we can see that this criterion does not originate from Art 125 TFEU.

Moreover, at the time the Court ruling was established, the ESM was not yet activated. Nowadays, given the ESM has taken effect already three times, we can test the fulfilment of this criterion on each financial assistance programme already released.

The cases of Spain and Greece seem undisputed as challenging the safety of the euro area as a whole. Their markets are closely intertwined with other Eurozone Member States. Also, their banking sector is systemically relevant. Spanish banks are listed among the systemically most important banks²³. Furthermore, for Greece, with its intertwined banking sector²⁴, having involved German and French banks it seems, without debate, important to save these economies to save the euro area as a whole.

The case of Cyprus does not seem as clear as the other two. The systemic relevance of Cyprus as well as whether the debt of Cypriot banks would endanger the euro zone as a whole seems questionable. Even Schaeuble claimed that Cyprus would not be systemic

²³ See

http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/574406/IPOL_BRI%282016%29574406_EN.pdf (21.4.17);

http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/ComunicadosBCE/NotasInformativasBCE/16/Arc/Fic/presbe2016_50en.pdf (21.4.17).

²⁴ See <http://www.businessinsider.com/if-greeces-banking-system-collapses-there-will-be-a-domino-effect-2015-6?IR=T> (21.4.17); <https://www.ecb.europa.eu/pub/pdf/other/reportonfinancialstructures201510.en.pdf> (21.4.17).

relevant.²⁵ Furthermore, it can be outlined that Cyprus only amounts to 0.2% of Eurozone GDP. Therefore, the smallest Member State cannot be considered a systemic risk.²⁶

If we were to follow the CJEU's argumentation with full consistency of the ESM with Art 125 TFEU all requirements would need to be fulfilled. In the case of Cyprus we can see that the criterion of endangering the euro area as a whole is not fulfilled.

Ad strict conditionality

Also this criterion: strict conditionality was established by the Court through the ECB Opinion on the draft of the Council amending Art 136 TFEU.²⁷

In this regard we need to mention that conditionality is not an invention of the CJEU, but we can find its origins in IMF practices.²⁸

During the crisis the rules on conditionality mostly depended on financial assistance which led to their further development.²⁹

Only since the inauguration of Art 136(3) TFEU into the Treaty framework of the EU, the requirement of conditionality is explicitly mentioned in the Treaties.³⁰

The ESM mentions a list of conditionality between which it has to choose: "*Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.*"³¹

Ultimately, it depends on the financial instrument which was chosen but also on the severity of financial weakness which has to be addressed.³²

²⁵ <https://euobserver.com/economic/118862> (03.06.16).

²⁶ Contrary Draghi: see <https://www.marketnews.com/content/sources-germany-isolated-view-cyprus-not-systemic-risk> (03.06.16): he argues that Cyprus bank failure could have a destabilizing effect on Greece.

²⁷ See CJEU 27.11.2012, C-370/12, para 136.

²⁸ See Ioannidis, EU Financial Assistance Conditionality after "Two-Pack", ZaöRV 2014, 66: Herein conditionality means two things: first of all, "*specific policies that a state needs to follow in order to have access to certain financial resources and the procedures for adopting them and secondly monitoring their implementation.*"

²⁹ Ioannidis, EU Financial Assistance Conditionality after "Two-Pack", ZaöRV 2014, 63.

³⁰ Ioannidis, EU Financial Assistance Conditionality after "Two-Pack", ZaöRV 2014, 75.

³¹ Art 12(1) ESM Treaty; see CJEU 27.11.2012, C-370/12, para 111: According to the CJEU the primary function of the strict conditionality takes the form of a macroeconomic adjustment programme; see also Adam/Mena Parras, The European Stability Mechanism through the legal meanderings of the Union's constitutionalism: Comment on Pringle, E.L.Rev. 2013, 857.

³² See Art 12(1) ESM Treaty; Art 13(3) ESM Treaty; Ioannidis, EU Financial Assistance Conditionality after "Two-Pack", ZaöRV 2014, 73.

When taking the ESM's conditionality into account while taking a look at the criterion established by the Court we can see that the Court in this regard only stated a minimal requirement which the ESM can expand.³³

Finally, we have to come to the conclusion that this criterion does not state a problem.

Ad staying responsible for own debts

To remain within the logic of the markets and stay subject to market discipline the Member States have to stay responsible for their own debts.

According to the Court, the ESM will not act as a guarantor of debts and will not assume them because the recipient Member State will stay responsible for its own debts.³⁴

In this regard the Court took into account at least parts of the telos of Art 125 TFEU.

When discussing responsibility for own debts, we also have to take into account the ESM as a risk sharing mechanism.

In this regard we have to discuss the economists' approach in calling the ESM a mechanism for strengthening risk sharing.³⁵ Economists listed the ESM under the term of Regional Financing Arrangements (RFAs) which have as "*objective providing a buffer of affordable financing to countries facing stress.*" Explicitly this risk sharing is mentioned as one of the layers involved in RFA financing.³⁶

Risk sharing is defined as followed: "*By reducing the stake, and investing with others in a range of risky investments, the risk of each investment is reduced*"³⁷. Or in simpler terms: "*risk sharing is a risk management method in which the cost of the consequences of a risk is distributed among several participants in an enterprise, such as in syndication.*"³⁸

Does risk sharing imply at the same time that a Member State is liable for another Member State in the normal usage of this language? We have to answer this question with yes. When it comes to risk sharing, the Member State has not only to bear its own risks but also has to

³³ See De Witte/Beukers, Case Law, The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle, CMLRev. 2013, para 840: They argue that the ESM's conditionality shall ensure the compatibility with EU law and can also go further than that of the Union.

³⁴ CJEU 27.11.2012, C-370/12, para 139.

³⁵ See here e.g. Erce (ESM), Risk-sharing via Regional Financial Agreements: The ESM Experience, ADEMU Workshop Risk-Sharing Mechanisms for the European Union, Florence 20-21 May 2016; see also Regling, „Risk sharing and resilience in the euro area“ Speech at conference on Building a Resilient Europe, Brussels, 30 September 2015; see also Rojas, Risk- Sharing within the EMU: The ESM Experience, ADEMU Workshop on Risk-Sharing Mechanisms for the European Union, Florence 20-21 May 2016.

³⁶ Erce (ESM), Risk-sharing via Regional Financial Agreements: The ESM Experience, ADEMU Workshop Risk-Sharing Mechanisms for the European Union, Florence 20-21 May 2016.

³⁷ http://www.lse.co.uk/financeglossary.asp?searchTerm=&iArticleID=2181&definition=risk_sharing (06.06.16).

³⁸ <http://www.businessdictionary.com/definition/risk-sharing.html> (13.06.16).

deal with (a part) of other Member States' risks, which can be outlined as the essence of sharing.

By the term *risk* we can assume, in our case, that a Member State profits by the assistance programmes of the ESM but is unable to pay back its liabilities.³⁹ Due to a lack in the MoU and the ESM Treaty as such, a Member State not paying back its duties will not fear any (fiscal) consequences.⁴⁰ Although the ESM states that it will establish a warning system to ensure that it receives repayments of a Member State profiting from a financial assistance programme by the ESM, it does not say, however, what the consequence would be if a Member State would not repay in a timely manner.⁴¹

For the next issue, we have to clarify the cost of the consequences:

We have to distinguish between paid-in capital and callable capital. Paid-in capital will be invested into high quality liquid assets and will not be used for distribution of financial aid to a Member State using one of the programmes.⁴²

Still this paid-in capital, as well as the callable capital, will be necessary for the ESM to take action. Member States will contribute to this paid-in and callable capital according to the sustainability of their economy. By paying their contribution, according to the contribution key of the ECB, Member States share the risks of default.⁴³

According to Art 3 ESM Treaty the ESM will raise funds by issuing financial instruments or entering into financial agreements with ESM Members. Here Member States will provide funds for such assistance through the mechanism.

This risk sharing will then take place and be distributed among the Member States ready to take financial agreements with the ESM, because not just one Member State will have to bear this duty, but several.⁴⁴

This interpretation leads us to the conclusion that the ESM, as a risk sharing mechanism, is also in breach of the criterion requiring they stay responsible for own debts.

³⁹ see Feigl, *Ist die Kritik am Europäischen Stabilitätsmechanismus (ESM) berechtigt?*, Arbeit und Wirtschaft 2013, 1: This commitment in the case of Austria would be €1.23 billion, but the financial failure of a Member State and the sticking to a strict interpretation of the no bail out provision would lead to an even higher commitment for Austria, if this would lead to resolving the Eurozone.

⁴⁰ Nevertheless see ESM, General Terms for ESM Financial Assistance Facility Agreement, 10.1: Some kind of consequences are mentioned within the General Terms of ESM Financial Assistance Facility Agreements, such as the cancellation of all or parts of the facility or declaring them as immediately due and payable; see Art 4(8) ESM Treaty: They will lose their voting rights as long as the failure continues.

⁴¹ Art 13(6) ESM Treaty.

⁴² FAQ on paid in capital 2015, 1, para 4-5 (13.06.16).

⁴³ Gaitanides, *Solidarität in der Finanzkrise*, in Hatje/Iliopoulos/Iliopoulos-Strangas/Kämmerer (Ed.), *Verantwortung und Solidarität in der Europäischen Union* 2015, 95.

⁴⁴ Art 3 ESM Treaty.

2. Main aim of Art 125 TFEU

When we take a more detailed look at the Court's argumentation, we can see that the main aim of the provision Art 125 TFEU was not sufficiently taken into account.

This provision provides for a ban of financial assistance for Member States and the Union, therefore also banning the institutions from financially assisting another Member State.⁴⁵

Within its wording it outlines two tasks: "shall not be liable" and "shall not assume commitments".

The term **shall not be liable** should assume that every Member State remains responsible for its debts.⁴⁶

The term **shall not assume commitments** can be seen as a prohibition of the Union and the Member States for assuming liability as a creditor of another Member State.⁴⁷

The main aim of this provision is to ensure the full functioning of the market mechanism, which should make sure that the Member States are exposed to the risks of the markets.

This should be reached by a stronger individual responsibility of Member States for their own households. This stronger responsibility has developed into a legal principle which, as its aim, states that Member States must stay responsible for their fiscal issues, with the end goal the stabilisation of the entire Union.⁴⁸ This financial responsibility leads to the fact that every Member State shall bear national debt by himself while remaining subject to the market discipline. Financial markets shall be the regulative and disciplinary tool to national debt, which should then lead to an automatism (e.g. higher interest rates) which forces the Member State to correct its own household deficit.⁴⁹

⁴⁵ Palmstorfer, To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law, E.L.Rev. 2012, 775.

⁴⁶ See Smulders/Keppenne in von der Groeben/Schwarze/Hatje (ed.), Europäisches Unionsrecht, Art 125 AEUV, para 13 (2015); see also Bandilla in Grabitz/Hilf/Nettesheim (ed.), Das Recht der Europäischen Union, Art 125 AEUV, para 6 (2016).

⁴⁷ See Bandilla in Grabitz/Hilf/Nettesheim (ed.), Das Recht der Europäischen Union, Art 125 AEUV, para 6 (2016); Smulders/Keppenne in von der Groeben/Schwarze/Hatje (ed.), Europäisches Unionsrecht, Art 125 AEUV, para 13 (2015).

⁴⁸ Hentschelmann, Finanzhilfen im Lichte der No Bailout- Klausel- Eigenverantwortung und Solidarität in der Währungsunion, EuR 2011, 285.

⁴⁹ Bandilla in Grabitz/Hilf/Nettesheim (ed.), Das Recht der Europäischen Union, Art 125 AEUV, para 2 (2016); see also Smulders/Keppenne in von der Groeben/Schwarze/Hatje (ed.), Europäisches Unionsrecht, Art 125 AEUV, para 15 (2015); Raschauer, Die Etappen der „Eurorettung“ und ihre Auswirkungen- eine Momentaufnahme, JRP 2013, 201; Palmstorfer, To bail out or not to bail out? The current framework of

Furthermore, Art 125 TFEU has to be read with Arts 123, 124 and 126 TFEU which all state that loans may be taken solely under the conditions of the markets.⁵⁰

Art 125 TFEU can be read as a prohibition of all kinds of assistance⁵¹, while the provision itself and several other Treaty provisions provide for an exception to this general rule.⁵²

3. ESM in breach of main aim

The CJEU stated that Art 125 TFEU should ensure that Member States remain within the logic of the market, still it did not take into account the telos of this provision.

If a Member State in need will not receive a loan any more under the ordinary market conditions, then it will get one by the ESM. In other words, the ESM will provide a money supply if the access to market financing is impaired.⁵³ The ESM will provide for money in circumstances when no money should be provided according to the markets.⁵⁴

financial assistance for euro area Member States measured against the requirements of EU primary law, E.L.Rev. 2012, 776; Heß, *Finanzielle Unterstützung von EU Mitgliedstaaten in einer Finanz- und Wirtschaftskrise und die Vereinbarkeit mit EU Recht*, ZJS 2010, 474; Hermann, *Griechische Tragödie der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone*, EuZW 2010, 415.

⁵⁰ Ruffert, *The European Debt Crisis and European Union Law*, CML Rev. 2011, 1785; see also Häde, *Die europäische Währungsunion in der internationalen Finanzkrise- An den Grenzen europäischer Solidarität?* EuR 2010, 856: He argues that Art 123- 126 TFEU have to be read together and all are safeguarding the euro currency; he further states that Art 125 will be activated if Art 123 and Art 124 TFEU were not sufficient.

⁵¹ Palmstorfer, *To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law*, E.L.Rev. 2012, 776; Hentschelmann in *Finanzhilfen im Lichte der No Bailout- Klausel- Eigenverantwortung und Solidarität in der Währungsunion*, EuR 2011, 286: He argues that this provision is a prohibition of bailing out because all restrictions of fiscal self-responsibility would encourage moral hazard; Faßbender, *Der europäische "Stabilisierungsmechanismus" im Lichte von unionsrecht und deutschem Verfassungsrecht*, NVwZ 2010, 800; Hentschelmann, *Finanzhilfen im Lichte der No Bailout- Klausel- Eigenverantwortung und Solidarität in der Währungsunion*, EuR 2011, 291; only partly agreeing with this argument: Häde, *Die europäische Währungsunion in der internationalen Finanzkrise- An den Grenzen europäischer Solidarität?*, EuR 2010, 857: He argues that the main aim of Art 125 TFEU is to prohibit any kind of assistance, still this assumption might only be represented if the result is representable. Situations might occur where exception rules have to be applied to not endanger the main aim the provision wants to save.

⁵² See in this regard Art 122(2) TFEU, Art 143 TFEU, Art 174 and Art 175 TFEU and the most recently established Art 136(3) TFEU as exception to this ban; see also Bandilla in *Grabitz/Hilf/Nettesheim (ed.), Das Recht der Europäischen Union Art 125 AEUV*, para 31 (2015).

⁵³ ESM Treaty foreword (13), 7; see also Craig, *Guest Editorial, Pringle: Legal Reasoning, Text, Purpose and Teleology*, MJ 2013, 8: He argues that it is the main aim for the ESM to provide for financial assistance where no assistance will be provided by the ordinary market.

⁵⁴ See Craig, *Guest Editorial, Pringle: Legal Reasoning, Text, Purpose and Teleology*, MJ 2013, 8; see also Heß, *Finanzielle Unterstützung von EU Mitgliedstaaten in einer Finanz- und Wirtschaftskrise und die Vereinbarkeit mit EU Recht*, ZJS 2010, 474: He argues that the correcting regulator should be the financial market.

If a mechanism such as the ESM is assisting the Member States by mobilising funding and providing for stability support by activating instruments⁵⁵, it may also be diminishing the Member States' budgetary responsibility to which Art 125 TFEU is aiming.⁵⁶

Moreover, the ESM will assist a Member State in need and this assistance can set incentives that are economically unjustified and would have an effect on the system of incentive outlined in Art 125 TFEU.⁵⁷

If the recipient Member State could not rely on assistance from the ESM but would remain within the logic of the market it would have to fear higher interest rates or other financial disadvantages. For sure, it may not get money under the same conditions it would receive from the ESM.⁵⁸

This leads us to the assumption to follow a strict interpretation of Art 125 TFEU like Palmstorfer⁵⁹ proposes. Art 125 TFEU was established as a disciplinary instrument and still has to be dealt as one.⁶⁰ Concluding, we can see that assistance granted by the ESM leads Member States to detour from the logic of the markets and is, therefore, in breach of Art 125 TFEU.⁶¹

Of course we have to state that this provision and its telos did not work out as they were intended during the crisis, it even seems that the drafters underestimated the risks of

⁵⁵ See Art 3 ESM Treaty.

⁵⁶ See Craig, Guest Editorial, Pringle: Legal Reasoning and Teleology, MJ 2013, 8; see also Palmstorfer, To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law, E.L.Rev. 2012, 776.

⁵⁷ See Hentschelmann, Finanzhilfen im Lichte der No Bailout- Klausel- Eigenverantwortung und Solidarität in der Währungsunion, EuR 2011, 284; see also Häde, Haushaltsdisziplin und Solidarität im Zeichen der Finanzkrise, EuZW 2009, 402; similar also Häde in Calliess/Ruffert (ed.), EUV/AEUV Art 125 TFEU, para 1 (2016): He also argues by the incentive as he mentions that the indebted Member State should not count on the same conditions as that are valid for a Member State with a sound budget; see also Hermann, Griechische Tragödie der währungsverfassungsrechtliche Rahmen für die Rettung, den Austritt oder den Ausschluss von überschuldeten Staaten aus der Eurozone, EuZW 2010, 415: he argues that the incentive of Art 125 TFEU is further secured by Art 126 TFEU and the Stability and Growth Pact.

⁵⁸ See http://www.europarl.europa.eu/RegData/etudes/note/join/2014/497755/IPOL-ECON_NT%282014%29497755_EN.pdf (20.4.17) and

<https://www.esm.europa.eu/sites/default/files/esm2015annualreport.pdf> (14.2.17): In this regard assistance to Greece: the ESM rates are well below market rates for Greece, as in 2015 EFSF and EFSM lending rates were at 1.57% and 0.72% (end of December 2015), whereas the IMF lending rate was in 2015 at 3.8%. Also before the crisis Greece had to pay higher interest rates at around 5%.

⁵⁹ See Palmstorfer, To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law, E.L.Rev. 2012; see also similar Faßbender, Der europäische „Stabilisierungsmechanismus“ im Lichte von Unionsrecht und deutschem Verfassungsrecht, NVwZ 2010, 800.

⁶⁰ Palmstorfer, To bail out or not to bail out? The current framework of financial assistance for euro area Member States measured against the requirements of EU primary law, E.L.Rev. 2012, 777.

⁶¹ See CJEU 27.11.2012, C-370/12, para 135: The Court argues that the Member States remain subject to the market in that regard, that this budgetary discipline has a higher objective: the financial stability of the monetary union.

sovereign debt problems.⁶² Still, this does not permit a complete non-compliance with this provision.

iii. Solution: establishment of exception clause in Art 136(3)

A strict interpretation of this provision also implies that an exception clause was necessary for the ESM to make it consistent with Art 125 TFEU. Therefore, the establishment of Art 136(3) TFEU was necessary to bring in line the ESM with Art 125 TFEU.

Due to the fact that the ESM took effect earlier than the provision of Art 136(3) TFEU⁶³, the ESM has to be considered as in breach of Art 125 TFEU, at least within the period when the provision did not yet exist.⁶⁴ Still this situation was remedied with the establishment of the exception clause.⁶⁵

b. Use of EU institutions outside the legal framework of the EU- *Organleihe*

The term *Organleihe* or, in other words, the borrowing of institutions, can be explained as a number of Member States making use of EU institutions by assigning them external tasks outside the legal order of the EU to enforce aims which not all EU Member States would agree to within the EU legal order.⁶⁶

This issue became increasingly important during the crisis. The ESM and the Fiscal Compact were making use of EU institutions.⁶⁷ In the case of the Fiscal Compact Member States made use of the Commission and the CJEU⁶⁸, whereas within the ESM the ECB also played a role⁶⁹.

⁶² Borger, How the Debt Crisis Exposes the Development of Solidarity in the Euro Area, ECLR 2013, 25.

⁶³ Which took effect in May 2013, Due to the delay caused by the Czech Republic in ratifying Decision 2011/199; see also Borger, How the Debt Crisis Exposes the Development of Solidarity in the Euro Area, ECL Rev. 2013, 23.

⁶⁴ See also Borger, How the Debt Crisis Exposes the Development of Solidarity in the Euro Area, ECL Rev. 2013, 24.

⁶⁵ See also Mayer, Vertrag über Stabilität, Koordinierung und Steuerung in der WWU und Europäischer Stabilitätsmechanismus, JRP 2012, 128.

⁶⁶ Fischer-Lescano/Oberndorfer, Fiskalvertrag und Unionsrecht- Unionsrechtliche Grenzen völkervertraglicher Fiskalregulierung und Organleihe, NJW, 2013, 9.

⁶⁷ Schima in Mayer/Stöger (ed.), EUV/AEUV Art 13 EUV, para 23 (2013).

⁶⁸ Firstly mentioned in the Preamble; tasks of the Commission are mentioned in Art 3(1)b, Art 5(2), Art 6, Art 8(1), Art 12 TSCG; tasks of the Court of Justice are mentioned in Art 8(1) TSCG.

⁶⁹ Tasks of the Commission and the ECB are mentioned within Art 4(4), Art 5(3), Art 5(6) lit a-g, Art 6(2), Art 13, Art 14(6) ESM Treaty; the Courts tasks are mentioned within Art 37 ESM Treaty.

First, it has to be mentioned that, in general, EU institutions have the possibility to also act outside the EU legal framework and may be used by the Member States, as long as they are sticking to the aims given to them in the Treaties.⁷⁰

Therefore, the main argument will not be to abolish the possibility for Member States to use institutions outside the EU legal order, but to make sure that these institutions are not exceeding their competences as outlined in Art 13(2) TEU.⁷¹

i. EU institutions within the ESM

When considering the EU institutions' duties within the ESM, we can see that not all institutions are taking over duties: only the Commission, the ECB and the CJEU will receive tasks by the ESM, whereas the European Parliament did not gain any tasks within the ESM.

The tasks the Commission and the ECB have taken on are central to this mechanism.⁷² Their duties include the assessment of financial needs and public debt sustainability (together with the IMF) of the Member State applying for aid. The Commission, together with the ECB, negotiates a MoU with its specific conditions attached to the financial assistance.⁷³ Furthermore, the Commission signs the MoU on behalf of the ESM.⁷⁴ It is also the Commission's duty to ensure that the conditions attached to the assistance programme are met.⁷⁵

⁷⁰ See here CJEU 2.3.1994 C-316/91 *Parliament v Council* and joined cases CJEU 30.6.1993 C-181/91 and C-248/91 *Parliament v Council and Commission*: in these decisions the Court made clear that no provisions are hindering Member States to make use of EU institutions outside the framework of the EU; see also Thym, *Ungleichzeitigkeit und Europäisches Verfassungsrecht* 2004, para 313: He argues that the Social agreement of 1993 in the times of establishment of the Maastricht treaty, which was also concluded without the consent of Great Britain, can be seen as an example in this case; same opinion Peers, *Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework*, ECL Rev 2013, para 46; contrary Craig, *The Stability, Coordination and Governance Treaty: principle, politics and pragmatism*, EL Rev 2012, 243: Here Craig argues in regard to the Fiscal Compact, but this argument can also be taken into account for the ESM case: Craig argues just because an EU institution has a power within the Lisbon Treaty does not legitimate it per se to use the same/analogous power under another Treaty. Furthermore, he argues that a natural interpretation would lead to the conclusion that the powers of institutions apply in the legal context of the EU. Therefore, an empowerment by the Lisbon Treaty is necessary to give institutions the possibility to take action outside the EU legal framework. Here we can see that Craig argues, at least in regard to the TSCG, that Institutions may act outside the treaties, but only in cases where they are entitled to do so by the Treaties.

⁷¹ See CJEU 30.6.1993, C-181/91 and C-248/91: The CJEU in its decisions also argued that Member States may make use of EU institutions; see also Schima in Mayer/Stöger (ed.), *EUV/AEUV Art 13 EUV*, para 25 (2013).

⁷² Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, ECL Rev. 2013, 265.

⁷³ Art 13(3) ESM Treaty.

⁷⁴ Art 13(4) ESM Treaty.

⁷⁵ Art 13(7) ESM Treaty.

The ECB assumes a consultative function and provides expertise. It negotiates the conditions and monitors compliance with the conditions.⁷⁶

Furthermore, it is the Commission and the ECB that decide on whether the emergency procedure will be used or not.⁷⁷

ii. Aim of Art 13(2) TEU

Art 13(2) TEU sets that “each Institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out on them.”⁷⁸

Art 13(2) TEU contains two main issues. First, the aim of this provision is to establish an institutional balance. The limitation of the powers of the institutions to those powers which are conferred to them by the Treaties can be seen as a prohibition to assume new tasks which are not mentioned in the Treaties.⁷⁹

Second, Art 13(2) sentence 2 TEU mentions the principle of loyal cooperation.⁸⁰ This principle is foremost mentioned in Art 4(3) TEU and was established through several Court rulings.⁸¹

iii. *Pringle* and Art 13(2) TEU

When taking the Court decision in *Pringle* into account, we can see that the CJEU took former case law, formed requirements for borrowing of institutions, and then applied these to the case of the ESM.

Leading judgments, which were cited in the *Pringle* decision dated back to the 1990s.⁸²

1. Requirements formed out of former case law

⁷⁶ Tuori, The European Financial Crisis- Constitutional Aspects and Implications, EUI Working Paper Law 2012/28, 16.

⁷⁷ See Art 4(4) ESM Treaty that states: “the emergency procedure shall be used where the Commission and the ECB both conclude that a failure to adopt a decision to grant or implement financial assistance would threaten the economic and financial stability of the euro-area”; the emergency procedure requires a qualified majority of 85%, the blocking minority of 15% is only fulfilled by Germany (26.96%), France (20.24%) and Italy (17.79%).

⁷⁸ Art 13(2) TEU.

⁷⁹ Streinz in Streinz (ed.), EUV/AEUV Art 13 EUV, para 6 (2012).

⁸⁰ See also Klamert, Loyalität und Solidarität in der Europäischen Union, ZÖR 2015, para 267- 285: He argues that loyalty is not part of solidarity and represents an own principle. Furthermore, loyalty among institutions states an exception to the general rule, that loyalty is mentioned primarily in a vertical dimension. Also one part of the principle of loyalty inter alia settles the cooperation of institutions and differentiates competences of institutions from competences of Member States.

⁸¹ See CJEU 5.6.1973, C-81/72 Commission v Council; CJEU 27.9.1988, C-204/86 Greece v Council; CJEU 30.3.1993 C-65/93 European Parliament v Council.

⁸² CJEU 30.6.1993, C-181/91 and C-248/91; CJEU 2.3.1994, C-316/91.

In its judgment the Court stated that:

- “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**”.⁸³

According to the Court these criteria were met.⁸⁴

2. Requirements for Court: Art 273 TFEU

The CJEU distinguished the use of the Commission and the ECB from the use of the Court itself.

In regard to the role allocated to the Court it establishes that the tasks mentioned in Art 37(2) ESM Treaty refer directly to Art 273 TFEU.⁸⁵

The Court outlined three conditions for the applicability of Art 273 TFEU which have to be fulfilled.

First of all, jurisdiction of the Court under Art 273 TFEU has to be subject to a special agreement⁸⁶; second, the dispute submitted must be subject-matter of the Treaties⁸⁷; and, third, Art 273 TFEU is subject to the condition that only Member States are parties.

According to the CJEU the ESM fulfils all three conditions.

iv. Discussion

We will elaborate on three tasks in detail: first, the case law, which was used by the CJEU, has to be taken into closer observation, whether it seems applicable in this case. Second, a closer look at the fulfilment of the requirements formed by the CJEU will be taken and, third, a closer look at the differentiation of interpretations of the Court’s tasks and the Commission and ECB tasks within the ESM.

⁸³ CJEU 27.11.2012, C-370/12 para 158; the Court also cited Opinion 1/92[1992] ECR I-2821, Opinion 1/00 [2002] ECR I-3493, Opinion 1/09 [2011] ECR I-0000.

⁸⁴ CJEU 27.11.2012, C-370/12, recital 160- 161.

⁸⁵ CJEU 27.11.2012, C-370/12, para 171.

⁸⁶ CJEU 27.11.2012, C-370/12, para 172.

⁸⁷ CJEU 27.11.2012, C-370/12, para 173.

1. Ad case law

The CJEU cited case law which was explicitly dealing with aid to third countries. More precisely, these cases are dealing with development cooperation between the EU and the benefitting (non EU) countries.⁸⁸ Moreover, the case of C-316/91 has, as its legal basis, the Lomé Conventions.⁸⁹ When it comes to the beneficiaries, the former cases differ from the ESM as the ESM may only take action for Member States and, even more specifically, only ESM Member States.

Besides the issue of different beneficiaries, the case law which was taken as a template for the ESM seems inapplicable because it dealt foremost with the issue of Parliamentary involvement and role. All the former cases were concerned with an action by the Parliament against political agreements by the Member States.⁹⁰

Another issue which was discussed within previous case law was the issue of whether this expenditure states Community expenditure or expenditure by the Member States.⁹¹

The Court came to the conclusion that these acts, although closely related to Community acts, are not community expenditures. The Court further argued that Member States may use steps drawing on the rules to Community expenditure, also outside the Community.⁹²

Also, this issue can be seen as not in any relation to the ESM as it was not considered questionable if the ESM states a mechanism outside the legal order of the EU.

Moreover it seems that former case law focused on the action for annulment. In *Lomé* the Court stated that an action for annulment for acts of institutions has to be always possible, no matter the nature or form of this legal act.⁹³

⁸⁸ See also Peers, Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework, *EuConst* 2013, para 48.

⁸⁹ Barents, Case Law C-316/91, 1995, 252.

⁹⁰ Barents, Case Law C-316/91, 1995, 253; see also Opinion of AG Jacobs delivered on 10 November 1993, Case C-316/91, I-628.

⁹¹ Opinion of AG Jacobs delivered on 10 November 1993, Case C-316/91, I-634.

⁹² See CJEU 2.3.1994, C-316/91, 1995 para 39-41; differently Opinion of AG Jacobs delivered on 10 November 1993, C-316/91, I-652, para 92: Within his concluding words AG Jacobs outlined that: “*Although it was adopted by the Council acting on the mandate of the Member States, it does not lie wholly outside the Community legal order.*” He goes even further to entitle it as an act *sui generis*; see also Peers, Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework, *ECL Rev* 2013, para 48: He took the issue of competences into account as well: within the *Lomé* and the *Bangladesh* cases the Court argued that the use of institutions would state Member States’ exercising their competences, whereas in the *Pringle* case it referred to the use of institutions as an issue not within the EU’s exclusive competence.

⁹³ CJEU 2.3.1994, C- 316/91, para 8; contrary Opinion of AG Jacobs C-316/91, para 93: the AG in *Lomé* took a different approach and stated that an act adopted by EU institutions outside the EU legal order may only be assessed to review its compatibility with EU law.

When comparing this approach with *Pringle*, we can see that the Court denied such a differentiation in the *Pringle* case and did not address this issue. Furthermore, AG Kokott did not mention it either in her view.

Moreover, the former cases dealt with the (limited) use of Community institutions to act as agents to coordinate the schemes and organize payment of money with the Member States consent whereas, within the ESM, the institutions take part in a mechanism established by the Member States where they are given major duties, such as assessing the financial needs of the Member State applying for assistance or establishing the MoU with its specific conditions attached.⁹⁴

Especially when comparing the tasks of the Commission within the cases of *Bangladesh* and *Lomé* and the tasks the Commission assumed within the ESM, it can be argued that the assigned tasks of the Commission within the ESM are wider than in the former two cases.⁹⁵

Therefore, we have to follow Craigs argument when he stated: „*When we reason by analogy we must ensure that the situations are analogous, and they are not.*”⁹⁶

2. Ad requirements

The requirements the Court was using to argue that the EU institutions can be enabled to take over duties outside the EU legal framework were tested at a particular time.⁹⁷ Still we have to bear in mind that the participation of EU institutions may be influential to the ESM and their role might change.

At the time of the *Pringle* Court ruling, the ESM was not used. Therefore, they lacked an example of how it actually would distribute its financial assistance programmes. As we can see now, while assisting Spain, Cyprus and Greece, the duties and possibilities to act,

⁹⁴ See also Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, ECL Rev 2013, 265.

⁹⁵ See Tuori, *The European Financial Crisis- Constitutional Aspects and Implications*, EUI Working Paper Law 2012/28, para 37; see also Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, ECL Rev 2013, 270: Rightly, Craig argues that former cases which were consulted, dealt only with limited ventures, whereas we cannot speak of a limited venture in the case of the ESM; See Koukiadaki, *Can the Austerity Measures be challenged in supranational Courts?*, University of Manchester, An analysis for the ETUC, 16; joined cases C-181/91 and C-248/91 *Parliament v. Council and Commission*; Tuori, *The European Financial Crisis- Constitutional Aspects and Implications*, EUI Working Paper, Law 2012/28.

⁹⁶ Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, ECL Rev 2013, 277.

⁹⁷ Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance*, ECL Rev 2013, 280.

especially for the Commission and the ECB, are not minor. But they are making decisions on their own.

The Commission can be seen as the key player for establishing the MoU, a binding act of the ESM. The Treaties do not provide the Commission- a non-judicial institution, with these powers, rather the Commission gets these powers by the ESM Treaty.⁹⁸ We can see that the powers of the Commission will be altered through the duties taken over within the MoU.⁹⁹ This leads us to the conclusion that the Commission's competences will be enhanced by the ESM Treaty.

In regard to the ECB's tasks within the ESM, we can see that, similar to the Commission, the ECB also overtakes major duties within this mechanism.¹⁰⁰

The ECB's deep involvement within the ESM creates doubts regarding its aim and whether or not it is getting further away from monetary policy and adopting a more active role in fiscal rescue operations.¹⁰¹ Also, Art 130 TFEU can stake a problem in this regard, as it restricts the Member States to assign new duties to the ECB.¹⁰²

⁹⁸ See Art 13 ESM Treaty, see further the emergency procedure of the ESM in Art 4(4) ESM Treaty as it will be the Commission together with the ECB deciding on the necessity of this procedure; similar see also Peers, *Towards a New Form of EU Law?: The Use of Institutions outside the EU Legal Framework*, ECL Rev 2013, para 49: He argues that as long as non-judicial institutions will not be given the power to adopt binding acts within the ESM they will not alter their essential role. In the case of the MoU the Commission will adopt binding acts-MoU.

⁹⁹ Contrary Craig, Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance, ECL Rev 2013, para 278: He takes a different point of view on the Courts argumentation, as he claims that the focus was not set on the meta-issue of whether the power given to the institution fits with its essential character. He also states that the conditions the Court sets for the institutions are hard to fail. In regard to the Commission's duty the Court took Art 17(1) TEU as the only reference for ensuring that it meets the conditions. With this very general approach it seems hard to argue that the Commission would ever fail this test; also contrary see De Witte in Azoulai/Maduro/De Witte/Cremona/ Hyvärinen/ Kocharov/ Abdallat, *Another Legal Monster? An EUI Debate on the Fiscal Compact Treaty*, EUI Working Paper Law 2012/09, para 7: In this regard De Witte distinguishes between competences and tasks of EU institutions. In his point of view Art 13 TEU shall describe the competences of EU institutions which are fixed by the Treaties. He argues in regard to the FCT but this argumentation holds true also for the case of the ESM. Competences are described within the Treaties, whereas tasks are given to the institutions by international treaties such as the FCT or in our case the ESM. Furthermore, it can be argued that these tasks are in line with the competences given to them by the EU Treaties. In regard to the FCT he argues that the institutions stand under no obligation to take over the new tasks

¹⁰⁰ See similar to the Commission's actions in regard to the MoU as mentioned in Art 13 ESM Treaty and actions for the emergency procedure of the ESM, as mentioned in Art 4(4) ESM Treaty.

¹⁰¹ Tuori, *The European Financial Crisis- Constitutional Aspects and Implications*, EUI Working Paper, Law 2012/28, para 38: Tuori comes to the conclusion that this would lead to a loss in its present institutional status; see also Koukiadaki, *Can the Austerity Measures be challenged in supranational Courts?*, University of Manchester, *An analysis for the ETUC*, para 16: She rightly comes to the conclusion that the ECB's involvement is hardly based on any tasks mentioned in the Treaties.

¹⁰² Tuori, *The European Financial Crisis- Constitutional Aspects and Implications*, EUI Working Paper, Law 2012/28, para 37: Tuori argues that *"as Art 130 TFEU makes clear, the ECB is supposed to function under an enhanced principle of independence, which arguably imposes additional restrictions on Member States' assigning new tasks to it."*

Concluding we can see that the ESM Treaty altered the essential powers of the Commission and the ECB given to them by the Treaties.¹⁰³

3. Special arrangement: CJEU

Contrary to the Commission and the ECB, the third institution playing a role within the ESM would not have to fulfil the before-mentioned conditions but meet different requirements which find their origin in Art 273 TFEU.

The CJEU, as such, is an institution in the same way the Commission and the ECB state institutions. Therefore, it does not make sense, why there will be made a differentiation between institutions, as they are all acting outside the EU legal order. In this regard the argumentation of the Court seems inconsistent. Also, the Court, in its *Pringle* judgment, does not provide for a sufficient answer to the question of why such a differentiation was made.

The AG took a different approach than the CJEU in regard to this provision and did not mention the requirements.¹⁰⁴ AG Kokott argued first that Art 273 TFEU is applicable because any dispute concerning the ESM Treaty would fall within the scope of Art 273 TFEU and second, that Art 273 TFEU has to be considered as a *lex specialis* to Art 259 TFEU.¹⁰⁵

Due to the sheer existence of Art 273 TFEU we could also come to the conclusion that the function of the CJEU within the ESM cannot be entitled as *Organleihe* in the sense it can be seen as for the Commission and the ECB.

It can be argued that according to Art 13 TEU neither Member States nor other legal entities may transfer non-contractual competences. Tasks may only be transferred to the institutions

¹⁰³ See AG Kokott 26.10.2012, C-370/12, *Thomas Pringle v Government of Ireland*, para 170-182: she further comes to the conclusion that the loss of independence of the Commission and the ECB can lead to an essential change in the character of these institutions; see also *Nettesheim in Grabitz/Hilf/Nettesheim* (ed.), *Das Recht der Europäischen Union Art 13 EUV*, para 36 (2016): He argues that this issue has to be seen also in regard to Art 48 TEU, and would need a change of the Treaties. We can see that the tasks of the institutions which they assume within the ESM are not minor but crucial to the out coming of financial aid for a Member State. The tasks alter the institutions (Commission and ECB) scope.

¹⁰⁴ Also the CJEU did not take into account the interpretation of this provision.

¹⁰⁵ AG Kokott 26.10.2012, C-370/12, para 186; see also Peers, *Towards a New Form of EU Law?: The Use of Institutions outside the EU Legal Framework*, ECL Rev 2013, 64; see also Peers, *Towards a New Form of EU Law?: The Use of Institutions outside the EU Legal Framework*, ECL Rev 2013, para 65, 71: Peers took also Art 344 TFEU into account and compared the wording with Art 273 TFEU, he then came to the conclusion that the wording of Art 273 TFEU "*subject matter of EU law*" has a wider scope than the "*interpretation or application of the Treaties*" according to Art 344 TFEU. He comes to the conclusion that Art 273 TFEU is always applicable if the issue concerned is within the scope of EU's competence. Furthermore, the wording of Art 273 TFEU makes clear that the dispute arising has to be of subject matter of the treaties, furthermore, as Peers also outlines, the non-applicability of the CJEU would lead to the jurisdiction of another Court, which would lead to a breach of Art 344 TFEU.

if the treaties provide for such (e.g. Art 273 TFEU). Here we can see that the Art 273 TFEU extends the competences of the Court in regard to Art 13 TEU.¹⁰⁶

4. Conclusion

The ESM, as the first permanent crisis resolution mechanism established outside the legal order of the EU, was created by the euro Member States to save the Eurozone Member States from slipping further into the crisis. From the very beginning the ESM aroused suspicions as to its potential unlawfulness. This led to a CJEU ruling *Pringle*, where the Court came to the conclusion that the ESM was not in breach of the Treaties and may be established outside the legal order of the EU.

Still, this Court ruling did not have the desired success as some more questions were raised through this judgment and further discussion is ongoing among legal scholars.

This paper focused on two important issues that further elaborate the insufficient Court argumentation in regard to Art 125 TFEU and Art 13(2) TEU while trying to explain an alternative interpretation which leads us to the conclusion to not follow the Court's argumentation in full.

In regard to the consistency of the ESM with Art 125 TFEU, the Court established several criteria but did not deal in detail with this provision's telos.

This leads to the final conclusion that only the establishment of an exception clause, such as Art 136(3) TFEU, could bring the ESM into line with Art 125 TFEU.¹⁰⁷

Second, in regard to the issue of borrowing of institutions, we can conclude that borrowing of institutions per se does not state a problem, still the argumentation applied in this case has to be considered insufficient. This is because of several reasons, such as: requirements were formed from former case law which was dealing with different aspects than the ESM; also, the requirements could not be fulfilled entirely as the use of EU institutions within the ESM

¹⁰⁶Nettesheim in Grabitz/Hilf/Nettesheim, Das Recht der Europäischen Union, Art 13 EUV, recital 65 (2015).

¹⁰⁷ See contrary CJEU, 27.11.2012, C-370/12, para 185.

altered their competences.¹⁰⁸ Furthermore, it seems arbitrary that the Court applies its self-invented requirements to the Commission and the ECB, but does not to the CJEU.¹⁰⁹

This leads to the conclusion that the institutions are altering their powers, which makes a Treaty change according to Art 48 TEU necessary.¹¹⁰

Concluding we can see that issue on the ESM being consistent with the Treaties needs further discussion as the *Pringle* Court ruling did not find remedy in all parts.

¹⁰⁸ Fischer-Lescano/Oberndorfer, *Fiskalvertrag und Unionsrecht- Unionsrechtliche Grenzen völkervertraglicher Fiskalregulierung und Organleihe*, NJW, 2013, 13.

¹⁰⁹ See also Craig, *Pringle and Use of EU Institutions outside the EU Legal Framework*, EU Const 2013, 283.

¹¹⁰ See Nettesheim in Grabitz/Hilf/Nettesheim (ed.), *Das Recht der Europäischen Union Art 13 EUV*, para 36 (2016); see also Fischer-Lescano/Oberndorfer, *Fiskalvertrag und Unionsrecht- Unionsrechtliche Grenzen völkervertraglicher Fiskalregulierung und Organleihe*, NJW, 2013, 10: Fischer-Lescano and Oberndorfer argue that in the case of the Fiscal Compact this treaty is in such a close relation to primary law that Art 48 TEU has to be considered as well. The same argumentation can also be applied to the ESM. Also the ESM has such a near relation to primary law especially to the provisions of monetary policy and economic policy. Member States are bound by this provision although they might conclude international treaties in the competence of economic policy.