THE EUROPEAN DEBT CRISIS AND EUROPEAN UNION LAW

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1. Introduction: European legal principles at stake

It was only a few weeks after the Lisbon Treaty had entered into force that the first signs of the current debt crisis became apparent. Before the first months of 2010, only some financial market experts were aware that the public debt situation of a group of EU Member States – sometimes designated as “peripheral”, and often grouped under a most polemic and pejorative epithet – had aggravated in a way that is generally known by now. Amongst these experts were certainly few, if any European lawyers.¹ It is not necessary to take an extremely pessimistic view to state that much of the reform effort that culminated in the difficult but finally successful ratification of the Lisbon Treaty or even European integration in general are at stake today. At least, we are faced with a true and severe European Union crisis with all its typical signs: a general debate about European integration, a diminished acceptance in the general public, a strengthening of well-known “euro-sceptical” positions (for instance the usual plaintiffs in the German Bundesverfassungsgericht² or – worse – new populist parties), tendencies of re-nationalization even in breach of EU law, and a lack of political leadership beyond national borders. Apparently, it is by no means an exaggeration to

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assume that the current crisis goes far beyond earlier difficulties of the integration process.

The European Monetary Union (EMU) has not been in the focus of the reform process since 2000, in view of the fact that its legal foundations were laid down in the Treaty of Maastricht (1993) and the Stability and Growth Pact (SGP – 1997). Therefore, modifications of the pertinent European Union law by the Treaty of Lisbon were of minor weight – perhaps with the exception of the new Article 136 TFEU, the scope of which has to be discussed. It could even be argued that the necessary creation of effective legal instruments to overcome a crisis within the EMU was missed out in the Treaty reform process.

The present article intends to present and evaluate the terms and instruments in the core fields of the current debt crisis. It will first consider and evaluate the measures of emergency reaction (section 2). Secondly, economic governance is put under scrutiny, which combines measures for enhanced economic convergence and instruments for budgetary control (section 3). The analyses will reveal most disturbing risks for three core issues of European Union law – nothing less than the integrity of European constitutionalism, the future of democratic Government in the EU and the conservation of wealth and stability (which are also legal values). This development has an impact on the future of European Union law and its scholarship, as well (section 4).

2. Emergency reaction: European integration in danger?

2.1. The Greek drama, the great umbrella, and dramas to come

European politics of the last two years has been reacting to a severe economic emergency. The dramatic situation in Greece is at the very beginning, and still in the centre of interest. It had for a long time been known that Greece had statistically manipulated its data for accession to the euro area, but it only

5. Some of the following facts are already reported in Ruffert, “Der rechtliche Rahmen für die gegenseitige Nothilfe innerhalb des Euro-Raumes”, 64 Berlin e-Working Papers on European Law (2011), available at: <portal-europarecht.de/epapers> (last visited 4 Oct. 2011). However, since January, the development did by no means stop. See also Louis, “Guest editorial: The no-bailout clause and rescue packages”, 47 CML Rev. (2010), 971 et seq.
became apparent in late 2009 that the country had continued to conceal its true public debt and was practically bankrupt. After some hesitation in the political sphere, which was also motivated by legal reflections, a first European rescue package was fastened on 2 May 2010. The Ministers of Economics and Finance of the Eurogroup informed about a loan agreement between Greece, the euro area countries and the International Monetary Fund (IMF) comprising 110 billion spread over three years and divided between the euro area Member States (€ 80 billion) and the IMF (€ 30 billion). A Council decision of 10 May 2010 endorsed the package in the context of the Greek deficit proceedings. Political modifications of the conditions were implemented in March 2011, lowering the interest rates by 1 %, and extending maturity to 7.5 years. Up to September 2011, € 65 billion have been disbursed, € 47.1 thereof by the euro area countries. The implementation is surveyed by a “troika” legal expert team of the Commission, the European Central Bank (ECB) and the IMF.

The Greek package was indeed nothing but a start to what was perhaps the most dramatic week-end in EU history. Just following the decision on the Greek bailout, the European Council and the ECOFIN-Council opened the great “rescue umbrella” for all EU Member States in need. This general bailout scheme is far more important, as Greece can always be considered a special case due to many particular phenomena lying at the heart of the Greek problems that are less pertinent elsewhere. The umbrella consists of three parts that must be differentiated for a sound analysis. Based on Article 122(2) TFEU, the Council passed Regulation No. 407/2010 on the European Financial Stabilization Mechanism (EFSM) which issues own bonds to

9. There is a historical analysis by Ludlow, “In the last resort – The European Council and the Euro crisis, spring 2010”, 7 Eurocomment Briefing Note (2010).
support Member States in crisis. Its resources are limited to € 60 billion due to budgetary restrictions. The Member States founded the European Financial Stability Facility (EFSF), a Special Purpose Vehicle (SPV) under Luxembourg law bundling securities of the Member States of the euro area of up to € 440 billion. If a Member State required support by the EFSF, the Facility would issue a loan or provide a guarantee on the basis of a conditionality agreement with the respective Member State. At the European Council meetings of March and June 2011, agreement was reached to ensure that € 440 billion were effectively available as a guaranteed sum. Consequently, some “overhead-security” must be made available by the Member States. In July 2011, a summit of the euro area Member States further extended the competences of the EFSF by allowing it to intervene in the secondary markets and to finance recapitalization of financial institutions. € 250 billion were expected to be contributed by the IMF.

After its creation in May 2010, the mechanism was applied three times. In November 2010, Ireland was in desperate need of financial support due to the crisis in its banking sector which had collapsed after a bubble created by mismanagement in taxation and surveillance policy. The rescue package laced by the Eurogroup and the ECOFIN-Council together with the IMF as well as three non-euro area States (UK, Sweden and Denmark) comprises € 85 billion, with € 22.5 billion for each the EFSM and the EFSF (the latter including bilateral help of € 4.8 billion from the three non-euro area States). The conditions for support are laid down in an implementing decision (for the

EFSM), and two Memoranda. The EFSF has issued a loan of €3.6 billion in February 2011 for Ireland. The EFSM has issued a bond of €4.75 billion in May 2011 and a further bond of €4 billion in September 2011 (both jointly for Ireland and Portugal).

Along the same lines, a rescue package has been prepared for Portugal – based on an agreement with all political forces in that country to assure security of fulfilment after the general elections in summer 2011. The package comprises €78 billion, shared between the EFSM, the EFSF and the IMF with €26 billion each. The conditions are laid down in a Memorandum of Understanding. Two EFSM bonds have been issued in May 2011 with €4.75 billion each (the first jointly with Ireland, cf. above), another one in September 2011 (€5 billion), and two ESFS loans of €2.2 and €3.7 billion respectively in June 2011.

In summer 2011, Greece appeared on the stage again, not only causing protests and severe criticism of EU politics, but also in need of new financial support to fulfil its debtor’s commitments. Of course, this was again a new situation for European politics – for the first time, a Member State that had already been formally rescued fell back into need. After very hard negotiations, the June European Council agreed on the draft by the Eurogroup for a new joint rescue package of the EFSM, the EFSF and the IMF, i.e. outside the first special Greek rescue fund. This package included “voluntary private


sector involvement in the form of informal and voluntary roll-overs of existing Greek debt at maturity”.25

Last but not least, it should be noted that the ECB has acquired Member States’ bonds from countries affected in considerable quantity on the basis of a security markets programme.26 This emergency reaction remained in the background until summer 2011, when the constant fears of contagion with respect to Spain and Italy materialized.27 The aim of the programme is to support security markets with respect to bonds issued by Member States in difficulty. Following the Eurogroup’s decisions in July 2011, the task of intervening in secondary markets will be transferred to the EFSF.28

2.2. The European Stability Mechanism

European politics tries to evade the ad hoc quality of the emergency measures taken so far. To this effect, the European Council proposed to establish the permanent European Stability Mechanism (ESM). Already in the second half of 2010, working groups of the ECOFIN Council had elaborated a reform29 that was finally endorsed by the European Council in December 201030. At its core, the reform provides for a new third paragraph in Article 136 TFEU which should be adopted by a simplified revision procedure under Article 48(6) TEU and which reads as follows:


28. Statement by the heads of State or Government of the euro area and EU institutions, cited supra note 16.


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

The Treaty amendment should be ratified as quickly as possible to ensure that the new paragraph enters into force on 1 January 2013 already. The ESM will follow the EFSF in June 2013; the EFSM will not be continued after that date. The ESM is established according to the model of the IMF with an effective lending capacity of €500 billion (subject to renewal) to be used for financial assistance “on the basis of strict policy conditionality under a macro-economic adjustment programme and a rigorous analysis of public-debt sustainability”. It will be an institution of the Member States of the euro area that gives other Member States the opportunity to participate “on an ad hoc basis”.31

As a matter of fact, the new ESM will be created by a Treaty between the euro area Member States “as an intergovernmental organization under public international law” located in Luxembourg. Hence, we are going to be faced with a public international legal SPV or a European mirror image of the IMF – according to the perspective one takes. Member States joining the euro area will automatically become a member of the ESM.

The new international organization will be governed by the Ministers of Finance of the euro area Member States forming its Board of Governors – the Commissioner for Economic and Monetary Affairs and the President of the ECB holding observer status.33 The Board will elect a “Chairperson” and decide by qualified majority according to the Member States’ respective capital subscriptions (80% being defined as the qualified majority) or by mutual agreement (unanimity without abstentions preventing adoption) in the most important cases: the granting of financial assistance (including terms and conditions), the fixing of the ESM lending capacity and changes in the menu of instruments.34 Internal disputes are to be settled by the Board of Governors, subject to submission to the ECJ under Article 273 TFEU.35

33. Art. 5(1) and (3) ESM Draft Treaty.
34. Ibid., Art. 5(6) and (7).
35. Ibid., Art. 32(3).
The capital structure of the ESM will be designed to assure the best ratings possible (“triple A”) for the new institution. The total capital will amount to € 700 billion, thus a substantial augmentation of the current capital of the EFSF (€ 440 billion). What is more, the ESM will be provided with a paid-in capital of € 80 billion phased in by the Member States in five equal annual instalments from 2013 to 2017 following the paid-in capital key of the ECB (e.g. France: 20.3859 %, Spain: 11.9037 %, Germany: 27.1464 %). The contribution key is also relevant for qualified majority voting (cf. above).

To implement Article 136(3) TFEU (after the envisaged amendment), the ESM can intervene by loans subject to strict conditionality under a macro-economic adjustment programme. Two instruments are identified:

- **ESM stability support (ESS)**, i.e. short-term or medium-term stability support. The support will follow a rather complicated procedure, beginning with the request of ESS by the Member State, followed by a Commission analysis and a joint assessment of the financial need and the required private sector involvement by the Commission, together with the IMF and “in liaison with the ECB”. The Board of Governors will then mandate the Commission (again, together with IMF and ECB) to negotiate and sign a Memorandum of Understanding with the respective Member State, which must be backed by a Council decision on the macro-economic adjustment programme (under Art. 121(4) TFEU). The Commission, the IMF and the ECB will also be jointly responsible for monitoring compliance (“troika”);

- the **purchase of bonds** of the Member State that is in severe financing problems. In this case, the ESM takes over what was initially implemented with the ECB’s security markets programme and later transferred to the EFSF (see above, section 2.1.).

It is important to note that the operation of the ESM will include private sector involvement. If it is concluded, after a debt sustainability analysis in line with IMF practice, “that a macro-economic adjustment programme can realistically restore the public debt to a sustainable path”, the main private creditors are to be encouraged to maintain their exposures. If this is denied, negotiations between the Member State concerned and the private creditors must be initiated following a plan to be included in the macro-economic programme and led by the principles of proportionality, transparency, fairness and cross-border co-ordination (to avoid the risk of contagion). The negotiations will be supported by standardized collective action clauses

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36. The rules explained in the following are laid down in Arts. 8–11 ESM Draft Treaty.
37. Ibid., Annex 1.
38. On ESM operations see Arts. 12–17 ESM Draft Treaty. Cf. the thorough explanation by Ohler, “The European Stability Mechanism: The long road to financial stability in the euro area”, 54 German Yearbook of International Law (2011), forthcoming, sub IV.
39. On such programme see section 3.3.2.
(CACs) “consistent with the CACs that are common in New York and English law” for new loans after 2013, the exact content of such clauses being meticulously described in the EMS agreement.  

2.3. Evaluation

2.3.1. In breach of substantive rules of the Monetary Union

From the beginning, the Member States’ rescuing activity has been under close legal scrutiny by European legal scholars, and rightly so. There are good reasons to submit that this policy is in breach of important provisions of the TFEU.

To begin with, Article 125(1) TFEU is rather explicit: “The Union shall not be liable for or assume the commitments of central Governments . . . of any Member State, . . . A Member State shall not be liable for or assume the commitments of central Governments . . . of another Member State, . . .” In the present legal situation, a bailout by the Union (first sentence) or by one or more Member States (second sentence) is forbidden. As a result, the decision of the Eurogroup of 2 May 2010 concerning Greece, the establishment of the EFSF, the extension of both in 2011 and the Eurogroup’s support for Ireland and Portugal are in breach of European Union law.

None of the counter-arguments brought forward against this reasoning is really convincing. The argument, that the wording “shall not be liable for or assume the commitments” was related to a duty of liability or assumption of commitment, and that consequently a deliberate support was not contrary to Article 125(1) TFEU, goes against the ratio of the provision. Article 125(1)


TFEU was explicitly enshrined in the Treaty together with other articles – above all Articles 123, 124 and 126 TFEU – to force the Member States to take up loans solely under the conditions of the financial markets and thus to consolidate their public spending for the benefit of the stability of the common currency. Even the prospect of deliberate help by some Member States would operate against this target. In fact, other voices point at that ratio: a rule designed to stabilize the euro could not be put into place against measures aiming at the same stabilization – such as the rescue packages for the Member States in trouble. This argument appears, when the Eurogroup claims to act “to safeguard financial stability in the euro area as a whole”, and it should not be easily dismissed. However, it is not valid in all of the cases at hand. The Greek part of the European economy is much too small and the options for the restructuring of debts are much too obvious – the safeguarding of financial stability did not demand a breach of the law. But even if this was denied for Greece, at least in the Irish and Portuguese case it becomes apparent that a shift of the system from a strict “no-bailout” to mutual support cannot be achieved by the mere re-interpretation of a core article of the Treaties or an “implicit modification”, even if one considers a discretionary margin in

Ambtenbrink et al, “Economic, Monetary and Social Policy”, in: Kapteyn, Mortelmans, McDonnell, Timmermans (eds.), The Law of the European Union and the European Communities, 4th ed. (Kluwer Law International, 2008), p. 881 at 908, and it could be derived from this that deliberate support was outside the prohibiting scope of Art. 125 TFEU and its predecessors. However, this is not cogent, and there are authors arguing in the direction of the present article, such as Smits, The European Central Bank. Institutional Aspects, (Kluwer Law International, 1997), p. 77. The counter-argument based on solidarity is analysed elsewhere in this article, see section 2.3.3.


44. This was the core argument of the German Federal Government in the proceedings before the Bundesverfassungsgericht, developed by its representative: Härde, “Rechtsfragen der EU-Rettungsschirm”, (2011) Zeitschrift für Gesetzgebung, 6 et seq., id., in Calliess and Ruffert, op. cit. supra note 72, Art. 125 AEUV, para 8.


47. This is rightly rejected by Schröder, “Die Griechenlandhilfen im Falle ihrer Unionsrechtswidrigkeit”, (2011) DÖV, 63 et seq.
favour of the Member States’ Governments in matters of economic emergency action.

Finally, the emergency clause of Article 122(2) TFEU deserves scrutinizing. This rule provides an exception allowing bailout activity of the EU via financial assistance, “(w)here a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control ...”. The applicability of the clause was not even seriously argued in the Greek case in May 2010, besides the doubtfulness of whether the particularities of the Greek crisis would allow for the assumption that we are faced with a Member State in difficulties “caused by . . . exceptional occurrences beyond its control”, since there was no Council decision taken but joint action within the Eurogroup. Nonetheless, Article 122(2) TFEU can serve (and is used) as a legal basis for the EFSM Regulation 407/2010, as this regulation only gives a precision and procedural concretization of the emergency clause. The fulfilment of the conditions of Article 122(2) TFEU must be checked in every single case. Certainly, this was difficult in the Irish situation, if we consider that exceptional occurrences to which the Member State had contributed are not generally excluded from Article 122(2) TFEU. However, an “exceptional” occurrence must be beyond what is usual in its creation and development. Though the extent of the financial crisis was exceptional, its effects were by no means unusual given the Irish Government’s failure to adequately supervise and tax the financial sector. Possibly such exceptional circumstances are at the basis of the EFSM part of the Portuguese bailout scheme, but the institutions failed to bring forward arguments that exceed general hints regarding the financial crisis.

In addition, the basis for the ECB’s security markets programme is rather weak, as Article 123(1) TFEU explicitly prohibits the purchase of debt instruments from “central Governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States”. Of course, it must be added that the prohibition only applies if such instruments are “purchased directly”. This very prohibition aims at avoiding the direct financing of States (or other public entities) by the ECB for the overall purpose of monetary stability. The indirect purchase was only allowed to enable the ECB to undertake some open market operations in the

49. Häde, op. cit. supra note 44, 12; Schorkopf, op. cit. supra note 41, 339.
51. Emphasis added.
fine-tuning of its monetary policy (Art. 18 ECB Statute52), but not to circumvent the prohibition of financial support for Member States. If for instance Italian State bonds are bought by the ECB, this is currently done to keep them marketable and to keep interest rates at a lower level for Italy – and this is beyond what the bank is empowered to do under Article 123(1) TFEU and Article 18 of its Statute. Moreover, many of the bonds bought by the ECB are not “marketable instruments” any more, due to the weakness of the debtor (in the case of Greece).53

This enumeration of legal doubts is not exhaustive. The doubtful compatibility of the activity of the IMF with its Treaty powers would be yet another question, but one of public international law.54 As far as the legal system of the EU is concerned, even if a view was taken that stresses the counter-arguments against the illustrated position, it would still be most disturbing that a complete shift in the EMU had been undertaken without setting aside the legal doubts. In its judgment of 7 September 2011, the Bundesverfassungsgericht upholds the German legislation implementing the Greek package and the EFSF. The Court concentrates on German constitutional law and only marginally (but rather explicitly) underlines the stabilizing function of Articles 123 and 125 TFEU together with a line of other articles.55 Earlier in 2010, the former French minister of finance, Christine Lagarde, quite openly admitted the unimportance of the Treaties for the policy options taken.56 In a European Union based on constitutional foundations, this is not a reassuring perspective.

2.3.2. The creation of a European Monetary Fund

The new Article 136(3) TFEU which will enable the creation of the ESM is intended to be inserted by a Treaty amendment following a simplified revision procedure under Article 48(6) TEU. This procedure only refers to the third

55. Cf. supra note 2. This could trigger off an indirect control by this Court in the future. 56. “We violated all the rules because we wanted to close ranks and really rescue the euro-zone,” quoted from: <www.reuters.com/article/2010/12/18/us-france-lagarde-idUSTRE6BH0V20101218> (last visited 4 Oct. 2011).
(operative) part of the TFEU and simplifies amendments since a conference of the representatives of the Governments or even a Convention is not necessary as it is in the ordinary revision procedure. There are some doubts as to the applicability of Article 48(6) TEU due to the profound changes in the EMU’s institutional structure. However, there is no increase of “the competences conferred on the Union in the Treaties” – in which case the simplified procedure would be excluded –, as the proposed section empowers the Member States, not the EU. Consequently, the doubts raised are at least far less serious compared with the other points made here.

What is more questionable is the establishment of the ESM as a new structure for emergency action outside the EU’s own institutional framework. The ESM appears to be a regional copy of the IMF, and it is totally “intergovernmental”; even more so, it is deliberately shaped as a tool for international cooperation beyond the EU level. Of course, the Member States are free to found new international organizations among themselves as a matter of principle, which may also include the marginal involvement of the common institutions as long as there is no judicial body of the new organization competent to adjudicate in EU law matters. Nonetheless, the erection of a new international institution enhances the complexity of the design of European integration, and it also sidesteps some crucial features of the EU’s institutional concept, which should strive for more transparency and not for a complex plurality.

The reflection behind this critical remark leads to one of the core challenges of the new ESM for EU law. Indeed, its construction is questionable in the light of the principle of democratic rule. The “democratic deficit” has always threatened progress in the course of European integration. Beyond the question whether it was really justified to talk about such deficit, it is evident that the Lisbon Treaty aims at the creation of democratic legitimacy, explicitly founding the EU on the value of democracy (Art. 2 TEU), constitutionally embedding the principle of representative democracy (Art. 10(1) TEU) and providing its institutional implementation with two lines of legitimacy (Art. 10(2) TEU) – supranational/European Parliament (EP) and national/national

57. Composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission under Art. 48(3) TEU.
58. Raised by Häde, op. cit. supra note 44, 29.
60. See for the latest case in the line Opinion 1/09 of 8 March 2011 (Patents Court).
Consequently, the establishment of democratically doubtful institutional arrangements should ignite the warning lights.

As may be shown, parliamentary control and political accountability towards the European Parliament is non-existent in the ESM, and it is substantially diminished with respect to national parliaments as in all similar institutional structures at the international level. Usually, such limitation of parliamentary influence, debate and participation is justified by a high measure of expertise and objectivity, institutionally anchored, above all, in the Commission, but in the given context also in the ECB or – in other instances – in agencies. In terms of theory and practice of democracy, such compensation may already be considered as doubtful, but what is scarcely acceptable is the replacement – in a field of exclusive EU competence! – of parliamentary decision and independent expertise by the opaque processes of Council or even Heads of State or Government negotiations. If the Member States’ implementing measures do not guarantee sound participation of national parliaments at least, the new institutional arrangement will not be able to fulfil the requirements of Article 10(2) TEU. Though the ESM is outside the institutional framework of the EU, its core principles have to be respected because the mechanism functions – via Article 136(3) TFEU – as an instrument to overcome the obstacles to establish a rescue mechanism within the Treaties. Requirements of national constitutional law might be added, as the German Bundesverfassungsgericht held that “mechanisms of considerable financial importance which can lead to incalculable burdens on the budget” would be impossible without mandatory approval by the German Bundestag.

In Europe, the level of integration is substantially higher than at global level – with all implications for democratic accountability – so that it is more than anachronistic to design a European institution according to the model of the IMF. Outside Treaty procedures, which are interlaced with the ESM in a very complicated manner, the Commission is reduced to being an observer – as is the ECB. This means that the initial institutional structure of the EMU with a strong and independent central bank is politically watered down in the new ESM. Last but by no means least, legal control is excessively reduced. The ECJ can only intervene in the framework of Article 273 TFEU.

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61. Cf. on this principle Nettesheim, in Grabitz, Hilf and Nettesheim (Eds.), *Das Recht der Europäischen Union* (2010), Art. 10 EUV, paras. 20 et seq., and Ruffert, in Caliss and Ruffert, op. cit. supra note 72, Art. 10 EUV, para 4 et seq.

62. Cf. *supra* note 2. The quotation in English is drawn from the press release. There is a following decision on the implementation in Germany which temporarily stops the operation of a particular parliamentary committee: decision of 27 Oct. 2011, 2 BvE 8/11.
What citizens are worried about in the current crisis is neither the question of legal soundness nor of democratic legitimacy, but first and foremost the future of welfare and stability in the EU and, in this context, the question whether the tools chosen by the political actors are viable. The doubts may also be cast in legal terms.

According to Article 3(1) TEU, the Union promotes “the well-being of its peoples”. The economic side of this aim is further developed in sections (3) and (4) of the same article, including the principle of price stability (Art. 3(3)(1), 2nd sentence TEU).\(^63\) The risk that the ESM might conflict with this principle is obvious. The existing legal construction of the EMU following the Maastricht Treaty and the SGP is one of strict stability which does not allow for emergency intervention because the prospect of such intervention would jeopardize the incentives to perform a solid budgetary and financial policy in the Member States. The political process in modern democracies appears to be unable to achieve this result by intrinsic mechanisms. Public support of governments and the assurance of being (re-)elected create incentives for public expenditure and – consequently – public debt which are not overcome easily. It is one of the most important elements of the EMU that it contained two rules limiting public debt from the outset: the 3 % limit for new debt and the 60 % limit for overall debt. In such a framework, a State debt that cannot be discharged needs restructuring with all consequences for the State concerned, in particular concerning future interest rates. It is often argued among the general public that the emergency mechanisms now established provisionally and planned in continuance for the near future were missing within that construction, but it is far more convincing to argue to the contrary. Price stability is enhanced if a Member State must always take into account the risk of debt restructuring. The EFSF and the EFSM are thus a clear deviance from a legal concept.

The same applies to the ESM. Of course, the Member States are entitled to change the Treaty and to establish a new institutional arrangement. Clearly, the aim of the new construction is to combine enhanced economic governance control on the one hand and emergency intervention on the other hand. The assumption that this mechanism reaches the same level of price stability might have been legitimate, but the actual Greek failure to fulfil the expectations impressively illustrates the limits and shows that it is unlikely that the new system will work. Contrary to many statements, the current crisis is not a euro crisis, but a State debt crisis, but this could change if the external value and

\(^{63}\) On the importance of this principle for the EMU cf. already Herdegen, op. cit. supra note 43.
internal stability of the euro are affected by emergency measures. There may be no choice for politics as it stands, but it is of course more than questionable to build the new ESM along the same lines of what might already have failed.

In the political sphere, it is sometimes argued that the principle of solidarity demands a re-arrangement of economic governance in the EU. Other participants in the public debate fear that we will face a Transfer Union, the re-distribution of economic wealth between the European nations, disregarding the countries’ own achievements and responsibilities. It could indeed be argued that solidarity according to Article 3(3)(3) TEU was exactly what was intended with the Greek, Irish and Portuguese rescue packages and what was planned with the ESM. Another argument is that solidarity towards the EU, the very idea of a community of citizens and States, could be weighed as a principle against all the aforementioned doubts and signs of scepticism, in particular with regard to Article 125 TFEU.

There is no doubt about the character of solidarity as a principle of the EU, and it is submitted that it has a clear position within the economic field. Solidarity is achieved via a cohesion policy and structural funds, via regional projects and within the Common Agricultural Policy. In these areas, the Transfer Union already exists, and it should operate for the mutual benefit of receiving countries and paying countries alike – the latter in support of their exporting industries. There is, however, no legal basis for further capital transfers, and in the EMU the express provision of Article 122(2) TFEU does not only reflect the principle of solidarity but also brings it into concrete shape in cases of distress of national economies. The provision clearly describes the scope of Member States’ solidarity, and it is necessary that the institutions explicitly rely on it when formulating a rescue package. What is more, the motives for the creation of the rescue packages are by no means related to solidarity alone, considering the effects on the banking sector. This holds in particular with respect to the questionable transfer of Greek and other State assets to the ECB, which, according to the Bank for International

64. This is the core argument of Calliess, “Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms”, (2011) Zeitschrift für Europarechtliche Studien, 268 et seq., who also gives a most extensive analysis on the principle of solidarity and its applicability in the field of the EMU (at 233 et seq.).


66. This was dubious in the Portuguese case: cited supra note 50.

67. See section 2.3.1.
Settlements, led to a considerable reduction in the relevant portfolios of some private banks.68

3. Economic governance: An ever closer Union?

3.1. Common currency and European economic governance

The difficulties faced by European law in the current debt crisis are by no means limited to the legal assessment of an emergency reaction. It is also necessary to design conceptually sound economic governance in the European Union to avoid future critical situations of the same quality. Apparently, this is even more difficult than fighting a crisis. Policy choice in economic matters generally depends on political, even ideological standpoints. It varies from country to country, so that manifold approaches are brought together in the European Union and have to be related to each other – in harmony or fruitful competition. The legal structuring of such a process can only rely on a limited range of knowledge in economics, given that this neighbouring science is in many respects in search of orientation after the financial crisis which called it into question so fundamentally.

From the beginning of the EMU, it has often been argued that such union would need a common economic policy or that it would even be impossible without such a policy.69 This submission is one of economics, not of law. Nevertheless, the interrelationship between economic policy and currency development is likewise obvious from a legal perspective, at least in two respects. First, in a monetary union, States lose their capacity to employ the currency as a tool of economic policy. It is no longer possible to devalue the currency to enhance one’s competitiveness or to fight domestic inflation as this was usual in many European countries. Second, an overall interest rate fixed by the ECB may be inappropriate in case of disparities. It may be too low for booming regions and too high for those in stagnation or even decline or depression. Besides special effects (such as the deficiencies of the political

68. BIS Quarterly Review, June 2011, p. 18 (available at: <www.bis.org> (last visited 4 Oct. 2011)). The report was communicated in Frankfurter Allgemeine Zeitung No. 131 of 7 June 2011, p. 19.

system in Greece or the consequences of the banking crisis in Ireland), it is also highly evident that the disjunction of the monetary union and the economic convergence play a role – to say the least – in the current crisis. Observers (from the countries in distress in particular) do not overlook the significant advantages of some countries, Germany above all, drawn from the common currency. In taking away the risks of floating exchange rates and of the excessive rise in value of the own currency (formerly the Deutsche Mark), the common currency operates as a gigantic export advancement programme. Will these distortions we are facing today be avoided by better economic governance?

3.2. **Enhanced convergence**

3.2.1. **Co-ordination following the Treaty provisions**

From the outset, the Member States were aware of the aforementioned difficulties. They had even foreseen a (relatively loose) co-ordination of their economic, in particular cyclical, policies in the Treaty of Rome (Arts. 103 et seq. EEC) to react to the envisaged establishment of the Common Market, without the slightest prospect of a common currency.\(^70\) In the Treaty of Maastricht, the basis for a closer cooperation was inserted into a new Article. Henceforth, Article 103 EC provided for a multilateral surveillance procedure based on a system of guidelines (benchmarks) established by the European Council together with the Council following a proposal of the Commission. This procedure allowed the monitoring of the economic development in the Member States by the Council based on Commission reports (which, in turn, had been based on information provided by the Member States) and created the possibility to react to disparities by Council Recommendations.\(^71\) The European Parliament was only informed about the guidelines. It was involved by means of a reporting requirement of the Presidents of the Council and the Commission and by the “invitation” of the President of the Council before the competent Committee of the EP. The provision remained untouched until the Treaty of Lisbon (though it was renumbered as Art. 99 EC in the Treaty of Amsterdam).

The system as described, including the weak participation of the Parliament, has generally been preserved in Article 121 TFEU – with three

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\(^71\) In detail Amtenbrink and De Haan, op. cit. *supra* note 43, 1079 et seq.
important exceptions.\footnote{For a comprehensive overview see Häde, in Calliess and Ruffert (Eds.), EUV/AEUUV-Kommentar, 4th ed. (2011), Art. 121 AEUV, paras. 3 et seq. Cf. also Chalmers, Davies and Monti, European Union Law, 2nd ed. (CUP, 2010), pp. 740 et seq.} First, besides the power of the Council to issue recommendations, the Commission is empowered to address a warning to the respective Member State, Article 121(4) TFEU. Second, when voting in its monitoring function, the Council will not take into account the vote of the Member State concerned.\footnote{The qualified majority being calculated in accordance with Art. 238(3)(a) TFEU.} Third, the detailed rules for the multilateral surveillance procedure are to be passed according to the ordinary legislative procedure (i.e. Art. 294 TFEU) instead of the (old) cooperation procedure (Art. 121(6) TFEU), which implies a certain strengthening of the Parliament.

3.2.2. \textit{The Commission’s reform package}

It may be doubted whether the reinforcement of the monitoring mechanism in the multilateral surveillance procedure would have alleviated the disparities that led to the current crisis if it had entered into force earlier than 1 December 2009. Nonetheless, it is conspicuous that the Commission concentrated on the elaboration of detailed rules in formulating reforms for the multilateral surveillance procedure. Right after the first high-water-mark of the debt crisis in June 2010, the Commission published a communication on “Enhancing economic policy coordination for stability, growth and jobs – Tools for stronger EU economic governance”\footnote{Communication from the Commission to the European Parliament, 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, Doc. COM(2010)367 final of 30 June 2010.} which already contained the core of the six main proposals which were then brought forward as part of a larger package in September 2010.\footnote{Colloquially known as the “Rehn-package” or the “sixpack”.} After difficult negotiations, the proposals have been modified and adopted in the European Parliament on 28 September 2011 and in the Council on 4 October 2011.

In the reform package, two regulations are related to enhanced convergence, while four other measures refer to budgetary control (see section 3.3. below). Of the two regulations on convergence, one will establish the excessive imbalance procedure (EIP), and another will provide for the respective enforcement measures. The EIP Regulation\footnote{Regulation (EU) of the European Parliament and of the Council of 4 October 2011 on the prevention and correction of macroeconomic imbalances (Commission proposal: COM(2010)527 final). Adopted as P7_TA(2011)0424.} intends to do nothing less than providing for detailed rules, based on Article 121(6) TFEU, for the detection, prevention and correction of excessive macro-economic...
imbalances within the Union. Such imbalances are defined as macro-economic developments with actual or potential adverse effects on the economy of a Member State, on the EMU or the EU as a whole (Art. 2(a) EIP Regulation). They may be detected by means of an indicative scoreboard made up of economic and financial indicators, linked to an alert mechanism and the opportunity to undertake an in-depth review assessing the relevant Member State’s action (Arts. 3–6 EIP Regulation). In the EIB procedure strictly speaking (Arts. 8–11 EIB Regulation) following the detection of imbalances, the Commission will inform the Council which, according to Article 121(4) TFEU, may recommend the Member State to take a corrective action according to a corrective action plan. The fulfilment of the plan is monitored by the Commission and assessed by the Council. As the correction of excessive imbalances may take considerable time, the procedure will (only) be held in abeyance after the Member State has taken the relevant measures. This means that the monitoring continues until the Council concludes, on recommendation of the Commission, that the Member State is no longer affected by excessive imbalances. This description of the EIB procedure sounds rather technical, but it should be clear that it may largely affect the Member States’ economic policies: “Correction of competitiveness and external imbalances requires significant changes in relative prices and costs and reallocation of demand and supply between the non-tradable sector and the export sector.” This may imply that the competitiveness of one Member State may be lowered to the benefit of another.

The rigidity of that result becomes clearer when considering the second regulation, which deals with the respective enforcement measures. Following a proposal of the Commission, the Council will impose an interest-bearing deposit or a yearly fine, if a Member State fails to comply with two successive deadlines set for taking the corrective action or for submitting the corrective action plan. The decision imposing a sanction will even “be deemed adopted” unless a qualified majority of the Council (excluding the Member State concerned) rejects the proposal within ten days following its adoption by the Commission. The deposit or fine will be 0.1 % of the gross domestic product (GDP) of the Member State concerned in the preceding year. The EP will introduce its view into the proceedings by means of an “Economic Dialogue”.

3.2.3. The Euro Plus Pact

However, it was not only the Commission that had promoted a reform package which was finally enacted. Additionally, the Heads of State or Government of the euro area (joined by Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania) agreed on the “Euro Plus Pact – Stronger Economic Policy Coordination for Competitiveness and Convergence” that overlays the multilateral surveillance procedure under Article 121 TFEU and the detailed rules in the reform package. Beyond the mechanisms contained in the two regulations described in the previous section (3.2.2), the Heads of State or Government of the Pact’s Members will undertake precise national commitments each year which will “be monitored politically by the Heads of State or Government of the euro area and participating countries on a yearly basis”. To enhance competitiveness, the development of wages and productivity will be monitored, the national wage setting mechanisms (e.g. centralized bargaining, indexation, wages policy within the public sector) must be reformed and protectionist environments must be abolished. Employment will be fostered by labour market reforms (including “flexicurity”) and tax reforms with respect to the taxation of labour. To ensure the sustainability of public finances, the pension systems will be adapted to the demographic situation. Though direct taxation remains under national competence, co-ordination will establish best practices (and avoid harmful practices). “Developing a common corporate tax base could be a revenue neutral way forward to ensure consistency among national tax systems while respecting national tax strategies, …”. The political commitments of the Euro-Plus-Pact must be read together with the political commitment to adhere to the Europe 2020 economic programme, which sets out specific economic targets for Europe as a whole.

3.3. Budgetary control

3.3.1. Preventive and corrective budgetary control according to the Treaty provisions

It is not only general economic governance which should be implemented to avoid a future crisis. The management of public budgets is of utmost

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81. Ibid., pp. 16 et seq.
82. Ibid., Annex I, p. 20.
importance in the EMU, as well. The focus of interest has often been on corrective measures, given the somehow spectacular nature of deficit proceedings under Article 126 TFEU, but sight should not be lost of the preventive limb of budgetary control, either. The multilateral surveillance procedure under Article 121 TFEU is also designed to serve as a means of preventive budgetary control to avoid excessive deficits. Regulation 1466/1997, which is part of the SGP, had established a particular mechanism obliging the Member States of the euro area to provide stability programmes on the basis of their medium-term objectives which serve as a basis for the multilateral surveillance according to (the new) Article 121(3) and (4) TFEU as far as budgetary matters are concerned.\footnote{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, O.J. 1997, L 209/1, as amended by Council Regulation (EC) No. 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, O.J. 2005, L 174/1.} Apparently, the mechanism failed with respect to those countries whose excessive deficits led to the current debt crisis and the intervention of European politics. But also the corrective limb, i.e. the existing mechanism for reaction in cases of an excessive deficit according to Article 126 TFEU and Regulation 1467/1997,\footnote{Council Regulation (EC) No. 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. 1997, L 209/6. On the preceding events cf. Louis, “The Economic and Monetary Union: Law and institutions”, 41 CML Rev. (2004), 578.} which implies the option that the Council can impose financial sanctions at the end of the day, following an initiative of the Commission, turned out to be of limited help. It is most noteworthy that Regulation 1467/1997 was modified in 2005 after a – relatively minor – problem of Germany and France with the 3 % -threshold.\footnote{Council Regulation (EC) No. 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, O.J. 1997, L 174/5.} As the slightest disturbance in the budgets of major and more or less stable countries within the EU had caused a modification of the rules, the current crisis could easily call into question the solidity of these rules.

\[3.3.2. \textbf{The reform package}\]

Out of the four measures within the reform package related to budgetary control, three concern the preventive limb, which first of all is reformed by a directive implementing prudent fiscal policy-making as a new principle of
budgetary governance. Annual expenditure growth is oriented towards a “prudent medium-term rate of growth of GDP”. “Revenue windfalls” are to be used for debt reduction, not for excessive expenditure. Benchmarks are to be established by the Commission, and in case of deviance from these benchmarks, the Commission may issue a warning or the Council may (if the deviance is persistent and/or particularly serious) take corrective action under Article 121(4) TFEU.

The procedural rules under Regulation 1466/1997 are proposed to be strengthened by an amending regulation, the Regulation on budgetary surveillance. Following another regulation, Council recommendations under Article 121(4) TFEU shall be backed by an enforcement mechanism based on Article 136 TFEU for euro area countries. The State concerned may be obliged to provide a deposit (interest-bearing) of up to 0.2 % of the GDP. Such sanction applies if the Council does not reject a respective proposal of the Commission within ten days by qualified majority. The deposit is returned if the situation has come to an end according to the opinion of the Council (Art. 3).

As far as the corrective limb is concerned, the proposed package seeks to re-strengthen the idea of the SGP. The proposal to modify Regulation 1467/1997 contains rules on the assessment of public deficit as well as procedural instruments for a sound treatment of deficit excess. The proposed Regulation on budgetary surveillance further provides for reversed majority voting in the case of excessive deficits, i.e. the adoption of the respective proposal of the Commission if the Council does not vote otherwise by qualified majority. Besides deposits, fines may be imposed (Arts. 4 and 5). Also in the case of budgetary control, the EP shall introduce its voice within an “Economic Dialogue”.

92. See supra note 89.
3.3.3. **The European Semester**

In addition, there is an agreement within the European Council on the mechanism of a “European Semester”, requiring the Member States to regularly submit their medium-term budgetary strategies as contained in their stability and convergence programmes to enable the European Council and the Council to take the relevant policy advice. However, the Member States did not commit themselves to any modification of the corrective mechanism beyond the reform package in this context.

3.4. **Evaluation**

3.4.1. **The extensive application of Article 136 TFEU**

Some of the measures to achieve convergence and budgetary control are highly doubted in EU legal terms, though in a less spectacular way than those to react to financial emergency. Few scholars would argue that Article 121(4) TFEU covers the sanctions – fines or deposits – contained in parts of the reform package, in particular, if the provision is compared with the elaborate mechanism of sanctions in Article 126 TFEU. It is also extremely questionable to modify Treaty rules on voting procedures as do some of the regulations within the package. Therefore, the Commission chose to apply Article 136 TFEU as an additional legal basis for the proposals as far as they concern the Member States of the euro area. This Article was inserted by the Lisbon Treaty together with the institutional embedding of the Eurogroup via Article 137 TFEU and the respective Protocol No. 14 establishing informal meetings and a Presidency. Though prepared in Article III-194 of the Draft Constitution, this provision appears rather enigmatic. Nonetheless, whatever the Council can do under Article 136(1) TFEU with regard to the euro area “… in order to ensure the proper functioning of economic and monetary union …”, action must be “… in accordance with the relevant provisions of the Treaties …” and must follow “… the relevant procedure from among those referred to in

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93. For the conclusion of the first European Semester see Conclusions of the European Council of 23/24 June 2011, EUCO 23/11, p. 2.
94. Häde, op. cit. supra note 72, Art. 137 TFEU.
Articles 121 and 126 …”. In the light of this clear wording, Article 136 TFEU does nothing but provide a means for enhanced cooperation of the Eurogroup, giving procedural indications about voting in its paragraph (2). Deviance from Treaty rules is not covered, even if this leads to strengthened budgetary control which is desirable. There seems to be little if any political discussion about these problematic parts of the reform package, which is certainly due to their obvious practical value. Sanctions and reverse voting appear to be necessary for the sake of stability.

3.4.2. *The role of the institutions in negotiated co-ordination*

Alongside these legal doubts, the tendency within the institutional framework of economic convergence and budgetary control must be evaluated rather critically. To some extent, this applies already to the mechanisms implemented by the reform package. Parliament is involved only to a minimum extent, which is barely acceptable if the highlighting of the principle of representative democracy in the Lisbon Treaty is taken into account. Reporting requirements and the Parliament’s forceful struggle for more influence via an “Economic Dialogue” are either insufficient or at least a poor compensation. On the whole, the new tendency of the institutional system does not seem to rely on the traditional advantages of the Community method, as the neutral expertise of the Commission is watered down by political assessments of the Council or the European Council. This effect becomes even stronger in the framework of all activity undertaken by the European Council or the Heads of State or Government of the Eurogroup under the heading “economic government” (gouvernement économique/Wirtschaftsregierung), as can be seen in its first traces in the “Euro-Plus-Pact” – the “European Semester” being fortunately integrated into the existing institutional framework. It is the intergovernmental and coordinating quality of the mechanisms established that calls into question their democratic legitimacy. What else should be subject to thorough debate in parliament but parameters such as wage policy or labour market reforms? If “economic government” is established, democratic legitimacy cannot be adequately strengthened by means of the

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96. Cf. in general Häde, op. cit. supra note 72, Art. 136 TFEU, and in detail Häde, op. cit. supra note 95.
98. This is made very clear by Louis, op. cit. supra note 85, 584; Häde, op. cit. supra note 95; Häde, op. cit. supra note 44, 25; and Ohler, “Die zweite Reform des Stabilitäts- und Wachstumspakts”, (2010) Zeitschrift für Gesetzgebung, 338 and 342.
accountability of the members of such “government” towards national parliaments or citizens either (cf. Art. 10(2)(2) TEU), considering the lack of transparency of economic negotiations at the European level.

With respect to national parliaments’ struggle for more effective control, the recent judgment of the German Bundesverfassungsgericht has to be considered again. The Court had already formulated a general limitation of a transfer of (inter alia) budgetary competences in its judgment on the Lisbon Treaty in 2009. Such a transfer necessitates the adoption of a completely new constitution by the pouvoir constituant, i.e. the people – which seems extremely unlikely. The ordinary procedural rules for changing constitutional provisions do not suffice.\textsuperscript{100} This dictum had been confusing with regard to the budgetary competences at the time of the judgment (summer 2009), as the current problems were at that time still unknown, and the basis in constitutional legal thinking is still unsettled.\textsuperscript{101} Nonetheless, the dictum was taken up in the judgment of 7 September 2011, and the Court held that the members of the Bundestag – as representatives of the people – “must remain in control of fundamental budget policy decisions”.\textsuperscript{102} As this does not prevent every European influence on budgetary matters, the reform legislation on preventive budgetary control just adopted does not contain an intrusion into (German) sovereignty, since there is no institutional re-arrangement of budgetary powers but a limited control of agreed expenditure standards. It is more likely, though, that the Bundesverfassungsgericht would be opposed to an intergovernmental rearrangement of economic governance in the EU, an “economic government” beyond parliamentary control.

3.4.3. The adequacy of the tools

Finally, also the functioning of the new mechanisms for economic governance and budgetary control may be doubted. It is highly useful to detect disparities in a decent way – and it should be a matter of course that all the (statistical)
information behind the scoreboards and reports is completely sound. However, the political reaction to such disparities is fraught with limitations. In this context, the option of weakening the strong instead of strengthening the weak is only a theoretical one. European integration has, until now, always worked in a way enhancing competition between the Member States’ policies in search for the best possible economic solutions. Another aspect is the envisaged mechanism of fines, the only mechanism in the whole convergence framework which is about to work automatically. We have seen that the imposition of fines within the frame of the deficit control under Article 126 TFEU would be of limited use, as countries in distress would have difficulties to pay them in any event. The same could apply to fines imposed on a country suffering disparities. The implementation of the “wrong” sanction is certainly a result of the European Council’s reluctance to introduce political sanctions, such as the loss of voting rights in the Council, which would have required a modification of the Treaties.

Beyond the limits of pecuniary sanctions, inherent deficits of economic governance should not be overlooked. During the last financial crisis, the world has learned a lot about the deficiencies of markets in assessing and allocating risks. Against this background, it is on the one hand obvious that States are in search of a decent balance between financial markets and public regulation. On the other hand, this does not challenge the evident finding that decentralized processes are superior to centralized decision-making by public authorities in creating knowledge. In this respect, it is worth noting that Germany has a scheme of economic governance operated by the State since the late 1960s (“Globalsteuerung”). This scheme was praised at its inception, complicated in its operation – and commonly assumed to be of virtually no effect on economic welfare. Doubts concerning the “debt brake” which is currently “exported” to other EU countries point in the same direction. When implementing elements of an economic government following centralist views of economic policy, platitudes of economic theory should not be taken apart. At least, the high complexity of the new legislation might indicate that the whole mechanism will be bureaucratically monstrous – although the aims of the reform package are beyond question.

103. There is a separate Art. 10a in the Regulation cited supra note 89, to assure this.
104. Of course, this was developed in Friedrich von Hayek’s seminal lecture Der Wettbewerb als Entdeckungsverfahren (1968), pp. 7 et seq.
4. European law and European legal scholarship in times of crisis

The evaluation of European economic governance during the last eighteen months does not concern legal details and jurisprudential niceties. It is no exaggeration that some core principles of European Union law are at stake. Whether in the evaluation of emergency reaction or in the field of economic governance, three most disturbing questions had to be asked: about the integrity of European constitutionalism, about the future of democratic institutions in Europe, and about the conservation of wealth and stability as legal values in EU law.

It is not easy for European legal scholarship to react to problems of such gravity. Instead of reaching a settlement of the law finally laid down in the Treaty of Lisbon, the academic community faces a challenge of hitherto unknown dimensions. The challenges to European constitutionalism, democratic governance and the principle of economic stability are so enormous that it has already been argued that the law should be set aside in an “EU state of emergency”.106

Actually, options for scholarly legal approaches appear to be scarce. On the one hand, scholars might support the shift in direction of economic governance within the EMU and the EU as such, searching for interpretations of the Treaties which should back the institutional turn. After all, it is for the sake of European integration that politics have to react and it would be overly exaggerating to blame all political activity of the last few months and years. On the other hand, the obvious dangers of what we are currently witnessing cannot be set aside easily. Doubts about the operability of a common currency in Europe are back in the discussion, and some scholars even feel an inclination for scientific support of EU-critics or adversaries to the EMU. But neither overdone apology nor distinct rejection are helpful to serve as an overall direction of European legal scholarship. What is needed the most is an orientation towards the core principles of European Union law. After all, the success of the European Union in bringing forward peace, common European values and the well-being of its peoples is to a large extent, if not primarily, due to the concept of “integration through law”.107 Integration is on its way...
following the Lisbon Treaty, the euro has been the common currency for more than ten years now, and all this should not be jeopardized easily. It is the loss in public support caused by the developments that is most disturbing.

In this sense, all these challenges, difficulties or even insurmountable obstacles notwithstanding, as an academic discipline European Union law cannot remain silent or reluctant but must actively participate in the assessment of the current crisis and in evaluating the instruments proposed and enacted to overcome it. In the present situation, this means mostly telling unpleasant truths — unpleasant for current EU politics above all — and to indicate consequences for further action. Excessive State debts have to be restructured, the Treaty rules against new excessive debts must be strengthened, the participation of the EP and the national parliaments has to be intensified with regard to economic governance. Sometimes, positive developments can be highlighted, such as the private sector involvement envisaged by the ESM. Further, from the standpoint of European constitutionalism, it is preferable that European institutions (re-)assume political leadership in a matter falling under the exclusive competence of the Union instead of leaving the field to the competing national interests represented by the Member States’ political leaders. It is by no means true that legal scholarship could not participate in sketching the map for the way out of the crisis. Emergency alone cannot justify politics deviating from principles and rules that have emerged as the legal and jurisprudential core of 60 years of European integration, all the more, as the success of political emergency efforts seems to disappear behind open manifestations of conflicting economic and political interests. The European Union is a Union based on the rule of law, not of power (claimed by whomsoever), and this must also hold in times of distress.