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From the Board

Constitutional Reflections and Crisis Ruminations

The crises have brought about a variety of responses from the European Union (EU). Here are some legal reflections and ruminations on the wider context. Two sets of trends may be perceived, both pulling in different directions. There is a greater reliance on instruments outside of EU law proper and a larger role for the Member States acting collectively ('inter-governmentalism') versus an increased role for the Commission and the ECB, which may be described as a more 'federal' or 'integrationist' element in crisis response. And there is both more and less transparency in the legal instruments and their judicial review by EU and State courts.

1 INSTITUTIONAL: 'INTER-GOVERNMENTALISM'

Institutional changes brought about by the financial and subsequent sovereign (and private!)¹ debt crisis has seen 'inter-governmentalism' creeping in. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG), better known as the 'Fiscal Compact' which it encompasses, lays down rules on budgetary discipline that largely copy the rules included in the so-called six-pack² and two-pack³ legislation adopted by normal legislative procedure, and contains additional rules, *inter alia* on the governance of EMU. It has been ratified

¹ Some narratives about the financial crisis forget that most EU States were plunged into the crisis when their banking sector froze, in the wake of the 2007 credit squeeze and the October 2008 Lehman failure. These stories fail to acknowledge that over-indebtedness of the private sector was one of the severe imbalances then causing havoc. Public indebtedness became a major issue across the EU with the need to take over, (re-)capitalize and guarantee banks, because of increased social spending with soaring unemployment and as a result of the contagion effect when financial markets retreated from the 'periphery' and requested excessive returns for continued lending after the Greek budgetary situation became clear.

² The 'six-pack' consists of the following legal acts reproduced in the Official Journal (OJ) No. 306 of 23 Nov. 2011:

1. Council Regulation (EU) No. 1177/2011 of 8 Nov. 2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure;
2. Regulation (EU) No. 1176/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the prevention and correction of macroeconomic imbalances;
3. Regulation (EU) No. 1175/2011 of the European Parliament and of the Council of 16 Nov. 2011 amending Council Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies;

by twenty-six of the twenty-nine Member States, with the United Kingdom and the Czech Republic⁴ the only outsiders (Croatia is expected to ratify it after its accession)⁵.

The Treaty establishing the European Stability Mechanism (ESM), adopted in a first version⁶ on 11 July 2011 and in its final⁷ version on 2 February 2012, is another example of an international agreement introduced alongside the treaties in the context of overcoming the crisis. Its creation was enabled (unnecessarily so,⁸ the Court of Justice of the European Union (CJEU) held in its *Pringle* judgment⁹ on the legality of the ESM Treaty and the TFEU amendment), by adding a third paragraph to Article 136 TFEU. The ESM is a successor to an even more bizarre legal construct: the *private* law form of the European Financial Stability Fund (EFSF), which was a special purpose vehicle (SPV) incorporated under Luxembourg law and based on an agreement governed by English law.¹⁰ The ESM also is the successor to the sole Union law-based entity for financial assistance to Euro Area Member States: the European Financial Stability Mechanism (EFSM).¹¹

4. Regulation (EU) No. 1174/2011 of the European Parliament and of the Council of 16 Nov. 2011 on enforcement measures to correct excessive macroeconomic imbalances in the Euro Area;

5. Regulation (EU) No. 1173/2011 of the European Parliament and of the Council of 16 Nov. 2011 on the effective enforcement of budgetary surveillance in the Euro Area; and

6. Council Directive 2011/85/EU of 8 Nov. 2011 on requirements for budgetary frameworks of the Member States.

³ The 'two-pack' consists of the following legal acts reproduced in the OJ L 140, 27 May 2013:

1. Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the Euro Area; and

2. Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the Euro Area experiencing or threatened with serious difficulties with respect to their financial stability.

⁴ In March 2014, it was reported that the Czech Republic would also sign and ratify the TSCG. See: <http://uk.reuters.com/article/2014/03/24/uk-czech-eu-idUKBREA2N0V420140324>.

⁵ See: <http://www.consilium.europa.eu/policies/agreements/search-the-agreements-database?command=details&lang=en&aid=2012008&doclang=EN> (accessed 14 Jul. 2014).

⁶ See European Commission Memo 11/493 of 8 Jul. 2011, at: http://europa.eu/rapid/press-release_MEMO-11-493_en.htm (accessed 14 Jul. 2014).

⁷ Subject to later amendments due to accession to the Euro Area. For the consolidated text after Latvia entered the Euro Area, see: <http://www.esm.europa.eu/about/legal-documents/index.htm> (accessed 14 Jul. 2014). The forthcoming adoption of the euro by Lithuania will require further adaptation.

⁸ Paragraph 184 of the *Pringle* judgment states: '(...) the amendment of Art. 136 TFEU by Art. 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States (see para.s 68, 72 and 109 of this judgment). Accordingly, that decision does not confer any new power on the Member States.'

⁹ Judgment of 27 Nov. 2012 in Case C-370/12 (*Thomas Pringle v. Government of Ireland, Ireland and The Attorney General*).

¹⁰ See Art. 16 of the EFSF Framework Agreement, at: http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf (accessed 14 Jul. 2014).

¹¹ Council Reg. (EU) No. 407/2010 of 11 May 2010 establishing a European financial stabilization mechanism, OJ L 118/1, 12 May 2010.

‘Inter-governmentalism’ didn’t stop there. When, in the implementation of their intention to break the sovereign doom loop between banks and governments,¹² Member States intended to make private creditors contribute first and foremost to any bank resolution (‘bail-in’,¹³ as opposed to ‘bail-out’) and decided to establish a Single Resolution Fund (SRF) into which banks’ contributions will be paid, they¹⁴ entered into an international agreement on mutualisation of the SRF that was first proposed to be included in the SRM Regulation. Thus, also in the context of ‘banking union’,¹⁵ an international treaty has been among the instruments for addressing the crisis. As is the case with the TSCG, the SRF Agreement¹⁶ is to be applied and interpreted in conformity with Union law and only in so far as it is compatible with Union law,¹⁷ whilst the substance of the Agreement is ultimately to be incorporated into EU law.¹⁸ Disputes about compliance with the SRF Agreement are to be brought before the

¹² Or the vicious circle between banks and sovereigns. This is the negative feedback loop between weak bank balance sheets and sovereign fragility. When banks need public funding, this may strain the budget of the government providing support to avoid banks collapsing. Conversely, banks may face higher funding charges if they are located in a jurisdiction with budgetary problems. Thus, the sovereign and the banks both suffer from each other’s market standing. It was against this background that the Heads of State and Government of the Euro Area declared, on 29 Jun. 2012: ‘We affirm that it is imperative to break the vicious circle between banks and sovereigns.’ This statement preceded the announcement of ‘banking union’.

¹³ See my *Is my money safe at European banks? – Reflections on the ‘bail-in’ provisions in recent EU legal texts in Capital Markets L. J.* (2014) 9 (2), pp. 137–156.

¹⁴ At least twenty-seven among them, the United Kingdom and Sweden not signing; see the Ecofin Council Press Release 10088/14 of 27 May 2014 at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/142710.pdf (accessed 14 Jul. 2014).

¹⁵ ‘Banking union’ stands for the triptych of: (1) a Single Supervisory Mechanism (SSM) conducting the prudential supervision of commercial banks operating in the Euro Area and in any ‘out’ Member State that seeks close cooperation with the ECB as the pivot in the SSM, (2) a Single Resolution Mechanism (SRM) for the resolution of banks in the same area, and (3) single deposit insurance. Legal instruments for the first two elements have been adopted: Council Regulation 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287/63, 29 Oct. 2013 (the SSM Regulation) and Regulation (EU) No. 806/2014 of the European Parliament and of the Council of 15 Jul. 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No. 1093/2010, OJ L 225/1, 30 Jul. 2014 (the SRM Regulation). The third element of ‘banking union’ is underdeveloped: only new harmonized rules on deposit insurance have been adopted: Directive 2014/49/EU of the European Parliament and of the Council of 16 Apr. 2014 on deposit guarantee schemes, OJ L 173/149, 12 Jun. 2014. ‘Banking union’ is supposed to operate on the basis of a single rule book for banks in Europe. This rule book includes the EU implementation of internationally agreed strengthened standards for banks (‘Basle-III’), adopted by the Basle Committee on Banking Supervision.

¹⁶ Agreement on the transfer and mutualization of contributions to the single resolution fund.

¹⁷ Article 2 TSCG and Art. 2 SRF Agreement.

¹⁸ Article 16(2) SRF Agreement. See, for a similar provision in the TSCG, its Art. 16.

CJEU,¹⁹ which also has a role under the TSCG.²⁰ Involvement of the Court is based on Article 273 TFEU. Peculiar to the SRF Agreement is a reference in its preamble to the *clausula rebus sic stantibus* in the Vienna Convention on the Law of Treaties. The essential basis of the parties' consent to be bound by the SRF Agreement concerns provisions of the SRM Regulation on 'bail-in', i.e., contributions from *private* instead of *public* (budgetary) sources. The same Court which, in the past, declared such doctrines of international law not to be applicable within a Community law context will now be called 'verify the existence of any fundamental change of circumstances and the consequences deriving from it'.²¹

All these novel concoctions of law in legal instruments invite a thorough legal study of the EU's various instruments of crisis response.

Under the same heading of 'inter-governmentalism', one may classify the enhanced role for the European Council and for the Eurogroup as crisis management fora. It is through these bodies that national representatives acted mainly when addressing their joint problems, with the concomitant danger that common interests are less well served than with truly 'federal' decision-making. The latter requires a stronger role for the Commission (also achieved; see below) and a possible European Treasury, an idea floated by former ECB President Jean Claude Trichet in Aix-la-Chapelle²² in 2011. In the meantime, the diverse policy responses to the crisis make Jürgen Habermas' reflection spot on: '(...) the flaw in the construction of the European Union: every country is responding with its own economic measures (...) there is at present no will-formation at the level of economic policy'.²³

2 INSTITUTIONAL: STRONGER 'FEDERAL' ELEMENTS

At the same time, the crisis has sown 'integrationist' results, primarily a stronger role for the Commission. Here, one thinks first of the strengthened role for the Commission under the new rules on economic governance: its recommendations for Council decisions on a Member State's excessive deficit²⁴ and on a Member

¹⁹ Article 14 SRF Agreement.

²⁰ Article 8 TSCG allows judicial review of compliance with the fiscal compact in the TSCG, through an action instituted by another contracting State, on the basis of a report by the Commission or based on its own views.

²¹ Recital 18 of the SRF Agreement.

²² *Building Europe, building institutions*, Speech by Jean-Claude Trichet, President of the ECB, on receiving the Karlspreis 2011 in Aachen, 2 Jun. 2011, at: <http://www.ecb.europa.eu/press/key/date/2011/html/sp110602.en.html> (accessed 14 Jul. 2014).

²³ Jürgen Habermas, *The crisis of the European Union – A Response*, p. 115.

²⁴ Article 4(2) of Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the Euro Area, providing for the imposition of an interest-bearing deposit on a Member State that has failed to take action in response to a recommendation of the Ecofin Council; Article 5 (2) of the same regulation, providing for the imposition of a non-interest bearing deposit on a Member State that has an excessive budget deficit and that either already had to lodge an interest-bearing deposit or shows

State's excessive economic imbalances²⁵ are automatically adopted once they are not rejected by qualified majority voting (QMV) within the Council within ten days. A particularly clear example of the stronger role for the Commission is the transparency on deviations from its recommendations in Council recommendations in the European Semester 2014: for each recommendation to an individual Member State,²⁶ changes introduced with which the Commission did not agree, are spelled out.

The strengthened role for the Commission in state-aid surveillance comes to mind, as well. Even though there has not been any change in formal status, the Commission seized the initiative for a thorough review of state-aid decisions, notably in the financial sector. Its proactive adoption of communications detailing how it would approach state-aid to banks²⁷ made it the natural, even though reluctant choice as final arbiter in bank resolutions. The Commission effected its overview role in tandem with the European Central Bank (ECB) as guardians of the Community interest.²⁸ These two, thus, tried to counter the original sin of crisis handling: the national approach followed at German federal chancellor Angela Merkel's insistence that banks be guaranteed or saved at the State rather than at the EU level. In his latest book *The Tragedy of the European Union*, investor-philanthropist George Soros rightly sees this as a turning point in the crisis.²⁹ This decision, ostensibly taken in the interest of the national taxpayer, led Europe deeper into the crisis, resulting in deficits and debts ballooning and

'particularly serious non-compliance with the budgetary policy obligations laid down in the [Stability and Growth Pact]'; and Article 6(2) of the same regulation on the imposition of a fine pursuant to Art. 126(8) TFEU.

²⁵ Article 3(3) of Regulation 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the Euro Area. This rule provides for the imposition of an interest-bearing deposit where the Ecofin Council has established that a Member State has failed to take the corrective action the Council has recommended pursuant to Regulation 1176/2011, or the imposition of an annual fine if a Member State has failed on two successive counts to remedy excessive imbalances in its economy, as established by the Ecofin Council pursuant to Regulation 1176/2011. The latter finding of non-compliance by the Ecofin Council is subject to the same reverse QMV voting procedure (Art. 10(4) of Regulation 1176/2011).

²⁶ See the Council's Explanatory Note, an accompanying document to Council Recommendations to Member States under the European semester 2014 (2014/C 247/28) in OJ C247/144, 29 Jul. 2014. The same issue of the Official Journal contains the Council's recommendations to twenty-six Member States on their National Reform Plans and their Stability (for the 'ins') or Convergence (for the 'outs') Programmes, and its recommendation to the Euro Area Member States on their implementation of the Broad Economic Policy Guidelines 2010–2014.

²⁷ See Communication from the Commission on the application, from 1 Aug. 2013, of State-aid rules to support measures in favour of banks in the context of the financial crisis ('Banking Communication'), OJ C 216/1, 30 Jul. 2013.

²⁸ For an early assessment, see my *European supervisors in the credit crisis: issues of competence and competition*, Ch. 15 in Mario Giovanoli and Diego Devos (eds.), *International Monetary and Financial Law in the light of the Global Crisis*, 2010, pp. 305–327.

²⁹ George Soros with Gregor Peter Schmitz, *The Tragedy of the European Union – Desintegration or Revival? 2014*.

producing the sovereign doom loop between banks and sovereigns that the 'banking union' is supposed to break. This decision marked the beginning of the retreat of banks behind national borders, leading to the fragmentation of banking markets that the ECB is trying to counter through its announcement of Outright Monetary Transactions (OMT), on which more below.

A third area where one discerns a strengthened role for the Commission, apart from economic governance and state-aid control, is in the resolution of banks. The SRM Regulation establishes a convoluted procedure which, although cumbersome, gives a central role to the Commission. Also, resolution of a bank needs to take into account the latter's assessment of any public funding under state-aid rules.

A further strengthening of 'integrationism', on top of a strengthened role of the Commission, can be seen in the extension of the powers of the ECB in the area of economic policy. For the ECB, the support of economic policies in the EU constitutes its secondary objective, next to maintaining price stability.³⁰

The ECB's involvement in economic policies received an impetus, first, with its assumption, while adopting its Securities Market Programme (SMP, 2010–2012)³¹ of intervention in public and private debt securities markets to restore their proper functioning and the monetary policy transmission mechanism, that Euro Area governments were seriously addressing budgetary imbalances.³² A further impetus followed with its requirement³³ under the announced OMT programme that Member States whose bonds it was (SMP)/is (OMT) willing to buy agree to the conditionality attached to the financing by the 'bail-out' funds. The introduction of the SMP and the OMT are, in this lawyer's eyes,³⁴ clearly within the mandate of the central bank, as they address the hindrances in effective translation of its monetary policy across the Euro Area and the existential threat to the single currency of which the ECB is the guardian. Yet, the accompanying

³⁰ Article 127(1) TFEU; Art. 2 ESCB Statute.

³¹ Decision of the ECB of 14 May 2010 establishing a securities markets programme (ECB/2010/5), OJ L 124/8, 20 May 2010.

³² See the ECB's press release of 10 May 2010 which, under the title 'ECB decides on measures to address severe tensions in financial markets' includes the following: 'In making this decision we have taken note of the statement of the euro area governments that they "*will take all measures needed to meet [their] fiscal targets this year and the years ahead in line with excessive deficit procedures*" and of the precise additional commitments taken by some euro area governments to accelerate fiscal consolidation and ensure the sustainability of their public finances.' (italics in original text, RS). Available at: <http://www.ecb.europa.eu/press/pr/date/2010/html/pr100510.en.html> (accessed 10 Jul. 2014).

³³ See the ECB's press release of 6 Sep. 2012 containing the Technical features of Outright Monetary Transactions (OMT) which includes the following: 'A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme.' Available at: http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html (accessed 10 Jul. 2014).

³⁴ Similarly, Armin Steinbach, *The Legality of the European Central Bank's Sovereign Bond Purchases*, The Yale J. of Intl L. Online, Fall 2013, 15–31.

conditionality involves a closer contribution of the ECB to its secondary objective of supporting economic policies than has hitherto been the case.

Furthermore, the ECB plays a prominent role in the so-called troika, the combination of the European Commission, the ECB, and the International Monetary Fund (IMF). The troika is the instrument of review of the conditionality attached to lending by the 'bail-out' funds and the IMF. Review missions of these combined authorities have been codified in the 'two-pack' legislation.³⁵ The Commission's role in such missions is clear thanks to its pivotal function in economic governance. The involvement of the IMF may be regretted, as economic policy coordination *within* the Union should not be dependent on a global organization of a monetary nature with economic policy oversight functions,³⁶ but became unavoidable to enforce conditionality and is in line with its role in respect of non-Euro Area Member States that receive balance-of-payments assistance.³⁷ The role of the ECB is central for its macro- and micro-prudential supervisory activities but may lead to confusion in the minds of the people of the States concerned. The central bank, originally mainly mandated to maintain price stability and now also authorized to oversee banks, may be seen to become deeply involved in economic policy *setting*, which differs from *supporting*, as in the SMP and OMT. The conduct of economic policy is an area reserved for politics. The ECB's troika role risks undermining the popular basis for its independence.

During the crisis, the ECB continued its traditional central bank's advisory role on economic policy, with regularly repeated and strengthened calls for economic policy adaptations (structural reforms and budgetary discipline). This advisory role is clearly within its mandate.

As already indicated, the 'federal' element of the Union has also been strengthened by the role allotted to the ECB in the prudential supervision of banks. As of 4 November 2014, the formal start of 'banking union', 120 'systemically significant' banks³⁸ come under the ECB's direct supervision, with all other EU-licensed banks supervised in the context of an SSM whose functioning the ECB is to direct. This is the manner in which the EU legislator endeavours to solve the financial trilemma that Dirk Schoemaker postulated (financial stability,

³⁵ See Art. 3(5) of Regulation 472/2013. The regulation emphasises the ECB's supervisory role in its review activities – yet, the ECB's continued involvement in review missions implies a close connection with economic policy monitoring.

³⁶ Of course, the IMF should have a role to play in the oversight of economic policy *of* the Union (Euro Area).

³⁷ Pursuant to Art. 143 TFEU and Council Regulation (EC) No 332/2002 of 18 Feb. 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, as amended.

³⁸ The ECB published a preliminary list of the credit institutions it will directly supervise as of 4 Nov. 2014; see: <http://www.ecb.europa.eu/ssm/pdf/SSM-listofdirectlysupervisedinstitutions.en.pdf?6dfe13ea9224b4f2f313c8c9dd05bc96> (accessed 10 Jul. 2014).

financial integration, and national financial policies are incompatible).³⁹ Whether the adopted arrangements fully serve this intention remains to be seen.⁴⁰

3 TRANSPARENCY OF THE CRISIS RESPONSE

Turning now to transparency, two opposing forces can be seen here as well. The provisions adopted in the area of economic governance are very detailed and technical in nature. Sometimes, they constitute no more than a label for the alignment of budgetary and economic policy coordination cycles that were thirty years overdue in an integrated economic area (the much-touted 'European Semester') or are simply 'hot air' (the Euro Plus Pact) and duplicative (the TSCG, which amounts to not much more than the combined 'six-pack' and 'two-pack' of EU legislation plus some institutional changes, and the spectre of a joint economic policy). Also, in 'banking union'-related issues, one sometimes sees an overdose of detail without clear results for practical application. For instance, the Bank Recovery and Resolution Directive (BRRD)⁴¹ – an element of the single rule book underpinning 'banking union' – contains 108 defined terms and 132 provisions which cover 158 pages in the Official Journal, and even this amount of legal ink does not harmonize the resolution and recovery regimes across Europe. This is because the BRRD refers to national insolvency rules and contains a 'no creditor worse off' rule. This rule requires the application of a counterfactual test when applying the resolution tools of the BRRD: supervisors are to ask themselves if an insolvency procedure were to apply, the investor would suffer equally. The SRM regulation is not much simpler. Also, the SSM legal texts are cumbersome in drafting. For instance, the allocation of powers to the ECB and National Competent Authorities (NCAs) is convoluted.⁴²

The three-minute video on the ECB's website explaining the SSM for saver Sarah⁴³ helps but one would have wished for somewhat less cumbersome drafting

³⁹ Dirk Schoenmaker, *The Financial Trilemma*, Economics Letters, Vol. 111, 2011, pp. 57–59; Duisenberg School of Finance – Tinbergen Institute Discussion Papers No. TI 11-019/DSF 7.

⁴⁰ This author is not as negative as Wolfgang Münchau who, in the *Financial Times* of 17 Mar. 2014, exclaimed: 'Europe should say no to a flawed banking union'.

⁴¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No. 1093/2010 and (EU) No. 648/2012, of the European Parliament and of the Council, OJ L 173/190, 12 Jun. 2014.

⁴² Article 6 SSM Regulation.

⁴³ Available at: <https://www.ecb.europa.eu/ssm/html/index.en.html> (accessed 14 Jul. 2014).

in the relevant legal acts. Speaking about availability, the translation of banking rules in English will be a major requirement for proper supervision as the joint supervision of banks will be conducted in English, next to the national language.⁴⁴

All of this does not detract from the admiration one should have for the relative speed of the reforms and the depth of the ‘federal take-over’ of areas considered State-sacrosanct even a few years ago. In the field of ‘banking union’, to conclude on this promising project, the envisaged Joint Supervisory Teams (JSTs) for supervision by the ECB and the NCAs of a significant bank will entail a multinational and multicultural exercise in an interplay between the ‘centre’ and ‘periphery’ of the European System of Central Banks⁴⁵ in very concrete tasks.

In other areas of post-crisis regulation, the wording is sometimes really convoluted, such as when the TSCG requires Member States to support a Commission initiative unless a majority of Member States is against it,⁴⁶ and the rule on the impact of the ECB members in the ECB’s Supervisory Board whose weight in voting when the ECB exercises its regulatory competence is equal to the median of the vote of the other (national) members of this new body.⁴⁷

⁴⁴ See Part I of Annex I of Commission Implementing Regulation (EU) No. 650/2014 of 4 Jun. 2014 laying down implementing technical standards with regard to the format, structure, contents list and annual publication date of the information to be disclosed by competent authorities in accordance with Directive 2013/36/EU of the European Parliament and of the Council, OJ L 185/1, 25 Jun. 2014. This legal act invites Member States to indicate whether national legislation implementing the Capital Ratio Directive (CRD) IV is available in English. This should be seen against the background of the SSM Framework Regulation which provides that communication between the ECB and the national supervisors and between a supervised credit institution and the ECB may be carried out in one chosen EU language. The Draft Framework Regulation makes clear that for ‘an EU language’ one needs to read: English. See ECB Regulation 2014/17 of 16 Apr. 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the ECB and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ L 141/51, 14 May 2014.

⁴⁵ And which will encompass other supervisory authorities than central banks where these, rather than the national central bank, perform prudential supervision.

⁴⁶ Article 7 TSCG, which reads as follows: ‘While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.’

⁴⁷ Article 26(7) SSM Regulation. The convoluted arithmetic to which this provision gives rise is ‘explained’ in the Annex to the ECB’s amended Rules of Procedure. See Decision of the European Central Bank of 22 Jan. 2014 amending Decision ECB/2004/2 adopting the Rules of Procedure of the European Central Bank (ECB/2014/1), OJ L 95/56, 29 Mar. 2014, at 63.

The newly established Supervisory Board proposes, but – officially – the Governing Council decides. Unavoidable from an institutional point of view and legally laudable but confusing as the real centre of gravity will probably lie elsewhere than with the formal decision-making organ. Similarly, the European Banking Authority and other European Supervisory Authorities propose implementing standards which the Commission then adopts but, materially, decision-making has been delegated. This state of affairs was at issue in the recent CJEU judgment⁴⁸ on ESMA's wide-ranging powers to intervene in commercial transactions. The CJEU found that ESMA decides on any ban on short-selling of securities within 'narrow' discretion that is circumscribed by the relevant regulation and its procedures. This ESMA short-selling ruling may have lifted the immediate threat to pan-European countering of certain trading practices on the financial markets in times of stress but it doesn't obviate the need for a clear-cut Treaty basis on which to exercise powers given to supervisory agencies. Judicial scrutiny of the crisis measures (on which more below), dispersed and not always available in English, does not really enhance their transparency. However, when it comes to transparency, the ECB's announced openness on policy-making,⁴⁹ and the far-reaching accountability mechanisms to which the ECB submitted in the context of 'banking union',⁵⁰ are hopeful signs. As is the application of the 'comply or explain' principle in the area of economic governance, e.g., when the Council deviates from Commission recommendations as remarked above.

⁴⁸ Judgment of 22 Jan. 2014 in Case C-270/12 (*UK vs. European Parliament and Council*).

⁴⁹ President Mario Draghi announced in his introductory statement on 3 Jul. 2014: '(...) we announce our commitment to publish regular accounts of the monetary policy meetings, which is intended to start with the January 2015 meeting.' See, also, the ECB's press release of the same date (*ECB to adjust schedule of meetings and to publish regular accounts of monetary policy discussions in 2015*), available at: http://www.ecb.europa.eu/press/pr/date/2014/html/pr140703_1.en.html (accessed 14 Jul. 2014). In his speech in Amsterdam at the bicentennial celebrations of DNB, the Dutch Central Bank, Mario Draghi already announced more transparency in the context of Art. 10.4 of the ESCB Statute which provides that proceedings of the meetings of the ECB's Governing Council are to be confidential but that the Governing Council may decide to make the outcome of its deliberations public. See: *Monetary policy communication in turbulent times*, Speech by Mario Draghi, President of the ECB, at the Conference De Nederlandsche Bank 200 years: Central banking in the next two decades, Amsterdam, 24 Apr. 2014, available at: <http://www.ecb.europa.eu/press/key/speaker/pres/html/index.en.html> (accessed 14 Jul. 2014).

⁵⁰ Notably, the Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/EU) of 6 Nov. 2013, OJ L 320/1, 30 Nov. 2013. See, also, the Memorandum of Understanding between the Council of the European Union and the European Central Bank on the cooperation on procedures related to the Single Supervisory Mechanism (SSM) of 4 and 11 Dec. 2013. Both documents are available at: <http://www.ecb.europa.eu/ssm/establish/html/index.en.html> (accessed 14 Jul. 2014).

4 SCRUTINY OF THE CRISIS RESPONSE AT THE NATIONAL AND UNION LEVEL

The scrutiny of crisis measures by the judiciary also reveals a bipolar tendency: both the Union judicature and several (sometimes *über-*) active⁵¹ State courts have been involved. Besides *Pringle*, already mentioned, the CJEU has dealt with challenges against the ECB's use of its powers in times of extreme crisis. Of course, the outcome of the first referral to the Luxembourg Court from its Karlsruhe-based brethren is eagerly awaited but may take until early 2015 to be decided.⁵² Other cases at the Union level also concern challenges by citizens. In 2011, the General Court⁵³ turned down *Herr Städter's* late⁵⁴ challenge of ECB measures to widen the eligibility criteria of collateral to ensure continued use of Greek,⁵⁵ Portuguese,⁵⁶ and Irish⁵⁷ government bonds in the monetary policy operations of the Eurosystem.⁵⁸ Similarly, in December 2013, the General Court rejected the challenge instituted by *Herr Von Storch* and 5,216 other plaintiffs who opposed the ECB's announced Outright Monetary Transactions (OMT).⁵⁹ It was held that the OMT needed additional legal instruments and decisions subject to the discretion of the ECB to become operative, whereas the applicants were not directly concerned in the sense of the fourth paragraph of Article 263 TFEU. More recently, on 25 June 2014, the General Court rejected an action for the annulment of an ECB decision taken in the context of the downgrading of Greek government debt and the Private Sector Involvement (PSI, or write-down of

⁵¹ The German Constitutional Court's reference for a preliminary ruling which formulates the precise conditions under which the Karlsruhe judges might consider the OMT to be in conformity with the ECB's mandate.

⁵² For an overview of the reasoning behind the German Federal Constitutional Court's reference in the OMT case, see Franz Mayer, *Rebels Without a Cause? A Critical Analysis of the German Constitutional Court's OMT Reference*, (15) German L. J. 2014, at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1613> (accessed 31 Jul. 2014).

⁵³ Order of the General Court of 16 Dec. 2011 in Case T-532/11 (*Städter v. ECB*), appeal rejected by Order of the Court of 15 Nov. 2012 in Case C-102/12P.

⁵⁴ The action for annulment of the ECB's legal acts was rejected as it was instituted after the period of two months from the publication of the legal acts concerned, prescribed in the sixth para. of Art. 263 TFEU.

⁵⁵ Decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government (ECB/2010/3), OJ L 117/102, 11 May 2010.

⁵⁶ Decision of the European Central Bank of 7 Jul. 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government (ECB/2011/10), OJ L 182/31, 12 Jul. 2011.

⁵⁷ Decision of the European Central Bank of 31 Mar. 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government (ECB/2011/4), OJ L 94/33, 8 Apr. 2011.

⁵⁸ The Eurosystem consists of the ECB and the National Central Banks (NCBs) of the Member States that have introduced the Euro (Art. 282(1), second sentence, TFEU).

⁵⁹ Order of the General Court of 10 Dec. 2013 in Case T 492/12 (*Sven A. von Storch and Others v. ECB*). The Order holding the request inadmissible is available in French and German only.

privately held Greek government debt). The latter case⁶⁰ was initiated by Alessandro Accortini and over 200 fellow plaintiffs from Italy who argued that, as holders of Greek government bonds, they were disadvantaged by an ECB decision that made the eligibility of Greek government bonds for Eurosystem operations⁶¹ conditional upon a credit enhancement.⁶² The Order provides a detailed and highly interesting unfolding story of the measures adopted in order to keep the Greek government and financial system afloat, citing a Bloomberg⁶³ news article and referring to an unpublished ECB decision.⁶⁴ Even though this case law gives some highly needed insight into the crisis combating arrangements that were effected, their availability in French and the language of the applicants (German or Italian) only reduces much needed transparency. The Court should make translations in the *lingua franca* of the ESCB and of the financial markets available.

The *pari passu* clause in legal documentation, requiring equal treatment of creditors, not only played a role in the Greek PSI and in CJEU case law. It is at the heart of the current Argentina debt saga. All this forms a stark reminder of the lack of binding public international law available when sovereigns can no longer service their debts. Default is an option which Collective Action Clauses (CACs)⁶⁵ may help avoiding. CACs may provide for some orderly write-down of unsustainable debts. The case of *Argentina*, which fought a long legal battle with investors ('vulture funds') that bought Argentinean bonds at a steep discount and subsequently initiated litigation to get full value, shows the need for international arrangements to handle such situations: a Sovereign Debt Restructuring Mechanism⁶⁶ may prevent the recurrence of such sagas.⁶⁷ If not feasible at the

⁶⁰ Case T-224/12 (*Alessandro Accorinti and Others v. ECB*); Order of the General Court (Fourth Chamber) of 25 Jun. 2014.

⁶¹ Pursuant to Art. 18.1 ESCB Statute, credit operations of the Eurosystem are to be effected against 'adequate collateral'.

⁶² This credit enhancement consisted of a specific guarantee executed by the Greek Government in favour of the ECB and the NCBs so as to avoid these members of the Eurosystem from undergoing the envisaged debt write-down by Greece.

⁶³ Bloomberg itself was acting against the ECB in other proceedings concerning the transparency of its handling of the Greek situation. The General Court rejected Bloomberg's request for annulment of the ECB's decision refusing access to a document on the use of derivatives to conceal the extent of the Greek budgetary situation. The General Court considered that disclosure would undermine the protection of the public interest as regards the economic policy of Greece. See its judgment of 29 Nov. 2012 in Case T-590/10 (*Gabi Thesing and Bloomberg Finance LP v. ECB*); appeal dismissed by Order of 6 Feb. 2014 (Case C-28/13 P).

⁶⁴ ECB/2012/NP6. The numbering indicates that there have been at least six unpublished ECB decisions in 2012.

⁶⁵ On CACs in the Euro Area context, see: http://europa.eu/efc/sub_committee/cac/index_en.htm (accessed 2 Aug. 2014).

⁶⁶ See 'IMF Board Discusses Possible Features of A Sovereign Debt Restructuring Mechanism', IMF Public Information Notice (PIN) No. 03/06, 7 Jan. 2003, at: <http://www.imf.org/external/np/sec/pn/2003/pn0306.htm> (accessed 2 Aug. 2014).

⁶⁷ Argentina was technically in default for the second time in a decade by 30 Jul. 2014. See: *Investors sanguine as Argentina defaults*, Financial Times, 31 Jul. 2014.

global level, introducing some form of organized debt restructuring according to binding legal lines adopted in advance may be wise in the European context. Whether merely introducing CACs in EU Member States' bond documentation is sufficient may be doubted.

State constitutional courts have been actively involved in the legal assessment of crisis measures, notably the Portuguese constitutional court,⁶⁸ which considered several strict austerity measures to be unconstitutional, forcing the Government in Lisbon to alter the relevant measures. A wide-ranging study to the effect of national courts' decisions on policies that are based both on international legal instruments and on EU law would be welcome.

5 OTHER CONSTITUTIONAL ISSUES

Of course, there are far more constitutional issues that merit further study. The emergence of the Euro Area Summit as a confined session of the European Council is still close to the crisis response. The relative influence of the European Council and the European Parliament in selecting the President of the European Commission is a wider development that recently drew a lot of attention. Also further from the financial crisis are the constitutional issues relating to the centrifugal forces to which the EU is subject. Secession is on the table, both from the EU and from its Member States. The Scottish referendum, the result of which will be known by the time you read this editorial, stirs up debate about the economic benefits and disadvantages of the three-century old union with England, and about the bonds beyond economics and arithmetic that bind the British people. Catalonia also plans a referendum but, contrary to Scotland which does so with London's approval,⁶⁹ does not have the federal authorities in Madrid behind this plan. The announced renegotiation of the terms of UK membership of the EU will open a host of issues that may be resolvable only in the context of a deepening of Euro Area integration. The legal issues here are many,⁷⁰ beyond the societal ones that are central to these debates.

⁶⁸ The Portuguese constitutional court's website is available in English: <http://www.tribunalconstitucional.pt/> Similarly, for the German Constitutional Court; see: <https://www.bundesverfassungsgericht.de> and the Estonian Constitutional Court, which even publishes on its website in French and Russian, apart from Estonian and English; see: <http://www.riigikohus.ee> (accessed 13 Jul. 2014).

⁶⁹ See the Agreement between the United Kingdom Government and the Scottish Government on a referendum on independence for Scotland, Edinburgh, 15 Oct. 2012, at: <http://www.scotland.gov.uk/About/Government/concordats/Referendum-on-independence> (accessed 2 Aug. 2014).

⁷⁰ See the collected think pieces on Secession within the Union – Intersection Points of International and European Law, at: <http://acelg.uva.nl/publications/secession.html> (accessed 2 Aug. 2014).

6 A MORE GLOBAL VIEW

The Union's surroundings are full of crises too. Tensions abound and (civil) wars rage in Ukraine, Syria, Iraq, Libya, and Israel/Palestine,⁷¹ to mention only the most topical. These conflicts lead to immense suffering for ordinary people with no effective action to protect them. Refugees are lucky to reach Europe's shores alive. Many may swelter in refugee camps in Greece in conditions unworthy of a Union which professes to uphold human values. Apart from the geopolitical and legal issues⁷² that these conflicts pose for the EU,⁷³ they show a disturbing tendency that also plays in Europe itself. Acceptance and tolerance of 'otherness', whether this concerns Christians in predominantly Muslim countries; Jews, Muslims, and Roma in Europe; Shia and Sunni Muslims in areas predominantly of the other strand of Islam, or Baha'is in Iran,⁷⁴ is becoming ever less prevalent. Respect for others' lives⁷⁵ and beliefs is paramount for the world to be a 'liveable' place. Law can only do so much here. The (inter-) cultural element of legal issues is never far away. The cultural aspects of the crises need to get our collective attention beyond legal-technical issues. Lawyers and politicians need to address mutual understanding and tolerance when engaging in policy-making. What can ordinary citizens do? All human beings may turn inward and engage in contemplation and reflection on their individual contribution to enhance compassion for sentient beings. When we acknowledge that we are part of a greater whole,⁷⁶ we may be

⁷¹ This seventy-year old conflict seems too hard to tackle with diplomacy and pressure. International law has recently had a very limited role to play. Only a mutual embracing and acknowledgment of the pain seems to offer a viable solution against deep-seated distrust and hatred. A grass-roots approach is needed. For hopeful contributions, see: Dr Izzeldin Abuelaish, *I SHALL NOT HATE*, Walker & Company, 2011, and Michael Lerner, *Embracing Israel/Palestine – A Strategy to Heal and Transform the Middle East*; see: <http://www.tikkun.org> (accessed 14 Jul. 2014). See, also, the Parents Circle Families Forum that brings together grieving relatives on both sides of the conflict, at: <http://www.theparentscircle.com>. This initiative rightly assumes that 'the process of reconciliation between nations is a prerequisite to achieving a sustainable peace'.

⁷² Including the adoption of economic sanctions. See Council Regulation (EU) No. 833/2014 of 31 Jul. 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229/1, 31 Jul. 2014, and Council Decision 2014/512/CFSP of 31 Jul. 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 229/13, 31 Jul. 2014.

⁷³ And their effect on EU nationals and others unrelated to but mortally affected by the conflict as the downing of Malaysia Airlines flight MH17 from Amsterdam to Kuala Lumpur shows.

⁷⁴ For an inspiring letter to the newly elected Iranian President written by seven Baha'i leaders who have been imprisoned for six years, see: <https://www.bic.org/news/Seven-imprisoned-Bahai-leaders-send-letter-President-Rouhani> (accessed 2 Aug. 2014).

⁷⁵ These times of conflict and terrorism are reflected in the fact that an otherwise so hope inspiring and utterly likeable person as US President Barack Obama is also associated with targeted extrajudicial killings. For an independent inquiry into the effects of this policy, see the reports of the *Bureau of Investigative Journalism* on drones in Afghanistan, Pakistan, Yemen, available at: <http://www.thebureauinvestigates.com/> (accessed 2 Aug. 2014).

⁷⁶ It is appropriate here to quote Albert Einstein (1879–1955): 'A human being is a part of a whole, called by us "universe", a part limited in time and space. He experiences himself, his thoughts and

better able to improve the human constructs, including law and its organizations and to address the crises, thus bringing closer the transition we humans are called to make.

RS,
8 August 2014

feelings as something separated from the rest... a kind of optical delusion of his consciousness. This delusion is a kind of prison for us, restricting us to our personal desires and to affection for a few persons nearest to us. Our task must be to free ourselves from this prison by widening our circle of compassion to embrace all living creatures and the whole of nature in its beauty.'