Appendix II: Legal constraints for joint issuance of Euro T-bills?

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Appendix II: Legal constraints for joint issuance of Euro T-bills?

(For detailed discussion, please contact Professor René Smits rs@renesmits.eu)

Article 125 Treaty on the Functioning of the European Union (TFEU)[*] excludes liability for the debts of another Member State. Among the provisions underlying the 1990s thinking behind EMU, the 'no bailout clause' makes public authorities of the Member States rely on markets for funding deficits. It is intended to enforce market discipline on governments. Joint issuance of Eurobonds - or Euro T-Bills - sits uncomfortably with the no bailout clause.

The realisation that the 1990s Treaty provisions did not properly address a situation in which the stability of the euro area as a whole would be in danger because of excessive deficits of individual States, led Member States to establish two 'rescue funds', the EFSF and the EFSM. The establishment of the ESM, the successor to these funds, will be given firm legal footing through the introduction of a new TFEU provision which specifically permits its establishment by Euro Area States. Article 136 TFEU will be amended by the addition of a third paragraph, reading as follows:

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

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[*] ***Article 125***

(ex Article 103 TEC)

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Member State practice during the evolution of the sovereign debt crisis has been evidence of a less strict interpretation of Article 125 TFEU than previously adhered to. This means that joint issuance of Eurobonds or Euro T-bills must not necessarily be considered to be in direct conflict with Article 125 TFEU.

In the interests of legal certainty, and to avoid any potential conflict with the interpretation of EU law by national constitutional courts, it would be preferable to add a third paragraph to Article 125 TFEU, as well, reading as follows:

‘3. The joint and several guarantee by Member States, or of the Union, of the issuance of debt instruments by Member States whose currency is the euro, and the joint issuance of such debt instruments shall be permitted, provided this issuance ensures strict compliance by participating Member States to the prohibition of excessive government deficits.’

The Treaty amendment undertaken in preparation for the establishment of the ESM, and the constitutional changes envisaged to embed fiscal discipline in national legislation provide a golden opportunity to introduce an additional Treaty amendment and, thereby, to discard any doubts on the legality of the issue of Eurobonds and Euro T-Bills.

René Smits (Professor of the Law of the Economic and Monetary Union, University of Amsterdam), 22 January 2012

[For a more elaborate discussion of the legal constraints for the joint and several guarantees between Member States, and for the issuance of Eurobonds or Euro T-Bills, see the Outline of the legal chapter on Eurobonds, 21 November 2011, written for *An “EMU Bond Fund” Proposal*, 21 November 2011, available at: [**add website**].]