Special Section
The ESM Before the Courts

Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy

By Jonathan Tomkin[*]

A. Introduction

This paper makes the claim that the legal framework governing the European Stability Mechanism (ESM) is contradictory, conceptually incoherent and may be characterized as a circumvention of Union law. It is further claimed that such circumvention, and the resulting establishment of a significant permanent institution outside and beyond the scope of the Union legal order, represents a challenge to European democracy and to the principle of respect for the rule of law.

The paper will first provide a brief overview of the background and legal framework governing the Treaty establishing the European Stability Mechanism (ESMT).[1] It will then address recent litigation challenging the compatibility of that legal framework with obligations under Union law. Finally, it will assess how the process by which the European Stability Mechanism was established is liable to impact upon the quality of European Democracy and the integrity of the Union legal order.

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[1] Treaty Establishing the European Stability Mechanism Between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland, 2 Feb. 2012, EUR. COMM'N DOC/12/3 [hereinafter ESMT], http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf.

https://doi.org/10.1017/S2071832200001759 Published online by Cambridge University Press

B. Background and Legal Framework

The ESMT was conceived in the context of an ongoing financial crisis in Europe which is claimed to threaten the very survival of the Union's single currency, the euro. The ESM, developed as a response to this threat, is intended to safeguard the financial stability of the euro area as a whole and of its Member States.[2] The ESMT creates a mechanism by which the eurozone Member States pool their resources to ensure that individual Member States in financial difficulty possess sufficient liquidity to be able to meet their debts. The ESM has an initial authorized capital stock of €700 billion, which may be used as a security against further borrowing.[3] The initial maximum lending capacity of the ESM fund (combined with the capacity of the European Financial Stability Facility (the EFSF), an existing bail-out fund) was set at €500 billion.[4] The Euro Member States have since agreed to increase that limit to €700 billion and to accelerate the contribution of paid-in capital to the fund.[5] The ESM can be seen as a signal to the financial markets that significant resources stand behind the debts of individual eurozone Member States.

The establishment of a debt-crisis mechanism was initially proposed by a Task Force on Economic Governance set up by the European Council of 25 and 26 March 2010. In its report, dated 21 October 2010, the Task Force recommended establishing a "credible crisis resolution framework for the euro area capable of addressing financial distress and avoiding contagion."[6] Agreement on the need to establish a permanent crisis mechanism was announced at a European Council Meeting on 28 and 29 October 2010.[7] In setting up such a mechanism, Member States were confronted with the challenge of identifying or creating a legal framework within which such a crisis mechanism could operate.

The Union had previously operated bailout funds through a European Financial Stabilisation Mechanism (the EFSM) and a European Financial Stability Facility. The former was established by Council Regulation 407/2010 on the basis of Article 122 TFEU.[8] The

[2] ESMT, *supra* note 1, at art. 3.

[3] ESMT, *supra* note 1, at art. 8.

[4] ESMT, *supra* note 1, at recital 6 & art. 39.

[5] Statement of the Eurogroup (30 Mar. 2012), http://eurozone.europa.eu/media/678952/eurogroup_statement_30_march_12.pdf. This alters the terms of Article 39 of the ESM Treaty.

[6] Strengthening Economic Governance in the EU: Report of the Task Force to the European Council (21 Oct. 2010), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117236.pdf.

[7] Conclusions of the European Council (EC), 28–29 Oct. 2010 (EUCO 25/1/10 REV 1), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/117496.pdf.

[8] Council Regulation 407/2010, Establishing a European Financial Stabilization Mechanism, 2010 O.J. (L 118) 1.

https://doi.org/10.1017/S2071832200001759 Published online by Cambridge University Press

latter was framed as a public limited company governed by the laws of Luxembourg.[9] Yet, even if Article 122(2) TFEU was considered to be capable of serving as a legal basis for the EFSM, it was not clear that the provision could serve as the basis for the proposed permanent stability mechanism. Article 122(2) TFEU is expressed in restrictive terms. Its wording suggests that financial assistance may be granted only in exceptional *force majeure* type circumstances, such as natural disasters or comparable events the occurrence of which are beyond the control of Member States. It is not evident that Article 122(2) TFEU was intended to authorize the permanent bailout of Member States facing challenges of an economic nature.[10] This restrictive interpretation is reinforced when Article 122 TFEU is read in combination with other provisions contained in Part Three, Title VIII of the TFEU. In particular, Article 123 TFEU prohibits the European Central Bank from extending credit facilities in favor of central governments and public bodies of Member States or from the purchase of their debt instruments. Article 125 TFEU, often referred to as the "no bailout" clause, expressly prohibits the Union or Member States from becoming liable or assuming commitments of other Member States.

Appreciating that a bailout mechanism might not sit comfortably in a "no bailout" economic and monetary Union, the European Council invited consultation on the "*treaty change required*" to establish a permanent stability mechanism.[11] Following this consultation the European Council, meeting on 16 and 17 December 2010, agreed that the TFEU should be amended and decided to effect such amendment using the simplified revision procedure (SRP) provided for in Article 48(6) TEU.[12] The SRP permits modification of Part Three of the TFEU by the adoption of a European Council Decision that must be approved by the Member States in accordance with their domestic procedures.

The proposed Treaty amendment would add a new third paragraph to Article 136 TFEU authorizing euro Member States to establish a permanent stability mechanism that would operate subject to strict conditionality. European Council Decision 2011/199/EU amending Article 136 of the TFEU was adopted on 25 March 2011.[13] Pursuant to its Article 2, the

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[10] This interpretation was confirmed by the Court of Justice in Case C-370/12, Pringle v. Ireland, ¶ 65 (27 Nov. 2012), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CJ0370:EN:HTML.

[11] Conclusions of the European Council, *supra* note 7. *See also* Decision 2011/199/EU, of the European Council of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union with Regard To a Stability Mechanism for Member States Whose Currency Is the Euro, 2011 O.J. (L 91) 1, recital 2.

[12] Conclusions of the European Council (EC), 16–17 Dec. 2010 (EUCO 30/1/10 REV 1), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/118578.pdf.

[13] Council Decision 2011/199/EU, *supra* note 11.

https://doi.org/10.1017/S2071832200001759 Published online by Cambridge University Press

Decision was to enter into force once approved by all Member States and, in any event, not earlier than 1 January 2013. [14]

The ESMT was negotiated at the same time as an inter-governmental agreement and a first version signed on 11 July 2011.[15] However, following its signature, the Member States considered further amendments to be necessary, and a revised draft of the ESMT was concluded on 2 February 2012. At first, the ESM was to become operational in July 2013.[16] However, it was subsequently agreed that the entry into force of the ESMT should be accelerated so that the ESM would become operational in July 2012—that is, at least half a year prior to the entry into force of the European Council Decision authorizing Member States to establish a permanent stability mechanism.[17] A number of legal challenges to the ESM were filed with the German Federal Constitutional Court, and the July 2012 date was postponed. On 12 September 2012 the German Federal Constitutional Court delivered a preliminary judgment permitting Germany to proceed with ratification of the ESM Treaty.[18] The ESMT entered into force on 27 September 2012.

C. The Legal Framework Governing the ESM Treaty and Its compatibility with Union Law

In addition to the challenges to the ESMT brought before the German Federal Constitutional Court, proceedings questioning the compatibility of the ESMT with national constitutional law or Union law were also instituted before the Courts in Estonia and Ireland.[19] The challenge in Ireland was instituted by Thomas Pringle, an independent

[14] It is of note that it is the Decision as opposed to merely the amendment contained in the Decision that is to enter into force at the relevant date.

[15] See *Factsheet: Treaty Establishing the European Stability Mechanism* (2 Feb. 2012), http://ec.europa.eu/economy_finance/economic_governance/documents/127788.pdf, published by the European Commission setting out the background and chronology to the adoption of the ESM Treaty.

[16] Press Release, Eur. Union, European Stability Mechanism (ESM) Is Inaugurated (8 Oct. 2012), http://www.esm.europa.eu/press/releases/20121008_esm-is-inaugurated.htm. The July 2013 date is also mentioned on the website of the European Commission at: *Treaty Establishing European Stability Mechanism (ESM) Signed* (11 Jul. 2011), http://ec.europa.eu/economy_finance/articles/financial_operations/2011-07-11-esm-treaty_en.htm.

[17] Factsheet, *supra* note 15.

[18] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Case Nos. 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12 & 2 BvE 6/12, 12 Sept. 2013 (Ger.), *available at* http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-067en.html. For further details, see contributions in this special edition from Susanne K. Schmidt and Karsten Schneider.

[19] Riigikohus [Supreme Court], Judgment No. 3-4-1-6-12, 12 July 2012 (Estonia), *available at* http://www.riigikohus.ee/?id=1347; Pringle v. Ireland, [2012] I.E.S.C. 47, Case No. 339/2012 (Ir.), *available at* http://www.supremecourt.ie/Judgments.nsf/frmSCJudgmentsByYear?OpenForm&l=en (pending before the Supreme Court of Ireland). Certain aspects of the case have already been subject to rulings by the Supreme Court.

https://doi.org/10.1017/S2071832200001759 Published online by Cambridge University Press

Member of Parliament and resulted in a reference for a preliminary ruling by the Irish Supreme Court.[20] That Court sought clarification on three points: (1) The validity of the European Council Decision of 25 March 2011; (2) whether the provisions of the ESMT were compatible with Member States' obligations under the Union Treaties; and (3) whether the entry into force of the ESMT was subject to the prior entry into force of the European Council Decision authorizing Member States to establish a permanent stability mechanism.

It is clear that, in establishing a permanent stability mechanism, the European Council and the Member States were confronted with a significant legal obstacle. How could the Union or the Member States establish a bailout fund when it appeared that bailouts were expressly prohibited by the Union Treaties? It is worth recalling that the prohibition on bailouts, originally agreed as part of the 1992 Maastricht Treaty, may not easily be dismissed as the product of some kind of oversight. On the contrary, it is apparent from records of the negotiations that Member States intentionally agreed that the particular form of Economic and Monetary Union established would be a "no bailout" EMU.[21] This approach had been agreed and ratified by democratically mandated Governments of the Member States.

In his challenge to the compatibility of the ESM Treaty, Pringle argued that an institution established to carry out economic and monetary activities with the objective of saving the Union's single currency must be established within the Union.[22] He observed that both the European Parliament and the European Central Bank favored establishing the ESM within the Union.[23] In its Opinion on the European Council Decision, the European Parliament warned that establishing a permanent stability mechanism outside the EU institutional

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[20] Pringle v. Ireland, *supra* note 19, Ruling of the Supreme Court of Ireland, Chief Justice Denham, 31 July 2012, *available at* http://www.courts.ie/__80256F2B00356A6B.nsf/0/E7504392B159245080257A4C00517D6A?Open&Highlight=0,Pringle,~language_en~. The Reference is available at: http://www.courts.ie/__80256F2B00356A6B.nsf/0/E44922F2B6DBED2F80257A4C00570284?Open&Highlight=0,Pringle,~language_en~.

[21] *See e.g.*, Euro. Parl., EP Analytical Summary of the Debates on EMU for the ICG (11 June 1991), *available at* http://ec.europa.eu/economy_finance/emu_history/documentation/chapter13/19910611fr14analyticalsummary.pdf (Available only in French; these are the records of the proceedings of the Inter-Institutional Conference on Economic and Monetary Union accompanying the Intergovernmental Conferences, held on Tuesday 11 June 1991). See also the records of the Monetary Committee, working on the preparation of the Maastricht Treaty.

[22] Observations of Pringle, at page 7, in Case C-370/12, Pringle v. Ireland, 2012 EUR-Lex CELEX LEXIS 0000 (27 Nov. 2012). The Observations of Pringle are available at http://www.extempore.ie/wp-content/uploads/2012/10/C-370.12-Observations-of-T.Pringle-as-filed-2.pdf. This position rests on arguments concerning competence of Union in economic and monetary policy set out in pages 20 to 28 of the submissions.

[23] Observations of Pringle, *supra* note 22, at 7.

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framework posed a risk to the integrity of the Treaty-based system.[24] The European Parliament further expressed regret that the European Council had not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism within the Union legal order.[25] The ECB similarly expressed support for recourse to the "Union method."[26]

Nevertheless, the Heads of State or Government of the eurozone opted to establish the ESM by means of an intergovernmental treaty outside the framework of the Union legal order. In his submissions Pringle argued that this approach was adopted as a means of overcoming the TFEU's prohibition on bailouts. This view was corroborated by observations lodged by Member States before the Court of Justice. A number of interveners sought to rely on the international status of the ESM to argue that it would not be subject to Union law or the prohibition on bailouts in particular.[27] Pringle argued that

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[24] European Parliament Resolution of 23 March 2011 on the Draft European Council Decision Amending Article 136 of the Treaty of the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency Is the Euro, EUR. PARL. DOC. P7_TA(2011)0103, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2011-0103+0+DOC+PDF+V0//EN. At paragraph 7 the European Parliament "Warns that the intention to establish the permanent stability mechanism outside the EU institutional framework poses a risk to the integrity of the Treaty-based system . . . ."

[25] Resolution of the European Parliament of 23 March 2011, *supra* note 24. Paragraph 9 states the European Parliament:

> Regrets that the European Council has not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism; considers in particular that, in the framework of the present Union competences with regard to economic and monetary union (Article 3(4) TEU) and monetary policy for Member States whose currency is the euro (Article 3(1)(c) TFEU), it would have been appropriate to make use of the powers conferred on the Council in Article 136 TFEU, or in the alternative to have recourse to Article 352 TFEU in conjunction with Articles 133 and 136 TFEU . . . .

[26] *Opinion of the European Central Bank of 17 March 2011 on a Draft European Council Decision Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency Is the Euro*, at para. 8, 2011 O.J. (C 140) 8, 9. Paragraph 8 observes: "A key element of the draft decision is that it provides for an intergovernmental mechanism instead of a Union mechanism. The ECB supports recourse to the Union method and would welcome that, with the benefit of the experience gained, the ESM would become a Union mechanism at an appropriate point in time."

[27] Observations of Cyprus, Ireland & Austria in Pringle v. Ireland, *supra* note 22 (on file with author). Cyprus states: "[T]he prohibition in Article 125 TFEU relates to the Union and the Member States, not to a third party such as the ESM, which has a legal personality distinct from Member States . . . ." The Government of Ireland submitted at paragraph 72 of its observations that "The Article 125(1) TFEU prohibition applies to "[a] Member State", while the ESM will be an international financial institution. The ESM will have legal personality, which will be separate and distinct from the ESM Members . . . ." Austria submitted that "Article 122 TFEU expressly relates

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the notion that Member States may collectively step outside of the Union in order to carry out—on a permanent basis—activities that otherwise would be prohibited inside of the Union is difficult to reconcile with Union law or indeed with a Union founded on the rule of law.

The Union legal order rests on a number of principles that are constitutional in nature and that have been developed by the European Court of Justice (ECJ) in case-law spanning six decades. Such principles may be regarded as the conceptual backbone of Union law. They provide a consistent framework through which the extremely diverse legal and factual contexts that arise in the Union legal order may be approached and examined. These "constitutional" principles include: The doctrine of supremacy and the direct effect of Union law; respect for general principles of Union law, including the principles of legal certainty and non-retroactivity; the principle of effective judicial protection; and rules on the division of competences within the Union legal order as well as the principle of sincere cooperation.

In his action, Pringle maintained that the establishment of the ESM outside the Union legal order was inconsistent with a number of these constitutional principles. First, he argued that it followed from the principle of supremacy and loyal cooperation that, if the Union Treaties prohibit Member States from engaging in a particular activity, then that prohibition applies to Member States regardless of the legal framework in which they operate, and in particular, regardless of whether they are acting inside or outside the Union.[28] Pringle observed that the ECJ has consistently held that the principle of loyalty precludes a Member State from entering into international agreements that would be incompatible with its obligations under the Union Treaties.[29] Pringle argued that if the Treaties prohibit bailouts *inside* the Union, then such bailouts are also prohibited *outside* the Union.

Second, Pringle submitted that, according to settled case-law, Member States were not merely prohibited from breaching Union law directly, but from tolerating breaches *through the intermediary of organizations set up or recognized by them*.[30] He noted that the ECJ

only to the Union. An international organisation such as the ESM is therefore not covered by that provision, especially since, furthermore, the Union is not a contracting party . . . ."

[28] Observations of Pringle, *supra* note 22, at 37–40. Express reference was made to Case 22/70, Comm'n v. Council, 1971 E.C.R. 263.

[29] Observations of Pringle, *supra* note 22, at 38, para. 3.97. Reference was made to Case C-307/97, Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt, 1999 E.C.R. I-6161, paras. 33 & 34; Case C-55/00, Gottardo v. Istituto nazionale della previdenza sociale, 2002 E.C.R. I-413, paras. 33 & 34; and Case C-376/03, D. v. Inspecteur van de Belastingdienst/Particulieren/Ondernemingen buitenland te Heerlen, 2005 E.C.R. I-5821, para. 52.

[30] Observations of Pringle, *supra* note 22, at 34–38, paras. 3.85 & 3.91. Reference was made to Case 50/76 Amsterdam Bulb v. Produktschap voor Siergewassen, 1977 E.C.R. 137, para. 35.

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has consistently held that breaches of Union law by entities under the decisive control of Member States may be attributed to the relevant Member States.[31]

Third, Pringle argued that the legal framework establishing the ESM was incompatible with the principle of the division of competences delimiting the boundaries between the Union legal order and that of its Member States.[32] He submitted that it was well established that the Union and the Member States are required to respect each other's competences and that, in this context, Member States are subject to "*special duties of action and abstention*" to ensure that they do not encroach upon Union competences.[33] The Union is conferred with exclusive competence in the field of monetary policy[34] and shared competence in the field of economic policy.[35] Pringle argued that the Union has been conferred with and exercises a substantial degree of economic coordinating competence in relation to measures that concern the single currency.[36] Moreover, it was recalled that the TFEU expressly requires that the coordination of economic policy take place *within* the

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[31] Case 249/81, Comm'n v. Ireland, 1982 E.C.R. 4005; Joined Cases 67, 68 & 70/85, Van der Kooy BV v. Comm'n*,* 1988 E.C.R. 219; Case C-188/89, Foster v. British Gas, 1990 E.C.R. I-3313; Case C-306/97, Connemara Machine Turf Co. v. Coillte Teoranta, 1998 E.C.R. I-8761; and Case C-325/00, Comm'n v. Germany, 2002 E.C.R. I-9977. See also, by analogy, Case C-196/04, Cadbury Schweppes v. Comm'rs of Inland Revenue, 2006 E.C.R. I-7995, concerning creation of legal structures designed to avoid tax. The "decisive control" test was advocated by Advocate General Van Gerven in his Opinion in *Foster v. British Gas*, 1990 E.C.R. at I-3313

[32] Observations of Pringle, *supra* note 22, at 20–28, 50, para. 3.146.

[33] Observations of Pringle, *supra* note 22, at 52, para. 4.3. Case C-266/03, Comm'n v. Luxembourg, 2005 E.C.R. I-4805. *See also* Case C-433/03, Comm'n v. Germany, 2005 E.C.R. I-6985, paras. 57 & 59; *and* Case 22/70, Comm'n v. Council (European Agreement on Road Transport) [AETR], 1971 E.C.R. 263.

[34] Consolidated Version of the Treaty on the Functioning of the European Union art. 3(1)(c), 5 Sept. 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[35] TFEU art. 2(3). Koen Lenaerts, Piet Van Nuffel, Robert Bray & Nathan Cambien, European Union Law ¶ 7-023 (3d ed. 2011) ("Since all competences outside the areas referred to in Arts 3 and 6 are shared by the Union with the Member States (see TFEU art.4(1)) [the coordination of the economic and employment policies of the Member States] can only be classified as falling within the general category of shared competences.").

[36] *See, e.g.*, Council Regulation (EC) No 1466/97 of 7 July 1997 on the Strengthening of the Surveillance of Budgetary Positions and the Surveillance and Coordination of Economic Policies, 1997 O.J. (L 209) 1, as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011, 2011 O.J. (L 306) 12; Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the Effective Enforcement of Budgetary Surveillance in the Euro Area, 2011 O.J. (L 306) 1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on Enforcement Measures To Correct Excessive Macroeconomic Imbalances in the Euro Area, 2011 O.J. (L 306) 8; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the Prevention and Correction of Macroeconomic Imbalances, 2011 O.J. (L 306) 25. *See also* Council Regulation (EC) No 1467/97 of 7 July 1997 on Speeding up and Clarifying the Implementation of the Excessive Deficit Procedure, 1997 O.J. (L 209) 6, as amended by Council Regulation No 1177/2011 of 8 November 2011, 2011 O.J. (L 306) 33.

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Union.[37] Pringle submitted the nature of monetary and economic competences conferred on the Union was consistent with the fact that the euro constitutes a core element of EMU and an intrinsic and fundamental part of the Union Treaties.

Pringle concluded that having regard to the principle of the division of competences, and the specific competences of the Union in economic and monetary policy, it is anathema that an entity entrusted with stabilizing the euro currency could be established outside the Union legal order and would be able to dictate conditions that will be imposed on Member States in matters so fundamental and integral to the Union as its economic policy and its currency.[38] Moreover, he argued that creating the ESM by means of an international treaty largely removed the institution from the legislative, judicial and democratic safeguards that formed an integral part of the Union legal order.

Fourth, Pringle submitted that the legal framework governing the ESM Treaty was inconsistent with the principle of legal certainty and non-retroactivity. He claimed that it was clear from the wording of the European Council Decision and of the October 2010 European Council Conclusions that the Member States and the European Council considered that the establishment of an institution such as the ESM "required" Treaty change. Moreover, he noted that even the ESM appeared to attribute its foundation to the authorization contained in the Treaty amendment.[39] Yet the Institutions and Member States nevertheless considered it was permissible to launch the ESMT even prior to the approval of the TFEU amendment by all Member States and prior to that amendment entering into force.[40]

Finally, Pringle argued that amendment of the Treaties to permit bailouts ought to have been carried out using the ordinary revision procedure.[41] He asserted that the SRP

[37] TFEU art. 5(1).

[38] Expressed in Oral observations on behalf of Pringle at the hearing of 23 Oct. 2012 (on file with author).

[39] On its own website, the ESM expressly referred to the amendment to the TFEU as its legal basis. *See* European Stability Mechanism, *Frequently Asked Questions About the European Stability Mechanism (ESM)*, EUR. STABILITY MECHANISM (8 Oct. 2012), http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf. In reply to the question "What is the legal basis of the ESM and how was it established?" it is stated that "the European Council agreed that the Treaty on the Functioning of the European Union (TFEU) should be amended in order for a permanent mechanism—the European Stability Mechanism—to be established by the Member States whose currency is the euro to safeguard the financial stability of the euro area as a whole. The amendment (in Article 136 of the Treaty) was adopted by the European Council on 25 March 2011." Although, this assertion was subsequently withdrawn and references to the European Council Decision removed. This revised explanation of the legal basis is available at European Stability Mechanism, *Frequently Asked Questions About the European Stability Mechanism (ESM)*, EUR. STABILITY MECHANISM (12 Nov. 2012), http://www.esm.europa.eu/pdf/FAQ%20ESM%2012112012.pdf.

[40] Observations of Pringle, *supra* note 22, at 18–19, paras. 3.6–3.10.

[41] Observations of Pringle, *supra* note 22, at 54, para. 5.4.

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represents an exception to the general rules governing Treaty amendment and that its scope should be interpreted restrictively. He further argued that the substance of the amendment did not respect substantive limits imposed on the SRP by Article 48(6) TEU.[42]

In their turn, the intervening Institutions and Member States essentially argued that the European Stability Mechanism is a funding facility that is a matter of economic policy and not monetary policy.[43] As a consequence, it was to be qualified as an activity in respect of which competence is shared between the Member States and the Union. The intervening Institutions and Member States further submitted that Member States retained competence over the provision of financial assistance to safeguard the euro and therefore were free to establish a stability mechanism outside the framework of the Union legal order.[44]

The intervening Institutions and Member States also argued that the granting of financial assistance under the ESM was subject to strict conditions, including a repayment obligation and did not amount to the assumption of liability that would be prohibited by Article 125 TFEU.[45] Moreover, it was argued that provisions of EMU that are concerned with the overall objective of establishing and promoting a single currency should not be interpreted in a manner that would threaten its survival.[46] The intervening Institutions and Member States also considered that it was permissible to amend Article 136(3) TFEU by means of the SRP because the relevant European Council Decision did not increase the competences of the Union.[47]

The intervening Institutions and Member States also defended the entitlement to launch the ESM in advance of the entry into force of the amendment to the TFEU. They claimed that the proposed amendment was not in fact necessary and did not constitute a legal

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[42] Observations of Pringle, *supra* note 22, at 55, paras. 5.6, 5.7.

[43] Observations of Ireland, para. 78, in Pringle v. Ireland, *supra* note 22 (on file with author). *See also*, Observations of Greece, para. 24, in Pringle v. Ireland, *supra* note 22 (on file with author); Observations of France, para. 67, in Pringle v. Ireland, *supra* note 22 (on file with author); Observations of Cyprus, para. 52, in Pringle v. Ireland, *supra* note 22 (on file with author); *and* Observations of the Netherlands, paras. 46–56, in Pringle v. Ireland, *supra* note 22 (on file with author).

[44] *See* Observations of Austria, para. 24, in Pringle v. Ireland, *supra* note 22 (on file with author), *and* Observations of the European Commission, para. 78, in Pringle v. Ireland, *supra* note 22 (on file with author).

[45] *See* Observations of Austria, *supra* note 44, para. 27, *and* Observations of the European Commission, *supra* note 44, paras. 69–72.

[46] *See* Observations of Germany, in Pringle v. Ireland, *supra* note 22 (on file with author), *and* Observations of the Netherlands, *supra* note 43, paras. 60–66.

[47] *See, e.g.*, Observations of Germany, *supra* note 46, para. 77, *and* Observations of the European Commission, *supra* note 44, para. 97.

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basis for the establishment of the ESM. They argued that it merely served to clarify and confirm Member States' existing competence to establish the ESM.[48]

In its judgment, the ECJ upheld the entitlement of Member States to participate in the ESMT as well as the validity of the European Council Decision amending Article 136 TFEU.[49] First, approaching the "no bailout" clause enshrined in Article 125 TFEU from a teleological perspective, the Court concluded that it did not prohibit the granting of financial assistance by the ESM.[50] The Court observed that the prohibition on bailouts sought to ensure that Member States remain subject to the logic of the market when they enter into debt so as to ensure that budgetary discipline is maintained.[51] In this regard, the Court noted that financial assistance granted by the ESM was subject to conditions, and the recipient Member State remained liable for its own debts.[52] Article 125 TFEU was therefore considered not to preclude financial assistance to Member States under the ESM, as such assistance did not diminish the incentive of the recipient Member State to conduct a sound budgetary policy.[53] Moreover, the Court clarified that financial assistance could only be granted when indispensible to safeguard the stability of the Euro area as a whole.[54]

The ECJ agreed with the intervening Member States and Institutions that the ESM was not an instrument of monetary policy.[55] The Court noted that the defining feature of monetary policy was the maintenance of price stability. Although acknowledging that the activities of the ESM could affect price stability, the Court held this was not its purpose.[56] The Court observed that the ESM falls within the area of economic policy,[57] which is not an area in which the Union has exclusive competence. Considering that the Union Treaties did not confer any specific power on the Union to establish a stability mechanism such as the ESM Treaty, the Court concluded that it was permissible for the Member

[48] *See, e.g.*, Observations of Germany, *supra* note 46, para. 77, *and* Observations of the European Commission, *supra* note 44, para. 97.

[49] Pringle v. Ireland, *supra* note 22.

[50] *Id.* at paras. 129–47.

[51] *Id.* at para. 136.

[52] *Id.* at paras. 137–38, 41, 43 & 45.

[53] *Id.* at paras. 136–38.

[54] *Id.* at para. 142.

[55] *Id.* at paras. 53–57.

[56] *Id.* at para. 56.

[57] *Id.* at para. 60.

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States to create such a mechanism outside the Union.[58] Even if it may be argued that the Union could have created such a mechanism within the Union pursuant to general powers provided for in Article 352 TFEU, the Court observed that the Union had not exercised such powers and was not obliged to have done so.[59]

Finally, the Court noted that since the Treaties did not at present preclude Member States participating in the ESM, Member States could ratify the Treaty without it being necessary to await the entry into force of the European Council Decision amending Article 136 TFEU.[60]

D. The Impact of the ESM Treaty on European Democracy

It is suggested that even if the legal framework governing the ESM has been held to be compatible with obligations enshrined in the EU Treaties, the process by which the Member States and the European Council established the European stability mechanism may be characterized as a circumvention of Union law which is liable to have an adverse effect on the integrity of the Union legal order and to the quality of European Democracy.

This claim rests on three principal arguments. First, it is normatively incoherent to use intergovernmental treaties to side-step restrictions and obligations contained in the Union Treaties. Second, it is conceptually incoherent to regulate matters of fundamental and intrinsic concern to the EU Treaties outside the Union legal order. Third, the establishment and operation of an important institution outside the constitutional framework of the Union and beyond the reach of its citizens (and the rights they are guaranteed under the Charter) is inconsistent with the principle of democratic governance. Each of these arguments will be considered in turn.

I. Normative Incoherence in Establishing the ESM Outside the Union Legal Order

The establishment and operation of the ESM outside the Union legal order represents a challenge to the scope and authority of binding EU Treaty norms.

Article 123 TFEU expressly prohibits the European Central Bank or the central banks of other Member States from granting overdraft facilities or any other type of credit facility to public authorities and bodies of the Union and of Member States from purchasing directly from them their debt instruments.[61] Yet the Member States have established, outside the

[58] *Id.* at paras. 64–68.

[59] *Id.* at para. 67.

[60] *Id.* at paras. 183–85.

[61] *Id.* at para. 123.

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framework of the Union Treaties, a new autonomous institution, the essential function of which is to provide loans to Member States and to purchase their debt instruments on the primary and secondary markets. The ECJ confirmed that as Article 123 TFEU is addressed specifically to the ECB and to the central banks of the Member States, it does not prohibit such assistance by a group of Member States.[62] Nevertheless, even if not prohibited, it is difficult to escape the conclusion that the establishment of a financial institution outside the Union that operates in liaison with and parallel to the ECB and is entrusted with carrying out *precisely* the activities that the ECB is prohibited from carrying out, constitutes a circumvention of the spirit of the prohibition contained in Article 123 TFEU.

Equally, the so-called "no bailout" clause enshrined in Article 125 TFEU has now been interpreted to permit a €700 billion bailout fund in circumstances where prohibition on bailouts was found not in secondary legislation, but enshrined in a provision of primary Treaty law. It is clear that the inclusion of the "no bailout" clause in the Maastricht Treaty was intended to provide a clear signal to the financial markets that "*neither the Community nor the other Member States stand behind a Member State's debts*."[63] But this is precisely what the ESM will do.

In its judgment in *Pringle* the ECJ held that the Member States' obligation under the ESM to grant financial assistance or to cover Member States failure to make contributions into the ESM Fund [64] does not constitute a *guarantee* or even an *assumption of commitments* prohibited by Article 125 TFEU essentially because the primary debtor remains liable for its debts and that financial assistance was subject to conditions.[65] However, such a position implies the premise that a defining characteristic of a *guarantee* is that it absolves a primary debtor of its debtor status. However, the creation of a guarantee does not necessarily or even ordinarily affect the primary liability of a debtor.[66] The defining feature of a guarantee is that it provides creditors with an alternative source of redress in the event of a debtor's default. A guarantor is under an obligation to assume the financial commitments of a debtor's debt regardless of the fact that the initial and primary duty of

[62] *Id.* at paras. 123–28.

[63] See records of the Monetary Committee, working on the preparation of the Maastricht Treaty, cited by the Commission.

[64] Pringle v. Ireland, *supra* note 22, paras. 144–45, referring to obligations under ESMT, *supra* note 1, at art. 25(2).

[65] Pringle v. Ireland, *supra* note 22, paras. 138, 45.

[66] *See, e.g.*, GERALDINE MARY ANDREWS & RICHARD MILLETT, LAW OF GUARANTEES (6th ed. 2012). At paragraph 1-005, the authors observe that "The essential distinguishing feature of a contract of guarantee is that the liability of the guarantor is always ancillary, or secondary, to that of the principal, who remains primarily liable to the creditor." At paragraph 1-001, the authors define suretyship as "[T]he generic term given to contracts by which one person (the surety) agrees to answer for some existing or future liability of another (the principal) to a third person (the creditor), and by which the surety's liability **is in addition to, and not in substitution for**, that of the principal." (emphasis added).

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payment remains with the debtor. In other words, the fact that a primary debtor is legally liable for a debt does not mean that the guarantor called upon to pay that debt is not assuming the debtor's financial burden.

Moreover, in practice, the provision of financial assistance on the scale envisaged by the ESMT will always be subject to conditions. It is practically and politically inconceivable that Member States would directly and fully assume such financial burden without imposing any conditions on the recipient Member State. To suggest that Article 125 TFEU was only intended to prohibit unconditional indemnities that fully absolve a debtor Member State of its liability for debts would significantly restrict its scope of application. Perhaps it was for this reason that the Court was careful to limit the permissibility of providing financial assistance to circumstances in which it is indispensable for the safeguarding of the financial stability of the euro as a whole.[67] Yet, even this limitation finds no basis in the text of Article 125 TFEU. That provision does not in any way qualify the prohibition on granting financial assistance depending on the particular purpose of such financial assistance.

In the context of the *Pringle* case, a number of interveners argued that the Union Treaty provisions and prohibitions on financial assistance laid down in Articles 122 and 125 TFEU referred to the Union and the Member States alone and not to independent entities they might choose to create.[68] Therefore, even if Article 125 TFEU prohibited the granting of financial assistance for the purposes of safeguarding the euro, such prohibition would not in any event extend to the ESM, which, as an international organization, possessed distinct legal personality and was not subject to Union law.[69]

Ultimately, the ECJ did not have to address this particular argument because it found that Article 125 TFEU did not prohibit the kind of financial assistance envisaged by the permanent stability mechanism. Nevertheless, the nature and tenor of such arguments lend support to the view that the establishment of the ESM outside the Union legal order was considered to facilitate the circumvention of the prohibition of bailouts in the Union legal order. This interpretation of Union law would be inconsistent with the principle of supremacy of Union law and incompatible with the authority of the EU legal order.[70] Indeed, the ECJ emphasized that, in operating outside the Union, the Member States were not performing functions that were prohibited inside the Union. The Court noted that,

[67] Pringle v. Ireland, *supra* note 22, para. 136.

[68] Observations of Cyprus, Ireland & Austria, *supra* note 27.

[69] *Id.*

[70] See, for example, the approach of the Court of Justice of the European Union (ECJ) in Amsterdam Bulb v. Produktschap voor Siergewassen, *supra* note 30, at para. 35; Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal, 1978 E.C.R. I-629, para. 14; and Case C-135/08, Rottman v. Freistaat Bayern, 2010 E.C.R. I-1449, para. 41.

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even when acting in areas of reserved competence, Member States must ensure that these competences are exercised in conformity with Union law.[71]

Finally, proceeding outside the framework of the Union Treaties facilitated the circumvention of the requirement to amend the TFEU using the ordinary revision procedure, which would have entailed the establishment of a Convention and the participation of representatives of national parliaments. Article 48(6) TEU restricts the use of the SRP to amendments that do not increase the competence of the Union. An amendment authorizing the *Union* to provide bailouts would, however, have entailed an increase in the competences of the Union, since no such entitlement presently exists in the Union Treaties, and consequently the SRP could not have been used.[72]

It is submitted that the decision to establish the ESM outside the EU legal order was intended to permit Member States to circumvent provisions prohibiting or restricting the granting of financial assistance by Member States or by the ECB. In addition, it facilitated Member States to side-step the requirement to amend the Union Treaties using the ordinary revision procedure. Taken cumulatively, the use of international agreements to bypass or circumvent provisions of Union law may be regarded as challenging the normative coherence of the Union legal order.

II. Conceptual Incoherence in Establishing the ESM Outside the Union Legal Order

The Union's single currency is at the core of EU economic and monetary Union and forms a fundamental and intrinsic part of the Union legal order. Article 3(4) TEU expressly entrusts the Union with establishing an economic and monetary union with the euro as its currency. To this end, the Treaty confers the Union with exclusive competence in monetary policy for eurozone Member States.[73] While economic policy is a field of shared competence, Member States are required to exercise their residual competence with a view to achieving the objectives of the Union, which include EMU.[74] Article 5(1) TFEU expressly requires that Member States coordinate their economic policies "within the Union." It is clear from Articles 119 TFEU that the activities of both the Union and Member States include the adoption of an economic policy that is based on the close coordination of Member States' economic policies, as well as on the internal market and on defined common objectives.

[71] Pringle v. Ireland, *supra* note 22, paras. 69, 124, 126.

[72] It is noteworthy that this point was also identified by the ECJ at the hearing of the *Pringle* case on 23 October 2012. The Court inquired whether the establishment of the ESM outside the Union legal order could not reasonably be regarded as a circumvention of the requirement to amend the Treaties using an ordinary revision procedure.

[73] Treaty on European Union, 7 Feb. 1992, 1992 O.J. (C 191) 1, art. 3(1)(c) [hereinafter TEU].

[74] TFEU art. 120, read in combination with TEU art. 3(4).

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Article 119(2) TFEU clarifies that these activities also include the single currency and the definition and conduct of a single monetary policy and exchange-rate policy. Article 136(1) TFEU confers upon the Union the competence to adopt measures specific to the Member States the currency of which is the euro in order to ensure the proper functioning of economic and monetary Union. The Union has made extensive use of the competence afforded to it in adopting a series of measures designed to strengthen economic governance of the Union.[75]

It is clear from these provisions that economic and monetary Union and the effective functioning of the eurozone is a matter falling within the scope of Union law. It is equally clear that, while the ESM may provide financial assistance to specific Member States, it is essentially concerned with preserving the stability of the Union's single currency and the euro area as whole.[76] Given the fundamental and intrinsic place of economic and monetary union within the EU treaties, it is conceptually incoherent for a mechanism that is intimately concerned with the preservation and functioning of that union to be established and to operate outside the Union legal order.

In *Pringle* the ECJ observed that the Union Treaties do not confer any specific power on the Union to establish a funding mechanism as envisaged by the European Council Decision. Indeed, the absence of such an express power is to be expected in circumstances where the provision of financial assistance had been expressly prohibited by Article 125 TFEU. However, the mere fact that a specific legal basis for establishing a funding facility does not exist in Union law, does not mean that it is appropriate for such a mechanism to be established outside the EU legal order once the mechanism relates to a matter that is of intimate concern to the Union Treaties and where that mechanism could have been established using more general powers conferred on the Union. It will be recalled that the European Parliament expressed regret that the European Council had not explored all the possibilities contained in the Treaties for establishing a permanent stability mechanism within the Union legal order.[77] Having regard to the present Union competences concerning economic and monetary union[78] and monetary policy for eurozone Member States,[79] the Parliament considered it would have been appropriate to make use of the powers conferred on the Council in Article 136 TFEU, or, in the

[75] *See, e.g.*, Council Regulation (EC) No 1466/97, *supra* note 36, as amended by Regulation (EU) No 1175/2011, *supra* note 36; Regulation (EU) No 1173/2011, *supra* note 36; Regulation (EU) No 1174/2011, *supra* note 36; *and* Regulation (EU) No 1176/2011, *supra* note 36. *See also* Council Regulation (EC) No 1467/97, *supra* note 36, as amended by Council Regulation No 1177/2011, *supra* note 36.

[76] Pringle v. Ireland, *supra* note 22, para. 136; ESMT, *supra* note 1, at art. 3.

[77] *See* Resolution of the European Parliament of 23 March 2011, *supra* note 24.

[78] TEU art. 3(4).

[79] TFEU art. 3(1)(c).

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alternative, to have recourse to Article 352 TFEU in conjunction with Articles 133 and 136 TFEU. In its Opinion the ECB equally supported recourse to the "Union method."

The approach advocated by the European Parliament would have been more consistent with the competences of the Union in the field of economic and monetary policy. It is well established that in areas of shared competence, Member States may only exercise their competence to the extent that the Union has not exercised its competences.[80] Given that Member States conferred competence upon the Union to ensure the proper functioning of economic and monetary Union, and that such competence has been exercised, the Union framework could have and ought to have been used to safeguard the stability of the eurozone area. Such an approach would moreover have ensured the incorporation of legislative, judicial and democratic safeguards that form part of the Union legal order.

III. Implications of Establishing the ESM Outside the Union Legal Order on Democracy and the Rule of Law

The Union is a highly complex political entity that mediates and balances numerous and varying interests of different Institutions, of the Member States as well of different civil and political groupings within the Member States. Dawson and De Witte have argued that the Union's response to the euro-crisis has significantly altered the Constitutional balance upon which the Union's stability is premised.[81] These commentators note that, in the context of the Union legal order, the doctrine of institutional balance ensures that the generation of legal norms takes account of three distinct sets of interest: Individual EU citizens (represented by the European Parliament); sovereign States (represented by the Council); and the supra-national interests (represented by the Commission). They further observe that the legislative process offers multiple forums through which the citizen's interests can be articulated ensuring that citizens have authorship over the norms that bind them. Dawson and De Witte conclude that the balance between the different Union institutions' decisions and their different prerogatives within the decision-making process ultimately ensures the legitimacy of the law-making process and serves to stabilize the Union's role as a supra-national setting for the generation of binding norms.[82]

The establishment of the ESM by way of an intergovernmental treaty outside the framework of the Union Treaties means, however, that the activities of the ESM are no longer subject to the legislative and democratic safeguards that are inherent in the Union legal order.

[80] TFEU art. 2(2).

[81] Mark Dawson & Floris de Witte, *Constitutional Balance in the EU After the Euro-crisis*, 76 MOD. L. REV. (forthcoming 2013).

[82] *Id.* at 10–11.

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First, as mentioned above, the creation of the ESM institution as an intergovernmental treaty has side-stepped the requirement for Member States to amend the Union Treaties using the ordinary revision procedure. Instead, it was possible for the European Council to introduce an amendment through the adoption of a Decision in accordance with the simplified revision procedure provided for under Article 48(6) TEU. It may be perfectly comprehensible for Member States in times of crisis to use as simple and swift a Treaty amendment procedure as possible. However, the SRP is also a less democratic procedure. It removes the requirement for a Convention and, in particular, for the participation of representatives of national parliaments. In relation to the Treaty on Stability, Co-ordination and Governance in the Economic and Monetary Union, Craig has noted that:

> [w]hatever one believes about its desirability or not, this new treaty does raise an issue of principle, which you can call a rule-of-law issue of principle, that is concerned with whether we should bear with equanimity the idea [of decision making rules] being circumvented by a treaty outside the fabric of the Lisbon Treaty in circumstances where the rules as to how change should be undertaken within the Lisbon Treaty are not capable of being met, particularly given that the SCG [Stability, Co-ordination and Governance] Treaty can only work through the participation of the EU institutions in the way that is written into that treaty.[83]

Arguably similar considerations arise in connection with the use of an inter-governmental treaty that circumvents the requirement for an ordinary amendment of the Union Treaties.

Second, the form of stability mechanism that has been established by the Member States operates beyond the Union legal order and is largely unaccountable to its citizens. Pursuant to Article 32(3) of the ESMT, the ESM enjoys "*immunity from every form of judicial process*" except to the extent that the ESM expressly waives its immunity.[84] Moreover, as the ESM is not a Union body, it is not subject to the EU Treaties, the Charter of Fundamental Rights, or General principles of Union law. As the ECJ has confirmed, the

[83] 7 Feb. 2012, PARL. DEB., H.C. (2012) 1817-i (U.K.), *available at* http://www.publications.parliament.uk/pa/cm201012/cmselect/cmeuleg/uc1817-i/uc181701.htm (Oral Evidence of Professor Paul Craig before the European Scrutiny Committee of the House of Commons; see Answer to Question 12).

[84] ESMT, *supra* note 1, at art. 32(3).

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Charter only applies in the field of Union law and is not binding on the ESM Institution.[85] At the same time, the activities of the ESM and, in particular, the "strict conditions" attaching to its grants of financial assistance, may well impact upon economic and social rights protected by the Charter. For example, Title IV of the Charter enumerates rights concerning fair and just working conditions, the entitlement to social security and social assistance, and access to health care. Economic conditions attaching to the ESM's financial assistance have the potential to directly and personally impact on citizens' social rights.[86] However, the ESM, in the performance of its functions, will not be subject to review against the provisions of the Charter. The ESM is set to operate outside the reach of the democratic and constitutional limitations that form part of the Union legal order.

Third, the accumulation of contradictions with and circumventions of the Union legal order gives the impression that, taken as a whole, the legal framework governing the ESM avoids a number of prohibitions and obligations set out in law. The extent of the circumvention becomes clear when one analyzes the arguments raised in support of the legal framework governing the ESMT in the context of the challenge in *Pringle*. Defenders of the ESMT maintained that Article 125 TFEU, referred to as the "no bailout" clause, did not prohibit bailouts;[87] that the ESM "bailout" fund ought not to be regarded as a "bail-out fund."[88] It was suggested that the ESM is immune from EU law prohibitions as it operates under international law and is an independent entity,[89] even though it is entirely controlled by the Member States. It was simultaneously argued that the ESM is *not* an independent entity so that disputes with the ESM should be regarded as disputes between Member

[85] Pringle v. Ireland, *supra* note 22, paras. 178–82.

[86] For example, see cases giving rise to a preliminary reference in Case C-434/11, Corpul Naţional al Poliţiştilor v. Ministerul Administraţiei şi Internelor (MAI) (14 Dec. 2011 Order), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62011CO0434:EN:NOT, and Case C-134/12, MAI v. Corpul Naţional al Poliţiştilor—Biroul Executiv Central (14 May 2012 Order), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CO0134:EN:NOT. See cases giving rise to a reference in Case C-128/12, Sindicato dos Bancários do Norte v. BPN—Banco Português de Negócios, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CN0128:EN:NOT (pending before the ECJ), and Case C-264/12, Sindicato Nacional dos Profissionais de Seguros e Afins v. Fidelidade Mundial—Companhia de Seguros, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62012CN0264:EN:NOT (pending before this Court).

[87] Observations of Germany, *supra* note 46, *and* Observations of the Netherlands, *supra* note 43. These Member States argued that the prohibition of Article 125 TFEU should be read teleologically in the context of the ongoing financial crisis. Germany argued that the prohibition on bailouts should be read restrictively "*in certain exceptional cases which were not foreseeable when the provision was adopted*."

[88] Observations of Ireland, *supra* note 43, *and* Observations of France, *supra* note 43. France argued that ESM is not "a bail-out" fund precluded by Article 125 TFEU because financial assistance is subject to repayment and conditionality. It was submitted on behalf of Mr. Pringle that a conditional bailout remains a bailout.

[89] Observations of Cyprus, Ireland & Austria, *supra* note 27.

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States relating to the subject matter of the Union Treaties,[90] affording the ECJ jurisdiction to rule on disputes under Article 273 TFEU. It was argued that the ESM is not concerned with monetary policy—although its task is to save the euro;[91] that the ESM falls outside the economic competence reserved to the Union—even though it is directly concerned with coordinating financial assistance to support the Union's single currency;[92] that the establishment of a bailout fund *requires* a Treaty amendment[93]—yet the ESM may operate before the amendment takes effect. Arguably the accumulation of such contradictions and the circumvention of prohibitions contained in the Union Treaties represent a challenge to the Union's fundamental commitment to respect for the rule of law as enshrined in Article 2 TEU.

E. Conclusion

When attention is devoted to avoiding one particular hazard, it can be all too easy to fall into another. In seeking to avoid restrictions on the provision of financial assistance or the requirement to amend the Treaties using the ordinary revision procedure, the Member States and Institutions proceeded to adopt measures that may be considered to impact adversely on the quality of European democracy.

The adoption of measures that are inconsistent with or circumvent prohibitions or obligations laid down in the Union Treaties gives the impression that legal principles and provisions, which are negotiated and adopted by democratically mandated representatives of the Member States, may be subordinated and ancillary to considerations of a political nature. This writer subscribes to the view that selective or inconsistent application of Union law risks undermining the integrity of the legal reasoning within the Union legal order.[94]

The establishment of a body that is fundamentally and intrinsically concerned with the Union's single currency outside the Union Treaties is not easily reconcilable with the

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[90] Observations of the Netherlands, *supra* note 43. That government states: "*Disputes concerning the interpretation and application of the ESM Treaty are evidently disputes which relate to the subject matter of the Treaties*."

[91] Observations of Belgium, in Pringle v. Ireland, *supra* note 22 (on file with author); Observations of Germany, *supra* note 46; Observations of the Netherlands, *supra* note 43; Observations of Ireland, *supra* note 43; Observations of Greece, *supra* note 43; Observations of France, *supra* note 43; Observations of Cyprus, *supra* note 43; *and* Observations of Austria, *supra* note 44.

[92] Observations of Germany, *supra* note 46; *and* Observations of the European Commission, *supra* note 44.

[93] *See* Decision 2011/199/EU, *supra* note 11, at recital 2.

[94] Paul Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, (2012) 37 EUR. L. REV. 231 (2012).

https://doi.org/10.1017/S2071832200001759 Published online by Cambridge University Press

central place of economic and monetary union within the Union legal order. The creation of a permanent stability mechanism that is liable to have a direct impact on the lives of Union citizens and yet lies outside and beyond the reach of the Union legal order, and is subject neither to general principles nor the rights enshrined in the Charter of fundamental rights, may be regarded as undermining of the principle of effective judicial protection and democratic accountability.

It has been argued that the Union is not so much defined by a common people or *demos* as by a shared commitment to common values, particularly democracy and the rule of law.[95] Even in exceptional circumstances, the adoption of permanent measures that are inconsistent with such values risks undermining the integrity of the Union legal order as a whole.

[95] See for example the characterization of the Union legal order by Professor Walter Van Gerven in WALTER VAN GERVEN, THE EUROPEAN UNION: A POLITY OF STATES AND PEOPLES (2005).

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