Needs must when the devil drives

The rule of law and the Economic and Monetary Union in times of financial crisis

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I. Economic and Monetary Union ruled by law

1. Rule of law as the european mean of existence

The European Union is a formation of law,[1] governed by the law and with the law as a benchmark for the establishment and exercise of public power. Being a legal community, the European Union existentially depends on legal certainty and confidence.[2] Constitutional law serves to stabilize and order the political community. It gives the political process an institutional body, orientation and allocates responsibility. Beyond the binding of sovereignty, the idea of the constitutional "rule of law" is also in the effective control of constitutional law. The normative program of the Union – as a *legal* order with a normative control claim – wants to give a regulatory framework to the social and political dynamics in advance, which also processes the event of a crisis in the law. The European Union seeks to realize the idea of justice by replacing violence and political pressure in the relations between the Member States themselves by the rule of law and perpetuates the expectations of the peoples of Europe in the political integration pro-

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1 Walter *Hallstein, Die Europäische Gemeinschaft* (5th edn 1979) p. 53.

2 Walter *Hallstein, Die Europäische Gemeinschaft* (5th edn 1979) p. 49; vgl. auch Michael Stolleis, *Europa als Rechtsgemeinschaft*, in Stefan Kadelbach (ed.), *Europa als kulturelle Idee* (2010) p. 71; Manfred Zuleeg, Die Europäische Gemeinschaft als Rechtsgemeinschaft [1994] Neue Juristische Wochenschrift, p. 545 et seqq.; Case 294/83 *Les Verts v Parlament* [1994] paras 23 et seqq.

cess consistent.[3] For this purpose, the necessary rules are normative in a way, that they give a binding action to the obligated parties and that they cannot be determined from the facticity of the situation, but to surrender to an abstract commandment what ought to be. A Constitution requires normative power for its actual validity, i.e. their ability to act limiting and regulating in the real social and political life as the essential condition for the community of people and countries in Europe.[4] In this respect, the chartered law of the European Union is not the expression of strictly positivist bond sovereign powers.[5] Within the democratic constitutional state the common good is not found, but formulated by the representative institutions, which have to discuss divergent ideals and ideas in a complex interplay of processes and control mechanisms. Only within a normative framework, that defines spaces and topics which are accessible to a political action, the peoples and states of Europe obtain the necessary security to engage in an exchange with others.[6]

To absorb the conditional nature of economic and social development and political will and to process them, the Union law provides both the system-integrated capabilities of the legislative system and the potentially changing treaty modification.[7] In its constitutional "core function" to limit politics and policies, the EU-law requires a special stability, as it is embodied in the European Unions consensual contract amendment process to the regulatory framework of the EU.[8] The primary law is written consensus with normative power over the content, scope and means of action at a European level that is not impressed by competing demands and that resists in case of a conflict. The rules of the possible contract modifications guarantee that this

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3 Frank Schorkopf, *Gestaltung mit Recht* [2011] Archiv des öffentlichen Rechts 136, p. 323, 324.

4 Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* [2th edn, 1995] p. 16.

5 Frank Schorkopf, *Gestaltung mit Recht* [2011] Archiv des öffentlichen Rechts 136, p. 323, 326.

6 Frank Schorkopf, *Gestaltung mit Recht* [2011] Archiv des öffentlichen Rechts 136, p. 323, 326.

7 Niklas Luhmann, Recht der Gesellschaft [1995] p. 429.

8 Frank Schorkopf, *Gestaltung mit Recht* [2011] Archiv des öffentlichen Rechts 136, p. 323, 326.

written agreement may be amended only in a strictly formalized procedure and unanimously. The confidence in this formalized process and unanimity allows national parliaments in the first place, to take over the responsibility for the negotiated treaty through ratification. As long as the law is not amended or repealed, also economic pressures neither affect the validity and effectiveness of the applicable normative standard nor the normative compliance and control claim.[9]

2. The rule of law of the Economic and Monetary Union

This fixedness applies particularly for the financial constitution of the economic and monetary union, oscillating between autonomy and solidarity. Based on the objective of Art. 3 IV TEU ("The Union shall establish an economic and monetary union whose currency is the euro"), Union law unfolds a normative program. Primary law expresses the terms of the monetary policy consensus of Member States to subdue their economic and monetary policy under common bindings and to ensure price stability together. Itself based on the political-economic assessments, the legal framework of economic and monetary union will withdraw economic solutions the policy dispute by codifying, set limits to the political leeway in economic decision, transform fault in breach of the law and achieve reliability and economic success.[10] The law consented to the economic and monetary union states a common framework for the task of the Member States' financial constitutions to coordinate public revenues and spending and to bring public financial services on the one hand and the state's financial capacity on the other hand into balance.[11]

For this purpose, the Community established by "Maastricht" 1992 an asymmetric economic and monetary union with a coordinated, state-controlled budgetary and economic policies and a supranational monetary policy. For monetary policy, the Euro states submit to the

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9 Cf. BVerfGE 50, 290 [337]; BVerfGE 4, 7 [17 et seqq.].

10 Gert Nicolaysen, *Rechtliche Bindung einer Stabilitätspolitik*, in Lerke Osterloh, Karsten Schmidt und Hermann Weber (eds.), *Staat, Wirtschaft, Finanzverfassung. Festschrift für Peter Selmer* (2004) p. 850.

11 Paul Kirchhof, *Staatliche Einnahmen*, in Paul Kirchhof and Josef Isensee, *Handbuch des Staatsrechts der Bundesrepublik Deutschland IV*, § 88, para 293.

substantive determination of the common law. The establishment of the monetary union implies the transfer of the exclusive competence for monetary and exchange rate policy of the participating Member States to the Union, and the detachment of the Member States' currencies by the common euro currency.[12] With the objectives of maintaining stable prices, sound public finances and monetary conditions and a sustainable and affordable balance of payments, the monetary policy lies in the hands of the European System of Central Banks and the European Central Bank in particular.

The economic, budgetary and fiscal policies remained within the competence of the Member States.[13] The Member States' fiscal and economic policies are committed to the objectives of Art. 120, 121 TFEU and subjected to preventive (Art. 121 TFEU) and corrective (Art. 126 TFEU) mechanism for the coordination and monitoring of economic policies and safeguard the financial and economic stability. Even if the economic policy as a "matter of common interest" refers the matter to a legal regime,[14] based upon a common understanding on basic principles with a substantive scale function (Art. 121 (3) TFEU): This coordination of economic policy requires Member States competencies and the abandonment of an exhaustive determination. From the sole responsibility for the budget follows the sole responsibility for the amount of credit on revenue side and the cost of debt financing. The "no bail-out" rule in Art. 125 TFEU is not only to rule out "moral hazard" in fiscal policy, but also to ensure an individual security alarm systems through the member states sole position in the capital markets. This preventive security concept with state-individual risk premiums together with a highly influential Stability and Growth Pact serves the purpose to prevent all States to compromise their payment and borrowing capacity.

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12 Art. 3 (1) lit. c TFEU

13 Art. 119 (3) TFEU.

14 Art. 119 (1) , 120, 121 TFEU; vgl. zu den Grundzügen der Wirtschaftspolitik der Mitgliedstaaten und der Gemeinschaft die Empfehlung des Rates v. 12.07.2005 (2005-2008), ABl. 2005 Nr. L 205/28; die Entscheidung des Rates v. 12.7.2005, ABl. 2005 Nr. L 205/21; die Empfehlung des Rates v. 14.05.2008, ABl. 2008 Nr. L 137/13; die Empfehlung des Rates v. 27.6.2009 ABl. 2009 Nr. L 183/1.

Despite these preventive protections, the Economic and Monetary Unions asymmetry bears of the risk that unstable financial and budgetary performance of the Member States impaires the monetary policy of the European Central Bank and the functioning of the monetary union as a whole. EU law does not contain provisions for the case that the corrective function, which was attributed to the markets, unfolds not as expected over the years and so crisis-ridden failures occur. Neither an aid regime, nor the transition in an insolvency proceeding is provided. The treaties do not govern the handling of the crisis but expelled the crisis origin due to false confidence in the normative strength of the common rules. At the time of signing the Maastricht-Treaty, the fear that the efforts to achieve stability will fail, which could then result in further concessions in terms of monetary policy on the part of the Member States, was just too intangible.[15]

Despite an imperfect financial confederate constitution and because of the chances of spill-over effects for the further integration: the Member States of Maastricht took the peril of establishing the European Monetary Union is an object of the Maastricht Treaty. Germany concluded that treaty with the other Member States, set it on a constitutional basis in Art. 23 I Basic Law and declared it applicable in Germany in the Assenting Act pursuant to Art. 23 I, III Basic Law. Establishing the European Monetary Union as an object of the Maastricht Treaty. Confidence in the strict normativity of law the Economic and Monetary Union, only amendable in a strictly formalized process by all Member States, and in a stable community that serves the primary objective of price stability through the independent institutional European System of Central Banks, safeguarded by the independent European Central Bank, convergence and deficit control, financial responsibility and non-liability for foreign debt, that precludes a European "debt and liabilities union" were constitutively for the German approval. The consented legal framework of the Economic and Monetary Union with its underlying stability requirements provides the normative limit of Member State commitment *ex constitutione* – and with the national constitutional identity as the outermost limit.[16] As the

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15 BVerfGE 89, 155 [189].

16 Art. 23 (1) 3 iVm Art. 79 (3) GG, cf. BVerfGE 89, 155 [186].

Bundesverfassungsgericht stated, finally the necessity of strict stability requirements results from objective of guaranteeing monetary property as the privately disposable economic basis of individual freedom:

"If the German mark is replaced by another currency, and so the sovereign guarantor of trust in redemption changed, then this changes the legal framework that guarantees the freedom objectified in money in the sphere of property rights. Trust in redemption will in the future no longer be based on the nationally constituted legal community of the Federal Republic of Germany, but borne by another legal community and the economic power that underpins it."[17]

With regard to the necessary democratic legitimation, reactions to economic problems of a Member State because of the shortcomings of the consented sanctions regime and the exclusion of liability must move within the legal framework borne by the will of Member States.[18] The same applies to the decision on the concrete shape of the Monetary Union on the basis of the Maastricht Treaty, which establishes a Monetary Union without simultaneous or immediately ensuing political union:

"If it becomes clear that the desired monetary union cannot actually be achieved without political union (which is not desired at present), then a new will have to be made as to how to proceed. […] indeed, in order to establish a political union, the Treaty would have to be amended, and such amendment cannot be effected without a decision being made by the governmental institutions of the nation States, including the German Bundestag. Within the limits of what is permissible under constitutional law, political responsibility must be assumed in turn for this decision." [19]

II. Flouting of European fiscal rules

1. Failure of the force of law

The development of the economic and monetary union – a story in subjunctive: If the Member States have complied with the legal debt brakes; if the financial autonomy would have been stressed; if each

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17 BVerfGE 97, 350 [372].

18 Bundestag printed papers 12/3895, S. 25 f.; Bundestag printed papers 12/39076; BVerfGE 89, 155 [200].

19 BVerfGE 89, 155 [207].

state would have experienced by direct credit requests on the market that poor creditworthiness causes high interest rates – however, expectations regarding the constitution of the European Monetary Union was disappointed.

What has become apparent by the political failure of the excessive deficit procedure against France and Germany[20] as well as numerous, but inconsequential excessive deficit procedures to misconducting member states[21] became obvious due to the European debt crisis and – "necessary without alternative" – the creation of reactive European safety nets. The method of financial surveillance of Member States' budgets, based in the Maastricht Treaty[22], concretized 1997[23] and "reformed" 2005[24] under secondary legislation, were found to be structurally deficient.

In spring 2010, the improbable fear of failure of the prevention and sanctioning mechanisms to ensure fiscal discipline in the euro countries with the consequence of further fiscal concessions became reality. Against this background, both the policy decisions of an asymmetric architecture of Economic and Monetary Union, for entry into the monetary union and the handling of the convergence criteria and the politicized context of the monitoring of rules reveal limits of the Economic and Monetary Unions rule of law. In its relative statics the

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20 ECJ Case C-27/04 Commission v Council [2004] para 13.

21 http://ec.europa.eu/economy_finance/economic_governance/sgp/deficit/index_en.htm

22 Protocol (Nr. 12) of 7.2.1992 on the excessive deficit procedure [1992] OJ C 191/84.

23 Resolution of the European Council on the Stability and Growth Pact Amsterdam, 17 June 1997, OJ *C* 236/1.; 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] OJ L 209/1; Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure [1997] OJ L 209/6.

24 Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2005] OJ L 174/1; Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2005] OJ L 174/5.

normativity of Union law is facing the challenge to be able to respond flexibly and effectively to occurring frictions without an appropriate programming. In such a situation, the antinomy between normative steering and commitment of Union law and political will, driven by economic needs fractures. Triggered by the European debt crisis, the conflict between constitutional constraint and democratic freedom puts European legal system on the test.

2. Mechanisms of emergency rescue

Caught between the necessary responses to increasing economic constraints and limitations of a legal system with normative claim of control and limitation, the member states resort to international cooperation as a form of action which was, since the treaty reforms of the 90s, frowned upon as a second-best solution compared with a fully communitization.

Spring 2010, Greece, as a Member State of the euro currency area, applied for financial aid from the European Union and the International Monetary Fund (IMF).[25] Thereupon, the Member States of the euro currency area granted Greece coordinated bilateral financial aid.[26] The arrangements between the states of the Eurogroup with Greece and between themselves consist of two agreements. On the one hand there is the Loan Facility Agreement between the states of the euro area and Greece, which essentially establishes the loan conditions and requirements for granting the loan, and on the other hand the Intercreditor Agreement, an agreement between the Member States of the euro area which lays down the rights and duties of the Member States between themselves.[27]

Following this, the European Council and the Economic and Financial Affairs Council agreed to create a European stabilisation

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25 See Joint statement by European Commission, European Central Bank and Presidency of the Eurogroup on Greece, IP/10/446, 23 April 2010.

26 Cp. for the necessary measures on a national level the *"Act on the Assumption of Guarantees to Preserve the Solvency of the Hellenic Republic Necessary for Financial Stability in the Monetary Union"* (Act on Financial Stability within the European Union) of 7 May 2010 (Federal Law Gazette I p. 537).

27 See Greece: Memorandum of Understanding on Specific Economic Policy Conditionality, 2 May 2010.

mechanism ("euro rescue package"), which was to comprise two components: the European Financial Stabilisation Mechanism, based on an EU regulation[28], and the European Financial Stability Facility (EFSF), a special purpose vehicle based on an inter-state agreement between the Member States of the euro currency area. In addition, the European Financial Stability Facility, a joint-stock company incorporated in Luxembourg, was founded. Its purpose is to issue bonds and to grant loans and credit lines to cover the financing requirements, subject to conditions, of Member States of the euro currency area which are in financial difficulties. The guarantees for the special purpose vehicle are allocated among the Member States of the euro currency area proportionately according to their share of the capital of the European Central Bank.[29]

3. European political existentialism

Driven by the alleged lack of alternatives *("If the euro fails, then Europe fails"*[30]*)*, the financial and sovereign debt crisis has pushed Member States to a temporary dispensation of their obligation to adhere to the rule of law. Considering the political unimaginability of a euro member state's bankruptcy, the normative force of the newly-created facts represents an implicit change in the constitution of the economic and monetary union. The rescue strategies – even if apostrophized as a "non alternative" – can be justified only as a temporary contracting-breakthrough to save the euro system as a whole. They remind one to a European political existentialism, in which the "action" is the political mean to turn the abnormal situation into a normal situation, in which norms can apply. If the conviction solidifies that

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[28] Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1.

[29] Cp. for the necessary measures on a national level the *"Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism"* (Euro Stabilisation Mechanism Act) of 22 May 2010 (Federal Law Gazette I p. 627), amended in July 2011 by the *"Act to Amend the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism"* of 9 October 2011 (Federal Law Gazette I p. 1992)

[30] Government declaration by Federal Chancellor Angela Merkel of 5. May 2010, German Bundestag, Minutes of plenary proceedings 17/39, p. 3722.

the current acquis of crisis management is inadequate, a conflict arises between the normativity of law, political pragmatism and the facticity of action that puts the regulatory framework as such in question. Contesting the legal orders rules of law itself, the formulation of extra-legal emergency rules attracts the no man's land between public law and political facticity.

But even if an assumed (temporary) loss of validity especially of the bailout ban (Art. 125 TFEU) does politically and economically not outweighs the disadvantages suffered by the law without an emergency rule for the (Monetary) Union as a whole: Even with the nimbus of European solidarity, financial assistance from the Union and the Member States needs to comply consistently with the primary legal system of a communitized monetary policy and the financial and budgetary policies in member state responsibility.

In addition, from the German member state perspective, the concept of the monetary union as a community of stability is the basis and object of the German Act of Consent. If the monetary union were not able to continually develop that stability as provided by the mandate of stability which has been agreed upon, it would move away from the concept upon which the Maastricht Treaty is based.[31] Despite the aim of euro stabilization for maintaining and securing the integration step Economic and Monetary Union as a whole, the emergency measures pave the way to a *"new culture of stability"*[32], that goes beyond the democratically and with "responsibility for integration" legitimated programme of integration set out in the Treaties of Maastricht and Lisbon and which authorizations is not borne by the existing consent to the law ratifying the Treaties. In this case, a new political decision is required. If it proves impossible to achieve the required stability within the existing framework, not the circumvention of stability assurance measures but the withdrawal of the Federal Republic from the euro zone is the option of the last resort.[33] The only alternative to this exit-scenario in a quandary between fiscal necessity and constitutional legality is a new policy decision being made by the governmental in-

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31 BVerfGE 89, 155 [200, 205].

32 Government declaration by Federal Chancellor Angela Merkel of 19. May 2010, German Bundestag, Minutes of plenary proceedings 17/42, p. 4126.

33 BVerfGE 89, 155 [207].

stitutions of the nation States on the amendment of the statics of the monetary union.

III. Redemtion: Return to the rule of law

The rule of law reaches its limits if the normativity is not sufficient to direct politics in the desired paths. The law must be adapted to continue to fulfill the demands of the legal community. The Euro states take account of these necessities on their way back from the unions and constitutional state of emergency into the legality. With the aim to ensure the stability of the economic and monetary union and therefore ultimately their existence as a whole, they created a system of intergovernmental principle persistent member state responsibility, preventative enhanced coordination and the possibility of budget support in case of emergency. Only by establishing a sustainable foundation of the euro stabilization, the union's constitutional state of emergency is left and the necessary space for the perception of parliamentary responsibility for integration is provided.

1. Mechanisms of juridification in the service of political leeway

Since the end of 2010, the Member States of the EU have been endeavoring to create a permanent crisis management mechanism, over and above the present "euro rescue package" to establish a "*permanent crisis mechanism to safeguard the financial stability of the euro area as a whole*"[34]. The rescue efforts are based on the findings that a wider margin of national responsibility has proven to be a threat to the stability of the euro area. Any imbalance threatens the single currency, any excessive national debt threatens price stability. Therefore, the rescue efforts are aimed specifically at structural legalization. They are aimed at politics prohibitions addressed to the political actors of the States, insofar as the consequences of local politics might feed through to the euro area as a whole. The project of the legalization turns away from a logic of emergency rescue by establishing a

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[34] European Council of 28/29 October 2010, EUCO 25/1/10 REV 1, Conclusions, p. 2.

"Rütlischwur"[35] in the form of a self-imposing fiscal pact and a permanent bailout-mechanism as a special right in case of budgetary distress and danger which denies the autonomy concept of Maastricht on the one hand and on the other hand ensures a sustainable balance between fiscal federalism and monetary unitarianism. With the underlying logic of "solidarity against austerity", the member states establish a regime of stabilization and de-politicization for the member states financial autonomy. A solidarity imperative is written to the financial constitution of the donor states; the fiscal self-government rights of the borrowing countries is partially overwritten. The Contracting States put their national financial autonomy into the service of the common economic and monetary union beyond the integration program of Maastricht. The Fiscal Compact emphasizes this serving function in its Art. 1 (1):

"By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion."

The "Treaty on Stability, Coordination and Governance in the Economic and Monetary Union" (TSCG or Fiscal Compact), an international treaty signed by 25 EU Member States (except the United Kingdom and the Czech Republic) serves the Member States' budgetary austerity.[36] The fiscal pact is intended to strengthen the Member States budgetary discipline by the Member State's commitment to enshrine debt brakes in accordance with detailed specifications in the domestic law. By virtue of Art. 3 (2) of the treaty, the Contracting Parties have the obligation to transpose the rules on balanced budgets

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35 Vgl. Ulrich Hufeld, *Between Emergency Aid and Rütli Schwur: The Reconstructing of the Economic and Monetary Union in Times of Economic Crisis*, in L'Europe en formation n° 361 (2011), p. 53–72.

36 Cp. for the necessary measures on a national level the draft bill of an *"Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union"* as amended to include the proposed amendments approved by the budget committee on 27 June 2012 (Bundestag printed papers 17/9046; 17/10125; 17/10171).

"through provisions of binding force and permanent character, preferably constitutional" at the latest one year after the entry into force of the Treaty. With reference to Art. 273 TFEU, the Court of Justice of the European Union is responsible for the jurisdiction over the question of whether this requirement has been respected or not. Moreover, the Fiscal compact juridifies the deficit procedure under Art. 126 TFEU by converting the qualified approval requirement under Art. 126 (13) TFEU into a qualified rejection requirement and by and it establishes the obligation to provide certain measures with the opening of an excessive deficit procedure.

The European Stability Mechanism (ESM) complements the project of de-politicization and debt reduction by establishing a system of solidarity and reward – which becomes superfluously in the medium term if the fiscal compact's project of de-politicization succeed. As a legal exception from the Member States self-commitment on soundness, only in cases of emergencies may apply: Solidarity against austerity. The Fiscal Compact reaffirms this normative nexus by stating,

"that the granting of financial assistance in the framework of new programmes under the European Stability Mechanism will be conditional, as of 1 March 2013, on the ratification of this Treaty by the Contracting Party concerned and, as soon as the transposition period referred to in Article 3(2) of this Treaty has expired, on compliance with the requirements of that Article"[37].

Correspondingly, the ESM-treaty declares:

"This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that article"[38].

Only under these premises the ESM provides solidarity against austerity. Equipped based on an international treaty between the 17 euro zone countries and established as an international financial institution with legal personality, the purpose of the ESM shall be to mobi-

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37 Recital 25 in the preamble of the fiscal compact.

38 Recital 5 in the preamble of the ESM-Treaty.

lise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States (Art. 3 ESM-Treaty). For this purpose, the Contracting States have mobilized their national financial resources and equipped the ESM with registered capital of € 700 billion.[39]

The ESM establishment was conditional on the revision of Art. 136 of the TFEU, containing the rules specific to Euro zone Member States. The new Art. 136 (3) TFEU equates a response of the European Union as a legal community to the temporary treaty-breakthrough of the existing stability system. The European Council of 25th March 2011, acting by unanimity, following the procedure of Art. 48 (6) TEU, after consultation of the European Parliament, the Commission and the European Central Bank, adopted a decision aiming at the amendment of Art. 136 (3) TFEU, inserting the sentence:

"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"[40].

3. Constitutional juridification

A. 'Community method' v 'Union method'

The juridification profit particular of the ESM – bailout on solid normative basis – is not reduced by the (abstract) risks of evasion of

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39 Cp. for the necessary measures on a national level the "Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism" of 13 September 2012 (Federal Law Gazette II p. 981).

40 European Council Decision 2011/199/EU 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] OJ L91/1; cp. for the necessary measures on a national level the *"Act on the European Council Decision of 25 March 2011 to Amend 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"* of 13. September 2012 (Federal Law Gazette II p. 978).

the *'Community method'* to a *'Union method'* [41] for the unity of the EU legal order, the way of legalization – international agreements outside the legal and institutional structure of the Union to introduce a system intergovernmental governance in the service and with regard to the law of the European Union – conceals within itself.[42] Although the division of the European Union into the euro area and the remaining national currency areas could be intensified by additional differentiation through external cooperation between Member States. The juxtaposition of acquis communautaire and external cooperation in the same policy area could endanger a basic attribute of the European rule of law – the unity of the normative base in the European Union – by causing or deepening different densities of cooperations or regulations. In addition, any represents a breakaway from the Unions common legal framework contests the European res judicata and challenges the normative power of the legal framework of the Economic and Monetary Union. However: This view ignores the fact that law and politics collide in a unique way within Economic and Monetary Union. The Monetary union has its basis, its orientation and its limits in the law. The legal framework also holds up a project that is by its nature also deeply political. The EU was and has never been only a community of law. The EU acts – even in compliance with legal bindings and through the language of law – as a political subject.[43] The European Integration as a "politically charged law" expresses one of the protagonists of the rescue efforts, Germanys Federal Minister of Finance Wolfgang Schäuble in his diagnosis,

"[...] wer Europa konkret voranbringen will, darf aber nie vergessen, dass Pragmatismus und Flexibilität meistens besser sind als Prinzipienreiterei, die am

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41 Speech by Federal Chancellor Angela Merkel at the opening of the 61st academic year of the College of Europe in Bruges, 2.11.2010, http://www.bundeskanzlerin.de/Content/DE/Rede/2010/11/2010-11-02-merkel-bruegge.html: *"abgestimmtes solidarisches Handeln – jeder in seiner Zuständigkeit, alle für das gleiche Ziel"* ("coordinated acts of solidarity – everyone within its jurisdiction, all for the same objective").

42 Paul P. Craig, *The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism*, in European Law Review 37 (2012) 231.

43 Martin Nettesheim, *Der Umbau der europäischen Währungsunion: Politische Aktion und rechtliche Grenzen* in: Stefan Kadelbach (ed.), *Nach der Finanzkrise*, p. 31, 47.

Ende nur Stillstand produziert. Also werden bis auf weiteres weder Gemeinschaftsmethode noch intergouvernementale Zusammenarbeit für sich allein ausreichend sein. Wir werden bis auf weiteres beides noch brauchen." [44]

B. Constitutionality of the reorganisation

From the perspective of the *Bundesverfassungsgericht*, the changes are paradigmatic for a fundamental constitutional principle and reorganization of the existing economic and monetary unio – and compatible with the German constitution in general.[45] From the perspective of the ECJ, the treaty amendment merely clarifies that the bail-out ban does not strictly preclude the establishment of a stabilization mechanism to provide financial assistance in the monetary union. Whether as part of a "radical transformation" or mere "clarification", the ESM fits in the legal structure of the otherwise unaltered Economic and Monetary Union and "legalizes" emergency rescues. The Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with European Union law.[46] In that regard, the ESM Treaty constitutes an amendment which fundamentally subverts the legal order governing economic and monetary union and which is incompatible with European Union law:[47]

Against this background, the lawfulness of the ESM is primarily a question of the distribution of competences between Union and the Member States. The Union has, under Art. 3 (1) lit c TFEU, an exclusive competence in the area of monetary policy for the Member States whose currency is the euro. However, the activities of the ESM do not fall within the monetary policy which is the subject of those provisions of the FEU Treaty. Under Art. 3 and Art. 12 (1) ESM-Treaty, the

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44 Speech by Federal Finance Minister Wolfgang Schäuble on the occasion of receiving the Charlemagne Prize 2012, 17.5.2012, http://www.karlspreis.de/preistraeger/2012/rede_von_dr_wolfgang_schaeuble.html

45 Cf. *Bundesverfassungsgericht,* Decision of 12 September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12 – [130].

46 Case C-370/12 *Pringle v Government of Ireland et al.* [2012], para 109.

47 Case C-370/12 *Pringle v Government of Ireland et al.* [2012], para 108.

purpose of the ESM is to mobilise funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems. Its purpose is to support the stability of the euro. The ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism. It is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members who are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency, while the financial assistance which the ESM grants must be entirely funded – the provisions of Art. 123 (1) TFEU being respected – from paid-in capital or by the issue of financial instruments, as provided for in Art. 3 of the ESM-Treaty.[48] Furthermore the ESM in its concrete design is consistent with the bailout ban in Art. 125 TFEU. That provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. The activation of financial assistance by means of the ESM is not compatible with Art. 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.[49] Art. 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.[50]

C. Unconstitutional determination of political leeway?

The "Rütlischwur" constitutes not a right of financial balance but of financial relations between autonomous but closely related political spaces. In this regard, the balance point in the European financial con-

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48 Case C-370/12 *Pringle v Government of Ireland et al.* [2012], para 95.
49 Case C-370/12 *Pringle v Government of Ireland et al.* [2012], para 136.
50 Case C-370/12 *Pringle v Government of Ireland et al.* [2012], para 137.

stitution moves in the direction of solidarity between Member States. The ESM-safety-net acts as stabilization promises to soothe the market for government bonds between creditors and interested states and helps them to gain market access. It is used to recover the trust in a cooperative form of government funding. At the same time support promises will only be granted when seeking States pursue and hold a consolidation strategy. Crisis management does not move in the classical framework of autonomous organization of the political community in which the sovereign nation-state formulates public welfare relevant politics autonomously. It rather determines previously open political spaces by the conditionality of aid promises to maintain government redevelopment pressure upright and to prevent "moral hazard". The principle of autonomy is replaced by solidarity against austerity, financial assistance against budgetary austerity. It would be shortsighted to conclude from the reciprocity and the juridification of conditionality that it atrophies the allegedly autonomous formulation of the conception of common good out of the political process. Within a compound of States of the European Monetary Union, the method of an all too "open coordination" of Member States' budgetary and fiscal policy has proven to be insufficient, if not even a threat to the for the essential stability of the monetary system. The juridification of a stronger preventive stability requirement and a permanent mechanism for conditioned emergency aid is the necessary correction of an inadequate system for its purposes. The imperative of "solidarity against austerity" serves the opening of political spaces, the recovery of the freedom for autonomous formulation of common good conceptions, to regain a sound leeway for open democratic governance – of course, taking into account the overarching common good of the stability of the economic and monetary union.

IV. The rule of law and the democratic scope

The re-organisation of the Economic and Monetary Union is based on state legitimacy and capacity for action and does not target absolute restrictions in fiscal politics. The reform of the rightly-guided Economic and Monetary Union is rather a process of re-politicization through parliamentarisation, which sets limits to the juridification of

the Economic Union. Without further treaty amendments the reforms in particular cannot to lead to a économique governance in the euro area, fully juridified and dominated by European institutions. In the existing structure of the European compound of States, only the national parliaments are able to confer legitimacy for financial relations between Member States. The ESM's contributions neither originate from the own resources of the EU nor are they a part of the EU budget. The ESM is a state driven fund. Also the Fiscal Compact is genuinely national law: National parliaments codify constitutionally to finance government spending in principle only from state tax revenues and not from government loans, in order to bind in this way the state budget legislators. Because the new "system of intergovernmental governance" lives on state resources, on the national financial power, it is based on resources under parliamentary budget sovereignty – and therefore needs to remain open to the political process.

1. Limits to a rule of law in the context of European integration

The European integration can limit the German fiscal policy merely in a wide range. The *German Bundestag* must stay responsible for financial and fiscal policy even in a European context. Art. 79 (3) of the German Basic Law (GG) is the standard for the limits of German participation and a fiscal legalization also in times of crisis. That provision does not safeguard any particular institutional structure of democratic decision-making. It safeguards the principle of democracy or the level of democratic legitimacy. From the perspective of the principle of democracy, the violation of the constitutional identity codified in Art. 79 (3) GG is at the same time an encroachment upon the constituent power of the people. In this respect, the constituent power has not granted the representatives and bodies of the people a mandate to dispose of the identity of the constitution. No constitutional body has been granted the power to amend the constitutional principles which are essential pursuant to Art. 79 (3) GG.[51] Particularly sensitive for the ability of a constitutional state to democratically shape itself are fundamental fiscal decisions on public revenue and public expenditure.[52]

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[51] *Bundesverfassungsgericht,* BVerfGE 97, 350 [262 et seqq.].

[52] *Bundesverfassungsgericht,* BVerfGE 97, 350 [262 et seqq.].

This prohibition of the relinquishment of budgetary responsibility does certainly not impermissibly restrict the budgetary competence of the legislature, but is specifically aimed at preserving it.[53]

Although this means no fiscal renationalization. The principle of openness towards European integration[54] as a part of the identity of the constitution has drawn a fiscal constraint by itself: In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany commits itself not only in legally, but also in fiscal policy.[55] A broad political autonomy and legitimatory through the transfer of sovereignty is also in "intergovernmental governance systems" limited by the reserve area of the overall budgetary responsibility as part of the constitutional identity.

Even thought the establishement neather of the Fiscal Compact nor the ESM transfers constitutional autonomy to the European Union and thus might deprive Germany of a core element of sovereign statehood: The ESM would be unconstitutional if the ESM could decide solely and independently decide on granting of financial aid. The state budget sovereignty can not be de-parliamentarised in the scope of ESM-volume and fully juridified entrusted to a Board of Governors. Based on the budgetary constitutional proviso, the *German Bundestag* bears inescapable the full responsibility as long as the German contribution is tied to the sovereignty of the federal income tax. Against this background, the *German Bundestag* may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisa-

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53 *Bundesverfassungsgericht,* Decision of 7. September 2011 – 2 BvR 987/10 – [124 et seq.].

54 Cf. the preamble of the Grundgesetz *("Inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law.")* and Art. 23 (1) GG *("With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. To this end the Federation may transfer sovereign powers by a law with the consent of the Bundesrat.")*

55 *Bundesverfassungsgericht,* Decision of 12 September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12 – [211].

tions. The relevant factor for adherence to the principles of democracy – serving the citizens right to decide indirectly through his representatives about the level of government expenditure, the debt and the tax burden and thus about the framework of the guarantee of the privately disposable economic basis of individual freedom – is whether the *German Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments. As representatives of the people, the elected Members of the *German Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental administration to preserve the constitutional identity.[56] Especially for the assumption of guarantees, the budgetary legislator needs a room for separate evaluation and decisionand to stay continually responsible for the support of the development of the political and monetary union. If decisions were made on essential budgetary questions of revenue and expenditure without the requirement of the *Bundestag*'s consent, or if supranational legal obligations were created without a corresponding decision by free will of the *German German Bundestag*, Parliament would find itself in the role of merely reenacting and could no longer exercise overall budgetary responsibility as part of its right to decide on the budget. Furthermore the *German Bundestag* may not, even by statute, deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue.

2. Limits to a rule of law by the budget legislators' "marge d'appreciation"

The *German Bundestag* is in charge of decide both on the basic principles of the Economic and Monetary Union and the necessary amount of financial obligations and liability commitments. The par-

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[56] *Bundesverfassungsgericht,* Decision of 12 September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12 – [211 et seqq.].

liament is – jointly with the parliaments of the other Member States – responsible for the assessment, whether and to what extent financial bonds are necessary to preserve democratic scope for settings and decisions for the future and thus to evoke a reduction for the scope for settings and decisions in the present. According to its scope of assessment, the *German Bundestag* opt for a completion of the existing architecture of the Economic and Monetary Union by stabilization measures and for the assumption of liability risks and thus the *Bundestag* decided against alternatives such as a Member States insolvency.

When examining whether the amount of payment obligations and commitments to accept liability will result in the *German Bundestag* relinquishing its budget autonomy, the legislature has broad latitude of assessment, in particular with regard to the risk of the payment obligations and commitments to accept liability being called upon and with regard to the consequences then to be expected for the budget legislature's freedom to act. The same applies to the assessment of the future soundness of the Federal budget and the economic performance capacity of the Federal Republic of Germany, including the consideration of the consequences of alternative options of action.[57] With regard to the probability of having to pay out on guarantees, the legislature has a latitude of assessment, which the *Bundesverfassungsgericht* must respect and it may not with its own expertise usurp the decisions of the legislative body which is the institution first and foremost democratically appointed for this task.[58] In establishing that there is a prohibited relinquishment of budget autonomy with regard to the extent of the guarantee given, the *Bundesverfassungsgericht* must restrict itself to manifest violations and in particular with regard to the risk of

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[57] *Bundesverfassungsgericht,* Decision of 12 September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12 – [201]; BVerfGE 129, 124 [182-183)].

[58] *Bundesverfassungsgericht,* Decision of 12 September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12 – [217, 234]; *Bundesverfassungsgericht,* Decision of 7. September 2011 – 2 BvR 987/10 – [130 et seqq.].

guarantees being called upon it must respect a latitude of assessment of the legislature.[59]

This budget legislators "marge d'appreciation" stands paradigmaticly of the openness of the process and the limitations to a rule of law in the Economic and Monetary Union with regard to the reciprocity of a rule of law in judicative control and the exercise of democratic legislative power. The political leeway does not set upon a judicial self restraint of the Constitutional Court – a self-withdrawal of the Constitutional Court –, but rather an expression of a constitutional "primary area" of politics. Through its actions, the *German Bundestag* may take decisive influence and limit the constitutional courts "articulation possibilities". The more comprehensive and intensive the parliamentary legislative process, the lower the possible density of constitutional control by the Constitutional Court. The less Parliament exercises its decisive influence, the more room it leaves for judiciary influence. The parliament only fulfills both dimensions of its responsibility in the context of Economic and Monetary Union – both for the budget and for the German participation in European integration – if the *German Bundestag*, together with the *Bundesrat*, consistently monitors the compliance with the of the Monetary Unions integration program and ensures that in the further development the Assumption of Liability does not transform by the sum of an indeterminate number of quasi-automated warranty takeovers from constitutional quantity into unconstitutional quality. Within this limit, the democratic leeway rejects an approach of a fully determinative rule of law.

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[59] *Bundesverfassungsgericht,* Decision of 12 September 2012 – 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 BvE 6/12 – [130].