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The EU as a Confederal Union of Sovereign Member Peoples: Exploring the potential of American (con)federalism and popular sovereignty for a constitutional theory of the EU

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13 The Sovereign Debt and EMU crises: A perfect confederal storm?

1 A perfect confederal storm?

Obviously, this chapter cannot provide a complete picture of the multi-faceted and ongoing financial crisis that is facing the EU and the world at large. *A fortiori*, it does not hope to provide anything close to a full solution. Considering the complexity and speed of developments, including the unpredictable reactions by that unimaginable amount of interactions jointly known as 'the market', any form of prediction is intrinsically presumptuous. Our excursion into this financial crisis, therefore, must be highly mindful of these limitations, including the very real chance that some of the assumptions it relies on will be radically changed in the near future.

Fortunately, the primary aim of applying the confederal prism to the financial crises is also not to predict. Instead, the goal is to illustrate the explanatory value of the confederal approach for grasping some of the constitutional roots of the crises, and the directions in which confederal solutions might be sought. Nevertheless, even this limited exercise requires a real engagement with the crisis. This at least entails formulating what confederalism has to say about the crisis and what a suitable confederal response would look like.

Before applying our confederal approach to the sovereign debt and EMU crises, a brief historical overview is in order, starting from the banking crisis that kick-started both crises, and eventually lead to the different measures that have so far been taken to combat the crises (section 2). Subsequently section 3 illustrates how the crises logically fit with, and flow from, the confederal weaknesses identified in part I. Once these confederal problems have been set out we turn to some potential confederal cures in section 4. Building on the strong points of the modified confederal form and the confederal conception of sovereignty developed in part II, some directions for confederal solutions to the crises are suggested, and some confederal pitfalls demarcated, after which section 5 ends with a brief conclusion.

2 A tale of three crises

The banking crisis, now conventionally linked with the fall of Lehman Brothers on 15 September 2008, was a costly one for most Member States.

Large rescue packages were required to prevent banks, and entire financial systems, from collapsing. As a result the financial position of many Member States was weakened, which contributed to and aggravated the sovereign debt crisis.

This second crisis erupted in January 2010 when Greece, 'correcting' its earlier reports, announced a deficit of 12.7%, and a debt of over 120% of GDP. [1] After this announcement, interest rates on its sovereign debt rose quickly. This further deteriorated its financial position, but also increased pressure on the Euro.[2] As Member States continued to disagree on what measures to take, the crisis deepened and spread. The interest rates of other Member States such as Ireland, Portugal and Spain came under increasing pressure as well. Fear of a domino effect arose. The sovereign debt crisis, for instance in the case of a sovereign default, could hit the banks and pension funds in all Member States. Yet these financial institutions were still reeling from the banking crisis, and would, therefore, require public support if faced with further losses. And, to finish the downward spiral, this public support would further increase public debt and lead to further increases in interest rates, potentially pushing large but weakened Member States like Spain over the edge as well. In other words the 'Greek' crisis was threatening all Member State economies.

Despite its general unpopularity in most Member States, and despite doubts as to the legality of aid to Greece under art. 125 TFEU, [3] an aid package of €110 billion was agreed on 2 May 2010.[4] As the markets proved thoroughly unimpressed, a much larger *temporary* emergency fund of €500 billion was then quickly established to back up distressed sovereign debt.[5] Providing

1 See generally, and including a warning for a 'true and severe European Union Crisis' which 'goes far beyond earlier difficulties of the integration process.', M. Ruffert, 'The European Debt Crisis and European Law' 48 *CMLRev* (2011), 1777-78.

2 Greek interest rates dropped sharply after accession to the EMU, coming close to the rate paid by Germany. In itself a clear indication that the markets were not taking art. 125 TFEU seriously. In the beginning of 2008 for instance, Greece paid just over 4%. After the eruption of the crisis rates skyrocketed again, for instance reaching more than 19% in September 2011.

3 See J.V. Louis, 'The No-bailout Clause and Rescue Packages', 47 *CMLRev* (2010), 984 et seq. and V. Borger, 'De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme', 59 *SEW* (2011), 211.

4 Of this package €30 billion was provided by the IMF, the remaining €80 billion by Eurozone Members utilizing a system of bilateral loans. As of April 2012, the last formal Commission figures available to the author, 73 billion of these funds had been disbursed. Also see the 'Statement by President Van Rompuy following the Eurogroup agreement on Greece' Brussels, 2 May 2010, PCE 80/10. Further see Louis (2010), 971. The facility has been reduced by 2.7 billion, furthermore, after Ireland and Portugal stepped down.

5 €60 billion of this sum is provided by the EU itself, the other €440 billion being guaranteed by the Member States.

external backbone, credibility and money, the IMF participated in this fund for another €250 billion, bringing its total capacity up to €750 billion.[6]

Both the inception and the nature of this temporary fund were rather extraordinary. The system eventually adopted was drafted within 48 hours, as it had to be finished before the Tokyo exchange opened for trade on the 9th of May.[7] At €15,625 billion per hour, this probably qualifies as some kind of record.[8] In addition, the peculiar nature of the fund reflects the challenge the crisis formed, and forms, for the EU.

The fund had two elements. On the one hand there was the European Financial Stability *Mechanism* (EFSM). This mechanism formed the EU side of the fund. Based on Article 122(2) TFEU it could guarantee up to €60 billion.[9] It was open to all Member States, including those not participating in the Euro.[10] The second, and largest, element was the European Financial Stability *Facility* (EFSF).[11] The facility is based on an *intergovernmental agreement* between the members of the Euro-zone. It is not based on an EU decision and does not form part of the EU itself.[12] The ESFF is a private corporate entity, a 'Special Purpose Vehicle' established for three years as a 'société anonyme' under Luxembourg law.[13] This private corporate entity, in turn, operates under its own statute and another *private law agreement* between the Member States involved and the ESFS. This agreement is governed by English law.[14] Backed by guarantees of the participating Member States, the EFSF is authorized to raise up to € 440 billion.[15]

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6 Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Brussels, 10 May 2010, 9614/10, ECOFIN 265, UEM 179.

7 Based on presentations by parties directly involved at the LLX (Leiden Law Exchange) round table on the EMU crisis on 11 February 2011. Chatham House rules applied.

8 Or as Ruffert calls it 'perhaps the most dramatic week-end in EU history' Ruffert (2011), 1779.

9 As of April 2012 the EFSM had committed €22.5 billion for Ireland, and €26 billion for Portugal of which respectively €18.4 and €15.6 billion had been disbursed. Remaining capacity was, therefore, €11.5 billion.

10 Council Regulation 407/2010 of 11 May 2010 Establishing a European financial stabilisation mechanism *OJ* (2011) L 118/1.

11 Although the permanent stability mechanism (ESM) became operational as of 8 October 2012 (see further below), the EFSF will remain in operation until 30 June 2013. During this time it will run in parallel with the ESM.

12 Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Brussels, 10 May 2010, 9614/10, ECOFIN 265, UEM 179.

13 Council Document 9614/10 of 10 May 2010.

14 Framework agreement between the euro area Member States and the EFSF, 7 June 2010 (www.efsf.europa.eu/about/index.htm. See Borger (2011), 208-209.

15 As of April 2012 the EFSF had committed a total of €189.4 billion of which €62.5 billion had already been disbursed. It further covered an unused Greek loan facility of 24.4 billion. Consequently it had a capacity of €275 billion left.

Interestingly the initial proposal of the Commission, at the beginning of this 48-hour period, had been to bring the fund fully within the framework of the EU, and to largely place it under the control of the Commission itself.[16] The Member States, however, went to considerable length to keep the EFSF, and with it the bulk of the money, *outside* the EU framework. At the same time, and to complicate the resulting picture further, the Member States agreed that 'the Commission will be allowed to be tasked by the euro area in this context', and indeed important powers were given to the Commission.[17] As a result the Commission, as an EU institution, received a role in a non-EU body designed to rescue a monetary Union at the centre of European integration itself.[18]

Both Ireland (€85 billion)[19] and Portugal (up to €79.1 billion)[20] received financial assistance under this temporary scheme.[21] With the situation in Greece remaining highly precarious, furthermore, agreement on a second Greek aid package of up to €130 billion was reached on 21 July 2011.[22]

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16 See the proposal of 9 May 2010 for a Council Regulation establishing a European financial stabilization mechanism (COM (2010) 2010 final). This fund would contain €500 billion, €440 billion being guaranteed by the Eurozone Members.

17 Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, Brussels, 10 May 2010, 9614/10, ECOFIN 265, UEM 179.

18 Such an 'external' role of the Commission was already accepted by the Court of Justice in joined cases C-181/91 and C-248/91 *Bangladesh* [1993] ECR I-3685 and C-316/91 *Lomé* [1994] ECR I-625. It has now been explicitly confirmed in C-370/12 *Pringle* [2012]. For a discussion of this use of EU institutions see V. Borger and A. Cuyvers, 'Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in de Economische en Monetaire Unie: de juridische en constitutionele complicaties van de eurocrisis.' 60 *Tijdschrift voor Europees en Economisch Recht (SEW)*, (2012), 370 et seq.

19 As of March 2012 the IMF had committed €22.5 billion (€19.4 billion disbursed). €17.7 billion was committed to Ireland from the EFSF (€9.4 billion disbursed), and €22.5 billion from the EFSM (€18.4 billion disbursed). €3.8 billion had been bilaterally committed by the UK (€2 billion disbursed), €0.6 billion by Sweden (€0.2 billion disbursed), €0.4 billion by Denmark (€0.1 billion disbursed) and €17.5 billion by Ireland itself (€17.5 billion also disbursed).

20 As of December 2010 €27.1 billion was committed by the IMF of which €22.1 billion had been disbursed. €52 billion was committed by the EU, of which €26 billion was committed from the EFSF, and the other €26 billion from the EFSM (€41.1 billion disbursed in total).

21 For the Irish package, which also includes bilateral contributions from the United Kingdom, Sweden and Denmark and funding from the IMF, see the Statement by the Eurogroup and ECOFIN Ministers of 28 February and the Council implementing decision of 7 December 2010 on granting Union financial assistance to Ireland, 17211/1/10 Rev 1, ECOFIN 796, *OJ* [2010] L 30/34. For Portugal, which aid includes funds from the EU/EFSM, the EFSF and the IMF, see the statement of the Council, Brussels, 17 May 2011 10231/11.

22 Of this sum up to €101 billion was guaranteed by the EU, and up to €28 billion by the IMF.

The details of this program were further outlined in the next months, and included a significant 'voluntary' contribution from the private sector.[23] On June 9th 2012, agreement was reached on an ESM aid package of up to a maximum of €130 billion for Spain and its banks.[24] On 25 June 2012 Cyprus also requested aid, primarily to recapitalize its banks. After initial opposition, an aid package of €10 billion was finally established on 12 April 2013.[25]

During the crisis, furthermore, the European Central Bank also played a vital role, largely by acquiring bonds from distressed member states, and eventually expressing its total commitment to upholding the euro, *inter alia* through its 'Outright Monetary Transactions' program.[26]

2.1 A permanent stability mechanism

In light of the ongoing crisis, and based on a report by a special task force lead by Herman van Rompuy,[27] plans were then developed to replace these temporary rescue mechanisms with a *permanent* 'European Stability Mechanism' (ESM).[28] Unlike the temporary measures such a permanent

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23 Statement by the Heads of State or Government of the Euro area and EU institutions. Brussels, 21 July 2011. Agreement with a sufficient percentage of the private creditors was finally reached through the IFF on February 21. Private creditors will forgive 53.5 percent of their principal. In addition they exchange their remaining debt for new Greek government bonds and notes from the European Financial Stability Facility with lower interest and longer duration. Also see the Statement by Commission Vice-President Olli Rehn on private sector participation in the second Greek programme, Brussels, 9 March 2012, MEMO/12/174.

24 Interestingly this package did not contain an IMF contribution, and also lacked an austerity package similar to the ones imposed on the other aid recipients, and above all Greece. So far €100 billion has been committed by the ESM, and €41.4 billion has been disbursed.

25 €9 billion of this sum was committed from the ESM, €1 billion was committed by the IMF. The conditions for this bailout included the forfeiting of all deposits over €100.000 in the Cyprus Popular Bank (or Laiki) and a large part of these uninsured deposits in the Bank of Cyprus as well. This after an earlier plan to levy all uninsured deposits had met heavy criticism, was rejected by the Cypriot Parliament, and was withdrawn. The Cypriot Parliament accepted this second package on 30 April 2013, the German *Bundestag* did so on 18 April 2013.

26 See for instance Decision (2010/281/EU) of the European Central Bank of 14 May 2010 establishing a securities market program *OJ* [2010] L 124/8, and further ECB/2009/16 , ECB/2009/16, ECB/2010/5, and ECB/2011/18. Further see the ECB Press releases 'Technical features of Outright Monetary Transactions', Frankfurt, 6 September 2012 and 'Measures to preserve collateral availability', Frankfurt, 6 September 2012. For a discussion on the legality of these actions see zie M. Seidel, 'Der Ankauf nicht markt – und börsenängiger Staatsanleihen, namentlich Griechenlands, durch die Europäische Zentralbank und durch nationale Zentralbanken – rechtlig nur fragwürdig oder Rechtsverstoss?', 14 *EuZW* (2010), 521 and C.H. Herrmann, 'EZB-Programm für die Kapitalmärkte verstösst nicht gegen die Verträge – Erwiderung auf Martin Seidel', 17 *EuZW* (2010), 645.

27 Final report of the Task Force to the European Council of 21 October 2010, 15302/10, ECOFIN 649.

28 European Council Conclusions, Brussels, 28-29 October 2010, EUCO 25/1/10, para. 2.

fund apparently did require a Treaty amendment, or at least the prospect of one.[29] In another far-reaching step, Member States agreed on such an amendment of article 136 TFEU in December 2010.[30] By utilizing the new 'simplified' amendment procedure of article 48(6) TEU, and emphasizing the 'surgical' nature of this amendment, a re-enactment of the Lisbon drama was to be prevented.[31] The amendment entered into force belatedly on 1 May 2013 after the Czech Republic finalized its ratification process..[32]

Anticipating the eventual entry into force of the amendment, however, the ESM treaty was already signed on July 11th 2011. Before becoming operational, however, both the anticipated amendment of article 136 TFEU and the ESM Treaty had to jump through quite a number of legal hoops, or perhaps more accurately forced others to do so. One major hurdle was cleared when the German *Bundesverfassungsgericht* found the ESM in conformity with the German Constitution.[33] The second major hurdle was lowered and subsequently overcome in *Pringle*.[34]

29 Doubting the legality of the temporary measures, especially under art. 125 TFEU, also see Ruffert (2011), 1785 et seq, or H. Kube and E. Reimer, 'Grenzen des Europäischen Stabilisierungsmechanismus' *NJW* (2010), 1913.

30 European Council Conclusions, Brussels 16-17 December 2010, EUCO 30/10, par.1-2, and European Council Decision of 25 March 2011 (2011/199/EU) 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 *OJ* (2011) L 91/1. The proposed new art. 136(3) TFEU reads: '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.' Also see the European Council Conclusions of 4 February 2011, EUCO 2/11, especially annex I, as well as the declaration following the extraordinary meeting of the European Council on 11 March 2011, 11/3/2011, EUCO 7/1/11 and the statement after the meeting of heads of state or government of the Euro area on 21 July 2011.

31 This despite the fact that art. 48(6) still requires full ratification by all Member States and their parliaments. Even under the ordinary amendment procedure, furthermore, the European Council may decide, by a qualified majority, not to convene a convention (art. 48(3) TEU), although the role of the European Parliament is larger in the ordinary procedure.

32 Art. 2 of European Council Decision of 25 March 2011 (2011/199/EU). The amendment was approved by the Czech Senate on 25/04/2012 and by the Chamber of Deputies on 5/06/2012, but long held up by the refusal of President Klaus to sign it.

33 BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*. See also the cooperative approach by the Estonian *Riigikohus* in its Constitutional Judgment 3-4-1-6-12 of 12 July 2012, *ESM Treaty*.

34 C-370/12 *Pringle*. See for a thorough and highly enlightening discussion V. Borger, 'The ESM and the European Court's Predicament in Pringle' , 14 *German Law Journal* (2013), 113.

Following these judicial *fiats* the ESM became operational on 8 October 2012.[35] It has been initially concluded between the seventeen Euro area countries, but is open to non-Euro area members for ad-hoc participation. It creates a permanent fund with in principle a maximum capacity of €750 billion.[36] The aim of the fund is to guarantee financial support to members in distress where such support is 'indispensable to safeguard the financial stability of the euro area as a whole and of its Member States.'[37] By doing so, under strict conditionality, the fund is intended to increase the trust of the markets in the sovereign debt of the Euro area.

2.2 *Of six-packs, duo-packs and plus-pacts*

The establishment of such a permanent fund is nevertheless only one element in a larger attempt to address the structural problems behind the sovereign debt and EMU crises.[38] Already at its inception several experts warned that there was a dangerous imbalance between the comprehensive Monetary Union and the far more limited Economic Union that accompanies it.[39] Existing mechanisms such as the original Stability and Growth Pact have failed to remedy this imbalance, as the EMU crisis has made abundantly clear.[40] Consequently, one major question has become how to strengthen the overall system so that emergency funds will become unnecessary. A veritable flurry of legislative activity has resulted.

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35 Treaty establishing the European Stability Mechanism, Brussels, February 2 2012 T/ESM 2012/en 1, art. 38.

36 €500 billion of this sum is provided by the participating states, and the IMF has agreed to a maximum contribution of €250 billion. Under art. 8 the maximum authorised capital stock is €700 billion. In March of 2012 the 17 ministers of finance of the ESM states announced that the capacity of the fund would actually be €800 billion, yet this sum also includes all previous aid to Greece, Ireland and Portugal.

37 Idem, Preamble section. 6, art. 3.

38 On this imbalance see among many others, F. Snyder, 'EMU revisited: Are we making a constitution? What constitution are we making?', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* 1st ed. (OUP 1999), 449 et seq, as well as the newer version, F. Snyder, 'EMU – Integration and Differentiation: Metaphor for European Union', in: P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (2nd edn, OUP 2011), 687 et seq.

39 See for instance the insightful analysis by A. Szász, *De Euro. Politieke achtergronden van de wording van een munt* (Mets en Schilts 2001) (although the live version is greatly recommended). Also see J-V. Louis, 'The Economic and Monetary Union: Law and Institutions', 41 *CMLR* (2004), 1075 and F. F. Ambtenbrink and J. de Haan, 'Reforming the Stability and Growth Pact', 31 *European Law Review* (2006), 402 et seq.

40 Resolution of the European Council on the Stability and Growth Pact Amsterdam. 17 June 1997. (97/C 236/01) and art. 121 and 126 TFEU and Council Regulation 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure *OJ* (1997) L 209/6 as amended by Regulation 1056/2005 of 27 June 2005 *OJ* (2005) L 174/5. On the failure and need to strengthen the EMU also see J-V. Louis, 'The Review of the Stability and Growth Pact', 43 *CMLRev* (2006), 104 and F. Ambtenbrink, 'Naar een effectievere economische governance in de Europese Unie' 59 *SEW* (2011), 433.

First several proposals to address this imbalance were developed, including by the Commission and the Special Taskforce headed by Council President Van Rompuy.[41] These led to the adoption of the so called six-pack, which includes mechanisms to improve both the preventative and the corrective arm of the Stability and Growth Pact and to improve economic convergence.[42] One of the central innovations in this new legislation is the possibility to impose a sanction by reversed qualified majority. Following a recommendation of the Commission, a sanction must be imposed, except where a qualified majority of the Council decides *not* to impose a sanction.[43]

Second, an additional 'duo-pack' with further measures has been adopted as well, and entered into force on May 30 2013. This package aims to further enhance the coordination and surveillance of budgetary processes.[44]

Third, and building on the Europe 2020 framework,[45] a Euro+ Pact was signed between the 17 Euro area members and 6 non-Euro area members.[46] The pact intensifies economic coordination for competitiveness and convergence, also in areas of national competence, and is integrated into the European semester.

More was nevertheless deemed necessary to adequately prop up the Monetary Union. The further measures envisioned, however, did not prove feasible within the existing Treaty framework. Nor was further EU Treaty amendment

41 Final report of the Task Force to the European Council of 21 October 2010, 15302/10, ECOFIN 649. Also see European Council Conclusions, Brussels, 21 July 2011.

42 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 *OJ* (2011) 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 *OJ* (2011) L 306/8, Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, *OJ* (2001) L 306/12, 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 *OJ* (2001) L 306/25, Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, *OJ* (2011) L 306/33, and Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States *OJ* (2011) L 306/41.

43 See art. 4, 5, and 6 of Regulation (EU) No 1173/2011.

44 See Regulation 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, *OJ* (2013) L140/1 and Regulation 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, *OJ* (2013) L 140/11.

45 Communication from the Commission on Europe 2020, Brussels, 3 March 2010, COM(2010) 2020 final.

46 Conclusions of the Heads of State or Government of the Euro area, Brussels, 11 March 2011. These six non – Euro area members are Bulgaria, Denmark, Latvia, Lithuania, Poland and Romania.

possible, mostly due to a British veto.[47] As a result, and highly interesting from the confederal perspective, a more intergovernmental route was chosen.

2.3 *A new outer circle of EU law: The TSCG*

On 2 March 2012, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was signed between 25 Members States, excluding the UK and the Czech Republic (the SCG treaty).[48] Formally this is a separate Treaty, established outside the EU framework. At the same time it is intimately connected with EU law.[49] Not only is it explicitly aimed at strengthening the EMU, it also incorporates multiple EU obligations, employs several EU institutions, and is highly mindful, at least in word, of the duty of sincere cooperation.[50] Most far reaching, the SCG Treaty envisions the incorporation of its own substance into the legal framework of the EU within a period of five years after entry into force.[51]

The SCG Treaty easily justifies a separate study in its own right.[52] The most interesting themes for our purpose are its dual relation to the EU framework, already mentioned above, and the inclusion of the so-called 'Golden Rule.' Starting point for this Golden Rule is that parties are obligated to have a balanced budget or run a surplus.[53] A national mechanism must

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47 Two options for a primary law solution were on the table. First, to use art. 126(14) TFEU to amend Protocol No. 12 on the excessive budget procedure. Second, going for an amendment of the Treaty, either though the ordinary amendment procedure of art. 48 TEU, or through one of the simplified alternatives in that provision. In the end the intergovernmental approach won the day, this in no small part due to the UK's demands to protect the interest of the UK's financial sector in the City, and its related veto of any primary law solution.

48 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Brussels 2 March 2012, T/SCG/en, Preamble.

49 For a discussion of this Treaty, and the suggestion that this may be the start of a new form of EU law that holds quite some potential, see Borger and Cuyvers (2012), 370. Further see the French *Conseil constitutionnel*, Decision 2012-653 DC of 9 August 2012, *Fiscal Compact*.

50 See, for instance, SCG Treaty art. 1(1), 2, 3, 4, 5, 7, 8, 9, 10, 12 and 13. Also see Editorial Comments 'Some thoughts concerning the Draft Treaty on a Reinforced Economic Union' 49 *CMLRev* (2012), 5.

51 SCG treaty, art. 16. A fact that also reflects the initial desire, *inter alia* by Germany and France, to choose a primary law solution.

52 Its relation to, and conformity with EU law, for instance, deserve further attention, as do its broader implications for the constitutional nature and future development of the EU, including the question how to incorporate this Treaty into EU law. On these points see P. Craig, 'The Stability, Coordination and Governance Treaty: principle, politics and pragmatism', 37 *European Law Review* (2012), 231, as well as the interestingly conflicting evidence given by Paul Craig and Michael Dougan to the European Scrutiny Committee of the House of Commons. House of Commons – European Scrutiny Committee, Treaty on Stability, Coordination and Governance: impact on the rule of law (62nd report, 27 March 2012). Further developing the more positive line of Dougan see Borger and Cuyvers (2012).

53 SCG Treaty art. 3(1)(a) and (b). See art. (3)(1)(c) and (d) for some softening around the edges.

be created to correct any deficit that might nevertheless occur. In the event of an excessive deficit this mechanism must be triggered automatically.[54] This national mechanism must, furthermore, follow the common principles established by the Commission.[55] The Court of Justice, acting under art. 273 TFEU, can be invited to rule on whether a Contracting Party has correctly implemented this obligation.[56] It is the nature of this mechanism that is of special relevance here:

> 'The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, *preferably constitutional*, or otherwise *guaranteed* to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of *common principles to be proposed by the European Commission*, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.'[57]

As will be discussed further below, both the creation of the SCG Treaty and this Golden Rule fit with the confederal perspective developed in this thesis. Both also contain some important confederal strengths and weaknesses. Before returning to our confederal application, however, we must first outline the last batch of measures and proposals developed to reinforce the Economic and Monetary Union.

2.4 *From Banking Unions to a 'deeply' 'genuine' EMU*

Considering the importance of a stable financial system for overcoming the current crisis and preventing future ones, a new supervision architecture for the financial sector was established.[58] More far-reaching measures were

54 SCG Treaty art. 3(1)(e). Note that this obligation, and hence the Golden Rule, only concerns the deficit, and not the debt ratio. SCG Treaty art. 3(1)(e).

55 See art. 3(2) TSCG, and for the guidelines themselves the communication from the Commission of 20 June2012 on the Common principles on national fiscal correction mechanisms, COM(2012) 342 final.

56 SCG Treaty art. 8. For a discussion of the actual nature and effect of any ruling by the Court of Justice, and the standard it should apply, see Borger and Cuyvers (2012).

57 SCG treaty art. 3(2).

58 See for an assessment of this need the de Larosière report of 25 February 2009, available at: http://www.esrb.europa.eu/shared/pdf/de_larosiere_report_en.pdf?27c60c4c7ddf5de635cbd4d8be381c0c. This new system consists of the European Systemic Risk Board (ESRB), the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority, the Joint Committee of the European Supervisory Authorities, and the relevant national authorities. More restrictive norms for capital requirements for banks, investment firms and insurance companies have also been set.

nevertheless considered necessary,[59] which lead to the discussion of a full 'Banking Union'.[60] This Banking Union is to be based on a 'Single Supervisory Mechanism' (SSM) under the auspices of the ECB,[61] and is currently set to also include a 'Single Resolution Mechanism' (SRM).[62] The ESM can then be envisioned as a back stop to these mechanisms.

Incorporating these ideas for a Banking Union, more comprehensive blueprints for a more stable EMU have subsequently been presented as well. On 24 October 2012 the European Parliament published its relatively ignored recommendation 'Towards a genuine Economic and Monetary Union'.[63] More attention was paid to the Commission's 'blueprint for a deep and genuine Economic and Monetary Union' launched on 30 November 2012,[64] and especially to the Van Rompuy plan entitled 'Towards a Genuine Economic and Monetary Union' that was presented shortly afterwards on 5 December 2012.[65]

The Van Rompuy plan matches the Commission's blueprint on many points. Yet as could be expected, it is less far reaching on several important points, such as the introduction of Euro bills, binding control over national budgets and deeper political integration, or in the longer term allowing the

59 See in this regard also the Green Paper on Stability Bonds, nibbling around the edges of the much debated 'Euro bonds' (Green Paper on the feasibility of introducing Stability Bonds – COM(2011)818 final).

60 Also see the Commission communication of 12 September 2012 on 'A Roadmap towards a Banking Union', COM(2012) 510 final, and the European Council Conclusions of 18 October 2012.

61 See the Commission Proposal of 12 September 2012 for a Council Regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, COM(2012) 511 final, 2012/0242 (CNS).

62 See, including this suggestion on an SRM from the European Council, the Commission communication of 12 September 2012 'Roadmap towards a Banking Union' COM(2012) 510 final, finding that: 'Further steps are needed to tackle the specific risks within the Euro Area, where pooled monetary responsibilities have spurred close economic and financial integration and increased the possibility of cross-border spill-over effects in the event of bank crises, and to break the link between sovereign debt and bank debt and the vicious circle which has led to over €4.5 trillion of taxpayers money being used to rescue banks in the EU.' And that 'mere coordination is not enough, in particular in the context of a single currency and that there is a need for common decision-making.'

63 European Parliament, Plenary Session, A7-0339/2012, RR\917057EN.doc.

64 COM(2012) 777 final.

65 Van Rompuy had been invited to submit such a plan by the European Council in June 2012 It has been expressly drafted 'In close collaboration with Barroso, Juncker, and Draghi, and expressly refers to the Commission blueprint. Available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf.

EU to generate revenue through taxation.[66] Differences that apparently distinguish a 'genuine' EMU from a 'deep and genuine' EMU.[67]

During the European Council summit of 13 and 14 December 2012 the Van Rompuy plan was discussed, relieved of its most daunting teeth, and transformed into a 'Roadmap for the *completion* of EMU'.[68] This roadmap largely focuses on implementing and effectuating existing legislation and treaties, as well as on creating more effective supervision on the financial sector. The 'immediate priority', for example, is to 'complete and implement the framework for stronger economic governance, including the 'six-pack', the TSCG and the 'two-pack', and to create a 'more integrated financial framework' including the 'Single Supervisory Mechanism'.[69] The European Council further 'urges' the establishment of 'a Recovery and Resolution Directive' and a 'Deposit Guarantee Scheme Directive' and to enable the ESM to 'recapitalize banks directly' so as to 'break the vicious circle between banks and sovereigns.'[70] Van Rompuy also received the assignment to draft another 'Roadmap' to be presented at the European Council summit in June 2013. Not wholly unconnected to the *entrée* of Mr. Hollande, this roadmap must focus on ensuring 'economic growth, competitiveness in the global context and employment in the EU', and thereby act as a kind of social counterpart to the focus on budgetary discipline so far.[71]

None of the more far-reaching plans of the European Parliament, the Commission or Van Rompuy, therefore, made it directly into the European Council conclusions. At the same time, the conclusions do state that the process of completing the EMU, which requires 'deeper integration', 'will *begin*' with these measures, implying that further measures will be taken in the future.[72] Many of the more far-reaching proposals will undoubtedly

66 Cf the statement on p. 5 on the Van Rompuy plan that, regarding further and deeper integration, the Commission's Blueprint offers 'a basis for debate'. The plan does stress, however, the need for a central fiscal capacity, and the ability to borrow and 'common debt issuance without resorting to the mutualisation of sovereign debt' (p. 12.).

67 The transformative objectives of the Commission proposal become especially evident where it describes the ultimately desired outcome and 'solution' on page 40: 'In contrast, that problem would no longer arise in a *full fiscal and economic union* which would *itself dispose of a substantial central budget*, the resources for which would be derived, in due part, from a *targeted, autonomous power of taxation* and from the possibility to *issue the EU's own sovereign debt*, concomitant with a *large-scale pooling of sovereignty* over the *conduct of economic policy* at EU level. The European Parliament would then have reinforced powers to co-legislate on such autonomous taxation and provide the necessary democratic scrutiny for all decisions taken by the EU's executive. (My italics).

68 See the European Council conclusions on completing EMU of 14 December 2012, EUCO 205/12.

69 Idem, paras. 5-7.

70 Idem, paras. 8 and 10.

71 Idem, point 12.

72 Idem, introduction.

resurface in this process, as solutions to the current structural imbalance will have to be found. At the moment, however, they have not yet been embraced by the European Council, which seems rather unwilling to make any real leaps of faith just yet.[73]

Taking stock of the developments since 2008, therefore, one can conclude that many measures have been adopted or are in the pipeline. Many of these measures would not even have been imaginable several years ago. At the same time the sovereign debt and EMU crises, as well as the debate on how to solve them, are still on-going, with several of the real fundamental decisions still ahead, and with multiple pundits continuing to suggest this thesis might end up as a work of legal history disturbingly soon.

This ongoing debate and uncertainty, coupled with the multifaceted nature and complexity of the crises already mentioned, might argue against any attempt to analyse the EMU phenomenon, or at least against doing so before it can be approached with the much needed wisdom of hindsight. Precisely because it is ongoing, however, and precisely because it fundamentally challenges the constitutional framework of the EU, it is interesting to see how this crisis should be understood and approached from the confederal prism developed above. For what use are theoretical rudders that only work in calm waters, and what better means than crises to test the limits of a constitutional system? The caveats set out above, however, obviously intensify as we shift from description to analysis.

3 The EMU crises: Confederal diseases?

So what light, if any, can our confederal prism shine on the many questions that these crises, and the responses to them so far, raise. Why, for instance, did this crises hit so hard, and why is it so difficult to overcome? But conversely, why has the EU survived so far, and where should it go from here? It is suggested that the three general propositions on the constitutional framework of the EU outlined in Part I –its internal focus, incorporation of federate modifications, and rule by law – can be of direct use here in outlining some confederal 'diseases' of the EU constitution that contribute to the crises. Similarly, the confederal perspective, including the notion of confederal sovereignty developed in part II, can indicate some directions in which to look for a cure, as well as some confederal pitfalls that should be avoided in this search.

73 In contrast see the blueprint of the Commission openly pleading for 'the necessary elements and the steps towards a full banking, economic, fiscal and political union.' and the creation of 'a new taxation power at the EU level, or a power to raise revenue by indebting itself on the markets'.COM(2012) 777 final., 3 and 33.

3.1 *The internal focus and the momentum of self-deepening*

To begin with, and in line with our first general proposition, the origins of the crisis fully fit with the internal and economic focus of the EU, and with the self-deepening federate competences that were granted to achieve them.[74] Not incidentally the common currency was a crowning achievement in completing the internal market. This internal market logic and dynamic, of course combined with the other interest involved, was even so strong that it trumped clear warnings over creating a full Monetary Union without a sufficiently strong Economic Union.[75] And indeed market integration was enhanced by the Monetary Union, as was the economic dependence of the Member States on this currency, the internal market, and therefore each other. In other words, the Monetary Union deepened the very same dependence and economic interrelation that contributed to its own adoption.

Interestingly, this same dependence now plays an important role in weathering the crisis. Market integration has created a powerful incentive for the Member States to protect the EMU. The cost of letting the Euro fail is uncertain, but could be so high that it might better not be risked. As a result, it has so far been accepted that the Monetary Union has to be secured, even if it means saving Greece or other 'sinners' in the process. The grudging and tardy manner in which aid has so far been given only demonstrates just how loath the other Member States were to step in, and how large their self-interest in saving the Euro must have been.[76]

Here the mechanism described in Part I – how the dependence on the internal market keeps pace with the level of integration – is clearly visible. An incentive that is now so strong that it forces political leaders to transfer billions of Euros to other Member States at a time when they already have to cut national budgets. Measures they then have to explain to their far from enthusiastic constituents, without any proper national foundation for doing so. It is difficult to imagine a traditional confederal system, with its external and defence focus, ever providing such a strong incentive for continued cooperation and increasing investments, except in times of full out war. Here the inverted focus of the EU seems to have contributed to the survival of the Union.

The sheer power of this internal mechanism can, at the same time, also pose a risk. Especially once it is further enhanced by the increasing control

74 See above chapter 3, section 2.4.3. and chapter 4, section 2.

75 Clearly many more (political) factors also contributed to the eventual establishment of the EMU. See Szász (2001), and Ambtenbrink and De Haan (2006).

76 See the very late reaction of the European Council first only limited to supportive statements. Only with a market crisis imminent was real action taken on May 9th 2010.

of markets over governments that we seem to be witnessing.[77] The direct response to the market in Europe on May 9th 2011 demonstrates the impressive power of that market.

The far-reaching controls established, and the many increasingly radical suggestions on further economic integration aired during the crisis, some by very senior political figures, further illustrate the enormous impetus for cooperation and integration provided by the internal perspective. One of the most far-reaching was the suggestion to establish a full-blown European Economic Government with independent powers to sanction Member State governments.[78] Suggestions that stand in stark contrast to the political sentiment so tangible still in Lisbon, with subsidiarity, less Europe and national identity as its rallying cries.[79]

These far-reaching proposals, however, make perfect sense from the logic of the (internal) market and economic integration.[80] If one economically depends on a Monetary Union, and this Monetary Union requires shared economic government, then one should create it. But how far can, and should, one go in creating a full-blown Economic and Fiscal Union to match the Monetary one? Especially where the sentiment in most national electorates has firmly remained in a sceptical mode towards increased European integration, or has deteriorated even further precisely due to the EMU crisis? It will be those national electorates that many decision makers in the EU will have to convince or at least answer to, and whose support and legitimacy is so necessary for the long-term prospects of the EU.

Constitutionally, therefore, what we might be seeing is the internal market engine of the confederal system going dangerously fast, and potentially disappearing over the horizon of its confederal foundation. Yet simultaneously, this internal market engine is becoming ever more central to sustaining the integration that has been achieved so far against (political) backlashes. Slowing it down might, therefore, threaten the whole European construct as well. In this way the confederal perspective fits with the broader feeling of the EU being trapped between a dangerous leap forward and an equally dangerous slide backwards. To complicate matters further, however, some of the other confederal problems discussed above are also brought into play by the crisis.

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77 See also chapter 4, section 2.

78 See for instance the comments Merkel and Sarkozy on establishing an economic government on 16 August 2011, or even more far reaching the earlier comments by German economy minister, Philipp Roesler on August 10, proposing an – unelected – 'stability council' for EU. http://euobserver.com/19/113251 and http://euobserver.com/19/113327.

79 Dougan (2007).

80 Cf already the language in the Commission blueprint: 'Over the longer term, the *logic* of aiming for a full banking union for all banks is compelling.' (COM(2012) 777 final., 30).

3.2 *Hitting the weak spots: Money*

The debt and EMU crises precisely hit the weak spots in the confederal armour of the EU. Chinks that were discussed in relation to our second and third general proposition: The reliance of the EU on the rule by law and stable Member States, and the gap between the confederal basis and the federate superstructure of the EU.[81]

To start with, these crises concern money. As discussed in part I, the financial position of the EU is far better than that of the US Confederation, but only because the Member States pay their dues, and because the EU can make do with a very small percentage of GDP due to its regulatory nature. Like the US Confederation, however, the EU still lacks the authority and the legitimacy to conduct massive financial operations, particularly of a redistributive character. The amounts involved in the crisis far exceed this capacity.[82] Not surprisingly, therefore, the financial crisis clearly reaffirmed the ultimate financial power of the Member States. Most noticeably we saw how the European Council stepped in and took control, sometimes almost relegating the Commission to a role as secretariat.[83] An increased role for this confederal powerhouse is logical from the confederal perspective, as it must compensate the expanding federate element of the EMU.[84] And even though these developments may further encapsulate the European Council within the federate superstructure of the EU, they also create the danger of over-compensation. The confederal elements may use the momentum available to undermine too much of the federate superstructure of the EU.[85]

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81 See chapter 3, section 3 and 4.

82 See above. Certainly so when we also include the massive operations of the ECB so far. Though more screened from direct political responsibility, masked by technical complexity, and of vital interest in preventing a further melt-down, these operations do concern, at the end of the day, very real money. See for instance Decision (2010/281/EU) of the European Central Bank of 14 May 2010 establishing a securities market program *OJ* [2010] L 124/8 as well as the Outright Monetary Transactions' program.

83 Editorial Comments 'An ever Mighty European Council' 46 *CMLRev* (2009), 1383.

84 In fact the very development of the European Council, from its relative formalization in 1974 under the initiative of Giscard d'Estaing, can of course be seen as a confederal counterweight. Not incidentally it was the French interest that was served by a more direct political mechanism such as the one offered by the European Council.

85 Though no clear parallel can be proven, or causality shown, the comparison with the empty chair crisis of 1965-66 comes to mind. Not coincidentally, certainly not from the confederal perspective, the crisis erupted in relation to two significant federate modifications: the Court of Justice had just established direct effect and primacy (*Van Gend & Loos* and *Costa v. E.N.E.L.*) and under the rules of the EEC Treaty the Council of Ministers was about to move to QMV on some important fields. The confederal, statist counter-move by De Gaulle (partially) countered at least one of these developments through the Luxemburg Accords. Equally it was the Commission that suffered the greatest set-back in power, and the political institution of the Council that gained the most. In that regard the move by De Gaulle may have been a constructive one (in the longer run) in maintaining a certain overall balance. In any event this dynamic may be at work again, and too strong a resistance against the apparent need for confederal counterweights should not be rejected too easily.

Such a shift towards a more fiscally oriented Union, therefore, forms a clear risk. It not just endangers EU effectiveness, but may also undermine the federate elements in the system, and may subjugate them to pure confederal power in the fiscal field. In other words: Once the EU largely becomes about redistributing money directly instead of regulating a market, Member States, or their political leaders, may start putting their principal authority to use. They may increase control and re-confederalise more federate elements. Elements that, as we saw above, play an important role in stabilizing the overall EU system in the longer run. The clear power play by the European Council fits with such a scenario. The confederal nature of the ESM, and the intergovernmental SCG Treaty similarly follow this pattern, even though the inclusion of the EU institutions in these instruments also testifies to the importance of a federate superstructure for the effectiveness of a confederal system.

Although no alternative solution to the path chosen so far may have been readily available, and though the risks flagged up here do not have to materialize, they are risks that should be taken into account, and of course already are being taken into account, for instance by the Commission. [86] The limited point here is that any attempt to deal with these risks might benefit from a confederal understanding, which includes placing individual events in the larger context of the balance between confederal and federate elements in the EU.[87]

3.3 Politics and conflict

In addition to the serious money involved, the crisis combined two further weak points of the confederal form: Politics and conflict.

To begin with, the crisis concerns a highly political area where law has so far played a secondary role at best. Budgetary decisions and public spending form the core of national politics, and are not often brought into the legal arena.[88] As our second proposition pointed out, however, the EU largely governs through rule by law. A mechanism that only works where a field is subject to legal, or at least bureaucratic, scrutiny.

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86 In the terms of Van Middelaar (2009), 42-43, some content of the 'internal' circle (*de binnensfeer*) is transferred to the middle sphere, and/or, perhaps more worryingly, the middle sphere itself is drawn more towards the external sphere, at least in terms of self-understanding and process.

87 Editorial Comments 'Some thoughts concerning the Draft Treaty on a Reinforced Economic Union' 49 *CMLRev* (2012), 5 et seq.

88 See also recognizing this the Van Rompuy plan, page 16: 'Decisions on national budgets are at the heart of Member States' parliamentary democracies.'

The spectacular failure of the stability and growth pact sadly makes the point.[89] Forced to fall back on a truly confederal and political policing system, the pact failed, and the Monetary Union was left out in the cold. [90] The clear limits of the restraining power of law in this political field, especially in times of crisis, further illustrates the point. Right or wrong, the precise meaning of, for instance, Article 122(2) or 125 TFEU did not seem a primary concern, or a concern at all, for political decision making during the crisis. Ruffert provides an illustrative quote by Lagarde, the then Minister of Finance of France, 'We violated all the rules because we wanted to close ranks and really rescue the euro-zone.'[91] And as a matter of fact, the Courts followed.[92]

The many creative experiments now ongoing with the ESM and SCG Treaties, merrily blending EU law and intergovernmentalism, betray an equal pragmatic approach to law. Again we can remain agnostic here on the ultimate correctness of this approach. The sole point made here is that such a clear shift to political decision making, and the subsequently reduced role for law, greatly reduce the capacity for the confederal rule by law. Yet (confederal) alternatives do not seem available either.

In addition, and partially as a result of its political nature, the crisis seems to force the EU to directly control, and come into conflict with, the Member States. It must do so, furthermore, on one of the most sensitive issues possible: The budget. Again, this challenges the EU in one of the major confederal weaknesses established above: The limited capacity of the centre to control Member States, or to pit itself against one or more Member States in a direct, non-legal confrontation.

Economic Union itself, in other words, seems to be a problematic area for the confederal rule by law on which the EU depends. Despite the clear failure of all previous attempts to have the confederal centre control its mem-

89 Whereby it should not be forgotten that the European Court of Justice also rejected the invitation to legally police the Stability and Growth Pact at the European level. See C-27/04 *Commission v. Council (Stability and Growth Pact)* [2004] ECR I-4829, and D. Doukas, 'The Frailty of the Stability and Growth Pact and the European Court of Justice: Much Ado About Nothing' 32 *LIEI* (2005), 293.

90 In this regard a further blow to the rule by law should be noted, only this one at the EU level. This is the easy way in which the restraints of art. 125 TFEU were set aside by the European Council. Although the extreme conditions make this readily understandable, such deviations from the rule of law can have a very damaging long-term effect.

91 Ruffert (2011), 1788. Cf also Van Middelaar (2009), 160: 'the political force that keeps everyone onboard simply is stronger than the legal logic.' (my translation).

92 See especially C-370/12 *Pringle*, BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*, BverGE 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2 be 6/12 (2012) *ESM Treaty*, Conseil constitutionnel, Decision 2012-653 DC of 9 August 2012, *Fiscal Compact*, and Estonian *Riigikohus* (Constitutional Judgment 3-4-1-6-12 of 12 July 2012, *ESM Treaty*.

bers, many of the solutions now proposed precisely force the EU further into such a controlling and conflicting role; a role highly unsuited for confederal systems.[93] The EU, and specifically the Commission, are asked to police national politicians on an issue that lies at the heart of national politics. A job, and even a power, that the Commission should perhaps not wish to obtain. In that sense the path of the Golden Rule, which will be discussed below, might hold more of a promise for confederal rule, even if it is far from risk free.

3.4 The schism between confederal basis and federate superstructure

Lastly, and most importantly, part of the crisis may ultimately be said to have its roots in a schism between one element of the EU's federate superstructure that became too large, and the confederal basis that must support it. The strongly federate Monetary Union, which includes an independent European Central Bank with exclusive powers over all monetary policy,[94] was based on the completely confederal basis of an intergovernmental Economic Union.[95] A schism, furthermore, that reflects, and flows from, the more fundamental schism within the constitutional structure of the EU discussed above.

After all, there was a very good reason *why* a full Fiscal and Economic Union was not established together with the Monetary Union. Member States were not willing to surrender such a key element of their national political process to the EU, and rightly so.[96] Not only do these powers belong at the principal level of the Member States, the EU also lacks the normative authority required to support such far-reaching powers.[97]

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93 See chapter 4, section 3.4.

94 Notice in this regard also the enormous increase in the role and power of the ECB in this crisis. The ECB is required to inject the trillions of Euros required, yet for which national politicians cannot accept open political responsibility, and hence is significantly empowered and intrinsically politicized.

95 See on the federal nature of the monetary union already the language of the Werner rapport in 1969, par 30, explicitly calling the ECB federal 'Considering the political structure of Community and the advantages of making existing central banks part of a new system, the domestic and international monetary policy-making of the Community should be organized in a federal form, in what might be called a European System of Central Banks (ESCB).'

96 The necessity of further political integration was of course already seen at the time, and even proposed, leading to Maastricht. See the proposal for further political union made in the European Council of 1990 in Dublin (*EC Bulletin* 6-1990, 1.11). Also see R. Corbett, 'The Intergovernmental Conference on Political Union' 30 *JCMS* (1992), 271 and W. Buiter, '"The Sense and Nonsense of Maastricht" Revisited: What Have We Learnt about Stabilization EMU? 44 *JCMS* (2006), 687.

97 See chapter 10, section 3.2., 8 and 9.

As experience has shown, however, even the Monetary Union itself already taxed the legitimacy of the EU to a very high degree. Removing something as vital and sensitive as budgetary powers from the national political arena, and placing that power, or control over that power, at the EU level, therefore, should perhaps not be something the EU desires. At least not if it does not want to explode the already wide gap between foundation and superstructure.[98] Yet unlike in other areas, the existing schism between the Monetary and the Economic Union already seems to have reached a critical level anyway. As a result the EU is confronted with the fundamental question of how to respond to such a constitutional challenge. Propelled by the internal dynamic of the market described above, it now appears faced with the choice between two potentially fatal evils: Either abandoning the Monetary Union or making a leap of faith, and a rather desperate one at that, for full Economic Union. It is to explore the outlines of an alternative confederal response to this dilemma that we turn to some of the confederal pitfalls and responses that can be developed to the crisis based on the work done so far.

4 Confederal pitfalls in responding to the crisis: Mind the gap…please

The analysis of the modified confederal system of the EU in part I revealed several inherent weak spots. As shown above, the Euro crisis simultaneously puts pressure on several of these. Responses to the crisis, however, should be very mindful of these weaknesses as well. They should take care not to aggravate existing weaknesses or base remedies on the weaker parts of the confederal basis. Two pitfalls that should be especially avoided are focused on here. First, the risk of exploding the federate superstructure in order to stabilize the EMU. Secondly, the related risk of subsequently trying to create a sufficient democratic authority at the EU level to support this expanded superstructure. Both risks are usefully illustrated by the Commission's blueprint for a deep and genuine EMU.

4.1 Exploding the federate superstructure

The first pitfall is to delegate too many new and far-reaching powers to the EU level, and thereby enlarge the already impressive federate superstructure of the EU outlined in part I. This pitfall is particularly dangerous as increasing central powers seems such a logical response. After all, the fundamental imbalance between the weak Economic Union and the federate

98 Also see the warning by the German BvGH in this connection, who held that members of the *Bundestag*, carrying the primary political authority and responsibility 'must remain in control of fundamental budget policy decisions.' BVerfGE 2 BvR 987/10, 2 BvR 1485/10 and 2 BvR 1099/10 (2011) *Euro Rescue Package*.

Monetary Union forms one of the structural causes of the entire crisis.[99] Elevating the economic leg of the EMU to the same federate level as the monetary leg would solve this imbalance.

In line with this logic, and its own institutional reflexes, the Commission strongly supports such further and deeper integration. A 'significant additional transfer of political powers' is necessary.[100] A 'full fiscal and economic union' is the desired 'final destination, it would involve a *political union* with adequate *pooling of sovereignty* with a *central budget as its own fiscal capacity* and a means of *imposing* budgetary and economic decisions on its members, under specific and well-defined circumstances.'[101] Such deep integration would also entail the common issuance of debt, and eventually the right of the EU to tax individuals directly.[102]

These proposals would significantly expand the federate superstructure of the EU, both quantitatively and qualitatively. They even provide for a right to tax, one of the fundamental federate modifications adopted at Philadelphia, and allow the EU to directly interfere in the budgetary heart of national politics.

As we saw, however, the current federate superstructure is already writing cheques the confederal foundation is barely able to cash. In addition, it is precisely the federate market competences of the EU that have the tendency to expand at the expense of the confederal elements in the EU Constitution, and that by doing so helped to create the entire crisis in the first place. These new federate elements, furthermore, would concern exactly those areas, like money, politics, conflict and enforcement, where a confederal system remains weak.

In other words, proposals to create a federate Economic Union expand the federate superstructure beyond what the confederal basis can carry, and would do so in some of the most dangerous and problematic areas imaginable for a confederation. Besides overburdening the confederal foundation of the EU, such an approach would force the confederal elements in the constitutional system to fight back. The central role that the European Council has claimed during the Euro crisis was already noted above, and provides a clear illustration of this risk. Where the powers at the European level become so significant, and start to include vital political issues like the budget and taxation, these political actors will quickly find ways to re-establish

99 This assumption also underlies the proposals from the European Parliament, the Commission Blueprint and the Van Rompuy Plan.

100 Commission 'blueprint for a deep and genuine economic and monetary union.' COM(2012) 777 final, 11.Cf also page 11 (progressive pooling of sovereignty' leading to 'a deeply integrated economic and fiscal governance framework'.

101 Idem, 31.

102 Idem, 31, 33 and 40.

control. As shown in part II, EU institutions will have no means of defeating the principal national authority and legitimacy of these actors once it is fully deployed. The net result might well be less central control than more, and a dangerous undermining of the entire federate superstructure on which the EU depends.[103] The fall out of such a power struggle could also tarnish the rule by law and general culture of legal compliance and cooperation that the EU relies on.

4.2 Relocating democracy to the EU level

Obviously the parties suggesting such an expansion of the EU superstructure are well aware of these risks. Yet in line with their desire to expand the superstructure, their solution generally is to jump into the second confederal pitfall as well by trying to establish the necessary democratic legitimacy for an expanded superstructure at the EU level.

Again, the proposals of the Commission provide a clear example. The choice to create a primary EU democracy to support deeper economic integration is already inherent in the two 'basic principles' the Commission formulates:

> 'First, in multilevel governance systems, accountability should be ensured at that level where the *respective executive decision* is taken, whilst taking due account of the level where the decision has an impact. Second, in developing EMU as in European integration generally, the level of democratic legitimacy always needs to *remain commensurate with the degree of transfer of sovereignty* from Member States to the European level.' Consequently it is the European Parliament 'that primarily needs to ensure democratic accountability (…).'[104]

It is still acknowledged that 'the role of national parliaments will always remain crucial in ensuring legitimacy (…)'. Yet it is not exactly clear what this crucial role entails because it is the European Parliament that must provide the real legitimacy at the EU level.[105] For this legitimacy 'requires a parliamentary assembly representatively composed in which votes can be taken. The *European Parliament, and only it, is that assembly for the EU* and hence for the euro.'[106]

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103 See above chapter 3, section 6.

104 Commission 'blueprint for a deep and genuine economic and monetary union.' COM(2012) 777 final, 35.

105 Cf in this regard also the almost mystical statement in art. 3(2) TSCG that the required correction mechanisms 'shall fully respect the prerogatives of national Parliaments', even though they must *guarantee* that the deficit does not become excessive.

106 Commission blueprint, 35.

Yet it fails to be seen, or demonstrated, how the European Parliament will provide this legitimacy. A gap illustrated by the interesting claim that the 'Lisbon Treaty has *perfected* the EU's unique model of supranational democracy'.[107] A somewhat optimistic assessment of the current legitimacy of the EU and the European Parliament. This assessment is also immediately contradicted by the second half of this sentence, which finds that this perfect system '*in principle* set[s] an appropriate level of democratic legitimacy in regard of today's EU competences.'[108] In practice, however, the European Parliament seems incapable of generating sufficient legitimacy to even support the current federate superstructure, let alone a greatly expanded one.

As demonstrated in part II, it is also impossible for the European Parliament to do so in the confederal authority structure of the EU. Unlike in a federate system there simply is no supreme central authority to represent at the EU level, and to draw legitimacy from.[109] The national parliaments therefore remain the principal representative bodies of the different sovereign member people.

Because there is no sufficient central authority to represent or legitimize such far-reaching central powers, it also comes as no surprise that the Commission struggles to concretize and substantiate the strengthened role of the European Parliament or the legitimizing effect expected. Achieving further legitimacy will require 'further reflections' on the 'EU's model of democratic legitimacy', despite its current perfection.[110] Later on, only some less than convincing suggestions are made, for instance ensuring that the European Parliament is 'more directly involved in the choice of the multiannual priorities of the Union', that it is 'regularly informed' on adjustment programmes, or the 'possibility of adapting its internal organisation to a stronger EMU.'[111] Nor does the suggestion to increase the control of the European Parliament over the new supervisory functions of the ECB seem likely to achieve the desired democratic result.[112] As a result, we are left with the general need to 'foster the emergence of a genuine European political sphere'.[113] The same challenge the EU has been facing all along.

Besides their ineffectiveness, however, two more fundamental shortfalls undermine such attempts to establish primary democratic legitimacy at the EU level, at least as long as the member peoples want to retain a confederal Union and their individual sovereignty.

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107 Idem, 35.
108 Idem, 35.
109 See chapter 4, section 4.
110 Commission blueprint, 35-36.
111 Idem, 37.
112 Idem, 39.
113 Idem, 37.

To begin with, it diverts the focus from the national level, though it is there that confederal democratic legitimacy could perhaps be best sought. Instead of investing in the confederal evolution of the national democratic process, as suggested in chapter 12, attention remains focussed on the EU level.

Second, the attempts to create legitimacy at the EU level automatically *challenge* the principal legitimacy of the national democratic system. The implicit claim is that this national level can be supplanted by an EU process. As part II of this thesis demonstrated, this is impossible within a confederal system.[114] Such claims can, as a result, lead to dangerous conflicts, that might undermine the modified confederal model of the EU.

Essentially these challenges, jointly shaping the second confederal pitfall, all flow from the flawed assumption that 'accountability should be ensured at that level where the respective executive decision is taken.' As long as a confederal system is to be maintained, however, accountability on such vital points must be ensured at the level where the principal political authority lies: The national one. As demonstrated in part II and chapter 12 above, the solution then lies in connecting decisions at the EU level to this principal national authority through a confederal evolution of the national democratic process.

4.3 Only conquer what you can defend

Jointly, these two confederal pitfalls may balloon the federate superstructure without providing any additional democratic legitimacy to support it. What is more, the existing legitimacy that lies at the national level may be challenged and undermined. The confederal potential of a direct and democratic basis for EU authority outlined in part II is not realized, and the national democratic processes cannot evolve in a way that allows them to expand their control beyond the borders of the declining state. The responsibility to develop effective budgetary controls that meet the requirements of the confederal centre, a task which could provide important content to a national democratic process on integration, is transferred to the central level.

In its turn the centre may be tempted to bite off far more authority than it can chew. Far-reaching authority to control national budgets may very well prove a Trojan horse, as the centre will be unable to provide the required legitimacy, and such authority may induce a countermove from the national

114 Of course one could reply that a federate foundation should therefore be established, and this might also be the implicit hope underlying the Commission blueprint. As has been discussed in part II, however, such a shift is considered neither feasible nor desirable for the foreseeable future. Nor, furthermore, should it be realized through stealth or trying to establish a *fait accompli*, which would be an extremely risky and undemocratic strategy.

political actors that the EU centre will not be able to repulse. Conquering ground now that some Member States are in disarray might be easy and tempting, but defending such conquests will be impossible, and future withdrawal will be costly.

The next section therefore attempts to provide a confederal contribution to this key challenge, and to the sustained group effort that will be required to tackle it.

5 Confederal cures?

For, in addition to highlighting some of the causes and pitfalls, and with the caveats set out above, the confederal prism might also help by indicating some alternative directions for solutions, at least at the constitutional level. Solutions that avoid some of the main weaknesses in the modified confederal system of the EU, and instead try to build on its particular strengths.

To this end two suggestions will be discussed here. First, establishing the checks on national economic discipline at the national level, and bringing them under more effective secondary EU control. Second, relying on automaticity, rather than any form of political decision making at the European level in enforcing Member State obligations.

Both of these suggestions concern the narrow issues of *enforcing* economic coordination and budgetary control. The lack of effective enforcement is one of the key weaknesses of the EMU, but of course not the only one. Consequently, even if the proposed approaches might be effective, they would not address other structural problems of the Euro such as the disparity in the balance of payments or the different level of competitiveness between Member States economies. Nevertheless improving the effectiveness on this point may go some way to softening the unattractive and seemingly impossible choice between either a federate 'E', or no 'M'. It may strengthen the economic limb of the EMU without transferring impossible amounts of federate powers to the EU. In addition, if the underlying logic and approach are correct, it may also be of use in addressing some of the other structural problems facing the EMU.

5.1 Designing confederal checks at the national level

As indicated above, switching to a full Economic and Fiscal Union seems out of the question. Aside from the fact that such a measure would likely not make it through public consultations at the moment, it might very well tax EU and national legitimacy beyond its breaking point. The more logical approach from the confederal perspective would seem to stop burdening the confederal level with enforcement tasks, and instead look for a solution at *the national level*, where the principal authority, the financial power, and the spending problem lies.

A '*Schuldenbremse*' forms one example of the kind of rule that could be adopted at the national level. Budgetary rules of this kind were already included in the Swiss Constitution in 2002 and the German Constitution in 2009[115] Poland has also constitutionally capped its public debt to three fifths of GDP, [116] and a similar proposal was accepted by the Spanish Senate in 2011.[117]

Now the precise functioning of such rules and budgetary control procedures should be left to the national democratic process, but they should take the limits set by the EU into account. The national rules should be developed with the aim of ensuring these limitations, but must do so at the national level. With such national rules in place the EU could then revert to its confederal rule by law; it could *connect* with these national rules and systems of control, and influence their application and interpretation. Rather than pitting itself against its Member States in a field where the EU does not have a hope of trumping them, the EU could then work with the Member States, or at least their legal systems, to fortify their own national measures.

The benefits of such an approach are perhaps best illustrated by the absurdity of their opposites, such as the plan of Dutch Prime Minister Rutte to turn indebted Member States into EU wards under direct control of a European Commissioner.[118] The focus of the EU should be to stimulate Member States to take appropriate national measures, not to superimpose itself as a higher level of economic government.[119] As demonstrated in part I, it is vital that a confederation is based on stable and responsible states, instead of trying to increase its powers to control unstable ones.[120]

115 Art. 115(2) of the German Basic Law now provides that revenue and expenditure must be balances, which is the case if not more than 0.35% of GDP has been borrowed. In exceptional circumstances a larger deficit may be allowed. The *Länder* will not be allowed to run any deficit at all. Under the transitional scheme of art. 143(d) of the Basic Law, however, the 0.35% limit will only bindingly apply to the Federal Government in 2016, and to the *Länder* in 2020. Italy and Austria have similarly included debt brakes.

116 Art. 216(5) of the Polish Constitution. Instead of such substantive caps one could also think of more procedural or transparency requirements.

117 Under this amendment, proposed by Zapatero on August 23 of 2011, the Spanish government will not be allowed to run a deficit of over 0.40% of GDP, and is under a constitutional obligation to reduce the deficit to under 60% of GDP. The amendment has not yet been passed.

118 See the letter of the Dutch Government to the Second Chamber of Parliament of September 7th 2011, co-signed by the Prime Minister, the Minister of Finance, the Minister of Economic Affairs, Agriculture and Innovation and the State Secretary of foreign affairs (i.e. not the Minister for Foreign Affairs). Ref 3106274.

119 For future members of the Euro zone, and even future Members of the EU such measures can, of course, be turned into accession requirements. See in this regard chapter 17 of the negotiation framework for the accession of Montenegro.

120 See chapter 4, section 3.4.

The 'Golden Rule' now incorporated in the SCG Treaty, which was inspired by the German and Swiss *Schuldenbremse*, and was coincidentally incorporated after this proposal was first formulated in this thesis, follows this confederal logic.[121] It effectively utilizes several important confederal tools.

First, it *legalizes* budgetary decisions. An obligation is created for Member States to bring their national budget procedure under national legal control. As we saw, this is an initial requirement to open a field up for confederal rule by law.[122]

Second, it subsequently relies on the Member States' own control mechanisms and enforcement capacity to self-police these budgetary limits. Primary enforcement, therefore, lies with the Member State. This also allows for a broader variety of controls and sanctions than the inevitable fines, and allows the mechanism to be more tailored to the specific national system it needs to keep in check.

Third, instead of being the primary enforcer, the Commission, acting outside the framework of the EU Treaties, is given the task of setting the standards that the national control mechanism should conform with.[123] In the same vein the Court of Justice, acting under Article 273 TFU, is not asked to rule directly on the national budgets, but on the national mechanisms established.[124] The confederal institutions are, therefore, used for second-level norm setting and enforcement in a highly legal manner, a task to which they are more suited than direct enforcement on politically sensitive fields.

Fourth, as the TSCG cannot rely on the supremacy that EU law claims, it contains the direct obligation to *constitutionally* elevate the Golden Rule, or at least to give it an equivalent status. A status that would guarantee, as much as legally possible, its effectiveness within the national legal orders.[125] As such, the legal supremacy required for effective national budgetary control is derived from the primary authority and legitimacy of the national constitution, and not from the broader but weaker supremacy of EU law.[126]

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121 Clearly not implying any form of causality whatsoever.

122 See chapter 4, section 3.1.

123 See art. 3(2) TSCG, and for the guidelines themselves the communication from the Commission of 20 June2012 on the Common principles on national fiscal correction mechanisms, COM(2012) 342 final.

124 For the indirect review of budgets this could give rise to via the logic of effectiveness see Borger and Cuyvers (2012).

125 See also chapter 3, section 4 on the rule by law and the reliance of the Member States themselves on the rule of law.

126 See chapter 10, section 8.

The entire approach and logic underlying the Golden Rule, therefore, conforms with the confederal rule by law approach described earlier, and therefore with the most effective enforcement mechanism available to a confederal system. Consequently, if constituted effectively, a Golden Rule can make do with the relatively light footprint the rule by law approach leaves in general. In turn this means that the federate superstructure of the EU can remain lighter, and a further widening of the gap between superstructure and foundation is prevented.

Two more general confederal benefits, therefore, also flow from this approach. To begin with, the Golden Rule anchors the EMU, and therefore part of the internal market, in the national constitutions. Second, and related, it also relocates part of the burden and responsibility for the EMU onto the national systems. It will not just be 'Brussels' demanding budget cuts, but national institutions and national judges. And it will be the national democratic process in which the debate over the necessity of such measures will take place, and where the crucial specifics of the Golden Rule will be decided.

At the same time, the Golden Rule system also knows clear risks and costs. To begin with such national measures share in the confederal risk of over-legalizing areas that should be largely left in the hands of politics. A proper balance should, therefore, be found between European (legal) controls on spending and national political discretion to decide on spending. In this regard the rather open phrase that the Golden Rule '(…) shall fully respect the prerogatives of national Parliaments' may ring a bit hollow: How to curb parliamentary spending power without limiting their prerogatives? Again, however, this balance should also become part of the national democratic process.

Much will also depend on the specifics of the clauses adapted, and the constitutional practice that develops around them. If national control mechanisms fail to be generally effective, which seems to be a real risk in several Member States, the secondary enforcement by the Commission and the Court of Justice will *de facto* revert to a primary role anyway.[127]

127 Regarding the interpretation, application and effectiveness of these national control mechanisms, furthermore, the interaction between such (constitutional) norms and EU law should be duly considered, certainly where such a Golden Rule is indeed to be incorporated from the TSCG into EU law proper. Although it cannot be explored here, these questions at least deserve to be flagged. For because national budgetary control mechanisms will then formally implement EU law, such national norms would have to comply with EU law, or at least be interpreted in conformity with EU law to the extent possible. The complete supremacy claimed by EU law, furthermore, combined with the potential direct effect of clearly worded European debt limits, could have far-reaching effects. The question could even be raised to what extent Member States would be forced to create legal remedies to enforce such rights and obligations. In other words, when bringing the budget under the EU rule by law, all the principles, doctrines and effects that accompany that rule by law make their entree as well.

Most fundamentally, however, the very same anchoring in national institutions and constitutions that forms the strength of the Golden Rule also forms an important risk. As we saw earlier, the EU already seems to be eating into the legitimacy of national institutions.[128] Asking them to take on another heavy task, and one that will remain of a clear 'external' signature, might be placing too big a burden on them as well, at least in their present status.[129] Even where sufficient national measures will be taken in all Member States, it will still be necessary, therefore, to increase the legitimacy, or 'carrying weight' of the confederal basis of the EU at the national level more generally.

As a result, the success of a Golden Rule will also depend on an improved confederal foundation for the EU more generally, and therefore on a confederal evolution of the national democratic process as outlined in part II and chapter 12. The member peoples should not just be empowered to engage in the precise formulation and modalities of the Golden Rule, but in a national democratic process on the EU more generally. Once such a national process is in place, after all, the electorate can also be properly informed about the necessity of a Golden Rule, and weigh the overall benefits, both national and European, against the likely costs. A debate can then also be had on the best way to structure such a Golden Rule, and what kind of exceptions and flexibility should be included. This opens up the field for national tailor-made solutions and creativity. One could imagine a more procedural mechanisms, for instance requiring new elections or a referendum on cuts where an excessive deficit occurs. Alternatively legal limits might be buffeted by political incentives, such as an automatic increase in income taxes and VAT where an excessive deficit is projected. Creating such a debate about the modalities and costs and benefits will also help the desired sense of EU solidarity to develop on the basis of enlightened self interest, at least if the assumptions underlying such rules are correct.[130] A Golden Rule can, in other words, form an important part of a confederal democratic process, but also needs to be grounded in precisely such a process.

5.2 The alternative of automaticity

One confederal alternative to national control mechanisms might be the inclusion of automatic sanctions at the EU level. This might be a counterintuitive suggestion, as automatic sanctions are generally seen as a far-reaching limitation of Member State control. Constitutionally, however, it can be argued that such automatic sanctions actually remain fully confederal in the sense that they are simply another method for the Member States to police

128 See chapter 4, section 3.5.

129 Where a new national institution is created, as is not unlikely given the wording of the SCG Treaty, furthermore, this new institution will not have any existing legitimacy to fall back on, and might be perceived even more as a European *Fremdkörper*.

130 See also the Van Rompuy plan, page 14.

themselves. The only difference with national sanctions would be that they are using the EU level to police themselves more effectively.

The imposition of an automatic, predefined fine, after all, would not so much be the application of an EU competence. It would be the execution of a direct and clear will of the Member State itself to be sanctioned when violating a certain rule. Especially where interpretation and application are relatively clear, this would be comparatively unproblematic, and would not require the EU claiming the normative authority to overrule or sanction the Member States in the area of public spending (at least not formally so, public perception will of course be a different matter altogether).

Automatic sanctions also reduce the political dimension, at least at the EU level, of imposing sanctions, and keep the imposition of sanctions within the legal domain. A domain that is much more amenable to confederal rule. In this sense the use of automatic sanctions could be compared to the important role played by negative integration more generally.[131] It could remove the need for political decision making, thereby removing the potential for political deadlock, provide a clear base line, and allow the legal institutions involved to gradually develop an Acquis that might guide and spur future decision making. Even more than with national sanctions, however, and as with negative integration in general, such automatic sanctions also raise issues of legitimacy, and also require a stronger confederal foundation.

6 A confederal course to weather a perfect confederal storm

The sovereign debt and EMU crises formed the second challenge and whetstone for the confederal approach developed in this thesis. Based on the findings above it can be concluded that a confederal approach can indeed provide useful insights and guidance.

First of all, it helps to reveal the confederal roots of the sovereign debt and EMU crises. As was shown, these crises precisely hit the major weak spots of the modified confederal system identified in part I. They were caused by a self-propelling federate superstructure that challenged the normative primacy of the national level and forced the EU into fields for which its confederal system is particularly unsuited: Money, politics, conflict and direct enforcement. A confederal approach hence helps to increase our understanding of why these crises arose, and why they form such a challenge to the EU.

131 See chapter 3, section 3.1.

Second, such improved understanding allows us to identify several pitfalls that should be avoided in the current struggle to combat the ongoing crises. Two understandable temptations should be resisted in particular: First, burdening the EU with a full-blown federate economic union, and then to, secondly, try and establish a federate democratic process at the EU level capable of supporting this expanded federate superstructure.

Both responses would be based on a deceptive logic, and would fail to grasp and respect the confederal nature of the EU. As a result they could widen the already dangerous gap between the EU's confederal foundation and its federate superstructure, without providing anywhere near the required level of democratic legitimacy. Equally, they would risk challenging the ultimate foundation of confederal authority in the sovereign member peoples.

Consequently, such centralizing responses to the crisis might lead to dangerous confederal readjustments in the entire EU system. In addition they might overburden the confederal foundation far beyond its maximum carrying capacity. Either way, such aggressive centralizing responses might win the battle to stabilize the EMU in the short run, but they would lose the war for a stable and democratic European Union in the long run. A conclusion that can be visualized by imagining the European Commission actually trying to restrain the German, French, Spanish or Polish parliaments and governments in an open conflict over the national budget, and doing so in the face of an overwhelming national electoral support not to give in to Brussels. A looe-lose situation for integration.

Third, and taking into account these pitfalls, a confederal approach points to some more promising solutions. In line with the modified confederal system of the EU, the focus should shift to the national level, and to ways of linking a more effective economic union to the primary authority of the member people. In line with the earlier conclusions on a confederal evolution of national democracy, effective budgetary checks should be established at the national level. Guided by its confederal obligations the national democratic process should be challenged and allowed to create effective control mechanisms, preferably at the constitutional level. Such national mechanisms should fit with the national system, and find a proper balance between the different interests involved. Clearly the result will not be as tight or unified as under a completely centralized system, and failures may occur. Yet a sufficient level of effectiveness might be possible, and any limits on effectiveness must also be accepted as the price to pay for respecting national identity and democracy, and the long term stability this would bring to the EU and its EMU on the whole.

A further potential benefit of such a confederal approach would be its contribution to the necessary confederal evolution of the national democratic process. Determining how and to what extent a Golden Rule should be incorporated in the national constitutional system provides important new

substance for such a political process, and also forces this process to engage with European integration. Whats more, by relying on national processes and mechanisms for enforcement, the EU can revert to the subsidiary role for which the confederal form is generally best suited.

Combining these insights, it is important that the political energy and opportunity provided by the crises is used wisely. Where possible it could be channelled into improving the confederal foundation of the EU in the national constitutional and democratic systems. In this way the leverage provided by the crises could be partially used to improve the stability of the national systems, both in terms of economic discipline and in terms of promoting a confederal democratic process more generally. For it is on the stability of these national systems, and their capacity to provide democratic legitimacy for European integration, that the EU largely depends. Hence it is important that the temptation is resisted to use the crises to further expand the federate superstructure of the EU, and to achieve short-term results. Instead, a long term investment in the confederal foundation of the EU might pay substantially higher and more sustainable dividends.