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The transformation of the euro: law, contract, solidarity

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5 The shift in solidarity

1 Introduction

By concluding the Treaty of Maastricht, the member states incorporated the single currency in their Founding Contract and consequently committed themselves to a solidarity that was largely negative in kind. Most of the key demands Union law made on them sought to safeguard price stability by requiring them to perform actions that targeted their own condition. In particular the prohibitions focusing on fiscal discipline in Articles 124-126 TFEU had this aim.[1] Each tried to ensure that member states act in the interest of the collective by demanding that they themselves exhibit fiscal prudence. At the time of the launch of the euro, Wolfgang Schäuble, not yet the important finance minister he would become during the crisis but still a member of the *Bundestag*, aptly put the solidarity states had to display. Echoing Theo Waigel when he had tabled his proposal for a stability pact in 1995,[2] Schäuble argued:

> 'It is inherent in the very meaning of an economic and monetary union that the observance of agreed policy forms the founding act of solidarity among the member states, given that – notwithstanding the no-bailout clause in the Treaty – all participants of the euro have to bear the consequences of the wrong policy of one of its members.'[3]

▪ This chapter contains and/or builds on previously published work by the author. See especially Vestert Borger, 'De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme' (2011) 59 SEW 207; Vestert Borger, 'The ESM and the European Court's Predicament in *Pringle*' (2013) 14 GLJ 113; Vestert Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 EuConst 7; Vestert Borger, 'The European Stability Mechanism: a crisis tool operating at two junctures' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 150.

1 The prohibition on monetary financing in Art 123 TFEU equally focuses on fiscal discipline, yet it is targeted at the ECB, not the member states.

2 See text to n 1 and n 314 (ch 3).

3 Wolfgang Schäuble and Karl Lamers, 'Europa braucht einen Verfassungsvertrag: Überlegungen zur europäischen Politik II' (UiD-Extra, 1999), para 2.5 (translation by the author). The author would like to thank Peter Maessen, former master student at Leiden University, for pointing to this document in his thesis. See Peter Maessen, 'Schäuble's Vindication: How Article 136(3) TFEU Sets the New Legal Standard for Solidarity in the Euro Area' (Master thesis, Leiden University 2012).

As much as Schäuble's words may at the time have created the impression that the kind of solidarity that the currency union demands of its members is immutable, it is susceptible to change, no matter its consolidation in primary law. In fact, the crisis has led to such a change and Schäuble has witnessed it from nearby. Central to this change is a widening of the currency union's stability conception. Whereas in its original form the currency union attributed predominant importance to price stability, it has transformed into one that is better at taking financial stability into account as well. This widened stability conception leads member states to not only display negative solidarity, characterised by actions in support of the collective that focus on the acting state itself, but to increasingly resort to positive solidarity, expressed through actions that directly benefit others.

In the past years, perhaps the most popular narrative to explain this move towards positive solidarity was to say that it served the self-interest of member states. Take Frank Schimmelfennig. Following liberal intergovernmentalist logic,[4] he points to the 'negative interdependence' between the members of the currency union, due in particular to the vicious circle between states and banks,[5] and argues that it lies at the basis of the actions they have taken in support of cohesion.[6] Leaving a financially distressed member state on its own was simply not an option when the crisis erupted late 2009; the threat that a sovereign default posed to other states and their banking systems was too high. States may have negotiated fiercely about how to devise their rescue operations legally and institutionally, and how to split the bill between those at the receiving and granting ends,[7] it was the realisation that each of them would be better off with than without the single currency that made them willing to back it in the first place.[8] Focusing specifically on Germany, Andrew Moravscik similarly reasons that it has come to the rescue as it 'is the greatest beneficiary of financial stability and the common currency. A sudden default of a eurozone country or the collapse of the currency itself would devastate the German economy…'.[9]

4 See text to n 113 (ch 2).
5 For a discussion of this vicious circle and the risks it has posed to the members of the currency union during the crisis see text to n 237 (ch 4).
6 Frank Schimmelfennig, 'Liberal intergovernmentalism and the euro area crisis' (2015) 22 Journal of European Public Policy 177, 179-183.
7 For an assessment of the negotiations in light of intergovernmental bargaining theory see Schimmelfennig (n 6) 184-188.
8 To put it in the words of Schmimmelfennig (n 6) 178: 'National preferences resulted from strong interdependence in the EA and the fiscal position of its member states: a common preference for the preservation of the euro was accompanied by divergent preferences regarding the distribution of adjustment costs'.
9 Andrew Moravscik, 'Europe After the Crisis: How to Sustain a Common Currency' (2012) 91 Foreign Affairs 54, 61.

Now, the members of the currency union have indeed acted in support of the collective for reasons of self-interest. The solidarity displayed by them therefore undeniably has a very important factual dimension to it.[10] And this factual solidarity not only resulted from financial interdependence. It was also rooted in a common destiny. The threatening prospect of the crisis spreading like a contagious disease throughout the currency union united its members in their battle against financial markets.[11] Especially in the first years of the crisis, markets' 'herd-like behaviour',[12] characterised by steep and sudden interest rate increases for bonds of 'peripheral' states,[13] tied the fate of each individual member to that of the whole.

Yet, those who argue that it is only self-interest that has made the members of the currency union act in unison fail to appreciate the normative dimension to their solidarity.[14] States did not only defend the single currency for utilitaristic reasons. They were also obligated to do so due the Founding Contract which commits them to the single currency, and ultimately to the Union itself.[15] This chapter seeks to capture this normative dimension to the solidary

10 On factual solidarity see text to n 107 (ch 2). For the argument that such rescue actions, to the extent they are based on self-interest, should not be seen as solidarity see Fabian Amtenbrink, 'Europe in Times of Economic Crisis: Bringing Europe's Citizens Closer to One Another?' in Michael Dougan, Niahm Nic Shuibhne and Eleanor Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart 2012) 185.

11 Politicians themselves recognised at a very early stage of the crisis that they were engaged in such a battle. Angela Merkel, for example, likened the crisis in May 2010 to 'a battle of the politicians against the markets' which she was 'determined to win'. See quote in Tony Barber, Quentin Peel and Telis Demos, 'Markets tumble on European debt fears' *Financial Times* (7 May 2010).

12 See in this regard Arne Niemann and Demosthenes Ioannou, 'European Economic Integration in Times of Crisis' (2015) 22 Journal of European Public Policy 196, 207-209 which also contains further references. The authors point out that even though financial markets may simply be seen as market places in which individual players pursue their own 'strategies', due to this 'herd-like behaviour' during the crisis states perceived their actions as 'unitary'.

13 See text to n 17 (ch 4).

14 Sofia Fernandes and Eulalia Rubio, for example, argue that 'Concerning the type of solidarity exercised, all over the crisis decisions on bail-outs and solidarity arrangements have been driven by enlightened self-interest considerations'. See Sofia Fernandes and Eulalia Rubio, 'Solidarity within the Eurozone: how much, what for, for how long?' (Notre Europe Policy Paper No 51, February 2012) 19.

15 Liberal intergovernmentalists like Frank Schimmelfennig to some extent recognise this too by pointing out that the shared willingness of member states to rescue and reform the euro has its origin in their original commitment to the single currency. To put it in the words of Schimmelfennig: '[T]he common interest of EA countries in preserving and stabilizing the euro and their preparedness to engage in institutional reforms strengthening the credibility of their commitment to the euro is best explained as endogenous to the previous decision to create a common currency'. See Schimmelfennig (n 6) 192 (reference omitted). For such a 'historical-institutionalist' analysis of the response to the crisis see Amy Verdun, 'A historical-institutionalist explanation of the EU's responses to the euro area financial crisis' (2015) 22 Journal of European Public Policy 219. Note, however, that her historical institutional explanation does not specifically focus on the normative constraints imposed by the Founding Contract. She rather posits that the crisis 'reconfirmed' that the member

ties between the member states, especially those in the currency union.[16] Its purpose is not to show to what extent they were acting on their political obligation, chasing their self-interest, or responding to other motivating forces each time they supported the collective. Rather, it uses their Founding Contract, and the change it underwent during the crisis, as a guide to understanding the transformation of the single currency's set-up.

The chapter is divided into three parts. The first concerns the positive solidarity that member states displayed towards Greece at the very beginning of the crisis. Like all acts of positive solidarity, it had its roots in a historic meeting of the heads of state or government on 11 February 2010. At that meeting, the leaders initiated a change in the Founding Contract between their states by jointly committing themselves to defend the single currency through safeguarding financial stability. In the months that followed they would confirm and specify this change through other, more specific commitments, which would eventually bind member states not only in their executive capacity, but in full: in May 2010 states put in place a rescue package for Greece of € 110bn.

The second part deals with the positive solidarity displayed towards other distressed member states. Almost immediately after the Greek assistance package had been announced on 2 May 2010, leaders realised it would not suffice to stem the crisis from spreading. Only days later, on 10 May, they therefore decided to put in place a rescue package of € 500bn for the currency union at large. Part of the assistance was provided by the Union through a rescue facility based on the support clause in Article 122(2) TFEU. Most of it, however, was paid out of the purses of the member states and mobilised through an intergovernmental rescue facility outside the confines of the Union Treaties.

This display of positive solidarity, to Greece and other member states, put great demands on the currency union's political leaders. The decisions they had to take in honour of the commitment to safeguard financial stability not only created difficulties for them back home, politically and legally, it also caused them to put great strain on the single currency's legal set-up that still

states 'were unwilling to let EMU unravel' (p 231) and, taking that as a starting point, then examines how the existing political-institutional setting influenced the political response to the crisis. For other historical-institutional accounts of the crisis response see Jonathan Yiangou, Mícheál O'keeffe and Gabriel Glöckner, 'Tough Love: How the ECB's Monetary Financing Prohibition Pushes Deeper Euro Area Integration' (2013) 35 Journal of European Integration 223 (analysing how the prohibition on monetary financing triggers and shapes further integration in the currency union); Ledina Gocaj and Sophie Meunier, 'Time Will Tell: The EFSF, the ESM and the Euro Crisis' (2013) 35 Journal of European Integration 239 (analysing how the establishment of the permanent rescue fund ESM results from 'path dependence', more particularly from the prior decision to set up the temporary rescue fund EFSF as an intergovernmental vehicle).

16 On normative solidarity see text to n 98 (ch 2).

reflected a stability conception from the past. The third part of the chapter therefore discusses the attempt of member states to take away this strain by incorporating the shift in solidarity in Union law. At the end of 2010, when the currency union had managed to make it through the first storm of the crisis, the European Council decided to amend Article 136 TFEU so as to allow states in the currency union to establish a permanent rescue mechanism. This chapter traces the process and considerations behind both the amendment and the creation of the mechanism, not only to show how they build on the decisions political leaders took in the very first months of the crisis, but also to allow an informed discussion of the Court's judgment on the currency union's transformation later in the study.

2 Saving Greece

2.1 Changing the Contract

Probably the most common criticism of European leaders during the crisis, especially in the first years, was that they failed to stem it at an early stage. Economists were at pains to stress their inability to take decisive action. According to Jean Pisany-Ferry and his colleagues, they 'procrastinated for months' to help out distressed governments.[17] Charlez Wyplosz similarly moaned that 'In this crisis, Eurozone leaders motto seems to be "too little, too late"'.[18]And from an economic perspective, such criticism was probably well-founded. Perhaps, if leaders had put in place a rescue package the moment Greece revealed its problems late 2009, markets would not have lapsed into panic. Perhaps too, then, this would have prevented the crisis from spreading to other member states. At the same time, however, such a grim view of the early response to the crisis fails to appreciate what politicians did achieve.[19] In a world in which only economics matters, and in which all economists agree, they might have responded differently. But they do not operate in such a world. They have to take into account electorates, coalitions, competing priorities and, importantly, the law. Yet, despite all these constraints, political leaders managed to commit themselves to the survival of the single currency

17 See François Gianviti and others, 'A European mechanism for sovereign debt resolution: a proposal' (Bruegel Blueprint Series No 10, 2010) 9.

18 Charles Wyplosz, 'They still don't get it' (*Vox*, 25 October 2011) <voxeu.org/article/eurozone-leaders-still-don-t-get-it> accessed 16 April 2017.

19 Former European Council president Herman Van Rompuy states in this regard that: '[T]hose who complain that on each occasion the European Union did "too little, too late" tend to underestimate the political constraints under which we in Europe operate ... Looking back, now that we are four or five years down the line, all the different steps we have taken amount to quite a leap'. See Herman Van Rompuy, *Europe in the Storm: Promise and Prejudice* (Davidsfonds Uitgeverij 2014) 32.

and have their states display solidarity in ways they had never done before. And the first to benefit from this solidarity was Greece.

When the true state of Greece's fiscal record became known to the public in the fall of 2009, action indeed did not follow immediately. Part of this inaction can be explained by the fact that not everyone was aware straight away of the magnitude of Greece's problems and the risks they posed to the currency union at large. Swedish prime minister Reinfeldt, whose state held the presidency of the Council at that time, was still saying in December 2009 that the Greek situation was 'of course problematic' but 'basically a domestic problem that has to be addressed by domestic decisions'.[20] More important, however, was the fact that the currency union needed time to reconcile itself with a new reality that was painful for each of its members, not in the least Greece itself.[21] The state shuddered to think of having to ask its partners or, even worse, the feared IMF, for financial assistance of which it knew it would only be granted in return for severe austerity measures and structural reforms.[22] 'We need no bilateral loans. We haven't asked for any help and don't need any', Prime Minister Papandreou reassured the Greek people.[23] Nor was there any 'issue of leaving the euro or of asking for help of the IMF'.[24] To enhance the credibility of its pledge, the government revised its budget plans several times in December and January, promising to push down the deficit by no less than 4% in 2010 only.[25]

But the markets were not impressed. By the end of January yields on ten-year Greek government bonds were far above 6%, at times even breaking through the 7% ceiling.[26] Barely a week earlier, European Central Bank President Jean-Claude Trichet had still dismissed a Greek departure from the currency union as an 'absurd hypothesis' at his monthly press conference.[27] In the corridors of power, however, awareness had set in that far from being absurd, the possibility of a departure from the currency union was real and could not be averted by Greece on its own. Telling is a confidential note

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20 Quoted in Wolfgang Münchau, 'European farce descends into Greek tragedy' *Financial Times* (14 December 2009). See also Matthew Lynn, *Bust: Greece, the Euro and the Sovereign Debt Crisis* (Bloomberg Press 2011) 130.

21 See also text to n 66 (prologue).

22 Carlo Bastasin, *Saving Europe: Anatomy of a Dream* (Brookings Institution Press 2015) 139.

23 Quoted in Chris Giles and Richard Edgar, 'Greek PM denies reports of EU bail-out' *Financial Times (FT. Com)* (28 January 2010).

24 Quoted in Kerin Hope, 'Greek PM rejects fears over eurozone' *Financial Times* (14 January 2010).

25 Kerin Hope and David Oakley, 'Greece unveils 3-year plan to curb deficit' *Financial Times (FT.Com)* (14 January 2010). See also Peter Ludlow, 'Van Rompuy Saves the Day: The European Council of 11 February 2010' (Eurocomment Briefing Note Vol 7, No 6) 3; Bastasin (n 22) 144-145.

26 David Oakley, 'End of tough week for eurozone bonds' *Financial Times* (30 January 2010).

27 'Introductory statement to the press conference (with Q&A)' (ECB, 14 January 2010).

European officials had prepared for a meeting of the Economic and Financial Committee on 5 February. Entitled 'Elements of external communication on the fiscal situation in Greece', it paid most attention to Greece's efforts to straighten up its fiscal record, yet it ended by posing the question: 'Will the euro area (or the EU) provide help to Greece in case of a risk of default?'[28]

The day before, on 4 February, chancellor Merkel had discussed that question with President Sarkozy when they met in Paris to decide on the Franco-German cooperation strategy until 2020.[29] She had told the French president that she was aware of Greece's predicament, but she also explained to him the constraints she faced at home that severely limited her room for manoeuvre.[30] Part of these constraints were rooted in electoral concerns. A considerable part of the German population found it difficult to accept having to help out a state whose problems they perceived as self-inflicted.[31] Such sentiment was further fostered by some of the media. *'Betrüger in der Euro-Familie'* (Swindlers in the Euro-family) read the front page of the conservative German magazine *Focus* in February 2010 whilst displaying the *Venus de Milo* statue sticking up her middle finger.[32] This popular resentment towards assistance for Greece was something to reckon with as such, yet it gained even greater importance due to the upcoming elections in North Rhine-Westphalia on 9 May, which the coalition parties had to win in order to maintain their majority in Germany's upper house of parliament, the *Bundesrat*.[33] Merkel's CDU was not doing well in the polls and the chancellor was therefore hesitant to make grand gestures to Greece, especially before the elections.

But it was not only electoral concerns that worried Merkel. She felt the constraining force of the law as well. Less than two decades earlier, the *Bundesverfassungsgericht* had approved of Germany's participation in the currency union on the condition that it would be a *Stabilitätsgemeinschaft*.[34] By rescuing Greece, Merkel now risked bringing down one of its most fundamental pillars – the no-bailout clause in Article 125 TFEU – and she feared that it would not stand before the court in Karlsruhe. Prominent stability hardliners already anticipated such a ruling by publicly ringing the alarm bells. According to Otmar Issing, former *Bundesbank* president and member of the Executive Board of the European Central Bank:

28 Quoted in Ludlow, 'Van Rompuy Saves the Day' (n 25) 8. See also Bastasin (n 22) 149.

29 Quentin Peel and Ben Hall, 'Germany and France to boost faltering alliance' *Financial Times* (4 February 2010).

30 Bastasin (n 22) 148-149.

31 Lynn (n 20) 136-138; Bastasin (n 22) 149-150.

32 'Titelseite: Betrüger in der Euro-Familie' *Focus* (22 February 2010). See also Lynn (n 20) 138.

33 Bastasin (n 22) 169, 183.

34 See text to n 1 (ch 4).

> '[F]inancial aid from other EU countries or institutions that amounted, directly or indirectly, to a bail-out would violate EU Treaties and undermine the foundations of Emu. Such principles do not allow for compromise … Emu is a "no transfers" community of sovereign states ... with firm rules accepted by entrants. These rules must not be changed ex-post. Governments must not forget what they promised their citizens when they gave up their national currencies.'[35]

His successor at the Executive Board, Jürgen Stark, put it even more bluntly:

> 'The Treaties set out a "no bail-out" clause, and the rules will be respected ... This is crucial for guaranteeing the future of a monetary union among sovereign states with national budgets. Markets are deluding themselves if they think that the other member states will at a certain point dip their hands into their wallets to save Greece.'[36]

These concerns in turn fed back into German politics, thereby putting more strain on the government. 'We are a stable-currency party', chairman of coalition party CSU Horst Seehofer told the public early 2010.[37] 'That's why we're helping Greece politically – but not a single euro can go there'.[38] But despite these harsh words, and just like most other members of the currency union, Germany would grant assistance to Greece only months later. The European Council summit of 11 February 2010 is key to understanding why.

In the days following the rendezvous between Merkel and Sarkozy on 4 February, expectations were growing that they would end the uncertainty surrounding Greece at the European Council summit of 11 February.[39] Newspapers talked about Franco-German plans to stem the crisis, [40]causing market sentiment to slightly improve.[41] The reality is, however, that for a long time it was highly uncertain whether the summit would produce any results. In fact, one day before the summit the possibility of a breakthrough seemed far away.[42] In the Eurogroup, the ministers of finance had discussed the dire

35 Otmar Issing, 'A Greek bail-out would be a disaster for Europe' *Financial Times* (16 February 2010).
36 Quoted in 'La Bce: tassi fermi e nessun aiuto ai conti della Grecia' *Il Sole 24 Ore* (6 January 2010) (as cited in Lynn (n 20) 142).
37 Quoted in Gerrit Wiesmann and Kerin Hope, 'Merkel hits out at banks over Greek deals' *Financial Times (FT.Com)* (17 February 2010).
38 Quoted in Wiesmann and Hope, 'Merkel hits out at banks over Greek deals' (n 37).
39 Ludlow, 'Van Rompuy Saves the Day' (n 25) 7-9.
40 See eg Tony Barber, Gerrit Wiesmann and Ben Hall, 'Athens' salvation lies with Paris and Berlin' *Financial Times* (9 February 2010); Arnaud Leparmentier, 'Paris et Berlin vont présenter un plan commun pour sauver la Grèce' *Le Monde (Le Monde.fr)* (10 February 2010).
41 See eg 'Greek "firewall" talk drives markets' *Financial Times* (10 February 2010).
42 Ludlow, 'Van Rompuy Saves the Day'(n 25) 8-9; Bastasin (n 22) 153.

situation of Greece and had come to an agreement on a draft declaration.[43] Its final paragraph stated that 'The members of the euro area share a common responsibility for the stability in the euro area' and then immediately followed this up with the remark that 'on the one hand' participating states had 'to conduct sound national policies in line with the agreed rules', whilst 'on the other hand' the members of the currency union would 'provide support, if needed…'. Although it remained far from launching an assistance programme for Greece, let alone mentioning any concrete numbers, the statement went too far for the German chancellor, as it suggested that Greece's duty to restore its own budget was of equal weight to that of its partners to grant assistance.[44]

The uncertainty surrounding Greece forced European Council President Herman Van Rompuy, who had been in office for only two months, to step in. Looking back at his presidency he tells how the agenda of his first European Council meeting of 11 February 2010, which was supposed to address the Union's 'economic growth prospects', was completely taken over by the Greek crisis.[45] With the Hellenic state verging on the brink of collapse, he considered it absolutely essential to have all heads of state or government agree on a common line of action. But that was easier said than done. 'We could not turn to our joint rulebook for answers', Van Rompuy explains, 'but had to invent from scratch'.[46] 'In fact', he continues, 'the EU treaties explicitly forbid member states to assume each other's financial commitments; this so-called "no-bailout-clause" was a founding principle of the Economic and Monetary Union'.[47] Given the disagreement about the Eurogroup's draft statement, early in the evening of 10 February he decided to adjourn the meeting of the European Council, which had been scheduled for 10.00 the next morning, to midday and first talk to the most important actors involved: Papandreou, Sarkozy and Merkel.[48] At the same time, he put his staff to work on a new draft statement.

When Van Rompuy tabled the new statement the next morning he managed to have all three leaders accept it.[49] Having ensured their consent, he subsequently discussed the text with all other members of the European Council and secured their backing too.[50] In its final form the statement contained three sentences that would turn out to be key to the transformation that the currency union would undergo in the following years. The first is

43 The draft declaration is available in Ludlow, 'Van Rompuy Saves the Day' (n 25) 9, 22. See also Bastasin (n 22) 152.
44 Ludlow 'Van Rompuy Saves the Day' (n 25) 9, 11; Bastasin (n 22) 152-153.
45 Van Rompuy, *Europe in the Storm* (n 19) 11-15.
46 Van Rompuy, *Europe in the Storm* (n 19) 12.
47 Van Rompuy, *Europe in the Storm* (n 19) 12.
48 Van Rompuy, *Europe in the Storm* (n 19) 12-13; Ludlow, 'Van Rompuy Saves the Day' (n 25) 9-10.
49 Van Rompuy, *Europe in the Storm* (n 19) 13-14.
50 Van Rompuy, *Europe in the Storm* (n 19) 14.

telling of the change in the stability conception underlying the single currency and reads as follows:

> 'All euro area members … have a shared responsibility for the economic and financial stability in the area.'[51]

Contrary to the draft statement of the Eurogroup, the text no longer followed up on this sentence by putting fiscal consolidation and financial support on the same level.[52] The obligation of each member state to conduct sound national policies was now mentioned separately at the very beginning of the statement. The implication of the currency union's changed stability conception, on the contrary, featured in the statement's final two sentences:

> 'Euro area Member States will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole. The Greek government has not requested any financial support.'[53]

To Merkel, this separation between fiscal consolidation and financial support was essential.[54] It signalled that the one having to take responsibility for the Greek misery was Greece itself. Things could only be different if its problems spread beyond its own borders and threatened the currency union at large. In that case, the members of the currency union could step in to safeguard financial stability by granting financial support. Although the statement indicated that Greece had not lodged a request for such support, by merely identifying this as a possibility the members of the currency union implicitly recognised that they would display such positive solidarity if the situation called for it. Or to put it in the words of Van Rompuy: 'Without spelling out that the other EU countries would lend money to Greece, we did touch on the limits of the no-bailout clause by stating that if a Greek bankruptcy threatened the financial stability of the whole Eurozone, member states would take action'.[55]

Those who had expected euro area leaders to put billions on the table may have been disillusioned with the statement. The truth is, however, that it was of fundamental importance. Political leaders – not only those in the euro area, all of them – had initiated a fundamental change of the Founding Contract between their states. They had jointly committed themselves to a currency

51 Statement by the Heads of State or Government of the European Union, Brussels, 11 February 2010.
52 See also Ludlow, 'Van Rompuy Saves the Day' (n 25) 11.
53 Statement by the Heads of State or Government of the European Union, Brussels, 11 February 2010.
54 Quentin Peel, 'Stability not solidarity at root of response to debt crisis' *Financial Times* (19 March 2010); Ludlow, 'Van Rompuy Saves the Day' (n 25) 11-12; Bastasin (n 22) 155-157.
55 Van Rompuy, *Europe in the Storm* (n 19) 13.

union that is very different from the one that had been introduced almost two decades earlier with the Treaty of Maastricht. A currency union that is not only geared to price stability, but that also attributes great importance to financial stability, up to the extent that it calls for financial assistance to safeguard it. In the weeks and months ahead they would specify the change in the Contract, to which the member states would eventually subscribe not just in their executive capacity, but in full. The positive solidarity that was bound to follow would therefore not only be factual in nature. Members of the currency union had a political obligation to show it too.

2.2 Specifying the change

The statement issued on 11 February not only signified a change in the set-up of the currency union; it also showed who could initiate such a change and give it further shape in the months ahead. A change that touches on the very core of the Founding Contract between the member states can only be brought about by their political leaders. In other words: it is '*Chefsache*'.[56] Only the heads of state and government had the authority to decide on the fate of Greece and the currency union at large.[57] Certainly, ministers of finance dealt extensively with these matters in the Council and the Eurogroup, just as civil servants did in the Economic and Financial Committee (EFC), the Eurogroup Working Group (EWG) and the Commission's DG ECFIN.[58] Yet, the principal decisions could only be taken by the 'chiefs'.[59]

The crisis, therefore, put into perspective the system of decision making in the economic and monetary union and the debate about the necessity of a *gouvernement économique*. Germany had argued against such a government at the time of the conclusion of the Treaty of Maastricht out of fear that too

56 Luuk van Middelaar, 'The Return of Politics: The European Union after the crises in the eurozone and Ukraine' (2015) 54 JCMS 495, 498.

57 See in this regard Uwe Puetter, 'Europe's deliberative intergovernmentalism: the role of the Council and the European Council in EU economic governance' (2012) 19 Journal of European Public Policy 161, 171: 'Only the "heads" themselves were in a position to make credible pledges of financial support, could agree joint positions for global coordination, and were able to finalize statements on a common strategy for domestic responses'. See also Alicia Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (OUP 2015) 91: 'The problems and potential solutions to the crisis were of such political significance and sensitivity that it would have been unthinkable for the Heads of State and Government not to have taken a leading role in the quest for recovery; it was furthermore crucial to calm down markets and private investors, and this could only be done by showing the involvement of the national executives at the highest level'.

58 See also Peter Ludlow, 'In the Last Resort: The European Council and the euro crisis, Spring 2010' (Eurocomment Briefing Note Vol 7, No 7/8) 10-11.

59 For an analysis of how the position of the Eurogroup has been affected by the crisis and the involvement of the heads of state or government see Dermot Hodson, *Governing the Euro Area in Good Times and in Bad* (OUP 2011) 46ff.

great an involvement of political leaders could negatively affect the Bank's ability to strive for price stability.[60] And it had been relatively successful in making that plea. Whereas the French had aimed to have the European Council in charge of streamlining economic and monetary policy, the TFEU only attributes the institution a task in relation to the coordination of economic policies and even there the Council plays a greater role. The crisis, however, revealed a blind spot in this system.[61] It may function in 'normal' times, yet it falls short when decisions are required that strike at the heart of the currency union's foundations; decisions that change the rules of the game. In such situations the involvement of the heads of state and government is unavoidable.

At the beginning of 2010, Germany had come to terms with that reality as well.[62] Looking ahead at the crucial European Council meeting at the French-German summit on 4 February, Merkel said that the political leaders would perceive themselves in the European Council as a 'true economic government' (*Wirtschaftsregierung*).[63] Admittedly, in Merkel's eyes this government should comprise all twenty-seven leaders and not, as France preferred, only those in the currency union; Germany still perceived this as too great

60 See text to n 237 (ch 3).

61 See in this respect also Van Middelaar (n 56) 501-502 (pointing attention to the re-emergence of the notion of 'government' in European discourse and stressing in this regard that 'politics is the authoritative form in which society copes with the unknown, with historic change'). As discussed already in the prologue to this study, many legal scholars depict the rise of the European Council as indicative of *constitutional* change. See eg Mark Dawson and Floris De Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) 76 MLR 817, 828ff (arguing that the European Council's importance is indicative of a change in the Union's 'institutional balance', which in turn signifies a more broader change in its 'constitutional balance'); Edoardo Chiti and Pedro Gustavo Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 CML Rev 683, 685-690 (arguing that this 'new form of intergovernmentalism' has 'redefined' the Union's institutional balance); Federico Fabbrini, *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (OUP 2016) 115ff (assessing the 'increasing intergovernmentalisation of the decision-making process, with the rise of the European Council as the forum for high politics' in the light of constitutional change). For a different view see Bruno De Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) 11 EuConst 434, 450 (arguing that the 'leading role taken by the European Council during the euro crisis was not an institutional novelty but corresponded precisely to the role which the European Council was expected to play under existing (pre-crisis) constitutional arrangements'). This study agrees with the latter position, taking the view that the actions of the European Council during the crisis are not indicative of a change of its institutional position but rather *confirm* or *evidence* its place in the Union's constitutional set-up. For greater analysis of this place and the consequences of the European Council's actions for other constitutional actors see the conclusion to this study.

62 Ludlow, 'Van Rompuy Saves the Day' (n 25) 8, 16-17.

63 Quoted in Lutz Meier, 'Merkel beugt sich Sarkozys Willen' *Financial Times Deutschland* (5 February 2010) (translation by the author).

a threat to the independence of the European Central Bank.[64] Yet, the shift in the German perspective on how the currency union should be governed was nonetheless remarkable and, as will become clear later on, would develop even further as the crisis progressed.[65]

Paradoxically, then, the political actors whose involvement the treaty drafters had sought to curtail so as to safeguard the single currency's focus on stability, now found themselves at the centre of decision making, being called upon to rescue that very currency. And Merkel, as the leader of the currency union's most powerful state that would have to contribute most to any assistance operation, had the greatest say of them all.

The decision of 11 February meant a departure – in principle – from the no-bailout clause. Its severity, however, would depend on the specifics of any assistance operation.[66] During subsequent negotiations the German chancellor tried to make the departure as limited as possible since the prospect of a constitutional challenge was still hanging over her like the sword of Damocles. In fact, the professors who had challenged the transition to the third stage of monetary union in 1998 now threatened to go to Karlsruhe again if their government consented to assistance for Greece:

> 'There is no shortage of proposals to help the Greeks, including assistance from other eurozone governments – a move that would contravene the "no-bailout" rule in the Maastricht treaty. There is, sadly, only one way to escape this vicious circle. The Greeks will have to leave the euro, recreate the drachma and re-enter the still-existing exchange rate mechanism of the European Monetary System, the so-called ERM-II, from which they departed in 2001 ... .we would like to state clearly that, should governments provide assistance to Greece in a manner that contravenes the no-bailout rule, we would have no hesitation in lodging a new lawsuit at the constitutional court to enjoin Germany to depart from monetary union.'[67]

Three issues were of particular interest to the German government, all of them having to do with the desire to deviate as little as possible from the no-bailout clause.[68] The first flowed directly from the statement of 11 February. It had been careful in distinguishing Greece's interest strictly speaking from that of the currency union as a whole. Only when the latter's financial stability was at stake could the former receive support. To further underline the fact that

64 See Ben Hall, 'French press home need for governance', *Financial Times* (18 February 2010).

65 See text to n 94 (ch 6) (discussing the legal formalisation of the 'Euro Summit').

66 For an analysis of how the German government 'steered a middle course' between 'ordoliberal' and 'Keynesian' policies by trying to put an 'ordoliberal stamp' on the assistance operations see Rainer Hillebrand, 'Germany and its Eurozone Crisis Policy' (2015) 33 German Politics and Society 6, 17.

67 Wilhelm Hankel and others, 'A euro exit is the only way out for Greece' *Financial Times* (26 March 2010). See also text to n 7 (ch 4).

68 See also Ludlow, 'In the Last Resort' (n 58) 13-21.

the currency union at large was the beneficiary rather than Greece as such, finance minister Schäuble stressed that assistance had to be accompanied by 'strict conditions and a prohibitive price tag …'.[69] The discipline expected from the markets but not achieved at a preventive stage, should now be achieved through policy conditionality and non-subsidised lending rates.

The other two implications had to do with the timing of assistance. In order to leave the no-bailout clause intact as much as possible, assistance should only be considered as '*ultima ratio*';[70] if indispensable to safeguard financial stability. Or to put it in Schäuble's words again: '[A]id must be the last resort'.[71] To further underline the *ultima ratio*-nature of assistance, the German government also demanded the involvement of the IMF.[72] This third demand was perhaps the most controversial one. At first, the German government had been divided over the issue itself. Schäuble was adamantly against such involvement as it would indicate the currency union's inability to handle its own affairs.[73] France, the Commission and the European Central Bank held similar views.[74] The IMF was the destination states like Zimbabwe or Venezuela turned to for help, not a member of the world's second largest economy.[75] 'If the IMF steps in', the Bank's Executive Board member Lorenzo Bini Smaghi reasoned, 'the image of the euro would be that of a currency that is able to survive only with the external support of an international organization … resorting to the IMF can be detrimental to the stability of the euro'.[76] In addition to this fear of a loss of reputation, the Bank was also afraid that the economists from Washington would 'impose' a reform programme on Athens that would frustrate its monetary policy.[77] Chancellor Merkel, however, assessed the situation differently. Although hesitant at first, she gradually

69 Wolfgang Schäuble, 'Why Europe's monetary union faces its biggest crisis' *Financial Times* (12 March 2010). See also Gerrit Wiesmann and Ralph Atkins, 'Schäuble calls for tough EMF sanctions' *Financial Times* (12 March 2010).

70 Ludlow, 'In the Last Resort' (n 58) 14; Bastasin (n 22) 158-159.

71 Schäuble (n 69).

72 Ludlow, 'In the Last Resort' (n 58) 19.

73 According to Schäuble: 'The acceptance of financial assistance from the IMF would, in my opinion, amount to an admission that the eurozone countries cannot solve their own problems with their own efforts'. See quote in Quentin Peel, 'First big step towards more integrated eurozone' *Financial Times* (8 March 2010).

74 Gerrit Wiesmann and Quentin Peel, 'Germany warms to giving IMF a role in any Greek debt rescue' *Financial Times* (19 March 2010); Ludlow, 'In the Last Resort' (n 58) 19-20; Lynn (n 20) 142-144; Bastasin (n 22) 168.

75 Lynn (n 20) 142-143.

76 Quoted in Ralph Atkins, 'ECB takes on Merkel over Greece' *Financial Times (FT.Com)* (24 March 2010). See also Trichet's statement at the ECB's press conference of 4 March 2010: 'Let me add that I do not believe that it would be appropriate to introduce the IMF as a supplier of help through standby arrangements or through any such kind of help'. See 'Introductory statement to the press conference (with Q&A)' (ECB, 4 March 2010).

77 Ludlow, 'In the Last Resort' (n 58) 19. See also Bastasin (n 22) 161.

became receptive to the idea.[78] Besides the fact that the organisation's expertise, which had already been alluded to in the statement of 11 February, would be helpful in devising a plan to bring the Greek economy back to a sustainable path, its involvement would also underline the last resort character of any rescue action, thereby easing pressure on the no-bailout clause.[79]

The occasion that was to bring further clarity on the Greek assistance operation was the European Council meeting of 25 March 2010. Contrary to the meeting on 11 February, the statement of which had been prepared mostly by Van Rompuy, this time Merkel took the lead on the negotiations.[80] In the weeks before the meeting, her aides turned to their traditional interlocutors at the Élysée to put together a statement for the upcoming European Council meeting that would reflect Germany's negotiating stance. The core of that stance was concisely worded by Merkel herself on the day of the meeting when she had to appear in the *Bundestag* to give a full outline of the government's position on a possible rescue of Greece. She first appealed to the fundamental commitment of 11 February:

> 'I think I can say that on 11 February, in an hour of fundamental economic and political challenges, Europe has proven itself as equally committed and considerate…'[81]

Then she explained how her government wanted to make this commitment concrete in relation to Greece:

> 'Today and tomorrow it is about specifying the decisions of the summit of 11 February ... the Federal Government will advocate in the council that, in a case of emergency, a combination of IMF aid and bilateral assistance should be guaranteed. Yet this is – I will say this again – ultima ratio. I will do my very best to make sure that such a decision – IMF and bilateral assistance – will succeed.'[82]

The French-German text, finalised by Merkel and Sarkozy themselves just hours before the start of the meeting, was first given to Van Rompuy and Papandreou and then presented with only slight changes to the other leaders of the currency union who gathered informally between the European Coun-

78 Quentin Peel and Nikki Tait, 'Germany warms to IMF bail-out for Greece', *Financial Times (FT.Com)* (18 March 2010); Bastasin (n 22) 145.

79 Quentin Peel, 'Merkel raises defence shields' *Financial Times* (25 March 2010); Ludlow, 'In the Last Resort' (n 58) 19; Lynn (n 20) 143-144.

80 Ludlow, 'In the Last Resort' (n 58) 17-18; Bastasin (n 22) 166.

81 Regierungserklärung von Bundeskanzlerin Merkel zum Europäischen Rat am 25. und 26. Marz, Berlin, 25 March 2010 (translation by the author).

82 Regierungserklärung von Bundeskanzlerin Merkel zum Europäischen Rat am 25. und 26. Marz, Berlin, 25 March 2010 (translation by the author).

cil's first working session and dinner.[83] Although several of them criticised the manner in which the text had been prepared, feeling they had been presented with a '*fait accompli*',[84] the document passed almost unchanged.[85] As a result, it greatly reflected the German view. The statement first referred to the decision of 11 February to safeguard financial stability and then stated that euro area states stood 'ready' to support Greece through bilateral loans on the basis of their respective share in the European Central Bank's capital key alongside the IMF.[86] France had secured, however, that the 'majority' of the support would have to be provided by the members of the currency union.[87] The statement also made clear that this support had 'to be considered *ultima ratio*', meaning that it could only be granted if needed to safeguard financial stability and when financing could no longer be obtained sufficiently on the markets.[88] If that scenario were to materialise, the discipline that the markets were supposed to but could no longer exert, would have to be replaced by public discipline through 'non-concessional' interest rates and, most importantly, 'strong' policy conditionality.[89] Only if Greece complied with this conditionality, which the Commission and the Bank had to verify, could euro area states unanimously decide to make disbursements under the loan. As a result, any positive solidarity of other states would have to be matched by Greece itself with negative solidarity in the form of budgetary cuts and economic reforms.

2.3 The 'Greek' facility

With their deal of 25 March, the leaders of the currency union specified their joint commitment to safeguard financial stability by detailing how their states would display positive solidarity in pursuit of this purpose. Yet, as Greece had not yet lodged an official request for assistance, the statement still spoke

83 Ludlow, 'In the Last Resort' (n 58) 18; Bastasin (n 22) 167.
84 Quentin Peel, Ben Hall and Stanley Pignal, 'Deal shows Merkel has staked out a strong role' *Financial Times* (27 March 2010). According to a Finnish official, quoted in the article: 'We are happy with the contents, but we don't want the way this deal was reached to become a precedent'.
85 Ludlow, 'In the Last Resort' (n 58) 18.
86 Statement by the Heads of State and Government of the Euro Area, Brussels, 25 March 2010.
87 Ludlow, 'In the Last Resort' (n 58) 20; Bastasin (n 22) 167.
88 Statement by the Heads of State and Government of the Euro Area, Brussels, 25 March 2010.
89 Statement by the Heads of State and Government of the Euro Area, Brussels, 25 March 2010.

about assistance in hypothetical terms.[90] It was clear to everyone, however, that assistance was unavoidable. In their statement, the leaders had still praised Greece for its 'ambitious and decisive action' that should allow it 'to regain the full confidence of the markets'.[91] But the markets were not impressed. A week after the meeting Greece managed to raise € 5bn in the markets, yet the interest it had to pay on its 7-year bond was still alarming: 5.9%, 325 basis points above similar German *Bunds*.[92] And at the beginning of April panic had fully returned as yields on 10-year bonds rose to 7.5%, the highest rate since Greece had entered the currency union in 2001.[93] It forced Papandreou on 8 April to call José Zapatero, the Spanish prime minister who held the Council presidency, and request him to convoke the euro area ministers of finance with a view to activating financial support.[94] Zapatero then turned to Sarkozy and Van Rompuy. The first supported the plan for a meeting, yet the latter withheld approval.[95] It seems he realised that Merkel, who was on a formal trip to the United States, would not give her consent without a specific, detailed plan for the assistance and Greece's adjustment efforts.[96]

The chancellor did indicate, however, that she had no objections to a gathering of the Eurogroup in order to further specify the plan for assistance, thereby paving the way for concrete action at the highest political level at a later stage.[97] And that is exactly what happened. In a video conference on 11 April the Eurogroup adopted a statement further detailing assistance for Greece.[98] The statement made clear that the 'non-concessional interest rate' on the bilateral loans would be set at 'around 5%'.[99] It also indicated that these loans would comprise a 'three-year period', with € 30bn to be provided in the first year, and that they would be 'centrally pooled' by the Commission. Most importantly, the Eurogroup tasked the Commission to immediately start working, in liaison with the Bank, on a programme for Greece setting out the latter's exact financing needs and reform efforts. That same day President Van

90 The statement of the 25 of March stipulated in this regard: 'The Greek government has not requested any financial support. Consequently, today no decision has been taken to activate…the mechanism'. See Statement by the Heads of State and Government of the Euro Area, Brussels, 25 March 2010.

91 Statement by the Heads of State and Government of the Euro Area, Brussels, 25 March 2010.

92 Kerin Hope, David Oakley and Jennifer Hughes, 'Greeks attract €5bn with new bond' *Financial Times* (30 March 2010).

93 Anousha Sakoui, 'Greek sovereign debt yields near year-highs' *Financial Times (FT.Com)* (8 April 2010).

94 Ludlow, 'In the Last Resort' (n 58) 24; Bastasin (n 22) 171

95 Ludlow, 'In the Last Resort' (n 58) 24; Bastasin (n 22) 171.

96 Ludlow, 'In the Last Resort' (n 58) 24; Bastasin (n 22) 171-172.

97 Ludlow, 'In the Last Resort' (n 58) 25.

98 Eurogroup statement on the support to Greece by Euro area Member States, Brussels, 11 April 2010.

99 Carlo Bastasin observes in this regard that the rate of 5% was actually considerably less than market rates (around 200 bps). See Bastasin (n 22) 173.

Rompuy issued a declaration in which he welcomed the statement and confirmed its consistency with the decisions that the heads of state or government had taken on 11 February and 25 March.[100]

On 23 April 2010 Prime Minister Papandreou subsequently let the world know his state could no longer withstand market pressure and formally asked his partners for help.[101] Little more than a week later, on 2 May 2010, the Eurogroup announced that it had unanimously decided to activate a three-year assistance programme for Greece worth € 110bn.[102] Of this amount € 30bn had to come from the IMF, whilst the greatest part – € 80bn – would be provided by euro area states through a system of bilateral loans, called 'Greek Loan Facility', to be coordinated by the Commission.[103] This facility rested on two legal instruments.[104] The first concerned an intercreditor agreement, concluded among the states granting assistance.[105] It governed essential aspects of their financial relationship, such as the mandate for the Commission to administer the pooled loans, the obligation of each state to contribute to the total amount of assistance in line with the capital subscription key of the Bank and the procedure for disbursements.[106] The second was a loan facility agreement between the euro area lenders and Greece regulating the assistance operation itself.[107] It set out in particular the requirement that disbursements of assistance could only be made if the lending states were of the opinion that Greece complied with the conditions attached to the assistance that were laid

100 Statement by President Van Rompuy on the Eurogroup agreement on Greece, Brussels, 11 April 2010.

101 See Joint statement by the European Commission, European Central Bank and Presidency of the Eurogroup on Greece, Brussels, 23 April 2010. See also text to n 79 (prologue).

102 Statement by the Eurogroup, Brussels, 2 May 2010.

103 On 5 May 2010 the representatives of the governments of the Member States agreed that the members of the euro area could task the Commission to administer the loan facility. See the Decision of the Representatives of the Governments of the 27 Member States of 5 May 2010 in Council document 9417/10. For more information on the permissibility of using Union institutions in intergovernmental initiatives see references in n 14 (ch 7).

104 See also Alberto De Gregorio Merino, 'Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance' (2012) 49 CML Rev 1613, 1616-1618.

105 Intercreditor agreement between the creditor euro area Member States, 8 May 2010 (Intercreditor Agreement). The agreement can be consulted at <www.irishstatutebook.ie/2010/en/act/pub/0007/sched1.html>, accessed 16 April 2017.

106 See in particular points 1(1), 2(3) and 4 Intercreditor Agreement.

107 Loan Facility Agreement between the euro area lenders, Greece, and the Bank of Greece acting as agent of the latter, 8 May 2010 (Loan Facility Agreement). The agreement can be consulted at <www.irishstatutebook.ie/2010/en/act/pub/0007/sched2.html> accessed 16 April 2017. It should be mentioned that Germany was not a partner to this agreement. Instead, *Kredietanstalt für Wiederaufbau* (KfW), a financial institution established under public law, acted as lender on behalf of Germany. See Recital 14 Loan Facility Agreement. See also De Gregorio Merino (n 104) 1617.

down in a Council decision based on Articles 126(9) and 136(1) TFEU,[108] and were further specified in a Memorandum of Understanding (MoU).[109]

Taken by the currency union's ministers of finance, the decision to activate assistance for Greece was in principle only binding on states in their *executive capacity*.[110] This was also recognised by the announcement of the Eurogroup, which stated that in some member states 'parliamentary approval' was needed before the assistance could be disbursed.[111] The onus therefore fell on governments to channel the facility through their parliaments. They all did so, except for the Slovakian government. Slovakia had worked hard to join the currency union only in 2009 and was reluctant to rescue its Hellenic partner that was more prosperous, but managed less efficiently. In August 2010 its newly-elected parliament therefore rejected participation in the assistance operation.[112] Prime Minister Iveta Radičová even defended the move by saying that her state would not support those that 'behaved irresponsibly, who did not behave according to the treaty and according to the stability pact'.[113] Yet, she failed to take responsibility for the group herself by not defending assistance for Greece and disregarding the political obligation Slovakia had incurred in its executive capacity earlier in May.

'It is a breach of the commitment undertaken by Slovakia in the Eurogroup', Economic and Monetary Affairs Commissioner Rehn said after the parliamentary vote.[114] The other members of the currency union were therefore quick to rebuke the state for its failure to respect this commitment to which they were reciprocally bound. 'All member states have committed themselves

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108 Council Decision 2010/320/EU of 10 May 2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit [2010] OJ L245/6, as last amended by Council Decision 2011/257/EU of 7 March 2011 [2011] OJ L110/26. In the interests of clarity the Council has subsequently adopted a new decision setting out the policy conditionality on 12 July 2011, repealing the previous one. See Council Decision 2011/734/EU of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (recast) [2011] OJ L 296/38, last amended by Council Decision 2013/6/EU of 4 December 2012 [2013] OJ L4/40. Note, however, that as of the entry into force of the 'Two-Pack', the issues surrounding conditionality are in principle governed by Reg 472/2013. See text to n 341 (ch 5).

109 Point 3(5)(c) Loan Facility Agreement. See also De Gregorio Merino (n 104) 1617.

110 For the difference between states acting in their *executive capacity* and *in full* see text to n 131 (ch 2).

111 Statement by the Eurogroup, Brussels, 2 May 2010.

112 See Jan Cienski, Stanley Pignal and Gerrit Wiesmann, 'Slovakia under fire over bail-out' *Financial Times* (13 August 2010).

113 Quoted in Jan Cienski, 'Slovakian leader defends Greece stance' *Financial Times (FT.Com)* (5 October 2010).

114 Quoted in Cienski, Pignal and Wiesmann, 'Slovakia under fire over bail-out' (n 112).

politically to assistance for Greece', Merkel's spokesman told the press.[115] 'Every member relies on solidarity; solidarity is not a one way street'.[116]

Within a year Slovakia would again be confronted with its commitment to safeguard financial stability, at a time when the stakes were even higher. And this time it would bow, dramatically.[117] At issue was not a rescue fund for Greece, but one for the currency union at large.

3 Saving the currency union

3.1 The call for a crisis fund

When the Eurogroup announced the assistance package for Greece on 2 May 2010, the key players were quick to reassure the public that they had prevented the crisis from spreading further.[118] IMF Managing Director Dominique Strauss Kahn, for example, said the move was necessary given the 'significant risks of spill over to other countries' but nonetheless 'exceptional'.[119] In reality, however, contagion risk was omnipresent. Merkel's insistence on the *ultima ratio* nature of assistance was understandable from her perspective, yet it had also slowed down the rescue of Greece.[120] The resulting uncertainty had fuelled market panic, as a result of which other debt-stricken states like Portugal and Ireland fell prey to the markets as well. As the euro 'plunged' against the dollar and stock markets around the world went down, there was fear that only two years after the collapse of Lehmann the world would witness another global financial crisis.[121] On 7 May 2010, only five days after the Eurogroup had decided to help out Greece, the euro area leaders therefore convened yet again to put in place an even greater rescue mechanism for the currency union at large.

The gathering at the highest political level had already been announced by Van Rompuy at a press conference of the EU-Japan summit on 28 April 2010.[122] The meeting would provide the leaders with the opportunity to

115 Quoted in Cienski, Pignal and Wiesmann, 'Slovakia under fire over bail-out' (n 112).
116 Quoted in Cienski, Pignal and Wiesmann, 'Slovakia under fire over bail-out' (n 112). For this initial lack of solidarity shown by Slovakia see also Amtenbrink (n 10) 183.
117 See text to n 203 (ch 5).
118 See also text to n 83 (prologue).
119 Quoted in Kerin Hope, Nikki Tait and Quentin Peel, 'Eurozone agrees Greek bailout' *Financial Times* (3 May 2010).
120 See also Ludlow, 'In the Last Resort' (n 58) 27, 50; Bastasin (n 22) 184.
121 Peter Garnham, 'Euro suffers violent price action' *Financial Times (FT.Com)* (7 May 2010); Barber, Peel and Demos, 'Markets tumble on European debt fears' (n 11); Bastasin (n 22) 185.
122 Kerin Hope, 'Van Rompuy quells Greek restructuring fears' *Financial Times (FT.Com)* (28 April 2010).

endorse the Eurogroup's decision on Greece whilst at the same time allowing them to discuss ways to strengthen the single currency in the long term. When Van Rompuy made the announcement, however, he refrained from mentioning a specific date, instead saying that the meeting would take place 'around 10 May'.[123] The choice for 10 May was inspired by the German ballot box. Since Merkel's CDU faced tough elections in Nordrhein-Westfalen on 9 May, the meeting would ideally take place afterwards so as to avoid that any decisions the leaders might take would have an impact on the electoral vote.[124]

Soon, however, it became clear that the meeting could not wait until the 10th. With markets getting more stressed by the day, Van Rompuy had to request Merkel whether she would agree to bring the meeting forward to Friday 7 May.[125] This would allow ministers of finance sufficient time to work out any decisions of the heads of state and government over the weekend, before the markets started trading again on Monday. The chancellor agreed. It was also clear by now that the meeting would not predominantly be about Greece nor long term plans. Leaders had to pacify markets instantly and defend the single currency by all means.[126] Telling is a letter of Thomas Wieser, the president of the Economic and Financial Committee (EFC), which he sent on 6 May to the president of the Eurogroup, Jean-Claude Juncker. In the letter he expressed his great concern about 'market trends' over the preceding days and argued that 'the issue of market pricing of sovereign risk' had to be 'addressed rapidly' so as to 'avoid the development of further instability'.[127] What is more, the members of the currency union had to 'express their willingness to take all necessary measures to protect the integrity and stability of the euro'.[128] Similar calls for action also came from outside the currency union.[129] In the morning of 7 May, prior to the crucial meeting, G-7 finance ministers and central bank governors held a teleconference to discuss the situation.[130] At an even higher level, the president of the United States called Merkel to share his concerns. According to Obama they 'agreed on the importance of a strong policy response by the affected countries and a strong financial response from the international community'.[131] The scene was set for a weekend that would decide the fate of the currency union.

123 Hope, 'Van Rompuy quells Greek restructuring fears' (n 122).
124 Ludlow, 'In the Last Resort' (n 58) 29; Bastasin (n 22) 183.
125 Ludlow, 'In the Last Resort' (n 58) 29; Bastasin (n 22) 184.
126 Ludlow, 'In the Last Resort' (n 58) 29.
127 Quoted in Ludlow, 'In the Last Resort' (n 58) 29.
128 Quoted in Ludlow, 'In the Last Resort' (n 58) 29. See also Bastasin (n 22) 191.
129 Bastasin (n 22) 191-192.
130 Bob Davis and John Hilsenrath, 'U.S. Presses Europe to Contain Greek Fallout' *The Wall Street Journal* (8 May 2010); Lynn (n 20) 155.
131 Quoted in Davis and Hilsenrath, 'U.S. Presses Europe to Contain Greek Fallout' (n 130).

Prior to the meeting in Brussels there was a series of 'bilaterals' in which key players such as Trichet, Sarkozy, Merkel, Barroso and Van Rompuy searched for common ground as there was not yet 'a eurozone consensus on how to proceed', an official later recalled.[132] These encounters went on for so long that the meeting itself – a working dinner – had to be postponed for two hours, which again gave some of the less prominent leaders the feeling they were being sidestepped.[133]

After the Greek Prime Minister Papandreou had finally opened the meeting by discussing the dire situation of his state, Central Bank President Trichet took the floor.[134] As will be shown in the next chapter, Trichet's role during the meeting is intriguing for various reasons.[135] For now, it suffices to state that Trichet tried to dispel any illusions that those sitting at the table might still have had about the nature of the crisis.[136] He showed them a chart demonstrating how interest rates for bonds of peripheral states were reaching dangerously high levels and impressed on their minds that whatever misery would fall upon these states would threaten the currency union at large. 'This isn't only a problem for one country', he allegedly said, 'it's several countries, it's Europe.'[137] His words impressed all leaders, even those of large states. An ambassador recalls how the president of France appeared 'stunned': 'Sarkozy was white with shock. I've never seen him so pale'.[138] Trichet subsequently gave national leaders a tongue-lashing for their failure to observe fiscal discipline during the preceding years and for which they now had to pay the price: 'We have done what we had to do. It is you, the member states, who have failed in your duty'.[139] The central banker ended with a dramatic call for action: 'Live up to your responsibility!'[140]

'It was Trichet's alarming speech that woke up all the participants in the meeting', one official later said.[141] 'Until then there was no real readiness to contemplate a package that was commensurate with the challenge'.[142] Yet, even though all leaders were now convinced of the necessity to live up to their commitment to safeguard financial stability, there was still a great difference in opinion on how to proceed. Sarkozy called for quick, drastic action and

132 Quoted in Ben Hall, Quentin Peel and Ralph Atkins, 'Twelve hours that tested the limits of the Union' *Financial Times* (11 May 2010). On the 'bilaterals' see also Ludlow, 'In the Last Resort' (n 58) 30; Lynn (20) 158; Bastasin (n 22) 193.
133 Ludlow, 'In the Last Resort' (n 58) 30. See also Bastasin (n 22) 193.
134 Ludlow, 'In the Last Resort' (n 58) 31; Lynn (n 20) 160-161; Bastasin (n 22) 193-194.
135 See text to n 28 (ch 6).
136 Tony Barber, 'Dinner on the edge of the abyss' *Financial Times* (11 October 2010).
137 Quoted in Barber, 'Dinner on the edge of the abyss' (n 136).
138 Quoted in Barber, 'Dinner on the edge of the abyss' (n 136).
139 Quoted in Ludlow, 'In the Last Resort' (n 58) 31.
140 Quoted in Bastasin (n 22) 194.
141 Quoted in Ben Hall, Quentin Peel and Ralph Atkins, 'The day that tested the limits of the Union' *Financial Times* (11 May 2010).
142 Quoted in Hall, Peel and Atkins, 'The day that tested the limits of the Union' (n 141).

pushed for a loan mechanism under the control of the Commission that would 'not oblige any of us to seek parliamentary approval at home'.[143] To Merkel, on the contrary, such approval was essential. She regarded it as a means to ensure conformity with the German constitution.[144] Whereas some of the assistance could perhaps be given shape on the basis of the Union Treaties and be brought under the aegis of the Commission, she insisted that a significant part should be placed under the control of national finance ministers and parliaments.[145]

The heads of state and government eventually settled for the option to leave it to the finance ministers to come up with a precise plan. They issued a statement in which they reaffirmed their commitment to ensure the stability of the currency union and called on the Commission to submit a proposal for a crisis mechanism to an 'extraordinary ECOFIN meeting' on Sunday 9 May.[146]

At the end of that meeting, however, the currency union would end up having not one such mechanism, but two. Both would put Union law under strain, each in their own way. The first because it aimed to accommodate the shift towards positive solidarity within the confines of the original stability framework in the Union Treaties, the second because it went outside it.

3.2 The mechanism

The Commission did not start thinking about a crisis mechanism until only after the political leaders had requested it to devise one. In the preceding weeks, its lawyers had racked their brains over such a mechanism and had reached the conclusion that it could be given shape on the basis of the current Treaties. Central to their thought was Article 122(2) TFEU, the provision that allows the Union to grant assistance to a member state in the case of exceptional difficulties beyond its control.[147] This Article, the Commission reasoned, provided the Union with the possibility to establish a rescue mechanism that would not fall foul of the no-bail out clause in Article 125 TFEU. In fact, its President Barroso was convinced of the legal solidity of this option. Asked about the possibility of establishing a crisis mechanism, he stated:

> 'I want to clarify this absolutely. We have checked this issue from a legal point of view and….no-bailout does not mean no help. On the contrary, there are many provisions in the Treaty; I could also quote Article 122 where there is a specific solidarity clause saying that where a member state is in difficulties the Council may, on a proposal from the Commission, grant financial assistance. So, it's com-

143 Quoted in Ludlow, 'In the Last Resort' (n 58) 31.
144 Ludlow, 'In the Last Resort' (n 58) 32, 34; Bastasin (n 22) 195.
145 Ludlow, 'In the Last Resort' (n 58) 32, 34; Bastasin (n 22) 195, 197.
146 Statement of the Heads of State or Government of the euro area, Brussels, 7 May 2010.
147 See text to n 291 (ch 3).

> pletely wrong and misleading to say that because of the "no-bailout" clause there cannot be help to some member states. It's quite the opposite. The Treaty design stipulates this.'[148]

However, resorting to Article 122(2) TFEU was far from easy, both politically and legally. Politically, it met with resistance from the United Kingdom. Just days earlier, on 6 May, the Conservative Party led by David Cameron had won the parliamentary elections.[149] Although the outgoing Labour government was still in charge of the negotiations, Finance Minister Alistair Darling informed his negotiating partners over the weekend that he could not sign up to a large-scale assistance mechanism on the basis of Article 122(2) TFEU.[150] Given that this provision lets the Council decide on the basis of a qualified majority of votes,[151] he was afraid that his state would be drawn into massive euro area assistance operations against its will.[152]

On Sunday 9 May the Commission nonetheless tabled a proposal on the basis of Article 122(2) TFEU for a Regulation establishing a 'European Financial Stabilisation Mechanism' ('EFSM' or 'mechanism') in which it had tried to accommodate British concerns.[153] The proposal stipulated that the Union could grant financial assistance 'in the form of a loan or of a credit line' to a euro area member state and it empowered the Commission 'to contract borrowings on the capital markets' for this purpose.[154] However, the total outstanding amount of assistance the Union could provide in this way could not exceed 'the margin' available under its own 'resources ceiling for payment appropriations', which meant that only € 60bn could be mobilised in this way.[155] Any assistance above that ceiling should 'benefit from the joint and pro-rata guarantee' of euro area states, thereby excluding the United Kingdom from any further financial involvement.[156]

Bringing together Union and member state assistance in one Union law instrument, as the Commission proposed, is legally problematic. Article 122(2) TFEU allows the Union to grant assistance but it does not speak about member states. It is therefore highly questionable whether it provides a legal basis for a Regulation obliging member states to contribute to an assistance operation.

148 Quoted in 'Interview Transcript: José Manuel Barroso' *Financial Times (FT.Com)* (23 March 2010).
149 Bastasin (n 22) 189.
150 Tony Barber and Ben Hall, 'EU to expand emergency fund by at least €60 bn' *Financial Times (FT.Com)* (9 May 2010); Peel and Atkins, 'Twelve hours that tested the limits of the Union' (n 132); Lynn (n 20) 173.
151 See Art 122(2) TFEU read in combination with Art 16(3) TEU.
152 Barber and Hall, 'EU to expand emergency fund' (n 150).
153 Commission, 'Proposal of 9 May 2010 for a Council Regulation establishing a European Financial Stabilisation Mechanism' COM (2010) 2010 final (EFSM proposal).
154 Arts 1 and 2(1) EFSM Proposal.
155 Art 2(2) EFSM Proposal.
156 Art 3(1) EFSM Proposal.

It is true that the predecessor to the current balance of payments assistance facility, which was laid down in Council Regulation 1969/88, adopted a similar approach.[157] However, Article 143(2) TFEU (ex Art 119 EC), the Treaty provision that governs such assistance,[158] specifically mentions the possibility for the Council to oblige states to contribute to such aid. As no such possibility is mentioned by Article 122(2) TFEU, the same technique cannot be used for assistance granted under this provision.

However, the Commission's proposal would never have to be legally challenged on these grounds as it met with resistance in the Council for other reasons. Germany's Interior Minister Thomas de Maizière, acting as substitute for Finance Minister Schäuble who had turned ill upon arrival in Brussels, indicated that a great aid scheme under Union law was unacceptable to his government.[159] The day before, on Saturday 8 May, Merkel had confirmed to Sarkozy by telephone that she would support a rescue fund totalling € 500bn.[160] Strauss Kahn, moreover, had already confirmed to the leaders of the currency union that the 'IMF would contribute half of whatever figure the Europeans agreed', making the total size of the rescue fund reach € 750bn.[161] Yet, Merkel had instructed De Maizière that the assistance that the member states had to provide – € 440 bn – should not be placed under the control by the Union in case such a set-up would not stand up before the *Bundesverfassungsgericht*.[162] She made clear that this money should, as had happened with Greece, be provided through bilateral loans.[163]

In the end, the Council decided to only use Article 122(2) TFEU and the Regulation based on it for the Union's contribution of € 60bn.[164] Contrary

157 See Arts 1(3) and 3(3) of Council Regulation (EC) 1969/88 of 24 June 1988 establishing a single facility providing medium-term financial assistance for Member States' balances of payments [1988] OJ L178/1. The current balance of payments assistance facility, laid down in Council Regulation 332/2002, no longer contains the possibility to oblige member states to grant assistance. It only allows the Union to grant assistance with a view to which the Commission can contract borrowings on the capital markets or with financial institutions. See Recital 9 and Art 1(2) of Council Regulation (EC) 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balance of payments [2002] OJ L 53/1, as last amended by Council Regulation 431/2009 of 18 May 2009 [2009] OJ L 128/1 (Reg 332/2002).

158 Note that Art 143 TFEU does not provide the legal basis for Reg 332/2002, which is based on Art 352 TFEU. See also n 459 (ch 3).

159 Barber, 'Dinner on the edge of the abyss' (n 136); Lynn (n 20) 166-167, 169.

160 Bastasin (n 22) 198.

161 Barber, 'Dinner on the edge of the abyss' (n 136).

162 Barber, 'Dinner on the edge of the abyss' (n 136). See also Ludlow, 'In the Last Resort' (n 58) 36-37; Bastasin (n 22) 199.

163 Barber, 'Dinner on the edge of the abyss' (n 136). See also See also Ludlow, 'In the Last Resort' (n 58) 36-37; Lynn (n 20) 172; Bastasin (n 22) 199.

164 Conclusions Ecofin Council meeting, Brussels, 9-10 May 2010, 9602/10; Art 2(2) of Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism [2010] OJ L 118/1 (Reg 407/2010).

to the Commission's proposal, Article 1 of the Regulation makes it clear that with a view to preserving financial stability the mechanism can be used to grant assistance to any member state – not just those in the currency union – that 'is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control'. Such assistance, which may take the form of a loan or credit line,[165] can be granted by the Council acting by a qualified majority on the basis of a Commission proposal.[166]

The Council decision granting assistance must contain, amongst others, the general economic policy conditions accompanying the support as well as the approval of the adjustment programme that the beneficiary state has prepared to meet these conditions.[167] It is for the Commission to negotiate, and subsequently conclude, a memorandum of understanding (MoU) with the recipient state detailing the general policy conditions attached to the assistance.[168] Disbursements of a loan take place in instalments and are subject to the Commission's positive assessment of compliance by the beneficiary state with the policy conditions and its adjustment programme.[169]

The Union's contribution of € 60bn was important, yet it paled before the € 440bn that the members of the currency union decided to provide. In line with Germany's wishes their contribution would not be part of the Union mechanism, but Merkel's plan to provide the assistance through bilateral loans would not see the light of day either.

3.3 The facility

For a long time during the Council meeting of 9 May, it was uncertain whether ministers of finance would manage to agree on a rescue fund. Some ministers preferred the original Commission proposal as it envisaged making available the funds in excess of the Union's ceiling of € 60bn by making use of state guarantees.[170] Contrary to Germany's preference for bilateral loans, this

165 Art 2(1) Reg 407/2010.
166 Art 3(2) Reg 407/2010.
167 Arts 3(3) and 3(4) Reg 407/2010. Note, however, that as of the entry into force of the 'Two-Pack', the issues surrounding conditionality are in principle governed by Reg 472/2013. See text to n 341 (ch 5). As a result, the decisions on conditionality based on Reg 472/2013 now contain a 'cross-reference' to the decisions taken on the basis of Reg 407/2010.
168 Art 3(5) Reg 407/2010. Art 3(6) stipulates that the Commission has to 'reexamine' the policy conditionality at least every six months and discuss with the state in question any changes that it needs to make to its adjustment programme. Art 3(7) states that the Council has to approve of any changes to the conditions and adjustment programme.
169 Art 4 Reg 407/2010. For the procedure governing the release of funds under a credit line see Art 5 Reg 407/2010.
170 Ludlow, 'In the Last Resort' (n 58) 36-37; Bastasin (n 22) 199.

assistance option would not put further pressure on national debt burdens. Ministers also indicated they were not itching to go to their parliaments to ask for approval of such a move so shortly after the Greek operation.[171] However, De Maizière stuck to his position. Having the Union provide assistance on the basis of state guarantees would come close to a 'Eurobond', at least in the eyes of the German public.[172] Yet time was running out. With no solution in sight, De Maizière eventually suggested that the other member states should opt for a 'common fund', while his state would separately provide assistance through a bilateral loan.[173] But a fund without the participation of Germany was a 'no-go' for the others as it would seriously weaken its credibility.[174] De Maizière phoned Merkel to discuss how to proceed. The chancellor instructed him: 'Stay firm. We still have two hours to negotiate'.[175]

When the markets were about to open in Sydney, the finance ministers realised they would miss their deadline. The French Minister Christine Lagarde then indicated they had to 'forget about Sydney' and do everything possible to issue a statement before the important Tokyo market started trading.[176] 'I did sense the pressure', she recalls, 'I was looking at my watch'.[177] Salvation finally came from Maarten Verwey, at the time Director of Foreign Financial Relations at the Dutch Ministry of Finance.[178] He suggested creating a 'Special Purpose Vehicle' (SPV) with the capability to raise funds in the markets using government guarantees. The German government could live with this solution. It still made use of government guarantees, yet it would be of an intergovernmental nature and it would not be based on Union law.[179] Euro area finance ministers therefore settled for Verwey's suggestion and committed themselves to provide assistance through such a vehicle that would expire after three years.[180] The decision was taken by these ministers 'meeting within

171 Barber, 'Dinner on the edge of the abyss' (n 136); Bastasin (n 22) 199.

172 Ludlow, 'In the Last Resort' (n 58) 37. See also Lynn (n 20) 169; Barber, 'Dinner on the edge of the abyss' (n 136); Bastasin (n 22) 199. For a more general analysis of how Germany's ordoliberal mindset stood in the way of the adoption of 'eurobonds' during the crisis see Matthias Matthijs and Kathleen McNamara, 'The Euro Crisis' Theory Effect: Northern Saints, Southern Sinners, and the Demise of the Eurobond' (2015) 37 Journal of European Integration 229.

173 Bastasin (n 22) 199-200.

174 Bastasin (n 22) 200.

175 Quoted in Bastasin (n 22) 200.

176 Quoted in Neil Irwin, *The Alchemists: Three Central Bankers and a World on Fire* (Penguin Books 2014) 230. Irwin tells that the ministers of finance eventually reached a compromise at 3:15 am. As a result, 'They missed the Japanese market deadline as well, but apparently the sense that European leaders were furiously working toward a deal was enough to assuage the markets'. See also Lynn (n 20) 172.

177 Quoted in Barber, 'Dinner on the edge of the abyss' (n 136).

178 Barber, 'Dinner on the edge of the abyss' (n 136); Bastasin (n 22) 200.

179 Ludlow, 'In the Last Resort' (n 58) 37; Barber, 'Dinner on the edge of the abyss' (n 136).

180 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.

the Council', which is a formula often used for intergovernmental cooperation initiatives outside the framework of Union law.[181] It indicates that it is not the Council that acts,[182] but the member states jointly exercising their sovereign rights, as a result of which the decision forms an agreement governed by international law.[183]

The vehicle itself, called European Financial Stability Facility ('EFSF' or 'facility'), forms a public limited liability company ('société anonyme') incorporated under Luxembourg law.[184] Its legal basis therefore lies outside Union law, in its articles of association.[185] Most of the essential provisions governing the facility's assistance operations, however, are not laid down in these articles but in a 'Framework Agreement' concluded on 8 June 2010 between the facility and the members of the currency union in their capacity as its shareholders.[186] This agreement, which is governed by English law,[187] regulates the guarantees each participating state has to provide, calculated on the basis of its subscription to the capital key of the European Central Bank,[188] with a view to ensuring the facility's effective lending capacity of € 440bn.[189] It

181 Koen Lenaerts and Piet Van Nuffel, *European Union Law* (Sweet & Maxwell 2011) 929-931.

182 Note, however, that for an act not to be a Council decision it is not enough to simply denominate it as a 'decision of the Member States'. According to the Court it is decisive 'whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council'. See Joined Cases C-181/91 & C-248/91 *Parliament v Council* [1993] EU:C:1993:271, paras 12-14.

183 Henry G Schermers, 'Besluiten van de vertegenwoordigers der Lid-staten; Gemeenschapsrecht?' (1966) 14 SEW 545, 549-550; Vestert Borger, 'De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme' (2011) 59 SEW 207, 209. For a more extensive analysis of the decision's legal character see Daniel Thym, 'Euro-rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsrechtliche Kontrolle' (2011) 22 EuZW 167, 168.

184 For detailed analysis see also De Gregorio Merino (n 104) 1619-1621.

185 The articles of association, last amended on 23 April 2014, are available at <www.esm.europa.eu/sites/default/files/efsf_status_coordonnes_23avrl2014.pdf> accessed 17 April 2017.

186 EFSF Framework Agreement between the euro area Member States and the EFSF (consolidated version incorporating the amendments agreed on during the summits of the euro area heads of state or government on 11 March 2011 and 21 July 2011) <www.efsf.europa.eu/about/legal-documents/index.htm>, accessed 17 April 2017 (EFSF Framework Agreement).

187 Point 16(1) EFSF Framework Agreement.

188 See Points 2(3)-(7) and Annex 2 EFSF Framework Agreement. Points 2(7) and 10(5)(f) make clear that a state requesting financial assistance may ask its partners to unanimously accept that it no longer issues guarantees or incurs liabilities as a guarantor in relation to any further debt issuances by the EFSF. All states having received assistance from the EFSF – Ireland, Greece and Portugal – are such 'stepping-out' guarantors.

189 Initially the total amount of guarantees equalled €440bn, as a result of which the facility's effective lending capacity was much lower. Given that only a few states benefit from the highest credit rating (AAA), the facility itself could only issue bonds with a similarly high rating – which was considered essential at the time – to the extent they were guaranteed

also determines that the facility shall be 'liquidated' on the earliest date possible after 30 June 2013,[190] the deadline for launching new assistance operations.[191]

Even though the facility differed from the first intergovernmental assistance vehicle for Greece in terms of its legal set-up, the conditions and procedure under which it could grant support were similar and reflected the change in the Contract initiated on 11 February 2010 and its subsequent specification by the deal of 25 March. Assistance could only be granted if needed to safeguard financial stability and had to be subject to strong conditionality.[192] Moreover, it required the unanimous approval of the granting states, both at the time of its launch and when specific disbursements had to be made.[193] Where the facility did differ from its 'Greek' predecessor was on the point of assistance instruments. It is here that the significance of normative solidarity is also most clearly evident. Understanding how and why requires examination of the meeting between the leaders of the currency union of 21 July 2011.

3.4 The search for 'flexibility'

Initially, the EFSF could only grant assistance through loans, just like the 'Greek' vehicle. But as the crisis took on ever-greater proportions, calls to strengthen its firepower and set of instruments increased, especially after Eurogroup and ECOFIN ministers had decided to grant Ireland € 85bn in financial assistance on 28 November 2010.[194] A first attempt at strengthening the facility came at the meeting of euro area heads of state and government of 11 March 2011.

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by these states (approximately €250bn). With a view to extending the effective lending capacity to the envisaged amount of €440bn, euro area heads of state or government therefore decided on 11 March 2011 to raise the total guarantee commitments to €780bn. See Conclusions of the Heads of State or Government of the euro area, Brussels, 11 March 2011, para 5; Recital 2 and Annex 1 EFSF Framework Agreement. See also De Gregorio Merino (n 104) 1620. See also text to n 195 (ch 5).

190 Point 11(2) EFSF Framework Agreement.

191 Points 2(5)(b) and 2(11) EFSF Framework Agreement.

192 Recital 1 and Point 2(1)(a) EFSF Framework Agreement. The latter provision states that the conditionality had to be laid down in an MoU to be negotiated by the Commission. No separate MoU was required in case the beneficiary state also received assistance from the EFSM. The provision also required the MoU's consistency with a decision on conditionality that the Council could take under Art 136(1) TFEU. Note, however, that as of the entry into force of the 'Two-Pack', the issues surrounding conditionality are in principle governed by Union law, in particular Reg 472/2013. See text to n 341 (ch 5).

193 Points 10(5)(a)-(b)EFSF Framework Agreement.

194 Statement of the Eurogroup and ECOFIN ministers, Brussels, 28 November 2010. The breakdown of the assistance was as follows: EFSM (€22.5bn), EFSF (€22.5bn), IMF (€22.5bn), the UK (€3.8bn), Sweden (€0.6bn), Denmark (€0.4bn). €17.5bn was provided by Ireland itself through a Treasury cash buffer and investments of the National Pension Reserve Fund.

There, they decided to make the facility's lending capacity 'fully effective' by raising the amount of guarantees underpinning it from € 440bn to € 780bn.[195] They also gave it the possibility to intervene on the primary market for government debt.[196] Yet, when Portugal also had to give in to the markets on 17 May 2011, receiving assistance worth € 78bn,[197] and Greece's assistance package appeared clearly insufficient, it was obvious that more had to be done. On 11 July the Eurogroup therefore announced that it stood ready to adopt 'further measures' to deal with the risk of contagion, in particular by 'enhancing the flexibility' of the facility, 'lengthening the maturities' of loans and 'lowering' their interest rates.[198] It refrained, however, from providing details about these measures, nor did it set out a specific time path for taking them. These difficult decisions had to be taken at the highest political level, at the meeting of Union institutions and euro area leaders of 21 July 2011. After that meeting, the Slovakian Prime Minister Radičová would again be confronted with her political obligation to safeguard financial stability.

The agreement of 21 July was broad, covering a range of issues that were listed in a long, technical statement.[199] At the very beginning, leaders reaffirmed their commitment to do whatever was needed to maintain financial stability in the currency union. With a view to that aim, Greece would receive a second support package from the facility in combination with a 'voluntary contribution' from the private sector.[200] In addition, and together with Portugal and Ireland, it also got a lengthening of the maturities of its loans as well as a reduction of the interest rate it had to pay.[201] What matters most for present

195 Conclusions of the Heads of State or Government of the euro area, Brussels, 11 March 2011, para 5. An increase of guarantees was needed as without such an increase the EFSF could not use the full €440bn if it wanted to qualify for a Triple-A status with credit rating agencies. See Recital 2 EFSF Framework Agreement. See also n 189 (ch 5).

196 Conclusions of the Heads of State or Government of the euro area, Brussels, 11 March 2011, para 5. The decision on primary market intervention would also apply to the (future) ESM.

197 Press release, 'Council approves aid to Portugal, sets conditions' (Brussels, 17 May 2011). Contributions to the overall amount of assistance were as follows: EFSM (€26bn), EFSF (€26bn), IMF (€26bn).

198 Statement by the Eurogroup, 11 July 2011.

199 Statement by the Heads of State or Government of the euro area and EU institutions, Brussels, 21 July 2011.

200 Statement by the Heads of State or Government of the euro area and EU institutions, Brussels, 21 July 2011, paras 2, 6-7. Note, however, that formal approval of the second aid package was only given after the 'haircut' on bonds in the hands of private creditors had been effectuated in March 2012. The emphasis on the 'voluntary' nature of the private sector contribution was a demand of the ECB, which still feared the contagious effects and stability risks of involving private investors in assistance operations. See Irwin (n 176) 313-315. See also text to n 296 (ch 5).

201 Statement by the Heads of State or Government of the euro area and EU institutions, Brussels, 21 July 2011, paras 3, 10. It should be noted that Greece had already received an interest rate reduction and an extension of the maturity for its loans at the summit of the currency union's leaders of 11 March 2011. See Conclusions of the Heads of State or

purposes, however, is that leaders also decided to increase the 'flexibility' of the EFSF by equipping it with more instruments.[202] The facility should be able to act on the basis of a precautionary programme so as to support member states with sound economic conditions before they experience funding difficulties in the market. It would also have the power to recapitalise banks through loans to governments and intervene on the secondary market for government bonds.

The statement indicated that the necessary procedures for the implementation of these decisions would be initiated 'as soon as possible'.[203] But this was easier said than done. The increase in guarantees supporting the facility, which leaders had agreed on in March, as well as its 'flexibilisation' required amendments to the facility's Framework Agreement and were therefore dependent on national approval. Slovakia postponed taking a decision for months, until it was one of only a few states left.[204] One of the governing coalition parties, the Freedom and Solidarity Party (SaS), was adamantly against the amendments. Its leader Richard Sulik argued that 'The whole idea of the euro bailout is wrong. It tries to solve the debt crisis with more debt'.[205] What is more, he considered the EFSF to be 'the biggest swindle against Slovak and European taxpayers'.[206] Prime Minister Radičová consequently again found herself in a fix. A year earlier she had ignored her political obligation to safeguard financial stability by refusing to take part in the Greek loan facility.[207] This time, however, the consequences of such a move would be much greater as it would put on the line the viability of a rescue fund for the currency union at large. At last, a way out of her predicament was offered by the centre-left opposition leader Robert Fico, but the sacrifice Radičová would have to make was great.[208] In return for his support, Fico demanded that she would call for early elections which his SMER Party was likely to win.

Government of the euro area, Brussels, 11 March 2011, para 5.

202 Statement by the Heads of State or Government of the euro area and EU institutions, Brussels, 21 July 2011, paras 8-9. The decision to increase the set of instruments also applied to the (future) ESM. The ESM Treaty, which had initially been concluded on 11 July 2011, therefore had to be redrafted. It was signed for a second time on 2 February 2012. See also text to n 328 (ch 5).

203 Statement by the Heads of State or Government of the euro area and EU institutions, Brussels, 21 July 2011, para 8.

204 Jan Cienski, 'Slovakia stuck on eurozone rescue fund' *Financial Times (FT.Com)* (4 October 2011).

205 Quoted in Cienski, 'Slovakia stuck on eurozone rescue fund' (n 204).

206 Quoted in Leos Rousek, Gordon Fairclough and Marcus Walker, 'EU bailout fault lines exposed in Slovakia' *The Wall Street Journal Online* (12 October 2011).

207 See text to n 110 (ch 5).

208 Jan Cienski, 'Slovaks strike deal to ratify deal' *Financial Times* (13 October 2011).

On 13 October 2011 Radičová took responsibility for the currency union by acting on her obligation.[209] She accepted Fico's offer and secured parliamentary approval. Slovakia no longer supported the facility's flexibilisation only in its executive capacity, but in full. After the vote in parliament Finance Minister Mikloš expressed his relief: 'The price is high, but I'm glad that Slovakia stood up to its commitments in the end and we are not blocking the euro zone from having this tool at its disposal to contain the crisis'.[210]

Following this display of solidarity, which Van Rompuy calls 'one of the most courageous decisions' he has ever witnessed 'around the Council table',[211] Radičová stayed on as prime minister until the elections in March 2012, which she lost to Fico.

4 Incorporating the shift in the Treaties

4.1 The chiefs back at the steering wheel

The weekend of 7-9 May 2010 became a watershed. The currency union's set-up used to be dominated by the overriding goal of price stability, symbolised most forcefully by the no-bailout clause in Article 125 TFEU. Now, however, it contained two rescue funds – the EFSM and the EFSF – that could be used to safeguard financial stability. 'It is an enormous change',[212] the French Minister for European Affairs Pierre Lellouche argued, comparing the shift towards positive solidarity with NATO's defence scheme: 'The € 440bn mechanism is nothing less than the importation of NATO's mutual defense clause applied to the eurozone. When one member state is under attack the others are obliged to come to its defence'.[213] 'It is expressly forbidden in the treaties by the famous no-bailout clause',[214] he reasoned. '*De facto*, we have changed the treaty'.[215]

209 Cienski, 'Slovaks strike deal to ratify deal' (n 208).
210 Quoted in Martin Santa and Jan Lopatka, 'Slovak EFSF approval completes ratification process' *Reuters* (13 October 2011).
211 Van Rompuy, *Europe in the Storm* (n 19) 36.
212 Quoted in Ben Hall, 'EU bail-out scheme alters bloc treaties, says France' *Financial Times* (28 May 2010). See also Lynn (n 20) 177.
213 Quoted in Hall, 'EU bail-out scheme alters bloc treaties, says France' (n 212).
214 Quoted in Hall, 'EU bail-out scheme alters bloc treaties, says France' (n 212).
215 Quoted in Hall, 'EU bail-out scheme alters bloc treaties, says France' (n 212). See in this respect also Willem T Eijsbouts and Thomas Beukers, 'The EU and Constitutional Change: A Research Proposal' (2010) 6 EuConst 335. In 2010, when the rescue facilities were established or initiated, they already argued: 'It is possible to view these mechanism as mere accessories to the monetary union rules. But they are probably better understood as modest though fundamental innovations'.

For Merkel that was precisely the problem. Already at the beginning of March her Finance Minister Schäuble had tabled a proposal for a 'European Monetary Fund', arguing that the rules on economic policy were 'incomplete' and left the currency union 'unprepared for extremely severe situations….that demand a comprehensive intervention to avert greater systemic risks'.[216] Whilst Merkel had supported the initiative in principle, she had also made it clear that such a fund would require treaty amendment: 'Without treaty change we cannot found such a fund'.[217] But in the weeks that followed, the chancellor had been overtaken by events. Market panic had reached such heights that treaty amendment – a long and dreadful process – was not an option.[218] The necessity to safeguard financial stability had forced her to commit to the establishment of a rescue fund with the Union Treaties left untouched. Admittedly, the EFSF had been given shape outside these Treaties, but that did not matter legally. Due to the supremacy of Union law, the reach of the no-bailout extends even to such intergovernmental action. The tension between what Union law demanded of the members of the currency union and the positive solidarity they had committed to politically could not have been higher.

Although in May 2010 Merkel had had no option but to consent to the establishment of the EFSF, she had demanded that the fund would be of a 'temporary nature'.[219] The expiration deadline of 30 June 2013 ensured her call for treaty amendment still had a natural urgency. Theoretically, of course, nothing prevented the member states in the currency union from prolonging the facility's functionality beyond the horizon of June 2013, but in her concern about a constitutional challenge in Karlsruhe Merkel made it absolutely clear this was not an option: 'I have said time and again that the rescue fund will end in 2013 and will definitely not simply be extended ... we need a crisis mechanism that is lasting, but different'.[220]

Thinking about a permanent crisis mechanism had already started early 2010.[221] At its meeting in March the European Council had asked its President Van Rompuy to establish a task force to present measures 'for an improved crisis resolution framework and better budgetary discipline…'.[222] The task

216 Schäuble (n 69).

217 Quoted in Quentin Peel, Ben Hall and Tony Barber, 'EMF plan needs new EU Treaty, says Merkel' *Financial Times* (9 March 2010).

218 Bastasin (n 22) 168.

219 Bastasin (n 22) 198. See also Lynn (n 20) 173.

220 Quoted in Quentin Peel and others, 'Germany confident of "crisis resolution" deal' *Financial Times (FT.Com)* (19 October 2010). See also Peter Ludlow, 'The Euro Crisis Once Again: The European Council of 28-29 October 2010 (Eurocomment Briefing Note Vol 8, No 3, December 2010) 9-10; Bastasin (n 22) 222.

221 Ludlow, 'The Euro Crisis Once Again' (n 220) 7.

222 European Council, Conclusions, Brussels, 25-26 March 2010, para 7.

force, which besides Van Rompuy consisted of Eurogroup President Juncker, Economic and Monetary Affairs Commissioner Rehn, Central Bank President Trichet and all national finance ministers, further defined its mandate when it met for the first time on 21 May 2010 by identifying four spearheads of reform: 'greater budgetary discipline', 'means to reduce divergences in competitiveness', an institutional upgrade of economic governance, and 'an effective crisis mechanism'.[223]

On each of these four fronts the task force, which presented its final report on 21 October 2010, laid the foundations for important reforms.[224] Many of these reforms were put in place by the European Parliament and the Council in November 2011 when they adopted the so-called 'Six-Pack'– a set of legislative measures consisting of five Regulations and one Directive – on the basis of either Article 121(6) or 126(14) TFEU, at times in combination with Article 136(1) TFEU when the reforms specifically targeted the states in the currency union.[225] Concerning budgetary discipline, for example, the task force advised *inter alia* to 'operationalise' the reference value for public debt of 60% of GDP and to put in place a 'wider range of sanctions' for euro area states.[226] These sanctions should also be applied 'with a higher degree of automaticity' and not only in the corrective arm of the Stability and Growth Pact, as used to be the case, but also preventively.[227]

223 Remarks by Herman Van Rompuy, President of the European Council, following the first meeting of the Task Force on Economic Governance, Brussels, 21 May 2010. The heads of state and government had already alluded to these priorities two weeks earlier, in their statement of 7 May. See Statement of the Heads of State or Government of the euro area, Brussels, 7 May, para 3.

224 Report of the Task Force to the European Council, *Strengthening Economic Governance in the EU* (Brussels, 21 October 2010) (Task Force Report on Economic Governance).

225 Regulation (EU) 1173/2011 of the European Parliament and the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area [2011] OJ L 306/1 (Reg 1173/2011); Regulation (EU) 1174/2011 of the European Parliament and the Council of 16 November 2011 on enforcement measures to correct and address macroeconomic imbalances in the euro area [2011] OJ L 306/8 (Reg 1174/2011); Regulation (EU) 1175/2011 of the European Parliament and the Council of 16 November 2011 amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L 306/12 (Reg 1175/2011); Regulation (EU) 1176/2011 of the European Parliament and the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306/25 (Reg 1176/2011); Council Regulation (EU) 1177/2011 of 8 November 2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L 306/33 (Reg 1177/2011); Directive (EU) 2011/85 of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L 306/122 (Dir 2011/85). Pointing out already at an early stage of the crisis that Art 136(1) TFEU should form the starting point for reforms to the currency union was Stefaan Van den Bogaert, '"Ich bin ein Europäer": Een uitweg uit de monetaire crisis?' (Inaugural Lecture Leiden University, 10 September 2010) 9.

226 Task Force Report on Economic Governance (n 224) point 1 (executive summary).

227 Task Force Report on Economic Governance (n 224) paras 5-31.

Parliament and Council followed these recommendations by amending the Pact.[228] As to debt, Article 2(1a) of its corrective arm – Regulation 1467/97 – now stipulates that it is excessive if it exceeds the reference value of 60% of GDP and 'the differential' with respect to this value has not decreased with at least 5% on average over the last three years. Sanctions, moreover, can no longer only be applied in the context of the corrective arm, but already once a euro area state significantly deviates from its adjustment path towards its medium-term objective and has 'failed to take action' in response to a Council recommendation on the basis of Article 121(4) TFEU demanding it to address this situation.[229] Their imposition has also become more automatic through the introduction of 'reverse qualified majority' voting. It means that the Council no longer has to actively vote in favour of sanctions in order to have them imposed on a member state; a decision to impose sanctions is now deemed to be adopted by the Council *unless* it decides within ten days of the adoption by the Commission of a recommendation concerning the sanction to reject this recommendation.[230]

On the front of macro-economic imbalances and competitiveness, the task force has provided crucial input too.[231] Its call for a 'surveillance mechanism' to address these issues was answered by Parliament and Council through the establishment of a 'macro-economic imbalances procedure'.[232] This procedure aims to identify potential risks for imbalances early on and to address excessive ones, not in the least through the imposition of sanctions if they occur in states belonging to the currency union.[233] Institutionally, one of the task force's recommendations concerned the introduction of a 'European Semester', a 'cycle of reinforced *ex ante* policy coordination' covering 'all elements of economic surveillance'.[234] Streamlining surveillance at Union level at the beginning of every year should allow national policy makers to take better note of the European 'dimension' to budgets and reform programmes when these have to be drafted later in the year.[235] The Semester was launched for the first

228 See in particular Reg 1175/2011; Reg 1177/2011; Reg 1173/2011. Formally speaking the latter Reg does not form part of the Pact, which according to the preambles of Regs 1466/97 and 1467/97 (as last amended by Regs 1175/2011 and 1177/2011) only consists of these two Regs and the European Council Resolution of 17 June 1997. Nonetheless, Reg 1173/2011 cannot be seen separately from the Pact.

229 Art 4(1) Reg 1173/2011 read in combination with Art 6(2) Reg 1466/97, as amended by Reg 1175/2011.

230 See Arts 4(2), 5(2) and 6(2) Reg 1173/2011.

231 Task Force Report on Economic Governance (n 224) paras 32-42.

232 Reg 1174/2011 and Reg 1176/2011.

233 Under the macro-economic imbalances procedure sanctions are also adopted by the Council on the basis of a reversed qualified majority. See Arts 3(3) and 5 Reg 1174/2011.

234 Task Force Report on Economic Governance (n 224) paras 42-45.

235 Task Force Report on Economic Governance (n 224) para 44.

time on 1 January 2011 and received legislative recognition through the adoption of the Six-Pack.[236]

By far the most delicate issue on the task force's agenda, however, was the establishment of a crisis mechanism. As it questioned the function and place of the no-bailout clause in the single currency's legal set-up, it was not something that could be addressed by Council and Parliament through secondary legislation. Striking at the very heart of the stability conception to which the member states had committed themselves two decades earlier, it could only be decided at the highest level: It was *Chefsache*, once again.

4.2 A stroll on the shores of Deauville

When the European Council had established the task force in March 2010, Merkel had ensured that treaty amendment was explicitly on the agenda as far as the crisis mechanism was concerned.[237] The task force had to explore 'all legal options to reinforce the legal framework', the conclusions stated.[238] But if the mechanism was shaped along German lines, treaty amendment would not just be an option; it would be a legal necessity. In his proposal for a European Monetary Fund, Schäuble had made it clear that the granting of emergency liquidity should 'never be taken for granted' and that in principle it should 'still be possible for a state to go bankrupt',[239] thereby implicitly indicating there was a need for rules on private debt restructuring.[240] Moreover, the granting of assistance would have to go hand in hand with greater means to enforce fiscal prudence.[241] Similar to the possibility to deprive a member state of its voting rights in the Council when it seriously and consistently breaches the values in Article 2 TEU,[242] the voting rights of euro area states had to be 'suspended for a year' if they 'intentionally breached' the budgetary rules.[243] It should ultimately even be possible to expel them from the currency union.[244] Whereas the involvement of the private sector could possibly still be given shape on the basis of the current Treaties, the voting sanctions could clearly not as they went far beyond the limited set of sanctions listed in Article 126(11) TFEU.

Other leaders, however, were not eager to engage in treaty amendment just months after the entry into force of the Lisbon Treaty in December 2009.

236 See Art 2-a Reg 1466/97, as amended by Reg 1175/2011.
237 Ludlow, 'The Euro Crisis Once Again' (n 220) 7; Bastasin (n 22) 208.
238 European Council, Conclusions, Brussels, 25-26 March 2010, para. 7.
239 Schäuble (n 69).
240 Bastasin (n 22) 145, 163.
241 Schäuble (n 69).
242 Art 7(3) TEU.
243 Schäuble (n 69).
244 Schäuble (n 69).

They either feared the prospect of having to organise a referendum on the change, bringing back the memory of the fiasco of the European Constitution in 2005, or simply lacked the political strength to steer the amendment through their parliaments.[245] When Van Rompuy visited Merkel in Berlin just days before the task force's final session on 18 October, he therefore told her that it would be difficult to get the other heads of state or government behind the idea of treaty amendment. He added, however, that her odds would be higher if she managed to have Sarkozy support the cause.[246]

By the time Van Rompuy visited Berlin, the German government had already started to intensify consultations with the French as it realised that its chances at treaty amendment were slim without the backing of the Élysée.[247] The French government, meanwhile, had its own concerns about the direction in which the deliberations within the task force were heading. In September, the Commission had anticipated the latter's final report by introducing its proposals for the 'six-pack' legislation mentioned above,[248] and the envisaged changes to the Stability and Growth Pact were not to the French government's liking.[249] The possibility to sanction member states in the currency union already at a preventive stage and the greater automaticity in imposing such sanctions due to 'reverse majority voting' made the prospect of having to face financial penalties much more real. Worrying too was the fact that the proposals left little room for states to escape sanctions once their budgets were judged to be 'off-track'. Under the Pact's corrective arm, for example, sanctions in the form of non-interest bearing deposits were to be imposed the moment the Council established an excessive deficit on the basis of Article 126(6) TFEU.[250] A fine, moreover, was already to be introduced by the Council if no effective action had been taken within, at most, six months after the Council had established the existence of an excessive deficit on the basis of Article 126(6) TFEU.[251]

245 To put it in the words of Eniko Gyori, the Hungarian minister for European affairs: 'Nobody wants to reopen Pandora's box unless they want to destroy the European Union'. See quote in Quentin Peel and Peter Spiegel, 'Merkel demands rewrite of EU treaties' *Financial Times* (28 October 2010).

246 Ludlow, 'The Euro Crisis Once Again' (n 220) 11.

247 Ludlow, 'The Euro Crisis Once Again' (n 220) 10; Bastasin (n 22) 220-221.

248 Commission Press Release, 'EU economic governance: the Commission delivers a comprehensive package of legislative measures' (Brussels, 29 September 2010). See also text to n 225 (ch 5).

249 Ludlow, 'The Euro Crisis Once Again' (n 220) 9; Bastasin (n 22) 221-222.

250 Art 4(1) Commission, 'Proposal of 29 September 2010 for a Regulation of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area' COM (2010) 524 final.

251 Art 1(3) Commission, 'Proposal of 29 September 2010 for a Council Regulation amending Regulation (EC) 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure' COM (2010) 522 final; Art 5(1) COM (2010) 524 final.

Given that France and Germany both had an interest in influencing the work of the task force, a compromise between the two member states was not far away. In the weeks before the task force's final session there were intensive negotiations between Paris and Berlin to find a solution that would satisfy both. They came to a close in the French town of Deauville, on 18 October. That day Merkel and Sarkozy were to meet the Russian President Medvedev in the context of a trilateral security summit.[252] However, they had decided to discuss the future of the currency union between the two of them prior to the summit. During a stroll on the beach the deal was struck.[253] In a joint declaration issued the same day the two leaders set out the contours of their compromise.[254] Concerning budgetary discipline, the imposition of sanctions should become 'more automatic', yet with due respect to 'the role of different institutions and the institutional balance'.[255] 'Acting by QMV', the Council should be empowered to 'impose progressively' sanctions in the form of interest-bearing deposits under the Pact's preventive arm in case of significant deviations of the adjustment path towards the medium-term budgetary objectives.[256] Under the Pact's corrective arm, moreover, there should be 'automatic' sanctions for states that were found by the Council, again 'acting by QMV', to have failed to implement the required corrective measures within six months after the establishment of an excessive deficit.[257]

In return for these concessions to the French, Merkel got them back her desired treaty amendment. Such an amendment was 'needed', the declaration read, for the establishment of a 'robust crisis resolution framework'.[258] It would allow for 'adequate participation of private creditors' and also make it possible to suspend the voting rights of member states 'in case of a serious violation of basic principles of economic and monetary union…'.[259] The amendment was to be adopted and ratified by the member states 'in due time before 2013', so as to have the permanent crisis mechanism up and running when the EFSF ceased to function mid-2013.[260]

The declaration landed like a bombshell in Luxembourg where the task force simultaneously held its final meeting.[261] Conscious of the negotiations taking

252 Ben Hall and Quentin Peel, 'Paris and Berlin seek "reset" with Moscow' *Financial Times* (18 October 2010); Ludlow, 'The Euro Crisis Once Again' (n 220) 11; Bastasin (n 22) 222.
253 Bastasin (n 22) 224.
254 Franco-German declaration, Deauville, 18 October 2010.
255 Franco-German declaration, Deauville, 18 October 2010.
256 Franco-German declaration, Deauville, 18 October 2010.
257 Franco-German declaration, Deauville, 18 October 2010.
258 Franco-German declaration, Deauville, 18 October 2010.
259 Franco-German declaration, Deauville, 18 October 2010.
260 Franco-German declaration, Deauville, 18 October 2010.
261 For extensive discussion of what happened in Luxembourg see Ludlow, 'The Euro Crisis Once Again' (n 220) 11-13; Bastasin (n 22) 219-225. The following discussion is based on these sources.

place between their chiefs in Deauville, Finance Ministers Schäuble and Lagarde had decided not to show up on the occasion. However, upon arrival in Luxembourg the Finnish, Swedish and Dutch finance ministers, as well as Central Bank President Trichet and Commissioner Rehn, were still confident that the Commission's proposals to tighten budgetary rules would be endorsed by the task force. But their mood quickly deteriorated when Jörg Asmussen, Germany's state secretary for financial affairs doing the honours for Schäuble, indicated that his government would side with the French view on the Stability and Growth Pact. President Van Rompuy was immediately aware of the window of opportunity presented by the German change of mind.[262] With the two most important states now in favour of softening the changes to the Pact, and with those still supporting the original Commission proposals clearly in a minority position, he pushed for a report with a somewhat softer tone on fiscal prudence. At the same time the report kept open the possibility of treaty amendment. It stated that the setting up of a crisis resolution framework required 'further work'.[263] As it could lead to treaty amendment, the issue should be left to the European Council.[264]

Coming out of the meeting, stability hawks were furious about what had happened. 'Some states have got cold feet',[265] Dutch Finance Minister Jan Kees de Jager told the press. Central Bank President Trichet even demanded that that his 'discontent' was recorded in an annex to the report. 'The president of the ECB does not subscribe to all elements of this report', it read.[266] Not helpful either for assessing the report on its merits was the fact that it was only published three days later, on 21 October.[267] Having only the French-German Deauville declaration to work with, much of the media pictured the deal as if Merkel had fallen to the knees of Sarkozy.[268] The reality is, however, that her concessions were minor.[269] The declaration stated that the Council would 'act by QMV' when imposing sanctions, but it left unmentioned that the Commission's plan to have the voting rule applied on a reversed basis was still on the table. That Merkel did not insist on having fully automatic sanctions, as some of her political rivals in Germany said she should have done,[270] is understandable. As had already been clear when Waigel pleaded

262 Ludlow, 'The Euro Crisis Once Again' (n 220) 12; Bastasin (n 22) 223.
263 Task Force Report on Economic Governance (n 224) para 57.
264 Task Force Report on Economic Governance (n 224) para 57.
265 Quoted in Peter Ehrlich and Lutz Meier, 'Merkel schont Defizitsünder' *Financial Times Deutschland* (19 October 2010) (translation by the author).
266 Task Force Report on Economic Governance (n 224) Annex 1.
267 Ludlow, 'The Euro Crisis Once Again' (n 220) 14.
268 See eg Ehrlich and Meier, 'Merkel schont Defizitsünder' (n 265); Marcus Walker and Charles Forelle, 'Merkel Cedes Ground in Pact on Debt Rules' *The Wall Street Journal Online* (21 October 2010).
269 Ludlow, 'The Euro Crisis Once Again' (n 220) 12-13; Bastasin (n 22) 223.
270 Quentin Peel, Gerrit Wiesmann and Joshua Chaffin, 'Rift in Germany over EU budget accord' *Financial Times* (22 October 2010).

for automatic sanctions in 1995,[271] this would require treaty amendment. Since Articles 126(11) and (13) TFEU make clear that sanctions can only be imposed on the basis of a vote in the Council, having them applied automatically is currently impossible.[272]

The only real point which the French managed to secure concerned the 'timing' of sanctions.[273] In its proposal the Commission required a euro area state to lodge an interest-bearing deposit the moment the Council issues a recommendation in accordance with Article 121(4) TFEU to take adjustment measures in case it significantly deviates from its medium-term objective.[274] The task force recommended imposing this sanction only after the state concerned has been given the opportunity to take such measures within a period of at most five months from the Council recommendation.[275] Yet, even on the point of timing the French government did not get everything it wanted. Whereas the Deauville declaration stated that under the Pact's corrective arm a state should be required to pay a fine if it failed to take corrective measures within six months after the Council had established the existence of an excessive deficit on the basis of Article 126(6) TFEU, the task force kept open the possibility to shorten the period to three months if this was 'warranted by the situation'.[276]

The German chancellor, on the contrary, returned home from Deauville having secured what she wanted. A permanent crisis mechanism for the currency union – including her desired treaty amendment to make that possible – had the backing of France and it was on the agenda for the European Council meeting of 28-29 October 2010.

271 See text to n 1 and n 314 (ch 3).

272 In fact, the reversed qualified majority voting rule already puts the law under strain. For analysis see Rainer Palmstorfer, 'The Reverse Majority Voting under the "Six-Pack": A Bad Turn for the Union?' 20 ELJ (2014) 186 (arguing it violates the Treaties); Thomas Beukers, 'The Eurozone Crisis and the Legitimacy of Differentiated Integration' in Bruno De Witte, Adrienne Héritier and Alexander H Trechsel (eds), *The Euro Crisis and the State of European Democracy* (EUI 2013) 14 (arguing that reverse majority voting is compatible with the Treaties as it only applies to new 'steps', not to existing ones under the excessive deficit procedure); René Smits, 'Correspondence' (2012) 49 CML Rev 827, 829 (defending reverse majority voting on the basis that any other reading would make Art 136 TFEU 'rather futile').

273 Ludlow, 'The Euro Crisis Once Again' (n 220) 12.

274 Art 3(1) COM (2010) 524 final.

275 Task Force Report on Economic Governance (n 224) para 21. This arrangement has also found its way in to the final version of the Pact. See Arts 6(2) Reg 1466/97 and 4(1) Reg 1173/2011.

276 Task Force Report on Economic Governance (n 224) para 22. This arrangement has also found its way into the final version of the Pact. See Arts 3(4) and 4(1) of Reg 1467/97 and 6(1) Reg 1173/2011.

4.3 Scaling back ambitions

That treaty amendment was on the agenda of the European Council did not mean it was a done deal. The events at Deauville had upset other member states, in particular those in northern Europe that had favoured tougher changes to the Pact. 'We're more or less used to Germany and France cooking things up', one diplomat said, 'but this was really flagrant'.[277] Apart from the dissatisfaction about what had happened in Deauville, there were also real concerns about the political feasibility of treaty change, both as to timing and scope.[278] Merkel wanted the permanent crisis mechanism to be in place before the EFSF would lose its capacity to engage in any new assistance operations on 30 June 2013.[279] With little more than two years left, and judging from past amendment procedures, it would be a race against the clock to have the amendment ratified by all member states in time. Moreover, some heads of state or government still indicated they would have great difficulty in selling treaty change in their domestic political arenas. In particular the United Kingdom's newly-elected Prime Minister David Cameron pointed out his predicament: 'The stability of the eurozone is important for us. But we would not accept anything that involves a transfer of power from Westminster to Brussels'.[280] In the run-up to the European Council meeting Van Rompuy therefore reminded Merkel that even though the deal of Deauville had increased her chances at treaty amendment, the reform would have to be limited in ambition and concise in nature for it to succeed.[281]

Meanwhile, the Council's legal service was busy tackling the question of how such a limited reform could be given shape legally. The idea that eventually triumphed is said to have come from Jean-Claude Piris, the head of the Council legal service who had just left office but was still involved in its business.[282] He suggested resorting to the simplified treaty revision procedure in Article 48(6) TEU. This procedure, which ought to be less time consuming than the ordinary one due to the fact that it does not require an intergovernmental conference or convention,[283] allows the European Council to adopt a decision amending all or part of the provisions of Part III of the TFEU. The decision enters into force as soon as it is approved by the member states in accordance with their national constitutional requirements. Piris thought the

277 Quoted in Joshua Chaffin and Peter Spiegel, 'Franco-German pact divides EU', *Financial Times* (25 October 2010).

278 Ludlow, 'The Euro Crisis Once Again' (n 220) 15-16.

279 See also text to n 191 and n 219 (ch 5).

280 Quoted in Peel and others, 'Germany confident of "crisis resolution" deal' (n 220).

281 Ludlow, 'The Euro Crisis Once Again' (n 220) 16-17.

282 Ludlow, 'The Euro Crisis Once Again' (n 220) 17.

283 See for a more extensive comparison of the ordinary and simplified revision procedures Bruno De Witte, 'Treaty Revision Procedures after Lisbon' in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU law after Lisbon* (OUP 2012) 117ff.

procedure could be used to insert a limited provision into the TFEU, no longer than two or perhaps three sentences, making clear that the members of the currency union could conclude a separate treaty to establish a rescue mechanism.[284]

Merkel was captivated by the idea, but also realised it would force her to scale down her ambitions.[285] Given that Article 48(6) TEU indicates that the simplified procedure may not be used to *increase* the competences of the Union, she would have to let go of depriving member states of their voting rights within the Council in case of serious violations of the budgetary rules. Yet, in the days prior to the meeting the chancellor did not put all her cards on the table.[286] She stuck to the voting-rights plan and, conscious of the fact that the issue of treaty amendment would lose momentum if the task force's recommendations would be implemented in a piecemeal fashion, insisted that the European Council could only approve of the task force's report in its entirety. When she spoke to the *Bundestag* the day before the meeting, she said:

> 'Tomorrow and the day after tomorrow, at the summit of European Heads of State and Government, I will insist that President Van Rompuy receives a precise mandate of the European Council on the basis of which he can, in close consultation with the members of the European Council, develop a proposal for the necessary, strictly limited Treaty changes and concrete options for a durable, robust crisis resolution framework and present them to the European Council in March 2011 at the latest. I say on behalf of the Federal Government and our country as a whole without ambiguity: to me, the consent to the report of the Van Rompuy-Task Force and the precise mandate of Herman Van Rompuy are inseparable. They form a package.'[287]

The strategy paid off. In its conclusions the European Council endorsed the task force's report in its entirety.[288] The conclusions then stated that the heads of state and government had agreed 'on the need for Member States to establish a permanent mechanism to safeguard financial stability of the euro area as a whole' and that they had invited President Van Rompuy 'to undertake consultations with the members of the European Council on a *limited* treaty change *to that effect*, not modifying Article 125 (no-bailout clause)'.[289] Although there was therefore no specific mention yet that such a limited amendment should be realised through the simplified revision procedure in Article 48(6) TEU, the conclusions were already hinting at this strategy by

284 Ludlow, 'The Euro Crisis Once Again' (n 220) 17.
285 Ludlow, 'The Euro Crisis Once Again' (n 220) 17.
286 Ludlow, 'The Euro Crisis Once Again' (n 220) 15.
287 Regierungserklärung von Bundeskanzlerin Merkel zum EU-Gipfel in Brüssel und zum Gipfel der G20-Staaten in Seoul, Berlin, 27 October 2010 (translation by the author).
288 European Council, Conclusions, Brussels, 28-29 October 2010, para 1.
289 European Council, Conclusions, Brussels, 28-29 October 2010, para 2 (emphasis added).

indicating that the *heads of state* had come to terms with the fact that *states* needed to establish a permanent mechanism for the currency union. As this precluded any increase of Union competences, the route to Article 48(6) TEU was open. Besides treaty amendment, the European Council also announced that the Commission would start working on 'the general features' of the mechanism, including '*the role of the private sector*'.[290] A final decision on the amendment and the features of the mechanism would be taken at the next meeting in December so as to leave enough time for the ratification process to be finalised no later than mid-2013.

Whereas Merkel managed to find support for treaty change as well as private sector involvement, her plan to suspend voting rights met with great resistance. 'It is incompatible with the idea of a limited treaty change', Commission President Barroso argued upon arrival at the meeting, 'and frankly speaking it is not realistic'.[291] Papandreou too argued that he was 'opposed to any discussion about the removal of voting rights'.[292] The chancellor therefore let go of it, at least for the moment.[293] It would not be covered by the amendment, yet the European Council conclusions did state that President Van Rompuy still 'intended' to examine 'the issue of the right of euro area members to participate in decision making in EMU-related procedures in the case of a permanent threat to the stability of the euro area as a whole'.[294]

'I am, on the whole, quite satisfied', Merkel told the press after the meeting.[295] The same was not true for Central Bank President Trichet. He had attended the meeting and had warned the members of the European Council of the risks of involving the private sector in the functioning of the permanent crisis mechanism.[296] Such involvement would not further the cause of securing financial stability. On the contrary, offering investors the prospect of having to participate in a debt restructuring at a time in which the markets were already in disarray would do more harm than good to the single currency. But markets were not the only factor national leaders had to take into account, as Merkel civilly explained: 'The president of the European Central Bank looks at everything to calm the markets….We support him on this but we also look

290 European Council, Conclusions, Brussels, 28-29 October 2010, para 2 (emphasis added).

291 Quoted in Joshua Chaffin and Peter Spiegel, 'EU leaders rebuff Merkel plan' *Financial Times* (29 October 2010).

292 Quoted in Chaffin and Spiegel, 'EU leaders rebuff Merkel plan' (n 291).

293 According to an anonymous observer the issue of voting rights was 'essentially just a bargaining chip on Germany's part to get what they really want'. See 'EU leaders to give green light to tweak treaty' *EUobserver* (28 October 2010) <euobserver.com/institutional/31154> accessed 14 April 2017. See also Schimmelfennig (n 6) 187.

294 European Council, Conclusions, Brussels, 28-29 October 2010, para 2.

295 Quoted in Joshua Chaffin, Peter Spiegel and Quentin Peel, 'Merkel's horse trading secures fragile triumph' *Financial Times* (30 October 2010).

296 Peter Spiegel, 'Trichet warns on bail-out risk' *Financial Times* (30 October 2010); Ludlow, 'The Euro Crisis Once Again' (n 220) 20-23; Bastasin (n 22) 225-226.

at our people and their very legitimate belief they should not bear the cost'.[297] Yet, there was more to the involvement of the private sector than just trying to appease public opinion. The demand that investors should bear part of the burden also reflected the oppositional dimension to the solidary behaviour of member states, united as they were by the prospect that if one of them fell prey to the markets others would follow, and the realisation that they were bound together by a common destiny.[298]

But Trichet was right. The call for private sector involvement was ill-timed and terrified markets. Soon politicians found themselves busy doing damage control.[299] In a declaration issued on 12 November the ministers of finance of France, Germany, Italy, Spain and the United Kingdom indicated that 'Whatever the debate about the future permanent crisis resolution mechanism, and the potential for private sector-involvement, we are clear that this does not apply to any outstanding debt and any programmes under current instruments'.[300] On 28 November the Eurogroup followed up on that promise when it adopted a statement setting out the main features of the permanent mechanism.[301] Any private sector involvement would be 'fully consistent with IMF policies'.[302] To 'facilitate' such a process standardised collective action clauses (CACs), making it possible to force creditors to participate in a debt restructuring if a majority of bond holders decides so, would be included in 'all new euro area government bonds, starting in June 2013'.[303] Before that date the private sector arrangements would have no effect.[304]

But the clarification came too late for Ireland. Already under pressure from the markets because of its ailing banking sector and gravely deteriorated fiscal position, the uncertainty surrounding private sector involvement was the last drop that made the cup run over. On the very same day that the Eurogroup issued its statement, ministers of finance also announced that Ireland would receive € 85 billion in financial assistance.[305] Later in the crisis, political leaders would even backtrack on their promise not to involve the private sector

297 Quoted in Spiegel, 'Trichet warns on bail-out risk' (n 296).

298 On 'oppositional solidarity' see also text to n 35 (ch 1).

299 Ralph Atkins and others, 'A punt too far' *Financial Times* (20 November 2010); Peter Ludlow, 'Doing Whatever is Required? The European Council of 16-17 December 2010 (Eurocomment Briefing Note Vol 8, No 4, March 2011) 10; Bastasin (n 22) 227.

300 The relevant part of the statement can be found in Peter Spiegel and David Oakley, 'EU ministers move to calm bond markets' *Financial Times (FT.Com)* (12 November 2010).

301 Eurogroup statement, Brussels, 28 November 2010.

302 Eurogroup statement, Brussels, 28 November 2010. This meant in particular that any restructuring of debt would only be considered if a member state were considered 'insolvent' on the basis of an analysis of the sustainability of its debt.

303 Eurogroup statement, Brussels, 28 November 2010.

304 This arrangement eventually found its way into the ESM Treaty, although the deadline for including CACs in government bonds was brought forward to 1 January 2013. See Recitals 11-12 and Art 12(3) ESM Treaty.

305 Statement by the Eurogroup and ECOFIN ministers, Brussels, 28 November 2010. See also text to n 194 (ch 5).

before 2013 and in relation to outstanding debt. Although they were at pains to stress that the Greek situation was 'exceptional and unique', the involvement of private creditors in the second aid package for Greece, decided on at the summit of 21 July 2011 and expanded at the one of 26 October,[306] was effectuated in March 2012, partly through the retroactive inclusion of collective action clauses in Greek government bonds.[307]

4.4 The permanent mechanism

The draft treaty amendment that had been devised under the guidance of Van Rompuy and which the Belgian government presented to the European Council at its meeting of 16 and 17 December 2010 was indeed limited. On paper, that is. Making use of the simplified amendment procedure in Article 48(6) TEU, the proposal suggested the European Council would adopt a decision inserting a third paragraph into Article 136 TFEU, which deals specifically with the members of the currency union. It read:

> '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.'[308]

Consisting of only two sentences, the amendment sought to align the Treaties with the transformation of the single currency's stability conception which had been set in motion through the change in the Founding Contract that had been initiated in February 2010. Carefully crafted, it set out the two most important conditions that the heads of state and government had attached to the shift in solidarity in the preceding months. The first was that assistance could only be granted if it was 'subject to strict conditionality'. The second reflected Merkel's insistence that financial support had to be *ultima ratio*. Although the amendment did not literally use this Latin term, the requirement that the permanent mechanism could only be activated 'if indispensable to safeguard the stability of the euro area as a whole' made equally clear that assistance had to be a last resort.[309]

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306 Statement by the Heads of State or Government of the euro area and EU institutions, Brussels, 21 July 2011, paras 5-7; Euro Summit statement, Brussels, 26 October 2011, paras 10-16.

307 See also text to n 200 (ch 5).

308 European Council, Conclusions, Brussels, 16-17 December 2010, Annex 1.

309 Peter Ludlow states in this regard that in the run-up to the European Council meeting the German government had pushed for the Latin phrase to be incorporated in the amendment, but that this met with resistance from other governments. Considering that the notion of 'indispensability' conveyed the same message, Merkel eventually consented to the proposal. See Ludlow, 'Doing Whatever is Required?' (n 299) 14, 18.

At least as interesting as the text of the amendment itself, was the preamble to the proposed Decision. In May 2010 the United Kingdom's outgoing Labour government had consented to the use of Article 122(2) TFEU to establish the EFSM.[310] In the eyes of Eurosceptic Conservatives, however, this had been a major mistake, making British taxpayers cough up money – via the Union's budget – for rescuing a currency union they had deliberately decided to stay out of.[311] Certainly, only weeks earlier they had participated in the rescue of Ireland with a bilateral loan, but given the strong financial ties to the Irish economy this had been done out of self-interest. According to Finance Minister George Osborne the separate loan reflected that 'we are not part of the euro….but Ireland is our closest economic neighbour'.[312] Yet, now that treaty amendment was on the table Prime Minister Cameron sought to exclude a recurrence of the events in May.

In the run-up to the European Council meeting it became clear, however, that other governments were not keen on expanding the scope of the amendment beyond the absolute minimum to cater for British concerns.[313] A compromise was eventually found by stating in the conclusions as well as in the preamble to the draft Decision that the European Council had agreed that since the permanent mechanism was 'designed to safeguard the financial stability of the euro area as a whole, Article 122(2) of the TFEU will no longer be needed for such purposes'.[314] When Cameron defended his bargain in the House of Commons a few days after the meeting, on 20 December, he argued:

> 'Britain is not in the euro and we are not going to join the euro, and that is why we should not have any liability for bailing out the eurozone when the new permanent arrangements come into effect in 2013. In the current emergency arrangements established under article 122 of the treaty, we do have such a liability. That was a decision taken by the previous Government, and it is a decision that we disagreed with at the time. We are stuck with it for the duration of the emergency mechanism, but I have been determined to ensure that when the permanent mechanism starts, Britain's liability should end, and that is exactly what we agreed at the European Council ... Both the Council conclusions and the decision that introduces the treaty change state in black and white the clear and unanimous agreement that from 2013 Britain will not be dragged into bailing out the eurozone.'[315]

The picture painted by Cameron was far too positive, for two reasons in particular. The first concerned the fact that the compromise on Article 122(2)

310 See text to n 147 (ch 5).
311 Ludlow, 'Doing Whatever is Required?' (n 299) 2, 15.
312 Quoted in George Parker, 'UK to lend €7bn to Ireland' *Financial Times (FT.Com)* (22 November 2010).
313 Ludlow, 'Doing Whatever is Required?' (n 299) 15.
314 European Council, Conclusions, Brussels, 16-17 December 2010, para 1 and Annex 1.
315 HC Deb 20 December 2010, cols 1187-88.

TFEU had been included in the draft decision's preamble, not its operative part. It had therefore no legally binding force. Second, even politically the agreement was less solid than Cameron made it believe. During the European Council meeting Commission President Barroso had turned against the compromise as he had realised that the consequence would be that any future assistance operation would be entirely intergovernmental, minimising the influence of his own institution and that of the European Parliament.[316] After setting out that the European Council had agreed that Article 122(2) TFEU '*will no longer be needed* for such purposes', the conclusions and the preamble to the draft decision therefore continued by saying the heads of state and government – not the Commission president (!) – had agreed that it '*should not be used* for such purposes'.[317] This specification may have seemed insignificant at the time, but this was not so. As it kept ambiguous the use of Article 122(2) TFEU for euro area rescue operations, it left open the possibility to resort to the provision if needed. And as chapter 7 will show, that is exactly what would happen in the summer of 2015.[318]

In line with Article 48(6) TEU, after the European Council had approved of the draft decision it was subsequently presented to the Bank, the Commission and the Parliament for an opinion.[319] All three opinions are interesting from a legal perspective, yet for now it suffices to single out the one from the Bank.[320] Earlier, on 28 October, the European Council had argued that the envisaged amendment should not alter the scope of the no-bailout clause.[321] That statement formed the culmination of intense negotiations in which especially the German chancellor had insisted on treaty amendment so as to avoid the permanent mechanism falling foul before the *Bundesverfassungsgericht*, whilst at the same time trying to stay as close as possible to the single

316 Ludlow, 'Doing Whatever is Required?' (n 299) 15, 19. Note, however, that under the intergovernmental construct that was eventually chosen, the ESM, the Commission has actually retained considerable influence due to its heavy involvement in its operation. See also text to n 348 (ch 5).

317 European Council, Conclusions, Brussels, 16-17 December 2010, para. 1 and Annex 1 (emphasis added).

318 See text to n 162 (ch 7).

319 Opinion of 17 March 2011 of the European Central Bank on a Draft European Council Decision Amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for member states whose currency is the euro [2011] OJ C 140/8 (ECB Opinion on Article 136(3) TFEU); Commission, 'Opinion of 15 February 2011 on the Draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for member states whose currency is the euro' COM(2011)70 final; Resolution of the European Parliament of 23 March 2011 on the Draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for member states whose currency is the euro [2011] OJ C 247 E/22 (European Parliament Resolution on Article 136(3) TFEU).

320 For a discussion of the opinion of the European Parliament see text to n 359 (ch 5).

321 See text to n 289 (ch 5).

currency's original stability set-up; too great a departure from it could equally incur the wrath of Karlsruhe. By stressing that the no-bailout clause would not be changed by Article 136(3) TFEU, the statement also seemed to want to avoid any doubts about the legality of already existing assistance funds, in particular the 'Greek' facility and the EFSF. At the same time, however, the European Council thereby denied the change in the Contract that had been initiated on 11 February. Legally, this begged the question why the Treaty should be amended in the first place. Even Karlsruhe would surely not require a treaty amendment only to make explicit that which had always been possible. Nonetheless, in its opinion the Bank followed the European Council's line of reasoning as it argued that Article 136(3) TFEU only 'helps to explain, and thereby confirms, the scope of Article 125 TFEU…'.[322]

Having received the opinions, the European Council adopted the Decision, numbered 2011/199, at its meeting of 25 March 2011.[323] Within just months it had managed to agree on treaty change. Nonetheless, Article 48(6) TEU determines that such a decision will only enter into force after all member states have approved it in line with their constitutional requirements. The Decision itself set a target date for the completion of these national approval procedures: 1 January 2013.[324] But with each state having the ability to throw a spanner in the works, it proved to be an overtly ambitious date. For more than two years, the Czech Republic failed to give the Decision its blessing. Both chambers of its parliament approved the Decision, yet its Eurosceptic President Václav Klaus refused to sign it, considering the permanent mechanism for which the Decision sought to clear the way 'horrifying and absurd'.[325] The Czech position only changed when Klaus was replaced as president by Miloš Zeman in March 2013. Less than a month later, on 3 April 2013, he signed the Decision, which subsequently entered into force on 1 May.[326]

Now, Article 136(3) TFEU itself does not provide the legal basis for the permanent crisis mechanism. It could not have done so without making it impossible to use the simplified revision procedure in Article 48(6) TEU, which excludes its use in case of an increase in Union competences. Article 136(3) TFEU takes account of that limit by making clear that the member states in the

322 ECB Opinion on Article 136(3) TFEU, para 5.

323 European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro [2011] OJ L 91/1 (European Council Decision 2011/199). See also European Council, Conclusions, Brussels, 25-26 March 2011, para 16.

324 Art 2 European Council Decision 2011/199.

325 Quoted in Tomas Dumbrovsky, *Constitutional Change Through Euro Crisis Law: "Czech Republic"* (EUI, February 2014) (references omitted).

326 Art 2 European Council Decision 2011/199 stipulates that failing the deadline of 1 January 2013, it would enter into force on the first day of the month following receipt by the Secretary General of the Council of the last of the notifications of approval. The Czech Notification was received on 23 April 2013.

currency union can establish a permanent mechanism, not the Union itself. Parallel to the amendment of the TFEU, the members of the currency union therefore also worked on a separate treaty to establish the permanent fund, called European Stability Mechanism (ESM).[327] The Treaty was initially signed on 11 July 2011, but soon it had to be revised due to the modifications that the political leaders had decided on at their summits of 21 July and 9 December 2011.[328] A second version of the Treaty was therefore signed on 2 February 2012.[329]

As with the amendment of the TFEU, the ratification process was far from easy. On 9 December 2011 the leaders in the currency union had decided to bring forward the deadline for the Treaty's entry into force to July 2012.[330] Article 48(1) of the Treaty makes clear, however, that it will only enter into force when it has been ratified by states representing at least 90% of the total subscriptions to the ESM's capital stock, which are determined in line with the capital key of the European Central Bank.[331] This meant that ratification difficulties in large states like Italy, France and Germany – each having a capital contribution exceeding 10% – could prevent the ESM from becoming operational. And they materialised in Germany where opponents challenged the Treaty before the *Bundesverfassungsgericht*. In chapter 7 this challenge will receive careful attention,[332] for now it suffices to point out that on 12 Septem-

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327 See also European Council conclusions of 16-17 December 2010, para 3.

328 The updates to the ESM Treaty concerned new assistance instruments, more flexible pricing, a link with the fiscal compact, a new emergency voting procedure, private sector involvement and the timing of capital contributions. See also text to n 199 (ch 5) and text to n 93 (ch 6).

329 Treaty establishing the European Stability Mechanism, Brussels, 2 February 2012. Some argue that the ESM's intergovernmental nature is simply the result of what historical institutionalists call 'path-dependence'. Once the EFSF was established it limited subsequent options for reform, as a result of which its permanent successor (the ESM) became intergovernmental as well. See Gocaj and Meunier (n 15) 248-250; Bruno De Witte, *Using International Law In the Euro Crisis: Causes and Consequences* (Arena Working Paper No 4, June 2013) 7. Others like Christopher Bickerton, Dermot Hodson and Uwe Puetter argue that the ESM genuinely evidences a greater willingness to support (intergovernmental) '*de novo* bodies' instead of endowing 'traditional supranational institutions' with greater powers. See Christopher J Bickerton, Dermot Hodson and Uwe Puetter, 'The New Intergovernmentalism: European Integration in the Post-Maastricht Era' (2015) 53 JCMS 703, 713-714.

330 Statement by the euro area Heads of State or Government, Brussels, 9 December 2011. On 30 March 2012 the Eurogroup decided that the EFSF would continue to fund the existing programmes for Portugal, Ireland and Greece, as a result of which the combined lending capacity of the EFSF and ESM became €700bn. See Statement of the Eurogroup, Brussels, 30 March 2012.

331 See Art 11 and Annex I ESM Treaty. Note, however, that the contribution key in Annex I contains a temporary correction to take into account the economic condition of certain states. It shall expire twelve years after the adoption of the euro by the ESM member concerned. See Art 42(1) ESM Treaty. New members of the ESM may also qualify for a temporary correction under Art 42(2) ESM Treaty.

332 See text to n 200 (ch 7).

ber 2012 the German constitutional court refused to issue a temporary injunction preventing Germany from ratifying the Treaty,[333] provided it was ensured that Germany's payment obligations would not exceed the amount of € 190bn that was specifically mentioned in the Treaty.[334] Moreover, none of the provisions on the inviolability of documents, professional secrecy and immunities of persons should bar detailed information of the *Bundestag*.[335] On 27 September, the contracting states provided this assurance through the adoption of an interpretative declaration.[336] That same day Germany deposited its instrument of ratification, thereby enabling the Treaty's entry into force.

Given that the ESM has its legal basis in a separate treaty, it forms an international organisation under international law with its seat in Luxembourg.[337] Contrary to the EFSF, it does not raise funds on the back of state guarantees but instead functions on the basis of capital stock worth € 700bn, which is divided into 'paid-in shares' and 'callable shares' and which should ensure a maximum lending capacity of € 500bn.[338] Similar to the EFSF, the ESM can support states using several instruments, ranging from 'ordinary' loans, precautionary assistance, intervention on primary and secondary bond markets, to the (indirect) recapitalisation of financial institutions.[339] In line with the change in the Contract initiated on 11 February 2010, such support can only be granted if it is indispensable to safeguard financial stability and subject to strict conditionality.[340] This conditionality is laid down in a Memorandum of Understanding that is concluded between the ESM and the recipient state. Since the entry into force of the 'Two-Pack' – two Union Regulations that further strengthen economic and budgetary surveillance for states in the currency union[341] – the requirement of conditionality is also laid down in

333 BVerfG, Case 2 BvR 1390/12 of 12 September 2012.
334 See Art 8(5) and Annex II ESM Treaty.
335 See Arts 32(5), 34 and 35(1) ESM Treaty.
336 Declaration on the European Stability Mechanism, Brussels, 27 September 2012.
337 Arts 1(1) and 31 ESM Treaty.
338 Art 8(1)-(2) and Recital 6 ESM Treaty.
339 Arts 14-19 ESM Treaty. For an in-depth analysis of the ESM instrument of indirect recapitalization see Vestert Borger, 'The European Stability Mechanism: a crisis tool operating at two junctures' in Matthias Haentjens and Bob Wessels (eds), *Research Handbook on Crisis Management in the Banking Sector* (Edward Elgar 2015) 150ff. Since December 2014 the ESM also has the ability to grant direct recapitalization assistance. See also text to n 165 (ch 6).
340 Arts 3 and 12(1) ESM Treaty.
341 Regulation (EU) 472/2013 of the European Parliament and the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L 140/1 (Reg 472/2013); Regulation (EU) 473/2013 of the European Parliament and the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L 140/11 (Reg 473/2013).

Union law itself. A state requesting financial assistance from the ESM needs to prepare a macroeconomic adjustment programme that requires approval by the Council.[342]

All major decisions of the ESM, such as those on the granting of assistance or capital calls, require, in principle, the mutual agreement of the Board of Governors,[343] which is composed of the finance ministers of participating states and thus *de facto* equals the Eurogroup.[344] Below the governors is the Board of Directors, to which each governor may appoint one director.[345] The directors need to ensure that the ESM is run in accordance with its founding treaty and bylaws and they may also exercise those powers that have been delegated to them by the Board of Governors.[346] Meetings of the Board of Directors are chaired by the ESM's managing director, who may also participate in those of the governors.[347]

342 Arts 6(1)-(2) Reg 472/2013. The requirement to prepare an adjustment programme also applies to states receiving assistance from the EFSM, EFSF, IMF or any (third) state. Art 7(12) makes clear that states do not have to prepare an adjustment programme if they receive precautionary financial assistance, loans for the recapitalisation of financial institutions, or benefit from other new ESM instruments not requiring an adjustment programme. The Council will, however, still have to approve 'the main policy requirements' that are included in the conditionality attached to assistance. Moreover, Art 2(3) indicates that states receiving precautionary assistance will be subject to 'enhanced surveillance'. In line with Arts 2(5) and 7(12) the Commission has published two lists of instruments: one on instruments not requiring a macroeconomic adjustment programme and one on instruments qualifying as precautionary assistance. See Commission Communication of 16 October 2013 from the Commission concerning two lists of financial assistance instruments under Regulation (EU) 472/2013 [2013] OJ C 300/1.

343 Art 5(6) ESM Treaty. Note, however, that Art 4(4) ESM Treaty allows decisions to grant and implement assistance to be taken on the basis of an 'emergency voting procedure'. In that case a decision requires a qualified majority of 85% of the votes cast. Decisions that require a normal qualified majority are set out in Art 5(7) ESM Treaty. Art 4 ESM Treaty determines how voting rules (unanimity, qualified majority, simple majority) should be applied.

344 Art 5(1) ESM Treaty. Each state shall also appoint an alternate governor, who can act on the governor's behalf when he is not present. Art 5(2) ESM Treaty states that the Board of Governors may decide to be presided by the president of the Eurogroup or to elect another chairperson from among its members. The economic and monetary affairs commissioner as well as the ECB president may participate as observers in meetings of the Board of Governors. The same applies to representatives of states outside the currency union that participate in assistance operations alongside the ESM on an *ad hoc* basis. See Arts 5(3)-(4) ESM Treaty.

345 Art 6(1) ESM Treaty. Governors may also appoint one alternate director which may act on the director's behalf when he is not present. The economic and monetary affairs commissioner as well as the ECB president may appoint one observer. The same applies to representatives of states outside the currency union that participate in assistance operations alongside the ESM on an *ad hoc* basis. See Arts 6(2)-(3) ESM Treaty.

346 Arts 5(6)(m), 6(5) and 6(6) ESM Treaty.

347 Art 7 ESM Treaty.

Union institutions are heavily involved in the functioning of the ESM as well.[348] The contracting states have empowered the Court to decide any dispute on the interpretation or application of the ESM Treaty which arises between the ESM and one of its members or between such members and which cannot be definitively settled by the Board of Governors.[349] The Commission and the Bank are closely involved too. In liaison with the Bank, the Commission has to assess the existence of risks to financial stability as well as a state's debt sustainability and financing needs if the ESM receives a request for assistance.[350] Moreover, it has to negotiate with the recipient state, and again in liaison with the Bank, the Memorandum of Understanding detailing the conditionality attached to assistance.[351] Once such a Memorandum has been approved by the Board of Governors the Commission also has to sign it on behalf of the ESM and subsequently monitor a state's compliance with it in liaison with the Bank.[352]

5 Conclusion

The importance of what happened on 11 February 2010 is impossible to overestimate. In a period of extreme uncertainty and market turmoil, and without a toolbox to deal with the situation, political leaders initiated a change in the Union's Founding Contract by jointly committing themselves to safeguarding financial stability. In so doing, they laid the basis for a transformation of the currency union's set-up, characterised by a widening of its stability conception. This, in turn, led to a shift in solidarity among the member states, a shift that put huge pressure on the law which needed time and action to adjust.

The panic and uncertainty that characterised the crisis during its first years may have subsided, but over time the solidarity that the members of the currency union will be asked to display in support of their currency is likely to evolve further. Two possible changes should be singled out. The first would result from a further shift towards positive solidarity, putting even greater pressure on the no-bailout clause. Over the past years, several reports have

348 In so doing, the ESM continues a practice that had already started with the EFSF. On 20 June 2011 the representatives of the governments of the Member States authorized the Contracting Parties to request the Commission and the ECB to perform the tasks provided for in the Treaty. See Decision of the Representatives of the Governments of the Member States of the European Union, Brussels, 20 June 2011, 12114/11; Recital 10 ESM Treaty. A similar request was made in relation to the EFSF on 10 May 2010. See Decision of the Representatives of the Governments of the 27 EU Member States, 10 May 2010, Brussels, 9614/10.

349 Recital 16 and Art 37(3) ESM Treaty.

350 Art 13(1) ESM Treaty.

351 Art 13(3) ESM Treaty.

352 Arts 13(4) and 13(7) ESM Treaty.

been published that investigate possibilities to strengthen the single currency's architecture. One of them has been prepared under the guidance of former European Council President Van Rompuy and was published in December 2012. Entitled 'Towards a Genuine Economic and Monetary Union', it calls for the creation of an 'insurance mechanism' in the medium term.[353] Contrary to the ESM, it should not serve as a crisis tool but as a 'shock absorber' that improves the currency union's 'resilience' by 'cushioning' adverse economic events that cannot be handled by states on their own.[354] Over time, it should be linked to a 'fiscal capacity' for the currency union based on 'common debt issuance'.[355] An even more recent report – published in June 2015 and written by Commission President Juncker in close cooperation with his peers at the European Council, the Parliament, the Bank and the Eurogroup – repeats the call.[356] If and to the extent that such debt issuance would be based on the joint and several liability of states,[357] it would lead to an even greater degree of positive solidarity between them. Indeed, under the ESM a state's liability does not go beyond its portion of the authorised capital stock.[358]

The second change is more fundamental as it would require a further modification of the single currency's stability conception. On 11 February 2010 leaders committed themselves to securing the currency union's financial stability, a commitment that eventually led to the establishment of the ESM. Yet, what would happen if assistance needs to be given to secure *political* stability? In its opinion on the European Council Decision introducing Article 136(3) into the TFEU, the European Parliament touched on the question. It stressed that the ESM involved all member states taking part in the single currency, even those 'whose economy may be seen as not "indispensable" for the purposes of safeguarding the euro area as a whole'.[359] During the last years of the crisis the issue has become increasingly relevant, especially in the context of the Cypriot rescue package of € 10bn in March 2013 and the

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353 Herman Van Rompuy, 'Towards a Genuine Economic and Monetary Union' (Brussels, 5 December 2012) 9-12 (Towards a Genuine EMU Report December 2012).

354 Towards a Genuine EMU Report December 2012 (n 353) 11-12

355 Towards a Genuine EMU Report December 2012 (n 353) 12.

356 Jean-Claude Juncker, 'Completing Europe's Economic and Monetary Union' (European Commission, June 2015) 14-15. For a more general analysis of the report see Stefaan Van den Bogaert and Armin Cuyvers, 'Of Carrots and Sticks: What Direction to Take for Economic and Monetary Union?' in Bernard Steunenberg, Wim Voermans and Stefaan Van den Bogaert (eds), *Fit for the Future?: Reflections from Leiden on the Functioning of the EU* (Eleven International Publishing 2016) 133-139.

357 Common debt issuance does not necessarily require joint and several liability. In its Green paper on 'stability bonds', published in November 2011, the Commission discusses several options for the joint issuance of debt, one of which does not require joint and several guarantees. See Commission, 'Green paper of 23 November 2011 on the feasibility of introducing Stability Bonds' COM (2011) 818 final.

358 Art 8(5) ESM Treaty. The question whether a state's liability under the ESM is indeed limited to this portion has been subject to further scrutiny by the *BVerfG*. See text to n 332 (ch 5).

359 Point 6 European Parliament Resolution on Article 136 TFEU.

third assistance programme for Greece of € 86 billion in August 2015. Admittedly, these assistance operations were still carried out with the purpose of maintaining financial stability. And the concern for financial stability is indeed still a very real one, even though the height of the crisis is over. Yet, the need to secure political stability has increasingly come to the fore.

Greece's case is telling. When leaders were discussing the third aid package for Greece in July 2015, they had become increasingly sceptical of the operation. Earlier that month, on 5 July, the Greek people had rejected the policy conditionality attached to the disbursement of the final tranche of the second loan package in a referendum called by the newly-elected Prime Minister Tsipras.[360] A growing body of opinion was saying that it would therefore perhaps be best for the state to return to the Drachma, especially now that the currency union was better capable of withstanding shocks. But European Council President Tusk reminded the public of the consequences of having a failed state at the Union's external borders: 'Our inability to find agreement may lead to the bankruptcy of Greece and the insolvency of its banking system. And for sure, it will be most painful for the Greek people. I have no doubt that this will affect all Europe also in the geopolitical sense. If someone has any illusion that it will not be so, they are naive'.[361]

Tusk's appeal to political stability was not the first. Ever since the start of the crisis, leaders have referred to it in order to justify assistance operations. Merkel has probably done it most forcefully when she appeared in the *Bundestag* on 19 May 2010 to defend her consent to a rescue fund for the currency union at large: 'If the euro falls, Europe falls' (*Scheitert der euro, dann scheitert Europa*).[362] But a joint commitment of similar importance as the one of 11 February 2010 to financial stability is still lacking, at least on paper. Not to mention its penetration into the law.

360 Henry Foy and Stefan Wagstyl, 'Greece's eurozone future in doubt after decisive No victory' *Financial Times (FT.Com)* (6 July 2015).

361 Remarks by President Donald Tusk after the Euro Summit of 7 July 2015 on Greece, Brussels, 7 July 2015.

362 Regierungserklärung von Bundeskanzlerin Merkel zu den Euro-Stabilisierungsmassnahmen, Berlin, 19 May 2010.