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"European Institutions in Trouble: The impact of Euro Crisis on EU's 'single institutional framework'"

Flore Vanackère, Yuliya Kaspiarovich

Global Studies Institute
10 rue des Vieux-Grenadiers
1205 Geneva
https://www.unige.ch/gsi/fr/

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Abstract:

In the aftermath of the global financial crisis, the EU and its MS had to face very pragmatic issues: how to avoid the economic collapse of Greece, Portugal and Ireland? Decisions had to be taken quickly in any institutional or legal forum that was immediately available. For this specific reason, legal solutions consisting of the conclusion of international agreements by some of the EU MS outside the EU legal framework was taken as a new normal. Because of the close legal relationship between these new international treaties and the EU legal order, a decision was also taken to "borrow" already existing EU institutions and entrust them with new tasks. In this paper we question the role of EU institutions outside of the EU legal framework. We first address the evolution of the EU institutional framework in the context of the Euro crisis in relation to art. 13 TEU and paragraph 7 of the TEU preamble – and particularly with respect to the requirement of a "single institutional framework". The first section shows that the "borrowing" of the EU institutions outside of the strictly EU legal framework does not seem to alter the nature of the single EU institutional setting. After all, the same institutions are charged with protecting the "general interest of the Union". The second section questions whether the tasks entrusted to the EU institutions outside of the EU legal framework do not undermine the institutional equilibrium as it exists within the EU legal order.

Au lendemain de la crise financière de 2008, l'UE et ses États membres ont dû faire face à des problèmes très concrets : comment éviter l'effondrement économique de la Grèce, du Portugal et de l'Irlande ? Des décisions ont dû être prises rapidement dans n'importe quel cadre juridico-institutionnel à disposition. Les solutions juridiques impliquant la conclusion d'accords internationaux par certains des États membres de l'UE en dehors du cadre juridique de l'UE ont ainsi commencé à être considérées comme une nouvelle normalité. Vu l'étroite relation juridique entre ces nouveaux traités internationaux et l'ordre juridique de l'UE, il a également été décidé de « réformer » les institutions européennes déjà existantes et de leur confier de nouvelles tâches. Dans ce papier, nous questionnons le rôle des institutions européennes en dehors du cadre juridique de l'UE. Nous nous penchons d'abord sur l'évolution du cadre institutionnel de l'UE dans le contexte de la crise de l'euro en relation avec l'art. 13 TUE et le paragraphe 7 du préambule du TUE, en particulier quant au caractère unique du cadre institutionnel de l'UE. La première section montre que « l'emprunt » des institutions de l'UE en dehors de son cadre juridique ne semble pas altérer la nature « unique » de ce cadre institutionnel. Après tout, les mêmes institutions sont chargées de protéger « l'intérêt général de l'Union ». La deuxième section examine la question de savoir si les tâches confiées aux institutions de l'UE en dehors du cadre juridique de l'UE ne compromettent pas l'équilibre institutionnel tel qu'il existe dans l'ordre juridique de l'UE.

Keywords: Single institutional framework; Euro crisis; EU legal order; Art. 13 TEU; ESM

Authors: Flore Vanackère, Yuliya Kaspiarovich

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Flore Vanackère and Yuliya Kaspiarovich***

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* Teaching and Research Assistant at the Global Studies Institute, PhD Candidate at the Faculty of Law, UNIGE.

** Postdoctoral researcher at the Global Studies Institute and Emile Noël Fellow at NYU School of Law.

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I. Introduction

"DESIRING to enhance further the democratic and efficient functioning of the institutions so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them …". This is the wording of the paragraph 7 of the TEU's preamble. The history of the TEU – and then of its preamble – is a relatively recent one. It was adopted in 1994 with the Treaty of Maastricht creating a framework for European communities and other existing "pillars". This explains the desire to further enhance the functioning of already existing institutions[1].

In this article, we will investigate the current role of existing institutions within the complex and hybrid legal architecture of the European Union (EU) and outside the EU legal framework. In relation with paragraph 7 of the Preamble, art. 13 TEU lists these institutions as a 'single institutional framework' within the EU. According to the above-mentioned paragraph 7 and art. 13 TEU, the EU institutions should 'act within the limits of the powers conferred [on them] in the Treaties' or 'carry out […] the tasks entrusted to them'. In other word, the institutions established by the treaties shall act only in respect of competences conferred to them by the Member States (MS) in those treaties. As is established, the Court of Justice of the European Union's (CJEU) case-law allows tasks to be attributed to the EU institutions by the MS outside the EU legal order.[2] Those tasks, however, cannot alter the essential character of the powers conferred on the institutions by the EU Treaties. What happens if the EU institutions are "used" outside the EU legal framework? Or even worse, what happens if the EU institutions are empowered outside the EU treaties in order to circumvent the obligations enshrined in the treaties or the instruments protecting fundamental rights?

These questions, even though they seem to be completely hypothetical, could not be more concrete, especially for the last decade. Indeed, in the aftermath of the 2008-2009 worldwide economic and fiscal crisis, the EU MS had to take urgent measures aimed at helping the most vulnerable Euro zone economies (particularly, the countries nicknamed the "PIIGS", namely Portugal, Italy, Ireland, Greece, and Spain). To this end, the Euro zone MS established some *ad hoc* mech-

[1] The institutional structure conceived 'in pillars' by the authors of the Maastricht Treaty was not the same as the one conceived by the authors of the Treaty establishing a Constitution for Europe. The purpose of this paper is to focus on the current challenges posed by the evolution of EMU to the institutional structure of the Union. Therefore, we will not address the transition from the 'pillar structure' of the EU to the 'single institutional framework', as announced in the preamble of the Lisbon Treaty.

[2] Joined cases C-181/91 and C-248/91, *European Parliament v Council of the European Communities and Commission of the European Communities (Emergency aid to Bangladesh)* ECLI:EU:C:1993:271; Case C-316/91, *European Parliament v Council of the European Union (Lomé Convention)* [1994] ECLI:EU:C:1994:76; or more recently, Case C-8/15 P, *Ledra Advertising v Commission and ECB,* ECLI:EU:C:2016:701.

anisms outside of the EU legal framework. The last of them was the European Stability Mechanism (ESM), an international law institution, put in place *via* the conclusion of an intergovernmental treaty. Though it is outside the EU legal order, the ESM mobilizes EU institutions in its functioning. As we will see in more detail *infra*, some of the EU institutions negotiate and conclude the agreements containing economic assistance measures and imposing the 'strict conditionality' on the MS in difficulty. They thus seem to act outside of the EU legal framework, far beyond the 'tasks entrusted to them', and even exceeding the 'essential character of the powers conferred' on them by the Treaties.

In this paper we will question the role of EU institutions outside – but at the margins of – the EU legal framework. We will first address the evolution of the EU institutional framework in the context of the Euro crisis about art. 13 TEU and paragraph 7 of the TEU preamble – and particularly regarding the requirements relating to the unity of the institutional framework. Our analysis will focus on the institutional setting of the ESM. The first section will show that the "empowerment" of the EU institutions outside of the strictly EU legal framework does not seem to alter the nature of the single EU institutional setting. After all, the same institutions are used to preserve issues related to the "general interest of the Union". For this, we will explore the development of the eurozone governance on the margin of the EU legal order, explaining why this unique framework is not punting into question the unity of the EU single institutional framework (II.). The following section will question whether the tasks entrusted to the EU institutions outside of the EU legal framework do not undermine the singularity of institutional equilibrium as it exists within the – very particular – EU legal order (III.).

II. The case of the ESM – the Eurozone's governance does not question the unity of the EU institutional framework

On September 15, 2008, one of the most spectacular bankruptcies in the history of the U.S. banking sector occurred. With the subprime mortgage crisis already well underway, the collapse of Lehman Brothers sounded the death knell for fundamentally reckless speculative practices. Given the significant intertwining of various financial markets and actors, a series of doubts began to emerge about the solvency of the financial system as a whole. As early as the end of 2008, some economists rightly spoke of the existence of a "systemic" crisis. This crisis is not yet over. Regulatory changes are too few and far too late[3]. In 2008-2009 global financial crisis immediately followed this failure, triggered by the collapse of the derivatives market, which then spread to the

[3] AUGUSTÌN JOSÉ MENENDEZ, "The Structural Crisis of European Law as a Means of Social Integration from the Democratic Rule of Law to Authoritarian Governance", ARENA Working Paper 5/2016, p. 2.

real economy and affected the whole complex network of financial interrelations and interdependencies. Reckless lending practices, questionable lending to economically and financially weaker or vulnerable States[4], the lack or insufficiency of adequate regulations and controls, poorly designed, if not "rotten" financial products and their rapid dissemination in the global financial market, a serious loss of confidence in the ability of credit institutions to value their financial assets… All of these interconnected factors led to the eruption of a large-scale financial crisis, rapidly turning into a public debt crisis and affecting some Euro area countries.

Indeed, some states, particularly in Europe, possessed financial institutions and a number of credit institutions that were in difficulty among the actors investing in their debt. As a result of this "financing" of their debt, the economies of the States became highly dependent on the financial markets, as they count today for their financing mainly on the financial markets by the means of the emission of bonds. In turn, some of these States have invested in the assets of several financial institutions, without necessarily having carried out any control of the quality of the assets in which these investments were made. Thus, by means of capital injections, the acquisition of "toxic" assets or the extension of conditional guarantees, private debt was transformed into public debt and accordingly the financial institutions concerned were absolved of any responsibility due to an erroneous assessment of the risks[5]. In addition, when some credit institutions ran into serious difficulties due to their speculative practices and started to incur irrecoverable losses, a series of national public institutions intervened to support the bail-out of too-big-to-fail financial institutions, either by injecting capital directly or by acquiring stakes in "dangerous", "rotten" assets of the financial institutions.

This resulted in some countries getting into significant economic difficulties in terms of public debt, as they were already under strain from previous decisions establishing increasingly strict fiscal rules and had suffered a decline in tax revenues since the beginning of the crisis[6]. A major failure of the banking sector at a global level, which caused a massive increase in public debt, was therefore the main cause of this systemic crisis. In response to this crisis, a legal framework was put in place very quickly at European and global level, despite the great technical complexity of the failures to be addressed. In this – for some EU countries – dramatic context, the setting up of an intergovernmental institutional framework via the European Financial Stability Facility

[4] Think of the practices developed in Greece by the financial institution Goldman Sachs. See. MATTHEW LYNN, Bust: Greece, the Euro and the Sovereign Debt Crisis, John Wiley & Sons, New Jersey, 2010.
[5] AUGUSTÌN JOSÉ MENENDEZ, *op. cit.*, p. 5.
[6] CAROLINE BRADLEY, "From Global Financial Crisis to Sovereign Debt Crisis and Beyond: What Lies Ahead for the European Monetary Union?", 22 *Transnat'l L. & Contemp. Probs.* (2013), p. 17.

(EFSF), the ESM and the Fiscal Compact outside the EU legal framework[7] was justified by the urgency of the financial and economic crisis that hit the Eurozone hard from 2009. The establishment of such a structure, however, calls into question certain principles contained in primary law, notably that of the uniqueness of the institutional framework of the Union contained in the paragraph 7 of the TEU's preamble.

In the following section, we propose to investigate the complex legal setting of the ESM and issues related to the "borrowing" of EU institutions outside of the EU legal framework. In this first section, we will start by briefly explaining how this mechanism was set up (A.); we will then explore the functioning of the ESM and provide some elements of the answer to the question raised in the introduction, namely whether the EU consists of a single institutional framework (B.).

A. The establishment of the ESM

The European Stability Mechanism is an international institution established by the signing of an intergovernmental treaty on February 2, 2012 by the – then – 17 MS of the Eurozone. This Treaty entered into force in October 2012. This mechanism replaces the two previous ones, the European Financial Stability Mechanism (EFSM) and the EFSF and consists of an international financial institution set up by the adoption of an intergovernmental treaty, which finds its source in the primary law of the Union. The establishment of the ESM was theoretically possible only by amending the TFEU, as the existence of such a mechanism was not provided for in the treaties – even though the CJEU in its Pringle judgement states the opposite establishing that the participation of the EU MS in the ESM is not violating the EU treaties and was thus possible without amending them.[8]

Indeed, we should remind that on the basis of art. 48 TEU, following the simplified revision procedure[9], the European Council adopted a decision on March 11, 2010, to amend art. 136 TFEU, which is found in the chapter specifically concerning the Member States whose currency is the

[7] BRUNO DE WITTE, "Using International Law in the Euro Crisis: Causes and Consequences" 4 ARENA Working Paper (2013).
[8] C-370/12, *Thomas Pringle v Government of Ireland*, ECLI:EU:C:2015:400, paragraphs 68, 72, 109 and 184, when the Court states that "the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States" (paragraph 184)
[9] Article 48(6) TEU provides for a simplified procedure for revising the treaties and contains two substantial conditions, in addition to the procedural conditions required for amending the treaties. First, the revision can only concern the third part of the TFEU; second, the amendment cannot increase the competences that are attributed to the EU in the treaties.

euro. Since its amendment in 2011, art. 136 TFEU contains a third paragraph, which states that: "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". However, this amendment was not in force when the ESM itself entered into force[10], and the ESM was thus put in place as an intergovernmental organization based on an international treaty between the Euro area MS.

There were several reasons for setting up the ESM as an intergovernmental structure. First of all, the economic emergency in which the Euro zone found itself at the time of the adoption of the first structures for providing financial assistance to member states justified the need to quickly set up an assistance structure *via* the intergovernmental route – with the lack of legitimacy[11] that this solution implies – rather than the "community" route. Second, as alleged by the CJEU[12], the establishment of such a mechanism on the fringe of primary law was also intended to circumvent certain provisions of this primary law[13], in particular the no bail out rule[14], as well as the already existing possibility of providing, within the framework of the Union, financial aid to a Member State facing extraordinary difficulties[15].

Nevertheless, the ESM is closely entangled with the Union law and therefore evolves in parallel with it. First, its very existence is based on a provision of primary law. Moreover, as the CJEU has recognized, this structure is a continuation of previous mechanisms adopted in the framework of the Union's economic policy[16]. A forthcoming reform of the ESM and of the Banking Union,

[10] This amendment entered into force in 2013.
[11] About legitimacy in the functioning of the EMU, see V. Schmidt, *Europe's Crisis of Legitimacy Governing by Rules and Ruling by Numbers in the Eurozone*, Oxford University Press, 2020.
[12] See C-370/12, *Thomas Pringle*, op. cit.
[13] Paul CRAIG, "Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance", 9 Eur. Constitutional Law Review (2013), p. 263.
[14] Article 125 TFEU states that: "[t]he Union [or a Member State] shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project".
[15] Article 122 TFEU states that: "1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken."
[16] Especially, the "six-pack" and "two-pack", which aim to strengthen economic governance in the Euro zone, both *via* a preventive and a corrective branch. See the consideration of the CJEU in case C-370/12, *Thomas Pringle*, op. cit., particularly points 58-59. The Court states that "the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union".

on which we will not expand in this paper, will further contribute to bringing the institutional frameworks of the ESM and the Union closer together[17].

B. The institutional functioning of the ESM

The purpose of the ESM is to provide stability support - *i.e.*, financial assistance – to MS in serious financial and economic difficulties or at risk of such difficulties, only if such assistance is essential to preserve the stability of the Euro area (art. 3 ESM Treaty). The ESM has a lending capacity of EUR 700 billion and the States Parties contribute to it in accordance with the distribution key set out in art. 8 and detailed in the Annex to the ESM Treaty. This distribution key is based on the relative contribution capacities of the Member States and therefore influences the voting rights in the Board of Governors[18]. It is important to recall that the assistance granted to the requesting Member State is strictly conditional: indeed, the third paragraph of art. 136 TFEU provides that the granting of financial assistance is subject to strict conditionality, which corresponds to conditions linked to reforms that the Member State concerned must carry out in order to be able to benefit from financial assistance from the ESM[19]. This principle of conditionality is central to the financial assistance policy of the ESM and is mentioned several times in the ESM Treaty; the terms of conditionality depend on the situation of the assisted Member State and will be included in the Memorandum of Understanding concluded with it[20].

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[17] At the Euro Summit meeting of 29 June 2018, the EU leaders agreed that "[t]he ESM will provide the common backstop to the SRF" (see the statement of the Euro Summit meeting on 29 June 2018, https://www.consilium.europa.eu/media/35999/29-euro-summit-statement-en.pdf). The ESM common backstop would take the form of a revolving credit line and would be a last resort tool subject to the principle of fiscal neutrality in the medium term. This reform is now about to take place, as the international agreements amending the ESM on the 27 January 2021. Among others, article 3 of the ESM Treaty has been supplemented by a paragraph indicating that "The ESM may provide the backstop facility to the SRB for the SRF to support the application of the resolution tools and exercise of resolution powers of the SRB as enshrined in European Union law". For further details, see https://www.consilium.europa.eu/en/press/press-releases/2021/01/27/statement-by-the-eurogroup-president-paschal-donohoe-on-the-signature-of-esm-treaty-and-the-single-resolution-fund-amending-agreements/. For further details about this reform, see JEAN-PAUL KEPPENNE, TIM MAXIAN RUSCHE, LAURA ESTRELLA BLAYA, "An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution", in D. Fromage, B. de Witte, *Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection*, Maastricht University, Faculty of Law Working Paper series, 2019/03, pp. 38-47.

[18] This preponderant weight of the generally creditor states in the decision-making process, while easily understandable due to the different contribution capacities of each member state, nonetheless results in a notable imbalance between member states of the Euro zone. For further details, see F. FABBRINI, "States' Equality v States' Power: The Euro-crisis, Inter-state Relations and the Paradox of Domination", Cambridge Yearbook of European Legal Studies, 17 (2015), pp. 3–35. The author states that "the Euro-crisis and the legal and political responses to it have also produced relevant constitutional implications for the horizontal relations of power between the Member States".

[19] This will often involve some of its social and economic policies - removal of "employment disincentives" for example, also concerning increased budgetary imperatives generating so-called "austerity" (budget cuts for certain policies); also concerning structural reforms linked to programs or funds for privatization of state assets, programs for recapitalization of certain financial institutions by the debtor member state, etc. Looking at the MoU between the ESM and Greece together, it appears that the main areas of reform are the fiscal and fiscal structural policies, the policy concerning social welfare, the financial stability (i.e., support for financial institutions), the labour and product markets, the privatisation policy, and the modernisation of public administration.

[20] We will examine below the procedure to conclude these instruments.

As it was noted, "[t]he EU and the ESM are closely linked, notably because of their partially parallel membership and objectives [and] a number of factors indicate a strong link and even interdependence with Union law"[21]. But even more than simply functioning "in parallel", which would imply that both structures do not overlap, the ESM operates essentially by mobilizing both the institutions of the Union, as understood in the strict sense - *i.e.*, within the meaning of art. 13(1) of the TEU - and institutions whose existence is provided for by primary law, but which are not included in art. 13 TEU. In fact, although it is an intergovernmental institution with a distinct legal personality, its operation and the fulfilment of its essential tasks are based on the institutions of the Union. At the decision-making level of the ESM there is its main body, the Board of Governors[22] : this main decision-making body is composed of the Ministers of Finance of the Member States whose currency is the euro... a composition which *de facto* is the same as the Eurogroup. The Eurogroup is an informal body, which existence is not formally mentioned as an EU institution in the sense of the art. 13 TEU alongside the other institutions of the Union but can be found in art. 137 TFEU. Protocol 14 to the treaties defines it as an informal meeting of the same ministers[23].

In addition to the Eurogroup, which acts as the "Board of Governors" for the operation of the ESM, two EU institutions are also involved in the functioning of the ESM: the ECB and the European Commission. We will focus on the role played by the Commission, as the role played by the ECB - possibly assisted by the IMF - is secondary to that played by the Commission. It is indeed the Commission that negotiates and concludes, on behalf of the ESM, the various Memoranda of Understanding containing the financial assistance plans. It is up to the Board of Governors, after receiving a request from a State in difficulty, to decide whether to grant it financial aid[24]. Further, if the decision to grant the assistance is positive, art. 13(3) of the ESM Treaty provides that it is up to the Commission (and, to a lesser extent, the ECB, possibly assisted by the IMF), to negotiate and conclude the Memorandum of Understanding containing the macroeconomic adjustment program[25]. This assistance instrument may consist of a range of instruments listed in articles 14 to 21 of the ESM Treaty.

The Commission thus has a central role in the ESM's action towards assisted MS. Initially, and on a mandate from the Board of Governors, it must assess whether the situation of the Member State

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[21] JEAN-PAUL KEPPENNE, TIM MAXIAN RUSCHE, LAURA ESTRELLA BLAYA, *op. cit.*, p. 40.
[22] Treaty establishing the European Stability Mechanism, article 4.
[23] Art. 1 of the Protocol on the Eurogroup states in particular that: "The ministers of the Member States whose currency is the Euro shall meet informally among themselves".
[24] ESM Treaty, article 13, paragraph 2.
[25] This macroeconomic adjustment program is composed of financial assistance instruments depending on the situation of the assisted country.

that has requested financial assistance from the ESM jeopardizes the stability of the Euro zone as a whole[26] and what the assistance to the debtor Member State would consist of. Subsequently, based on a second decision adopted by the Governing Council, the Commission is responsible for negotiating the terms of and signing the Memorandum of Understanding with the concerned MS, in the name and on behalf of the ESM[27]. Finally, the Commission, possibly assisted by the ECB, is responsible for monitoring whether the terms of the Memorandum of Understanding and strict conditionality are being respected, *i.e.*, whether the MS receiving financial assistance is complying with the conditions contained in the agreed economic adjustment program. The Commission's surveillance is carried out in conjunction with the European Semester, which aims at coordinating the economic policies of the EU Member States.

The significant involvement of the Commission in the negotiation and conclusion of the Memoranda of Understanding raises the question not only of the respect of Union law by the institutions acting in the framework of the ESM, including fundamental rights, but also of who - the EU or the ESM - is the responsible entity in the event of an alleged occurrence of damage arising from the execution of these Memoranda of Understanding. More specifically, the question arises as to the unity of the Union's institutional framework for economic and monetary policy.

Following the CJEU reasoning in its *Pringle* case-law[28], it is indeed the ESM that concludes such instruments and that is responsible both for compliance with Union law in the context of the conclusion of Memoranda of Understanding, and for any damage caused in the context of their application. In this judgment, the Court considers that the fact that the institutions of the Union are mobilized in the context of the operation of the ESM implicates only the ESM, and not the Union. However, the Court takes care to temper this distinction between the structure of the Union and that of the ESM and integrates the aim pursued by the ESM with that pursued by the Union. It thus affirms that even when it participates in the first place in the operation of the ESM, the Commission retains its role as guardian of the treaties; it goes further, affirming that the tasks entrusted to the Commission and the ECB in the context of the ESM Treaty do not distort the powers conferred on it by the EU and TFEU treaties[29].

The Court confirmed this line in its *Ledra Advertising* judgment[30], giving it the opportunity to rule more concretely on the role played by the institutions in the functioning of the ESM. This judgment concerned, among other things, a claim for compensation for the damage caused by the

[26] The stability of the Euro zone is, let us recall, the main goal of the ESM in pursuing its financial assistance policy.
[27] ESM Treaty, article 13, paragraph 1.
[28] C-370/12, *Thomas Pringle*, op. cit.
[29] C-370/12, *Thomas Pringle*, op. cit, points 158-159.
[30] C-8/15 P, *Ledra Advertising v Commission and ECB,* op. cit.

application of the Memorandum of Understanding concluded by the Commission[31]. The Court once again tempered the distinction between the institutional framework of the Union and that of the ESM. It considered that, in the case of a dispute arising under a Memorandum of Understanding concluded by the Commission in the framework of the ESM, damages may indeed be claimed from the Commission acting on the EU's behalf[32]. Again, as the Commission pursues in the context of the ESM an aim similar to that entrusted to it by art. 17 TEU, it retains its role as guardian of the Treaties also in this context.

Thus, according to the CJEU, the involvement of the EU institutions in the negotiation, conclusion and supervision of the Memoranda of Understanding does not call into question the unity of the EU's institutional framework: admittedly, the Commission and the ECB are acting outside of EU primary law; however, they are still bound to respect it. Moreover, the Commission, when it acts in the context of the operation of the ESM, pursues, according to the Court, an objective identical to that prescribed by art. 17 TEU and pursued in the context of the policies of the Union. In that it is obliged, also when it acts on behalf of the ESM, to "promote the general interest of the Union" and to "oversee the application of Union law"[33].

Finally, it is important to mention that the CJEU is also involved in the operation of the ESM. Indeed, following art. 37 (2) of the ESM Treaty, the Board of Governors shall rule on any dispute arising between a member of the ESM and the ESM, or between members of the ESM, relating to the interpretation and application of the ESM Treaty, including any dispute concerning the compatibility of decisions adopted by the ESM with that Treaty. Following art. 37 (3) ESM, if a member of the ESM disputes the decision referred to in paragraph 2, the dispute shall be referred to the CJEU. It seems that the "borrowing" of the CJEU in a treaty between certain MS outside of the EU legal framework is consistent with the idea of a single institutional framework. The jurisdiction of the CJEU, in this particular case, is based on the art. 273 TFEU[34].

If we were to stick to what is developed above, we could simply answer in the affirmative to the question raised in the introduction to this paper. First, the ESM is based on the primary law of the

[31] A Memorandum of Understanding had been concluded with the Cypriot government and was aimed at reorganizing several banking institutions that were experiencing significant difficulties. Several Cypriot individuals as well as a Cyprus-based companies had deposits with concerned financial establishments, which are the Bank of Cyprus and the Laiki Bank. The implementation of the measures agreed upon with the government of Cyprus caused a substantial reduction in the value of these deposits.

[32] Which is a surprising conclusion, considering the Commission does not have its own legal personality. It would imply that the EU would be responsible for damages caused by the Commission in the framework of the ESM.

[33] C-370/12, *Thomas Pringle*, op. cit, para 163.

[34] Such as indicated by the recital 16 of the Preamble of the ESM Treaty: "Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the TFEU."

Union – in particular, art. 136 TFEU – and it operates in close coherence with the already existing "Community" framework concerning the economic governance of the Union – in particular, the "Six-Pack" and the "Two-Pack" and the European Semester. Second, as we have also seen, the institutional framework of the Union – the Commission, the ECB, the CJEU and the Eurogroup in the form of the ESM's Board of Governors – is largely mobilized in the very functioning of the ESM; according to the case law of the Court, this does not call into question the powers entrusted to the institutions by the treaties. Third, the reform of the ESM envisaged in relation to the Single Resolution Fund (SRF) makes the relationship between the institutional framework of the ESM and that of the Union even closer, insofar as the Banking Union is an integral part of Union law – even though the SRF is also set up by an intergovernmental treaty.

However, this conclusion must be tempered. In the second part of this paper, we will explore the impact of the task entrusted to the EU institutions under the ESM on the institutional equilibrium within the EU legal order (II).

III. The impact of tasks entrusted to the EU institutions under the ESM on the institutional equilibrium within the EU legal order

As was already discussed *supra*, the ESM was established by an international treaty concluded between certain MS outside of the EU legal framework to confront the emergency of the financial crisis. Following the issue that led to the decision in the above-mentioned *Pringle* case[35], namely the compatibility of the ESM with various substantive provisions of the EU primary law[36], it might appear that the international legal framework was mainly used in order to circumvent the prohibition on bail-out in art. 125 TFEU[37]. It is not the first legal instrument of such a kind, and it is usually discussed in the legal literature as a particular form of intergovernmental cooperation, or a new form of EU law[38], or part of differentiated integration within the EU[39]. Its main characteristics are partial participation of the EU MS, a strong link with the EU law and the "borrowing"

[35] C-370/12, *Thomas Pringle*, op. cit.
[36] Paul CRAIG, op. cit.
[37] Art. 125 TFEU, Consolidated version of the Treaty on the Functioning of the European Union 2016 (OJ C 202); De Witte, 'Using International Law in the Euro Crisis: Causes and Consequences' (n 7).
[38] STEVE PEERS, "Towards a New Form of EU Law?: The Use of EU Institutions Outside the EU Legal Framework", 9 Eur. Constitutional Law Review (2013), 37.
[39] CLELIA LACCHI, "How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis? Reflections on the EMU Inter Se International Agreements Between EU Member States", in: T. Giegerich, S. Zeitzmann, D. Schmitt (eds), Flexibility in the EU and Beyond; Nomos Verlagsgesellschaft mbH & Co KG 2017; BRUNO DE WITTE, "Treaties between EU Member States as Quasi-Instruments of EU Law", in: Marise Cremona and Claire Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations*, Oxford Scholarship Online, 2018.

of the EU institutions outside of the EU legal framework. We will discuss here the last characteristics with regard to a possible impact of such use of the EU institutions on the institutional equilibrium within the EU.

As a reminder, according to art. 13 (2) TEU: "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them"[40]. In other words, the EU institutions are established by the EU treaties concluded by the EU MS. Each institution is entrusted with specific powers in these treaties and must act in accordance with them. The whole legal structure, as well as the decision-making activity within the EU legal order[41] is part of a certain institutional equilibrium under the rule of EU law[42].

Apart from the provision enshrined in the art. 273 TFEU[43], the EU treaties do not have any particular legal basis for granting extra-EU treaties powers or tasks to EU institutions. How can the EU institutions thus be entrusted with new tasks following the conclusion of an international agreement by certain EU MS outside the EU legal framework? We will investigate this legal question as regards the ESM in the first section through the analysis of the CJEU case law on this particular issue (A.). In the second section, we will examine whether these new tasks impact the institutional equilibrium and the distribution of powers between the EU institutions within the EU (B.)

A. How are new tasks entrusted to the EU institutions?

There is a fundamental paradox in the very essence of this question with regard to the ESM treaty. Let us remind our readers that the ESM treaty was concluded outside the EU legal framework by 17 MS for two main reasons. First, the EU lacked exclusive or even shared competence to proceed with a legislative initiative which allowed the Eurozone MS to conclude a separate international treaty. Second, the rationale behind the ESM treaty was contrary to art. 125 TFEU[44] and needed

[40] Art. 13 (2) TEU, Consolidated version of the Treaty on European Union 2016 (OJ C 202).
[41] Notably, arts. 288-294 TFEU, Consolidated version of the Treaty on the Functioning of the European Union.
[42] See especially: Paul Craig, 'Pringle and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) 9 European Constitutional Law Review 263; as response to: Peers (n 36).
[43] Art. 273 TFEU, Consolidated version of the Treaty on the Functioning of the European Union: "The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".
[44] C-370/12, *Thomas Pringle*, op. cit., para 136 and the following reasoning of the Court in paras 137-147 concluding the opposite.

art. 136 TFEU to be amended[45]. These questions led Thomas Pringle, a member of the Dáil Éireann, the lower house of the Irish parliament, to question whether it was consistent with EU law for Ireland to ratify the ESM treaty. With no surprise, considering the emergency of the situation, the CJEU decided, in full court of 27 judges taking less than 4 months, on the compatibility of the ESM treaty with EU law[46]. This case is also important for another reason: the legal reasoning of the Court when considering the use of the EU institutions outside the EU legal framework.

The referring court in *Pringle* asked whether the allocation of new tasks to the Commission, the ECB and the Court is compatible with the powers of these institutions as enshrined in the EU treaties[47]. The Court responded to this question, with regard the role of the Commission and the ECB in the ESM, stating: "The Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance"[48]. In order to justify such a conclusion, the Court quotes its previous case-law dating from 1993[49] and 1994[50]. In the 1993 jurisprudence, *European Parliament v. Council and Commission*, the EP challenged the validity of the decision taken collectively by MS within the Council to grant financial aid to Bangladesh and to confer power upon the Commission to ensure the duty of coordination[51]. The Court ruled that the provision of the TEEC mentioned by the EP "does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council"[52]. Furthermore, the Court added that MS are free to make use outside the Community legal framework of the criteria taken from the budgetary provisions within the Community[53]. However, regarding the action brought by the EP against the Commission on the violation of the treaty provisions relating to the budget, the Court simply concluded that as the decision on the financial aid was not made within the Community framework, the EP prerogatives could

[45] Paragraphe 3 was added to the art. 136 TFEU.
[46] See this case note: BRUNO DE WITTE AND THOMAS BEUKERS, "The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle", 50 Common Market Law Review (2013).
[47] C-370/12, *Thomas Pringle*, op. cit., para 154. In this paper will investigate the 'borrowing' of the Commission and the ECB. We will not address the participation of the CJEU in the ESM.
[48] ibid 158.
[49] Joined cases C-181/91 and C-248/91, *European Parliament v Council of the European Communities and Commission of the European Communities (Emergency aid to Bangladesh)* ECLI:EU:C:1993:271.
[50] Case C-316/91, *European Parliament v Council of the European Union (Lomé Convention)* [1994] ECLI:EU:C:1994:76.
[51] The EP argued that: 'According to the fourth indent of Article 155 of the Treaty [TEEC], however, powers of implementation may be conferred on the Commission only by a decision of the Council' *European Parliament v Council of the European Communities and Commission of the European Communities (Emergency aid to Bangladesh)* (n 48) para 19.
[52] Ibid, para 20.
[53] Ibid, para 22.

not have been affected. At that time, it is worth noting, the EP was entitled to bring proceedings before the Court only to safeguard its own prerogatives. The action was thus dismissed, and the Commission was entitled for the first time to act outside the EU legal framework to coordinate the distribution of financial aid to foreign countries.

The Advocate-General Jacobs, in his conclusions in this case, framed the principle as follows: "In cases where the Member States decide to act individually or collectively in a field within their competence, there is nothing in principle to prevent them from conferring on the Commission the task of ensuring coordination of such action. It is for the Commission to decide whether or not to accept such a mission, provided of course that it does so in a way which is compatible with its duties under the Community Treaties"[54]. The same issue was raised in the *European Parliament v. Council* case concerning the Lomé Convention[55]. The EP challenged a decision issued by the Council to establish a special procedure to administer financial aid from MS to African, Caribbean and Pacific countries within the framework of the Lomé Convention. This procedure was distinct from the EU's budgetary procedure. The Court confirmed its finding from the *Bangladesh* case[56]. Furthermore, the Advocate-General Jacobs in his opinion provided the Court with a much more detailed reasoning touching upon the nature of the Lomé Convention as a mixed agreement. He rejected the argument made by the EP that the Community institutions cannot act on the basis of a mandate conferred upon them by the MS. He especially illustrated it with the Lomé Convention *per se*, a mixed agreement. He also gave the example of accession negotiations and foreign policy cooperation, in which EU institutions are acting in the realm of MS' competences and thus might entrust the EU institutions with extra-EU treaties tasks[57]. The Advocate-General Jacobs again confirmed his position, in a slightly more detailed way than in the *Bangladesh* case, stating that: "It is therefore possible for a Community institution to undertake on behalf of the Member States certain functions outside the framework of the Treaty provided that such functions, and the way in which it performs them, are compatible with its Treaty obligations. Whether that is the case is subject to the control of the Court"[58].

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[54] AG Jacobs in Case C-316/91, *European Parliament v Council of the European Communities and Commission of the European Communities (Emergency aid to Bangladesh)* [1992] ECLI:EU:C:1992:520 (CJEU) [26].
[55] *European Parliament v Council of the European Union (Lomé Convention)*, op. cit.
[56] ibid 41: 'No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up'.
[57] AG Jacobs in Case C-316/91, *European Parliament v Council of the European Union (Lomé Convention)* [1993] ECLI:EU:C:1993:872, para 82, 86–88.
[58] Ibid, para 84; for further discussion, see: STEVE PEERS, "Towards a New Form of EU Law? […], op. cit.; PAUL CRAIG, op. cit.; BRUNO DE WITTE, "Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?" 11 European Constitutional Law Review (2015), 434; ANASTASIA KARATZIA, MENELAOS MARKAKIS, "What Role for the Commission and the ECB in the European Stability Mechanism?" 6 Cambridge International Law Journal (2017), 232.

In the *Pringle* case, the CJEU used exactly the same approach that it adopted in *Bangladesh* and *Lomé Convention* cases mentioned above. It also added that the "borrowing" of the EU institutions outside the EU legal framework is possible as long as new tasks entrusted to the institutions "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties"[59]. The Court draws this very principle from its case-law concerning international agreements[60]. It concludes that duties allocated to the Commission and to the ECB in the ESM do not alter the essential character of the powers of these institutions under the EU legal framework. In order to do so, the Court first notes that the ESM falls within the sphere of economic policy, which is not an EU exclusive competence[61]. Second, it states that neither the Commission nor the ECB have a decision-making power under the ESM and their activities under this treaty only commit the ESM[62]. Thirdly, and most interestingly, the Court proposes a quite astonishing rationale in order to conclude that the tasks conferred on the Commission and the ECB "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties"[63]. The Court looks exclusively at the objectives guiding the action of the Commission, first, within the EU legal framework[64] and within the ESM. It concludes that as the Commission is tasked with promoting the general interest of the EU within the EU legal order, and as the objective of the ESM treaty is to ensure the financial stability of the Euro area, the Commission, by its involvement in the ESM, promotes the general interest of the Union[65]! The Court does not make any substantial analyses of a potential effect on the institutional equilibrium within the EU as regards the decision-making process. It does not seem to be bothered at all by the fact that basically EU MS circumvent EU legal order constraints, including with regard the distribution of competences between the EU and its MS, in order to facilitate the decision-making process with the same institutional actors[66].

Regarding the role of the ECB within the ESM, the Court is similarly concise: it looks at the objectives behind the functioning of the ECB within the EU and within the ESM and concludes that all tasks are perfectly "in line"[67]. This is even more problematic considering the special role

[59] C-370/12, *Thomas Pringle*, op. cit., para 158.
[60] For example: *Opinion 1/92 relating to the creation of the European Economic Area* [1992] ECLI:EU:C:1992:189 (CJEU) [32, 41]; *Opinion 1/09 on the creation of a unified patent litigation system* [2011] ECLI:EU:C:2011:123 (CJEU) [75].
[61] C-370/12, *Thomas Pringle*, op. cit., para 160.
[62] Ibid, para 161.
[63] Ibid, para 162.
[64] Art. 17 (1) TEU, Consolidated version of the Treaty on European Union: "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them [...]".
[65] C-370/12, *Thomas Pringle*, op. cit., para 164.
[66] See also: PAUL CRAIG, op. cit., for the analysis of the Pringle judgement.
[67] C-370/12, *Thomas Pringle*, op. cit., para 165.

played by the ECB within the EU legal order and considering its significant independence from other institutions' scrutiny. Unlike other EU institutions listed in art. 13 TEU, the ECB "shall have legal personality".[68] This distinct legal personality of the ECB and of the EU is also reflected in art. 340 TFEU regarding separate non-contractual liability of the Union[69] and of the ECB.[70]

This very short and vague reasoning of the CJEU on the issue of "borrowing" of the EU institutions by an international agreement concluded by some MS among themselves indicates a profound malaise behind such a practice. On the one hand, it shows the blurring border between the EU and its MS substantive competences under the EU and FEU treaties. On the other hand, it also hides a potential institutional disequilibrium within the EU legal framework following the attribution of new tasks to the EU institutions outside the EU.

B. What impact does these new tasks produce on the institutional equilibrium within the EU?

Paul Craig, being very critical of the Court's reasoning in *Pringle*, argued: "If the essential character, for example, of the Commission's powers is to be judged in terms of the very general objectives contained in art. 17 (1) then it is difficult to imagine any instance in which it could not be claimed that it was acting to 'promote the general interest of the Union', or 'oversee the application of Union law'"[71]. It is true that, if the test proposed by the Court to verify whether new tasks entrusted to the EU institutions to act outside of the EU legal framework respect the EU treaties remains that general, numbers of treaties can be concluded by the EU MS outside the EU granting such tasks to the EU institutions. However, it doesn't mean that these new tasks won't alter the institutional equilibrium within the EU with regard to the powers attributed by the EU and FEU treaties to the EU institutions.

Such reasoning also creates a paradox. As Craig underlines, within the EU legal framework, the EU institutions in order to act must ground their action on a particular legal basis enshrined in the treaties. The same is true for the international agreements concluded by the EU, alone or jointly with its MS, with third states. However, following the CJEU case-law, the EU institutions can participate in international agreements concluded by the EU MS outside the EU legal framework, and exercise any kind of tasks entrusted to them, as long as they "don't alter the essential character

[68] Art. 282(3) TFEU.
[69] Art. 340 par. 2.
[70] Art. 340 par. 3.
[71] PAUL CRAIG, op. cit., 278.

of the powers conferred on them by the treaties"[72]. This very reasoning cannot be consistent with basic principles of the EU law. Bruno de Witte explains such a "liberal attitude" of the Court towards the use of the EU institutions outside the EU legal framework and despite the strict wording of the art. 13 TEU, in terms of the difference between "powers" and "tasks". If powers are entrusted to the EU institutions by the treaties and can only be changed through a complex procedure modifying those treaties[73]; extra tasks may be given to the EU institutions more easily. The EU institutions may accept new tasks outside the EU legal framework as long as they don't affect already existing powers and as long as all EU MS agree to "lend" them[74].

Furthermore, Advocate-General Kokott, in her conclusions in the *Pringle* case, raises an important issue of the consent granted by other MS, which are not participating in the ESM, to "borrow" the Commission and the ECB within the ESM[75]. She reminds us that the representatives of the governments of all MS adopted a decision on 20th of June 2011 according to which "the ESM Treaty is to contain provisions under which the European Commission and the European Central Bank are to perform the tasks provided for in the Treaty". However, the legal scholarship is not unanimous as to whether the consent of all MS is necessary in order to "lend" the EU institutions to be entrusted with new tasks outside the EU legal framework the necessary powers. Steve Peers argued that such a consent is not necessary as long as concerned EU institutions are acting in accordance with their competences enshrined in EU and FEU treaties[76]. Paul Craig defended the opposite view and argued that the consent of all EU MS is necessary[77], which was the case for the ESM as mentioned above.

We tend to agree with Paul Craig. In its *Pringle* judgement, the Court relies on its external relations case-law in order to assess the premise that as long as new tasks entrusted to the EU institutions do not alter the essential character of the powers conferred on those institutions by the EU and FEU treaties, they are perfectly fine[78]. However, the comparison made between on the one hand, the ESM, which is concluded by some EU MS outside of the EU legal framework and involves "borrowing" some of the EU institutions, and on the other hand, international agreements concluded by the EU alone or with participation of its MS, is not entirely appropriate[79]. The EU is not participating as a contracting party in the ESM. It means that the ESM treaty has not gone through

[72] Ibid, 280.
[73] Art. 48 TEU, Consolidated version of the Treaty on European Union.
[74] BRUNO DE WITTE, 'Using International Law in the Euro Crisis: Causes and Consequences', op. cit., 20.
[75] AG Kokott, C-370/12, *Thomas Pringle*, op. cit.
[76] STEVE PEERS, op. cit., 54–55.
[77] PAUL CRAIG, op. cit., 272–273.
[78] C-370/12, *Thomas Pringle*, op. cit., para 158.
[79] PAUL CRAIG, op. cit., 277.

the procedure enshrined in the art. 218 TFEU[80]. Especially, paragraph 11 of this article allows any international agreement to be submitted to the legal scrutiny of the CJEU, which usually clearly says whether an international agreement is compatible or not with essential character of the EU institutions' powers.

In its more recent, and already mentioned, judgment *Ledra Advertising et al. v. European Commission and European Central Bank*, the Court clarified the extent of legal duties of "borrowed" EU institutions under the ESM[81]. The Court stated that the Commission and the ECB[82] acting within the ESM remain fully bound by EU law and by the Charter of Fundamental Rights of the EU and may be held liable under art. 268 and 340 (2) (3) TFEU in cases of violation of EU law provisions[83]. This judgment seems to ensure some output legitimacy for the actions of the EU institutions used within the ESM treaty. The very fact that the EU institutions might have engaged their extra-contractual responsibility by negotiation and signing Memoranda of Understanding in violation of EU law and the Charter in particular, adds accountability to their actions outside the EU legal framework[84].

IV. Conclusion

In this article we have tried to propose an answer to an uneasy question as to whether the EU really consists in a single institutional framework, as paragraph 7 of the TEU's preamble states. We have especially focused on the issue of the "borrowing" of already existing EU institutions, namely the Commission and the ECB, outside the EU legal framework in the context of the eurozone governance. We did not look at different institutional creations going beyond the art. 13 TEU, such as EU agencies for example. Furthermore, we acknowledge that the internal structure of the European Monetary Union is quite complex *per se* and was subject of an extensive pan of academic

[80] Art. 218 TFEU, Consolidated version of the Treaty on the Functioning of the European Union.
[81] *Ledra Advertising Ltd and Others v European Commission and European Central Bank* [2016] ECLI:EU:C:2016:701 (CJEU).
[82] The Court's solution in this case should have emphasized that it is not a question of sharing responsibility between the Commission and the ESM, but between the EU and the ESM. As a reminder, according to article 13, paragraph 4 of the TESM states that the Commission negotiates and signs the Memorandum "on behalf of the ESM". For what concerns the liability of the ECB, the solution would be different. Indeed, the ECB enjoys its own legal personality, in accordance with article 282 § 3 TFUE – this legal personality being the reason why article 340 TFEU contains a third paragraph, concerning the responsibility of the ECB which is distinct from the EU.
[83] ibid 65; *AG Wahl, Ledra Advertising Ltd and Others v European Commission and European Central Bank* [2016] ECLI:EU:C:2016:290 (CJEU) [85–91].
[84] PAUL DERMINE, "The End of Impunity: The Legal Duties of Borrowed EU Institutions under the European Stability Mechanism Framework ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising et al. v. European Commission and European Central Bank Case Notes' 13 European Constitutional Law Review (2017) 369 ANASTASIA KARATZIA, MENELAOS MARKAKIS, op. cit.

literature on differentiated integration within the EU[85]. We did not focus our paper on the internal dimension of the functioning of the EMU, but rather on the problematic external "borrowing" of the EU institutions, in the examination of the particular case of the ESM.

In the aftermath of the global financial crisis, the EU and its MS had to face very pragmatic issues: how to avoid the economic collapse of Greece, Portugal and Ireland, and of the Euro zone as a whole? Decisions had to be taken quickly in any institutional or legal forum that was immediately available. For this reason, legal solutions consisting of the conclusion of international agreements by some of the EU MS outside the EU legal framework was accepted as a new normal. Because of close legal relationship between these new international treaties and the EU legal order, a decision was also taken to "borrow" already existing EU institutions and entrust them with new tasks. We have seen this process implemented through the analysis of the ESM treaty concluded between 17 MS and mobilizing the Commission, the ECB and the CJEU for its effective functioning. We have mainly analysed the role of the Commission and of the ECB through the prism of EU constitutional law.

It appeared to us that the EU technically still consists of a single institutional framework, even when it "lends" its institutions to other international legal bodies such as the ESM. After all, the Commission and the ECB remain the same institutions and their powers within the EU remain technically unchanged, even though they are entrusted with new tasks via the ESM treaty. However, it does not mean that the institutional equilibrium within the EU is not destabilised by such new tasks conferred to the EU institutions. We have demonstrated this difficult legal conundrum through the CJEU case-law on the issue of the "institutional borrowing". More fundamentally – and this is hardly evident from the jurisprudence of the CJEU – this disruption of the institutional balance has important consequences for the conduct of democracy in the Union, insofar as, firstly, the parliamentary branch is clearly side-lined from the functioning of the ESM and, secondly, "the balance between State power and State equality which had characterised the EU constitutional settlement"[86] is notably challenged.

[85] See footnote 39 above for some references on the "differentiated integration" debate.
[86] F. FABBRINI, "States' Equality v States' Power […]", *op. cit.*, p. 14.