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GUEST EDITORIAL: THE NO-BAILOUT CLAUSE AND RESCUE PACKAGES

> "... to enter the euro zone there must be an overwhelming sentiment within society that the country is preparing to achieve a common destiny with the other members ... One cannot jump in and jump out of the euro area as one hops on and off from a bus; participation in EMU commits the destiny of a country." (Jean-Claude Trichet)[1]

The development of the debt crisis in Greece and, soon afterwards, the risk of contamination in a number of other euro area Member States has led to the adoption of measures of assistance by the Union and its Member States which raise questions of legal interpretation at the very heart of the Economic and Monetary Union as it is conceived by the Treaties.

The course of events

Developments were spectacular, considering both the novelty of the mechanisms put into place, the questions they raise, the conflicts between partners – especially France and Germany – and the astronomic amounts involved. They caught the attention of European and national authorities during most of the first semester under the Spanish Presidency, which soon appeared as one of the countries potentially in trouble. They were an extraordinary test for the new institutions created by the Lisbon Treaty, which entered into force in December 2009, especially for the new "stable" president of the European Council.

Everything started with the revelation by the new Government in place in Greece of the wrong figures[2] given by its predecessor in autumn 2009 about the amount of the budget deficit (estimated at 5.6 % GDP) which turned out to be a double digit one (first 12.6 % GDP, and later on 13.6%, a figure not considered definitive by Eurostat). The accumulated debt (124.9 % GDP) was one of the three highest in the EU, and the markets started to have doubts about the solvability of the Greek State. They imposed risk premiums on Greek bonds and on their Credit Default Swaps, which rose steadily. As a matter of fact, in

1. Interview in *Il Sole 24 Ore*, 9 April 2010, BIS Review 45/2010.
2. See Report on Greek Government deficit and debts statistics, Eurostat. European Commission, COM(2010)1 final, 8 Jan. 2010.

the full light of day, Greece appeared to have been escaping the application of the rules on excessive deficits and the Stability and Growth Pact for years. As described by Professor Axel Weber, President of the Deutsche Bundesbank, "When the full extent of these omissions appeared, the capacity of the Greek State to be able in the future to respect its obligations concerning the interests and the reimbursement of its debt, was fundamentally questioned by the participants in financial markets and hence the access to capital markets almost cut off."[3]

The measures of assistance consist in successive mechanisms, concerning first Greece alone and, then, any Member State which would be in need. The package of bilateral loans to Greece was adopted on 2 May 2010, by the euro area Finance Ministers, and effectively triggered on 7 May. It followed a specific request by Greece, made on 23 April, and was preceded by two statements, one by the Heads of State or Government of the EU, on 11 February (regarding the principle: "Euro area Member States will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole."), and another one by the Heads of State and Government of the euro area (on the basic features of the mechanism), on March 25; this was further developed in a Statement of the euro area Member States, of 11 April 2010. The finance plan provides for bilateral loans with a total amount of 80 billion euros over three years, supplemented by 30 billion euros provided by the IMF, i.e. 110 billion euros in total, in the framework of a joint programme, including amounts and conditionality, negotiated between the Commission, the Greek Government and the IMF. Loans are allocated at a rate of Euribor plus some hundreds of basis points,[4] bearing in total around 5 percent, i.e. an interest rate inferior to that imposed on Greece by the markets, but deemed to be non-concessional[5] because it was the rate that Greece was charged before the explosion of the reactions of the financial markets, a criterion which has some parallel with that increasingly applied to determine the compatibility of a State aid with the internal market.[6]

3. See the opinion given by Prof. Dr. Axel Weber, at public hearings before the Budget Committee of the Bundestag, on the draft law on the assumption of guarantees in the framework of a European Stabilization Mechanism, 19 May 2010, Pressenotiz, www.bundesbank.de/download/presse/pressenotizen/2010/20100519.

4. See, for the specific formula, the Statement on the support to Greece by euro area Member States, 11 April 2010; available on <www.consilium.europa.eu> (visted 30 June 2010)

5. This condition was imposed in the Statement by the Heads of State and Government of the euro area, on 25 March 2010: "Interest rates will be non-concessional, i.e. not contain any subsidy element."

6. Cf. the reference to the normal market conditions and the comparison with a well-advised operator, see Dony, *Droit de l'Union européenne*, 3rd ed. (Editions de l'Université de Bruxelles, 2010), No 719, p. 418.

The acceleration and the extension of the crisis to other euro area Member States (Portugal and Spain, in particular) – the so-called contamination –, with repercussions outside the euro area, especially the rapid decline of the exchange rate of the euro against most important currencies, prompted an extraordinary meeting of the Ecofin Council, on 9/10 May. As a follow-up to an improvised Summit of the euro area Member States on 7/8 May, the Ecofin Council was to provide for a European stabilization mechanism including:

– a "European financial stabilization mechanism", created by a Council Regulation based on Article 122(2) TFEU (ex 100(2) EC),[7] which could mobilize up to 60 billion euros[8] in the context of a joint EU/IMF support, and subject to strong conditionality, i.e. "on terms and conditions similar to the IMF"; this mechanism, available to euro area as well as to non-euro area members, is additional to the existing facility providing medium-term financial assistance for non-euro area Member States;[9] the mechanism, which "will stay in place as long as needed to safeguard financial stability",[10] is complemented by
– an intergovernmental agreement, which established[11] on 7 June 2010, as a

7. See Council Regulation (EU) 407/2010 of 11 May 2010 establishing a European stabilization mechanism, O.J. 2010, L118/1.

8. This amount corresponds "to the margin available under the own resources ceiling for payment appropriations". See Reg. 407/2010, Art. 2(2), cited previous note.

9. See Arts. 143 and 144 TFEU and Council Regulation (EC) 332/2002 of 18 Feb. 2002 establishing a facility providing medium-term financial assistance for Member States' balance of payments, O.J. 2002, L 53/1. This facility has benefited Latvia, Hungary and Romania.

10. The name of the mechanism is the one given to it by the Regulation. The other quotations between inverted commas are from the conclusions of the Ecofin Council of 9 May 2010, 9596/10 (Presse 108). The temporary feature of the mechanism also derives from Art. 9 of Reg. 407/2010, which obliges the Commission to make periodic reports on the implementation of this Regulation and "on the continuation of the exceptional occurrences that justify the adoption of this regulation." This Article echoes Recital No 8, which asks to the Commission to "regularly review whether the exceptional circumstances threatening the financial stability of the European Union as a whole still exist."

11. On 10 May, "the Representatives of the Governments of the euro area Member States commit to provide assistance through a Special Purpose Vehicle (SPV) that is guaranteed on a pro rata basis by participating Member States in a coordinated manner and that will expire after three years, up to 440 billions euros, in accordance with their share in the paid-up capital of the European central bank and pursuant to their national constitutional requirements." Council of the EU, 10 May 2010, 9614/10. A parallel decision of the 27 Member States allowed the Commission to be tasked by the euro area Member States in this context. Four weeks were needed to finalize the agreement, amid persisting scepticism in the markets. The distinction between a mechanism based on Art.122 (2) TFEU (the EFSM) and a SPV, a concept borrowed from sometimes very non-transparent market instruments, was due to the limits imposed on the EFSM. See *supra* at note 7. The Commission provided for a different system in its proposal. There would have been one mechanism, involving an amount of 500 billion euros, based on Art.122 (2) TFEU

limited liable company under Luxembourg law[12] for three years, a "Special Purpose Vehicle", called the "European Financial Stability Facility (EFSF)" which would collect funds and provide loans, subject to a strict conditionality,[13] with the guarantee of all the Member States of the euro area, up to 440 billion euro, [14] the IMF participating in financing arrangements by providing at least half as much as the EU contribution, i.e. 250 billion euro, bringing the total to 750 billion euro.

Measures adopted independently by the ECB could also be seen as part of the rescue packages. The Governing Council of the ECB had already decided, on 3 May, to suspend the application of the minimum rating threshold in the collateral requirements for the purposes of the Eurosystem's credit operations in the case of marketable instruments issued or guaranteed by the Greek

and available only to euro area Member States; up to 60 billion euros it would have been guaranteed by the budget and for the rest by the Member States. The Council did not accept this solution. We return to this *infra*. See proposal for a Council regulation establishing a European financial stabilization mechanism, 9 May 2010, COM(2010)2010 final,eur-lex.europa.eu/lex UriServ/LexUriServ.do?uri=COM:2010:2010:FIN: EN:PDF, Art.3 (deleted in the version adopted by the Council).

12. It has been incorporated with Luxembourg as its sole shareholder "to expedite its creation". See *European Financial Stability Facility,* société anonyme, Grand duché de Luxembourg, *Mémorial* C, 8 June 2010, No 1189, p. 57026. All Member States of the euro area have reconfirmed their commitment to enter their capital as soon as possible. Sweden and Poland have decided to associate themselves to the EFSF The shareholding of each Member State in the EFSF will correspond to its respective share in the paid-up capital of the ECB. "The obligation of Member States to issue guarantees for the EFSF debt instruments will enter into force as soon as a critical mass of Member States, representing 90% of shareholding, has completed the relevant national parliamentary procedures." The EIB has confirmed its willingness to provide treasury management services and administrative support to the EFSF through a service level contract. See Terms of reference of the Eurogroup. European Financial Stability Facility, 7 June 2007. A framework agreement between euro area Member States and the EFSF was also concluded (published on the website of the Bundesfinanzministerium, according to information received from René Smits). Klaus Regling, former director general, DG Ecfin, of the European Commission was appointed Executive director of the EFSF, as from 1 July 2010.

13. It will be for the Commission to negotiate the policy conditions attached to the loan, which will be included in a memorandum of understanding concluded with the beneficiary Member State, and to assess compliance with these conditions, in liaison with the ECB. The Commission will also ensure consistency between EFSF operations and other operations of assistance to euro area Member States. See the Terms of reference of the Eurogroup, European Financial Stability Facility, 7 June 2010.

14. It will be a 120% individual guarantee of each Member State's pro rata of each bond issue and thus not a joint guarantee. Additionally, when loans are made, a cash reserve will be constituted to provide for a cushion or cash buffer for the operation of the EFSF and if needed other mechanisms would be adopted "to further enhance the creditworthiness of the bonds or debt securities issued by the EFSF." See Terms of reference of the Eurogroup, quoted previous footnotes

Government. This decision, which gives special treatment to debt instruments of a specific country in need, demonstrated the will of the ECB to recover the lead on Credit rating agencies, whose ratings were as a rule taken into account for the acceptance of collaterals.[15]

On 10 May, the ECB adopted other decisions in order to address the severe tensions in financial markets. The most striking one[16] was the option to carry out interventions in the euro area public and private debt securities markets "to ensure depth and liquidity in those market segments which are dysfunctional".[17] Since then, the Central Banks of the Eurosystem have bought on the markets debt instruments of various euro area Member States for billions of euros. Such operations are not, in principle, contrary to the prohibition of monetary financing under Article 123 TFEU – which forbids the direct acquisition of debt instruments of EU Member States by the BCE or by National Central Banks, but does not forbid the acquisition of such securities on the open market.[18] In order to avoid a corresponding increase of the monetary mass, the ECB decided to "sterilize" these interventions, by the use of the deposit facility opened to banks with the central banks of the Eurosystem.

The legal questions

The objective of this editorial is not to offer a detailed account of the sometimes difficult negotiations which took place between the Member States and

15. See in this context, "Derrière les mots de Christian Noyer: les banques centrales sont trop dépendantes des agences de notation", *La Tribune*, 7 June 2010.

16. This decision was adopted "with an overwhelming majority" (dixit President Trichet) by the Governing Council. The president of the *Bundesbank* made public his negative vote, in a series of declarations on the crisis that did not contribute to the authority of the ECB and to the strength of the euro.

17. On these measures, see Trichet, "The ECB's response to the recent tensions in financial markets", speech at the 38th Economic Conference of the Oesterreichische Nationalbank, Vienna, 31 May 2010, www.ecb.int/press/key/date/2010/html/sp100531_2.en.htlm; see also the interview with Bini Smaghi, "Das ist Geldpolitik des 21. Jahrhunderts." 20 May 2010, www.boersen-zeitung.de/index.php?li=1&artid=2010095073 Other important central banks like the Federal Reserve and the Bank of England have recently bought huge amounts of Treasury bonds, providing a large increase in liquidity. The Eurosystem, which injects massive amounts of liquidity to banks at an interest rate around 1%, sterilizes the liquidity created by the buying of bonds, in order to avoid a potential inflationary effect. The President of the Bundesbank voted against this decision adopted by an overwhelming majority in the ECB Governing Council. While understanding the rationale of the decision, he feared, as he explained to the Press, the risks for the Eurosystem deriving from the accumulation of bad assets. For a positive analysis of the policy of the ECB, see Funk Kirkegaard, "In defence of Europe's grand bargain", Peterson Institute of International Economics, No. PB 10–14, Washington D.C., June 2010, p. 4.

18. See Häde, "Haushaltdisziplin und Solidarität im Zeichen des Finanzkrise", (2009) EuZW, 399–403, at 400. What would be illicit, would be to use this possibility for overcoming the prohibition, as recalled by the quoted author.

the institutions or to analyse the relevant mechanisms in depth, nor does it aim to take a position on the economic relevance of the measures adopted and their chance of success. We have been asked by the editors to focus on legal aspects, but the matter necessarily calls for some reference to the context. We will first look at the following questions: are the assistance schemes in conformity with one of the basic rules of EMU, the so-called "No-bailout rule" of present Article 125 TFEU? What is the meaning of this prohibition? What is the relation between Article 122(2) TFEU, which was explicitly selected as the legal basis for the European Financial Stabilization Mechanism, and the no-bailout rule? What are the limits of this provision?

These are not just theoretical questions. They have been raised in the political as well as in the academic debate. They form the background to actions before the German Constitutional Court (BVerfG) – which this Court has up until now rejected under what in French or Belgian law would be called a "*référé d'extrême urgence*".[19] These do not prejudge the decision on substance. As a matter of fact, the arguments used by the Court in order to refuse to issue a unilateral decision, based both on self-restraint on the part of the BVerfG (which is unable to substitute its own assessment of the risk to financial stability for that made by the Government) and lack of interest on the part of the applicant (no violation of Art. 14 Grundgestez on the protection of ownership) may seem to leave little hope for the plaintiff to see his request admitted. But it is always problematic to anticipate the decision of a court.

We will thus make some comments on the measures that have been taken, confronting them with the legal framework we have described.

The no-bailout clause

Article 125 TFEU (ex 103 EC) provides (unchanged since the Maastricht Treaty):

> "1. The Union 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. 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 another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.
> 2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the

19. See BVerfG, 7 May 2010, 2 BvR 987/10 and 9 June 2010, 2BvR 1099/10.

> application of the prohibitions referred to in Articles 123 and 124 and in this Article."

The prohibition is directly applicable. "The 'no-bailout' clause is clear and precise."[20] Paragraph 2 enables the Council to "specify definitions". It is a limited enabling clause, which was not intended to oblige the Council to legislate and which did not provide for other implementing measures than "as required" to specify definitions. The Council included such definitions in a Regulation adopted shortly after the entry into force of the Maastricht Treaty.[21] The definitions aim at specifying what is included in the concept of public sector used by the provision. Article 125 prohibits guarantees, either beforehand or ex post, by EU institutions or by Member States with one exception in the text, concerning "mutual financial guarantees for the joint execution of a specific project".

The prohibition has to be read in conjunction with the two preceding articles, which are also directly applicable: Article 123 TFEU on the prohibition of "monetary financing", i.e. allocating credit by the central banks, including the ECB, to Member States or EU institutions (repeated in Art. 21 of the Statute of the ESCB and the ECB) and Article 124 TFEU on the prohibition of privileged access by the State to financial institutions. These three prohibitions are linked with the obligation of Member States under Article 126 TFEU to avoid excessive deficits, and with the correlated Stability and Growth Pact.

The no-bailout rule is a crucial element of the stability within the Union, a concept on which the Treaty focuses in various provisions. Price stability is mentioned in Article 3(3) TEU, in Article 119 (2) and (3) TFEU, Article 127(1) TFEU and in Article 2(1) of the Statute of the ESCB and ECB. Price stability is also one of the convergence criteria for the adoption of the euro (Art. 140(1) TFEU). The market is supposed to sanction the profligality of Member States – who might allow their deficit to grow – by increasing risk premiums on bonds. In its *Maastricht* decision, the German Constitutional Court stressed the importance it attaches to the concept of "*Stabilitätsgemeinschaft*", a fundamental value that, for the Court, is in particular embedded in the no-bailout clause.[22] An evolution of the Union contrary to this imperative

20. Lastra, *Legal Foundations of International Monetary Stability* (OUP, 2006), p.252; Bandilla, (quoting Hahn and Siebelt, *Hdb. der EG-Wirtschaftsrecht,* F.1, Rdnr.65), in *Das Recht der EU*, Grabitz and Hilf, Art. 103, Anm. 3.

21. See Council Regulation (EC) No 3603/93 of 13 Dec. 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b(1) of the Treaty, O.J. 1993, L 332/1.

22. See for an English version, *Bundesverfassungsgericht*, 12 Oct. 2003, II, 5 e, in Oppenheimer (Ed.) *The Relationship between European CommunityLaw and National Law: The Cases* (Cambridge University Press, 1994), p. 569.

could, in the view of the Court, justify the withdrawal of Germany from the Union.[23]

The no-bailout clause is an essential part of the "budgetary code" of the Union, and beyond its literal wording is, together with the two preceding prohibitions mentioned above, the expression of the responsibility of each Member State for its own public finance. As observed by René Smits, Member States are "on their own"[24] as far as their public finances are concerned. They have to finance themselves, if necessary, on the market and at the conditions set by the market. Markets are the judges of their financial health.[25]

But the authors of the Treaty realized that it is not wise to be exaggeratedly confident of the reactions of the markets in order to maintain financial stability, as was observed in the Delors report. The sanction imposed by the market is often late and, when it occurs, excessive.[26] It was, hence, thought necessary to supplement the prohibition – which some, like the United Kingdom, would have found a sufficient element of discipline – with coordination of economic policies and specific rules addressed to the budgetary policy of the Member States. This led, in particular, to the provisions on excessive deficits (now Art. 126 TFEU),[27] which were enhanced, to the extent possible without Treaty revision, by the Stability and Growth Pact adopted in 1997, one year before the changeover to the third stage of EMU, and reformed in 2005.[28]

23. Ibid., p. 568.

24. Smits, *The European Central Bank* (Kluwer Law International, 1997), p. 77. See also Calfaro, *Unione Monetaria e coordinamento delle politiche economiche* (A. Giuffrè, 2001), p. 59: "ogni Stato è solo e unico responsabile del proprio bilancio"; Lastra, op.cit. *supra* note 20, p. 252 et seq.

25. See Häde, op. cit. *supra* note 18, at 402: "Ein wesentlicher Zweck des Haftungsausschlusses und der anderen Sicherungen in Art. 101ff. EG ist es, der Mitgliedstaaten auch hinsichtlich der Bewertung ihrer Bonität den Kapitalmärkten auszusetzen." See Townsend, *The Euro and EMU. An historical, institutional and economic description* (John Harper, 2007), p. 108: a Member State must borrow on the financial markets "in the same way as, and in competition with, other borrowers, including large corporations."

26. *Report on economic and monetary union in the European Community*, OPOCE, Luxembourg, 1989, p.24. See also Häde, op. cit. *supra* note 18. Besson, "L'euro et les marchés financiers" in *L'euro dix ans après*, Colloque de la CEDECE, Paris, 18 juin 2010 (provisional version, to be published): "L'expérience montre que la 'discipline des marchés' ne s'exerce pas en continu mais suit un cycle de sous-réactions/sur-réactions."

27. See Hallerberg and Bridwell, "Fiscal Policy Coordination and Discipline: The Stability and Growth Pact and Domestic Fiscal Regimes", in Dyson (Ed.), *The Euro at Ten*, *Europeanization, Power and Convergence* (OUP, 2009), p. 69–86 (71) on the no-bailout rule: "There was concern, however, that this position was not credible. A State with a fiscal crisis could hurt all members of the euro area, and the remaining States could consequently find it in their best interest to bail out this State. Consequently, there seemed little to prevent States from relaxing their fiscal stances once they joined. These concerns led to the creation of the SGP..."

28. Louis, "The Review of the Stability and Growth Pact", 43 CML Rev. (2006), 85–106.

Did the system work reasonably well? To be brief: if the ECB was able to dominate inflation during the more than ten years of EMU, the excessive deficit procedure and the Stability and Growth Pact (SGP) have not succeeded in maintaining budgetary discipline during all these ten years, and have been unable to maintain discipline through the crisis,[29] although the situation would surely have been worse in the absence of rules.

Lorenzo Bini Smaghi, member of the Executive Board of the ECB, has explained with great clarity why, in his view, the "key assumptions" on which what he called the "economic and fiscal dimension" of the euro area construction was based, turned out to be misplaced.[30]

What were these assumptions? "The first was that markets would exert strong pressure on euro area fiscal policies. The second assumption was that if the first assumption were insufficient to discipline public finances, then the Stability and Growth Pact, based on monitoring, peer pressure and sanctions, would do the job. The third assumption, reinforcing the previous ones, is that if a member of the euro area were unable to implement sound fiscal policies, it would be left to its own devices. The final assumption was that national economic policies would be geared to ensure convergence among euro area economies, within a strengthened single market."

Why were these assumptions misplaced in the view of this ECB Executive Board member? First, "markets did not impose the necessary discipline on the Member States." Spreads on bonds narrowed independently of emerging potential problems and when markets reacted they did it "in an abrupt and procyclical way." The assessment of the Delors report turned to be right: don't be too confident of markets or, we should add, instructed by experience, of the judgment of the credit rating agencies that are their expression. Undisciplined Member States benefited from the better health of some of their partners and the exclusion of bailout was no longer very credible.[31] Markets needed the Greek crisis in order to consider States individually, and taken on their own merits.

29. Cf. the triumphalist view by the Commission on fiscal consolidation in its Communication on EMU@ten: successes and challenges after 10 years of Economic and Monetary Union, COM(2008)238 final, 7 May 2008, p. 2: "Progress in fiscal consolidation has been impressive over the past few years and culminated in a deficit of only 0.6 % of GDP in 2007 compared to an average of 4 % in both the 1980s and 1990s."

30. See his speech on "Challenges for the Euro Area, and the World Economy", Group of the Thirty, Rabat, 28 May 2010, www.ecb.int.press/key/date/2010/htlm/sp100528.en.htlm

31. Häde, op. cit. *supra* note 18, 402. Townsend, op. cit. *supra* note 25, p. 109 writes that one can speculate that the ease for small States to borrow on the markets has led to the decision to have, in addition to the discipline of Articles 100–103, "a specific and detailed rule against excessive deficits."

Second, "the SGP did not work as expected." This does not need explanation for the readers of this *Review*.[32] The crisis has merely worsened the situation. Paul De Grauwe illustrates the weakness of the SGP by resorting to the image of "a fire code without a fire brigade".[33] There is no insurance mechanism in the euro zone and he explains: "This is like saying that if people follow the fire code regulations scrupulously there is no need for a fire brigade... When it [the Eurozone] finally set up a fire brigade, the latter was busy trying to punish the guilty before it started extinguishing the fire." There is neither a significant central budget nor a monetary fund. It has been underlined that, in the absence of both of these, we need "une forte contrainte sur les *soldes* budgétaires."[34] The reform in progress prepared by the task force chaired by President Van Rompuy will apparently include a strengthening of both preventive measures and sanctions. The future will demonstrate whether they are more effective than the present ones.

Third, and here the pertinent paragraph of Bini Smaghi's speech deserves to be literally quoted: "in the midst of the worst crisis since World War II, the belief that countries could be left to their own devices, and eventually fail, without infecting others, proved wrong. Several academics and commentators are still flirting with the idea that a partial default could be organized in an orderly fashion, with minor repercussions on the country itself and on its neighbours. But financial markets have shown how exposed they are to contagion, – contagion which, by the way, is not limited to the euro area. It's global."

Those who have consistently insisted on refraining from helping Greece,[35] considering that Greece bears its own responsibility for its perilous fiscal situation and the mismanagement (to say the least) of its statistics, both when adopting the euro and afterwards, have often evoked the "moral hazard" possibly resulting from such intervention. The cost of non-intervention was surely at least as great. It has increased due to the time lag before the Member States could react.[36] In this context, the manifestation of interest and support outside

32. We refer the reader in particular to the seminal article by Herdegen, "Price stability and budgetary restraints in the Economic and Monetary Union: The law as guardian of economic wisdom", 35 CML Rev. (1998), 9–32.

33. De Grauwe, "Fighting the wrong enemy", VOX, 19 May 2010, www.voxeu.org/index.php?=node/5062

34. Besson, op.cit. *supra* note 26. Emphasis by the author.

35. See, in particular, the various recent publications of the *Centrum für Europâische Politik*, the Berlin think-tank of the *Stiftung Ordnungspolitik* www.cep.eu and Issing, "Die europäische Währungsunion am Scheideweg", *FAZ*, 29 Jan. 2010.

36. See Pisani-Ferry, "Le pouvoir politique doit montrer que sa capacité d'action est sans limite", *Les Echos*, 10 May 2010: "Les chefs d'Etat ont longtemps cru qu'il leur suffisait d'afficher un consensus politique pour rassurer. A chaque fois, il n'a fallu que trois jours pour déceler les failles dans ce consensus. Ils ont délapidé leur capital de crédibilité." For EU stan-

the Union for the measures adopted at euro area level is remarkable. Problems for the euro can indeed damage the fragile restart of the world economy after the recession. The procrastination in the Greek case had global repercussions. G7 and G20 leaders and the IMF have more or less discreetly encouraged the EU to take the necessary measures.

The fourth reason mentioned in the quoted speech is the divergence in nominal cost and price developments. Fast growth in countries with lower income per capita and easy money through excessive external borrowing hid the "decline in competitiveness" and caused "large payments imbalances within the Union." The EMU has apparently not progressed very much in the direction of an optimal currency area.

Crisis mechanisms

The second group of questions relates to Article 122(2) TFEU (ex 100(2) EC). Is Article 122(2) the key to the right remedies? What are its potentialities and its limits? What is its relation with Article 125?

We quote the whole of Article 122 TFEU (ex 100 EC, as amended) in order to place the paragraph referred to in its context:

> "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."

Article 103 of the Rome Treaty on conjunctural policy inspired this provision when the Maastricht Treaty abrogated that Article.[37] Both provisions, the old one and the new, allow for the Council to take exceptional measures in case of a special occurrence and, explicitly at least in Article 122(1), when it does not

dards, things seemed to have gone fast and, on the weekend of 7 to 10 May, they really went very fast, but the volatility of the markets requires a unity of intent, careful preparation by people at the right level, clarity, and speediness. Transparency is not an unnecessary luxury. It is part of the solution. Decisions taken always had to be supplemented, and much time was needed because of divergences of positions among partners at the highest level.

37. See e.g. Hattenberger, Art. 100, in Schwarze (Ed.), *EU-Kommentar*, 2nd ed. (Nomos, 2009), p. 1186, §3.

seem possible to use any other provision of the Treaty, in particular the general sweeping clause of Article 352 TFEU (ex 308 EC).

Two modifications have been brought to former Article 100 EC since the entry into force of the Maastricht Treaty: the first and most important, brought by the Nice Treaty, substitutes qualified majority for unanimity in the first paragraph and for the "financial assistance" decided under the second paragraph in case of exceptional occurrences beyond [the] control [of a Member State]", as was already the case for "severe difficulties caused by natural disasters". The Lisbon Treaty added the words "in a spirit of solidarity between Member States", and the reference to supply "in the area of energy" in the first paragraph. These additions confirm the interpretation given before to paragraph 1 – which has been used once in the field of oil supply.[38] It does not in any way limit the field of application of Article 122(1), which could bear on all sectors of economic activity.[39]

Paragraph 2, when it was introduced by the Maastricht Treaty, was clearly the result of a compromise that involved, on the one hand, upholding present Articles 143 and 144 TFEU (ex 119 and 120 EC; 108 and 109 of the original Rome Treaty) applicable in case of balance of payments difficulties encountered by non-euro area members and, on the other hand, the introduction of a clause of assistance in case of "exceptional occurrences", which would constitute an exception to the extremely rigorous no-bailout clause, as that had been insisted on by some States during the negotiation in a sort of North-South conflict. Some States were reluctant to see a transformation of the Community into a so-called "transfer Union", and others were conscious of potential difficulties.[40]

The Commission had proposed, for the negotiation of the Maastricht Treaty, the introduction of a mechanism of financial assistance, which could have taken the form of a support programme including budgetary assistance or special loans in case of difficulties or serious threats of difficulties in a Member State. The Council could have established a system of borrowing, under a ceiling to be set, in order to finance special loans. The system would have been activated in case of major economic difficulties in one or more Member States or when economic convergence would need a special effort of the Community in parallel with national strategies of adjustment "in a spirit of positive

38. Council Directive 2006/67/EC of 24 July 2006 imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products, O.J. 2006, L 217/8.

39. See Smulders, "Art.100", von der Groeben and Schwarze (Eds.), *Kommentar zum Vertrag über die EU und zur Gründung des EG*, 6th ed. (Nomos, 2003), p.50, §5.

40. See Pipkorn, "Legal arrangements in the Treaty of Maastricht for the effectiveness of the EMU", 31 CML Rev. (1994), 263 et seq., esp. 273, quoted in Hattenberger, Art.100, in Schwarze et al. (Eds.), *EU-Kommentar*, 2nd ed. (Nomos, 2009), p. 1186, §5.

conditionality". General conditions of this kind of intervention would have been adopted following the procedure of cooperation, i.e. involving the European Parliament.[41]

The Maastricht IGC made of this provision a true crisis clause. The text of the Treaty provision, as it was adopted, is more restrictive in the description of potential cases of application – but its silence makes it more open as to the forms of assistance.[42] It does not provide orientations as to the kind of action that the Union can take for facing the evils mentioned in the paragraph. The Council has a broad discretionary power not only on the choice of the measure but also, primarily, on the opportunity to intervene.[43] Conditionality is an essential element of the mechanism. Unfortunately, the procedure only requires the European Parliament to be informed of the decisions taken and not to contribute to them, which has encouraged arguments based on the lack of legitimacy of Union action in this case.[44] One powerful arm of the budget authority was to be left out.

Article 122(2) TFEU must be interpreted as a "counterweight" to the no-bailout clause.[45] The exclusion of co-responsibility does not automatically rule out assistance interventions in favour of Member States in difficulty.[46] If that

41. See Art. 104 in "IGC: Contributions of the Commission, Communication of 21 August 1990", *Bull CE*, suppl. 2/91, p. 23 and 40. On the preparatory works, see also Häde, op. cit. *supra* note 18, 402. The concern of the Commission seemed to be partially taken into account under the chapter of economic and social cohesion.

42. See Hattenberger, op. cit. *supra* note 40, p. 54, point 27: "Artikel 100 Absatz 2 [definiert] weder die genaue Art des Beistandes, noch die Bedingungen, unter denen er gewährt wird."

43. See Bandilla, *Das Recht der Europäischen Union*, in Grabitz/Hilf, Beck's Verlag, 2006, p. 3, point 11: "Der Rat kann – also sehr weiter Ermessensspielraum- auf Vorschlag, etc...."

44. See Bandilla, Art. 100, in Grabitz/Hilf, op. cit., p. 2, §4, referring to Art.100 (1). Cf. Smulders, op. cit. *supra* note 39, who is of the opinion that the Community could create a fund under this provision in order to influence the economy.

45. See Hattenberger, op. cit. *supra* note 40, p. 1186; Bandilla, op. cit *supra* note 43: "Sie bildet ferner ein Gegengewicht zu Art.103...".

46. See Häde, op. cit. *supra* note 18, 402. It is remarkable that the generalization of qualified majority voting in Art. 100 prompted the IGC to annex a declaration No 6 affirming the compatibility of measures taken under Art. 100 with the no-bailout clause and budgetary discipline. See "Declaration on Article 100 of the Treaty establishing the European Community": "The Conference recalls that decisions regarding financial assistance, such as are provided for in Article 100 and *are compatible with the no bail-out rule laid down in Article 103*, must comply with the 2000–2006 financial perspective, and in particular paragraph 11 of the Interinstitutional Agreement of 6 May 1999 between the European Parliament, the Council and the Commission on budgetary discipline and improvement of the budgetary procedure, and with the corresponding provisions of future interinstitutional agreements and financial perspectives." (Our emphasis). This declaration, which could not deprive the Treaty provision of its true meaning, has disappeared with the Lisbon Treaty. See on the relations between Arts. 100 and 103, the comments of Martucci, in Pingel (Ed.), *Commentaire article par article des traités UE et CE*, 2nd ed. (Helbing Lichtenhahn, Dalloz, Bruylant, 2010), p. 883.

were the case, Article 122(2) would be meaningless.[47] But the Council and the Member States have to take into account this coexistence of the principle stated by Article 125 while configuring the measures of assistance, as it is intended to give due regard to the rules on excessive deficits. These elements give a special importance to the principle of proportionality, i.e. the appropriateness of the means in consideration of the possibly conflicting principles stated by the three provisions.

This leads us to develop, first, the question related to the field of application of Article 122(2) and, then, that of the extent of the competences of the Union under this provision. We have mentioned that it is necessary to "take into account" Article 125 on no-bailout and Article 126 on excessive deficits when designing assistance measures. Article 122(2) is applicable in case of difficulties or serious threats of severe difficulties, caused by exceptional occurrences beyond a Member State's control. All these words underline the limits to be respected by the Council when deciding on assistance to a State. The occurrence has to be exceptional and not manageable under other Treaty provisions. An excessive deficit in the meaning of Article 126 TFEU, creating a problem for the service of the debt, does not *per se* justify the activation of the assistance procedure under Article 122(2). First, there is a special procedure to be applied under a specific provision (Art. 126),[48] and second, it does not qualify as a special occurrence beyond the control of the Member State concerned. It could not, as such, justify a derogation to Article 125. [49] Nevertheless, this is not the case if the situation, whatever its origin, degenerates into an asymmetric shock or a shock common to a number of Member States, in a period of serious crisis created by economic, social or political events.[50] That was clearly the case of Greece, Ireland and potentially other States this year. The crisis

47. See once again Häde, op. cit. *supra* note 18, 403: "Die bloβe Existenz des gegen die wirtschaftstärkeren Mitgliedstaaten durchgesetzten Art.100 II EG und auch dessen tatbestandliche Weite belegen, dass der Haftungsausschluss nicht in jedem Fall das letzte Wort sein soll."

48. See Townsend, op. cit. *supra* note 25, p. 108 observes that it is not applicable to the service of the debt because a debt problem derives from the cumulative effect of the decisions of the State concerned.

49. See Martucci, op. cit., *supra* note 46, p. 883: "... l'article 100 ne saurait vider l'article 103 de son contenu, de sorte que le concours mutuel ne devrait pas pouvoir bénéficier à un Etat qui n'a pas montré toute la diligence nécessaire pour éviter la survenance d'une crise budgétaire." Cf. Häde, op. cit. *supra* note 18, 401: Budgetary problems can nevertheless degenerate into insolvency.

50. See Martucci, op. cit. *supra* note 46, p. 859. See Häde, op. cit. *supra* note 18, 401: "Hinzukommen muss, dass der betroffene Staat die Kontrolle über die Situation verloren hat.“ The same author refers to an article by Heinemann, "Bailout-und Bonitätseffekte in der WWU", (1995) *ZWS*, 115, 605–622, 609 who is of the opinion that "eine akute Schuldenkrise...zweifellos als nicht mehr kontrollierbares und auβergewöhnliches Erreignis zu qualifizieren [wäre].“

in Greece spread to other countries in and outside the euro area and had repercussions on the global scene. It became clear for Greece's partners that it could not be left on its own, for the sake of the stability of the euro area, and that letting a euro area member default as a "solution" was not an acceptable one. Since it is exceptional, the remedy must cease to be applied once the crisis disappears. "Exceptional" means "temporary".

Conditionality is essential. While the Council has, as we have seen, a margin of discretion to decide on the assistance, it has to be conditional. This element is part of the necessary reconciliation of Articles 122(2) and 125 TFEU. Both statements of the Heads of State or Government – respectively of the EU and of the euro area – allude to the "shared responsibility" of all euro area members for the economic and financial stability in the area (11 February) or "their willingness to take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole" (25 March). This emphasis on the stability in the euro area as a whole was a political requirement, but Article 122(2) does not exclude the possibility of activating the procedure in the case of an asymmetric shock affecting one Member State.

Article 122(2) TFEU provides for an action of the EU, not of the Member States. One should not conclude that loans by Member States are excluded. The no-bailout clause does not prohibit these. Before Greece, Latvia, a non-euro area Member State, had benefited from loans from a number of mostly Nordic Countries, in addition to assistance by the EU, the IMF, the World Bank and the EBRD. Should these intergovernmental loans be non-concessional, as requested by the Statements quoted earlier? We are not sure that this element is essential, and the rate provided for Greece and deemed to be non-concessional was in any case more favourable to the borrower than if market rates had been applied, and it is not clear what market rates are when it is not possible to find a lender.[51] It is nevertheless true that the setting of the interest rate could intervene as an element for justifying the soundness of the operation in consideration of the principle of responsibility of a Member State's government for its own finances, which is embedded in the no-bailout rule.

The rescue package of 10 May includes a Union element (60 billion euros of loan) and an intergovernmental one (the EFSF). It was not, as we have observed, what was provided for by the Commission in its proposal. A single mechanism would have been more transparent, but (some) Member States obviously preferred a system of guarantees committing them outside the EU legal order, rather than to have it imposed upon them by an EU act. On the other hand, this allowed them to submit the system to their constitutional

51. See *supra*.

procedures and to avoid a guarantee to the EU for operations through financial markets. The spectre of the German Constitutional Court was also very present in the discussions, and influenced the attitude of Germany in this debate.

The mechanisms of assistance are temporary ones. Should they become permanent instruments available in case of need? Proposals have been made by some economists and by the German Government to create a Fund.[52] This idea has often been associated with the possibility to make recourse to a debt restructuring a default or forced (temporary?) exit option for the heavily indebted State. The Commission and finance ministers have shown interest in the idea of establishing a financial stability fund. In its Communication on "Reinforcing economic policy coordination",[53] the Commission declares its intention "in the medium-to-long term to make a proposal for a permanent crisis resolution mechanism." Presumably, the question will be discussed by the task force appointed by the Heads of State and Government of the euro area on 25 March 2010, under the chairmanship of the president of the European Council, which has as part of its mandate to look at a "robust framework for crisis resolution respecting the principle of Member States' own budgetary responsibility". The creation of such a Fund would most probably need a revision of the Treaty.

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52. See Gros and Mayer, "How to deal with sovereign default in Europe: Towards a Euro(pean) Monetary Fund", CEPS Policy Brief, N°202, February 2010; Schäuble, "Why Europe's monetary union faces its largest crisis?", FT.com 12 March 2010. On the proposals, see Louis, "Un Fonds monétaire européen? Réflexions sur le débat", Notre Europe, *Les Brefs*, N°15, April 2010.

53. Brussels, 12 May 2010, COM(2010)250 final.

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