



## ARTICLES

# THE LAW OF THE ECONOMIC AND MONETARY UNION: COMPLEMENTING, ADAPTING OR TRANSFORMING THE EU LEGAL ORDER?

edited by Fernando Losada and Klaus Tuori

## THE *SUI GENERIS* FRAMEWORK FOR IMPLEMENTING THE LAW OF EMU: A CONSTITUTIONAL ASSESSMENT

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TABLE OF CONTENTS: I. Introduction. – II. Key features of the general framework of implementing and adapting EU law. – III. *Sui generis* aspects of the framework governing the implementation of the law of EMU. – III.1. The ECB's implementing function under SSM. – III.2. Enforcement as a separate executive function from implementation under art. 291 TFEU. – III.3. The exception of Council implementation under art. 291(2) TFEU. – IV. A constitutional assessment. – IV.1. The ECB's implementing function under the SSM. – IV.2. Implementation by the Council. – V. Conclusion.

ABSTRACT: This *Article* compares the implementation of EMU law with the framework governing the implementation of EU law in general to determine whether that general framework has been complemented, adapted or transformed by the developments in the area of EMU Law. This *Article* finds that the legal framework governing the implementation of EMU law indeed deviates from the default framework. However, part of the *sui generis* framework for implementing EMU law is constitutionally mandated. On the other hand, it is less clear whether the ECB is entitled to supplement legislation or whether in fact it can only implement legislation. A second problematic aspect that this *Article* identifies is the significant role that the Council takes in implementing EMU law. Finally, it is in the area of EMU law that the Court identified a distinct type implementing power that is not covered by art. 291 TFEU or by other explicit legal bases in the Treaties that directly confer an executive power on the Council. The new type of power is not necessarily restricted to EMU law and can in principle be identified in other areas of EU law, showing the ramifications that the development of EMU law has on other areas of EU law.

KEYWORDS: implementing acts – delegated acts – comitology – SGP – enforcement – institutional balance.

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## I. INTRODUCTION

A constitutionalist reading of the development of the law of the Economic and Monetary Union (EMU) suggests that the law in this area is in some way detached from other areas of EU law: the constitutional balance in this area has allegedly shifted away from the typical constitutional balance of the EU polity<sup>1</sup> or the typical “Community Method” has been replaced with a new “Union Method”.<sup>2</sup> This *Article*, which focuses on the issue of the implementation (in the broad sense) of EU law, will therefore start from the working hypothesis that the principles that apply to the implementation of the law of EMU also diverge from the general principles governing the implementation of EU law. In the first part, the latter general principles will concisely be set out. Next, the *Article's* central hypothesis will be tested by looking at a number of significant cases in the deepening of the EMU. Of course, if the working hypothesis is confirmed, this does not automatically mean that the framework for implementing the law of EU is legally problematic. The scope left under EU primary law for a *sui generis* implementation framework, tailored to or specific to the EMU, is a separate question, which this *Article* will treat accordingly. Any idiosyncrasies found in the implementation of the law of EMU will thus be assessed in order to conclude on the constitutional legitimacy of the *sui generis* (aspects of the) framework for implementing the law of EMU. The answer to the question of how the notion of implementation is different (or not) in the area of EMU will finally also tell us something about the EU legal order itself.

## II. KEY FEATURES OF THE GENERAL FRAMEWORK OF IMPLEMENTING AND ADAPTING EU LAW

On paper, the Lisbon Treaty radically changed the legal *instrumentarium* available to the EU. In a nutshell, the Treaty first made a distinction between legislative and non-legislative acts. In the latter category, there are those non-legislative acts that are adopted directly based on the Treaties and those that are adopted based on secondary legislation. This secondary legislation is normally implemented by the Member States (as explicitly recognised in art. 291(1) TFEU) but if uniform conditions in implementation are required, the Commission or Council may be empowered to adopt implementing acts (art. 291(2) TFEU). A final type of non-legislative act then is the delegated act foreseen in art. 290 TFEU pursuant to which the Commission can amend or supplement formal legislative acts in relation to their non-essential elements.

Elaborating on this, the Lisbon Treaty first introduced the (ordinary and special) legislative procedure(s). As a result, in the EU Treaties there is now a distinction between those legal bases that refer to a legislative procedure and those which do not. If the legal basis

<sup>1</sup> M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) ModLRev 817.

<sup>2</sup> T Eijsbouts and J H Reestman, 'Editorial: In search of the Union Method' (2015) EuConst 425.

prescribes recourse to a legislative procedure, the act to be adopted will be a formal legislative act.<sup>3</sup> If the legal basis does not formally prescribe recourse to a legislative procedure, the act to be adopted is not a legislative act in a formal sense even if it is adopted through a procedure that also requires Parliamentary consultation or even consent.<sup>4</sup> Throughout the Treaties, provisions granting such an “executive law-making” function to either the Council or the Commission may be noted. However, whereas art. 289 TFEU makes clear that formal legislative acts may be adopted pursuant to the different legislative procedures, there is no general provision recalling the possibility for the Council and Commission to engage in executive law-making through the adoption of acts that are legislative in a material sense but not in the formal sense. Instead, that possibility will have to be inferred from each single legal basis providing in such a power.

Secondly, the Lisbon Treaty also created the separate categories of delegated and implementing acts in arts 290 and 291 TFEU. Pre-Lisbon, these two categories came under the general notion of “implementation” under art. 202 TEC and were governed by the comitology rules. Arts 290 and 291 TFEU on the other hand make a distinction between two different normative activities: amending and supplementing formal EU legislation on the one hand (art. 290 TFEU) and implementing binding EU acts on the other hand (art. 291 TFEU). Art. 290 TFEU allows the legislator to grant a “delegated” power to the Commission, albeit that the Commission cannot be empowered to amend or supplement the essential elements of legislation. Since the Council and/or Parliament delegate a power, which they normally exercise, they also retain control over the Commission and can withdraw their delegation or veto individual delegated acts which the Commission intends to adopt.

In contrast, art. 291 TFEU makes clear that the Member States are the default actors to implement EU law. However, if “uniform conditions in implementation” are required, the Commission or the Council shall be granted an implementing power. The difference in language with art. 202 TEC must be noted here: whereas granting an implementing power to the Commission under art. 211 art. 202 TEC was a decision entirely within the discretion of the Council (and Parliament), art. 291 TFEU has objectivised this test. Just like art. 202 TEC, art. 291 TFEU makes clear that in the choice between Commission and the Council, the former is the default EU actor to implement EU law. But again the language is stricter, whereas pre-Lisbon the “Council may also reserve the right, in specific cases, to exercise directly implementing powers itself”, art. 291 TFEU prescribes that “in duly justified specific cases and in the cases provided for in Articles 24 and 26 of the Treaty on European Union” the Council may be empowered. The comitology system has thereby shrunk and is hence only applicable when the Commission adopts implementing acts under art. 291 TFEU. Differently from the situation pre-Lisbon, the instrument setting

<sup>3</sup> Confirming as such, see joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council of the European Union* ECLI:EU:C:2017:631 paras 62-64.

<sup>4</sup> Before the Court’s confirmation to the contrary AG Wathelet argued to the opposite in case C-104/16 *P Front Polisario v Council* ECLI:EU:C:2016:677, opinion of AG Wathelet, paras 151-161.

out the comitology procedures is now also adopted by the Council and Parliament, rather than by the Council on its own.

What was a radical reform on paper has, however, been largely undone by both the political institutions and the Court subsequent to the entry into force of the Lisbon Treaty. For a more elaborate discussion, reference is made to other works,<sup>5</sup> but it may still be noted that the post-Lisbon “law of implementation” and the institutional balance in this area are much closer to the status quo pre-Lisbon than one would expect from a simple reading of arts 290 and 291 TFEU. Thus, the Court has largely undone the fundamental distinction between implementation and supplementation by confirming a discretion on the part of the legislator to choose between either of both.<sup>6</sup> The Court also undermined the constitutional framework of arts 290 and 291 TFEU by declaring it an open system, for the legislature to elaborate upon, in *Short-selling* (cf. *infra*).<sup>7</sup> The political institutions from their side have further undermined the distinction between delegated and implementing acts by de facto re-introducing a kind of comitology also in the adoption of delegated acts.<sup>8</sup> Finally, the Commission itself has proposed to re-introduce a formal role for the Council when the Commission adopts implementing acts.<sup>9</sup>

### III. *SUI GENERIS* ASPECTS OF THE FRAMEWORK GOVERNING THE IMPLEMENTATION OF THE LAW OF EMU

Before looking into the *sui generis* aspects of the implementation framework as it applies in the area of the EMU it is necessary to explicitly delimitate this area. Despite calls for a large conception of “EU” law which would also encompass *inter omnes* international agreements

<sup>5</sup> M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' (2016) CMLRev 1501; C Tovo, 'Delegation of Legislative Powers in the EU: How EU Institutions Have Eluded the Lisbon Reform' (2017) ELR 677.

<sup>6</sup> Case C-427/12 *Commission v Parliament and Council* ECLI:EU:C:2014:170; case C-88/14 *European Commission v European Parliament and Council of the European Union* ECLI:EU:C:2015:499.

<sup>7</sup> Case C-270/12 *United Kingdom v Council and Parliament* ECLI:EU:C:2014:18. See also M Simoncini, 'The Delegation of Powers to EU Agencies After the Financial Crisis' (2021) European Papers [www.europeanpapers.eu](http://www.europeanpapers.eu) 1485.

<sup>8</sup> See the Common Understanding between the European Parliament, the Council and the Commission on Delegated Acts annexed to the Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 on Better Law-Making.

<sup>9</sup> See Proposal COM(2017) 85 final from the Commission of 15 February 2017 for a Regulation of the European Parliament and of the Council amending Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 on laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers. Ironically, a consensus seems to exist between the Member States in Council that the Commission's proposal to give more powers to the Council would violate the institutional balance. See Presidency Progress Report Doc. 10127/18 from the Council of the European Union of 15 June 2018 on the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 182/2011 cit.

concluded by Eurozone Member States,<sup>10</sup> the law of EMU is conceived here as set out by Losada and Tuori in the *Introduction* to this *Special Section* (it corresponds to “EU law on the EMU” according to their categorisation).<sup>11</sup> Since the aim of this *Article* is to assess to what extent the general framework for implementing EU law applies to the specific EMU field, *inter se* (or even *inter omnes*) agreements or general EU law in the area of financial services are excluded from the scope of this research. Nevertheless, this *Article* will also briefly highlight developments in this area in order to present a realistic and broader picture of the constitutional transformation that may be witnessed in the field of EMU law.

Thus, while the implementation of international law instruments like the European Stability Mechanism, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the Agreement on the transfer and mutualisation of contributions to a Single Resolution Fund and the proposed dedicated Eurozone budget, fall outside the scope of this *Article*, it is important to highlight their existence. As Fabbrini has convincingly argued, the tendency of the EU Member States to deepen Eurozone integration through international law, rather than through the available legal bases in the EU Treaties, undermines the institutional balance.<sup>12</sup> Specifically for the question of implementation then: if it is accepted that the EU Treaties lay down a specific institutional balance for the implementation of EU law whereby certain prerogatives are granted to the EU institutions,<sup>13</sup> these prerogatives are effectively undermined when EU Member States have recourse to international law to deepen Eurozone integration. This trend of integration through international law is by and large an EMU-phenomenon, since the only other prominent example is that of the Agreement on a Unified Patent Court.

As noted, the area of financial services does not come under the law of EMU either but an important development originating in that area has had important ramifications for the law of EMU nonetheless. As a result, it merits being pointed out here. Still, since the *Article* by Simoncini deals with EU agencies,<sup>14</sup> the *Short-selling* ruling<sup>15</sup> of the Court, which related to the powers conferred on the European Securities and Markets Authority (ESMA) need not be fully developed here. Instead, it suffices to note that on many points the Court’s reasoning in *Short-selling* is hardly convincing and this because the Court on the one hand

<sup>10</sup> See T Eijsbouts and J H Reestman, 'Editorial: In search of the Union Method' cit. 3.

<sup>11</sup> F Losada and K Tuori, 'Integrating Macroeconomics Into the EU Single Legal Order: The Role of Financial Stability in Post-crisis Europe' (2021) *European Papers* www.europeanpapers.eu 1367, 1370.

<sup>12</sup> F Fabbrini, 'A Principle in Need of Renewal? The Euro-Crisis and the Principle of Institutional Balance' (2016) *Cahiers de droit européen* 285.

<sup>13</sup> For an argument to this effect, see M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' cit.

<sup>14</sup> M Simoncini, 'The Delegation of Powers to EU Agencies' cit.

<sup>15</sup> *United Kingdom v Council and Parliament* cit.

continues to rely on *Meroni* while on the other hand it effectively denudes the original doctrine of its meaning.<sup>16</sup> Specifically on the matter that is most relevant for our present discussion, the Court of Justice interpreted arts 290-291 TFEU as an open system, which the EU legislature could develop, e.g. by granting de facto implementing powers on a body not foreseen in either art. 290 or 291 TFEU. Indeed, the Court itself rightly noted that it was “called upon to adjudicate on whether the authors of the FEU Treaty intended to establish, in Articles 290 TFEU and 291 TFEU, a single legal framework under which certain delegated and executive powers may be attributed solely to the Commission or whether other systems for the delegation of such powers to Union bodies, offices or agencies may be contemplated by the Union legislature”.<sup>17</sup> However, it did not subsequently answer that question explicitly. Instead, it questionably inferred from the possibility to challenge binding acts (of general application) of agencies that it should be possible to give concomitant powers to those agencies. Next it noted that the ESMA is vested “with certain decision-making powers in an area which requires the deployment of specific technical and professional expertise”<sup>18</sup> and concluded “that conferral of powers does not correspond to any of the situations defined in Articles 290 TFEU and 291 TFEU”.<sup>19</sup> To answer why that conclusion may be drawn from its preceding findings, the Court relies on a circular reasoning: the contested power of the ESMA should not be seen in isolation but must be appreciated in its context which is one of close cooperation between national and EU authorities where both “must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions”.<sup>20</sup> In other words, the ESMA has certain powers because they are necessary and these powers could be legally conferred because they are necessary. Presumably then, this does result in any problem under arts 290 and 291 TFEU because under those latter two articles “the deployment of specific technical and professional expertise”<sup>21</sup> is not required.

The Court thus allowed the legislature to confer an implementing power under art. 291 TFEU to a body not mentioned in art. 291 TFEU by denying it is an implementing power in the sense of that article to begin with and, crucially, without safeguarding in any way the prerogatives bestowed on the institutions by that provision, notably the Commission’s legitimate claim to be the default executive actor at EU level.<sup>22</sup> This ruling

<sup>16</sup> See M Chamon, ‘Granting Powers to EU Decentralised Agencies: Three Years Following *Short-selling*’ (2018) ERA Forum 597.

<sup>17</sup> *United Kingdom v Council and Parliament* cit. para. 78.

<sup>18</sup> *Ibid.* para. 82.

<sup>19</sup> *Ibid.* para. 83.

<sup>20</sup> *Ibid.* para. 85.

<sup>21</sup> *Ibid.* para. 82.

<sup>22</sup> See C Blumann, ‘Un Nouveau Départ pour la Comitologie. Le Règlement n 182/2011 du 16 février 2011’ (2011) Cahiers de droit européen 26. However, Bianchi notes that pre-Lisbon the executive power was deemed to be held by the Commission, while the Lisbon Treaty clarified that it is in the first place held by the Member States and only exceptionally by the Commission. See D Bianchi, ‘La comitologie est morte!

proved to be instrumental in the establishment of the Single Resolution Board (SRB), which, as part of the Banking Union, squarely falls in the law of EMU.<sup>23</sup> Of all the EU agencies, the SRB has the most far-reaching powers. This has been enabled by the *Short-selling* ruling, but the legislature arguably has not fully exploited the potential of *Short-selling*. Experiences with the SRB's functioning could thus provide a springboard to further agencification within and beyond EMU. In the words of the Parliament, *Short-selling* "indicated a potentially enhanced scope for activities of the European System of Financial Supervisors under Article 114 TFEU in comparison to the prevailing interpretation of the judgment in [...] *Meroni* at the time when the ESFS was created and therefore the Commission should assess its potential implications in the then forthcoming review of the ESFS".<sup>24</sup> For the moment, the Commission has not picked up on this suggestion, indicating again that the main limit to further agencification in the EU (or EMU) administration is a political rather than a legal one.

Turning to EMU law proper, several instances may be noted where the rules on the implementation of EMU law diverge from the general rules on the implementation of EU law. This *Article* will look at some of them: the implementing function which the European Central Bank (ECB) exercises within the Banking Union (section III.1), the enforcement function exercised by the Council in the Stability and Growth Pact (SGP) (section III.2) and the use that is made of the possibility to exceptionally entrust an implementing function under art. 291(2) TFEU to the Council (section III.3).

### III.1. THE ECB'S IMPLEMENTING FUNCTION UNDER THE SSM

The Single Supervisory Mechanism (SSM) Regulation<sup>25</sup> grants an implementing function to the ECB since art. 4(3) of the Regulation provides that "[t]he ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation". Art. 6 of the Regulation deals with the cooperation between the ECB and the national authorities and provides in para. 7 that the "ECB shall, in consultation with national competent authorities, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to

vive la comitologie! : premières réflexions sur l'exécution du droit de l'Union après le Traité de Lisbonne : l'exemple de la Politique Agricole Commune' (2012) RTDE 83.

<sup>23</sup> For a discussion on how the legislative negotiations on the SRB were influenced by the *Short-selling* case, see M Chamon, 'The Empowerment of Agencies under the Meroni Doctrine and Article 114 TFEU: Comment on United Kingdom v Parliament and Council (Short-selling) and the Proposed Single Resolution Mechanism' (2014) ELR 3.

<sup>24</sup> Resolution 2013/2166(INL) of the European Parliament of 11 March 2014 with recommendations to the Commission on the European System of Financial Supervision (ESFS) Review.

<sup>25</sup> Regulation (EU) 1024/2013 of the Council of 15 October 2013 on conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

organise the practical arrangements for the implementation of this Article".<sup>26</sup> The power thus conferred on the ECB is an implementing power in the sense of the Court's 2014 *Biocides* judgment,<sup>27</sup> but it is not conferred on either the Commission or the Council as prescribed by art. 291 TFEU. At first sight then the ECB finds itself in a similar position as the EU decentralised agencies but in fact, this implementing power is explicitly foreseen in EU primary law itself. The SSM Regulation is based on art. 127(6) TFEU while art. 132(1) TFEU provides that the ECB may adopt "regulations to the extent necessary to implement the tasks defined in [...] Article 25.2 of the Statute of the ESCB and of the ECB". The latter article subsequently refers back to the instruments adopted pursuant to art. 127(6) TFEU. As a result, and from a constitutional perspective, the implementing power conferred on the ECB in the SSM regulation is something in between the executive competences, which the Council and Commission derive directly from the Treaties, and the power vested in these institutions under art. 291 TFEU. This odd constellation results from the unforeseen post-Lisbon development of the role of the ECB. Under the Lisbon Treaty the ECB is conceived as an executive actor with the ability to take some concrete decisions (also in the form of Regulations) within its concrete sphere of competence. However, by conferring banking supervision competences on the ECB, the legislator transformed it into a de facto legislative actor in the area. Hence, the provisions on implementation by the ECB seem to distort the original constitutional design of the EU and EMU.

So far, the Court of Justice has not been asked to rule on the limits to the ECB's powers when it adopts implementing acts under art. 132(1) TFEU. It is therefore unclear what the limits are to this implementing power, *i.e.* which standard the Court would apply when the legality of such implementing measures is challenged. Will the Court apply the standard applicable under art. 291 TFEU, which would require the ECB to respect the essential general aims of the legislative act that it implements, but at the same time allowing it to adopt all the measures necessary or appropriate for the implementing of that act, provided that they are not contrary to it?<sup>28</sup> Will the Court opt for the *Meroni*-standard which it has developed for EU agencies in *Short-selling*, requiring the implementing power to be precisely delineated in that *i)* the conferral of powers is exceptional, *ii)* the ECB's powers are embedded in decision-making procedures involving other actors, and *iii)* the

<sup>26</sup> This implementing power has been put into operation by the ECB when it adopted Regulation (EU) 468/2014 of the European Central Bank of 16 April 2014 on establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities.

<sup>27</sup> In this case, the Court defined the notion of implementation under art. 291(2) TFEU as "provid[ing] further detail in relation to the content of a legislative act, in order to ensure that it is implemented under uniform conditions in all Member States". See *European Commission v European Parliament and Council of the European Union* cit. para. 39.

<sup>28</sup> Case C-65/13 *Parliament v Commission* ECLI:EU:C:2014:2289 para. 44.



ECB acts pursuant to pre-defined criteria?<sup>29</sup> Or will the Court still apply some other threshold? As argued elsewhere, a sound litigation strategy can force the Court to take a position on this and requires parties contesting specific measures enforcing the SSM Regulation to not focus exclusively on those measures but also incidentally raise an exception of illegality against art. 6(7) of the SSM Regulation.<sup>30</sup>

In constitutional terms, it would seem advisable for the Court to apply the more lenient standard of art. 291 TFEU. The possible argument that the Court already applied *Meroni* to the ECB and that *therefore* the *Short-selling* standard should apply to it, should be dismissed out of hand. While in *Tralli* the Court indeed applied *Meroni* to the ECB,<sup>31</sup> the delegation at issue was wholly internal within the ECB (Governing Council to Executive Board) and the Court applied an *argumentum a fortiori*: internal delegations within one institution should not be scrutinized more strictly than (and at least as favourably as) external delegations (where one institution delegates its powers to a private body).<sup>32</sup> Evidently, this provides little to no basis to argue that therefore, *Meroni* also applies to a conferral by the legislator of an implementing power to the ECB. Of course, should the ECB's implementing power be treated as an art. 291 TFEU power, the question of the ECB (illegally) supplementing legislation is bound to pop up. For the ECB, this would result in even more acute legal problems than for the Commission. After all, the Treaties clearly foresee both implementation and supplementation by the Commission, albeit that the former is regulated under art. 291 TFEU while the latter is governed by art. 290 TFEU. *Biocides*,<sup>33</sup> *Visa Reciprocity*<sup>34</sup> and *Eures Network*<sup>35</sup> illustrate the institutional importance which choosing one over the other has and the importance of qualifying a specific rulemaking activity as either implementation or supplementation.<sup>36</sup> For the ECB then, the demarcation line between implementation and supplementation would be even more relevant because it raises an issue of competence rather than procedure, the ECB only being competent to implement but (unlike the Commission) not to supplement legislation.

<sup>29</sup> Thus applying *mutatis mutandis* the general rules that may be inferred from *Short-selling*. See M Chamon, 'Granting powers to EU decentralised agencies, three years following Short-selling' cit. 600.

<sup>30</sup> See by analogy M Chamon, 'Limits to Delegation under Article 290 TFEU: The Specificity and Essentiality Requirements Put to the Test' (2018) Maastricht Journal of European and Comparative Law 243.

<sup>31</sup> Case C-301/02 P *Tralli v ECB* ECLI:EU:C:2005:306.

<sup>32</sup> M Chamon, *EU Agencies: Legal and Political Limits to the Transformation of the EU Administration* (Oxford University Press 2016) 223.

<sup>33</sup> *European Commission v European Parliament and Council of the European Union* cit.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Parliament v Commission* cit.

<sup>36</sup> In this regard, Zdobnõh argues that both arts 290 and 291 TFEU actually deal with the same kind of power or normative activity and that the sole difference between them lies in the control mechanisms which are deemed required. See D Zdobnõh, 'Competition between Articles 290 and 291 TFEU: What are these two Articles about' in E Tauschinsky and W Weiss (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law: Walking a Labyrinth* (Edward Elgar 2018) 60.

### III.2. ENFORCEMENT AS A SEPARATE EXECUTIVE FUNCTION FROM IMPLEMENTATION UNDER ART. 291 TFEU

One of the policy responses to the euro crisis has been to strengthen the SGP through the adoption of the Six Pack.<sup>37</sup> This resulted in more effective enforcement in both the preventive and corrective arms of the SGP, through Regulations 1173/2011 and 1177/2011. While the latter simply streamlines the enforcement and sanctioning under art. 126 TFEU, the former created new enforcement and sanctioning mechanisms. It thus provides that if the Council either finds that a Member State has not followed up on a Council recommendation under art. 121(4) TFEU, or if it finds an instance of non-compliance under art. 126(6) or (8) TFEU, it may respectively impose an interest-bearing deposit, a non-interest-bearing deposit and a fine upon recommendation from the Commission. In addition, fines may also be imposed in case a Member State has manipulated the statistics it sends to Eurostat. The procedure by which the Council acts is in itself remarkable. While the Commission in its legislative proposal had foreseen a procedure whereby the Council acts on the proposal of the Commission,<sup>38</sup> in the final regulation the Council does so upon the Commission's recommendation. This allows a circumvention of the Community Method as reflected in art. 293(1) TFEU.<sup>39</sup> Of course, the fact that the Council is empowered to adopt sanctioning measures *vis-à-vis* Member States rather than the Commission would appear to constitute an example of the exception under art. 291(2) TFEU, which needs to be duly reasoned. While this aspect will be returned to later, it suffices to note here that recital 25 of the preamble to Regulation 1173/2011 indeed contains a (concise) justification for the exceptional implementing power of the Council.<sup>40</sup>

In a judgment of 2017 however, the Court has indirectly cast doubt on whether such a justification is necessary in the first place. In this respect, it may be noted that after Regulation 1173/2011 entered into force, the Council adopted "sanctioning" decisions on

<sup>37</sup> See F Martucci, 'La longue marche vers le cadre budgétaire intégré de la Zone Euro' (2018) *Revue de l'Union Européenne* 157; C Antpöhler, 'Emergenz der europäischen Wirtschaftsregierung – Das Six Pack als Zeichen supranationaler Leistungsfähigkeit' (2012) *ZaöRV/HJIL* 353.

<sup>38</sup> See e.g. the changes from "proposals" to "recommendations" in the original proposal of the Commission in Proposal COM(2010) 524 final for a Regulation from the European Parliament and from the Council of 29 September 2010 on the effective enforcement of budgetary surveillance in the euro area, resulting in Regulation (EU) 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area.

<sup>39</sup> On the importance of this provision in upholding the community method, see M Chamon, 'Upholding the "Community Method": Limits to the Commission's Power to Withdraw Legislative Proposals – Council v Commission (C-409/13)' (2015) *ELR* 900.

<sup>40</sup> Recital 25 of Regulation (EU) 1173/2011 reads as follows: "The power to adopt individual decisions for the application of the sanctions provided for in this Regulation should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the measures adopted by the Council in accordance with Articles 121 and 126 TFEU and Regulations (EC) 1466/97 and (EC) 1467/97".

four occasions. Thus in 2016 the Council adopted two implementing decisions in relation to Spain and Portugal after a finding, under art. 126(8) TFEU that these two countries had not taken effective measures to tackle an excessive deficit. Normally this would result in the imposition of a fine under art. 6 of Regulation 1173/2011, but the Commission recommended that no fine be imposed and the Council acted upon these recommendations.<sup>41</sup> In 2015, the Council adopted a Decision,<sup>42</sup> later requalified as an Implementing Decision,<sup>43</sup> imposing a fine on Spain for manipulating statistics. In 2018, the Council adopted an Implementing Decision imposing a similar fine on Austria.<sup>44</sup> By (continuing to) qualify(ing) these decisions as implementing acts, it is clear that the Council itself assumes it is exercising an implementing function under art. 291 TFEU. However, when Spain challenged the fine imposed on it in 2015 the Court ruled differently. It did so when it had to confirm its own jurisdiction to hear the case: art. 51 of the Court's Statute provides that the General Court is competent to hear direct actions against acts adopted by the Council under art. 291 TFEU. As a result, if the decision contested by Spain indeed was an implementing act, the General Court would have been competent to hear the case. Yet, the Court accepted jurisdiction itself and this ultimately because it read art. 291(2) TFEU not in isolation but in context with art. 291(1) TFEU.<sup>45</sup> As a result, the Court, while acknowledging that the Council exercised an implementing power in the general sense,<sup>46</sup> found that the Council could not have exercised an art. 291 TFEU implementing power, since "*Article 291(2) TFEU relates solely to legally binding acts of the European Union which lend themselves in principle to implementation by the Member States*".<sup>47</sup> Since Member States cannot be expected to fine themselves, the Council's power to fine Member States cannot be an art. 291 TFEU implementing power.

Because the Court only had to deal with this issue to determine its own jurisdiction, it did not have to be crystal clear on where that "new" implementing power then did reside, but it seemed to suggest that since reliance on correct statistics "is essential for the discharge of the responsibilities which Articles 121 and 126 TFEU confer on the Council",<sup>48</sup>

<sup>41</sup> See Implementing Decision (EU) 2017/2350 of the Council of 9 August 2016 on imposing a fine on Portugal for failure to take effective action to address an excessive deficit and Implementing Decision (EU) 2017/2351 of the Council of 9 August 2016 on imposing a fine on Spain for failure to take effective action to address an excessive deficit.

<sup>42</sup> See Decision (EU) 2015/1289 of the Council of 13 July 2015 on imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia.

<sup>43</sup> See Corrigendum to Council Decision (EU) 2015/1289 of July 2015 imposing a fine on Spain for the manipulation of deficit data in the Autonomous Community of Valencia.

<sup>44</sup> See Implementing Decision (EU) of the Council 2018/818 of 28 May 2018 on imposing a fine on Austria for the manipulation of debt data in Land Salzburg.

<sup>45</sup> Case C-521/15 *Spain v Council* ECLI:EU:C:2017:982 para. 45.

<sup>46</sup> *Ibid.* para. 44.

<sup>47</sup> *Ibid.* para. 48 emphasis added.

<sup>48</sup> *Ibid.* para. 53.

this implementing power may implicitly reside in arts 121 and 126 TFEU. This would mean that there is a fourth type of implementing power. Just like the implementing power in *Short-selling*, its discovery results from the EU's response to the financial or euro crises without it being a priori confined to this area. After all, the deciding factor here was that Member States could not enforce EU law against themselves, a reasoning that may apply in any area of EU law. Indeed, large parts of EU law are not to be enforced against private parties but against Member States. The typical example are the rules on state aid, which are clearly embedded in the TFEU itself. In other areas, such as the SGP, they are embedded in secondary legislation. For instance, in the administration of the payments under the Common Agricultural Policy (CAP), as a form of sanctioning the Commission may exclude payments from Union financing if Member States have insufficiently acted to ensure compliance with the CAP. Today, these decisions are taken as implementing decisions pursuant to the advisory comitology procedure<sup>49</sup> but it is questionable whether these are decisions that could actually be taken by the Member States themselves (under art. 291(1) TFEU) as required by *Spain v Council*.

### III.3. THE EXCEPTION OF COUNCIL IMPLEMENTATION UNDER ART. 291(2) TFEU

In quantitative terms, the most significant implementing power exercised by the Council under art. 291(2) TFEU relates to the implementation of the common VAT rules under Directive 2006/112. A second group of implementing decisions relates to psychoactive substances and is taken by the Council pursuant to a pre-Lisbon third pillar legal basis.<sup>50</sup> More recently, the Council has also started to adopt implementing measures following the migration crisis to which the EU has been confronted,<sup>51</sup> and has been conferred further implementing powers in the area of border control and migration.<sup>52</sup> To ease pressure on the frontline states the Council, for the first time, also exercised its executive law-

<sup>49</sup> See arts 52 and 54 of the Regulation (EU) 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy and repealing Council Regulations (EEC) 352/78, (EC) 165/94, (EC) 2799/98, (EC) 814/2000, (EC) 1290/2005 and (EC) 485/2008.

<sup>50</sup> Following a challenge by the European Parliament, the Court upheld the legality of this implementing power in light of Protocol 36 to the Lisbon Treaty (on transitional provisions). See joined cases C-317/13 and C-679/13 *Parliament v Council* ECLI:EU:C:2015:223. See also M Chamon, 'Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty' cit. 1535.

<sup>51</sup> See e.g. Implementing Decision (EU) 2017/246 of the Council of 7 February 2017 setting out a Recommendation for prolonging temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. This implementing power was already granted to the Council under the pre-migration crisis Schengen Borders Code (SBC) but has only recently been exercised for the first time. Remarkably, while art. 29 refers to a recommendation to be adopted by the Council, the Council adopted an 'Implementing Decision setting out a Recommendation'.

<sup>52</sup> While the Commission proposed to exercise this power itself, the new Frontex Regulation leaves it to the Council to determine whether there is a "situation at the external border requiring urgent action". Cf. art. 19 of the Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September

making power under art. 78(3) TFEU.<sup>53</sup> Finally then, also the euro-crisis resulted in the activation of the Council's exceptional implementing function under art. 291(2) TFEU.

The non-legislative European Financial Stabilisation Mechanism (EFSM) Regulation provided a first illustration of an exceptional implementing function being granted to the Council.<sup>54</sup> In line with the proposal of the Commission,<sup>55</sup> the regulation indeed provides that a decision on granting a loan to a eurozone Member State be taken by the Council.<sup>56</sup> A second important example to note is the Council's power under the Two Pack to adopt macroeconomic adjustment programmes for those Eurozone countries that have requested financial assistance from the ESM.<sup>57</sup> This programme will then replace the economic partnership programme, which the Member State concerned will have adopted under the excessive deficit procedure in which it would typically already have found itself.<sup>58</sup> A third implementing power has been granted to the Council in the Single Supervisory Mechanism (SSM) Regulation, since the Chair and Vice-Chair of the Supervisory

2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) 863/2007 of the European Parliament and of the Council, Council Regulation (EC) 2007/2004 and Council Decision 2005/267/EC with the Commission's proposed art. 18 in European Commission, Proposal COM(2015) 671 final for a Regulation of the European Parliament and of the Council on the European Border and Coast Guard and repealing Regulation (EC) 2007/2004, Regulation (EC) 863/2007 and Council Decision 2005/267/EC.

<sup>53</sup> See e.g. Decision (EU) 2015/1601 of the Council of 22 September 2015 on establishing provisional measures in the area of international protection for the benefit of Italy and Greece. It may be noted here that in this Decision, the Council also conferred a further implementing power (under art. 291 TFEU) on itself rather than to the Commission, as proposed by the latter (cf. art. 4 of Council Decision 2015/1601 with art. 4 of the Proposal COM(2015) 451 final of the Commission of 9 September 2015 for a Council Decision establishing provisional measures in the area of international protection for the benefit of Italy, Greece and Hungary. See also Council Implementing Decision (EU) 2016/408 of 10 March 2016 on the temporary suspension of the relocation of 30 per cent of applicants allocated to Austria under Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

<sup>54</sup> See Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European Financial Stabilisation Mechanism. Thus, here again the Council relied on a primary law executive power to confer implementing powers to itself.

<sup>55</sup> See art. 4 of Communication COM(2010) 2010 final from the Commission of 3 March 2010 on Europe 2020: A strategy for smart, sustainable and inclusive growth.

<sup>56</sup> See art. 3 of the European Financial Stabilisation Mechanism (EFSM) Regulation (EU) 407/2010 of the Council of 11 May 2010 on establishing a European financial stabilisation mechanism.

<sup>57</sup> See art. 7 of the Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. The Commission also proposed this implementing power in Proposal COM(2011) 819 final of the Commission of 23 September 2011 for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area.

<sup>58</sup> See art. 9 of the Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

Board are formally appointed by the Council pursuant to implementing acts.<sup>59</sup> A fourth implementing power may be found in the Single Resolution Mechanism (SRM) Regulation. In the original proposal of the Commission, the *ex-ante* contributions payable by Eurozone banks to feed the Single Resolution Fund would be calculated based on a methodology worked out by the Commission in delegated acts.<sup>60</sup> In the final SRM Regulation, however, this methodology is prescribed in Council implementing acts.<sup>61</sup> The Council also exercised this power when it adopted Regulation 2015/81.<sup>62</sup> Finally, in response to the Covid-19 pandemic, the Council has been granted further implementing powers. For instance, under the Recovery and Resilience Facility, the Council, through implementing acts, approves the national plans based on the Commission's assessment and the Council may suspend commitments to ensure coherence with economic governance under the SGP.<sup>63</sup> In the Commission's original proposal it was already foreseen that the suspension would be decided upon by the Council but the approval of the national plans would have been decided upon by the Commission.<sup>64</sup> The common denominator in these cases of course is that, to a varying degree, the decisions to be taken are of significant political and economic importance. It would suggest that apart from the essential elements being reserved to the legislature, there is a further distinction between significant (but not essential) elements that come under the natural authority of the Council and less significant elements of implementation that may be left to the Commission (or the Member States

<sup>59</sup> See art. 26(3) of the Regulation 1024/2013 cit. In the Commission's original proposal (see Proposal COM(2012) 511 final from the Commission for a Regulation of the European Parliament and of the Council of 29 October 2013 on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area), the Chair and Vice Chair were elected by the ECB Governing Council, from the members of the Executive Board and the Governing Council respectively.

<sup>60</sup> See art. 66 of the Proposal COM(2013) 520 final from the Commission for a Regulation of the European Parliament and of the Council of 10 July 2013 on establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Bank Resolution Fund and amending Regulation (EU) 1093/2010 of the European Parliament and of the Council.

<sup>61</sup> See art. 70(7) of the Regulation (EU) 806/2014 of the European Parliament and of the Council of 15 July 2014 on establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) 1093/2010.

<sup>62</sup> Implementing Regulation (EU) 2015/81 of the Council of 19 December 2014 on specifying uniform conditions of application of Regulation (EU) 806/2014 cit. with regard to *ex ante* contributions to the Single Resolution Fund.

<sup>63</sup> See arts 20(1) and 10(3) of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 on establishing the Recovery and Resilience Facility.

<sup>64</sup> See arts 9 and 17 of the Proposal COM(2020) 408 final of the Commission for a Regulation of the European Parliament and of the Council of 28 May 2020 on establishing a Recovery and Resilience Facility.

or EU agencies).<sup>65</sup> Of course, so far, such a distinction is not formally recognised in the EU Treaties or by the Court.

#### IV. A CONSTITUTIONAL ASSESSMENT

Having identified several atypical cases of “implementation” in the area of EMU, the question becomes in how far these idiosyncrasies are defensible from a constitutional perspective. Evidently this question has to be addressed not simply in the light of the EU Treaties but also in light of the Court’s post-Lisbon jurisprudence on arts 290 and 291 TFEU, regardless how questionable some of these clarifications may have been.<sup>66</sup>

##### IV.1. THE ECB’S IMPLEMENTING FUNCTION UNDER THE SSM

Starting with the ECB’s implementing function, it was noted above that this has an unquestionable legal basis in primary law itself but that at least two pertinent constitutional questions remain, *i.e.* which standard should be applied to assessing the exercise of an implementing power by the ECB and whether the ECB should be denied the competence to supplement (rather than implement) EU legislation. The second issue borrows from the distinction introduced by arts 290 and 291 TFEU and is only relevant if this distinction can be applied *mutatis mutandis* to the ECB. So far, however, the Court has not provided much further clarity on how we can distinguish implementation from supplementation (under arts 290 and 291 TFEU). As a result, there is no proper standard to assess the ECB’s implementing decisions against. On the first question, it has been argued above, in light of the sound constitutional basis of the ECB, that the same generous standard as applies to the Commission’s implementation function under art. 291(2) TFEU should be relied upon.

Opportunities to test these questions have arisen but so far have not been seized. For instance, when the ECB determined that Landeskreditbank Baden-Württemberg was a significant entity that should come under the ECB’s supervision. That bank subsequently argued that given the “particular circumstances” as referred to in art. 6(4) of the SSM Regulation it should be exempted from direct ECB supervision. Since the Council had not further clarified the notion of “particular circumstances”, the ECB had done so itself in arts 70 and 71 of the SSM Framework Regulation.<sup>67</sup> When the Landeskreditbank challenged the

<sup>65</sup> For an argument that there may be a distinction between the material type of decisions which the Commission could adopt and those which the EU agencies could adopt, see M Chamon, ‘Beyond Delegated and Implementing Acts: Where do EU Agencies Fit in the Article 290 and 291 Scheme?’ in E Tauschinsky and W Weiss (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law – Walking a Labyrinth* (Edward Elgar 2018) 188.

<sup>66</sup> For a critical analysis of the Court’s post-Lisbon jurisprudence on arts 290 and 291 TFEU, see M Chamon, ‘Institutional Balance and Community Method in the Implementation of EU Legislation Following the Lisbon Treaty’ cit.

<sup>67</sup> See Regulation (EU) 468/2014 cit.

ECB's decision before the General Court, the latter noted that the Council had "confer[ed] on the ECB exclusive competence for determining the content of the concept of 'particular circumstances' within the meaning of Article 6(4), second subparagraph, of that same regulation, which was implemented through the adoption of Articles 70 and 71 of the SSM Framework Regulation".<sup>68</sup> The applicant however had only argued that the ECB had misapplied the SSM Regulation and its own SSM Framework Regulation when adopting the contested decision. As noted above, it could also have incidentally questioned the legality of arts 70 and 71 of the SSM Framework Regulation in light of the SSM Regulation (the ECB having overstepped its implementation mandate) and the illegality of the SSM Regulation itself (the Council having conferred a legislative power on the ECB rather than a permitted implementing power).<sup>69</sup> Concretely one could for instance argue that the ECB by determining what "particular circumstances" are, has supplemented the SSM Regulation whereas it is only empowered to implement the Regulation. Alternatively, one could argue that the Council in art. 6 of the SSM Regulation could not have validly conferred a supplementing power on the ECB. However, if the power to clarify the notion of "particular circumstances" is qualified as an implementing power to which the generous *Eures Network* standard of art. 291(2) TFEU is applied *mutatis mutandis*, it would seem difficult to conclude that the ECB has overstepped its implementation mandate.

#### IV.2. IMPLEMENTATION BY THE COUNCIL

The increased role of the Council in the implementation (in the broadest sense) of EMU law also raises constitutional questions. A first one results from *Spain v Council*, where the Court suggested that some "implementation" powers conferred in secondary legislation may not come under art. 291 TFEU. Another is the question whether the rule and exception foreseen in art. 291(2) TFEU has been respected.

##### a) False implementation.

The potential ramifications of *Spain v Council* are as of yet unclear. The Court held that some implementation cannot be qualified as implementation in the sense of art. 291 TFEU. But, does that mean that art. 291(4) TFEU also precludes such acts from figuring the prefix "implementing"? Clearly, the Council thinks not.<sup>70</sup> Further, since art. 291 TFEU does not apply, neither the Commission nor the Council would be the default EU actors to exercise these implementing powers and neither would the justification requirement to confer powers on the Council apply. Could the legislature confer this implementing power on a body like an EU agency (subject to it respecting the *Short-selling* doctrine)? At first sight, this would not appear to be possible if the implementing power finds its (im-

<sup>68</sup> Case T-122/15 *Landeskreditbank Baden-Württemberg v ECB* ECLI:EU:T:2017:337 para. 63.

<sup>69</sup> See M Chamon, 'Limits to Delegation under Article 290 TFEU' cit.

<sup>70</sup> As noted above, the Council adopted a further implementing act *vis-à-vis* Austria following the ruling in *Spain v Council* cit.



plied) legal basis in arts 121 and 126 TFEU, since these provisions only refer to the (European) Council, Commission, Parliament and Economic and Financial Committee. Then again, the lack of a reference to agencies (in art. 291 TFEU) was not an obstacle for the Court in *Short-selling* either.

One might be tempted to dismiss these “problems” as in-existent in practice and as merely resulting from an oddity in EU procedural law.<sup>71</sup> That is not the view taken here, however. The Court in *Spain v Council* clearly relied on a distinct interpretation of art. 291 TFEU, the relevance of which cannot be confined to the division of jurisdiction between the Court and the General Court. As it is, the Council has adopted further acts qualified as “implementing” acts for which it is doubtful that they could have been properly adopted by the Member States and for which it is therefore doubtful whether they come under art. 291 TFEU. The appointment of the Chair and Vice Chair of the SSM Supervisory Board is one such decision,<sup>72</sup> since *a fortiori* the appointment of an EU official is not something that a Member State can decide itself. Perhaps more significantly, the same seems to apply to the decision to grant a loan from the EFSM and the decisions adopting the macroeconomic adjustment programmes (MAPs) under the Two Pack. The fact that these replace the economic partnership programmes (EPPs) which are adopted by the individual Member States’ themselves should not immediately lead us to conclude that the adoption of MAPs does come under art. 291 TFEU. After all, the MAPs are qualitatively different from the EPPs. The latter are basically informational replies to the Commission’s recommendations, setting out what a Member State is (planning to) do(ing) in terms of its economic policy. The MAPs on the other hand are binding instructions, spelling out what economic reforms a Eurozone Member States is required to undertake by virtue of EU law. Whether or not this comes under either art. 291 TFEU or under an implied “implementing” power is constitutionally significant. While the Court has not required a justification in *Short-selling* to confer powers on an EU agency rather than the Commission or Council, the ruling may still be read in that way. The result of this would be that “implementing” powers that do not come under art. 291 TFEU could be conferred on any kind of body without needing a special justification, since there is no default actor to adopt such implementing acts to begin with. Even if such powers are conferred on the Council, the requirement of justification under art. 291(2) TFEU would still not apply. This would allow a further fragmentation of the EU executive process, in absence of any guiding framework.

b) Implementation in duly justified cases.

<sup>71</sup> Buchet for instance argues that the importance of this case is rather limited. See A Buchet, 'La réforme des pouvoirs conférés à la commission européenne, entre métamorphose et réminiscence' (2018) Cahiers de droit européen 226.

<sup>72</sup> See e.g. Implementing Decision (EU) 2018/1958 of the Council of 6 December 2018 on the appointment of the Chair of the ECB Supervisory Board.

Art. 202 TEC provided that the Council could reserve an implementing power to itself in “specific cases” which, in the Court’s case law, also needed to be properly substantiated.<sup>73</sup> The only relevant (pre-Lisbon) judgment of the Court however makes clear that it does not put the threshold very high for the Council to reserve powers to itself. In the, admittedly specific, case of the implementation of border security legislation during the transitional phase following the entry into force of the Amsterdam Treaty, the Court found the “general and laconic considerations” on the “enhanced role of the Member States and the sensitivity of the areas involved” sufficiently precise to allow it to review this choice<sup>74</sup> and subsequently held that the Council could reasonably take the view that a specific case (in the sense of art. 202 TEC) was at issue.<sup>75</sup>

This case law suggests that the Court will only set aside the choice of the Council to reserve itself implementing powers if that choice is manifestly inappropriate or if no justification is given. Arguably however, the bar for the Council to reserve powers to itself has also been raised by the Lisbon Treaty. Unlike art. 202 TEC, art. 291 TFEU now refers to “*duly justified* specific cases”,<sup>76</sup> which could be seen as a stricter standard unless one takes the view that it simply codifies the second comitology decision and the Court’s pre-Lisbon jurisprudence.<sup>77</sup> According to Blumann however, under the Lisbon framework it should be more difficult to reserve implementing powers to the Council.<sup>78</sup> The Comitology Regulation may also be read in this light. While in the pre-Lisbon *Commission v Council* case the Court still accepted a general argument on the sensitivity of the area concerned to confer implementing powers on the Commission, the current Comitology Regulation (and this differently from the Comitology Decision) provides that when adopting implementing acts in “particularly sensitive sectors”, the Commission will take special care not to go against any predominant opinion in the Appeal Committee.<sup>79</sup> This underscores the new reality that the simple fact that implementing acts are to be adopted in “particularly sensitive sectors” is not sufficient for the Council to reserve powers to itself.

<sup>73</sup> See case C-16/88 *Commission v Council* ECLI:EU:C:1989:397 para. 10; case C-257/01 *Commission v Council* ECLI:EU:C:2005:25 para. 50.

<sup>74</sup> *Ibid.* para. 53.

<sup>75</sup> *Ibid.* para. 59.

<sup>76</sup> In French, German, Italian and Dutch, the Treaties also refer to “des cas spécifiques dûment justifiés”, “entsprechend begründeten Sonderfällen”, “in casi specifici debitamente motivati”, “naar behoren gemotiveerde specifieke gevallen”.

<sup>77</sup> In his opinion in *Commission v Council*, AG Léger also noted that the Constitutional Treaty (now art. 291 TFEU) provided for conditions “a little more specific” than those in the second Comitology Decision. See case C-257/01 *Commission v Council* ECLI:EU:C:2004:226, opinion of AG Léger, para. 43.

<sup>78</sup> C Blumann, ‘Un Nouveau Départ pour la Comitologie. Le Règlement n 182/2011 du 16 février 2011’ cit.

<sup>79</sup> See recital 14 of the Comitology Regulation (EU) 182/2011 of the European Parliament and of the Council of 16 February 2011 on laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

So far, however, the Court has not been requested to apply this (new?) standard. It is far from clear therefore how instances of the Council's exceptional implementing function under art. 291 TFEU, like granting EFSM loans, the adoption of the MAPs, the methodology for calculating ex-ante contributions for the Single Resolution Fund, and finally some of the post-Covid-19 economic recovery measures should be assessed.

The fact that it is the Council that decides on granting EFSM loans is motivated as follows under the EFSM Regulation: "Given their particular financial implications, the decisions to grant Union financial assistance pursuant to this Regulation require the exercise of implementing powers, which should be conferred on the Council". In relation to the MAPs, Regulation 472/2013 provides that the power to adopt them should be conferred on the Council since it is "of particular relevance to the policy of economic coordination of Member States, which, pursuant to art. 121 TFEU, is to take place within the Council".<sup>80</sup> On the Council's power to define the methodology for ex-ante contributions, the SRM Regulation provides that "[t]he Council should, within the framework of the delegated acts adopted under Directive 2014/59/EU, adopt implementing acts to specify the application of the methodology for the calculation of individual contributions to the Fund, as well as the technical modalities for computing the flat contribution and the risk-adjusted contribution".<sup>81</sup> Finally, when it comes to the approval of the Member States' recovery and resilience plans and the possible suspension of commitments to ensure coherence with sound economic governance, Regulation 2021/241 on the Recovery and Resilience Facility provides respectively that "[t]he Council should approve the assessment of the recovery and resilience plans by means of an implementing decision"<sup>82</sup> and that "in view of the importance of the financial effects of the measures imposed [*i.e.* the suspension of commitments], implementing powers should be conferred on the Council".<sup>83</sup>

Undoubtedly these "justifications" may be qualified as rather "general and laconic", although this does not exclude that, read in their context, they may amount to duly justified substantiations in the sense of art. 291(2) TFEU. If we take a conservative stance, whereby the threshold to reserve implementing powers to the Council under Lisbon rules is the same (or at least not lower) than the threshold pre-Lisbon, the justifications given in the EFSM and Two Pack regulations would indeed seem sufficient. Given the possible impact on the EU budget and the Council's role in establishing the budget, a role for that institution in the decision on granting EFSM loans indeed seems appropriate or at least does not seem manifestly ill-conceived. Again, given the role of the Council in the coordination of the Member States' economic policies, it is not manifestly inappropriate to grant the Council an implementing power to adopt MAPs. Even if a higher threshold is applied,

<sup>80</sup> See recital 18 of the Regulation's preamble.

<sup>81</sup> See recital 114 of the Regulation (EU) 806/2014 *cit.*

<sup>82</sup> See recital 45 of Regulation 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility.

<sup>83</sup> *Ibid.* recital 29.

because for instance the Comitology Regulation makes clear that the Commission may also be empowered to adopt implementing measures in “particularly sensitive sectors”, it seems doubtful that the Council manifestly erred in reserving to itself an implementing power, since in the legislature’s justification there is no reference to the sensitivity of the area concerned but only (implicitly) to the traditional dominant role of the Council in budgetary and economic coordination affairs. The same may finally be said as to the suspension of commitments under the Recovery and Resilience Facility Regulation. The situation is different however for the Council’s implementing power to determine the methodology for the calculation of ex-ante contributions under the SRM Regulation and for the approval of national plans under Recovery and Resilience Facility. The only relevant recitals to those Regulations simply postulate that the Council should establish the methodology and should approve the plans but without justifying why this ought to be so. The complete absence of justification then amounts to a manifest violation of the duty to provide a statement of reasons under art. 296 TFEU.

In light of the previous subsection, an important caveat should still be stressed here: if these five cases, which the legislature and the Council seem to assume come under art. 291 TFEU, are actually not governed by art. 291 TFEU, following *Spain v Council*, the duty of motivation that rests on the legislature pursuant to art. 291(2) TFEU might also not apply. As a result, such *sui generis* implementing powers could be reserved to the Council without requiring any special justification at all. Whether this is so of course depends on the (procedural) requirements which the Court would impose on the exercise of the *sui generis* implementing powers, which it has discovered in *Spain v Council*. In any event, the standard under art. 296 TFEU should be met, but it would further seem advisable, from a rule of law and legal certainty perspective, to apply art. 291(2) TFEU by analogy.

c) Covid-19 a catalyst for further constitutional modification?

After this *Article* was provisionally finalized, the EU institutions adopted a plethora of measures to tackle the Covid-19 pandemic. Given these measures’ economic and political significance, they present strong intergovernmental features. Time and space do not allow a fully-fledged analysis of these measures. Still, it may be noted that in addition to the features of the Recovery and Resilience Facility Regulation discussed previously another remarkable aspect of this Regulation relates to the procedure for authorizing payments. This type of decision squarely falls within the Commission’s budgetary powers under the general Financial Regulation, as also reflected in the Commission’s original proposal in which it foresaw that payments would be made after a positive assessment of whether the goals of the national recovery and resilience plans had been achieved.<sup>84</sup> Under the final Regulation it is still the Commission taking the final decision but in accordance with art. 24(4), the Economic and Financial Committee also gives an opinion which the Commission must take into account in its assessment. What is more, recital 52 of the

<sup>84</sup> See art. 19 of the Proposal COM(2020) 408 final cit.

Regulation (but only this recital and not art. 24) even provides in a referral to the European Council if one or more Member States in the Economic and Financial Committee are of the opinion that another Member State did not achieve its targets. The recital thereby provides that the procedure on authorization is suspended as long as the European Council has not exhaustively discussed the matter. While this set up has been qualified as justified in light of the Member States' liability for the EU's financial situation and because this was (politically) the only viable solution to convince Member States such as the Netherlands,<sup>85</sup> this de facto modification of the Financial Regulation and the drafting technique of creating a referral to the European Council through a legislative act's recitals rather than in its main provisions are legally questionable and should not be replicated or generalised in the post-Covid-19 era.

## V. CONCLUSION

Has the deepening of the EMU resulted in the complementation, adaption or transformation of the law governing the implementation of EU legislation? Answering this question first requires delimitating the notion of the "law of EMU". In this *Article*, the law of the EMU is conceived strictly as being composed only of the body of EMU law that is proper EU law. The *inter se* and *inter omnes* international agreements concluded by Eurozone Member States were therefore not taken into account, even if they are part of the deepening of the EMU. It is clear that in the implementation of such agreements, the Member States can devise *ad hoc* arrangements which do not necessarily align with the default arrangements that apply under EU law and may indeed even undermine those default arrangements.

Focusing on EU law proper it may be noted that the implementation of EMU law indeed deviates from the default framework. However, the latter itself is not as clear-cut and simple as generally assumed and cannot be reduced to arts 290 and 291 TFEU either. Part of the *sui generis* framework for implementing EMU law is then constitutionally mandated and as such beyond reproach. This is especially so for the ECB's role in the SSM. Still a lingering issue here is whether the ECB is entitled to supplement legislation or whether in fact it can only implement legislation. This issue is obfuscated by the fact that under the Court's general jurisprudence both (very different) normative activities are blurred. However, while the Commission can both supplement and implement EU law (the distinction only being relevant to determine the modalities to exercise the competence), the ECB *prima facie* can only implement EU law (the distinction acquiring greater relevance since it would determine not the exercise but the existence of competence).

A second problematic aspect to the implementation of EMU law is that the Council is taking up more implementing powers, similar to the development in the area of migration following the 2015 migration crisis. It is following the deepening of EMU law that the

<sup>85</sup> See D Fromage, 'Towards Increasing Unity and Continuing Executive Predominance Within the E(M)U Post-COVID?' (2020) LIEI 385 and 395-396.

Court also identified a separate type of implementing power that is not covered by art. 291 TFEU or by the legal bases in the Treaties that directly confer an executive power on the Council. While not *a priori* restricted to the law of EMU, the latter has indirectly still “revealed” this separate type of power and has thus contributed to the adaptation of the EU law on implementation. The ramifications of this judicial discovery are still unclear. It could facilitate a further pluralisation of the EU executive as it could mean that the legislature has greater discretion in choosing the actor most appropriate to exercise certain *sui generis* implementing powers. Because of the sensitivity of the issues concerned, the Council has also been increasingly empowered under secondary legislation pursuant to art. 291 TFEU. While it is unclear whether post-Lisbon a stricter threshold applies for the Council to reserve implementing powers under art. 291(2) TFEU, one could argue that the mere fact that an area is (politically) sensitive is in itself insufficient for the Council to retain (or reclaim) implementing powers. At least in the SRM Regulation, an example may be found of the Council reserving implementing powers to itself (arguably for political reasons) without even meeting the rather lax pre-Lisbon standard. If these developments go unchecked, the law of implementing EMU law may de facto further develop into a field of law separate from the general framework for implementing EU law, thus transforming the law of implementation of EU legislation. At the time this *Article* was finalized, the dust was yet to settle on the plethora of EU measures adopted to tackle the economic fallout of the Covid-19 pandemic, yet the latter at least has the potential to serve as a further catalyst for such transformation.