ARTICLES

European Institutions Acting Outside the EU Legal Order: The Impact of the Euro Crisis on the EU's 'Single Institutional Framework'

Flore Vanackère* and Yuliya Kaspiarovich**

Abstract: In the aftermath of the global financial crisis, the EU and its Member States had to face very pragmatic issues: how to avoid the economic collapse of Greece, Portugal and Ireland? Decisions had to be taken quickly in any institutional or legal forum that was immediately available. For this specific reason, legal solutions entailing the conclusion of international agreements by some of the EU Member States outside the EU legal framework were taken as a new normal. Due to a close legal relationship between these new international treaties and the EU legal order, a decision was also taken to "borrow" already existing EU institutions and entrust them with new tasks. In this *Article*, we question the role of EU institutions outside the EU legal framework. We first address the evolution of the EU institutional framework in the context of the euro crisis in relation to art. 13 TEU and recital 7 of the TEU preamble and the requirement of "unity of the institutional framework". Section II shows that "borrowing" the EU institutions outside the EU legal framework does not seem to alter the nature of the single EU institutional setting. Section III questions whether the tasks entrusted to the EU institutions outside the EU legal framework do not undermine the existing institutional equilibrium within the EU legal order. Section IV addresses the EU response to the Covid-19 pandemic from an institutional perspective as raising similar concerns within the EU legal order. The last section concludes.

Keywords: EU institutional framework – eurozone crisis – European Stability Mechanism – Covid-19 – Next Generation EU – institutional adaptability.

* Teaching and research assistant, Global Studies Institute, University of Geneva, flore.vanackere@unige.ch.

** Assistant professor, University of Groningen, y.kaspiarovich@rug.nl.

European Papers
Vol. 7, 2022, No 1, pp. 481-506
www.europeanpapers.eu
ISSN 2499-8249
doi: 10.15166/2499-8249/568

I. Introduction

"Desiring to enhance further the democratic and efficient functioning of the institutions to enable them better to carry out, within a single institutional framework, the tasks entrusted to them […]". This is the wording of para. 7 of the Treaty on the European Union's (TEU) preamble. The history of the TEU and its preamble is a relatively recent one. It was adopted in 1993 with the entry into force of the Treaty of Maastricht, creating a framework for European communities and other existing "pillars". This explains the desire to further enhance the functioning of already existing institutions.[1]

This *Article* aims at investigating the current role of existing institutions within the complex legal architecture of the European Union (EU) and outside the EU legal framework. In relation to para. 7 of the preamble, art. 13 TEU lists these institutions as a "single institutional framework" within the EU. According to para. 7 and art. 13 TEU, the EU institutions should "act within the limits of the powers conferred [on them] in the Treaties" or "carry out […] the tasks entrusted to them". In other words, the institutions established by the Treaties shall act only in respect of the competencies conferred upon them by the Member States in the Treaties. As established, the Court of Justice of the European Union's (CJEU) case-law allows tasks to be attributed to the EU institutions by the Member States outside the EU legal order.[2] Those tasks, however, cannot alter the essential character of the powers conferred on the institutions by the EU Treaties. What happens if the EU institutions are "used" outside the EU legal framework? Or even worse, what happens if the EU institutions are empowered to act outside the EU treaties circumventing the obligations enshrined in them?

Even though these questions seem to be completely hypothetical, they could not be more concrete, especially for the last decade. Indeed, in the aftermath of the 2008-2009 worldwide economic and fiscal crisis, the EU Member States had to take urgent measures aimed at helping the most vulnerable eurozone economies (particularly, the countries nicknamed the "PIIGS": Portugal, Italy, Ireland, Greece, and Spain). To this end, the eurozone Member States established some *ad hoc* mechanisms outside the EU legal framework. The last of them was the European Stability Mechanism (ESM), an international law institution, put in place *via* the conclusion of an intergovernmental treaty. Though it is situated outside the EU legal order, the ESM mobilizes EU institutions in its functioning. As we will see in more detail *infra*, some of the EU institutions negotiate and conclude agreements

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

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

containing economic assistance to EU Member States in difficulty. Thus, they seem to act outside the EU legal framework, far beyond the "tasks entrusted to them", and even exceeding the "essential character of the powers conferred" on them by the Treaties.

In this *Article*, we will question the role of EU institutions outside – but at the margins of – the EU legal framework. We will first address the evolution of the EU institutional framework in the context of the euro crisis in light of the requirement to ensure the unity of the institutional framework. Then, our analysis will focus on the institutional setting of the ESM. The first Section will show that the "empowerment" of the EU institutions with tasks outside the EU legal framework does not seem to alter dramatically the nature of the EU institutional setting. After all, the same institutions are simply just act to preserve "general interest of the Union". As example, we will discuss the evolution of the eurozone governance on the margin of the EU legal order and its implications on the unity of the EU institutional framework (II). The following Section will question whether the tasks entrusted to the EU institutions outside the EU legal framework do not undermine institutional equilibrium as it exists within the EU legal order (III). In the light of this analysis, the fourth Section will examine the EU emergency response to the Covid-19 pandemic and the role of the EU institutions in it (IV).

II. The case of the ESM: why the eurozone's governance system does not question the unity of the EU institutional framework

On September 15, 2008, one of the most spectacular bankruptcies in the history of the U.S. banking sector occurred. With the subprime mortgage crisis already well underway, the collapse of Lehman Brothers sounded the death knell for fundamentally reckless speculative practices. Given the significant intertwining of various financial markets and actors, a series of doubts emerged about the solvency of the financial system as a whole. As early as the end of 2008, some economists spoke about a "systemic" crisis and rightly so. Regulatory changes were too few and far too late.[3] In 2008-2009, the global financial crisis immediately followed this failure, triggered by the collapse of the derivatives market, which then spread to the real economy and affected the whole complex network of financial interrelations and interdependencies. Reckless practices, questionable lending to economically and financially weaker or vulnerable States,[4] the lack or insufficiency of adequate regulations and controls, poorly designed, if not "rotten" financial products and their rapid dissemination in the global financial market, a serious loss of confidence in the credit institutions' capacity to value their financial assets… All of

[3] AJ Menendez, 'The Structural Crisis of European Law as a Means of Social Integration from the Democratic Rule of Law to Authoritarian Governance' (ARENA Working Paper 2-2016).

[4] Think of the practices developed in Greece by the financial institution Goldman Sachs. See M Lynn, *Bust: Greece, the Euro and the Sovereign Debt Crisis* (John Wiley & Sons 2010).

these are interconnected factors which led to the eruption of a large-scale financial crisis, which rapidly turned into a public debt crisis affecting some euro area countries.

Indeed, some States, particularly in Europe, had some financial institutions and a number of credit institutions investing in their debt that were in difficulty. As a result of this "financing" of their debt, the economies of the States became highly dependent on the financial markets, mainly by means of the emission of bonds. In turn, some of these States have invested in the assets of several financial institutions, without necessarily having carried out any control on the quality of the assets in which these investments were made. Thus, in order to avoid some systemic banking institutions to collapse, it became necessary to inject capital, acquire "toxic" assets or extend conditional guarantees. Accordingly, the financial institutions concerned were absolved of any responsibility due to an erroneous assessment of the risks.[5] In addition, when some credit institutions ran into serious difficulties due to their speculative practices and started to incur irrecoverable losses, a series of national public institutions intervened to support the bail-out of too-big-to-fail financial institutions, either by injecting capital directly or by acquiring stakes in "dangerous" or "rotten" assets of the financial institutions.

As a result, some countries got into significant economic difficulties in terms of public debt, as they were already under strain from previous decisions establishing increasingly strict fiscal rules and had suffered a decline in tax revenues since the beginning of the crisis.[6] A major failure of the banking sector at global level, which caused a massive increase in public debt, was the main cause of this systemic crisis. In response to the crisis, a legal framework was established very quickly at a European and global level, despite the great technical complexity of the failures to be addressed. In this – for some EU countries – dramatic context, the setting up of an intergovernmental institutional framework *via* the European Financial Stability Facility (EFSF), the ESM and the Fiscal Compact outside the EU legal framework[7] was justified by the urgency of the financial and economic crisis that hit the eurozone hard from 2009. The establishment of this new governance system, however, calls into question certain principles contained in primary law, notably the unity of the institutional framework of the Union contained in para. 7 TEU's preamble.

In the following Section, we propose to investigate the complex legal setting of the ESM and some issues related to the "borrowing" of EU institutions outside the EU legal framework. We will start by briefly explaining how this mechanism was set up (II.1); we will then explore the functioning of the ESM and provide some elements of the answer to the question raised in the introduction (II.2).

[5] AJ Menendez, 'The Structural Crisis of European Law as a Means of Social Integration' cit. 3.

[6] C Bradley, 'From Global Financial Crisis to Sovereign Debt Crisis and Beyond: What Lies Ahead for the European Monetary Union?' (2013) TransnatlL&ContempProbs 9, 17.

[7] B de Witte, 'Using International Law in the Euro Crisis: Causes and Consequences' (ARENA Working Paper 2013).

II.1. The establishment of the ESM

The ESM is an international institution established by an intergovernmental treaty in 2012 by 17 Member States of the eurozone. This treaty replaces the European Financial Stability Mechanism (EFSM)[8] and the EFSF and consists of an international financial institution set up which finds its source in the primary law of the Union. The establishment of the ESM was theoretically possible only by amending the TFEU, as the existence of such a mechanism was not provided for in the Treaties – even though in its *Pringle* judgment, the CJEU stated the opposite arguing that the participation of the EU Member States in the ESM was not in violation of the EU Treaties and was thus possible without amending them.[9]

Indeed, one should remember that on the basis of art. 48 TEU, following the simplified revision procedure,[10] the European Council adopted a decision on March 11, 2010, to amend art. 136 TFEU, which is found in the chapter specifically concerning those Member States whose currency is the euro. Since its amendment in 2011, art. 136 TFEU contains a third paragraph which states that: "The Member States whose currency is the Euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the Euro area as a whole". However, this amendment was not in force when the ESM entered into force,[11] and the ESM was thus put in place as an intergovernmental organization based on an international treaty between the euro area Member States.

There were several reasons for setting up the ESM as an intergovernmental structure. First of all, the economic emergency in which the eurozone found itself when the first structures for providing financial assistance to Member States were adopted justified the need to quickly set up an assistance structure *via* an intergovernmental route – with the lack of legitimacy[12] that this solution implies – rather than the "community" route. Furthermore, the capacity of the previous mechanisms – EFSM and EFSF – to act was very poor. The former, based on art. 122 TFEU, had a very limited lending capacity which did

[8] Established on the basis of art. 122 TFEU, thus within the legal and institutional framework of the EU.

[9] Case C-370/12 *Pringle* ECLI:EU:C:2015:400 paras 68, 72, 109 and 184, when the Court states that "the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States" (para. 184).

[10] Art. 48(6) TEU provides with a simplified procedure for revising the Treaties and contains two substantial conditions in addition to the procedural conditions required for amending the Treaties. First, the revision can only concern the third part of the TFEU; second, the amendment cannot increase the competencies that are attributed to the EU in the Treaties.

[11] This amendment entered into force in 2013.

[12] About legitimacy in the functioning of the EMU, see V Schmidt, *Europe's Crisis of Legitimacy Governing by Rules and Ruling by Numbers in the Eurozone* (Oxford University Press 2020). On the consequences of euro-crisis institutional upheaval and legitimacy concerns, see M Dawson and F de Witte, 'Constitutional Balance in the EU after the Euro-Crisis' (2013) ModLRev 817.

not allow it to address the difficulties faced by Greece. The later mechanism had a greater capacity of action but was limited in time.

As it has often been pointed out, the establishment of the ESM raised numerous questions of compatibility with primary EU law.[13] These issues were addressed by the Court first in its famous *Pringle* judgment. In this case, the Court not only decided on the delicate issue of allocation of powers (economic v. monetary policy) but also concluded that the ESM was not in violation of the no bail-out clause laid down in art. 125. The Court also checked the compatibility of the ESM with arts 122[14] and 123 TFEU[15], art. 13 TEU and its principle of institutional balance,[16] and finally with principle of loyal cooperation as set out in art. 4(3) TEU[17]. With no surprise, the conclusion was that the ESM is perfectly consistent with the EU law. While, in a context of economic and financial emergency, the Court considers the ESM to be compatible with primary law on all the points raised by

[13] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance' (2013) EuConst 263, 273; J Tomkin, 'Contradiction, Circumvention and Conceptual Gymnastics: The Impact of the Adoption of the ESM Treaty on the State of European Democracy' (2013) German Law Journal 169, 172. More nuanced, other authors have argued that the Court in its *Pringle* case played with the ambiguous terms of the "no bail-out clause". See PA Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) German Law Journal 141, 162.

[14] Regarding the question related to the compatibility of the ESM with art. 122 TFEU raised by Irish Supreme Court, the CJEU answers that the action of Member States in establishing an assistance mechanism such as the ESM does not in any way impede the Union's powers to set up a mechanism on the basis of art. 122 TFEU. According to the CJEU, art. 122 TFEU is not a satisfactory legal basis for the establishment of the ESM. See *Pringle* cit. paras 115-122. The failure to rely on existing Treaty provisions has been heavily criticized, not only by legal scholars, but also by the European Parliament (see European Parliament, Resolution of 23 March 2011 on the Draft European Council Decision Amending Article 136 of the Treaty of the Functioning of the European Union with Regard to a Stability Mechanism for Member States Whose Currency Is the Euro, and the ECB (see European Central Bank, Opinion of 17 March 2011 on a Draft European Council Decision Amending Article 136 of the Treaty on the Functioning of the European Union with regard to a Stability Mechanism for Member States Whose Currency Is the Euro para. 8).

[15] Art. 123 TFEU enshrines the prohibition on the ECB to acquire Member States' debt directly, just like does art. 125 TFEU, with the aim that Member States should pursue a sound budgetary policy. As it has been noted, and rightly so in our view, a link can be established between the ESM and what was called the ECB's "unconventional policy" (the Outright Monetary Transaction – OMT – program). Indeed, the OMT program foresees that, if a Member State is assisted by the ESM via the conclusion of a memorandum of understanding, the ECB can buy State's debt unlimitedly – in contradiction with art. 123(1) TFEU. One could thus see the ESM and its aid programs as a way to circumvent the prohibition of art. 123 TFEU *stricto sensu*. We will not elaborate further on this point, as the OMT program and other "unconventional policies" led by the ECB is not the main topic of this article. For more details see K Pantazatou and IG Asimakopoulos, 'Conventional and Unconventional Monetary Policy' in F Fabbrini and M Ventoruzzo (eds), *Research Handbook on EU Economic Law* (Elgar Publishing 2019) 173.

[16] Section III of this *Article* will discuss in detail the consequences of the *Pringle* judgment on the principle of institutional balance laid down in art. 13 TEU. Indeed, even if the Court does not clearly raise the question of institutional balance in its *Pringle* judgment, this principle is however at stake in Court's reasoning on art. 13 TEU. See M Chamon, "The Institutional Balance, an Ill-fated Principle of EU Law?" (2015) EPL 371, 388.

[17] *Pringle* cit. paras 148-152.

the complainant[18], there are several arguments on which this decision has to be criticized. Although, the purpose of this *Article* is not to provide yet another commentary on the Pringle judgment[19], some critical considerations shall be addressed below.

First, the way the Court differentiates monetary and economic policy – a delimitation which is the fundamental condition for the validity of the ESM under art. 48(6) TEU – is not satisfactory.[20] Indeed, and as it was already suggested by Paul Craig, the argument that the ESM was primarily about monetary policy, in the light of the wording of arts 3 and 12 of the ESM Treaty[21], is the key.[22] However, the Court's argumentation in the Pringle case can be summarized as follows: stability of euro within the EU monetary policy and stability of the euro area within the ESM are completely different objectives. According to the Court, the ESM cannot be seen as pursuing a "monetary policy" (exclusive EU competence) objective but an "economic policy" (Member States' competence that EU can only coordinate).[23] In our view, the Court, by displaying its tautological legal formalism and not elaborating sufficiently enough its reasoning on the delimitation of both competences, misses the opportunity to clarify the real *raison d'être* of the ESM in the light of economic realities.[24] As it was shown in the Section II, the systemic nature of the economic crisis and the intertwined nature of current economic realities makes such a distinction if not technically impossible,

[18] It was not surprising as the opposed solution "would have precipitated further crisis in the financial markets" (see P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) Maastricht Journal of European and Comparative Law 1).

[19] See among others PA van Malleghem, 'Pringle: A Paradigm Shift in the European Union's Monetary Constitution' (2013) German Journal of Law 141, 163; B de Witte, 'The Court of Justice approves the creation of the ESMS outside the EU legal order: Pringle' (2013) CMLRev 805, 831; P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' cit.

[20] As a reminder, the simplified revision procedure of art. 48(6) TEU could only be mobilized if, *inter alia*, the parts of the Treaties other than part III of the TFEU were not affected by the envisaged amendment. However, according to the complaint raised by Thomas Pringle as related in the first preliminary question of Irish Supreme Court, the Member States of the Eurozone acted in the field on EU monetary policy by establishing the ESM (which is an exclusive competence of the EU) and not economic policy as argued by the Court (which is primarily a Member States' competence exercised under the coordination of the competent EU institutions). This amendment of EU Treaties thus affected the provisions on the division of competences contained in the first part of the TFEU which could not be done *via* a simplified revision procedure.

[21] These two dispositions express the main objective pursued by the ESM, the stability of the Euro area as whole.

[22] P Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology' cit. 5. According to the author, and we follow him on this, "the reasoning [of the CJEU on this distinction] was strained".

[23] According to the Court, "the objective pursued by [the ESM], which is to safeguard the stability of the euro area as a whole, [is] clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy". See *Pringle* cit. para. 56.

[24] Indeed, the two objectives do not seem to us, on economic grounds, to be so distinct as the Court claims it to be in *Pringle* cit. para. 56.

at least intellectually problematic. As we shall see below,[25] this unsatisfactory distinction raises concerns with regard the ECB's action and liability in the context of the ESM.

Second, one may ask whether the establishment of such a mechanism on the fringe of primary law has circumvented certain provisions of primary law, in particular the no bailout rule,[26] as well as the already existing possibility of providing financial aid to a Member State facing extraordinary difficulties within the framework of the Union.[27] Indeed, initially adopted in the Maastricht Treaty, the non-bailout clause was intended to create a monetary union, which excluded, among other things, the bailing out of Member States in difficulties. In this respect, the establishment of a financial assistance mechanism such as the ESM raises obvious questions of compatibility with arts 123 and 125 TFEU. Furthermore, as the records of the negotiations show, Member States explicitly agreed that the EMU should be a "no bailout" EMU.[28] However, in its *Pringle* judgment, the Court validates the ESM as being compatible with the EU Treaties' "no bail-out clause". According to the Court, the objective of this provision is to ensure that Member States pursue sound budgetary policies, an objective which is consistent with the strict conditionality attached to the aid granted under the ESM.[29] Court argues that financial assistance is granted to Member States on the basis of strict conditionality. Thus, an assisted Member State should be encouraged to pursue a fiscal policy that respects the spirit and the objective of art. 125 TFEU. This reading of art. 125, if it allows the validation of the ESM, is not entirely convincing. The prospect of financial assistance in the case where a Member State would be unable to finance itself on the markets seems to us, on the contrary, to fundamentally impact the way in which Member States shall conduct their budgetary policy in the Union. The Court with its understandable concern to validate the ESM is however unconvincing in its legal reasoning.

[25] See section II.2 concerning the institutional functioning of the ESM.

[26] Art. 125 TFEU states that: "[t]he Union [or a Member State] shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project".

[27] Art. 122 TFEU states that: "1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular, if severe difficulties arise in the supply of certain products, notably in the area of energy". 2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken".

[28] European Parliament, *EP Analytical Summary of the Debates on EMU for the ICG* (11 June 1991) ec.europa.eu.

[29] The Court states that "[g] iven that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished [...]". See *Pringle* cit. para. 136.

One could elaborate further and further on this judgment, as it is one of the fundamental cases not only in the field of EMU policy but also more largely concerning the institutional balance within the EU. We shall remind our reader however that the objective of our *Article* is not to draw a comprehensive critical analysis of this case, but rather to show that the establishment of the ESM continues to raise constitutional questions of fundamental importance for the EU. In spite of previous considerations, one should acknowledge that the ESM is closely entangled with EU law and, therefore, evolves in parallel with it. This closeness is indicated by several observations. Indeed, the very existence of the ESM is based on a provision of EU primary law. Moreover, its structure is a continuation of previous mechanisms adopted in the framework of the Union's economic policy.[30] And finally, an ongoing reform of the ESM and of the Banking Union will further contribute in bringing the institutional frameworks of the ESM and of the Union closer together.[31]

II.2. The institutional functioning of the ESM

As we said above, the purpose of the ESM is to provide stability support – *i.e.*, financial assistance – to Member States in serious financial and economic difficulties or at risk of such difficulties, but only on the condition that such assistance is essential to preserve the stability of the euro area (art. 3 of the ESM Treaty). The ESM has a lending capacity of EUR 700 billion, and the States Parties contribute to it in accordance with the distribution key set out in art. 8 and detailed in the Annex to the ESM Treaty. This distribution key is based on the relative contribution capacities of the Member States and, therefore,

[30] Especially the "six-pack" and "two-pack" which aim at strengthening the economic governance in the Eurozone, both *via* a preventive and a corrective branch. See the consideration of the CJEU in *Pringle* cit. paras 58-59. The Court states that "the stability mechanism whose establishment is envisaged by art. 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union".

[31] At the Euro Summit meeting of 29 June 2018, the EU leaders agreed that "[t]he ESM will provide the common backstop to the SRF" (see the statement of the Euro Summit: European Council, *Meeting on 29 June 2018* www.consilium.europa.eu). The ESM common backstop would take the form of a revolving credit line and would be a last resort tool subject to the principle of fiscal neutrality in the medium term. This reform is now about to take place, as the international agreements amending the ESM on the 27 January 2021. Among others, art. 3 of the ESM Treaty has been supplemented by a paragraph indicating that "The ESM may provide the backstop facility to the SRB for the SRF to support the application of the resolution tools and exercise of resolution powers of the SRB as enshrined in European Union law". For further details, see European Council, *Statement by the Eurogroup President, Paschal Donohoe, on the signature of ESM Treaty and the Single Resolution Fund Amending Agreements* www.consilium.europa.eu. For further details about this reform, see JP Keppenne and Others, 'An ESM Backstop Facility to the Single Resolution Board: The Difficult Marriage of an EU Mechanism and an Intergovernmental Institution' in D Fromage and B de Witte (eds), 'Recent Evolutions in the Economic and Monetary Union and the European Banking Union: A Reflection' (Maastricht University Working Paper 2019) 38. This *Article* shall not address this topic further on.

influences the voting rights in the Board of Governors.[32] It is important to recall that the assistance granted to the requesting Member State is strictly conditional: indeed, the third paragraph of art. 136 TFEU provides that the granting of financial assistance is subject to strict conditionality. This corresponds to conditions linked to reforms that the Member State concerned must carry out to benefit from financial assistance from the ESM.[33] The principle of conditionality is central to the financial assistance policy of the ESM and is mentioned several times in the ESM Treaty. The "language" of conditionality depends on the situation of the assisted Member State and shall be elaborated in the Memorandum of Understanding concluded with such.[34]

"[T]he EU and the ESM are closely linked, notably because of their partially parallel membership and objectives [and] a number of factors indicate a strong link and even interdependence with Union law".[35] Even more than simply existing "in parallel", which would imply that both structures do not overlap, the ESM operates essentially by mobilizing both the institutions of the Union, as understood in the strict sense – *i.e.*, within the meaning of art. 13(1) of the TEU – and institutions whose existence is provided for by primary law but which are not included in art. 13 TEU. In fact, although it is an intergovernmental institution with a distinct legal personality, its operational power is based on the institutions of the Union. The Board of Governors is the decision-making body of the ESM and is composed of the Ministers of Finance of the Member States whose currency is the euro… just like the composition of the Eurogroup.[36] Eurogroup is an informal body whose existence is not formally mentioned in the Treaties under of art. 13 TEU alongside other institutions of the Union but can be found in art. 137 TFEU. Protocol 14 to the Treaties defines it as an informal meeting of the Ministers of Finance of the Member States.[37]

[32] This preponderant weight of the general creditor states in the decision-making process, while easily understandable due to the different contribution capacities of each Member State, nonetheless results in a notable imbalance between Member States of the Eurozone. For further details, see F Fabbrini, 'States' Equality v States' Power: The Euro-crisis, Inter-State Relations and the Paradox of Domination' (2015) CYELS 3, 16. The author states that "the Euro-crisis and the legal and political responses to it have also produced relevant constitutional implications for the horizontal relations of power between the Member States".

[33] This will often involve some of Member States' social and economic policies - removal of "employment disincentives" for example, or increased budgetary imperatives generating so-called "austerity" (budget cuts for certain policies); also structural reforms linked to programs or funds for privatization of state's assets, programs for recapitalization of certain financial institutions by the debtor Member State, etc. Looking at the Memorandum of Understanding between the ESM and Greece, it appears that the main areas of reform are fiscal and other structural policies: policy concerning social welfare, financial stability (*i.e.*, support for financial institutions), labor and product markets, privatization policy, and modernization of public administration.

[34] We will examine further on the procedure to conclude such instruments.

[35] JP Keppenne and others, 'An ESM Backstop Facility to the Single Resolution Board' cit. 31.

[36] Treaty establishing the European Stability Mechanism (ESM Treaty) [2012] art. 4.

[37] Art. 1 of Protocol n. 14 on the Euro Group [2008] in particular that: "The ministers of the Member States whose currency is the Euro shall meet informally among themselves".

In addition to Eurogroup, two additional EU institutions are also involved in the functioning of the ESM: The ECB and the European Commission. We will now focus on the role played by the Commission. It is indeed the Commission that negotiates and concludes, on behalf of the ESM, the Memoranda of Understanding containing financial assistance plans. After receiving a request from a Member State in difficulty, it is up to the Board of Governors to decide whether to grant it financial aid or not.[38] If the decision to grant the assistance is positive, art. 13(3) of the ESM Treaty stipulates that it is up to the Commission (and, to a lesser extent, the ECB, possibly assisted by the IMF), to negotiate and conclude the Memorandum of Understanding containing a macroeconomic adjustment program.[39] This assistance instrument may consist of a range of tools listed in arts 14 to 21 of the ESM Treaty.

The Commission has a central role in the ESM's action towards assisted Member States. Initially, and on the basis of a mandate from the Board of Governors, it must assess whether the situation of the Member State that has requested financial assistance jeopardizes the stability of the eurozone as a whole and what the assistance to the debtor Member State would consist of.[40] Subsequently, based on a second decision adopted by the Governing Council, the Commission is responsible for negotiating and signing the Memorandum of Understanding with the concerned Member States in the name and on behalf of the ESM.[41] Finally, the Commission, possibly assisted by the ECB, is responsible for monitoring whether the terms of the Memorandum of Understanding and strict conditionality are being respected, *i.e.*, whether the Member States receiving financial assistance complies with the conditions contained in the agreed economic adjustment program. The Commission's surveillance is carried out in conjunction with the European Semester, which aims at coordinating the economic policies of the EU Member States.

The significant involvement of the Commission in the negotiation and conclusion of the Memoranda of Understanding raises the question of the respect of Union law by the institutions acting in the framework of the ESM, including the respect of fundamental rights. It also questions who - the EU or the ESM - is the responsible entity in the event of an alleged occurrence of damage arising from the execution of these Memoranda of Understanding. More specifically, the question arises as to the unity of the Union's institutional framework in the field of economic and monetary policy.

Following the CJEU's reasoning in the *Pringle* case,[42] it is indeed the ESM that concludes Memoranda of Understanding and must insure the compliance of those with Union law. In this judgment, the Court considers that the institutions of the Union

[38] ESM Treaty cit. art. 13(2).

[39] This macroeconomic adjustment program is composed of financial assistance instruments depending on the situation of the assisted country.

[40] The stability of the Eurozone is, let us recall, the main goal of the ESM in pursuing its financial assistance policy.

[41] ESM Treaty cit. art. 13(1).

[42] *Pringle* cit.

mobilized in the context of the operation of the ESM triggers potential responsibility of the ESM and not of the Union. However, the Court takes care to temper this distinction between the structure of the Union and of the ESM and balance the aim pursued by the ESM against the one pursued by the Union. Thus, it affirms that even when it participates in the first place in the operation of the ESM, the Commission retains its role as guardian of the treaties. The Court goes further in its reasoning and states that the tasks entrusted to the Commission and the ECB in the context of the ESM Treaty do not distort the powers conferred on it by the EU and FEU treaties.[43]

The Court confirms this line in its *Ledra Advertising* judgment,[44] giving it the opportunity to rule more concretely on the role played by the institutions in the functioning of the ESM. This judgment followed on a claim for compensation for the damage caused as the result of application of the Memorandum of Understanding concluded between the Commission and Cyprus.[45] The Court once again tempered the distinction between the institutional framework of the Union and the ESM. It considered that in the case of a dispute arising under a Memorandum of Understanding concluded by the Commission in the framework of the ESM, damages may indeed be claimed from the Commission acting on the EU's behalf.[46] Again, in the context of the ESM, as the Commission pursues an aim similar to that entrusted to it by art. 17 TEU, it retains its role as guardian of the Treaties also in this context.

Thus, according to the CJEU, the involvement of the EU institutions in the negotiation, conclusion and supervision of the Memoranda of Understanding does not call into question the unity of the EU's institutional framework. Admittedly, the Commission and the ECB are acting outside of EU primary law. However, they are still bound to respect it. Moreover, when the Commission acts in the context of the ESM, it pursues, according to the Court, an objective identical to that prescribed by art. 17 TEU which is to "promote the general interest of the Union" and to "oversee the application of Union law".[47]

There is however an institutional issue that the Court fails to address in its *Ledra Advertising* judgment. While it expressly says that the Commission shall act in respect of fundamental rights and freedoms as guaranteed in the EU legal order, the Court does not settle this question with regard to the action of the ECB. Indeed, the ECB is only mentioned

[43] *Ibid*. paras 158-159.

[44] *Ledra Advertising v Commission and ECB* cit.

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

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

[47] *Pringle* cit. para. 163.

in the para. 64 of the judgment.[48] The question with regard the ECB's liability in the context of the ESM would however be an important issue to address mainly for two reasons. First, the ECB, unlike the other institutions listed in art. 13 TEU, has its own legal personality.[49] Furthermore, art. 340(3) TFEU, requires it to "make good any damage caused by its actions or by its servants in the performance of their duties". It would have been an important legal development should the Court have assessed the conditions for extra-contractual liability of the ECB with regard its action outside the EU legal framework (within the ESM).

Secondly and even more fundamentally, it seems that the Court contradicts its reasoning previously held in *Pringle* case. According to the Court, Commission's action within the ESM is in accordance with primary law because it continues to exercise its mission as "guardian of the Treaties" enshrined in art. 17 TEU (ensuring the stability of the euro area). In other words, and following the Court's reasoning, it seems that the Commission does not simply act in accordance with the Treaties, it is also somehow extends the reach of EU law beyond EU (in the ESM framework). Similar reasoning cannot be applied to the ECB's action which does not promote the general interest of the Union, but guarantees stability of the euro. Furthermore, the Court said in the *Pringle* judgment that the aim pursued by the ESM (maintaining stability of the eurozone as a whole) must be clearly distinguished from that pursued in the context of monetary policy by the ECB (price stability). In its *Ledra* judgment, the Court is confronted with the question of whether the Commission and the ECB can be held liable in case of a damage resulting from an action or an omission stemming from a Memorandum of Understanding. The Court examined this issue only with regard to a potential action by the Commission but not the ECB. Furthermore, if the Court were to accept that the ECB is required to conduct economic policy, would its action still be considered as being in conformity with the principles of attribution of competences and institutional balance stemming from art. 13 TEU?

Finally, it is important to mention that the CJEU is also involved in the operation of the ESM. Indeed, following art. 37(2) of the ESM Treaty, the Board of Governors shall rule on any dispute arising between a member of the ESM and the ESM or between members of the ESM, relating to the interpretation and application of the ESM Treaty, including any dispute concerning the compatibility of decisions adopted by the ESM with that Treaty. Following art. 37(3) ESM, if a member of the ESM disputes the decision referred to in para. 2, the dispute shall be referred to the CJEU. It seems that "borrowing" the CJEU in a treaty between certain Member States outside of the EU legal framework is consistent with the

[48] The Court says in para. 63 of the judgment that the complaints concerned are related "to compensation for the damage allegedly suffered as a result of, first, the inclusion by the Commission and the ECB of the disputed paragraphs in the Memorandum of Understanding of 26 April 2013 and, secondly, the Commission's inaction in breach of the obligation to ensure, in the context of the adoption of the Memorandum of Understanding, that the latter was in conformity with EU law" (we emphasize).

[49] Art. 282(3) TFEU.

idea of a single institutional framework. The jurisdiction of the CJEU, in this particular case, is based on art. 273 TFEU.[50]

If we were to stick to what is developed above, we could simply answer in the affirmative to the question raised in the introduction to this *Article*. First, the ESM is based on the primary law of the Union – in particular, art. 136 TFEU – and it operates in close coherence with the already-existing "Community" framework concerning the economic governance of the Union – in particular, the "Six-Pack" and the "Two-Pack" and the European Semester. Second, as we have also seen, the institutional framework of the Union – the Commission, the ECB, the CJEU and the Eurogroup in the form of the ESM's Board of Governors – is largely mobilized in the very functioning of the ESM. According to the case law of the Court, this does not call into question the powers entrusted to the institutions by the treaties – even though this case-law leaves some institutional questions that are not fully answered. Third, the ongoing reform of the ESM in relation to the Single Resolution Fund (SRF) makes the relationship between the institutional framework of the ESM and the Union even closer, insofar as the Banking Union is an integral part of Union law – even though the SRF is also set up by an intergovernmental treaty.

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

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

As already discussed *supra*, the ESM was established by an international treaty concluded between certain Member States outside the EU legal framework to confront the financial crisis emergency. Following the issue that led to the decision in the above-mentioned *Pringle* case,[51] namely the compatibility of the ESM with various substantive provisions of the EU primary law,[52] it might appear that the international legal framework was mainly used to circumvent the prohibition on the bailout in art. 125 TFEU.[53] It is not the first legal instrument of such a kind usually named in the legal literature as a particular form of intergovernmental cooperation, or a new form of EU law,[54] or even part of differentiated

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

[51] *Pringle* cit.

[52] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit.

[53] Art. 125 TFEU; De Witte, 'Using International Law in the Euro Crisis: Causes and Consequences' cit.

[54] S Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions Outside the EU Legal Framework' (2012) EuConst 37, 56.

integration within the EU.[55] Its main characteristics are partial participation of the EU Member States, a strong link with EU law, and "borrowing" of EU institutions outside the EU legal framework. We will discuss here the last characteristic about a possible impact of such use of the EU institutions on the institutional equilibrium within the EU.

As a reminder, according to art. 13(2) TEU: "Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them."[56] In other words, the EU institutions are established by the EU Treaties concluded by the EU Member States. Each institution is entrusted with specific powers in these Treaties and must act in accordance with them. The whole legal structure, as well as the decision-making activity within the EU legal order[57] is part of a certain institutional equilibrium under the rule of EU law.[58]

Apart from the provision enshrined in art. 273 TFEU,[59] the EU Treaties do not have any particular legal basis for granting extra-EU Treaties powers or tasks to EU institutions. How can the EU institutions thus be entrusted with new tasks following the conclusion of an international agreement by certain EU Member States outside the EU legal framework? We will investigate this legal question about the ESM in the first Section by analyzing CJEU's case law on this particular issue (III.1). In the second Section, we will examine whether these new tasks impact the institutional equilibrium and the distribution of powers between the EU institutions within the EU (III.2)

III.1. How are new tasks entrusted to the EU institutions?

There is a fundamental paradox in the very essence of this question regarding the ESM Treaty. Let us remind our readers that the ESM Treaty was concluded outside the EU legal framework by 17 Member States for two main reasons. First, the EU lacked exclusive or even shared competence to proceed with a legislative initiative, which allowed the eurozone Member States to conclude a separate international treaty. Second, the rationale behind the ESM Treaty was contrary to art. 125 TFEU[60] and needed art. 136

[55] C Lacchi, 'How Much Flexibility Can European Integration Bear in Order to Face the Eurozone Crisis? Reflections on the EMU Inter Se International Agreements Between EU Member States' in T Giegerich and others (eds), *Flexibility in the EU and Beyond* (Nomos 2017); B De Witte, 'Treaties between EU Member States as Quasi-Instruments of EU Law' in M Cremona and C Kilpatrick (eds), *EU Legal Acts: Challenges and Transformations* (Oxford Scholarship Online 2018).

[56] Art. 13(2) TEU.

[57] Notably, arts 288-294 TFEU.

[58] See especially: P Craig, 'Pringle and Use of EU Institutions Outside the EU Legal Framework' cit.

[59] Art. 273 TFEU: "The Court of Justice shall have jurisdiction in any dispute between Member States, which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties".

[60] *Pringle* cit. para. 136 and the following reasoning of the Court in paras 137-147, concluding the opposite.

TFEU to be amended.[61] These questions led Thomas Pringle, a member of the Dáil Éireann, the lower house of the Irish parliament, to question whether it was consistent with EU law for Ireland to ratify the ESM Treaty. With no surprise, and as we said *supra*, considering the emergency of the situation, in a full court of 27 judges taking less than four months, the CJEU decided on the compatibility of the ESM Treaty with EU law.[62] This case is also important for another reason: the legal reasoning of the Court when considering the use of the EU institutions outside the EU legal framework.

The referring court in *Pringle* asked whether the allocation of new tasks to the Commission, the ECB and the Court is compatible with the powers of these institutions as enshrined in the EU treaties.[63] The Court responded to this question about the role of the Commission and the ECB in the ESM, stating: "The Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance".[64] In order to justify such a conclusion, the Court quotes its previous case-law dating from 1993[65] and 1994.[66] In the 1993 jurisprudence, *European Parliament v Council and Commission*, the EP challenged the validity of the decision taken collectively by Member States within the Council to grant financial aid to Bangladesh and to confer power upon the Commission to ensure the duty of coordination.[67] The Court ruled that the provision of the TEEC mentioned by the EP "does not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council."[68] Furthermore, the Court added that Member States are free to make use outside the Community legal framework of the criteria taken from the budgetary provisions within the Community.[69] However, regarding the action brought by the EP against the Commission on the violation of the Treaty provisions relating to the budget, the Court simply concluded that as the decision on financial aid was not made within the Community framework, the EP

[61] Para. 3 was added to art. 136 TFEU. Also, see the discussion in section II of the *Article*.

[62] See this case note: B de Witte and T Beukers, 'The Court of Justice Approves the Creation of the European Stability Mechanism Outside the EU Legal Order: Pringle' (2013) CMLRev 805, 816.

[63] *Pringle* cit. para. 154. We mentioned the role of the Court in the ESM under section II.2. But as this *Article* investigates the "borrowing" of the Commission and the ECB, we will not elaborate further on the participation of the CJEU in the ESM.

[64] *Ibid*. para. 158.

[65] *Parliament v Council (Emergency aid to Bangladesh)* cit.

[66] Case C-316/91 *Parliament v Council (Lomé Convention)* ECLI:EU:C:1994:76.

[67] The EP argued that: "According to the fourth indent of Article 155 of the Treaty [TEEC], however, powers of implementation may be conferred on the Commission only by a decision of the Council", *Parliament v Council (Emergency aid to Bangladesh)* cit. para. 19.

[68] *Ibid*. para. 20.

[69] *Ibid*. para. 22.

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

> "In cases where the Member States decide to act individually or collectively in a field within their competence, there is nothing in principle to prevent them from conferring on the Commission the task of ensuring coordination of such action. It is for the Commission to decide whether or not to accept such a mission, provided, of course, that it does so in a way that is compatible with its duties under the Community Treaties".[70]

The same issue was raised in the *European Parliament v Council* case concerning the Lomé Convention.[71] The EP challenged a decision issued by the Council to establish a special procedure to administer financial aid from Member States to African, Caribbean and Pacific countries within the framework of the Lomé Convention. This procedure was distinct from the EU's budgetary procedure. The Court confirmed its finding from the *Bangladesh* case.[72] Furthermore, AG Jacobs, in his opinion, provided the Court with much more detailed reasoning, touching upon the nature of the Lomé Convention as a mixed agreement. He rejected the EP's argument that the Community institutions could not act on the basis of a mandate conferred upon them by the Member States. He especially illustrated it with the Lomé Convention *per se*, a mixed agreement. He also gave the example of accession negotiations and foreign policy cooperation, in which EU institutions are acting in the realm of Member States' competencies and thus might entrust the EU institutions with extra-EU Treaties tasks.[73] AG Jacobs again confirmed his position in a slightly more detailed way than in the *Bangladesh* case, stating that: "It is, therefore, possible for a Community institution to undertake on behalf of the Member States certain functions outside the framework of the Treaty provided that such functions, and the way in which it performs them, are compatible with its Treaty obligations. Whether that is the case is subject to the control of the Court".[74]

[70] Case C-316/91, *Parliament v Council (Emergency aid to Bangladesh)* ECLI:EU:C:1992:520, opinion of AG Jacobs, para. 26.

[71] *Parliament v Council (Lomé Convention)* cit.

[72] *Ibid*. para. 41: "No provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up".

[73] *Parliament v Council (Lomé Convention)* opinion of AG Jacobs cit., paras 82, 86-88.

[74] *Ibid*. para. 84; for further discussion, see: S Peers, 'Towards a New Form of EU Law?' cit.; P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit.; B de Witte, 'Euro Crisis Responses and the EU Legal Order: Increased Institutional Variation or Constitutional Mutation?' (2015) EuConst, 434; A Karatzia and M Markakis, 'What Role for the Commission and the ECB in the European Stability Mechanism?' (2017) Cambridge International Law Journal 232, 243.

In the *Pringle* case, the CJEU used exactly the same approach that it adopted in the *Bangladesh* and *Lomé Convention* cases mentioned above. It also added that "borrowing" EU institutions outside the EU legal framework is possible as long as new tasks entrusted to the institutions "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[75] The Court draws this very principle from its case-law concerning international agreements.[76] It concludes that duties allocated to the Commission and the ECB in the ESM do not alter the essential character of the powers of these institutions under the EU legal framework. In order to do so, the Court first notes that the ESM falls within the sphere of economic policy, which is not an EU exclusive competence.[77] Second, it states that neither the Commission nor the ECB has a decision-making power under the ESM, and their activities under this treaty only commit the ESM.[78] Thirdly, and most interestingly, the Court proposes a quite astonishing rationale to conclude that the tasks conferred on the Commission and the ECB "do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[79] The Court looks exclusively at the objectives guiding the action of the Commission, first, within the EU legal framework[80] and within the ESM. It concludes that as the Commission is tasked with promoting the general interest of the EU within the EU legal order, and as the objective of the ESM Treaty is to ensure the financial stability of the euro area, the Commission, by its involvement in the ESM, promotes the general interest of the Union![81] The Court does not make any substantial analyses of a potential effect on the institutional equilibrium within the EU regarding the decision-making process. It does not seem to be bothered at all that basically EU Member States circumvent EU legal order constraints, including the distribution of competences between the EU and its Member States, to facilitate the decision-making process with the same institutional actors.[82]

The Court is similarly concise regarding the role of the ECB within the ESM: it looks at the objectives behind the functioning of the ECB within the EU and within the ESM and concludes that all tasks are perfectly "in line" with the Treaties.[83] This is even more problematic considering the special role played by the ECB within the EU legal order and

[75] *Pringle* cit. para. 158.

[76] For example: Opinion 1/92 *Accord EEE – II* ECLI:EU:C:1992:189 paras 32, 41; Opinion 1/09 *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets* ECLI:EU:C:2011:123 para. 75.

[77] *Pringle* cit. para. 160.

[78] *Ibid*. para. 161.

[79] *Ibid*. para. 162.

[80] Art. 17(1) TEU: "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them […]".

[81] *Pringle* cit. para. 164.

[82] See also: P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit., for the analysis of the *Pringle* judgement.

[83] *Pringle* cit. para. 165.

considering its significant independence from other institutions' scrutiny. Unlike other EU institutions listed in art. 13 TEU, the ECB "shall have legal personality".[84] This distinct legal personality of the ECB and the EU is also reflected in art. 340 TFEU regarding the separate non-contractual liability of the Union[85] and the ECB.[86]

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

III.2. What impact do these new tasks produce on the institutional equilibrium within the EU?

Critical of the Court's reasoning in *Pringle*, Paul Craig argued: "If the essential character, for example, of the Commission's powers, is to be judged in terms of the very general objectives contained in art. 17(1), then it is difficult to imagine any instance in which it could not be claimed that it was acting to "promote the general interest of the Union" or "oversee the application of Union law".[87] It is true that if the test proposed by the Court to verify whether new tasks entrusted to the EU institutions to act outside the EU legal framework respect the EU Treaties remains that general, numbers of treaties can be concluded by the EU Member States outside the EU granting such tasks to the EU institutions. However, it doesn't mean that these new tasks won't alter the institutional equilibrium within the EU regarding the powers attributed by the EU and FEU Treaties to the EU institutions.

Such reasoning also creates a paradox. As Craig underlines, in order to act within the EU legal framework, the EU institutions must ground their action on a particular legal basis enshrined in the Treaties. The same is true for the international agreements concluded by the EU, alone or jointly with its Member States, with third States. However, following CJEU case-law, the EU institutions can participate in international agreements concluded by the EU Member States outside the EU legal framework and exercise any kind of tasks entrusted to them, as long as they "don't alter the essential character of the powers conferred on them by the treaties".[88] This very reasoning cannot be consistent with basic principles of the EU law. Bruno de Witte explains such a "liberal attitude" of the Court towards the use of the EU institutions outside the EU legal framework, despite the

[84] Art. 282(3) TFEU.
[85] Art. 340(2) TFEU.
[86] Art. 340(3) TFEU.
[87] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit. 278.
[88] *Ibid*. 280.

strict wording of art. 13 TEU, in terms of the difference between "powers" and "tasks". If powers are entrusted to the EU institutions by the Treaties and can only be changed through a complex procedure modifying those Treaties;[89] extra tasks may be given to the EU institutions more easily. The EU institutions may accept new tasks outside the EU legal framework as long as they don't affect already existing powers and as long as all EU Member States agree to "lend" them.[90]

Furthermore, in her conclusions in the *Pringle* case, AG Kokott raises an important issue of consent granted by other Member States that are not participating in the ESM to "borrow" the Commission and the ECB within the ESM.[91] She reminds us that the representatives of all Member States governments adopted a decision on 20 June 2011, according to which "the ESM Treaty is to contain provisions under which the European Commission and the European Central Bank are to perform the tasks provided for in the Treaty". However, the legal scholarship is not unanimous as to whether the consent of all Member States is necessary to "lend" the EU institutions to be entrusted with new tasks outside the EU legal framework the necessary powers. Steve Peers argued that such consent is not necessary as long as concerned EU institutions act in accordance with their competencies enshrined in EU and FEU Treaties.[92] Paul Craig defended the opposite view and argued that the consent of all EU Member States is necessary,[93] which was the case for the ESM mentioned above.

We tend to agree with Paul Craig. In its *Pringle* judgment, the Court relies on its external relations case-law to assess the premise that new tasks entrusted to the EU institutions are perfectly fine as long as they do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.[94] However, the comparison made between, on the one hand, the ESM, concluded by some EU Member States outside of the EU legal framework and involves "borrowing" some of the EU institutions, and, on the other hand, international agreements concluded by the EU alone or with the participation of its Member States, is not entirely appropriate.[95] The EU is not participating as a contracting party in the ESM. It means that the ESM Treaty has not gone through the procedure enshrined in art. 218 TFEU.[96] Especially, para. 11 of this art. allows any international agreement to be submitted to the legal scrutiny of the CJEU, which usually clearly says whether or not an international agreement is compatible with the essential character of the EU institutions' powers.

[89] Art. 48 TEU.
[90] B de Witte, 'Using International Law in the Euro Crisis' cit. 20.
[91] Case C-370/12 *Pringle* ECLI:EU:C:2012:756, opinion of AG Kokott.
[92] S Peers, 'Towards a New Form of EU Law' cit. 54–55.
[93] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit. 272-273.
[94] *Pringle* cit. para. 158.
[95] P Craig, 'Pringle and Use of EU Institutions outside the EU Legal Framework' cit. 277.
[96] Art. 218 TFEU.

In its more recent, and already mentioned, judgment *Ledra Advertising*, the Court clarified the extent of the legal duties of "borrowed" EU institutions under the ESM.[97] The Court stated that the Commission and the ECB[98] acting within the ESM remain fully bound by EU law and by the Charter of Fundamental Rights of the EU and may be held liable under arts 268 and 340(2)(3) TFEU in cases of violation of EU law provisions.[99] This judgment seems to ensure some output legitimacy for the actions of the EU institutions used within the ESM Treaty. The very fact that the EU institutions might have engaged their extra-contractual responsibility by negotiation and signing Memoranda of Understanding in violation of EU law and the Charter, in particular, adds some accountability to their actions outside the EU legal framework.[100] The above developments highlight the existence of an institutional imbalance in the EMU's system of governance. These developments in the field of the EU economic governance architecture raise further questions: is there a systemic approach to crisis governance within the EU? To what extent can institutional balance and long-term legitimacy concerns be sacrificed on the account of efficiency and emergency? In the following Section and in order to provide answers to these interrogations, we will examine the reforms introduced by the EU institutions following the Covid-19 pandemic (section IV).

IV. The post-Covid institutional set-up: back to a "Community" mode of governance?

The outbreak of Covid-19 at the beginning of 2020 has been an unprecedented shock for our societies and a great challenge for our democracies. Since the beginning of the pandemic, both the EU institutions and its Member States have taken unprecedented measures to address this crisis and its devastating far-reaching health, social, economic and legal consequences. Surprisingly quickly, and after the early emergency support

[97] *Ledra Advertising v Commission and ECB* cit.

[98] The Court's solution, in this case, should have emphasized that it is not a question of sharing responsibility between the Commission and the ESM but between the EU and the ESM. As a reminder, according to art. 13(4) of the TESM states that the Commission negotiates and signs the Memorandum "on behalf of the ESM". For what concerns the liability of the ECB, the solution would be different. Indeed, the ECB enjoys its own legal personality, in accordance with art. 282(3) TFUE – this legal personality being the reason why art. 340 TFEU contains a third paragraph concerning the responsibility of the ECB that is distinct from the EU.

[99] *Ledra Advertising v Commission and ECB* cit. 65; case C-8/15 P *Ledra Advertising Ltd and Others v European Commission and European Central Bank* ECLI:EU:C2016:701, opinion of AG Wahl, paras 85–91.

[100] P Dermine, 'The End of Impunity: The Legal Duties of Borrowed EU Institutions under the European Stability Mechanism Framework ECJ 20 September 2016, Case C-8/15 to C-10/15, Ledra Advertising et al. vs. European Commission and European Central Bank Case Notes' (2017) EuConst 369; A Karatzia and M Markakis, 'What Role for the Commission and the ECB in the European Stability Mechanism?' cit. These considerations must obviously be seen in the light of the developments we have outlined above concerning the *Ledra* judgment.

measures were introduced by the European Commission, the ECB and the Eurogroup,[101] the European Council adopted a 750 billion euros EU Recovery Fund known as "Next Generation EU" (NGEU) to reinforce the EU's 2021-2027 multiannual financial framework (MFF).[102] Federico Fabbrini argued in this respect that: "[a]s such, by endowing the European Commission, for the first time, with significant power to borrow money on the financial markets, and to transfer funds to the Member States, NGEU represents a paradigm change in the functioning of EMU, pushing the EU architecture of economic governance towards an arrangement akin to that of federal regimes".[103] Let us have a closer look at this new mechanism established by the EU institutions to face the pandemic. We will argue that the adoption of the NGEU can be seen as a paradigm shift in the way the EU adopts crisis management instruments.

The adoption of the NGEU had a significant impact on the institutional structure of EMU. Indeed, in addition to the suspension of several rules concerning state aids,[104] tax rules,[105] and introduction of a series of solidarity measures,[106] one could also observe the extended role granted to the EU institutions involved in the EMU. In the early days of the crisis, a series of decisions were taken at the intergovernmental level by the Eurogroup. Initial calls for aid in the form of a common debt instrument adopted by the EU institutions were rejected by some states in favor of the ESM and its conditionality.[107] The Eurogroup, whose formation corresponds to that of the ESM's Board of Governors, was tasked with negotiating initial aid instruments for Member States affected by the pandemic. Firstly, the Eurogroup decided to create a guarantee fund at the EIB aiming at financing companies affected by the pandemic, thus significantly extending the powers of the EIB.[108] Then, and

[101] Communication COM(2020) final from the Commission of 20 March 2020 on the Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak.

[102] European Council of 17–18–19-20-21 July 2020 on the recovery plan and multiannual financial framework for 2021-2027; AD 'Alfonso, 'Next Generation EU : a European instrument to counter the impact of the coronavirus pandemic' (2020) European Parliament Research Service Briefing.

[103] F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19: EMU Beyond the Pandemic' (2022) JComMarSt 186, 187.

[104] Communication COM(2020) final cit.

[105] As allowed by the clause in the Stability and Growth Pact. See European Commission Press Release, *Coronavirus: Commission proposes to activate fiscal framework's general escape clause to respond to pandemic* ec.europa.eu.

[106] Particularly, the activation of the EU solidarity fund and the proposed establishment of European instrument for temporary support to mitigate unemployment risks in an emergency. For a useful summary of these measures, see the independent academic report commissioned by the Irish Department of Finance and realized by F Fabbrini, 'Europe's Economic & Monetary Union Beyond Covid-19' (December 2020) An Roinn Airgeadais www.gov.ie 14-15.

[107] See Dutch Finance Minister Wopke Hoekstra, Statement at the Tweede Kamer, 7 April 2020 debatgemist.tweedekamer.nl.

[108] EIB press release, *EIB Board Approves €25 Billion Pan-European Guarantee Fund in Response to Covid-19 Crisis*, 26 May 2020 www.eib.org.

in relation to the action of the ESM, the Eurogroup took the decision to create the possibility for the ESM to establish a specific credit line (the "Pandemic Crisis Support Line"), open to the Member States of the eurozone and intended to cover costs, in particular health costs, related to the pandemic. This aid was established in the form of loans not submitted to the classical "strict conditionality" requirement.[109]

Although effective on a short-term basis, the ESM was not a sufficient tool for managing a pandemic. An innovative solution to deal with Covid-19 was needed, rather than a conditionality-based approach which would mobilize the ESM. A more general recovery plan was to be put in place, based on an ambitious Spano-Franco-German initiative.[110] At the end of May 2020, the European Commission proposed, using "multi-faceted legal constellation"[111] and in connection to the multiannual financial framework (MFF), to establish a recovery fund intended to assist Member States and companies affected by the pandemic within the EU. The NGEU financial plan was established to finance the rebuilding of the EU economy according to the Commission's priorities: Green deal, digitalization, and social inclusion. The broad scope of the plan has been seen by some as a sign of the sustainability of this fiscal construct, and not only as a way to temporarily absorb the shock of the Covid-19 crisis.[112] Let us clearly highlight the differences between the response to the eurozone crisis a decade ago and the response to the recent Covid-19 crisis.

There are indeed a number of differences between the assistance mechanisms previously put in place in the context of the eurozone crisis (particularly the ESM), on the one hand, and the NGEU adopted to face the pandemic, on the other hand.[113] Firstly, and

[109] Consilium, *Term sheet: ESM Pandemic Crisis Support*: www.consilium.europa.eu. This aid from the ESM is devoid of the conditionality usually attached to the functioning of this institution. The Term Sheet only requires that "ESM Member States would commit to use ESM Pandemic Crisis Support to support domestic financing of direct and indirect healthcare, cure and prevention related costs due to the COVID 19 crisis". For further details on the action of the ESM in this crisis, see G Zaccaroni, 'The Future of the ESM within a Hybrid EMU law' (BRIDGE Working Paper 2020) 11.

[110] See S Dennison, 'Spain goes Eisenhower: Coronavirus, cohesion, and the return of MFF talks' (23 April 2020) European Council on Foreign Relations ecfr.eu; Élysée, *French-German Initiative for the European Recovery from the Coronavirus Crisis* www.elysee.fr.

[111] F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19' cit. 191. Four different legal ways were indeed followed in order to establish the NGEU. First, an EU Recovery Instrument, in the form of a regulation enacted by the Council on the basis of art. 122 TFEU and specifying the size of NGEU and the allocation of funds. Second, a regulation was enacted by the EP and the Council to establish the RRF, based on art. 175 TFEU. Third, a revision of the EU Own Resources Decision (ORD), in that increasing EU spending ceilings and enabling the EU to issue debt securities. Fourth, a regulation allowing to both connect the NGEU with the MFF and to put forward the conditionality linking the respect of the rule of law and the receipt of funds.

[112] C Alcidi and D Gros, 'Next Generation EU: A Large Common Response to the COVID-19 Crisis' (2020) Inter Economics 202-203.

[113] Arts 122 and 175(3) TFEU.

most obviously, the legal basis used to set up the ESM,[114] and the one mobilized to establish the NGEU are quite different. The former is an *ad hoc* financial assistance instrument based on strict economic conditionality and established on the margins of EU law as an international treaty. The latter is a genuine fiscal mechanism based on a "more political than economical" conditionality (respect for the rule of law) and developed within the EU legal order. Furthermore, one could notice that art. 122 TFEU – among other articles which served as legal basis for pandemic-related legal instruments – was invoked in the *Pringle* case as being violated in the context of establishment of the ESM. If in the case of the ESM, the decision was taken to conclude an international treaty by fear that a permanent financial assistance mechanism would be contrary to EU Treaties provisions. To face the Covid-19 pandemic, an emergency instrument could rely on appropriate legal basis in EU primary law.

Another important difference is the way this recovery plan is financed (two thirds in grants and one third in loans)[115] was called not only a "radical change" but also a "major breach" in the field of economic governance. Indeed, it is not financed by States' contributions to a common budget – nor by an external intergovernmental construction such as the ESM – but by the issuance of EU debt on the financial markets. This recovery plan gives the Commission a totally new and crucial role of "quasi-EU treasury"[116] allowing to borrow large amounts of funds on behalf of the Union on the capital markets.[117]

Furthermore, the NGEU grants to the EU, even though on a temporary basis, new powers in fiscal matters. It is a significant development as it allows in a way the rebalancing of an asymmetric relationship between the economic (including fiscal) and monetary branches of the EMU. The Union is thus empowered to levy new taxes of a European nature to increase the expenditure ceilings within the framework of the MFF.

The EU response to the crisis caused by the Covid-19 pandemic goes much further than the one given to the eurozone crisis. Indeed, the EU response to the pandemic seems to strengthen the European integration project empowering the EU institutions with some federal prerogatives. It shows a notable adaptability of the Treaties and the ability with which the Union's institutions can adapt their actions – and therefore the letter of the Treaty – to the exogenous upheavals affecting the EU economy. Neither the modification of the Treaties, nor the creation of an institutional instrument at the margins of the Union's legal order was necessary to provide this original and audacious response. Thus, one may wonder whether the nature of legal and institutional responses to this latest crisis is – or not – the beginning of a more general institutional rebalancing. Time

[114] *Ibid*. 136(3) TFEU, even though let us remind here that according to the Court, its modification was not indispensable, as the Member States already had the competence to establish such a mechanism.

[115] P Dermine, 'The EU's Response to the COVID-19 Crisis and the Trajectory of Fiscal: Integration in Europe – Between Continuity and Rupture' (2020) LIEI 337, 341.

[116] F Fabbrini, 'The Legal Architecture of the Economic Responses to COVID-19' cit. 193.

[117] European Council of 17–18–19-20-21 July 2020 on the recovery plan and multiannual financial framework for 2021-2027 cit.

will show whether new EU tools for crisis management are here to push for an "ever closer union among the peoples of Europe" without denaturalizing the EU's "single institutional framework".

V. Conclusion

In this *Article*, we proposed an answer to an uneasy question as to whether the EU really consists of a single institutional framework, as recital 7 of the TEU's preamble states. We have especially focused on the issue of "borrowing" of already existing EU institutions, namely the Commission and the ECB, outside the EU legal framework in the context of eurozone governance. We did not look at different institutional creations going beyond art. 13 TEU, such as EU agencies, for example. Furthermore, we acknowledge that the internal structure of the European Monetary Union is quite complex per se and was the subject of an extensive pan of academic literature on differentiated integration within the EU. In examining the specific case of the ESM, we did not focus on the internal dimension of the functioning of the EMU, but rather on the problematic external "borrowing" of EU institutions.

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

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

constitutional settlement"[118] is notably challenged. The latest institutional reforms adopted in response to the crisis caused by the Covid-19 pandemic demonstrate, however, the great adaptability of the EU institutions to exogenous upheavals and the possibility, in the absence of treaty changes, of taking the "Community route", neglected during the eurozone crisis.

[118] F Fabbrini, 'States' Equality v States' Power' cit. 32.