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The Economic and Monetary Union and the European Union's Competence Issues

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I Introduction

The European Union (EU) is considered a legal body (*Rechtsgemeinschaft*) founded on the Treaty on the EU (TEU) and on the Treaty on the Functioning of the EU (TFEU) (Article 1 (3) TEU). This means that the EU is not just an international cooperation between several countries, but has a legal basis. Further, according to Article 19 (1) TEU, the Court of Justice of the EU (CJEU) shall ensure that the law is observed in the interpretation and application of the Treaties. The CJEU ensures that legal acts comply with the EU's legal order and ensures that EU law is effective.

The EU is an international organisation, on which the Member States confer competences to attain objectives they have in common (Article 1 TEU). The EU can act

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only within the limits of the competences conferred upon it by the Member States in the Treaties (Article 5 (2) TEU); competences not conferred upon the EU in the Treaties remain with the Member States (Articles 4 (1) and 5 (2) TEU). This is the principle of conferral. It is related specifically to a vertical competence division—one between the EU and its Member States.

The EU has an institutional framework and its institutions are the European Parliament, the Council of the European Union, the European Council, the European Commission, the Court of Justice of the European Union, and the European Central Bank (Article 13 (1) TEU). These institutions can act only within the limits of the powers conferred on them in the Treaties, and in conformity with the procedures, conditions, and objectives set out in them (Article 13 (2) TEU). This is also known as the principle of conferral, and is related specifically to a horizontal competence division—one between the EU's institutions.

The CJEU ensures the division of competencies laid down in the Treaties.

This article aims to clarify the competence issues related to the Economic and Monetary Union (EMU), and to demonstrate that the EMU functions within the legal framework of the Treaties—even during the Euro crisis—and the CJEU plays a role in ensuring this.

II Basic structure of the competencies of the EMU

1. The EMU and the Maastricht Treaty

The EMU was defined in the Maastricht Treaty—formally, the TEU. The Maastricht Treaty was signed in 1992 and came into force in 1993, more than 20 years ago. The Maastricht Treaty is one of the most important treaties in the EU. It mandates the founding of the Union and creation of Union citizenship. The formulation of the Maastricht Treaty led to a revision in the treaty establishing the European Economic Community (EEC) and introduced a new title, 'Title VI', for the economic and monetary union (Article 102a~109m TEC), with several protocols for the EMU. For example, Article 105 TEC (now, Article 127 TFEU) states that the primary objective of the European System of Central Banks (ESCB) shall be to maintain price stability. Article 105a TEC (now, Article 128 TFEU) states that the European Central Bank (ECB) has the exclusive right to authorise the issue of euro banknotes within the Union. Article 107 TEC (now, Article 130 TFEU) ensures the independence of the ECB. This means that the EMU has had an institutionally legal foundation since its inception.

The Maastricht Treaty also specifies the stages for the attainment of an Economic and Monetary Union. As specified in Article 109e TEC, the second stage for the attainment of an EMU began on 1 January 1994. Article 109j (4) TEC states, 'If by the end of 1997 the date for the beginning of the third stage has not been set, the third stage shall start on 1 January 1999'. Although the euro came into circulation in 2002, the first stage of the EMU began 10 years before circulation. This means that the accomplishment of the EMU was based not on accidental political decisions, but on a well-considered legal plan.

Germany, Ireland, Spain, France, Italy, Luxembourg, the Netherlands, Austria, Portugal, and Finland were the original members of the EMU. Greece became a member on 1 January 2001, followed by Slovenia (2007), Cyprus and Malta (2008), Slovakia (2009), Estonia (2011), Latvia (2014), and Lithuania (2015). Of the 28 EU Member States, 19 are Eurozone countries; the UK and Denmark are not part of this. As set out in the Maastricht Treaty, these two countries opted out of the EMU. Other countries (Bulgaria, Czech Republic, Croatia, Lithuania, Hungary, Poland, Romania, and Sweden[1]) that have not yet participated in the euro are under obligation to adopt the euro, especially if they match the economic criteria (interest rates, budget deficits, level of government debt, and inflation rate). They do not have a choice; they need only fulfil the criteria, that is, whether they are able.

2. The EMU and Competences

One of the aims of the EU was to establish an economic and monetary union, the currency of which is the euro (Article 3 (3) TEU). The EU has exclusive competence in monetary policies of Member States whose currency is the euro (Article 3 (1)(c) TFEU). If the EU has exclusive competence, only the EU may legislate and adopt legally binding acts (Article 2 (1) TFEU). The EMU has both economic and monetary policies. The EU has exclusive competence only in monetary policy, and the Member States have competence in the economic policy.

3. Related actors and actions

The EU has exclusive competence over monetary policy. The aim of the ESCB is to maintain price stability (Article 127 (1) TFEU). The ECB is modelled on the German federal bank. The ESCB defines and implements the monetary policy of the EU, conducts foreign exchange operations, holds and manages the official foreign reserves of the Member States, and promotes the smooth operation of payment systems (Article 127 (2) TFEU). The ECB has exclusive rights to authorise the issue of euro banknotes (Article 128 (1) TFEU). The independency of the ECB and the ESCB are guaranteed in Article 130 TFEU. The ESCB is governed by the decision-making bodies of the ECB, which are the Governing Council and the Executive Board (Article 129 (1) TFEU). The Council may unanimously confer specific tasks upon the ECB concerning policies relating to the prudential supervision of credit institutions and other financial institutions (Article 127 (6) TFEU). In addition, the European Parliament and European Council can adopt measures to establish an agency, based on Article 114 TFEU, related to the establishment and functioning of the internal market. For example, the European supervisory authorities (European Securities and Markets Authority (ESMA), European Insurance and Occupational Pensions Authority, and European Banking Authority) are established, based on Article 114 TFEU.

Exclusive competence is not conferred on the EU in the field of economic policy, but the EU institutions may adopt secondary legislation to enforce the economic governance of the Eurozone. For example, the European Parliament and the European Council may adopt detailed rules for a multilateral surveillance procedure (Article 121 (6) TFEU). The European Council adopts measures to strengthen the coordination between and surveillance of the euro countries' budgetary discipline and to set out economic policy guidelines (Article 136 (1) TFEU). It also adopts appropriate provisions that replace the

excessive deficit protocol (Article 126 (14) TFEU). On those legal bases, the EU adopted the 'six pack' and 'two pack' legislative measures to prevent financial crises and enforce the economic governance over the euro countries: ①Regulation No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area, ②Regulation No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, ③Regulation No 1175/2011 amending Regulation No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic polices (the preventive arm of the Stability and Growth Pact), ④ Regulation No 1176/2011 on the prevention and correction of macroeconomic imbalances, ⑤ Regulation No 1177/2011 amending No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (the corrective arm of the Stability and Growth Pact), ⑥Directive 2011/85 on requirements for budgetary frameworks of the Member States, and additionally, ⑦Regulation No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threated with serious difficulties with respect to their financial stability, and ⑧Regulation No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficits of the Member States in the euro are.

Competences that are not conferred upon the EU belong to the Member States—meaning that the Member States can legislate and conclude agreements independently. For example, the treaty establishing the European Stability Mechanism (ESM) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG)—also known as the Fiscal Compact—were signed by only some EU Member States.

III Concrete Cases: ESM, OMT, and ESMA

1. ESM

The euro was affected by the bankruptcy of Lehmen Brothers. Due to this, the EU took a variety of measures to handle the European debt crisis. The European Financial Stability Mechanism (EFSM) and European Financial Stability Facility (EFSF) were established provisionally. However, it was also necessary to establish a permanent stability mechanism that would provide financial assistance. To this end, as a result of Decision 2011/199 of the European Council on 25 March 2011, Article 136 paragraph 3 was added to XXXX. The decision was adopted according to Article 48 (6) TEU, the simplified revision procedure. Article 136(3) TFEU states, 'The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole…' The treaty establishing the European Stability Mechanism was concluded by 17 of the EU's Member States on 2 February 2012.

On 13 April 2012, Pringle, a member of the Irish Parliament took action before the High Court in Ireland, insisting that the amendment of Article 136 TFEU through Decision 2011/199 was unlawful, and that the Decision was incompatible with the EU Treaties. The High Court dismissed the action, and Pringle appealed before the Supreme Court. The Supreme Court referred the case for a preliminary ruling before the CJEU (case C-370/12 Pringle[2]). The CJEU decided the case on 27 November 2012, in the form of the full court, to examine whether the objectives to be attained by the stability mechanism fell under monetary policy—that is, whether the subject matter of the ESM treaty fell within the exclusive competence of the EU or the Member States (para. 55). The CJEU showed that the stability mechanism's objective—safeguarding the stability of the Eurozone as a whole—was clearly distinct from the objective of maintaining price stability, which was the primary objective of the EU's monetary policy (para. 56). The CJEU also showed that the grant of financial assistance to a member state did not fall under monetary policy, and that the stability mechanism served to complement the new regulatory framework for strengthened economic governance of the EU. Further, while the provisions of the framework were essentially preventive and their objective was to reduce the risk of public debt crises as far as possible, the objective of establishing the stability mechanism was the management of financial crises (para. 59). Finally, the Court stated that in light of the objectives to be attained by the stability mechanism and the close link between that mechanism, the provisions of the TFEU relating to economic policy, and the regulatory framework for strengthened economic governance of the Union,

it must be concluded that the establishment of that mechanism fell within the area of economic policy (para. 60). The CJEU also decided that the activities of the ESM did not fall under monetary policy, and that the establishment of the ESM did not affect the power of the EU and the Member States were entitled to act in the area (para. 104–105).

2. Outright Monetary Transactions

The president of the ECB published the decisions of its Governing Council regarding the OMT decision taken on 6 September 2012. Based on the Outright Monetary Transactions (OMT) decisions, an unlimited amount of government bonds of selected Member States can be purchased in secondary markets. Gauweiler and others brought constitutional actions concerning the OMT decisions before the German Federal Constitutional Court, insisting that the OMT decisions form an ultra vires act inasmuch as they are not covered by the mandate of the ECB and infringe Article 123 TFEU. This Article lays down prohibitions on financing to public authorities. The German Federal Constitutional Court requested a preliminary ruling before the CJEU, on the basis that the OMT decisions were incompatible with EU law, including Article 123 TFEU.[3] This was the first request for a preliminary ruling by the German Federal Constitutional Court. It is also surprising that the German Court showed its interpretation on his side at the same time.

The CJEU received the request from the German Federal Constitutional Court on 10 February 2014, and passed judgment on 16 June 2015, in the Grand Chamber (Case C-62/14).[4]

The CJEU first examined whether the OMT programme fell within the EU's monetary policy. According to the CJEU, under Article 130 TFEU, the ESCB was to independently carry out its task of formulating and implementing the EU's monetary policy; Article 130 TFEU was intended to shield the ESCB from all political pressure, in order to enable it to effectively pursue its objectives (para. 40). First, the Court confirmed that the aim of the OMT programme was to safeguard 'an appropriate monetary policy transmission and the singleness of the monetary policy'. Second, the CJEU stated that it was clear from 18.1 of the Protocol on the Statute of the ESCB and the ECB that in order to achieve the objectives of the ESCB and carry out its tasks, the ECB and the national central banks may operate in the financial markets by buying and selling outright marketable instruments in euros (para. 54). In addition, the Court showed that the fact that the programme was specifically limited to certain government bonds was not of a nature to

imply that the instruments used by the ESCB fell outside the realm of monetary policy. The Court therefore concluded that the OMT programme fell under the ambit of monetary policy (para 56).

The CJEU next examined if the OMT programme was compatible with Article 123 TFEU. The CJEU confirmed that it was clear from its wording that Article 123 TFEU prohibited the ECB and the central banks of the Member States from granting overdraft facilities or any other type of credit facility to public authorities and from purchasing their debt instruments directly from them (para. 94). Confirming this, the Court stated the following: 'The implementation of the OMT programme must be subject to conditions intended to ensure that the ESCB's intervention on secondary markets does not have an effect equivalent to that of a direct purchase of government bonds on the primary market' (para 105). Second, the OMT programme is accompanied by a series of guarantees that are intended to limit its impact on the impetus to follow a sound budgetary policy. Third, the impact of the OMT programme is limited by the fact that the ESCB has the option of selling the purchased bonds at any time, and it follows that the consequences of withdrawing those bonds from the markets may be temporary (para. 117). Finally, the CJEU said that the OMT programme did not lessen the impetus of the Member States concerned to follow a sound budgetary policy, and Article 123 TFEU did not prevent the ESCB from adopting such a programme and implementing it under conditions that did not result in the ESCB's intervention having an effect equivalent to that of a direct purchase of government bonds from public authorities and bodies of the Member States (para. 121).

The decision of the CJEU did not accept the interpretation of the German Federal Constitutional Court. We now await the final decision of the German Federal Constitutional Court on this matter.

3. ESMA

The European System of Financial Supervision (ESFS) was implemented in order to prevent financial crisis in the Eurozone. ESFS is comprised of macro prudential oversight and micro prudential oversight. Micro prudential oversight of the financial system is comprised of three supervisory authorities: (1) European Banking Authority (EBA), (2) European Securities and Markets Authority (ESMA), and (3) European Insurance and Occupational Pensions Authorities (EIOPA).

The ESMA was established by Regulation 1095/2010 of the European Parliament and European Council. Its legal basis was Article 114 TFEU. In the case of C-270/12 UK v. EP and Council,[5] it was not discussed if an establishment like the ESMA was authorised based on 114 TFEU. According to Article 28 Regulation 236/2012, ESMA requires natural or legal persons who have net short positions in relation to a specific financial instrument or class of financial instruments to notify a competent authority or to disclose details of any such position to the public. The UK requested that the Court annul Article 28 of the regulation.

It insisted that if Article 28 of Regulation 236/2012 was to authorise the ESMA to direct decisions at natural or legal persons, that provision was ultra vires Article 114 TFEU. The Court said that it should be recalled that a legislative act adopted on that legal basis must, first, comprise measures for the approximation of the provisions laid down by the laws, regulations, or administrative actions in the Member States and, second, have as its object the establishment and functioning of the internal market (para. 100). The CJEU also stated that Article 28 of Regulation 236/2012 aimed to harmonise the Member States' laws relating to the supervision of a number of stocks and to the monitoring of certain commercial transactions concerning those stocks. To fulfil the second condition, the Court said that ESMA should have the power to take measures where short selling and other related activities threaten the orderly functioning and integrity of the financial markets of the whole or part of the financial system in the EU where there may be cross-border implications, and competent national authorities have not taken sufficient measures to address the threat (para. 115). The purpose of the power was, in fact, to improve conditions for the establishment and functioning of the internal markets in the financial field (para 116). The Court concluded that Article 28 of Regulation 236/2012 satisfied all the requirements laid down in Article 114 TFEU.

IV. Conclusions

The EMU has a legal institutional basis. During the financial crisis, too, EU institutions and Member States made efforts to use the available legal instruments instead of panicking. The EU institutions adopted measures, including 'six pack' and 'two pack' legislative measures to prevent financial crises and enforce economic governance in the Eurozone countries. The Member States concluded the ESM Treaty and TSCG. The CJEU protected the EMU, respecting the EU legal order and ensuring its effectiveness. The financial crisis caused by the Lehmen Brothers shock in 2008 became the first touchstone issue for the EMU. It was a difficult time, but the crisis was overcome with measures taken under the EU's legal framework.

The EU has exclusive competence in monetary policy while the Member States have competence in economic policy. In the case of both the ESM and OMT, the CJEU had to draw a line between those policies. In the OMT case, particularly, the view of the German Federal Constitutional Court differs from that of the CJEU regarding the scope of the economic and the monetary policies. We must wait for the final decision of the German Federal Constitutional Court. However, it is safe to say that the CJEU has the right to the last word as far as the interpretation of EU law is concerned.

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[1] Sweden is not allowed to opt out, however facing the result of the referendum in Sweden, it has not yet introduced the euro.
[2] Case C-370/12, Pringle v. Government Ireland, Judgement of the European Court of Justice (Full Court) of 27 November 2012, EU:C:2012:756.
[3] BVerfG, 2 BvR 2728/13 of 14. 01. 2014.
[4] Case C-62/14, Gauweiler and others v. Deutscher Bundestag, Judgement of the European Court of Justice (Grand Chamber) of 16 June 2015, EU:C:2015:400.
[5] Case C-270/12, UK v. EP and Council, Judgement of the European Court of Justice (Grand Chamber) of 22 January 2014, EU:C:2014:18.