

6. JUDICIAL CONTROL OF MONETARY AND FISCAL DECISIONS IN THE EUROPEAN UNION

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1. INTRODUCTION

Ongoing debt crisis (since 2010) of several Member States of the Eurozone resulting from global economic slowdown (since 2007) sparked doubts about viability of single currency introduced more than 15 years ago (1999). The collapse of the Eurozone and reintroduction of national currencies has been feared since then.

The European Union and the Member States reacted with rescue measures. Heavily indebted Member States – Greece, Portugal, Ireland and Cyprus – needed massive rescue loans. The loans were provided by other Member States, international institutions and funds newly established within the European Union for this purpose. The European Central Bank alleviated with purchase of bonds of these states plus Italy and Spain on financial market, lending money to endangered banks, extremely low interest rates and quantitative easing.

Both rescue loans and unconventional monetary policy cause political skirmishes between the Member States. Mandated austerity is objected by people in the South and unexpected expenditures for rescue in the North where also inflation is feared. National politicians cannot ignore these views and push for the solutions they perceive as serving national interests. Relations between the Member States thus deteriorate. The entire existence of the European Union is questioned.

The crisis emerged due to the chronic incompliance with the rules agreed for the maintenance of the single currency two decades ago. Several measures adopted due to the crisis also compromise existing rules.

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The European Communities were, and the European Union is, a polity governed with law (*rule of law*), albeit with specific supranational features.¹ Judiciary plays crucial role. The above mentioned controversies are thus increasingly brought to courts of the European Union and also to the courts of the Member States, because adjudication of this supranational law is shared by supranational and national judiciary. A collection of papers addressing recent trends in judiciary in the European Union thus deserves attention to it.

Nevertheless, judicial control of fiscal and monetary decisions is rare or entirely missing in the world. Its potential, methods and limits are thus rarely discussed. Therefore, this paper must start with an overview of roles and functioning of judiciary plus an outline of nature of money and public budgets.

The crisis is a continuous political event of the highest importance. It is closely followed by media, especially in its hot phases. One such phase started in February 2015 when the cabinet formed after the victory of leftist Syriza in Greek parliamentary elections refuses austerity imposed with rescue loans. "Grexit"² is debated again.

Legal aspects of the crisis and measures addressing it are analysed by legal scholars with considerable delays. Attention to them varies across Europe. This reveals not only different impact of the crisis on them, but also varied authority of supranational law (and law generally) and quality of its reflection. Prominence of attention in Germany³ will be explained.

2. TRADITIONAL AND EMERGING ROLES OF JUDICIARY

Courts have two traditional tasks. Firstly, they decide disputes among individuals (civil judiciary). Secondly, they confirm or reject guilt of perpetrators of crimes and impose punishments (criminal judiciary).

Both judiciaries suffered repeatedly from interventions of government. The courts thus developed into the third branch of government, separated from executive and legislative. The rule of law is impossible without judicial independence from political and social pressures.

¹ The rule of law (or concept of *Rechtstaatlichkeit*) in supranational European Union is subject of continuous reflection of legal scholars in papers and monographs. Wennerström E. O., *The Rule of Law and the European Union*, Uppsala, Iustus Förlag, 2007 can be highlighted as example of the most detailed elaboration of the issue in recent English-written literature.

² "Greek exit", portmoneau for the withdrawal of Greece from the Eurozone, coined by W. H. Buiter and E. Rahbari (Citibank) in 2012.

³ Legal aspects of debt and currency crisis of the European Union is addressed prominently in German legal literature, see among others T.M.J. Möller, F.-C. Zeitler (eds.), *Europa als Rechtsgemeinschaft – Währungsunion und Schuldenkrise*, Mohr Siebeck, 2012.

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Judicial control of administration developed slower. Monarchs and politicians exercising executive power opposed it. In addition, various administrative agendas are subject of judicial control to different extent.⁴ Administrative judiciary is often difficult to identify. Some countries integrate it with judiciary for civil and criminal matters. Other ones established special courts. Independent tribunals and commissions exist. Experts are involved. However, the demand for the judicial control of administration can be reduced with professionalization of administrative authorities and with its protection against political interference.

The workload of national court systems differs significantly due to economic, social and political conditions, stability and quality of statutory laws, preventive effects of adjudication in general and persuasiveness of case-law of superior courts in particular. The number of judges varies significantly among countries. The amount of cases brought before courts grew significantly during the 20th century in developed countries. Attorneys and in-house counsels multiplied. Judiciaries in many countries suffer from chronic overload.⁵

New disputes brought to courts result from economic, social, political and technological development. Judges were not involved in protection of privacy in cyberspace century ago. Few anti-discrimination measures existed. However, demand for judicial interventions emerges also in spheres formerly spared. Legislation addressing industries and services, protection of environment, urban planning and land use, healthcare and education is to be applied by courts in modes and extent unseen in the past.

Misuses of legislation by totalitarian and authoritarian regimes resulted into emphasis for constitutionality. Constitutions thus acquired genuine superior position. Catalogues of fundamental rights and freedoms were attached to the outline of the government. Constitutional control of legislation and of operations of executive and judiciary was introduced. Many countries have established separate constitutional courts for this purpose.⁶

⁴ Interesting summary of tasks and organization of administrative judiciary can be found in R. Winkler, *Administrative Justice in Europe: The EU Acquis, good practice and recent Developments – Working Paper submitted for the Twinning Project Support to more efficient, effective and modern operation and functioning of the Administrative Court of the Republic of Croatia*, November 2007, available at www.upravnisudrh.hr.

⁵ Comparison of judiciaries in the Member States of the Council of Europe can be found in CEPEJ (European Commission for the Efficiency of Justice), *European Judicial Systems – Edition 2014 (2012 data): Efficiency and quality of justice – An overview*, available at www.coe.int/t/dghl/cooperation/cepej/evaluation/2014/synthese2014_en.pdf, see p. 17 (number of professional judges for 100.000 inhabitants), p. 22 (Number of 1st instance incoming and resolved civil (and commercial) litigious cases per 100 000 inhabitants in 2012), and p. 24 (Clearance Rate (CR) and Disposition Time (DT) of litigious civil (and commercial) cases in first instance courts in 2012).

⁶ R. Wahl, *Das Bundesverfassungsgericht im europäischen und internationalen Umfeld*, *Aus Politik und Zeitgeschichte*, B 37–38/2001, pp. 45–54, available at www.bpb.de/apuz/26041/das-bundesverfassungs-gericht-im-europaeischen-und-internationalen-umfeld?p=all.

Numerous international treaties harmonize national laws, coordinate their application and simplify interstate cooperation. International treaties are applied together with statutes or instead of them by administration and judiciary. Specific supranational law emerged in the European Communities and grows in the European Union.

Courts thus apply more complex laws than earlier. Statutes shall be interpreted with consideration of constitutions, international treaties and entire supranational law in the Member States of the European Union.

Commentaries, papers and judgments always served both judges for their adjudication and attorneys for their argumentation. Genuine flood of information emerged with electronic databases.

Sound and fair adjudication requires understanding of political, social, psychological and economic aspects of the case. Certainly, judges can ask various experts for explanation and opinion. Nevertheless, they must understand the issue at the end.

Even laws addressing private relations and suppressing criminality do not escape entirely political consideration. Political aspects of many non-traditional judicial agendas are even more apparent.

Eventual judicial control of monetary and fiscal policy thus requires judges to interpret vaguely formulated rules and hardly identifiable principles established in various legal systems and formulated in various legal documents. In addition, they must become familiar with economic theories and practices. Fiscal and monetary measures are intensively politicized. Their eventual judicial control would be thus also politicized.

3. RULES AND INSTITUTIONS FOR MONETARY AND FISCAL POLICY

Governments steer economic, social and political activities of individuals and collectives with commands and incentives. Commands are prescriptions and prohibitions. Non-compliance is sanctioned. Incentives encourage and discourage. Commands shall be specified with law. There will be no *rule of law* without it. Most incentives are also established by laws and described with them due to their political importance.

Certainly, an individual should not be reduced to *homo economicus*. There are also incentives beyond economic stimulation which can be explained by sociologists and psychologists. Nevertheless, the most important incentives applicable by governments are undoubtedly of economic nature.

Surely, public expenditures cannot be downplayed to incentives. Governments spend money for their tasks. Administration, judiciary, police and army guarantee security from internal and external threats. Governments

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alleviate social inequality and risks. Intentional incentives form a thin part of public expenditures.

Money developed for easier exchange of goods, services, work and capital. Gold and silver coins were used for centuries. Attempts to replace them with banknotes failed until the 19th century. De-metallised *fiat money* emerged not earlier than in the 20th century. Electronic transactions reduce need for banknotes and coins.⁷ International trade and investment are impossible without cross-border payments. Money now moves freely and easily across borders. Economists debate continuously about adequate definition of money and measurement of its amount (money supply or money stock)⁸ in national economy closely integrated with other economies in the world.

Countries established central banks or agencies for creating ("printing") money and for steering its circulation. Monetary policy is, however, nothing purely technical. Price stability competes with other goals such as development, growth, employment, financing of public tasks and repayment of public and private debts.

Gradual removal of gold as intrinsic stabilizer during the 20th century resulted in inflation unexperienced in previous centuries.⁹ Many countries suffered hyperinflation. Price stability was thus desirable. Independence of central banks from inherently politicized executive was a solution.¹⁰ This independence shall be guaranteed with rules for selection and position of experts charged to formulate and realize monetary policy.

Central banking thus became comparable with judiciary as regards its independence.¹¹ Supreme and constitutional courts are the institutions best to compare. Being a justice of these courts is similarly excellent career for legal scholars or practitioners as being a governor, director or member of central bank board for economists. Both authorities decide issues of national importance. Competing economic theories such as Keynesian economics and monetarism can be compared with judicial activism and restraint.

⁷ Numerous books, articles, papers, presentations analyse and summarize the development of money in various historical periods for pupils, students of economics and other disciplines and for general public. Summary sufficient for understanding for purpose of this paper can be found in English Wikipedia "History of money".

⁸ Quantity theory of money underlines importance of money in national (international) economy. The theory developed since 16th century. Significant scholars addressing it were L. Mises and M. Friedman.

⁹ See B. Taylor, *Century of Inflation*, available at www.globalfinancialdata.com.

¹⁰ About recent debate on independence and responsibility of central banks K. Ullrich, *Unabhängigkeit und Verantwortlichkeit der Europäischen Zentralbank*, Zentrum für Europäische Wirtschaftspolitik, ZEW Discussion Papers, 2003, No. 03-65, available at <http://hdl.handle.net/10419/23999>.

¹¹ G. Tridimas, *A comparison of Central Bank and Judicial Independence* in A. Marciano (Ed.), *Constitutional mythologies: New perspectives on controlling the state* Springer, Chapter 11, pp. 155-170, New York, 2011.

The differences between judiciary and central banking, however, cannot be ignored. Goals of monetary policy are formulated generally. There are several instruments available with variable effects. Economic theories shall be reflected by governors, directors and other managers of national central banks. Measures cannot be discussed in advance, if goals are to be achieved and insider trading avoided.¹²

Fiscal policy belongs inherently to sphere of public power. It culminates in periodical approvals or rejections of annual budgets and plans for longer periods by parliaments and councils. In addition, many statutes have fiscal consequences. Legislations establishing government authorities and institutions, armed forces, social security and healthcare, education and improvement and maintenance of infrastructure can be mentioned. Similarly, taxes, fees and contributions for their financing are also political topic of utmost importance.

Monetary policy is uniform for the entire territory of particular country without internal barriers for payments. On the contrary, fiscal policy is inherently decentralized. There are regional and municipal budgets. There are funds for specific tasks. Even centralized budgets need to be implemented for particular institutions and individuals. Formally separated budgets of distinct units of government are interconnected in reality.

The misappropriation of funds allocated for various purposes emerged during entire history. Expenditures were thus controlled by the government. Individual comptrollers or auditors are engaged and courts or offices of auditors were established. Their independence was later guaranteed with statutes and even with constitutions.

Many states and numerous municipalities were indebted during their entire existence.¹³ Surely, many debts resulted from wars. Other causes cannot be overlooked. Politicians often prefer expenditures because this approach boosts economy and increases welfare of population or they simply serve wishes of selected groups and individuals. The burden of repayment is left for the next generations and for future politicians.

Experience with irresponsible fiscal policy leading to insolvency of particular governments resulted in demand for restrictions. Balanced budget is required or deficit is limited. Related borrowing must be authorized by elected body or by superior authorities.

These requirements are imposed foremost on municipalities, regions and public funds to avoid differentiated indebtedness and eventual insolvency compromising the fulfilling of their tasks at the expense of responsible units.

¹² The most recent example of an entirely surprising step is the decision of the Swiss National Bank to abandon peg of the Franc to the Euro on 15. 1. 2015 (just one day after delivery of the opinion of the attorney general in the OMT case discussed below).

¹³ For recent reflection of sovereign debt see K. Dyson, *States, Debt and Power: Saints and Sinners in European History and Integration*, Oxford University Press, 2014.

Some autonomous states have acted voluntarily. Most notably, the United States of America adopted a similar approach to bailout them.

The mere reliance on market forces have proven insufficient. In the United States, the high level of indebtedness.¹⁵ Cuts with considerable political risk ("cliff"),¹⁶ Nonetheless, among European countries, many have installed them. The results are not adequate expert.

The independence of auditors and fiscal policy with broad powers.

Decisions of particular municipalities and individuals. Such actions fail.

Certainly, the interpretation of the law is also rare. We have seen the prosecution. Other

¹⁴ For detailed information see *State Balance Sheet* (StateBalanced).

¹⁵ D.A. Austin, *Monetary Service Report* (Organization/Service).

¹⁶ The 2010 Tax Expenditures of 2012 was covered by the

¹⁷ *Gesetz zur Änderung des Bundesgesetzes über die Finanzbeziehungen* (eds.), *Die neue Finanzbeziehungen*.

¹⁸ Amendment of the National Act

¹⁹ Article 216(5)

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Some autonomous governments install barriers against their indebtedness voluntarily. Most states¹⁴ and many municipalities in the United States of America adopted them after systematic refusals of the federal government to bailout them.

The mere requirement of balanced budget and the control of indebtedness have proven inefficient in cases of sovereigns. For example, the Congress of the United States of America has enacted numerous laws limiting federal indebtedness.¹⁵ Nevertheless, it increased them always to avoid mandatory cuts with considerable effect on government operations and economy ("fiscal cliff").¹⁶ Nonetheless, debt brakes have become fashionable during last decade. Among European countries, Germany,¹⁷ Switzerland,¹⁸ Poland¹⁹ or Spain²⁰ installed them. Several countries establish specific institutions for providing adequate expertise and eventually operating installed debt brakes.²¹

The independence of above mentioned authorities – central banks, courts of auditors and fiscal boards – increases their compliance of monetary and fiscal policy with broadly formulated legal requirements.

Decisions of central banks have serious and even devastating impact on particular manufactures, service providers, financial institutions, investors and individuals. Sudden changes of monetary policy spark insolvency to companies. Nevertheless, adjudication of monetary policy is missing. Probably, sporadic actions fail.

Certainly, numerous other judgments have fiscal implications. Above all, the interpretation of tax and social laws can significantly influence fiscal policies. Nevertheless, judicial control of decisions of parliaments and assemblies related to fiscal policy – approval of budgets, allocation of money for various tasks, is also rare. We can assume that politicians comply with clear rules to avoid prosecution. Otherwise, political assessment is surely respected.

¹⁴ For detailed overview see National Conference of State Legislatures, *NCSL Fiscal Brief: State Balanced Budget Provisions*, 2010, available at www.ncsl.org/documents/fiscal/StateBalancedBudgetProvisions2010.pdf.

¹⁵ D.A. Austin, M.R. Levit, *The debt limit: history and recent increases*, Congressional Research Service Report for Congress, RL31967, 2010, available at <http://fpc.state.gov/documents/organization/105193.pdf>. Debt ceilings replaced congressional approval of any loan.

¹⁶ The 2010 Tax Relief Act expected cessation of important tax reliefs and cuts of public expenditures were expected by the Budget Control Act of 2011. American Taxpayer Relief Act of 2012 was compromise which avoided the activation of this strong debt brake.

¹⁷ *Gesetz zur Änderung des Grundgesetzes (Artikel 91c, 91d, 104b, 109, 109a, 115, 143d)*, BGBl. 2009 I S. 2248, For detailed legal analyses see C. Kastrop, G. Meister-Scheufelen, M. Sudhof (eds.), *Die neuen Schuldenregeln im Grundgesetz: Zur Fortentwicklung der bundesstaatlichen Finanzbeziehungen*, Bwv – Berliner Wissenschafts-Verlag, 2010.

¹⁸ Amendment of Articles 126 and 159 of the Constitution of Swiss Confederation adopted by the National Assembly in 22. 6. 2001 and confirmed 2. 12. 2001 by popular vote.

¹⁹ Article 216(5) of *Konstytucja Rzeczypospolitej Polskiej*.

²⁰ Amendment of Article 135 *Constitución Española*, adopted 27.9.2011.

²¹ For example, the *Staatschuldenausschuss* and later the *Fiskalrat* in Austria.

4. A SINGLE CURRENCY FOR THE INTEGRATION IN THE EUROPEAN UNION

The crucial task of the European Communities and of the European Union was and is the economic integration of its Member States. Basic economic freedoms are the principal legal instrument for this purpose. Numerous regulations, directives and decisions contribute to their realization. This liberalization resulted into immense trade in goods and significant movement of workforce, services and capital among the Member States.

Cross-border payments are necessary for realization of these basic economic freedoms.²² Trade between the countries with their own currencies requires their exchange. Such exchange is, however, not for free. In addition to it, fluctuation of exchange rates causes risk to trade partners engaged in repeated, subsequent or postponed delivery. Risk coverage is expensive. Single currency shared by the extensively trading countries was and is justified with the removal of these costs and risks. Significant savings were promised with introduction of the Euro²³ and were indeed achieved.²⁴

The single currency was suggested already decades ago. Exchange rates became volatile after collapse of the Bretton Woods system (1971) emulating disrupted gold standard. Exchange risks and costs for insurance thus sharply increased for intra-community trade benefiting from basic economic freedoms.

The project of the single currency accompanied the establishment of the European Union in 1993. Eleven Member States introduced the Euro as abstract currency in 1999. Sums on deposits and amounts fixed in contracts, wills, decisions and judgments were to be recalculated. Coefficients for recalculation were fixed already in 1998.²⁵ The Euro was represented with former banknotes and coins of the Member States for a transitional period. Troubles with replacement of cash were feared. The European Union and the Member States thus carefully prepared for it. The withdrawal of national banknotes and coins and the introduction of Euro-banknotes and Euro-coins were easier than expected. Parallel circulation of old and new banknotes and coins was thus

²² As demonstrated in judgment of the Court of Justice of 31.1.1984, 286/82 and 26/83 in *Luisi and Carbone*, ECR 1984, p. 00377.

²³ Commission of the European Communities (1990): *One Market, One Money: An Evaluation of the Potential Benefits and Costs of Forming an Economic and Monetary Union*, European Economy 44, October. Savings were expected from 0.2-1.0% of GDP. Critical appraisal can be found in Mendizabal R., H., 'Monetary Union and the Transaction Cost Savings of a Single Currency', *Review of International Economics*, vol. 10, no. 2, pp. 263-277, 2002.

²⁴ An analysis after the five years of the Euro in physical circulation trying to distinguish impact of the Euro on prices increases is I. Beuerlein, *Fünf Jahre nach der Euro-Bargeldeinführung - War der Euro wirklich ein Teuro?*, Statistisches Bundesamt, *Wirtschaft und Statistik* 2/2007, pp. 208-212.

²⁵ Council Regulation (EC) No 2866/98 on the conversion rates between the euro and the currencies of the Member States adopting the Euro.

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The Eurozone is significant part of the European Union. However, the UK and Denmark opted out and Sweden tacitly joined them after their accession. Since then, several new Member States of the European Union qualified to introduce the Euro. Introduction was smooth in all these Member States. The Eurozone comprises nineteen Member States with 340 million people in 2015.

The Euro serves as currency also in several other states. According to expectations, it has become supplementary reserve currency besides the dollar. It is widely accepted as stable currency in many other countries.

5. ORIGINAL LEGAL FRAMEWORK FOR THE EURO

The Maastricht Treaty concluded in 1992 established several crucial requirements for Member States²⁶ for the introduction of the single currency on their territory:

- (1) independence of national central bank;
- (2) convergence of inflation (within span 1.5% above three Member States with the lowest inflation);
- (3) convergence of interest rates (+2% above three Member States with the lowest rates);
- (4) stable exchange rate of their national currency (the participation in the European Monetary System without fluctuation beyond fixed limits);
- (5) low deficit of public budgets (central, state, regional, local government plus institutions of social security and special public funds below 3% GDP); and
- (6) indebtedness of such defined national government less 60% GDP.²⁷

The two above mentioned fiscal requirements were confirmed later for the Member States of the Eurozone as the Stability and Growth Pact.²⁸

The European Union is required to operate balanced budget.²⁹ It shall be noted that revenues and expenditures are limited. This supranational polity lacks power to impose taxes.

²⁶ Then Article 109j of the Treaty establishing the European (Economic) Community and related Protocol on the convergence criteria referred to in Article 109j of the Treaty establishing the European Community.

²⁷ Now Article 126 and Article 140 TFEU.

²⁸ Resolution of the European Council on the Stability and Growth Pact Amsterdam of 17 June 1996, Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Council Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure.

²⁹ Article 310 paragraph 1 TFEU.

The Euro is legally required to be stable currency with low inflation.³⁰ The policies of the European Central Bank and central banks of the Member States of Eurozone (the Eurosystem since the Lisbon Treaty) are thus addressed with corresponding rules. Managers are independent from the Member States. These central banks are prohibited to provide money to the Member States.³¹

Legal framework for the Euro is labelled as "Economic and Monetary Union".³² Nevertheless, the first adjective has not been clarified. Few economic policies were coordinated in reality.³³

6. ONSET OF THE DEBT CRISIS AND ITS CAUSES

Especially German economists³⁴ discouraged from single currency already in its preparatory phase before 1998. Among others, it was contested whether the future zone of the single currency is optimum currency area according to theories of Robert Mundell.³⁵

Several political scientists and historians admit that introduction of the Euro started in a political deal after collapse of socialist regimes in Central and Eastern Europe. Germany was allegedly allowed to unify in exchange for single currency by France desiring to curtail dominance of the Deutschmark.³⁶

As mentioned, three Member States decided to retain their national currencies. Their population was suspicious or rejected the idea. Other European nations varied in their support for the single currency.³⁷

The Euro was introduced in 1999 despite chronic non-compliance of many Member States with fiscal criteria.³⁸ Unfortunately, situation has not improved

³⁰ Article 282 paragraph 2 TFEU.

³¹ Article 123 paragraph 1 TFEU.

³² Article 119 TFEU is introductory part of the title VIII "Economic and monetary policy". Chapter dedicated to "economic policy" addresses prominently fiscal policy of the Member States. Economic policy beyond fiscal policy is, however, addressed with general provisions underlining joint responsibility.

³³ For overview see B. Hacker, *On the Way to a Fiscal or a Stability Union? The Plans for a "Genuine" Economic and Monetary Union*, Friedrich-Ebert-Stiftung www.fes.de/ipa, 2013.

³⁴ 155 German professors of economics (initiated by M. Neumann) called in joint resolution against the introduction of the Euro in 1998. Numerous articles were published in 1997-98 in newspapers, journals and research papers. The topic was fiercely debated in thematic courses at the *Europa-Kolleg Hamburg*, I have studied in winter semester 1997/98 in post-graduate specialized programme.

³⁵ Mundell R., 'A Theory of Optimum Currency Areas', *The American Economic Review*, Vol. 51, No. 4, pp. 657-665, 1961.

³⁶ M. Sauga, S. Simons, Wiegrefe, *The Price of Unity: Was the Deutsche Mark Sacrificed for Reunification?*, Spiegel Online International, 30. 9. 2010, available at www.spiegel.de.

³⁷ For overview of the developments between 1990-2012 see F. Roth, L. Jonung, F. Nowak-Lehmann, *Crisis and public support for the Euro*, Vox CEPR's policy portal, 5.11.2012, available at www.voxeu.org/article/crisis-and-public-support-euro.

³⁸ For details see C. Degenhart, *Missachtung rechtlicher Vorgaben bei der Umsetzung der Währungsunion*, pp. 85-100, in T.M.J. Möller and F.-C. Zeitler (eds.), *Europa als Rechtsgemeinschaft - Währungsunion und Schuldenkrise*, Mohr Siebeck, 2012.

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Economy flourished at the end of the 20th and at the beginning of the 21st centuries worldwide, including most parts of Europe. Investors were optimistic. The heavily indebted Member States using the Euro were capable to refinance their public debt with loans with significantly lower interest rates than in the past. An opportunity to reduce their indebtedness was not used. On the contrary, these states plus their municipalities, companies and individuals extended their borrowings. Economic boom was thus stimulated. Investors enjoyed high profits. Especially, real estate prices skyrocketed.

The situation reversed after the onset of global economic recession in 2007. Many countries faced serious troubles. Manufacturers and service providers suffered from decreasing demand from indebted population. Asset prices collapsed. Banks faced unpaid credits. Unemployment increased. Government revenues dropped due to decreasing wages and vanishing profits. On the contrary, public expenditures increased. Unemployed people claimed social assistance. Governments granted massive bailouts to banks, because they feared runs of creditors.

Trust of lenders disappeared in case of the heavily indebted Member States of Southern Europe. Exorbitant interest rates for refinancing of loans were asked at financial markets⁴⁰ and credit-default swaps skyrocketed. Greece has been exorbitantly indebted. Its insolvency became imminent. Insolvency of one Member State would spark (*domino effect*) troubles of the other highly indebted Member States: Portugal, Ireland, Cyprus, Spain and Italy.⁴¹

It was assumed that insolvency would compel such Member State to reintroduce national currency. Public debt crisis of several Member States was thus perceived as threat to the Euro.⁴²

The potential collapse of the single currency would surely undermine the European Union. Reintroduction of national currencies would require restrictions of cross-border movements of payments. Necessary border controls could be misused for reintroduction of obstacles to free movement of persons, services and goods.

³⁹ Presidency Conclusions – Brussels, 22 and 23 March 2005, Improving the implementation of the Stability and Growth Pact – Council Report to the European Council.

⁴⁰ For the figures during onset of the crisis and related early analysis see Hagen J, Schuknecht J., Wolswijk G., *European bond spreads in the current crisis*, 21.12.2009, VOX CEPR's policy portal, www.voxeu.org/article/european-government-bond-spreads-current-crisis. Recent interest rates during 2014 are available at www.ecb.europa.eu/stats/money/long/html/index.en.html.

⁴¹ The threat of contagion (*domino effect*) was alleged, or rejected by numerous commentators and politicians as justification of various rescue measures or their refusal.

⁴² See, among others, P.J. Welfens, *Die Zukunft des Euro – Die europäische Staatsschuldenkrise und ihre Überwindung*, Nicolaische Verlagsbuchhandlung GmbH, Berlin, 2012, pp. 162–173, 224–239 or P. Athanassiou, *Withdrawal and Expulsion from the EU and the EMU – Some Reflexions*, Legal Working Paper Series, No. 10, 2009, European Central Bank – Eurosystem.

It is worth to note that expulsion of any insolvent Member State as confirmed weakling from the Eurozone is hard to imagine. People would not voluntarily change the Euro for national currency while expecting its devaluation. Monetary unions broke up when their stabilized Member States decide to introduce their own stable currency.⁴³

7. ALLEVIATION OF THE CRISIS AND PREVENTION OF ITS ESCALATION

Fearing the collapse of the Eurozone, leaders of the Member States and the European Union decided to assist endangered Member States with huge rescue loans. Bilateral loans were quickly followed with orchestrated action. The European Union has provided collateral for joint borrowing at financial markets known as the European Financial Stabilisation Mechanism (EFSM).⁴⁴ The European Financial Stability Facility (EFSF) was established as temporary fund for rescue loans.⁴⁵ European resources were not sufficient. The International Monetary Fund (IMF) also provided rescue loans. Finally, the European Stability Mechanism (ESM) was established as huge fund public fund besides the European Union providing rescue loans at the end in 2011.⁴⁶

On the other hand, heavily indebted and potentially insolvent Member States of the Mediterranean have failed until now in their effort to mutualize their public debts. Various models of interstate guarantees and of "Eurobonds"

⁴³ The Introduction of Czechoslovak *koruna* in 1919 after breakup of Austrian-Hungarian monarchy and orchestrated separation of that currency into Czech and Slovak ones in 1993 initiated by the Czech Republic, for details see J. Fidrmuc, J. Horváth, J. Fidrmuc, 'The stability of monetary unions: lessons from the breakup of Czechoslovakia', *Journal of Comparative Economics*, 1999, vol. 27, no. 4, pp. 753-781.

⁴⁴ Council Regulation 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

⁴⁵ Founded 7 June 2010, established after Framework Agreement in Luxembourg as "société anonyme" under Luxembourgish law by 17 Shareholders: Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovakia, Slovenia and Spain. The EFSF has provided financial assistance to Ireland, Portugal and Greece. Since 1 July 2013, the EFSF may no longer engage in new financing programs or enter into new loan facility agreements. Collection of related documents is available at www.efsf.europa.eu/about/legal-documents/index.htm.

⁴⁶ Treaty establishing the European Stability Mechanism (ESM) between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic and the Republic of Finland (the "euro area Member States" or "ESM Members"), signed 2. 2. 2012 and entered into force 27.9.2012.

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have been discussed and proposed by the European Union.⁴⁷ Nevertheless, Northern Member States reject this idea as reward for hazard and punishment of prudence.

The control of budgetary policy of the Member States was strengthened to prevent eventual failure to honour debts endangering the single currency. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("the Fiscal Compact")⁴⁸ requires the Member States of the Eurozone to install and operate debt brakes. Legislation colloquially labelled as Two-pack⁴⁹ and Six-pack⁵⁰ has remodelled secondary law addressing fiscal policies and economic development of the Member States.

The debt crisis as potential currency crisis is tackled also with monetary policy. The European Central Bank and central banks of the Southern Member States became benevolent to commercial banks. Immense long-term loans have been granted to numerous banks in Southern Europe facing troubles due to collapse of real estate bubble and economic recession. These banks would collapse without such emergency liquidity assistance (ELA). Requirements for collateral for this borrowing were relaxed. Bonds of heavily indebted states are accepted.⁵¹

Irresponsible banking should be prevented with more stringent rules and with effective supervision. International operations are not effectively controlled by authorities of the Member States, despite harmonization of banking laws of the Member States with directives of the European Union.

⁴⁷ Green Paper on the feasibility of introducing Stability Bonds, published 23.11.2011, COM (2011) 818 final.

⁴⁸ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union signed 2.3.2012 and entered into force 1.1.2013.

⁴⁹ Regulation (EU) No 473/2013 of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area plus Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, see also Ioannidis M., 'EU Financial Assistance Conditionality after "Two Pack"', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 2013, pp. 62–104.

⁵⁰ Regulation (EU) No 1175/2011 of the European Parliament amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Council Regulation (EU) No 1177/2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ. Regulation (EU) No 1173/2011 of the European Parliament and the Council on the effective enforcement of budgetary surveillance in the euro area, Regulation (EU) No 1176/2011 of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances plus Regulation (EU) No 1174/2011 of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

⁵¹ For the development of the policy see J. Eberl, C. Weber, *ECB Collateral Criteria: A Narrative Database 2001–2013*, Ifo Working Paper No. 174, 2014, available at www.cesifo.de.

The Single Supervision Mechanism (SSM)⁵² covering most important banks is already implemented by the European Union and the Member States. On the other hands, the Single Resolution Mechanism (SRM) consisting of mutual reserve fund for resolution of banks is long term task. Its finalization is unclear despite adopted legal framework.⁵³ At the moment it is clear where endangered banks operate.

8. POLITICAL CONSEQUENCES OF THE CRISIS

Crises cause disputes and alienation. Members of associations, shareholders and employees of companies and institutions, citizens of municipalities and nations debate about and quarrel over causes, threats and remedies. Tensions increase. Weak structures can collapse in severe crises. The debt crisis and potential currency crisis sparked serious political crisis of the European Union. Many feared – and some wished – its disintegration.

Member States assisted with rescue loans are required to introduce austerity. Budget cuts, however, curtail national economy. Lower wages result in lower spending. Demand for goods and services decreases. Manufacturers and providers incur losses, cease to pay taxes and dismiss their workers. The impact thereof on public revenues is sinister. Capacity to repay public debt is thus further compromised. Unsurprisingly, austerity measures are perceived by many as unworkable and dangerous.

Austerity measures imposed on indebted Southern Member States thus sparks opposition. Government coalitions collapse, early elections are held and populist parties strengthen their position. Politics of Northern Member States pushed to spend money for rescue loans was also not spared. Large parts of population oppose it. Various populist and Eurosceptic parties and movements emerge and grow. These parties and movements were, as expected,⁵⁴ successful in election of the European Parliament in 2014.

⁵² Regulation (EU) No 1022/2013 of the European Parliament and of the Council amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013, Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions.

⁵³ Regulation (EU) No 806/2014 of the European Parliament and of the Council establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 plus Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund, agreed on 14. 5. 2014 by the Member States of the EU, not yet ratified.

⁵⁴ S. Kessel, A.L.P. Pirro, *Discontent on the Move: Prospects for Populist Radical Right Parties*, pp. 14–18, in the 2014 European Parliament Elections in Times of Crisis, *Intereconomics* 2014, ZBW – Leibniz Information Centre for Economics, DOI: 10.1007/s10272–014–0483–1.

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The debt and currency crisis reveals limits of the European Union as supranational polity which has not become a federation. The Member States have provided huge sums to the rescue funds. Therefore, they decided on their use. Certainly, variable economic performance and situation determines strength of individual Member States.

The European Commission tries to retain its authority with surveillance and control. The European Parliament is often powerless and irrelevant rubber stamp body for measures adopted by the Commission after negotiation with the Member States represented in the Council.⁵⁵

It is worth to note that the European Union did not face similar troubles as the Member States. The Commission – presided for two terms by José Manuel Barroso since 2004 – did not collapse due the crisis as national cabinets did. There was no early election not only because law does not expect it, but also because nobody called for it. Selection of the new president of the Commission Jean-Claude Juncker as experienced negotiator confirms specific politics in supranational structure.

Nonetheless, the European Union faces considerable loss of reputation.⁵⁶ Renaissance of intergovernmental method reveals weaknesses of supranational model. Tensions among the Member States and incapacity to address the crisis without external assistance were apparent.

The debt and currency crisis has worsened relations among European nations. Southerners criticize Northerners for troubles resulting from austerity and its alleged ineffectiveness. Northerners blame Southerners for irresponsible borrowing and wider government failure to address their troubles.

There is no consensus about causes of the crisis in the European Union. Welfare model in general and its particular variants in the Member States, corruption and inefficient governance, reckless borrowing by governments and also by enterprises and individuals and hazardous lending by banks are blamed.

The design of the Eurozone without adequate economic coordination and fiscal integration necessary to mitigate different economic performance of the Member States is criticized as immediate cause of the crisis.

It shall be noted that also the other developed countries – the United States of America and Japan – suffered during last decade from economic slowdown and chronic stagnation, respectively. The debt of the United States government is comparable with heavily indebted states in the Eurozone. The public indebtedness of Japan is the highest among developed countries.

It is hard to agree on remedies without consensus about causes. Adopted remedies resulting from lengthy negotiation under considerable pressures are

⁵⁵ F. Schimmelfennig, *Liberal Intergovernmentalism and the Euro Zone Crisis*, available at www.eup.ethz.ch/people/schimmelfennig/publications/LL_euro_crisis.pdf.

⁵⁶ L. Bellier, C. Guibéguet, *La réputation de l'UE ternie par la crise de la dette*, Les Echos, 2.8.2012, available at www.lesechos.fr.

thus also fiercely debated. Some experts, politicians and commentators criticise bail-outs as promotion of hazardous behaviour. Expansionary monetary policy is depicted as potential impulse for inflation. Others, however, claim that imposed austerity worsens situation in the Member States already suffering from economic crisis. Solidarity among the Member States and their nations consisting in rescue loans and expansive monetary policy is required.

The debt and currency crisis revealed limits of mutual understanding in multilingual European Union. People debate about its causes, consequences and remedies in spaces separated by linguistic barriers. Politicians operate also foremost in national sphere. The deliberation of national representations and representatives of the European Union continues as diplomacy, albeit with interventions of supranational authority.

Experts are capable to debate internationally. Nevertheless, their debates on national level continue. For example, German-written discourse differs significantly from English-written discourse of experts active on global level.

9. LEGAL ASPECTS OF REMEDIES AND REINTERPRETATION OF RULES

Supranational law of the European Union is enforced more effectively than international law. It is, however, weaker than federal laws in existing federations. Direct effect and primacy are well anchored in case-law,⁵⁷ but lack clear confirmation in the founding treaties.⁵⁸

Compliance with law of the European Union is often troublesome due to weak enforcement by its own authorities. Assistance of executive and judicial authorities of the Member States is necessary in many cases. Required implementation of directives and regulations is often perfunctory.

Relative weakness of the European Union law revealed with the debt crisis.⁵⁹ Chronic incompliance with crucial requirements remained unsanctioned for decades.

Founding treaties can be amended only if all Member States achieve consensus. Signatures of premiers and ministers must be followed with parliamentary or popular approval and with ratification by the heads of the states. Similarly, many regulations, directives and decisions must be adopted unanimously in the Council. The rest requires qualified majority.

⁵⁷ Landmark judgments 26–62 *van Gend en Loos* and 6–64, *Costa v. E.N.E.L.*

⁵⁸ Declaration No. 17 concerning primacy; Annex to this Final Act the Opinion of the Council Legal Service on the primacy of EC law as set out in 11197/07 (JUR 260).

⁵⁹ R. Streinz, *Rechtsprinzipien des EuGH zur Durchsetzung des Europäischen Rechts*, pp. 21–44, in Möllers T.M.J., Zeitler F.-C. (eds.), *Europa als Rechtsgemeinschaft – Währungsunion und Schuldenkrise*, Mohr Siebeck, 2013.

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It is not surprising that several measures adopted in situation of urgency have dubious legal framework under such conditions. The European Financial Stability Facility was established outside supranational law as private company according to Luxembourgish law. The European Financial Stability Mechanism started with secondary law hardly compatible with requirement of balanced budget set in the founding Treaties.⁶⁰ The foundation of the European Stability Mechanism with special international treaty concluded by the Member States of the Eurozone was confirmed only later with amendment to the Treaty on Functioning of the European Union.⁶¹

In addition, representatives of the Member States and of the institutions of the European Union and commentators supporting their decisions resort to utilitarian interpretations of rules. Refusal of them as inappropriate, inapplicable and even harmful. Provisions of the Treaty expecting the separation of budgets of the Member States and of the European Union were understood as the no-bail-out clause.⁶² Rescue loans were not expected. Thresholds for public debt were expected as prevention of any demand for them.

Detailed secondary legislation was nonetheless adopted and amended for strengthening of surveillance of the Member States by institutions of the European Union. The Fiscal Compact was adopted as an additional international treaty besides the founding Treaties by most Member States.

It can be questioned whether complicated procedures of surveillance, reporting and evaluation could improve situation. Commentators are rather sceptical.⁶³ Imposing fines on the Member States in financial distress is intrinsically problematic. Automatized sanctions could be regretted. The requirement to amend constitutions is unusual and challenging. The Member States cannot tackle imbalance of international trade and developments in markets without interventions hardly compatible exactly with basic economic freedoms of the European Union.

The above mentioned rules on operations of the European Central Bank and central banks of the Member States were reinterpreted in the sense that purchase of bonds of highly indebted Member States facing mistrust of investors

⁶⁰ Article 310(1) TFEU.

⁶¹ The European Council Decision of 25 March 2011 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 (2011/199/EU), Details are analysed, among others, by A. Meyer-Heine, *Le TFUE et l'assistance financière à un État membre. Réflexions liées à la mise en place du MES*, Revue de l'Union Européenne, 2014, pp. 13–38.

⁶² The interview with German EU law professor M. Ruffert in S. Ruhkamp, Professor für Europarecht "Hilfe für Griechenland wäre Rechtsbruch", *Frankfurter Allgemeine Zeitung – Finanzen*, 23.1.2010, available www.faz.net/aktuell/finanzen/anleihen-zinsen/professor-fuer-europarecht-hilfe-fuer-griechenland-waere-rechtsbruch-1912963.html.

⁶³ Scepticism on EU efforts to curtail public debt of the Member States with elaborate rules and mechanisms of control was expressed in R.D. Kelemen, T. Teo, 'Law, Focal Point and Fiscal Discipline in the United States and in the European Union', *American Political Science Review*, vol. 108, no. 2., 2014, pp. 355–370. Authors highlight disciplining effect of markets.

is allowed as necessary for the stabilization of currency. Emergency liquidity assistance (ELA) provided to banks which have invested in these bonds and have lost considerable sums in are also justified as necessary for stabilization of the bank sector and thus the economy.

The conditions of rescue loans, related surveillance of borrowing Member States by lenders and authorities charged by them deserve analysis, albeit their enforcement with assistance of the courts cannot be expected in most cases.

The inefficiency of several rules, vagueness and missing consensus on interpretation of other ones and the creation of complicated new rules whose applicability is questioned undermines legitimacy of entire framework for the Euro.

Legal scholars even now underline that the new Member States are obliged to introduce the Euro. It can be claimed, however, that circumstances have changed fundamentally. According to principles of international law, such changes can release from original obligation if separable from other obligation.⁶⁴ Monetary union relies now on altered rules and exists in rather different economic, political and settings.

Such interpretation was not voiced until now. Opponents of the Euro tend to delegitimize authority of the European Union in general. This approach, however, has a political parallel. The European Union ceased to push the new Member States to join the Euro. Applicants were checked rigorously. The smaller new Member States – Slovenia, Slovakia, Estonia, Latvia and Lithuania – have adopted it. On the contrary, the bigger new Member States – Poland, Czech Republic, Hungary, Romania and Bulgaria – hesitate to join.

10. JUDICIAL INVOLVEMENT IN THE CRISIS

As mentioned, judiciary is crucial for the rule of law. The Court of Justice has decisively contributed to the development of law of the European Communities as supranational legal system. The courts of Member States have largely accepted this approach.

Political controversies related to the ongoing debt crisis and eventual currency crisis thus inevitably attract judicial actions if there is legal framework for the single currency.

However, the tendency to bring these controversies before the courts is variable in the Member States. Rescue loans and other measures save the heavily indebted Member States from their insolvency. Few would complain in these countries. Complaints emerge from institutions, political parties and other

⁶⁴ Article 62 of the Vienna Convention on Law of Treaties. Nevertheless, this fundamental change can be invoked for withdrawal from treaty, e.a. from entire founding treaties of the European Union. From legal point of view, the Euro is not separable from economic liberalization.

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actors. They oppose their own governments agreeing with rescue measures or approach of the institution of the European Union.

The courts in few Member States have been called to decide on cases related to the debt and eventual currency crisis. The greatest attention is duly paid to Germany.

Germany developed strong model of Rechtsstaat after the catastrophe of Nazism. The Grundgesetz is applied intensely for the control of legislation and its enforcement. Germany established strong constitutional court for this task. Its constitutional judiciary was emulated in many countries. The methodology of constitutional principles and fundamental rights developed by the Bundesverfassungsgericht is emulated abroad.

German insistence on constitutional principles and fundamental rights was and is so strong that even European integration, generally supported by the German elites and the population, was questioned if overlooked by the European institutions. Among others, German pressure contributed to consideration of the European Convention on Human Rights and the case-law of the European Court for Human Rights by the Court of Justice and to adoption of the Charter of Fundamental Rights of the European Union.

Germany contributes the greatest sums for rescue loans. Germany is prosperous thanks reformed markets and tendency to savings. German public budgets – despite non-compliance with official threshold – are perceived as the most stabilized. The interest rate of *Bundesanleihen* forms the measurement for reliability of other government bonds (spreads).⁶⁵ Germans are self-assured that the situation reflects sound national economic and fiscal policy.

Finally, Germany suffered hyperinflation ninety years ago, resulting into interwar instability leading to the Nazi regime and disastrous war. Germans thus perceive stable currency as essential for economic and social stability. The Euro is legitimate only if it will be stable for a long period of time and thus is a real successor of the Deutschmark.

The feeling of responsibility for war atrocities towards other Europeans is widely shared by German elites. Nevertheless, the preparedness to confirm it with extraordinary financial contributions to projects of European unity is vanishing.

All these factors cause significant engagement of German Bundesverfassungsgericht. This engagement is perceived as complicating in other countries as was revealed in an impatient statement of the former French minister of finance and now the director of the International Monetary Fund Christine Lagarde.⁶⁶

⁶⁵ Switzerland is the only country whose bonds compete with *Bundesanleihen* it their reputation. Nevertheless, German presence at international markets is bigger, see www.bloomberg.com/markets/rates-bonds/.

⁶⁶ "If I hear the word Karlsruhe one more time, I'm leaving the room", K.-A. Scholz, *Karlsruhe's constitutional monastery*, analysis of Deutsche Welle 11.9.2012, www.dw.de/karlsruhes-constitutional-monastery/a-16231161-1.

The Bundesverfassungsgericht was cautious to undermine rescue measures agreed or promoted by the Bundesregierung and endorsed by the Bundestag. It accepted rescue loan to Greece and the establishment of the European Stability Mechanism.⁶⁷ Nevertheless, it underlined necessity of parliamentary approval and control over all expenditures.

Times are changing now. The Bundesverfassungsgericht requested⁶⁸ in spring 2014 the Court of Justice⁶⁹ for check of compliance of Outright Monetary Transactions (OMT). These Outrights Monetary Transactions⁷⁰ are at the moment the policy proclaimed in September 2012 by the European Central Bank to purchase without limits bonds of the Member States if rejected by investors.

The first request of the Bundesverfassungsgericht for preliminary ruling in six decades of coexistence of this court with the supranational judiciary of the European Communities shows that the court has substantial doubts about the compliance with principles of the European Union.

It shall be highlighted that the Bundesverfassungsgericht declared request as necessary communication before eventual resort to rebellion against supranational law in name of core values of German constitutionalism.⁷¹

The courts of other Member States are asked to intervene from time to time. Nevertheless, the sole case worth to mention was a request of the Supreme Court of Ireland for preliminary ruling when deciding on complaint of deputy Pringle against establishment the European Stabilization Mechanism.⁷² The Court of Justice interpreted the no-bail-clause narrowly.

We can expect that the Court of Justice would accept this policy. The request mentioned could be rejected for formal grounds because it was decided by the Council of the European Central Bank and presented by its president Mario Draghi, but not yet implemented. Even if the request for preliminary ruling is accepted, the response can be benevolent.⁷³

The opinion of the advocate general delivered in January 2015⁷⁴ reveals competing inclinations within the Court of Justice. On the one hand, the European Central Bank shall enjoy considerable independence while deciding on monetary

⁶⁷ Decision of the second senate 2 BvR – 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10 of 7.9.2011.

⁶⁸ Decision of the second senate 2 BvR 2728/13 of 14.1.2014.

⁶⁹ Registered by the Court of justice as C-62/14 Gauweiler (deputy of German Bundestag leading group of complainants).

⁷⁰ Decided by the Governing Council of the European Central Bank on 6.9.2012. The program was described in *ECB Monthly Bulletin*, September 2012, pp. 7–11, www.ecb.europa.eu/pub/pdf/mobu/mb201209en.pdf.

⁷¹ Decision of the second senate – 2 BvR 2661/06 of 6.7.2010 in *Honeywell*.

⁷² Judgment C-370/12, *T. Pringle v. Government of Ireland and the Attorney General* of 27.11.2012.

⁷³ For comments on legal aspects see M. Goldmann, *Adjudicating Economics? Central Bank Independence and the Appropriate Standard of Judicial Review*, *German Law Journal*, vol. 15, no.2, pp. 265–280, available at www.germanlawjournal.de.

⁷⁴ Opinion of AG P. Cruz-Villarón issued on 14.1.2015 accepts the OMT as unconventional and exceptional tool of monetary policy for which the ECB is competent and judiciary should be

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policy. The advocate general admits lack of expertise. On the other hand, the legal framework for the Euro establishes restrictions for operations of the European Central Bank obliged to care for stable single currency. The compliance requires thus for steering of currency circulation. They shall be well explained.

It is hard to predict the incoming decision of the Court of Justice. As mentioned, judicial control of monetary policy is unprecedented at national level. I expect benevolence. It can be argued that the European Central Bank operates within its mandate for monetary policy. The Court will probably show respect for the independence of central banking of the European Union as a "sister institution" resembling in its authority and independence the Court itself. The Court could fear consequences of eventual rigorous interpretation of the rules for stability of the Eurozone, but it would surely conceal this attitude.

We can expect similar restraint of the Court of Justice in eventual future cases addressing controversial measures tackling the debt crisis of the Member States and eventual currency crisis in the Eurozone.

Debates will surely emerge whether such judicial restraint is good. This approach can cause further deterioration of legitimacy of the Euro and of the European Union. The Member States agreed and their people accepted to introduce single currency under specific conditions. Feared rebellion of the *Bundesverfassungsgericht* could be signal of such erosion of legitimacy of the supranational structure in its keystone state.

However, the Court of Justice would be swiftly accused of judicial activism if decides to intervene in measures of competent institutions of the European Union and its Member States. Many would highlight that the compliance with the rules after a decade of their ignorance could have dangerous outcomes. If amendment cannot be achieved, reinterpretation of rules can be feasible and even their ignorance would be necessary.

Doubts raised about measures aimed at alleviation of debt and currency crisis can bring new cases to the Court of Justice. The number of such causes will be low, albeit they will be of the highest political importance. Among others, the Court of Justice is expected contribute to enforcement of restrictions imposed on the Member States with the Fiscal Compact. The Court shall evaluate implementation and eventually impose heavy fines.⁷⁵

The judiciary of the European Union can expect entire new agenda with already mentioned centralization of bank supervision.⁷⁶ Permissions, sanctions, requirements, prohibitions addressed to banks and their forced administration

cautious with its review. Nevertheless, principles of monetary policy and prohibition of direct financing are recalled. Eventual realization shall be carefully explained by the ECB.

⁷⁵ Article 8 of the Treaty. Action of the European Commission to the Court of Justice is expected. Financial sanctions up to 0.1% GDP can be imposed by the Court for non-compliance. The article underlines relation with general provisions addressing role of judiciary.

⁷⁶ Detailed analysis of judicial aspects of emerging banking union in L. Wissink, T. Duijkersloot, H. Widdershoven, 'Shifts in Competences between Member States and the EU

are rarely reviewed by courts. Decision-making is often vested to central banks. Their independence and urgency spare it from adjudication. Nevertheless, the impact of bank supervision on interests of clients, shareholders and managers cannot be denied. Therefore, judicial control cannot be entirely refused.

11. CONCLUSIONS

Recent cases brought to the Court of Justice challenging the monetary and fiscal measures adopted in the Eurozone shattered by the debt crisis of its several Member States are unprecedented. National courts have never been asked to resolve substantial controversies related to national fiscal and monetary policies.

The emergence of such cases just in the European Union deserves explanation. Firstly, the European Communities and the European Union were and are the structures governed with law, despite any weaknesses resulting from its supranational features. Secondly, the Euro was introduced according to the project formulated in legal terms. Other currencies are not subjected to similar legal framework.

However, chronic in compliance with fiscal requirements brought the Eurozone at the edge of collapse. The rescue loans and unconventional monetary policy introduced since the onset of the crisis were not expected. These measures are controversial. They assist indebted Member States at the expense of responsible Member States. Eventual inflationary trends are perceived in opposite ways by debtors and by creditors.

The compliance of these measures with the original set of rules is questionable. These rules are formulated vaguely. Original and textual⁷⁷ interpretation of these rules invoked by some is perceived as unfeasible and even dangerous for the viability of the Euro as the shared currency of nineteen Member States by others, including key persons of the European Union. The president of the European Central Bank Mario Draghi said to do "whatever it takes" to save the Euro.⁷⁸

The approach of the Court of Justice is hard to predict. The Court of Justice is and will probably continue to be cautious whether to intervene in the fiscal and monetary policies adopted by the European Commission, the European Parliament and the Council and the European Council or by the Member States represented as political actors as well as the European Central Bank as an independent institution.

in the New Supervisory System for Credit Institutions and their Consequences for Judicial Protection', *Utrecht Law Review*, no. 5, 2014, pp. 92–115.

⁷⁷ Originalism is the approach of interpretation of the US Constitution as the text was allegedly understood two centuries ago.

⁷⁸ His statement of 25.7.2012 is repeatedly cited as the outline of the ECB policy during any event.

The structure extensively of adjudication courts of the cannot be ignored.

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The structure of the European Union as supranational structure relying extensively on the Member States makes things more complicated. The adjudication of European Union law is realized in close cooperation with the courts of the Member States – as the Bundesverfassungsgericht – whose opinions cannot be ignored.

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FOR DEMOCRACY

Edited by

ELŻBIETA KUŻELEWSKA
Dariusz KLOZA
Izabela KRAŚNICKA
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CONTENTS

<i>Foreword by Prof. Maciej Szpunar</i>	v
<i>Preface</i>	vii
<i>List of Abbreviations</i>	xv

PART ONE

THE COURT OF JUSTICE OF THE EUROPEAN UNION

1. Democracy in Constitutional Politics of European Courts:

An Overview of Selected Issues

Bogusia PUCHALSKA 3

1. Introduction	3
2. The ECJ and national courts: power struggle or cooperation?	6
2.1. European Court of Justice: its own master?	6
2.2. The main tenets of ECJ's constitutional politics	7
2.3. The enduring attraction of the concept of sovereignty in relations between the ECJ and NCs	10
2.4. Beyond 'sovereignty': power struggle, or power-posturing?	14
3. The supremacy of EU economic policy	16
3.1. What is the model of economic policy entrenched in the Treaties? ...	17
3.2. The ECJ and the EU's 'democratic deficit'	18
3.3. Entrenchment of the EU economic policy, TTIP, and the role of the courts	20
3.3.1. Democratic deficit of economic policy and the courts	20
a. Investor-state dispute settlement	21
4. Conclusions	22
Bibliography	23

2. The Institutional Balance as CJEU's Contribution to Democracy in the Union: Selected Issues

Tomasz DUBOWSKI 25

1. Introduction	25
2. The CJEU and the traces of institutional balance in the Treaties	26
3. Institutional balance as a general principle of EU (EC) law? The Court's role	29

Intersentia

ix

4. Institutional balance and democracy in the EU – visible links	32
5. Conclusion	35
Bibliography	36
3. From Judicial Dialogue Towards Constitutional Spill-Over? The Economic Analysis of Preliminary Reference Procedure and the Application of the EU Charter of Fundamental Rights	
Mariusz J. GOLECKI	37
1. Introduction	37
2. Constitutional courts and the preliminary reference procedure: judicial dialogue and judicial spill-over.	41
3. Towards an economic analysis of breach of the EU Charter of Fundamental Rights by the national constitutional court	45
4. Tentative conclusion	53
Bibliography	54
4. Towards the Democratization of the EU? Strengthening prerogatives of the European Parliament in the case law of the Court of Justice of the European Union	
Agnieszka PIEKUTOWSKA	57
1. Introduction	57
2. The defence of the prerogatives of the European Parliament before the CJEU. Pre-Lisbon case-law.	59
3. Post-Lisbon judgments of the CJEU on the EP's prerogatives	63
4. Conclusion	67
Bibliography	69
5. Democratic Values in the Court of Justice Adjudication on the Private Enforcement of the European Union Competition Law	
Franciszek STRZYCZKOWSKI	73
1. Introduction	73
2. The influence of the American experience on private enforcement of the European antitrust law	75
3. The importance of the reform of the EU competition law enforcement. ...	76
3.1. Towards fostering private damages actions – proposals of the European Commission	77
4. The position of the European Courts	78
5. <i>Locus standi</i> to claim damages under European Union competition law ..	83
6. Concluding remarks	85
Bibliography	85

6. Judicial Control of the European Union	
Filip KŘEPELKA	
1. Introduction	
2. Traditional approach	
3. Rules and instruments	
4. A single currency	
5. Original legal basis	
6. Onset of the crisis	
7. Alleviation of the crisis	
8. Political consequences	
9. Legal aspects	
10. Judicial involvement	
11. Conclusions	
Bibliography	
7. How CJEU's "Digital Rights" are Shaping the Future in the Digital Age	
Gabriela ZANON	
1. Introduction	
2. The relationship between the digital world: <i>Digital Rights</i>	
2.1. Preliminary considerations in protection of digital rights retention	
2.2. Bulk retention of data – not only for law enforcement	
2.3. Clarification of the scope of digital rights of the 8 of the Charter	
2.4. Requirements for digital rights – fundamental rights	
3. The relationship between the digital world: <i>Google v. Spain</i>	
3.1. Internet search engines – involves digital rights	
3.2. "Global" digital rights	
3.3. The right to be forgotten with the digital world	
3.4. Criteria for digital rights	
4. Conclusion	
Bibliography	

nks 32
 35
 36

 ver?
 ure and
 ts
 37
 37
 edure:
 41
 er of
 45
 53
 54

 prerogatives of
 Justice of the
 57
 57
 nt before the
 59
 ves 63
 67
 69

 on the Private
 73
 73
 orcement
 75
 enforcement. ... 76
 als of
 77
 78
 ompetition law .. 83
 85
 85

6. Judicial Control of Monetary and Fiscal Decisions in the
 European Union
 Filip KRÉPELKA 87

 1. Introduction 87
 2. Traditional and emerging roles of judiciary 88
 3. Rules and institutions for monetary and fiscal policy 90
 4. A single currency for the integration in the European Union 94
 5. Original legal framework for the euro 95
 6. Onset of the debt crisis and its causes 96
 7. Alleviation of the crisis and prevention of its escalation 98
 8. Political consequences of the crisis 100
 9. Legal aspects of remedies and reinterpretation of rules 102
 10. Judicial involvement in the crisis 104
 11. Conclusions 108
 Bibliography 109

 7. How CJEU's "Privacy Spring" Construed the Human Rights Shield
 in the Digital Age
 Gabriela ZANFIR 111

 1. Introduction 111
 2. The relationship between individuals and the state in the digital
 world: *Digital Rights Ireland* 112
 2.1. Preliminary observation: there is a wide societal interest
 in protecting human rights against the bulk collection and
 retention of metadata 113
 2.2. Bulk retention of metadata touches on the freedom of expression,
 not only on privacy 113
 2.3. Clarification on the differences in content between Articles 7 and
 8 of the Charter 115
 2.4. Requirements for data retention legislation to comply with
 fundamental rights 117
 3. The relationship between individuals and private bodies in the digital
 world: *Google v. Spain* 119
 3.1. Internet search engines are data controllers and their activity
 involves processing of personal data 120
 3.2. "Global" territorial scope of Directive 95/46/EC 121
 3.3. The right to erasure applies when the processing does not comply
 with the provisions of Directive 95/46/EC 122
 3.4. Criteria for the balance of rights 123
 4. Conclusion 123
 Bibliography 124

8. The Supremacy of the EU Law as Interpreted by the Polish Constitutional Tribunal	
Elżbieta KUŹELEWSKA and Dariusz KUŹELEWSKI	127
1. Introduction	127
2. Specificity of the constitutional review in Poland	128
3. The primacy of the EU law over national law	129
4. The principle of supremacy in the light of the Polish Constitutional Tribunal's judicature	131
5. Conclusions	137
Bibliography	139
9. Reception of EU Law in Polish Courts – A Case of “Teddy Bear” Law	
Izabela KRAŚNICKA	143
1. Introduction	143
2. The principle of supremacy, the principle of direct effect and the principle of indirect effect of EU law	144
3. “Working time” under the Polish law and EU law	148
4. Czesław Miś’ arguments in the light of the ECJ case law	150
5. Arguments of the Polish courts	152
6. The final decision and its consequences	154
7. Closing remarks	156
Bibliography	157
10. Enforcing Europe’s Foundational Values in Central and Eastern Europe: A Case in Point	
Tine CARMELIET and Georgia Christina KOSMIDOU	159
1. Introduction	159
2. Shortcomings of the EU’s institutional framework	162
2.1. Article 7 TEU	162
2.1.1. Procedural obstacles	162
2.1.2. Substantive obstacles	164
2.1.3. Conclusion	166
2.2. Legal creativity to protect the European foundational values	167
2.2.1. Infringement actions by the European Commission	167
2.2.2. Social pressure and issue linkage	169
3. Policy recommendations	171
3.1. In search for a definition of liberal democracy	171
3.2. A stronger role for the CJEU	173
4. Concluding observations	175
Bibliography	177

PART TWO
THE EUROPEAN C

11. Protocol 16 to the Charter of Fundamental Rights and Better Domestic Remedies	
Władysław JÓŹWIK	
1. Introduction	
2. Protocol 16 – background	
3. The new advisory jurisdiction	
3. Protocol 16 and the Charter	
3.1. A step towards a more integrated system	
3.2. A step towards a more effective system of the Convention	
4. Protocol 16 and the Charter	
4.1. ECtHR – views	
4.2. The optional nature of the protocol	
4.3. Protocol 16 and the Charter	
5. Conclusion	
Bibliography	
12. The EU’s Parliamentary Court’s <i>Sejdić</i> and <i>Zornić</i> Cases	
Fisnik KORENIC	
1. Introduction	
2. EU’s constitutional framework and representation	
3. A note on the cases <i>Sejdić</i> and <i>Zornić</i>	
Parliament of the EU	
4. Thresholds on EU citizenship and of electoral system	
5. Concluding remarks	
Bibliography	

PART TWO
THE EUROPEAN COURT OF HUMAN RIGHTS

11. Protocol 16 to the ECHR: A Convenient Tool for Judicial Dialogue and Better Domestic Implementation of the Convention?
Władysław JÓŻWICKI..... 183

1. Introduction..... 183

2. Protocol 16 – background 184

3. The new advisory opinion mechanism – basic characteristics..... 187

3. Protocol 16 and the chances it opens 191

3.1. A step towards enhancing domestic implementation of the ECHR.. 192

3.2. A step towards more harmonious and up-to-date interpretation of the Convention 193

4. Protocol 16 and its drawbacks 197

4.1. ECtHR – victim of its success revisited? 197

4.2. The optional and nonbinding character of the AOs and some practical concerns..... 199

4.3. Protocol 16 and the EU 201

5. Conclusion 205

Bibliography 206

12. The EU’s Parliamentary Representation in the Light of the Strasbourg Court’s *Sejdić* and *Zornić* Standards: Is there Tendency for a New Parliamentary Order in the EU?
Fisnik KORENICA and Dren DOLI 211

1. Introduction 211

2. EU’s constitutional architecture with regard to parliamentary representation..... 214

3. A note on the concept of parliamentary representation in the light of *Sejdić* and *Zornić*: European Parliament of the EU people or European Parliament of the EU Member States *peoples*..... 217

4. Thresholds on EU Parliament and ‘regressive proportionality’ model of electoral system: is there an objective system of electoral criteria?.... 225

5. Concluding remarks and a general forthcoming outlook..... 229

Bibliography 231

13. The European Concept of a Fair Trial and the Legal Admissibility of Assessors in the Polish Judicial System
 Karol PACHNIK and Jakub KRAJEWSKI..... 233

1. Introduction..... 233

2. The position of an assessor in Polish common courts..... 233

3. Standards of a fair trial..... 236

4. Amending the organisation of courts..... 239

5. Regulations on assessors in Polish administrative courts – possible solutions..... 241

6. Conclusion..... 242

Bibliography..... 243

LIST

AG	Adv
AO	Adv
BVerfG, FCCG	Fede
	(Bur
CC	Com
CCP	Cod
CE	Cent
CFR	Cha
CFSP	Com
CJEU	Cou
CoE	Cou
CoM	Com
EAW	Eur
EC	Eur
EC, Commission	Eur
ECB	Eur
ECHR	Eur
ECJ	Eur
ECtHR	Eur
EEC	Eur
EFSF	Eur
EFSM	Eur
ELA	Em
EP, Parliament	Eur
ESM	Eur
EU	Eur
GCh	Gra
GDP	Gro
ISDS	Inv
MEP	Me
MS	Me
NC	Nat
NCA	Nat
OMT	Ou
SMP	Sec