The Key Legal Texts of the European Crises

Treaties, regulations, directives, case law

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Version 1.0 – September 2014

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INTRODUCTION

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This volume compiles and examines the key set of legal documents of the European Great Crisis. As is well known, financial turmoil in the US subprime market was the triggering factor of multiple and overlapping crises that hit the global economy after 2007. While the subprime crisis was as American as apple pie, Europe has been the key battlefront of the world crisis since (at the very least) 2009. Not only were European financial intermediaries avid buyers of financial products made with "US financial technology", so to say (many if not most of them actually assembled in the City of London), but perhaps even more importantly, the crises revealed many structural weaknesses within the European Union. The depth and breadth of the European crises account for the many makeshift decisions taken and structural reforms adopted since 2007. Most of these decisions have been enshrined in legal acts. Many new regulations and directives have been passed in the name of containing and overcoming the crises. More spectacularly, the crises have been said to be the cause of an amendment to the Treaties, of two "classic" international treaties (the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, popularly known as the Fiscal Compact, and the European Stability Mechanism Treaty, through which a kind of European Monetary Fund has been established) which are peculiarly situated between national constitutional law and European Union law, and of several amendments to national constitutions. Less visibly but perhaps decisively, new constitutional conventions have emerged and are by way of consolidating, expanding or restraining the powers and competencies of institutions and institutional actors under European and national law.

It seems to us that systematic compilation of the key legal documents of the crises is a worthwhile task. It could fairly be said that the drive to put texts together is almost a Pavlovian reflex of jurists, especially of jurists trained in the Roman law tradition and socialised into the habit of reading legal codes. Both of us were indeed missing the code, and we set ourselves to write one. The Commission has for years been producing a compilation of relevant EMU texts. However, that "code" is, for our purposes, incomplete. Not only does it not include documents that for us are key, but it also does not include rulings. And courts seem to us to have played a highly important role, especially in the last three years (for the time being) of the crises. But it also seems to us that this anthology is useful for additional and perhaps even more relevant reasons. Firstly, public discourse on the European crises has still to come to terms with the depth of changes. Still in

the depths of the crises, we are inclined to perceive management of the crises as a sequence of ad hoc measures adopted in the rush of the moment. Compiling documents in a systematic way is a necessary step to calibrate the importance and transcendence of the changes in a more sober, less agitated manner. For reasons that are explored in more depth in a companion ARENA report, *Europe in the crises or Europe as the crises?* (the third report that ARENA has published on the European crises), it appears that the structural, long-term impact of managing the crises on the constitutional law of the European Union and its Member States is bigger than that of any previous round of Treaty amendment. In headline terms, the crises have been a more powerful spark of constitutional change than the Maastricht, Amsterdam or Nice Treaties. Secondly, changes made and reforms adopted on the constitutional hoof cannot but lead to erratic development. But we are under the strong impression that the fact that measures were taken more rapidly than scholars (legal and politico-scientific scholars and, perhaps even more so, economists) could understand, even less explain, what was being decided does not mean that no patterns, tendencies, or directions are discernible. For that purpose, legal documents have to be put together, like the pieces of a puzzle. This is what we do here, in support of the theoretical assessments contained in the report, and as an invitation to further reflection.

In order to be able to assess the importance of these changes, the reader needs to have in mind what were the main assumptions on which the original design of EMU was based. Only against that background is it possible to understand the true constitutional relevance of the measures adopted. Therefore an explanation of the historical background leading towards monetary union opens this introduction (I), followed by a brief and succinct description of the key features of the Maastricht/Amsterdam EMU constitution, distinguishing between common monetary policy, coordination of national economic policies and the relationship between them (II). After briefly explaining how this legal framework was completed and refined during its first years of operation (III), we will try to relate the diagnosis of the causes of the crises with the prognosis of what needs to be done (IV). We conclude with a reflection about the most relevant constitutional challenges resulting from the new, post-crisis EMU legal framework (V).

I.- Towards monetary union

Monetary union has been on the European integration agenda since the very creation of the Communities. It could be said, although it is rarely said, that the first step towards creation of the European Union was indeed a monetary one: the creation of the European Payments Union (EPU) in

1950. The Bretton Woods arrangements of 1944 aimed at establishing a global financial architecture which would reconcile free international trade with national autonomy to steer national economies. Attempts at liberalising the convertibility of European currencies under the new international financial architecture ended up in misery in the second half of the 40s. The massive imbalance between the United States and Europe had to be tackled for the Bretton Woods system to work. A purely bilateral system of compensation of payments associated with trade based on dollars dragged down intra-European trade. By means of creating mechanisms to compensate payments multilaterally and by means of allowing states to enter into temporary deficits, EPU contributed to kickstarting intra European trade and gave a major boost to economic activity in general.

By 1957, however, EPU had been so successful that it was dismantled (not without argument), and one year later European states opted for currency convertibility under Bretton Woods. Just at the time that European integration had entered into a new phase with the signing of the Rome Treaties, Europeans trusted that the monetary stability needed to underpin creation of the common market would be provided through a specific form of global cooperation: cooperation under the hegemonic role played by the United States as issuer of the ultimate reserve currency, the US dollar.

Structural tensions at the heart of the Bretton Woods system were very soon to emerge. By 1962 the European Commission was taking seriously the need to create "local" means of ensuring monetary stability by some form of Monetary Union. Economist Richard Triffin, a Belgian who had made his academic career in the USA, not only published prescient articles and books on the matter, but was a key adviser to Commission Vice-President Marjolin. When the Bretton Woods system entered into a coma in the late 1960s, plans for monetary integration accelerated. The circumstances could not have been more propitious. For one, Europeans had a very obvious reason to act: international arrangements were collapsing and European integration was premised on monetary stability, a monetary stability that was necessary not only to make the Common Agricultural Policy workable, but also to ensure that sudden, wild swings in currency value would not seriously affect patterns of transnational trade and consequently undermine the internal market. Moreover, national constitutional traditions seemed to be just converging on the way in which economic policy should be run. The outlying character of the postwar German understanding, based on a net separation of fiscal and monetary policy, and trusting the latter to an independent central bank subject to a legally codified mandate to ensure price stability, was being softened by the first serious experiments with discretionary fiscal policy. Events unfolded rather quickly. By the time the US President put the nail in the

Bretton Woods coffin by suspending convertibility of dollars into gold, and (later) endorsed free floating of the dollar, Europeans had only agreed to start thinking about how to achieve monetary union in ten years' time (Werner Plan). When monetary turbulence was coupled with the first oil crisis, Member States of the European Communities started to apply different policies, which amplified the asymmetric character of the economic shock. From then onwards disagreement about the way in which monetary and fiscal policy should be made consistent within future (and ever more distant) monetary union, the path towards monetary union, and the criteria for selecting which states should be part of monetary union, only grew. The attempt to recreate a Bretton Woods lite on a European scale failed rather quickly: The so-called Snake quickly became a small group of states gyrating around the new emerging monetary sun, the Deutsche Mark. The Exchange Rate Mechanism, or ERM, lasted longer and in some ways anticipated some of the features of EMU (members of the ERM basically renounced the monetisation of public debt, a first step towards both the independence of the central bank and the subjection of fiscal policy to financial market accountability), but in some ways created the conditions for its final collapse. Fully-fledged free movement of capital, itself seen as a necessary step towards monetary union, was introduced in 1992 and immediately revealed the structural tensions lingering behind the steering of exchange rates under EMU. As long as it lasted, ERM was seen as the lesser evil by most Member States. ERM provided stability, but only at the hefty price of having to subordinate national monetary policy to the by then European monetary hegemon, the Bundesbank.

II.- The original design of EMU in Maastricht

The 1991 agreement on the blueprint for monetary union was shaped by the eleventh attempt at making monetary union happen as part of the drive towards a single market. The Commission set the agenda and sought support among the central bankers of the European Communities. The result was the Delors Committee Report of 1989. But there was still much resistance, outside Germany, to a monetary union founded on a clear cut distinction between monetary and fiscal policy, and anchored to an independent central bank. The fact that changed the game was the fall of the Berlin Wall. The prospect of German reunification created the conditions under which monetary union came to be seen as absolutely necessary. Scholars tend to say that monetary union was a way of anchoring Germany to Europe, making of the European Union a community of fate. A Germany tied to the European mast by means of sharing the currency with all other European states was a less fearsome Germany, even if reunited. Indeed it was Germans themselves who were said to be reassured against fears of a Germany too big and too powerful.

But while there was much urgency on all sides to agree on EMU, this did not translate into an agreement on how to make EMU actually work. The result was that the specific Maastricht provisions on economic and monetary policy were a very peculiar compromise. Germany abandoned its traditional defence of monetary union following and not preceding economic convergence (monetary union being the "crowning" memento of effective and real economic union) and going hand in hand with political union (and consequently the creation of taxing and spending capacities at the supranational level). In brief, Germany gave up the deutschmark. But in exchange, Germany imposed what formally amounted to cutting and pasting some of the key features of the German constitutional design of the relationship between economic and monetary policy. The result was, however, markedly idiosyncratic: an asymmetric economic and monetary union. On the one hand, monetary policy was federalised and depoliticised. The power to steer monetary policy was placed in the hands of the most independent central bank in the world, subject to a constitutional mandate enshrined in the Treaties that limited its goal to ensuring price stability. The European Central Bank was far more independent than the Bundesbank, given that its independence and mandate were not enshrined in an ordinary statute, but in a constitutional norm, amendment of which would require unanimous agreement among all Member States of the Union. On the other hand, fiscal policy remained national and formally fully political (and consequently, potentially discretionary). The coherence of a single federal monetary policy and a plurality of national fiscal policies was ensured in a three-fold manner.

Firstly, several provisions of the Treaty structurally limited the breadth of discretion in fiscal policy by means of restricting the capacity of states to self-finance through debt. States were forced to borrow at market conditions: Debt could not be monetised by the European Central Bank, states could not impose forced loans on private financial institutions, and debt could not be shifted or placed in common among Member States. Moreover, the capacity of financial markets to impose fiscal discipline was expected to increase by making free movement of capital an *erga omnes* Community freedom, by means of fully liberalising the entry or exit of capital from or to countries which were not part of the Union.

Secondly, national fiscal policies were to be coordinated, and their proper implementation monitored, by the collective of national exchequers. While the Treaties did not formally create the Eurogroup, there was a clear expectation that Eurozone states would come to meet separately.

Thirdly, the EEC Treaty as amended by the Maastricht Treaty, and in greater detail (and perhaps even in a new form) the Stability and Growth

Pact, set specific numerical limits on deficit and debt, and foresaw sanctions that would be imposed if Member States exceeded targets and failed to take proper measures to correct their fiscal trajectories.

It must be noted that, as to coordination of economic policies, European institutions were given different tasks than those which they were carrying out in other areas of EU law. This represented a move from the community method, based on adoption of law according to a concrete balance of the interests represented in European institutions (the Commission, representing the supranational interest, has the legislative initiative; the European Parliament and Council, representing different democratic legitimacies, European and national, are the final decision-makers), to a more political approach where the Commission works as a mere secretariat of the Council, analysing data from the Member States and suggesting economic policy changes in case these are needed. Importantly, in any event it was for national executives to adopt all decisions at the supranational level, the European Parliament being basically excluded.

A) Main features of the common monetary policy

EMU was designed as a political process in different and successive stages. For those Member States participating in the third (and final) stage of EMU or, putting it differently, for those Member States whose currency is the euro, all competences related to monetary policy, including fixing the exchange rate, were conferred on the European Union (Article 3.1.c TFEU). Hence, they are exclusive competences at the supranational level. In addition, and as mentioned above, a new institutional setting – the European System of Central Banks (ESCB), with the European Central Bank (ECB) at its head – was established solely for dealing with these new exclusive competences. Thus it is important to bear in mind that competence over monetary issues and the institutional setting for dealing with them are indissolubly bound together. The ESCB and ECB exist in order to fulfil the task assigned to them by the Treaties, and that task (monetary policy) can only be carried out by those institutions. Substance and form are inextricably linked in this concrete policy.

This is reflected in the aims of both the policy and its institutional setting. Substantively, the primary objective of the single monetary policy is to "maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union" (Article 119.2 TFEU, §1). Regarding the institutional setting, the main objective of the ESCB is to "maintain price stability. Without prejudice to the objective of price stability the ESCB shall support the general economic policies in the Union" (Article 127.1 TFEU, §1). Underlying this almost identical drafting are two parallel ideas: policy has to be driven towards price stability, and

the institution in charge of conducting policy has to lead towards the very same aim. But they also mean that if new actors were assigned a role in policy, price stability would still be the aim to achieve. The same can be said if new competences were conferred on the ESCB, since price stability would still be the main aim of its activity. This is of significant importance, as we shall see.

The link between form and substance is also evident when considering how the ESCB is supposed to carry out its task of maintaining price stability. Independence of the authority in charge of monetary policy from political institutions is the cornerstone of the system. Avoiding all political interference when conducting monetary policy would increase the chances of meeting the aim of price stability. Therefore, members of the ESCB and ECB are forbidden to seek or take instructions from any European institution or any government of a Member State, and in turn the latter agree to respect the independent status of the ESCB and ECB (Article 130 TFEU,§1). Indeed, Member States have to guarantee the independent status of their own Central Banks in their national legislation, so as to avoid all possible influence on them (Article 131 TFEU, §1).

B) Main features of coordination of (national) economic policies

Establishing a common monetary policy not paralleled by a common economic government requires coordination of national economies in order to reduce disparities between them. Otherwise Member States could take advantage of the shared context by transferring the costs of their national policies to the other Member States. But mere coordination is not enough to guarantee EMU stability: limitation of national economic policies is also required. This is the reason why the common currency is accompanied by some restrictions on national economic policies, specifically concerning budgetary deficit and public debt.

As to coordination of national economic policies, the main instrument at the disposal of European institutions for carrying this out are the broad economic policy guidelines for the European Union and its Member States (Article 121.2 TFEU, §1). The Council adopts a recommendation with these guidelines after a proposal by the Commission and political agreement by the European Council. The European Parliament only has to be informed once a recommendation has been adopted. Thus in procedural terms coordination is of a clear political nature, with national executives (either in the formation of the Council or at the European Council) having full responsibility over the content of the guidelines. The same conclusion can be achieved when considering the legal act adopting the guidelines, since the Treaties describe recommendations as having “no binding force” (Article 288 TFEU).

Coordination of national economic policies is monitored through a multilateral surveillance procedure (Article 121.3 and 121.4 TFEU, §1). The Council is responsible for checking that Member States' performance adjusts to the requirements of the overall strategy for the Union described in the guidelines. To that end, Member States keep the Commission informed about all economic measures they adopt, and the Commission prepares a report for the Council. If Member States' measures are not consistent with the guidelines or if some economic developments might jeopardize the Union's objectives, the Commission can issue a warning to the Member State(s) concerned. In a further step, the Council may finally adopt a recommendation to that end and, if necessary, even make it public.

As is clear from this description, multilateral surveillance is also of a mainly political nature, since no legal sanction exists for conducting economic policy beyond the margins established in the guidelines. As it was designed, the system bases Member State compliance on their commitment to policy objectives and, if necessary, on political peer pressure exerted at the Council. Once again, there is no more than an obligation to report to the European Parliament about all events related to multilateral surveillance (Article 121.5 TFEU, §1). All these elements show that, according to basic EMU design, economic policies remain a national competence.

This basic principle notwithstanding, EMU imposes some restrictions over national economic policies. The whole system is based on the concept of economic stability. Accordingly, "Member States shall avoid excessive government deficits" (Article 126.1 TFEU, §1). The importance of sound public finances is expressed in limitations on Member State budgetary deficits, which cannot exceed 3% of GDP, and public debt, which cannot go beyond 60% of GDP (Article 126.2 TFEU in relation to Article 1 of Protocol No. 12 TEU on the excessive deficit procedure, §1). A somewhat tighter monitoring system than the one for coordination of economic policies is established for ensuring observance of these requirements: the Commission launches an excessive deficit procedure if a Member State breaches the requirements or is perceived by the Commission to be at risk of doing so, although it is for the Council to finally decide about the existence of an excessive deficit. In that case, the Commission must adopt a recommendation addressed to the Member State concerned establishing a time limit for curing the situation. Publicity of these measures may follow if no effective action is taken by the Member State. If the situation still persists, the Council gives notice to the Member State of the measures to be adopted in a certain time limit, and can oblige it to report periodically about how political measures for economic adjustment are being implemented (the whole procedure is described in Article 126.3 to 9 TFEU, §1).

Up to this point the procedure is mainly of a political nature. On the one hand, this results from its exclusion from the scope of the infringement proceedings before the CJEU (Article 126.10 TFEU, §1); on the other, the Court itself has acknowledged that the Council has discretion not only to determine the existence of an excessive deficit, but also to make its own "assessment of the relevant economic data, of the measures to be taken and of the timetable to be met by the Member State concerned".[1] This means that obligation exists on the part of the Council to follow Commission proposals or, in other words, politics still have a role to play at the Council.

If the Council finally reaches the last stage in the procedure, the door is open for it to impose sanctions on the Member State concerned, namely requiring publication of additional information before issuing bonds, inviting the European Investment Bank (EIB) to reconsider lending policy towards the Member State, requiring the deposit of some sum until the excessive deficit has been corrected, or to impose fines (Article 126.11 TFEU, §1). These measures are all of a binding nature so that non-observance may result in the Commission launching infringement proceedings.

C) The relationship between common monetary policy and coordination of national economic policies

A final consideration must cover how supranational monetary policy and national economic policies relate to each other. Both policies are intimately linked and it is not easy to separate them. Isolating monetary policy and conferring on the ECB the exclusive competence to define and implement it assures that Member States cannot directly interfere with the objective of price stability. However, some additional measures are required to guarantee that they do not put that objective at risk indirectly, in particular by not taking sufficient care of the soundness of their public finances. To avoid this situation, in addition to the measures of a non-binding character we have reviewed, some other binding provisions in the Treaties prohibit credit facilities from the ESCB to any public institution (Article 123 TFEU, §1), ban privileged access to financial institutions by public institutions (Article 124 TFEU, §1) and rule out the transfer of liabilities from one Member State to another or to the European Union – what is known as the non-bailout clause (Article 125 TFEU, §1). The result of these provisions in combination is that Member States have to resort to markets when looking for financing. Since the cost of financing in the markets would be higher than if simply printing money or borrowing on favourable conditions from the central bank, Member States, so the argument continues, would be aware of the importance of not going into the red. This

[1] Case C-27/04, Commission vs. Council, of 13 July 2004 [2004] ECR I-06649 (paragraph 80).

would contribute to the soundness of their public finances. But, in addition, markets will impose different costs when lending money depending on the economic performance of each Member State. This means that for those with a budgetary deficit or public debt problems the cost of borrowing will be higher. Accordingly, markets will discipline profligate Member States if multilateral surveillance and the excessive deficit procedure do not.

III.- First amendments after Maastricht

In the lapse of time between ratification of the Maastricht Treaty and the first symptoms of the crisis the original design of EMU received its final touches with establishment and revision of the Stability and Growth Pact (SGP), creation of the Eurogroup in order to coordinate monetary and economic policies in the Eurozone, and new institutional provisions on decision-making rules for Eurozone-related issues, included in the Treaty of Lisbon.

Aware of the importance of sound national fiscal policies for the correct working of EMU, heads of state and government agreed on a framework for monitoring these policies more tightly than required by the rules of the Treaty. This European Council Resolution and the two Regulations further developing the multilateral surveillance procedure and the excessive deficit procedure (Articles 121 and 126 TFEU, §1) are the components of what is known as the SGP.[2] This set of norms worked relatively well until both Germany and France were found in an excessive deficit position. The Commission recommended sanctions, but since this was a decision of a political and thus a discretionary nature, agreement in the Council was required, which Member States failed to achieve. This led to a legal dispute between the two institutions, resolved by the Court of Justice recognizing the leeway the Council had when deciding.[3] This situation revealed a clear mismatch between the general design of EMU and Member State incentives to implement its rules, in particular those on imposition of sanctions. In order to avoid new conflicts, the two Regulations were amended in 2005. Although other measures also increased the strictness of some elements of fiscal constraint, the overall result of the revision was a weakening of budgetary discipline. Furthermore, the rationale underlying the new regime was slightly different from the previous one: while the original SGP was based on a quick reaction once an excessive deficit was detected, after the amendment the idea was to give more time to Member States to address the problem.

[2] Resolution of the European Council of 17 June 1997 (OJ C 236, 2.8.1997, p. 1); Council Regulation (EC) 1466/97, of 7 July 1997, on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 209, 2.8.1997, p. 1); and Council Regulation (EC) 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 209, 2.8.1997, p. 6).
[3] Case C-27/04, *op. cit. supra* fn. 1.

Regarding the scope of EMU, the basic assumption of the Treaties, despite "opt-in" and "opt-out" clauses for the UK and Denmark, was that all Member States would sooner or later be part of the third stage of the EMU, that is, would have the euro as their currency. A common legal framework would thus exist for all Member States. However, with the *de facto* opt-out of Sweden (deliberately failing to fulfil one of the criteria required for adopting the euro, namely participating in the Exchange Rate Mechanism II) and the accession in 2004 of several new Member States which were not ready to adopt the single currency, a differentiated Council formation including only members of the Eurozone was required when coordinating the now common monetary policy and the different national economic policies. This role was played by the Eurogroup, an informal meeting, taking place on the eve of ECOFIN Councils, gathering the economic and financial ministers of the Eurozone members, the commissioner for economic and financial affairs and the president of the ECB.

The Lisbon Treaty recognized for the first time the existence of the Eurogroup, explicitly mentioning that its meetings are of an informal character and that ministers of Eurozone members should elect a president (Article 137 TFEU and Protocol 14, §1). This was part of a new set of provisions introduced on EMU (a new Chapter added to Title XVIII of Part Three TFEU), which for the first time establishes rules specific to Member States whose currency is the euro. Perhaps the most relevant of these new measures, apart from that recognizing the existence of the Eurogroup, is that legal acts implementing Articles 121 and 126 TFEU may be adopted by, and only affect, members of the Eurozone (Article 136 TFEU, §1). These new provisions made explicit what the Eurogroup has *de facto* suggested: that a clear gap existed, now for the first time even in legal terms, between Members participating and not participating in the third stage of EMU.

IV.- What went wrong during the crisis: changes required in the whole EMU framework

The economic crisis has challenged all the basic foundations on which EMU design was based. In the first place, reliance on markets for disciplining reluctant Member States has not worked as expected, first because they were far from having full and reliable information to make accurate risk assessments (and it is not absurd to assume that they will never have such information in real life), and second because they react in a binary way, either financing or not, to any new information and event, thus with their exaggerated reaction worsening the financial situation of some Member States and of the whole Eurozone. This culminated in a sudden block of all financing possibilities for some Member States which

were led to a position where they had either to go bankrupt or ask for extraordinary financing resources. The European Council opted for the second option and created several mechanisms allowing transfers of money to Member States under strict conditionality (thus avoiding a conflict with the non-bailout provision of Article 125 TFEU, §1). But knowing this financial aid was available in case of need might make some Member States ease their fiscal efforts needed for coordinating national economic policies. Therefore, in order to avoid moral hazard a tighter supervision of national budgetary and fiscal policies was established, resorting not only to secondary law but also to international law, eventually leading to amendments in national constitutions. The ECB, for its part, started different programmes contributing to easing the financial problems of some Member States which had to pay what was allegedly an excessive interest rate when placing their bonds on the markets. To what extent this concrete problem could be solved via the issue of common bonds by the whole Eurozone was indeed explored,[4] although no step has been taken in that direction. In addition to all this, new competences have been conferred on the European Union in areas of macro-prudential supervision of financial markets and banking supervision.

A) Assistance to Member States with extremely severe financial difficulties

The decision opting to grant financial help to Member States in difficulty instead of accepting their failure (and the sudden mistrust in the Euro currency which it may entail) faced one difficulty: the Treaties established that neither the Union nor its Member States were supposed to be liable for the debts of any other Member State (Article 125 TFEU, §1). The rationale behind this non-bailout clause was to force Member States to resort to markets and therefore to take special care of the soundness of their budgets. Although the legal constraint could rather easily be circumvented via bilateral lending of money under strict conditionality, thus discarding the direct assumption of responsibility by the Union or other Member States, all the measures adopted contributed to undermining the rationale of the provision as long as they introduced incentives for Member States to relax control over their fiscal policies: if any problem arises, a safety net now exists which, despite the hard conditionality imposed, may avoid bankruptcy.

Under this major change in the underlying rationale of the constitutional framework of EMU different measures and mechanisms have been adopted: first a European programme for direct financial aid granted by the

[4] See Commission's Green Paper on Stability Bonds, of November 23rd, 2011, available at http://ec.europa.eu/commission_2010-2014/president/news/documents/pdf/green_en.pdf.

Commission and backed by all, and not only Eurozone, EU members (European Financial Stabilisation Mechanism, §16); then a temporary special purpose vehicle financed by Eurozone members providing financial assistance to Member States in difficulty (European Financial Stability Facility, §17); and finally a permanent international organization replacing the two previous financial aid programmes and granting help to Eurozone members in difficulty (European Stability Mechanism, §5). The Treaties have accordingly been amended (§4), so a new paragraph in Article 136 TFEU now allows the establishment of financial assistance mechanisms, granted under strict conditionality, in case it is "indispensable to safeguard the stability of the euro area as a whole". This wording seems to introduce a new principle in the Treaties for the whole EMU, namely the stability of the common currency, thus adding a new element to be taken into account by monetary policy and (national) economic policies, to balance their prior univocal goals, in the shape of price stability and fiscal stability, with this new principle.

B) Strengthening supervision over national fiscal and budgetary policies

The moral hazard inherent in establishing financial assistance mechanisms at European level was to be avoided by simultaneous adoption of enhanced fiscal and budgetary supervision measures. Consequently, the European Commission and the Council (in the new formation including only Eurozone members, as established by Article 136 TFEU) have been decisively empowered by secondary law as well as by international law not only to monitor but also to shape national economic policy. For instance, Member States are now mandated to prevent and correct national macroeconomic imbalances at the same time as the Commission and Council have been granted new powers concerning monitoring and control of these national macroeconomic policies (Regulation 1176/2011, §34, and Regulation 1174/2011, §35). In addition, these two institutions have seen their powers strengthened (in particular the Commission) in coordinating and supervising national fiscal policy, as a result of the tightening of pre-existing fiscal rules (that is, the medium-term budgetary objective as described in consolidated Regulation 1466/97, §21, and Article 3 TSCG, §6) and the introduction of new rules, including provisions on the trajectory of reduction of excessive deficits (Articles 5 and 6 of consolidated Regulation 1466/97, §21) and public debt (Article 2 of consolidated Regulation 1467/97, §22). The salience of the Commission also results from new procedural rules according to which not only will automatic correction mechanisms be triggered at the national level when deficits go astray (Article 3.1.e TSCG, §6, and Commission's communication on

national fiscal correction mechanisms[5]), but also the sanctioning proposals of the Commission will be approved when a qualified minority, and not a qualified majority, of Eurozone members supports its proposal (in the rather odd jargon that is widely used, we have moved from qualified majority to 'reversed qualified majority'). This means that from sanctions based on naming and shaming (relying not only on peer pressure, but especially on the discipline of the markets) or, in particular cases, adopted by the Council with a wide discretion, EMU has moved to semi-automatic sanctions where politics (and markets) have a limited role to play. The resulting centralisation of fiscal policy is reflected in the structure of the (relatively) new budgetary procedure, the 'European Semester', which ensures that the key economic, budgetary and fiscal choices of all Eurozone members are monitored by the Commission and the Council (in its Eurozone formation) before each national budget bill is sent to its national parliament (Regulation 1173/2011, §24, Directive 2011/85/EU, §26, and Regulation 472/2013, §28).

All these changes imply a clear break from the Maastricht asymmetric model of monetary union, which clearly distinguished between a common monetary policy and independent but coordinated national economic policies, as it is hard to keep on affirming that Member States retain the power to conduct their fiscal policy autonomously.

C) Monetary policy guided by a new implicit objective and jeopardizing ECB independence

During recent years the leeway with which the ECB conducts the monetary policy of the Eurozone has been substantially increased. Instead of being exclusively guided towards price stability, saving the euro (or to be more precise, avoiding a reduction in the number of Eurozone states) has emerged as a meta-goal that trumps the spirit if not the letter of some Treaty provisions. Indeed, keeping the transmission channels of monetary policy open and unclogged has been repeatedly invoked by the ECB to justify what the Bank itself has characterised as 'non-standard' monetary policy measures. Deviation from the task the Treaty assigned to the ECB is particularly evident in the light of a set of measures through which it has undertaken two new roles. On the one hand, that of lender of last (increasingly in some cases, first) resort for Eurozone banks, by means of moving from providing refinancing for fixed amounts at variable rates to offering refinancing for unlimited amounts at fixed rates (at the same time that the collateral eligible to guarantee the loans was progressively expanded, that is, the quality standards of collateral have been reduced). As

5 Communication on common principles for national fiscal correction mechanisms, COM(2012)342, available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0342:FIN:EN:PDF:

a result, it is perhaps not far-fetched to conclude that the ECB has been either a market-maker or full alternative to interbank financing for the last six years (and counting). This implies, at the very least, a different understanding of what Articles 127.1 and 119 TFEU, §1 (which mandate that allocation of capital be the result of the operation of markets) imply for the conduct of monetary policy.

On the other hand, in aiming to contribute to reducing the costs of borrowing of Eurozone members, the ECB has assumed the role of an indirect lender of last resort. It has done so either by acquiring sovereign debt in secondary debt markets (through the securities markets programme launched in May 2010, §44, radically expanded in August 2011 when the ECB started buying Italian and Spanish debt,[6] and replaced by the announced but never implemented Outright Monetary Transactions programme in September 2012, §49) or by means of lending states money via massive refinancing opportunities to financial institutions (this was perhaps the case of the two huge refinancing operations—the three-year refinancing operations, or LTROs, in jargon—of late 2011 and early 2012, oversubscribed by financial institutions from the periphery of the Eurozone and which led to large-scale purchases of debt of the ailing Eurozone states). Even if the specific way and extent to which the ECB has conducted all these programmes is rather restrained, not going beyond what is needed to avoid fiscal asphyxia, they seem to require a rather innovative understanding of Article 123 TFEU, §1, which prohibits any credit facility to Member States and their institutions as well as all direct purchase of their debt by the ECB.

Consequently, the ECB is not only putting at risk the primacy of price stability as the main objective of monetary policy by contributing to ease the severe financing problems of Eurozone members, but it is even compromising its independence by becoming a creditor of some of them. This undermines the very cornerstone of the system designed in Maastricht, where ECB independence was justified by the single and clear goal of monetary policy and the technical, a-political character of its task. If the Bank has to balance between different goals (price stability and stability of the Eurozone) then it should work under the strict mandate of a representative institution; and if the Bank, when adopting monetary policy measures, has to take into account its own potential losses resulting from owning Member States' debt, then its task is far from being able to qualify as technical. In any case, the way the ECB has conducted monetary policy in recent years seems to be contrary to the basic assumptions of the original design of EMU and has *de facto* altered what was agreed in Maastricht.

[6] See for example, European Central Bank mounts rescue for Italy and Spain – but sets its price
, The Guardian, 8 September 2011, available at http://www.theguardian.com/business/2011/aug/08/debt-crisis-europeanbanks

D) New competences conferred at the European level

In addition to the various alterations to the original design of EMU regarding coordination of national economic policies (now strictly supervised from the European level) and monetary policy (currently in the hands of a not-so-independent ECB with a not-so-clear mandate), the relationship between these two policies has been substantially modified in EMU architecture, first, as already mentioned, by establishing financial assistance programmes for Member States in difficulty, and second by conferral of a new set of competences on the European Union devoted in particular to macro-prudential supervision of financial markets and micro-prudential supervision of financial activities and institutions.

Regarding macro-prudential supervision, the key actor is the newly created European Systemic Risk Board (Regulation 1092/2010, §8), a supranational institution where the ECB is bound to play a leading if not decisive role (Regulation 1096/2010, §9). Micro-prudential supervision, on the other hand, has been split into several areas. Three different supranational agencies were created: the European Banking Authority (Regulation 1093/2010, §10), the European Insurance and Occupational Pensions Authority (Regulation 1094/2010, §12) and the European Securities and Markets Authority (Regulation 1095/2010, §13), the three together forming a European Supervisory Authority. However, supervision of financial institutions has recently been transferred to a bank Single Supervisory Mechanism (SSM), led by the ECB (Regulation 1024/2013, §14 and Regulation 1022/2013, §11). The real muscles of that power, the financial means to enable effective decisions on the liquidation of banks, will be articulated through a Single Resolution Mechanism (SRM) which has already been agreed between the European Parliament and Council but still not officially published. All these changes have put an end to the assumption that monetary union could be stabilised without centralisation of the power to grant banking licences and to supervise the operations of financial institutions. Because of their systemic importance in a monetary union, banks cannot simply rely on national rules on establishment and supervision. Mutual recognition via free provision of services has been overruled by harmonization through common supranational rules.

Activities of such market actors as credit rating agencies have also been regulated, with a view to avoiding malfunctions and irresponsible behaviour. Thus, one of the first measures reacting to the crisis was to establish conditions and requirements for practising credit rating activities (Regulation 1060/2009, §13, Regulation 513/2011,[7] and Regulation

[7] Regulation (EU) 513/2011 of 11 May 2011amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 145, of 31.5.2011, pp. 30-56.

462/2013,).[8] Market operators in this sector currently have to pay fees for supervision, registration and certification of their activities (Delegated Regulation 272/2012,)[9] and can incur fines in the case of conflict of interests, disregard of operational requirements or obstruction of supervision, for example (Delegated Regulation 946/2012,).[10] That this is now a heavily regulated sector is proved by a set of technical obligations and standards imposed on these operators (Delegated Regulation 446/2012,[11] Delegated Regulation 447/2012,[12] Delegated Regulation 448/2012,[13] and Delegated Regulation 449/2012,).[14]

This intense regulatory activity, ranging from risk assessment of the whole Eurozone at a macro level to supervision of financial institutions and other actors operating in the market, indicates that what before the crisis was seen as an unnecessary task, interfering with financial markets capable of self-stabilising themselves or, at least, not prone to suicide, is now perceived as vital for the stability of the Eurozone. Therefore, while according to its original design EMU architecture should be completed with the discipline of markets, after the crisis detailed regulation of financial markets, banks and credit rating agencies proves that a radical change has happened: the emphasis is now on the disciplining of markets.

V.- EMU after the crisis: constitutional reflection wanted!

According to the agreement reached in Maastricht, EMU was based on a clear division of competences: while monetary policy was common, Member States retained control over economic policies. The stability of this asymmetric monetary union was shaped along clear lines, namely a federal but apolitical ECB (and the transformation of national central banks into the semblance of the ECB), a (thin) set of constitutional principles, two (short) Regulations making up the Stability and Growth Pact, the soft law

[8] Regulation (EU) 462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies, OJ L 146, of 31.05.2013, pp. 1-33.

[9] Commission delegated regulation (EU) No 272/2012, of 7 February 2012, supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to fees charged by the European Securities and Markets Authority to credit rating agencies, OJ L 90, of 28.03.2012, pp. 6-10.

[10] Commission Delegated Regulation (EU) No 946/2012 of 12 July 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to rules of procedure on fines imposed to credit rating agencies by the European Securities and Markets Authority, including rules on the right of defence and temporal provisions, OJ L 282, of 16.10.2012, pp. 23-26.

[11] Comission Delegated Regulation (EU) No 446/2012, of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on the content and format of ratings data periodic reporting to be submitted to the European Securities and Markets Authority by credit rating agencies, OJ L 140, of 30.5.2012, pp. 2-13

[12] Commission Delegated Regulation (EU) No 447/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council on credit rating agencies by laying down regulatory technical standards for the assessment of compliance of credit rating methodologies, OJ L 140, of 30.05.2012, pp. 14-16.

[13] Commission Delegated Regulation (EU) No 448/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards for the presentation of the information that credit rating agencies shall make available in a central repository established by the European Securities and Markets Authority, OJ L 140, of 30.05.2012, pp. 17-31.

[14] Commission Delegated Regulation (EU) No 449/2012 of 21 March 2012 supplementing Regulation (EC) No 1060/2009 of the European Parliament and of the Council with regard to regulatory technical standards on information for registration and certification of credit rating agencies, OJ L 140, of 30.05.2012, pp. 32-52.

that was expected to emerge in the process of peer learning and review, and the capacity of market actors to contribute both to stabilisation of financial markets and to disciplining of autonomous national budgetary decisions. This entailed that to a rather large extent EMU was pledged to the ideal of self-stabilising and public-disciplining financial markets. The fact that some Member States of the EU were not members of the Eurozone was regarded as not only temporary but also as something essentially manageable.

However, the crisis soon tested to what extent the foundations of EMU were solid. The severity of the recession and the risks entailed for Eurozone members did not lead to amendment of the basic rules established in the Treaties, but to the revision and expansion of secondary law implementing those Treaty provisions, allegedly only solving specific malfunctions. However, when doing so assumptions underlying the whole design of EMU have been subverted, leading to constitutional mutations. Hence, regulating credit rating agencies in order to avoid conflicts of interest and thus incorrect risk assessment altered the original design by conferring new specific regulatory powers at the supranational level in an area where market discipline was supposed to be enough; establishing financial assistance mechanisms to avoid Member State defaults, even though only working under strict conditionality, watered down the non-bailout provision by increasing moral hazard; untying the critical knot between bank failure and national budgets via establishment of a Single Resolution Mechanism, also conferred regulatory powers at the supranational level. This affected the internal market by taking away financial activities such as credit rating and banking from the control of Member States. In these sectors, free provision of services, based on mutual recognition, is now replaced by harmonization via regulation at the European level.

But the most important mutations refer to new divisions created between Member States (being or not being part of the Eurozone; being in a situation of budgetary surplus or deficit) and to the institutional architecture and decision-making powers attached.

A) Distinction between Eurozone members and non-members

As mentioned above, coexistence of EU Member States participating and not participating in the Eurozone was considered a temporary situation not leading to any substantial problem. Nonetheless, when combined with extensive use of free movement of capital, some shortfalls in EMU design were revealed, in particular regarding what Members actually shared in EMU. Cross-border capital flows from some states to others created a community of economic risks in a regulatory, redistributive and insurance vacuum; in brief, no community of insurance was built alongside the

community of economic risks. The various (and not all fruitful) initiatives aimed at establishing a supranational regulatory framework of financial activities, the beefing up of European regulatory agencies, the creation of the Systemic Risk Board and last but not least the assignment of powers of micro-prudential regulation to the ECB result from learning the hard way the sheer limits of trusting too much in the action of financial markets. The moment when it is established that the stability of monetary union requires more than soft law and the discipline of financial markets is the moment when being inside or outside the Eurozone starts to matter.

This is now evident when examining the legal acts adopted during the crisis. For instance, four out of the eight pieces of secondary legislation strengthening supervision over national fiscal and budgetary policies are explicitly addressed only to Eurozone Member States. The European Stability Mechanism also only applies to Eurozone members and has been created outside the formal Treaty framework in connection with amended Article 136.3 TFEU. Moreover, the TSCG is an intergovernmental agreement signed by 25 of the (then) 27 Member States, that is, all non-Eurozone states but the United Kingdom and the Czech Republic. On the other hand, two non-members of the Eurozone, Denmark and Romania, have declared their being fully bound by the whole Treaty (provisions for Eurozone members included). Finally, in the context of banking union an explicit agreement on the part of non-Eurozone members is required to allow supervision of their credit institutions by the Single Supervisory Mechanism (Article 7.2 Regulation 1024/2013, §14).

B) Distinction between Member States in surplus or in deficit

A second major cleavage results from the different legal position of surplus and deficit states. The move from qualified majority voting to reverse qualified majority voting (or, jettisoning the jargon and using clear terms, to minority voting) as to monitoring and, especially, disciplining national fiscal policy results *de facto* in empowering surplus states (a minority within the Eurozone) against deficit states. Given the interplay of the rules assigning votes in the Council and the national interests at stake, it is not too far-fetched to see that a Commission seeking to sanction a deficit state will look for the votes of surplus states. Interestingly enough, Germany, Austria, Finland and the Netherlands, which have been proactive when defending fiscal discipline, happen to make up a qualified minority.

Similarly, while the European Stability Mechanism can only act by unanimous consent when taking important decisions (including the decision to provide financial assistance to one Eurozone state), there is one exception, which allows decisions by 85% of the votes in case of urgency. Importantly, votes have been attributed depending on the capital of the

Mechanism which each Member State has subscribed. This means that some, but not all, states have formal *solo* veto power: Germany, France and Italy, of which perhaps only Germany can effectively make use of it without setting a precedent that may apply to itself in the long run.

C) A new (and duplicated) institutional setting for the Eurozone

Resulting from all these amendments and changes, the EMU institutional setting has been modified, concentrating powers in two concrete poles: the ECB on the one hand, and on the other hand the various bodies representing national executives in the supranational arena. Regarding the first pole, while the single task assigned to the ECB in the original design was the conduct of monetary policy according to the primary objective of price stability, after the crisis it has become not only the decisive actor within the European Systemic Risk Board and thus the institution that is called upon to shape macroprudential policy, but also the prudential supervisor of European financial institutions. In addition, it has been freed from some of the constraints that seemed to be placed on the conduct of its monetary policy, as it seems that other institutional actors and national governments have accepted, if not welcomed, its role as lender of last (in some cases first) resort to Eurozone banks, and indirect lender of last resort to Eurozone states (at least to the extent that this is required to avoid fiscal asphyxia).

The second pole concentrating power during the crisis consists of the different bodies and formations representing national executives at the supranational level. Here a process of duplication of supranational institutions seems to have taken place when organizing the particular decision-making powers needed for the Eurozone, thus consolidating the legal gap between members and non-members of the Euro area. Besides formation of the Council dealing with Economic and Financial issues (ECOFIN) and the European Council, where all EU Member States participate, the Eurozone has required three new institutional structures: first, the Eurogroup, informally gathering the Economy and Finance ministers of Eurozone members, the Commissioner for economic affairs and the president of the ECB; second, the new Council formation exclusive to the Eurozone (Article 136.1 and 2 TFEU, §1), whose task is to adopt decisions regarding macro-economic imbalances and the excessive deficit procedure, implementing Articles 121 and 126 TFEU; and third, the Euro-summit (Article 12 TSCG, §6; Rules of Procedure, §57), where Eurozone heads of state and government informally meet the Commissioner for economic affairs and the president of the ECB (and the president of the European Parliament). Importantly, meetings of the latter body should include the heads of state and government of non-Eurozone members that

ratified the Treaty when discussing competitiveness, modification of the global architecture of the Euro area and the fundamental rules to apply to it in the future, and the president of the Euro-summit has to report to the European Parliament and the non-members of the Eurozone on their activities (Article 12.3, 5 and 6 TSCG, §6). All these provisions denote the complicated balance required when dealing with issues affecting members and non-members of the Eurozone and the growing gap between the legal implications of belonging to the Eurozone or not.

Apart from the concentration of power in these two poles, there are some other institutional movements, although not so relevant. It is worth mentioning, nonetheless, the existence of a clear structural pressure, resulting from all these developments, to find ways to ensure coherence between the constituency of the Eurozone and the representatives sitting in the European Parliament. Although the role of the latter in EMU, apart from contributing as legislator to adopting secondary law, is basically limited to reporting on measures once they have been adopted (an *ex post* control euphemistically called 'European dialogue'), there could be unalike or even conflicting interests between members of the Parliament depending on whether they come from members or non-members of the Eurozone. In order to avoid this situation it has been suggested that for certain issues particularly affecting the Eurozone only representatives from those Member States should participate.

Finally, the current salience of national executives in the European arena magnifies the classic difficulties faced by National Parliaments when monitoring their activity. When considering against that backdrop the relevance of the limitations imposed on national fiscal and budgetary autonomy, it seems reasonable to require National Parliaments to increase their awareness of what is happening at the supranational level. Therefore, an Interparliamentary Conference on Economic and Financial Governance of the European Union has recently been established (Article 13 TSCG, §6). However, involvement of national executives has been particularly enhanced not in general economic affairs, but in Eurozone governance. Does this suggest the need for new coordination of Eurozone National Parliaments?

LAW PRE-DATING THE CRISES

§1. Treaty on the Functioning of the European Union (Extracts)

TITLE VII – ECONOMIC AND MONETARY POLICY

Article 119 (ex Article 4 TEC)

1. For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition.

2. Concurrently with the foregoing, and as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy the primary objective of both of which shall be to maintain price stability and, without prejudice to this objective, to support the general economic policies in the Union, in accordance with the principle of an open market economy with free competition.

3. These activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

CHAPTER 1: ECONOMIC POLICY

Article 120 (ex Article 98 TEC)

Member States shall conduct their economic policies with a view to contributing to the achievement of the objectives of the Union, as defined in Article 3 of the Treaty on European Union, and in the context of the broad guidelines referred to in Article 121 (2). The Member States and the Union shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

Article 121 (ex Article 99 TEC)

1. Member States shall regard their economic policies as a matter of common concern and shall coordinate them within the Council, in accordance with the provisions of Article 120.

2. The Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union, and shall report its findings to the European Council.

The European Council shall, acting on the basis of the report from the Council, discuss a conclusion on the broad guidelines of the economic policies of the Member States and of the Union.

On the basis of this conclusion, the Council shall adopt a recommendation setting out these broad guidelines. The Council shall inform the European Parliament of its recommendation.

3. In order to ensure closer coordination of economic policies and sustained convergence of the economic performances of the Member States, the Council shall, on the basis of reports submitted by the Commission, monitor economic developments in each of the Member States and in the Union as well as the consistency of economic policies with the broad guidelines referred to in paragraph 2, and regularly carry out an overall assessment.

For the purpose of this multilateral surveillance, Member States shall forward information to the

Commission about important measures taken by them in the field of their economic policy and such other information as they deem necessary.

4. Where it is established, under the procedure referred to in paragraph 3, that the economic policies of a Member State are not consistent with the broad guidelines referred to in paragraph 2 or that they risk jeopardising the proper functioning of economic and monetary union, the Commission may address a warning to the Member State concerned. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned. The Council may, on a proposal from the Commission, decide to make its recommendations public.

Within the scope of this paragraph, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

5. The President of the Council and the Commission shall report to the European Parliament on the results of multilateral surveillance. The President of the Council may be invited to appear before the competent committee of the European Parliament if the Council has made its recommendations public.

6. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, may adopt detailed rules for the multilateral surveillance procedure referred to in paragraphs 3 and 4.

Article 122 (ex Article 100 TEC)

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

Article 123 (ex Article 101 TEC)

1. Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as 'national central banks') in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments.

2. Paragraph 1 shall not apply to publicly owned credit institutions which, in the context of the supply of reserves by central banks, shall be given the same treatment by national central banks and the European Central Bank as private credit institutions.

Article 124 (ex Article 102 TEC)

Any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States to financial institutions, shall be prohibited.

Article 125 (ex Article 103 TEC)

1. The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.

2. The Council, on a proposal from the Commission and after consulting the European Parliament, may, as required, specify definitions for the application of the prohibitions referred to in Articles 123 and 124 and in this Article.

Article 126 (ex Article 104 TEC)

1. Member States shall avoid excessive government deficits.

2. The Commission shall monitor the development of the budgetary situation and of the stock of government debt in the Member States with a view to identifying gross errors. In particular it shall examine compliance with budgetary discipline on the basis of the following two criteria:

(a) whether the ratio of the planned or actual government deficit to gross domestic product exceeds a reference value, unless:

— either the ratio has declined substantially and continuously and reached a level that comes close to the reference value,

— or, alternatively, the excess over the reference value is only exceptional and temporary and the ratio remains close to the reference value;

(b) whether the ratio of government debt to gross domestic product exceeds a reference value, unless the ratio is sufficiently diminishing and approaching the reference value at a satisfactory pace.

The reference values are specified in the Protocol on the excessive deficit procedure annexed to the Treaties.

3. If a Member State does not fulfil the requirements under one or both of these criteria, the Commission shall prepare a report. The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State.

The Commission may also prepare a report if, notwithstanding the fulfilment of the requirements under the criteria, it is of the opinion that there is a risk of an excessive deficit in a Member State.

4. The Economic and Financial Committee shall formulate an opinion on the report of the Commission.

5. If the Commission considers that an excessive deficit in a Member State exists or may occur, it shall address an opinion to the Member State concerned and shall inform the Council accordingly.

6. The Council shall, on a proposal from the Commission, and having considered any observations which the Member State concerned may wish to make, decide after an overall assessment whether an excessive deficit exists.

7. Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.

8. Where it establishes that there has been no effective action in response to its recommendations within the period laid down, the Council may make its recommendations public.

9. If a Member State persists in failing to put into practice the recommendations of the Council, the Council may decide to give notice to the Member State to take, within a specified time limit, measures for the deficit reduction which is judged necessary by the Council in order to remedy the situation.

In such a case, the Council may request the Member State concerned to submit reports in accordance with a specific timetable in order to examine the adjustment efforts of that Member State.

10. The rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraphs 1 to 9 of this Article.

11. As long as a Member State fails to comply with a decision taken in accordance with paragraph 9, the Council may decide to apply or, as the case may be, intensify one or more of the following measures:

— to require the Member State concerned to publish additional information, to be specified by the Council, before issuing bonds and securities,

— to invite the European Investment Bank to reconsider its lending policy towards the Member State concerned,

— to require the Member State concerned to make a non-interest-bearing deposit of an appropriate size with the Union until the excessive deficit has, in the view of the Council, been corrected,

— to impose fines of an appropriate size.

The President of the Council shall inform the European Parliament of the decisions taken.

12. The Council shall abrogate some or all of its decisions or recommendations referred to in paragraphs 6 to 9 and 11 to the extent that the excessive deficit in the Member State concerned has, in the view of the Council, been corrected. If the Council has previously made public recommendations, it shall, as soon as the decision under paragraph 8 has been abrogated, make a public statement that an excessive deficit in the Member State concerned no longer exists.

13. When taking the decisions or recommendations referred to in paragraphs 8, 9, 11 and 12, the Council shall act on a recommendation from the Commission.

When the Council adopts the measures referred to in paragraphs 6 to 9, 11 and 12, it shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

14. Further provisions relating to the implementation of the procedure described in this Article are set out in the Protocol on the excessive deficit procedure annexed to the Treaties.

The Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the European Central Bank, adopt the appropriate provisions which shall then replace the said Protocol.

Subject to the other provisions of this paragraph, the Council shall, on a proposal from the Commission and after consulting the European Parliament, lay down detailed rules and definitions for the application of the provisions of the said Protocol.

CHAPTER 2: MONETARY POLICY

Article 127 (ex Article 105 TEC)

1. The primary objective of the European System of Central Banks (hereinafter referred to as 'the ESCB') shall be to maintain price stability. Without prejudice to the objective of price stability, the ESCB shall support the general economic policies in the Union with a view to contributing to the achievement of the objectives of the Union as laid down in Article 3 of the Treaty on European Union. The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119.

2. The basic tasks to be carried out through the ESCB shall be:

— to define and implement the monetary policy of the Union,

— to conduct foreign-exchange operations consistent with the provisions of Article 219,

— to hold and manage the official foreign reserves of the Member States,

— to promote the smooth operation of payment systems.

3. The third indent of paragraph 2 shall be without prejudice to the holding and management by the governments of Member States of foreign-exchange working balances.

4. The European Central Bank shall be consulted:

— on any proposed Union act in its fields of competence,

— by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 129(4).

The European Central Bank may submit opinions to the appropriate Union institutions, bodies, offices or agencies or to national authorities on matters in its fields of competence.

5. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system.

6. The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.

Article 128 (ex Article 106 TEC)

1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

2. Member States may issue euro coins subject to approval by the European Central Bank of the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.

Article 129 (ex Article 107 TEC)

1. The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.

2. The Statute of the European System of Central Banks and of the European Central Bank (hereinafter referred to as 'the Statute of the ESCB and of the ECB') is laid down in a Protocol annexed to the Treaties.

3. Articles 5.1, 5.2, 5.3, 17, 18, 19.1, 22, 23, 24, 26, 32.2, 32.3, 32.4, 32.6, 33.1(a) and 36 of the Statute of the ESCB and of the ECB may be amended by the European Parliament and the Council, acting in accordance with the ordinary legislative procedure. They shall act either on a recommendation from the European Central Bank and after consulting the Commission or on a proposal from the Commission and after consulting the European Central Bank.

4. The Council, either on a proposal from the Commission and after consulting the European Parliament and the European Central Bank or on a recommendation from the European Central Bank and after consulting the European Parliament and the Commission, shall adopt the provisions referred to in Articles 4, 5.4, 19.2, 20, 28.1, 29.2, 30.4 and 34.3 of the Statute of the ESCB and of the ECB.

Article 130 (ex Article 108 TEC)

When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.

Article 131 (ex Article 109 TEC)

Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.

Article 132 (ex Article 110 TEC)

1. In order to carry out the tasks entrusted to the ESCB, the European Central Bank shall, in accordance with the provisions of the Treaties and under the conditions laid down in the Statute of the ESCB and of the ECB:

— make regulations to the extent necessary to implement the tasks defined in Article 3.1, first indent, Articles 19.1, 22 and 25.2 of the Statute of the ESCB and of the ECB in cases which shall be laid down in the acts of the Council referred to in Article 129(4),

— take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute of the ESCB and of the ECB,

— make recommendations and deliver opinions.

2. The European Central Bank may decide to publish its decisions, recommendations and opinions.

3. Within the limits and under the conditions adopted by the Council under the procedure laid down in Article 129(4), the European Central Bank shall be entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions.

Article 133

Without prejudice to the powers of the European Central Bank, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency. Such measures shall be adopted after consultation of the European Central Bank.

CHAPTER 3: INSTITUTIONAL PROVISIONS

Article 134 (ex Article 114 TEC)

1. In order to promote coordination of the policies of Member States to the full extent needed for the functioning of the internal market, an Economic and Financial Committee is hereby set up.

2. The Economic and Financial Committee shall have the following tasks:

— to deliver opinions at the request of the Council or of the Commission, or on its own initiative for submission to those institutions,

— to keep under review the economic and financial situation of the Member States and of the Union and to report regularly thereon to the Council and to the Commission, in particular on financial relations with third countries and international institutions,

— without prejudice to Article 240, to contribute to the preparation of the work of the Council referred to in Articles 66, 75, 121(2), (3), (4) and (6), 122, 124, 125, 126, 127(6), 128(2), 129(3) and (4), 138, 140(2) and (3), 143, 144(2) and (3), and in Article 219, and to carry out other advisory and preparatory tasks assigned to it by the Council,

— to examine, at least once a year, the situation regarding the movement of capital and the freedom of payments, as they result from the application of the Treaties and of measures adopted by the Council; the examination shall cover all measures relating to capital movements and payments; the Committee shall report to the Commission and to the Council on the outcome of this examination.

The Member States, the Commission and the European Central Bank shall each appoint no more than two members of the Committee.

3. The Council shall, on a proposal from the Commission and after consulting the European Central Bank and the Committee referred to in this Article, lay down detailed provisions concerning the composition of the Economic and Financial Committee. The President of the Council shall inform the European Parliament of such a decision.

4. In addition to the tasks set out in paragraph 2, if and as long as there are Member States with a derogation as referred to in Article 139, the Committee shall keep under review the monetary and financial situation and the general payments system of those Member States and report regularly thereon to the Council and to the Commission.

Article 135 (ex Article 115 TEC)

For matters within the scope of Articles 121(4), 126 with the exception of paragraph 14, 138, 140(1), 140(2), first subparagraph, 140(3) and 219, the Council or a Member State may request the Commission to make a recommendation or a proposal, as appropriate. The Commission shall examine this request and submit its conclusions to the Council without delay.

CHAPTER 4: PROVISIONS SPECIFIC TO MEMBER STATES WHOSE CURRENCY IS THE EURO

Article 136

1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

Article 137

Arrangements for meetings between ministers of those Member States whose currency is the euro are laid down by the Protocol on the Euro Group.

Article 138 (ex Article 111(4), TEC)

1. In order to secure the euro's place in the international monetary system, the Council, on a proposal from the Commission, shall adopt a decision establishing common positions on matters of particular interest for economic and monetary union within the competent

international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

2. The Council, on a proposal from the Commission, may adopt appropriate measures to ensure unified representation within the international financial institutions and conferences. The Council shall act after consulting the European Central Bank.

3. For the measures referred to in paragraphs 1 and 2, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a).

CHAPTER 5: TRANSITIONAL PROVISIONS

Article 139

1. Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as 'Member States with a derogation'.

2. The following provisions of the Treaties shall not apply to Member States with a derogation:

(a) adoption of the parts of the broad economic policy guidelines which concern the euro area generally (Article 121(2));

(b) coercive means of remedying excessive deficits (Article 126(9) and (11));

(c) the objectives and tasks of the ESCB (Article 127(1) to (3) and (5));

(d) issue of the euro (Article 128);

(e) acts of the European Central Bank (Article 132);

(f) measures governing the use of the euro (Article 133);

(g) monetary agreements and other measures relating to exchange-rate policy (Article 219);

(h) appointment of members of the Executive Board of the European Central Bank (Article 283(2));

(i) decisions establishing common positions on issues of particular relevance for economic and monetary union within the competent international financial institutions and conferences (Article 138(1));

(j) measures to ensure unified representation within the international financial institutions and conferences (Article 138(2)).

In the Articles referred to in points (a) to (j), 'Member States' shall therefore mean Member States whose currency is the euro.

3. Under Chapter IX of the Statute of the ESCB and of the ECB, Member States with a derogation and their national central banks are excluded from rights and obligations within the ESCB.

4. The voting rights of members of the Council representing Member States with a derogation shall be suspended for the adoption by the Council of the measures referred to in the Articles listed in paragraph 2, and in the following instances:

(a) recommendations made to those Member States whose currency is the euro in the framework of multilateral surveillance, including on stability programmes and warnings (Article 121(4));

(b) measures relating to excessive deficits concerning those Member States whose currency is the euro (Article 126(6), (7), (8), (12) and (13)).

A qualified majority of the other members of the Council shall be defined in accordance with Article 238(3)(a).

Article 140 (ex Articles 121(1), 122(2), second sentence, and 123(5) TEC)

1. At least once every two years, or at the request of a Member State with a derogation, the Commission and the European Central Bank shall report to the Council on the progress made by the Member States with a derogation in fulfilling their obligations regarding the achievement of economic and monetary union. These reports shall include an examination of the compatibility between the national legislation of each of these Member States, including the statutes of its national central bank, and Articles 130 and 131 and the Statute of the ESCB and of the ECB. The reports shall also examine the achievement of a high degree of sustainable convergence by reference to the fulfilment by each Member State of the following criteria:

— the achievement of a high degree of price stability; this will be apparent from a rate of

inflation which is close to that of, at most, the three best performing Member States in terms of price stability,

— the sustainability of the government financial position; this will be apparent from having achieved a government budgetary position without a deficit that is excessive as determined in accordance with Article 126(6),

— the observance of the normal fluctuation margins provided for by the exchange-rate mechanism of the European Monetary System, for at least two years, without devaluing against the euro,

— the durability of convergence achieved by the Member State with a derogation and of its participation in the exchange-rate mechanism being reflected in the long-term interest-rate levels.

The four criteria mentioned in this paragraph and the relevant periods over which they are to be respected are developed further in a Protocol annexed to the Treaties. The reports of the Commission and the European Central Bank shall also take account of the results of the integration of markets, the situation and development of the balances of payments on current account and an examination of the development of unit labour costs and other price indices.

2. After consulting the European Parliament and after discussion in the European Council, the Council shall, on a proposal from the Commission, decide which Member States with a derogation fulfil the necessary conditions on the basis of the criteria set out in paragraph 1, and abrogate the derogations of the Member States concerned.

The Council shall act having received a recommendation of a qualified majority of those among its members representing Member States whose currency is the euro. These members shall act within six months of the Council receiving the Commission's proposal.

The qualified majority of the said members, as referred to in the second subparagraph, shall be defined in accordance with Article 238(3)(a).

3. If it is decided, in accordance with the procedure set out in paragraph 2, to abrogate a derogation, the Council shall, acting with the unanimity of the Member States whose currency is the euro and the Member State concerned, on a proposal from the Commission and after consulting the European Central Bank, irrevocably fix the rate at which the euro shall be substituted for the currency of the Member State concerned, and take the other measures necessary for the introduction of the euro as the single currency in the Member State concerned.

Article 141 (ex Articles 123(3) and 117(2) first five indents, TEC)

1. If and as long as there are Member States with a derogation, and without prejudice to Article 129(1), the General Council of the European Central Bank referred to in Article 44 of the Statute of the ESCB and of the ECB shall be constituted as a third decision-making body of the European Central Bank.

2. If and as long as there are Member States with a derogation, the European Central Bank shall, as regards those Member States:

— strengthen cooperation between the national central banks,

— strengthen the coordination of the monetary policies of the Member States, with the aim of ensuring price stability,

— monitor the functioning of the exchange-rate mechanism,

— hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets,

— carry out the former tasks of the European Monetary Cooperation Fund which had subsequently been taken over by the European Monetary Institute.

Article 142 (ex Article 124(1) TEC)

Each Member State with a derogation shall treat its exchange-rate policy as a matter of common interest. In so doing, Member States shall take account of the experience acquired in cooperation within the framework of the exchange-rate mechanism.

Article 143 (ex Article 119 TEC)

1. Where a Member State with a derogation is in difficulties or is seriously threatened with difficulties as regards its balance of payments either as a result of an overall disequilibrium in its balance of payments, or as a result of the type of currency at its disposal, and where such difficulties are liable in particular to jeopardise the functioning of the internal market or the implementation of the common commercial policy, the Commission shall immediately

investigate the position of the State in question and the action which, making use of all the means at its disposal, that State has taken or may take in accordance with the provisions of the Treaties. The Commission shall state what measures it recommends the State concerned to take. If the action taken by a Member State with a derogation and the measures suggested by the Commission do not prove sufficient to overcome the difficulties which have arisen or which threaten, the Commission shall, after consulting the Economic and Financial Committee, recommend to the Council the granting of mutual assistance and appropriate methods therefor.

The Commission shall keep the Council regularly informed of the situation and of how it is developing.

2. The Council shall grant such mutual assistance; it shall adopt directives or decisions laying down the conditions and details of such assistance, which may take such forms as:

(a) a concerted approach to or within any other international organisations to which Member States with a derogation may have recourse;

(b) measures needed to avoid deflection of trade where the Member State with a derogation which is in difficulties maintains or reintroduces quantitative restrictions against third countries;

(c) the granting of limited credits by other Member States, subject to their agreement.

3. If the mutual assistance recommended by the Commission is not granted by the Council or if the mutual assistance granted and the measures taken are insufficient, the Commission shall authorise the Member State with a derogation which is in difficulties to take protective measures, the conditions and details of which the Commission shall determine.

Such authorisation may be revoked and such conditions and details may be changed by the Council.

Article 144 (ex Article 120 TEC)

1. Where a sudden crisis in the balance of payments occurs and a decision within the meaning of Article 143(2) is not immediately taken, a Member State with a derogation may, as a precaution, take the necessary protective measures. Such measures must cause the least possible disturbance in the functioning of the internal market and must not be wider in scope than is strictly necessary to remedy the sudden difficulties which have arisen.

2. The Commission and the other Member States shall be informed of such protective measures not later than when they enter into force. The Commission may recommend to the Council the granting of mutual assistance under Article 143.

3. After the Commission has delivered a recommendation and the Economic and Financial Committee has been consulted, the Council may decide that the Member State concerned shall amend, suspend or abolish the protective measures referred to above.

PROTOCOL 12: On the Excessive Deficit Procedure

THE HIGH CONTRACTING PARTIES,

DESIRING TO lay down the details of the excessive deficit procedure referred to in Article 126 of the Treaty on the Functioning of the European Union,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The reference values referred to in Article 126(2) of the Treaty on the Functioning of the European Union are:

- 3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices;

- 60 % for the ratio of government debt to gross domestic product at market prices.

Article 2

In Article 126 of the said Treaty and in this Protocol:

- "government" means general government, that is central government, regional or local government and social security funds, to the exclusion of commercial operations, as defined in the European System of Integrated Economic Accounts;

- "deficit" means net borrowing as defined in the European System of Integrated Economic Accounts;

- "investment" means gross fixed capital formation as defined in the European System of Integrated Economic Accounts;

- "debt" means total gross debt at nominal value outstanding at the end of the year and consolidated between and within the sectors of general government as defined in the first indent.

Article 3

In order to ensure the effectiveness of the excessive deficit procedure, the governments of the Member States shall be responsible under this procedure for the deficits of general government as defined in the first indent of Article 2. The Member States shall ensure that national procedures in the budgetary area enable them to meet their obligations in this area deriving from these Treaties. The Member States shall report their planned and actual deficits and the levels of their debt promptly and regularly to the Commission.

Article 4

The statistical data to be used for the application of this Protocol shall be provided by the Commission.

PROTOCOL 13: On the Convergence Criteria

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the details of the convergence criteria which shall guide the Union in taking decisions to end the derogations of those Member States with a derogation, referred to in Article 140 of the Treaty on the Functioning of the European Union,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The criterion on price stability referred to in the first indent of Article 140(1) of the Treaty on the Functioning of the European Union shall mean that a Member State has a price performance that is sustainable and an average rate of inflation, observed over a period of one year before the examination, that does not exceed by more than 1 ½ percentage points that of, at most, the three best performing Member States in terms of price stability. Inflation shall be measured by means of the consumer price index on a comparable basis taking into account differences in national definitions.

Article 2

The criterion on the government budgetary position referred to in the second indent of Article 140(1) of the said Treaty shall mean that at the time of the examination the Member State is not the subject of a Council decision under Article 126(6) of the said Treaty that an excessive deficit exists.

Article 3

The criterion on participation in the Exchange Rate mechanism of the European Monetary System referred to in the third indent of Article 140(1) of the said Treaty shall mean that a Member State has respected the normal fluctuation margins provided for by the exchange-rate mechanism on the European Monetary System without severe tensions for at least the last two years before the examination. In particular, the Member State shall not have devalued its currency's bilateral central rate against the euro on its own initiative for the same period.

Article 4

The criterion on the convergence of interest rates referred to in the fourth indent of Article 140(1) of the said Treaty shall mean that, observed over a period of one year before the examination, a Member State has had an average nominal long-term interest rate that does not exceed by more than two percentage points that of, at most, the three best performing Member States in terms of price stability. Interest rates shall be measured on the basis of long-term government bonds or comparable securities, taking into account differences in national definitions.

Article 5

The statistical data to be used for the application of this Protocol shall be provided by the Commission.

Article 6

The Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, the ECB and the Economic and Financial Committee, adopt appropriate provisions to lay down the details of the convergence criteria referred to in Article 140(1) of the said Treaty, which shall then replace this Protocol.

PROTOCOL 14: On the Euro Group

THE HIGH CONTRACTING PARTIES,

DESIRING to promote conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area,

CONSCIOUS of the need to lay down special provisions for enhanced dialogue between the Member States whose currency is the euro, pending the euro becoming the currency of all Member States of the Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

Article 1

The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission.

Article 2

The Ministers of the Member States whose currency is the euro shall elect a president for two and a half years, by a majority of those Member States.

PROTOCOL 15: On Certain Provisions relating to the United Kingdom of Great Britain and Northern Ireland

THE HIGH CONTRACTING PARTIES,

RECOGNISING that the United Kingdom shall not be obliged or committed to adopt the euro without a separate decision to do so by its government and parliament,

GIVEN that on 16 October 1996 and 30 October 1997 the United Kingdom government notified the Council of its intention not to participate in the third stage of economic and monetary union,

NOTING the practice of the government of the United Kingdom to fund its borrowing requirement by the sale of debt to the private sector,

HAVE AGREED upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

1. Unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under no obligation to do so.

2. In view of the notice given to the Council by the United Kingdom government on 16 October 1996 and 30 October 1997, paragraphs 3 to 8 and 10 shall apply to the United Kingdom.

3. The United Kingdom shall retain its powers in the field of monetary policy according to national law.

4. Articles 119, second paragraph, 126(1), (9) and (11), 127(1) to (5), 128, 130, 131, 132, 133, 138, 140(3), 219, 282(2), with the exception of the first and last sentences thereof, 282(5), and 283 of the Treaty on the Functioning of the European Union shall not apply to the United Kingdom. The same applies to Article 121(2) of this Treaty as regards the adoption of the parts of the broad economic policy guidelines which concern the euro area generally. In these provisions references to the Union or the Member States shall not include the United Kingdom and references to national central banks shall not include the Bank of England.

5. The United Kingdom shall endeavour to avoid an excessive government deficit.

Articles 143 and 144 of the Treaty on the Functioning of the European Union shall continue to apply to the United Kingdom. Articles 134(4) and 142 shall apply to the United Kingdom as if it had a derogation.

6. The voting rights of the United Kingdom shall be suspended in respect of acts of the Council referred to in the Articles listed in paragraph 4 and in the instances referred to in the first subparagraph of Article 139(4) of the Treaty on the Functioning of the European Union. For this purpose the second subparagraph of Article 139(4) of the Treaty shall apply.

The United Kingdom shall also have no right to participate in the appointment of the President, the Vice-President and the other members of the Executive Board of the ECB under the second subparagraph of Article 283(2) of the said Treaty.

7. Articles 3, 4, 6, 7, 9.2, 10.1, 10.3, 11.2, 12.1, 14, 16, 18 to 20, 22, 23, 26, 27, 30 to 34 and 49 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank ("the Statute") shall not apply to the United Kingdom.

In those Articles, references to the Union or the Member States shall not include the United Kingdom and references to national central banks or shareholders shall not include the Bank of England.

References in Articles 10.3 and 30.2 of the Statute to "subscribed capital of the ECB" shall not include capital subscribed by the Bank of England.

8. Article 141(1) of the Treaty on the Functioning of the European Union and Articles 43 to 47 of the Statute shall have effect, whether or not there is any Member State with a derogation, subject to the following amendments:

(a) References in Article 43 to the tasks of the ECB and the EMI shall include those tasks that still need to be performed in the third stage owing to any decision of the United Kingdom not to adopt the euro.

(b) In addition to the tasks referred to in Article 46, the ECB shall also give advice in relation to and contribute to the preparation of any decision of the Council with regard to the United Kingdom taken in accordance with paragraphs 9(a) and 9(c).

(c) The Bank of England shall pay up its subscription to the capital of the ECB as a contribution to its operational costs on the same basis as national central banks of Member States with a derogation.

9. The United Kingdom may notify the Council at any time of its intention to adopt the euro. In that event:

(a) The United Kingdom shall have the right to adopt the euro provided only that it satisfies the necessary conditions. The Council, acting at the request of the United Kingdom and under the conditions and in accordance with the procedure laid down in Article 140(1) and (2) of the Treaty on the Functioning of the European Union, shall decide whether it fulfils the necessary conditions.

(b) The Bank of England shall pay up its subscribed capital, transfer to the ECB foreign reserve assets and contribute to its reserves on the same basis as the national central bank of a Member State whose derogation has been abrogated.

(c) The Council, acting under the conditions and in accordance with the procedure laid down in Article 140(3) of the said Treaty, shall take all other necessary decisions to enable the United Kingdom to adopt the euro.

If the United Kingdom adopts the euro pursuant to the provisions of this Protocol, paragraphs 3 to 8 shall cease to have effect.

10. Notwithstanding Article 123 of the Treaty on the Functioning of the European Union and Article 21.1 of the Statute, the Government of the United Kingdom may maintain its "ways and means" facility with the Bank of England if and so long as the United Kingdom does not adopt the euro.

PROTOCOL 16: On Certain Provisions Relating to Denmark

THE HIGH CONTRACTING PARTIES,

TAKING INTO ACCOUNT that the Danish Constitution contains provisions which may imply a referendum in Denmark prior to Denmark renouncing its exemption,

GIVEN THAT, on 3 November 1993, the Danish Government notified the Council of its intention not to participate in the third stage of economic and monetary union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union:

1. In view of the notice given to the Council by the Danish Government on 3 November 1993, Denmark shall have an exemption. The effect of the exemption shall be that all Articles and provisions of the Treaties and the Statute of the ESCB referring to a derogation shall be applicable to Denmark.

2. As for the abrogation of the exemption, the procedure referred to in Article 140 shall only be initiated at the request of Denmark.

3. In the event of abrogation of the exemption status, the provisions of this Protocol shall cease to apply.

§2. Council Regulation (EC) No 332/2002, of 18 February 2002, establishing a facility providing medium-term financial assistance for Member States' balances of payments, OJ L 43, February 23rd, 2002, pp. 1-3

Having regard to the Treaty establishing the European Community, and in particular Article 308 thereof,

Having regard to the proposal from the Commission, presented following consultation with the Economic and Financial Committee,[1]

Having regard to the opinion of the European Parliament,[2]

Having regard to the opinion of the European Central Bank,[3]

Whereas:

(1) The second subparagraph of Article 119(1) and Article 119(2) of the Treaty provide that, acting on a recommendation from the Commission made after consulting the Economic and Financial Committee, the Council will grant mutual assistance where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments. Article 119 does not define the instrument to be used for granting the mutual assistance envisaged.

(2) It should be possible for the operation of lending to a Member State to take place soon enough to encourage that Member State to adopt, in good time in a situation where orderly exchange rate conditions prevail, economic policy measures likely to prevent the occurrence of an acute balance of payments crisis and to support its efforts towards convergence.

(3) Each loan to a Member State should be linked to the adoption by that Member State of economic policy measures designed to re-establish or ensure a sustainable balance of payments situation and to adapt it to the gravity of the balance of payments situation in that State and to the way in which it develops.

(4) Appropriate procedures and instruments should be provided for in advance to enable the Community and Member States to ensure that, if required, financial medium-term assistance is provided quickly, especially where circumstances call for immediate action.

(5) In order to finance assistance that has been granted, the Community needs to be able to use its creditworthiness to borrow resources that will be placed at the disposal of the Member States concerned in the form of loans. Operations of this kind are necessary to the achievement of the objectives of the Community as defined in the Treaty, especially the harmonious development of economic activities in the Community as a whole.

(6) To this end, a single facility providing medium-term financial assistance for Member States' balances of payments was established by Council Regulation (EEC) No 1969/88.[4]

(7) Since 1 January 1999 the Member States participating in the single currency no longer qualify for medium-term financial assistance. However, the financial assistance facility should be retained in order to meet not only the potential needs of the present Member States which have not adopted the euro but also the needs of new Member States until such time as they adopt the euro.

(8) The introduction of the single currency has led to a substantial reduction in the number of Member States eligible for the instrument. A downwards revision of the present ceiling of EUR 16 billion is therefore justified. The loan ceiling should, though, be kept at a sufficiently high level in order to satisfy properly the simultaneous needs of several Member States. A reduction in the loan ceiling from EUR 16 billion to EUR 12 billion seems apt to meet this need and also to take account of forthcoming enlargements of the European Union.

(9) The glaring imbalance between the number of potential beneficiaries of the loans during the third stage of economic and monetary union and the number of countries capable of financing them makes it difficult to maintain direct financing of loans granted by all the other Member States. These loans should therefore be financed exclusively by way of recourse to

1 OJ C 180 E, 26.6.2001, p. 199.
2 Opinion delivered on 6 September 2001 (–OJ C 72 E March 21th 2002).
3 OJ C 151, 22.5.2001, p. 18.
4 OJ L 178, 8.7.1988, p. 1. Regulation as amended by the 1994 Act of Accession.

capital markets and financial institutions, these having now attained a stage of development and maturity which should enable them to undertake such financing.

(10) The arrangements for using the facility should also be clarified in the light of experience gained and account should be taken of the development of international financial markets and of the technical possibilities and constraints inherent in recourse to these sources of financing.

(11) It is for the Council to decide whether to grant a loan or appropriate financing facility, its average duration, its total amount and the amounts of the successive instalments. However, the characteristics of the instalments, duration and type of interest rate, should be fixed by common agreement between the beneficiary Member State and the Commission. If the Commission takes the view that the loan characteristics desired by that Member State result in financing that is incompatible with the technical constraints imposed by capital markets or financial institutions, it must be able to propose alternative financing arrangements.

(12) In order to finance loans granted under this Regulation, the Commission should be authorised to contract on behalf of the European Community borrowings on capital markets or from financial institutions.

(13) The financial assistance facility established by Regulation (EEC) No 1969/88 should be adapted accordingly. In the interests of clarity, that Regulation should be replaced.

(14) For the adoption of this Regulation, which provides for the granting of Community loans financed exclusively with funds raised on the capital markets and not by the other Member States, the Treaty provides no powers other than those of Article 308,

HAS ADOPTED THIS REGULATION:

Article 1

1. A Community medium-term financial assistance facility enabling loans to be granted to one or more Member States which are experiencing, or are seriously threatened with, difficulties in their balance of current payments or capital movements shall be established. Only Member States which have not adopted the euro may benefit from this Community facility.

The outstanding amount of loans to be granted to Member States under this facility shall be limited to EUR 12 billion in principal.

2. To this end, in accordance with a decision adopted by the Council pursuant to Article 3 and after consulting the Economic and Financial Committee, the Commission shall be empowered on behalf of the European Community to contract borrowings on the capital markets or with financial institutions.

Article 2

Where a Member State which has not adopted the euro proposes to call upon sources of financing outside the Community which are subject to economic policy conditions, it shall first consult the Commission and the other Member States in order to examine, among other things, the possibilities available under the Community medium-term financial assistance facility. Such consultations shall be held within the Economic and Financial Committee, in accordance with Article 119 of the Treaty.

Article 3

1. The medium-term financial assistance facility may be implemented by the Council on the initiative of:

(a) the Commission, acting pursuant to Article 119 of the Treaty in agreement with the Member State seeking Community financing;

(b) a Member State experiencing, or seriously threatened with, difficulties as regards its balance of current payments or capital movements.

2. The Council, after examining the situation in the Member State seeking medium-term financial assistance and the adjustment or back-up programme presented in support of its application, shall decide, as a rule during the same meeting:

(a) whether to grant a loan or appropriate financing facility, its amount and its average duration;

(b) the economic policy conditions attaching to the medium-term financial assistance with a view to re-establishing or ensuring a sustainable balance of payments situation;

(c) the techniques for disbursing the loan or financing facility, the release or drawing-down of which shall, as a rule, be by successive instalments, the release of each instalment being subject to verification of the results achieved in implementing the programme in terms of the objectives set.

Article 4

In cases where restrictions on capital movements are introduced or reintroduced pursuant to Article 120 of the Treaty during the period of the financial assistance, its conditions and arrangements shall be re-examined pursuant to Article 119 of the Treaty.

Article 5

The Commission shall take the necessary measures to verify at regular intervals, in collaboration with the Economic and Financial Committee, that the economic policy of the Member State in receipt of a Community loan accords with the adjustment or back-up programme and with any other conditions laid down by the Council pursuant to Article 3. To this end, the Member State shall place all the necessary information at the disposal of the Commission. On the basis of the findings of such verification, the Commission, after the Economic and Financial Committee has delivered an opinion, shall decide on the release of further instalments.

The Council shall decide on any adjustments to be made to the initial economic policy conditions.

Article 6

Loans granted as medium-term financial assistance may be granted as consolidation of support made available by the European Central Bank under the very short-term financing facility.

Article 7

1. The borrowing and lending operations referred to in Article 1 shall be carried out in euro. They shall use the same value date and shall not involve the Community in the transformation of maturities, in any interest rate risk, or in any other commercial risk.

The characteristics of the successive instalments released by the Community under the financial assistance facility shall be negotiated between the Member State and the Commission. Where the Commission takes the view that the characteristics desired by the Member State will lead to Community financing that runs counter to the technical constraints imposed by financial markets or is such as to tarnish the reputation of the Community as a borrower on those same markets, it has the right to withhold its agreement and propose an alternative solution.

Where a Member State receives a loan carrying an early repayment clause and decides to exercise this option, the Commission shall take the necessary steps.

2. At the request of the debtor Member State and where circumstances permit an improvement in the interest rate on the loan, the Commission may refinance all or part of its initial borrowings or restructure the corresponding financial conditions.

Refinancing or restructuring operations shall be carried out in accordance with the conditions set out in paragraph 1 and shall not have the effect of extending the average duration of the borrowing concerned or increasing the amount of capital outstanding at the date of the refinancing or restructuring.

3. The costs incurred by the Community in concluding and carrying out each operation shall be borne by the beneficiary Member State.

4. The Economic and Financial Committee shall be kept informed of developments in the operations referred to in the first subparagraph of paragraph 2.

Article 8

The Council shall adopt the decisions referred to in Articles 3 and 5, acting by qualified majority on a proposal from the Commission made after consulting the Economic and Financial Committee.

Article 9

The European Central Bank shall make the necessary arrangements for the administration of the loans.

The funds shall be paid only for the purposes indicated in Article 1.

Article 10

Every three years the Council shall examine, on the basis of a report from the Commission and after the Economic and Financial Committee has delivered an opinion, whether the facility established still meets, in its principle, arrangements and ceiling, the need which led to its creation.

Article 11

Regulation (EEC) No 1969/88 is hereby repealed.

Article 12

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Communities.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 18 February 2002.

THE LAW OF THE CRISES

I. PRIMARY LAW

§3. Euro Plus Pact, Conclusions of the European Council of March 24/25th 2011, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/120296.pdf

This Pact has been agreed by the euro area Heads of State or govemment and joined by Bulgaria, Denmark, Latvia, Lithuania, Poland, Romania to strengthen the economic pillar of the monetary union, achieve a new quality of economic policy coordination, improve competitiveness, thereby leading to a higher degree of convergence. This Pact focuses primarily on areas that fall under national competence and are key for increasing competitiveness and avoiding harmful imbalances. Competitiveness is essential to help the EU grow faster and more sustainably in the medium and long term, to produce higher levels of income for citizens, and to preserve our social models. Other Member States are invited to participate on a voluntary basis.

This renewed effort for stronger economic policy coordination for competitiveness and convergence rests on four guiding rules:

a. It will be in line with and strengthen the existing economic governance in the EU, while providing added value. It will be consistent with and build on existing instruments (Europe 2020, European Semester, Integrated Guidelines, Stability and Growth Pact and new macro- economic surveillance framework). It will involve a special effort going beyond what already exists and include concrete commitments and actions that are more ambitious than those already agreed, and accompanied with a timetable for implementation. These new commitments will thereafter be included in the National Reform and Stability Programmes and be subject to the regular surveillance framework, with a strong central role for the Commission in the monitoring of the implementation of the commitments, and the involvement of all the relevant formations of the Council and the Eurogroup. The European Parliament will play its full role in line with its competences. Social partners will be fully involved at the EU level through the Tripartite Social Summit.

b. It will be focused, action oriented, and cover priority policy areas that are essential for fostering competitiveness and convergence. It will concentrate on actions where the competence lies with the Member States. In the chosen policy areas common objectives will be agreed upon at the Heads of State or Government level. Participating Member States will pursue these objectives with their own policy-mix, taking into account their specific challenges.

c. Each year, concrete national commitments will be undertaken by each Head of State or Government. In doing so, Member States will take into account best practices and benchmark against the best performers, within Europe and vis-a-vis other strategic partners.

The implementation of commitments and progress towards the common policy objectives will be monitored politically by the Heads of State or Government of the euro area and participating countries on a yearly basis, on the basis of a report by the Commission. In addition, Member States commit to consult their partners on each major economic reform having potential spill-over effects before its adoption.

d. Participating Member States are fully committed to the completion of the Single Market which is key to enhancing the competitiveness in the EU and the euro area. This process will be fully in line with the treaty. The Pact will fully respect the integrity of the Single Market.

Our goals

Participating Member States undertake to take all necessary measures to pursue the following objectives:

- Foster competitiveness
- Foster employment
- Contribute further to the sustainability of public finances
- Reinforce financial stability

Each participating Member State will present the specific measures it will take to reach these goals. If a Member State can show that action is not needed on one or the other areas, it will not include it. The choice of the specific policy actions necessary to achieve the common objectives remains the responsibility of each country, but particular attention will be paid to the set of possible measures mentioned below.

Concrete policy commitments and monitoring

Progress towards the common objectives above will be politically monitored by the Heads of State or Government on the basis of a series of indicators covering competitiveness, employment, fiscal sustainability and financial stability. Countries facing major challenges in any of these areas will be identified and will have to commit to addressing these challenges in a given timeframe.

a. Foster competitiveness

Progress will be assessed on the basis of wage and productivity developments and competitiveness adjustment needs. To assess whether wages are evolving in line with productivity, unit labour costs (ULC) will be monitored over a period of time, by comparing with developments in other euro area countries and in the main comparable trading partners. For each country, ULCs will be assessed for the economy as a whole and for each major sector (manufacturing; services; as well as tradable and non-tradable sectors). Large and sustained increases may lead to the erosion of competitiveness, especially if combined with a widening current account deficit and declining market shares for exports. Action to raise competitiveness is required in both all countries, but particular attention will be paid to those facing major challenges in this respect. To ensure that growth is balanced and widespread in the whole euro area, specific instruments and common initiatives will be envisaged to foster productivity in regions lagging behind.

Each country will be responsible for the specific policy actions it chooses to foster competitiveness, but the following reforms will be given particular attention:

(i) respecting national traditions of social dialogue and industrial relations, measures to ensure costs developments in line with productivity, such as:

- review the wage setting arrangements, and, where necessary, the degree of centralisation in the bargaining process, and the indexation mechanisms, while maintaining the autonomy of the social partners in the collective bargaining process;

- ensure that wages settlements in the public sector support the competitiveness efforts in the private sector (bearing in mind the important signalling effect of public sector wages).

(ii) measures to increase productivity, such as:

- further opening of sheltered sectors by measures taken at the national level to remove unjustified restrictions on professional services and the retail sector, to foster competition and efficiency, in full respect of the Community acquis;

- specific efforts to improve education systems and promote R&D, innovation and infrastructure;

- measures to improve the business environment, particularly for SMEs, notably by removing red tape and improving the regulatory framework (e.g. bankruptcy laws, commercial code).

b. Foster employment

A well functioning labour market is key for the competitiveness of the euro area. Progress will be assessed on the basis of the following indicators: long term and youth unemployment rates, and labour participation rates.

Each country will be responsible for the specific policy actions it chooses to foster employment, but the following reforms will be given particular attention:

- labour market reforms to promote "flexicurity", reduce undeclared work and increase labour participation;

- life long learning;

- tax reforms, such as lowering taxes on labour to make work pay while preserving overall tax revenues, and taking measures to facilitate the participation of second earners in the work force.

c. Enhance the sustainability of public finances

In order to secure the full implementation of the Stability and Growth Pact, the highest attention will be paid to:

■ Sustainability of pensions, health care and social benefits

This will be assessed notably on the basis of the sustainability gap indicators[1]. These indicators measure whether debt levels are sustainable based on current policies, notably pensions schemes, health care and benefit systems, and taking into account demographic factors.

Reforms necessary to ensure the sustainability and adequacy of pensions and social benefits could include:

- aligning the pension system to the national demographic situation, for example by aligning the effective retirement age with life expectancy or by increasing participation rates;
- limiting early retirement schemes and using targeted incentives to employ older workers (notably in the age tranche above 55).

The sustainability gap are indicators agreed by the Commission and Member States to assess fiscal sustainability.

■ National fiscal rules

Participating Member States commit to translating EU fiscal rules as set out in the Stability and Growth Pact into national legislation. Member States will retain the choice of the specific national legal vehicle to be used, but will make sure that it has a sufficiently strong binding and durable nature (e.g. constitution or framework law). The exact formulation of the rule will also be decided by each country (e.g. it could take the form of a "debt brake", rule related to the primary balance or an expenditure rule), but it should ensure fiscal discipline at both national and sub-national levels. The Commission will have the opportunity, in full respect of the prerogatives of national parliaments, to be consulted on the precise fiscal rule before its adoption so as to ensure it is compatible with, and supportive of, the EU rules.

d. Reinforce financial stability

A strong financial sector is key for the overall stability of the euro area. A comprehensive reform of the EU framework for financial sector supervision and regulation has been launched.

In this context, Member States commit to putting in place national legislation for banking resolution, in full respect of the Community acquis. Strict bank stress tests, coordinated at EU level, will be undertaken on a regular basis.

In addition, the President of the ESRB and the President of the Eurogroup will be invited to regularly inform Heads of State or Government on issues related to macro-financial stability and macroeconomic developments in the euro area requiring specific action. In particular, for each Member State, the level of private debt for banks, households and non-financial firms will be closely monitored.

In addition to the issues mentioned above, attention will be paid to tax policy coordination.

Direct taxation remains a national competence. Pragmatic coordination of tax policies is a necessary element of a stronger economic policy coordination in the euro area to support fiscal consolidation and economic growth. In this context, Member States commit to engage in structured discussions on tax policy issues, notably to ensure the exchange of best practices, avoidance of harmful practices and proposals to fight against fraud and tax evasion.

Developing a common corporate tax base could be a revenue neutral way forward to ensure consistency among national tax systems while respecting national tax strategies, and to contribute to fiscal sustainability and the competitiveness of European businesses.

The Commission has presented a legislative proposal on a common consolidated corporate tax base. Concrete yearly commitments

In order to demonstrate a real commitment for change and ensure the necessary political impetus to reach our common objectives, each year participating Member States will agree at the highest level on a set of concrete actions to be achieved within 12 months. The selection of the specific policy measures to be implemented will remain the responsibility of each country, but the choice will be guided by considering in particular the issues mentioned above. These commitments will also be reflected in the National Reform Programmes and Stability Programmes submitted each year which will be assessed by the Commission, the Council, and the Eurogroup in the context of the European Semester.

§4. European Council Decision of March 25th, 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; OJ L 91, of April 6th, 2011, pp. 1-2

Having regard to the Treaty on European Union, and in particular Article 48(6) thereof,

Having regard to the proposal for revising Article 136 of the Treaty on the Functioning of the European Union submitted to the European Council by the Belgian Government on 16 December 2010,

Having regard to the opinion of the European Parliament,[19]

Having regard to the opinion of the European Commission,[20]

After obtaining the opinion of the European Central Bank,[21]

Whereas:

(1) Article 48(6) of the Treaty on European Union (TEU) allows the European Council, acting by unanimity after consulting the European Parliament, the Commission and, in certain cases, the European Central Bank, to adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union (TFEU). Such a decision may not increase the competences conferred on the Union in the Treaties and its entry into force is conditional upon its subsequent approval by the Member States in accordance with their respective constitutional requirements.

(2) At the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect.

(3) On 16 December 2010, the Belgian Government submitted, in accordance with Article 48(6), first subparagraph, of the TEU, a proposal for revising Article 136 of the TFEU by adding a paragraph under which 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 and stating that the granting of any required financial assistance under the mechanism will be made subject to strict conditionality. At the same time, the European Council adopted conclusions about the future stability mechanism (paragraphs 1 to 4).

(4) The stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole as have been experienced in 2010, and hence help preserve the economic and financial stability of the Union itself. At its meeting of 16 and 17 December 2010, the European Council agreed that, as this mechanism is designed to safeguard the financial stability of the euro area as whole, Article 122(2) of the TFEU will no longer be needed for such purposes. The Heads of State or Government therefore agreed that it should not be used for such purposes.

(5) On 16 December 2010, the European Council decided to consult, in accordance with Article 48(6), second subparagraph, of the TEU, the European Parliament and the Commission, on the proposal. It also decided to consult the European Central Bank. The European Parliament [1], the Commission [2] and the European Central Bank [3], respectively, adopted opinions on the proposal.

(6) The amendment concerns a provision contained in Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties,

HAS ADOPTED THIS DECISION:

Article 1

The following paragraph shall be added to Article 136 of the Treaty on the Functioning of the European Union:

"3. 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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality.".

Article 2

[19] Opinion of 23 March 2011 (OJ C 247 E August 17th 2012)
[20] Opinion of 15 February 2011 (OJ L 161 June 21 th 2011)).
[21] Opinion of 17 March 2011 (OJ C 140 May 11th 2011 ()

Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.

This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph.

Article 3

This Decision shall be published in the Official Journal of the European Union.

Done at Brussels, 25 March 2011.

§5. Treaty Establishing the European Stability Mechanism, Feb 1th 2012, available at http://www.esm.europa.eu/pdf/esm_treaty_en.pdf

THE CONTRACTING PARTIES, 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");

COMMITTED TO ensuring the financial stability of the euro area;

RECALLING the Conclusions of the European Council adopted on 25 March 2011 on the establishment of a European stability mechanism;

WHEREAS:

(1) The European Council agreed on 17 December 2010 on the need for euro area Member States to establish a permanent stability mechanism. This European Stability Mechanism ("ESM") will assume the tasks currently fulfilled by the European Financial Stability Facility ("EFSF") and the European Financial Stabilisation Mechanism ("EFSM") in providing, where needed, financial assistance to euro area Member States.

(2) On 25 March 2011, the European Council adopted Decision 2011/199/EU 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[1] adding the following paragraph to Article 136: "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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

(3) With a view to increasing the effectiveness of the financial assistance and to prevent the risk of financial contagion, the Heads of State or Government of the Member States whose currency is the euro agreed on 21 July 2011 to "increase [the] flexibility [of the ESM] linked to appropriate conditionality".

(4) Strict observance of the European Union framework, the integrated macro-economic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union, should remain the first line of defence against confidence crises affecting the stability of the euro area.

(5) On 9 December 2011 the Heads of State or Government of the Member States whose currency is the euro agreed to move towards a stronger economic union including a new fiscal compact and strengthened economic policy coordination to be implemented through an international agreement, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG"). The TSCG will help develop a closer coordination within the euro area with a view to ensuring a lasting, sound and robust management of public finances and thus addresses one of the main sources of financial instability. This Treaty and the TSCG are complementary in fostering fiscal responsibility and solidarity within the economic and monetary union. It is acknowledged and agreed that the granting of financial assistance in the framework of new programmes under the ESM will be conditional, as of 1 March 2013, on the ratification of the TSCG by the ESM Member concerned and, upon expiration of the transposition period referred to in Article 3(2) TSCG on compliance with the requirements of that Article.

[1] OJ L 91, 6.4.2011, p. 1.

(6) Given the strong interrelation within the euro area, severe risks to the financial stability of Member States whose currency is the euro may put at risk the financial stability of the euro area as a whole. The ESM may therefore provide stability support on the basis of a strict conditionality, appropriate to the financial assistance instrument chosen if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. The initial maximum lending volume of the ESM is set at EUR 500 000 million, including the outstanding EFSF stability support. The adequacy of the consolidated ESM and EFSF maximum lending volume will, however, be reassessed prior to the entry into force of this Treaty. If appropriate, it will be increased by the Board of Governors of the ESM, in accordance with Article 10, upon entry into force of this Treaty.

(7) All euro area Member States will become ESM Members. As a consequence of joining the euro area, a Member State of the European Union should become an ESM Member with full rights and obligations, in line with those of the Contracting Parties.

(8) The ESM will cooperate very closely with the International Monetary Fund ("IMF") in providing stability support. The active participation of the IMF will be sought, both at technical and financial level. A euro area Member State requesting financial assistance from the ESM is expected to address, wherever possible, a similar request to the IMF.

(9) Member States of the European Union whose currency is not the euro ("non euro area Member States") participating on an ad hoc basis alongside the ESM in a stability support operation for euro area Member States will be invited to participate, as observers, in the ESM meetings when this stability support and its monitoring will be discussed. They will have access to all information in a timely manner and be properly consulted.

(10) On 20 June 2011, the representatives of the Governments of the Member States of the European Union authorised the Contracting Parties of this Treaty to request the European Commission and the European Central Bank ("ECB") to perform the tasks provided for in this Treaty.

(11) In its statement of 28 November 2010, the Euro Group stated that standardised and identical Collective Action Clauses ("CACs") will be included, in such a way as to preserve market liquidity, in the terms and conditions of all new euro area government bonds. As requested by the European Council on 25 March 2011, the detailed legal arrangements for including CACs in euro area government securities were finalised by the Economic and Financial Committee.

(12) In accordance with IMF practice, in exceptional cases an adequate and proportionate form of private sector involvement shall be considered in cases where stability support is provided accompanied by conditionality in the form of a macro-economic adjustment programme.

(13) Like the IMF, the ESM will provide stability support to an ESM Member when its regular access to market financing is impaired or is at risk of being impaired. Reflecting this, Heads of State or Government have stated that the ESM loans will enjoy preferred creditor status in a similar fashion to those of the IMF, while accepting preferred creditor status of the IMF over the ESM. This status will be effective as of the date of entry into force of this Treaty. In the event of ESM financial assistance in the form of ESM loans following a European financial assistance programme existing at the time of the signature of this Treaty, the ESM will enjoy the same seniority as all other loans and obligations of the beneficiary ESM Member, with the exception of the IMF loans.

(14) The euro area Member States will support equivalent creditor status of the ESM and that of other States lending bilaterally in coordination with the ESM.

(15) ESM lending conditions for Member States subject to a macroeconomic adjustment programme, including those referred to in Article 40 of this Treaty, shall cover the financing and operating costs of the ESM and should be consistent with the lending conditions of the Financial Assistance Facility Agreements signed between the EFSF, Ireland and the Central Bank of Ireland on the one hand and the EFSF, the Portuguese Republic and Banco de Portugal on the other.

(16) Disputes concerning the interpretation and application of this Treaty arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union ("TFEU").

(17) Post-programme surveillance will be carried out by the European Commission and by

the Council of the European Union within the framework laid down in Articles 121 and 136 TFEU,

HAVE AGREED AS FOLLOWS:

CHAPTER 1 – MEMBERSHIP AND PURPOSE

Article 1 – *Establishment and members*

1. By this Treaty, the Contracting Parties establish among themselves an international financial institution, to be named the "European Stability Mechanism" ("ESM").

2. The Contracting Parties are ESM Members.

Article 2 – *New members*

1. Membership in the ESM shall be open to the other Member States of the European Union as from the entry into force of the decision of the Council of the European Union taken in accordance with Article 140(2) TFEU to abrogate their derogation from adopting the euro.

2. New ESM Members shall be admitted on the same terms and conditions as existing ESM Members, in accordance with Article 44.

3. A new member acceding to the ESM after its establishment shall receive shares in the ESM in exchange for its capital contribution, calculated in accordance with the contribution key provided for in Article 11.

Article 3 – *Purpose*

The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.

CHAPTER 2 – GOVERNANCE

Article 4 – *Structure and voting rules*

1. The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director and other dedicated staff as may be considered necessary.

2. The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. In respect of all decisions, a quorum of 2/3 of the members with voting rights representing at least 2/3 of the voting rights must be present.

3. The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. Abstentions do not prevent the adoption of a decision by mutual agreement.

4. By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast.

Where the emergency procedure referred to in the first subparagraph is used, a transfer from the reserve fund and/or the paid-in capital to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the financial support granted under that emergency procedure. The Board of Governors may decide to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital.

5. The adoption of a decision by qualified majority requires 80 % of the votes cast.

6. The adoption of a decision by simple majority requires a majority of the votes cast.

7. The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.

8. If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be

unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

Article 5 – *Board of Governors*

1. Each ESM Member shall appoint a Governor and an alternate Governor. Such appointments are revocable at any time. The Governor shall be a member of the government of that ESM Member who has responsibility for finance. The alternate Governor shall have full power to act on behalf of the Governor when the latter is not present.

2. The Board of Governors shall decide either to be chaired by the President of the Euro Group, as referred to in Protocol (No 14) on the Euro Group annexed to the Treaty on the European Union and to the TFEU or to elect a Chairperson and a Vice-Chairperson from among its members for a term of two years. The Chairperson and the Vice-Chairperson may be re-elected. A new election shall be organised without delay if the incumbent no longer holds the function needed for being designated Governor.

3. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB, as well as the President of the Euro Group (if he or she is not the Chairperson or a Governor) may participate in the meetings of the Board of Governors as observers.

4. Representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a stability support operation for a euro area Member State shall also be invited to participate, as observers, in the meetings of the Board of Governors when this stability support and its monitoring will be discussed.

5. Other persons, including representatives of institutions or organisations, such as the IMF, may be invited by the Board of Governors to attend meetings as observers on an ad hoc basis.

6. The Board of Governors shall take the following decisions by mutual agreement:

(a) to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital, in accordance with Article 4(4);

(b) to issue new shares on terms other than at par, in accordance with Article 8(2);

(c) to make the capital calls, in accordance with Article 9(1);

(d) to change the authorised capital stock and adapt the maximum lending volume of the ESM, in accordance with Article 10(1);

(e) to take into account a possible update of the key for the subscription of the ECB capital, in accordance with Article 11(3), and the changes to be made to Annex I in accordance with Article 11(6);

(f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13(3), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18;

(g) to give a mandate to the European Commission to negotiate, in liaison with the ECB, the economic policy conditionality attached to each financial assistance, in accordance with Article 13(3);

(h) to change the pricing policy and pricing guideline for financial assistance, in accordance with Article 20;

(i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19;

(j) to establish the modalities of the transfer of EFSF support to the ESM, in accordance with Article 40;

(k) to approve the application for membership of the ESM by new members, referred to in Article 44;

(l) to make adaptations to this Treaty as a direct consequence of the accession of new members, including changes to be made to the distribution of capital among ESM Members and the calculation of such a distribution as a direct consequence of the accession of a new member to the ESM, in accordance with Article 44; and

(m) to delegate to the Board of Directors the tasks listed in this Article.

7. The Board of Governors shall take the following decisions by qualified majority:

(a) to set out the detailed technical terms of accession of a new member to the ESM, in accordance with Article 44;

(b) whether to be chaired by the President of the Euro Group or to elect, by qualified majority, the Chairperson and Vice-Chairperson of the

Board of Governors, in accordance with paragraph 2;

(c) to set out by-laws of the ESM and the rules of procedure applicable to the Board of Governors and Board of Directors (including the right to establish committees and subsidiary bodies), in accordance with paragraph 9;

(d) to determine the list of activities incompatible with the duties of a Director or an alternate Director, in accordance with Article 6(8);

(e) to appoint and to end the term of office of the Managing Director, in accordance with Article 7;

(f) to establish other funds, in accordance with Article 24;

(g) on the actions to be taken for recovering a debt from an ESM Member, in accordance with Article 25(2) and (3);

(h) to approve the annual accounts of the ESM, in accordance with Article 27(1);

(i) to appoint the members of the Board of Auditors, in accordance with Article 30(1);

(j) to approve the external auditors, in accordance with Article 29;

(k) to waive the immunity of the Chairperson of the Board of Governors, a Governor, alternate Governor, Director, alternate Director or the Managing Director, in accordance with Article 35(2);

(l) to determine the taxation regime applicable to the ESM staff, in accordance with Article 36(5);

(m) on a dispute, in accordance with Article 37(2); and

(n) any other necessary decision not explicitly provided for by this Treaty.

8. The Chairperson shall convene and preside over the meetings of the Board of Governors. The Vice-Chairperson shall preside over these meetings when the Chairperson is unable to participate.

9. The Board of Governors shall adopt their rules of procedure and the by-laws of the ESM.

Article 6 – *Board of Directors*

1. Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. Such appointments shall be revocable at any time. The alternate Directors shall have full power to act on behalf of the Director when the latter is not present.

2. The Member of the European Commission in charge of economic and monetary affairs and the President of the ECB may appoint one observer each.

3. Representatives of non-euro area Member States participating on an ad hoc basis alongside the ESM in a financial assistance operation for a euro area Member State shall also be invited to participate, as observers, in the meetings of the Board of Directors when this financial assistance and its monitoring will be discussed.

4. Other persons, including representatives of institutions or organisations, may be invited by the Board of Governors to attend meetings as observers on an ad hoc basis.

5. The Board of Directors shall take decisions by qualified majority, unless otherwise stated in this Treaty. Decisions to be taken on the basis of powers delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5(6) and (7).

6. Without prejudice to the powers of the Board of Governors as set out in Article 5, the Board of Directors shall ensure that the ESM is run in accordance with this Treaty and the by-laws of the ESM adopted by the Board of Governors. It shall take decisions as provided for in this Treaty or which are delegated to it by the Board of Governors.

7. Any vacancy in the Board of Directors shall be immediately filled in accordance with paragraph 1.

8. The Board of Governors shall lay down what activities are incompatible with the duties of a Director or an alternate Director, the by-laws of the ESM and rules of procedure of the Board of Directors.

Article 7 – *Managing Director*

1. The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, relevant international experience and a high level of competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either.

2. The term of office of the Managing Director shall be five years. He or she may be re-appointed once. The Managing Director shall, however, cease to hold office when the Board of Governors so decides.

3. The Managing Director shall chair the meetings of the Board of Directors and shall participate in the meetings of the Board of Governors.

4. The Managing Director shall be chief of the staff of the ESM. He or she shall be responsible for organising, appointing and dismissing staff in accordance with staff rules to be adopted by the Board of Directors.

5. The Managing Director shall be the legal representative of the ESM and shall conduct, under the direction of the Board of Directors, the current business of the ESM.

CHAPTER 3 – CAPITAL

Article 8 – *Authorised capital stock*

1. The authorised capital stock shall be EUR 700 000 million. It shall be divided into seven million shares, having a nominal value of EUR 100 000 each, which shall be available for subscription according to the initial contribution key provided for in Article 11 and calculated in Annex I.

2. The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms.

3. Shares of authorised capital stock shall not be encumbered or pledged in any manner whatsoever and they shall not be transferable, with the exception of transfers for the purposes of implementing adjustments of the contribution key provided for in Article 11 to the extent necessary to ensure that the distribution of shares corresponds to the adjusted key.

4. ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.

5. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

Article 9 – *Capital calls*

1. The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

2. The Board of Directors may call in authorised unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8(2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

3. The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt.

4. The Board of Directors shall adopt the detailed terms and conditions which shall apply to calls on capital pursuant to this Article.

Article 10 – *Changes in authorised capital stock*

1. The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of

the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I.

2. The Board of Directors shall adopt the detailed terms and conditions which shall apply to all or any capital changes made under paragraph 1.

3. Upon a Member State of the European Union becoming a new ESM Member, the authorised capital stock of the ESM shall be automatically increased by multiplying the respective amounts then prevailing by the ratio, within the adjusted contribution key provided for in Article 11, between the weighting of the new ESM Member and the weighting of the existing ESM Members.

Article 11 – *Contribution key*

1. The contribution key for subscribing to ESM authorised capital stock shall, subject to paragraphs 2 and 3, be based on the key for subscription, by the national central banks of ESM Members, of the ECB's capital pursuant to Article 29 of Protocol (No 4) on the Statute of the European System of Central Banks and of the European Central Bank (the "ESCB Statute") annexed to the Treaty on European Union and to the TFEU.

2. The contribution key for the subscription of the ESM authorised capital stock is specified in Annex I.

3. The contribution key for the subscription of the ESM authorised capital stock shall be adjusted when:

(a) a Member State of the European Union becomes a new ESM Member and the ESM's authorised capital stock automatically increases, as specified in Article 10(3); or

(b) the twelve year temporary correction applicable to an ESM Member established in accordance with Article 42 ends.

4. The Board of Governors may decide to take into account possible updates to the key for the subscription of the ECB's capital referred to in paragraph 1 when the contribution key is adjusted in accordance with paragraph 3 or when there is a change in the authorised capital stock, as specified in Article 10(1).

5. When the contribution key for the subscription of the ESM authorised capital stock is adjusted, the ESM Members shall transfer among themselves authorised capital stock to the extent necessary to ensure that the distribution of authorised capital stock corresponds to the adjusted key.

6. Annex I shall be amended upon decision by the Board of Governors upon any adjustment referred to in this Article.

7. The Board of Directors shall take all other measures necessary for the application of this Article.

CHAPTER 4 – OPERATIONS

Article 12 – *Principles*

1. If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

2. Without prejudice to Article 19, ESM stability support may be granted through the instruments provided for in Articles 14 to 18.

3. Collective action clauses shall be included, as of 1 January 2013, in all new euro area government securities, with maturity above one year, in a way which ensures that their legal impact is identical.

Article 13 – *Procedure for granting stability support*

1. An ESM Member may address a request for stability support to the Chairperson of the Board of Governors. Such a request shall indicate the financial assistance instrument(s) to be considered. On receipt of such a request, the Chairperson of the Board of Governors shall entrust the European Commission, in liaison with the ECB, with the following tasks:

(a) to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, unless the ECB has already submitted an analysis under Article 18(2);

(b) to assess whether public debt is sustainable. Wherever appropriate and possible, such an assessment is expected to be conducted together with the IMF;

(c) to assess the actual or potential financing needs of the ESM Member concerned.

2. On the basis of the request of the ESM Member and the assessment referred to in paragraph 1, the Board of Governors may decide to grant, in principle, stability support to the ESM Member concerned in the form of a financial assistance facility.

3. If a decision pursuant to paragraph 2 is adopted, the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen. In parallel, the Managing Director of the ESM shall prepare a proposal for a financial assistance facility agreement, including the financial terms and conditions and the choice of instruments, to be adopted by the Board of Governors.

The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned.

4. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors.

5. The Board of Directors shall approve the financial assistance facility agreement detailing the financial aspects of the stability support to be granted and, where applicable, the disbursement of the first tranche of the assistance.

6. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner.

7. The European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility.

Article 14 – *ESM precautionary financial assistance*

1. The Board of Governors may decide to grant precautionary financial assistance in the form of a precautionary conditioned credit line or in the form of an enhanced conditions credit line in accordance with Article 12(1).

2. The conditionality attached to the ESM precautionary financial assistance shall be detailed in the MoU, in accordance with Article 13(3).

3. The financial terms and conditions of the ESM precautionary financial assistance shall be specified in a precautionary financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the ESM precautionary financial assistance.

5. The Board of Directors shall decide by mutual agreement on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), whether the credit line should be maintained.

6. After the ESM Member has drawn funds for the first time (via a loan or a primary market purchase), the Board of Directors shall decide by mutual agreement on a proposal from the Managing Director and based on an assessment conducted by the European Commission, in liaison with the ECB, whether the credit line continues to be adequate or whether another form of financial assistance is needed.

Article 15 – *Financial assistance for the re-capitalisation of financial institutions of an ESM Member*

1. The Board of Governors may decide to grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalising the financial institutions of that ESM Member.

2. The conditionality attached to financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be detailed in the MoU, in accordance with Article 13(3).

3. Without prejudice to Articles 107 and 108 TFEU, the financial terms and conditions of financial assistance for the re-capitalisation of an ESM Member's financial institutions shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing financial assistance for the re-capitalisation of an ESM Member's financial institutions.

5. Where applicable, the Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), the disbursement of the tranches of the financial assistance subsequent to the first tranche.

Article 16 – *ESM loans*

1. The Board of Governors may decide to grant financial assistance in the form of a loan to an ESM Member, in accordance with Article 12.

2. The conditionality attached to the ESM loans shall be contained in a macro-economic adjustment programme detailed in the MoU, in accordance with Article 13(3).

3. The financial terms and conditions of each ESM loan shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing ESM loans.

5. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), the disbursement of the tranches of the financial assistance subsequent to the first tranche.

Article 17 – *Primary market support facility*

1. The Board of Governors may decide to arrange for the purchase of bonds of an ESM Member on the primary market, in accordance with Article 12 and with the objective of maximising the cost efficiency of the financial assistance.

2. The conditionality attached to the primary market support facility shall be detailed in the MoU, in accordance with Article 13(3).

3. The financial terms and conditions under which the bond purchase is conducted shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

4. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the primary market support facility.

5. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director and after having received a report from the European Commission in accordance with Article 13(7), the disbursement of financial assistance to a beneficiary Member State through operations on the primary market.

Article 18 – *Secondary market support facility*

1. The Board of Governors may decide to arrange for operations on the secondary market in relation to the bonds of an ESM Member in accordance with Article 12(1).

2. Decisions on interventions on the secondary market to address contagion shall be taken on the basis of an analysis of the ECB recognising the existence of exceptional financial market circumstances and risks to financial stability.

3. The conditionality attached to the secondary market support facility shall be detailed in the MoU, in accordance with Article 13(3).

4. The financial terms and conditions under which the secondary market operations are to be conducted shall be specified in a financial assistance facility agreement, to be signed by the Managing Director.

5. The Board of Directors shall adopt the detailed guidelines on the modalities for implementing the secondary market support facility.

6. The Board of Directors shall decide by mutual agreement, on a proposal from the Managing Director, to initiate operations on the secondary market.

Article 19 – *Review of the list of financial assistance instruments*

The Board of Governors may review the list of financial assistance instruments provided for in Articles 14 to 18 and decide to make changes to it.

Article 20 – *Pricing policy*

1. When granting stability support, the ESM shall aim to fully cover its financing and operating costs and shall include an appropriate margin.

2. For all financial assistance instruments, pricing shall be detailed in a pricing guideline, which shall be adopted by the Board of Governors.

3. The pricing policy may be reviewed by the Board of Governors.

Article 21 – *Borrowing operations*

1. The ESM shall be empowered to borrow on the capital markets from banks, financial institutions or other persons or institutions for the performance of its purpose.

2. The modalities of the borrowing operations shall be determined by the Managing Director, in accordance with detailed guidelines to be adopted by the Board of Directors.

3. The ESM shall use appropriate risk management tools, which shall be reviewed regularly by the Board of Directors.

CHAPTER 5 – FINANCIAL MANAGEMENT

Article 22 – *Investment policy*

1. The Managing Director shall implement a prudent investment policy for the ESM, so as to ensure its highest creditworthiness, in accordance with guidelines to be adopted and reviewed regularly by the Board of Directors. The ESM shall be entitled to use part of the return on its investment portfolio to cover its operating and administrative costs.

2. The operations of the ESM shall comply with the principles of sound financial and risk management.

Article 23 – *Dividend policy*

1. The Board of Directors may decide, by simple majority, to distribute a dividend to the ESM Members where the amount of paid-in capital and the reserve fund exceed the level required for the ESM to maintain its lending capacity and where proceeds from the investment are not required to avoid a payment shortfall to creditors. Dividends are distributed pro rata to the contributions to the paid-in capital, taking into account the possible acceleration referred to in Article 41(3).

2. As long as the ESM has not provided financial assistance to one of its members, the proceeds from the investment of the ESM paid-in capital shall be returned to the ESM Members according to their respective contributions to the paid-in capital, after deductions for operational costs, provided that the targeted effective lending capacity is fully available.

3. The Managing Director shall implement the dividend policy for the ESM in accordance with guidelines to be adopted by the Board of Directors.

Article 24 – *Reserve and other funds*

1. The Board of Governors shall establish a reserve fund and, where appropriate, other funds.

2. Without prejudice to Article 23, the net income generated by the ESM operations and the proceeds of the financial sanctions received from the ESM Members under the multilateral surveillance procedure, the excessive deficit procedure and the macro-economic imbalances procedure established under the TFEU shall be put aside in a reserve fund.

3. The resources of the reserve fund shall be invested in accordance with guidelines to be adopted by the Board of Directors.

4. The Board of Directors shall adopt such rules as may be required for the establishment, administration and use of other funds.

Article 25 – *Coverage of losses*

1. Losses arising in the ESM operations shall be charged:

(a) firstly, against the reserve fund;

(b) secondly, against the paid-in capital; and

(c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9(3).

2. If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.

3. When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM

Members in accordance with rules to be adopted by the Board of Governors.

Article 26 – *Budget*

The Board of Directors shall approve the ESM budget annually.

Article 27 – *Annual accounts*

1. The Board of Governors shall approve the annual accounts of the ESM.

2. The ESM shall publish an annual report containing an audited statement of its accounts and shall circulate to ESM Members a quarterly summary statement of its financial position and a profit and loss statement showing the results of its operations.

Article 28 – *Internal Audit*

An internal audit function shall be established according to international standards.

Article 29 – *External audit*

The accounts of the ESM shall be audited by independent external auditors approved by the Board of Governors and responsible for certifying the annual financial statements. The external auditors shall have full power to examine all books and accounts of the ESM and obtain full information about its transactions.

Article 30 – *Board of Auditors*

1. The Board of Auditors shall consist of five members appointed by the Board of Governors for their competence in auditing and financial matters and shall include two members from the supreme audit institutions of the ESM Members - with a rotation between the latter - and one from the European Court of Auditors.

2. The members of the Board of Auditors shall be independent. They shall neither seek nor take instructions from the ESM governing bodies, the ESM Members or any other public or private body.

3. The Board of Auditors shall draw up independent audits. It shall inspect the ESM accounts and verify that the operational accounts and balance sheet are in order. It shall have full access to any document of the ESM needed for the implementation of its tasks.

4. The Board of Auditors may inform the Board of Directors at any time of its findings. It shall, on an annual basis, draw up a report to be submitted to the Board of Governors.

5. The Board of Governors shall make the annual report accessible to the national parliaments and supreme audit institutions of the ESM Members and to the European Court of Auditors.

6. Any matter relating to this Article shall be detailed in the by-laws of the ESM.

CHAPTER 6 – GENERAL PROVISIONS

Article 31 – *Location*

1. The ESM shall have its seat and principal office in Luxembourg.

2. The ESM may establish a liaison office in Brussels.

Article 32 – *Legal status, privileges and immunities*

1. To enable the ESM to fulfil its purpose, the legal status and the privileges and immunities set out in this Article shall be accorded to the ESM in the territory of each ESM Member. The ESM shall endeavour to obtain recognition of its legal status and of its privileges and immunities in other territories in which it performs functions or holds assets.

2. The ESM shall have full legal personality; it shall have full legal capacity to:

(a) acquire and dispose of movable and immovable property;

(b) contract;

(c) be a party to legal proceedings; and

(d) enter into a headquarter agreement and/or protocols as necessary for ensuring that its legal status and its privileges and immunities are recognised and enforced.

3. The ESM, its property, funding and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of judicial process except to the extent that the ESM expressly waives its immunity for the purpose of any proceedings or by the terms of any contract, including the documentation of the funding instruments.

4. The property, funding and assets of the ESM shall, wherever located and by whomsoever held, be immune from search, requisition, confiscation, expropriation or any other form of seizure, taking or foreclosure by executive, judicial, administrative or legislative action.

5. The archives of the ESM and all documents belonging to the ESM or held by it, shall be inviolable.

6. The premises of the ESM shall be inviolable.

7. The official communications of the ESM shall be accorded by each ESM Member and by each state which has recognised the legal status and the privileges and immunities of the ESM, the same treatment as it accords to the official communications of an ESM Member.

8. To the extent necessary to carry out the activities provided for in this Treaty, all property, funding and assets of the ESM shall be free from restrictions, regulations, controls and moratoria of any nature.

9. The ESM shall be exempted from any requirement to be authorised or licensed as a credit institution, investment services provider or other authorised licensed or regulated entity under the laws of each ESM Member.

Article 33 – *Staff of the ESM*

The Board of Directors shall lay down the conditions of employment of the Managing Director and other staff of the ESM.

Article 34 – *Professional secrecy*

The Members or former Members of the Board of Governors and of the Board of Directors and any other persons who work or have worked for or in connection with the ESM shall not disclose information that is subject to professional secrecy. They shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

Article 35 – *Immunities of persons*

1. In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.

2. The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.

3. The Managing Director may waive any such immunity in respect of any member of the staff of the ESM other than himself or herself.

4. Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly.

Article 36 – *Exemption from taxation*

1. Within the scope of its official activities, the ESM, its assets, income, property and its operations and transactions authorised by this Treaty shall be exempt from all direct taxes.

2. The ESM Members shall, wherever possible, take the appropriate measures to remit or refund the amount of indirect taxes or sales taxes included in the price of movable or immovable property where the ESM makes, for its official use, substantial purchases, the price of which includes taxes of this kind.

3. No exemption shall be granted in respect of taxes and dues which amount merely to charges for public utility services.

4. Goods imported by the ESM and necessary for the exercise of its official activities shall be exempt from all import duties and taxes and from all import prohibitions and restrictions.

5. Staff of the ESM shall be subject to an internal tax for the benefit of the ESM on salaries and emoluments paid by the ESM, subject to rules to be adopted by the Board of Governors. From the date on which this tax is applied, such salaries and emoluments shall be exempt from national income tax.

6. No taxation of any kind shall be levied on any obligation or security issued by the ESM including any interest or dividend thereon by whomsoever held:

(a) which discriminates against such obligation or security solely because of its origin; or

(b) if the sole jurisdictional basis for such taxation is the place or currency in which it is issued, made payable or paid, or the location of any office or place of business maintained by the ESM.

Article 37 – *Interpretation and dispute settlement*

1. Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall

be submitted to the Board of Directors for its decision.

2. The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

3. If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.

Article 38 – *International cooperation*

The ESM shall be entitled, for the furtherance of its purposes, to cooperate, within the terms of this Treaty, with the IMF, any State which provides financial assistance to an ESM Member on an ad hoc basis and any international organisation or entity having specialised responsibilities in related fields.

CHAPTER 7 – TRANSITIONAL ARRANGEMENTS

Article 39 – *Relation with EFSF lending*

During the transitional phase spanning the period from the entry into force of this Treaty until the complete run-down of the EFSF, the consolidated ESM and EFSF lending shall not exceed EUR 500 000 million, without prejudice to the regular review of the adequacy of the maximum lending volume in accordance with Article 10. The Board of Directors shall adopt detailed guidelines on the calculation of the forward commitment capacity to ensure that the consolidated lending ceiling is not breached.

Article 40 – *Transfer of EFSF supports*

1. By way of derogation from Article 13, the Board of Governors may decide that the EFSF commitments to provide financial assistance to an ESM Member under its agreement with that member shall be assumed by the ESM as far as such commitments relate to undisbursed and unfunded parts of loan facilities.

2. The ESM may, if authorised by its Board of Governors, acquire the rights and assume the obligations of the EFSF, in particular in respect of all or part of its outstanding rights and obligations under, and related to, its existing loan facilities.

3. The Board of Governors shall adopt the detailed modalities necessary to give effect to the transfer of the obligations from the EFSF to the ESM, as referred to in paragraph 1 and any transfer of rights and obligations as described in paragraph 2.

Article 41 – *Payment of the initial capital*

1. Without prejudice to paragraph 2, payment of paid-in shares of the amount initially subscribed by each ESM Member shall be made in five annual instalments of 20 % each of the total amount. The first instalment shall be paid by each ESM Member within fifteen days of the date of entry into force of this Treaty. The remaining four instalments shall each be payable on the first, second, third and fourth anniversary of the payment date of the first instalment.

2. During the five-year period of capital payment by instalments, ESM Members shall accelerate the payment of paid-in shares, in a timely manner prior to the issuance date, in order to maintain a minimum 15 % ratio between paid-in capital and the outstanding amount of ESM issuances and guarantee a minimum combined lending capacity of the ESM and of the EFSF of EUR 500 000 million.

3. An ESM Member may decide to accelerate the payment of its share of paid-in capital.

Article 42 – *Temporary correction of the contribution key*

1. At inception, the ESM Members shall subscribe the authorised capital stock on the basis of the initial contribution key as specified in Annex I. The temporary correction included in this initial contribution key shall apply for a period of twelve years after the date of adoption of the euro by the ESM Member concerned.

2. If a new ESM Member's gross domestic product (GDP) per capita at market prices in euro in the year immediately preceding its accession to the ESM is less than 75 % of the European Union average GDP per capita at market prices, then its contribution key for subscribing to ESM authorised capital stock,

determined in accordance with Article 10, shall benefit from a temporary correction and equal the sum of:

(a) 25 % of the percentage share in the ECB capital of the national central bank of that ESM Member, determined in accordance with Article 29 of the ESCB Statute; and

(b) 75 % of that ESM Member's percentage share in the gross national income (GNI) at market prices in euro of the euro area in the year immediately preceding its accession to the ESM.

The percentages referred to in points (a) and (b) shall be rounded up or down to the nearest multiple of 0,0001 percentage points. The statistical terms shall be those published by Eurostat.

3. The temporary correction referred to in paragraph 2 shall apply for a period of twelve years from the date of adoption of the euro by the ESM Member concerned.

4. As a result of the temporary correction of the key, the relevant proportion of shares allocated to an ESM Member pursuant to paragraph 2 shall be reallocated amongst the ESM Members not benefiting from a temporary correction on the basis of their shareholding in the ECB, determined in accordance with Article 29 of the ESCB Statute, subsisting immediately prior to the issue of shares to the acceding ESM Member.

Article 43 – *First appointments*

1. Each ESM Member shall designate its Governor and alternate Governor within the two weeks of the entry into force of this Treaty.

2. The Board of Governors shall appoint the Managing Director and each Governor shall appoint a Director and an alternate Director within the two months of the entry into force of this Treaty.

CHAPTER 8 – FINAL PROVISIONS

Article 44 – *Accession*

This Treaty shall be open for accession by other Member States of the European Union in accordance with Article 2 upon application for membership that any such Member State of the European Union shall file with the ESM after the adoption by the Council of the European Union of the decision to abrogate its derogation from adopting the euro in accordance with Article 140(2) TFEU. The Board of Governors shall approve the application for accession of the new ESM Member and the detailed technical terms related thereto, as well as the adaptations to be made to this Treaty as a direct consequence of the accession. Following the approval of the application for membership by the Board of Governors, new ESM Members shall accede upon the deposit of the instruments of accession with the Depositary, who shall notify other ESM Members thereof.

Article 45 – *Annexes*

The following Annexes to this Treaty shall constitute an integral part thereof:

1) Annex I: Contribution key of the ESM; and

2) Annex II: Subscriptions to the authorised capital stock.

Article 46 – *Deposit*

This Treaty shall be deposited with the General Secretariat of the Council of the European Union ("the Depositary"), which shall communicate certified copies to all the signatories.

Article 47 – *Ratification, approval or acceptance*

1. This Treaty shall be subject to ratification, approval or acceptance by the signatories. Instruments of ratification, approval or acceptance shall be deposited with the Depositary.

2. The Depositary shall notify the other signatories of each deposit and the date thereof.

Article 48 – *Entry into force*

1. This Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions set forth in Annex II. Where appropriate, the list of ESM Members shall be adjusted; the key in Annex I shall then be recalculated and the total authorised capital stock in Article 8(1) and Annex II and the initial total aggregated nominal value of paid-in shares in Article 8(2) shall be reduced accordingly.

2. For each signatory which thereafter deposits its instrument of ratification, approval or acceptance, this Treaty shall enter into force on the day following the date of deposit.

3. For each State which accedes to this Treaty in accordance with Article 44, this Treaty shall enter into force on the twentieth day following the deposit of its instrument of accession.

ANNEX I – CONTRIBUTION KEY OF THE ESM

ESM Member	*ESM key (%)*
Kingdom of Belgium	3,4771
Federal Republic of Germany	27,1464
Republic of Estonia	0,1860
Ireland	1,5922
Hellenic Republic	2,8167
Kingdom of Spain	11,9037
French Republic	20,3859
Italian Republic	17,9137
Republic of Cyprus	0,1962
Grand Duchy of Luxembourg	0,2504
Malta	0,0731
Kingdom of the Netherlands	5,7170
Republic of Austria	2,7834
Portuguese Republic	2,5092
Republic of Slovenia	0,4276
Slovak Republic	0,8240
Republic of Finland	1,7974
Total	100,0

ANNEX II – SUBSCRIPTIONS TO THE AUTHORISED CAPITAL STOCK

ESM Member	*Number of shares*	*Capital subscription (EUR)*
Kingdom of Belgium	243 397	24 339 700 000
Federal Republic of Germany	1 900 248	190 024 800 000
Republic of Estonia	13 020	1 302 000 000

Ireland	111 454	11 145 400 000
Hellenic Republic	197 169	19 716 900 000
Kingdom of Spain	833 259	83 325 900 000
French Republic	1 427 013	142 701 300 000
Italian Republic	1 253 959	125 395 900 000
Republic of Cyprus	13 734	1 373 400 000
Grand Duchy of Luxembourg	17 528	1 752 800 000
Malta	5 117	511 700 000
Kingdom of the Netherlands	400 190	40 019 000 000
Republic of Austria	194 838	19 483 800 000
Portuguese Republic	175 644	17 564 400 000
Republic of Slovenia	29 932	2 993 200 000
Slovak Republic	57 680	5 768 000 000
Republic of Finland	125 818	12 581 800 000
Total	7 000 000	700 000 000 000

§6. Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("Fiscal Compact"), March 2th, 2012, available at http://european-council.europa.eu/media/639235/st00tscg26_en12.pdf

[THE CONTRACTING PARTIES, I.E. ALL MEMBER STATES OF THE EUROPEAN UNION EXCEPT THE UNITED KINGDOM AND THE CZECH REPUBLIC]

CONSCIOUS of their obligation, as Member States of the European Union, to regard their economic policies as a matter of common concern;

DESIRING to promote conditions for stronger economic growth in the European Union and, to that end, to develop ever-closer coordination of economic policies within the euro area;

BEARING IN MIND that the need for governments to maintain sound and sustainable public finances and to prevent a general government deficit becoming excessive is of essential importance to safeguard the stability of the euro area as a whole, and accordingly, requires the introduction of specific rules, including a "balanced budget rule" and an automatic mechanism to take corrective action;

CONSCIOUS of the need to ensure that their general government déficit does not exceed 3 % of their gross domestic product at market prices and that their general government debt does not exceed, or is sufficiently declining towards, 60 % of their gross domestic product at market prices;

RECALLING that the Contracting Parties, as Member States of the European Union, are to refrain from any measure which could jeopardise the attainment of the Union's objectives in the framework of the economic union, particularly the practice of accumulating debt outside the general government accounts;

BEARING IN MIND that the Heads of State or Government of the euro area Member States agreed on 9 December 2011 on a reinforced architecture for economic and monetary union, building upon the Treaties on which the European Union is founded and facilitating the implementation of measures taken on the basis

of Articles 121, 126 and 136 of the Treaty on the Functioning of the European Union;

BEARING IN MIND that the objective of the Heads of State or Government of the euro area Member States and of other Member States of the European Union is to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded;

WELCOMING the legislative proposals made by the European Commission for the euro area, within the framework of the Treaties on which the European Union is founded, on 23 November 2011, on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability, and on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States, and TAKING NOTE of the European Commission's intention to present further legislative proposals for the euro area concerning, in particular, ex ante reporting of debt issuance plans, economic partnership programmes detailing structural reforms for Member States under an excessive deficit procedure as well as the coordination of major economic policy reform plans of Member States;

EXPRESSING their readiness to support proposals which the European Commission might present to further strengthen the Stability and Growth Pact by introducing, for Member States whose currency is the euro, a new range for medium-term objectives in line with the limits established in this Treaty;

TAKING NOTE that, when reviewing and monitoring the budgetary commitments under this Treaty, the European Commission will act within the framework of its powers, as provided by the Treaty on the Functioning of the European Union, in particular Articles 121, 126 and 136 thereof;

NOTING in particular that, in respect of the application of the "balanced budget rule" set out in Article 3 of this Treaty, that monitoring will be carried out through the setting up, for each Contracting Party, of country-specific medium-term objectives and of calendars of convergence, as appropriate;

NOTING that the medium-term objectives should be updated regularly on the basis of a commonly agreed method, the main parameters of which are also to be reviewed regularly, reflecting appropriately the risks of explicit and implicit liabilities for public finance, as embodied in the aims of the Stability and Growth Pact;

NOTING that sufficient progress towards the medium-term objectives should be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the provisions specified under European Union law, in particular Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 ("the revised Stability and Growth Pact");

NOTING that the correction mechanism to be introduced by the Contracting Parties should aim at correcting deviations from the medium-term objective or the adjustment path, including their cumulated impact on government debt dynamics;

NOTING that compliance with the Contracting Parties' obligation to transpose the "balanced budget rule" into their national legal systems, through binding, permanent and preferably constitutional provisions, should be subject to the jurisdiction of the Court of Justice of the European Union, in accordance with Article 273 of the Treaty on the Functioning of the European Union;

RECALLING that Article 260 of the Treaty on the Functioning of the European Union empowers the Court of Justice of the European Union to impose a lump sum or penalty payment on a Member State of the European Union which has failed to comply with one of its judgments and RECALLING that the European Commission has established criteria for determining the lump sum or penalty payment to be imposed in the framework of that Article;

RECALLING the need to facilitate the adoption of measures under the excessive deficit procedure of the European Union in respect of Member States whose currency is the euro and whose planned or actual ratio of general government deficit to gross domestic product exceeds 3 %, whilst strongly reinforcing the objective of that procedure, namely to encourage and, if necessary, compel a Member State to reduce a deficit which might be identified;

RECALLING the obligation for those Contracting Parties whose general government debt exceeds the 60 % reference value to reduce it at an average rate of one twentieth per year as a benchmark;

BEARING IN MIND the need to respect, in the implementation of this Treaty, the specific role of the social partners, as it is recognised in the laws or national systems of each of the Contracting Parties;

STRESSING that no provision of this Treaty is to be interpreted as altering in any way the economic policy conditions under which financial assistance has been granted to a Contracting Party in a stabilisation programme involving the European Union, its Member States or the International Monetary Fund;

NOTING that the proper functioning of the economic and monetary union requires the Contracting Parties to work jointly towards an economic policy where, whilst building upon the mechanisms of economic policy coordination, as defined in the Treaties on which the European Union is founded, they take the necessary actions and measures in all the areas which are essential to the proper functioning of the euro area;

NOTING, in particular, the wish of the Contracting Parties to make a more active use of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and Articles 326 to 334 of the Treaty on the Functioning of the European Union, without undermining the internal market, and their wish to have full recourse to measures specific to the Member States whose currency is the euro pursuant to Article 136 of the Treaty on the Functioning of the European Union, and to a procedure for the ex ante discussion and coordination among the Contracting Parties whose currency is the euro of all major economic policy reforms planned by them, with a view to benchmarking best practices;

RECALLING the agreement of the Heads of State or Government of the euro area Member States, of 26 October 2011, to improve the governance of the euro area, including the holding of at least two Euro Summit meetings per year, to be convened, unless justified by exceptional circumstances, immediately after meetings of the European Council or meetings with the participation of all Contracting Parties having ratified this Treaty;

RECALLING also the endorsement by the Heads of State or Government of the euro area Member States and of other Member States of the European Union, on 25 March 2011, of the Euro Plus Pact, which identifies the issues that are essential to fostering competitiveness in the euro area;

STRESSING the importance of the Treaty establishing the European Stability Mechanism as an element of the global strategy to strengthen the economic and monetary union and POINTING OUT that the granting of Financial assistance in the framework of new programmes under the European Stability Mechanism will be conditional, as of 1 March 2013, on the ratification of this Treaty by the Contracting Party concerned and, as soon as the transposition period referred to in Article 3(2) of this Treaty has expired, on compliance with the requirements of that Article;

NOTING that 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 are Contracting Parties whose currency is the euro and that, as such, they will be bound by this Treaty from the first day of the month following the deposit of their instrument of ratification if the Treaty is in force at that date;

NOTING ALSO that the Republic of Bulgaria, the Kingdom of Denmark, the Republic of Latvia, the Republic of Lithuania, Hungary, the Republic of Poland, Romania and the Kingdom of Sweden are Contracting Parties which, as Member States of the European Union, have, at the date of signature of this Treaty, a derogation or an exemption from participation in the single currency and may be bound, as long as such derogation or exemption is not abrogated, only by those provisions of Titles III and IV of this Treaty by which they declare, on depositing their instrument of ratification or at a later date, that they intend to be bound;

HAVE AGREED UPON THE FOLLOWING PROVISIONS:

TITLE I: PURPOSE AND SCOPE

Article 1

1. By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the

economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion.

2. This Treaty shall apply in full to the Contracting Parties whose currency is the euro. It shall also apply to the other Contracting Parties to the extent and under the conditions set out in Article 14.

TITLE II: CONSISTENCY AND RELATIONSHIP WITH THE LAW OF THE UNION

Article 2

1. This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

2. This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union.

TITLE III FISCAL COMPACT

Article 3

1. The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law:

(a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus;

(b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;

(c) the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;

(d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1,0 % of the gross domestic product at market prices;

(e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

2. The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.

3. For the purposes of this Article, the definitions set out in Article 2 of the Protocol (No 12) on the excessive deficit

procedure, annexed to the European Union Treaties, shall apply.

The following definitions shall also apply for the purposes of this Article:

(a) "annual structural balance of the general government" refers to the annual cyclically-adjusted balance net of one-off and temporary measures;

(b) "exceptional circumstances" refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.

Article 4

When the ratio of a Contracting Party's general government debt to gross domestic product exceeds the 60 % reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU)

No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union.

Article 5

1. A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact.

2. The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission.

Article 6

With a view to better coordinating the planning of their national debt issuance, the Contracting Parties shall report ex-ante on their public debt issuance plans to the Council of the European Union and to the European Commission.

Article 7

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

Article 8

1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the

European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3(2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3(2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the

necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

2. Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union.

TITLE IV: ECONOMIC POLICY COORDINATION AND CONVERGENCE

Article 9

Building upon economic policy coordination, as defined in the Treaty on the Functioning of the European Union, the Contracting Parties undertake to work jointly towards an economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness. To that end, the Contracting Parties shall take the necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability.

Article 10

In accordance with the requirements of the Treaties on which the European Union is founded, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of measures specific to those Member States whose currency is the euro, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of enhanced cooperation, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on matters that are essential for the proper functioning of the euro area, without undermining the internal market.

Article 11

With a view to benchmarking best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed ex-ante and, where appropriate, coordinated among themselves. Such coordination shall involve the institutions of the European Union as required by European Union law.

TITLE V: GOVERNANCE OF THE EURO AREA

Article 12

1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in Euro Summit meetings, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings.

The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office.

2. Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area.

3. The Heads of State or Government of the Contracting Parties other than those whose currency is the euro, which have ratified this Treaty, shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the

fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of this Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

4. The President of the Euro Summit shall ensure the preparation and continuity of Euro Summit meetings, in close cooperation with the President of the European Commission. The body charged with the preparation of and follow up to the Euro Summit meetings shall be the Euro Group and its President may be invited to attend such meetings for that purpose.

5. The President of the European Parliament may be invited to be heard. The President of the Euro Summit shall present a report to the European Parliament after each Euro Summit meeting.

6. The President of the Euro Summit shall keep the Contracting Parties other than those whose currency is the euro and the other Member States of the European Union closely informed of the preparation and outcome of the Euro Summit meetings.

Article 13

As provided for in Title II of Protocol (No 1) on the role of national Parliaments in the European Union annexed to the European Union Treaties, the European Parliament and the national Parliaments of the Contracting Parties will together determine the organisation and promotion of a conference of representatives of the relevant committees of the European Parliament and representatives of the relevant committees of national Parliaments in order to discuss budgetary policies and other issues covered by this Treaty.

TITLE VI: GENERAL AND FINAL PROVISIONS

Article 14

1. This Treaty shall be ratified by the Contracting Parties in accordance with their respective constitutional requirements. The instruments of ratification shall be deposited with the General Secretariat of the Council of the European Union ("the Depositary").

2. This Treaty shall enter into force on 1 January 2013, provided that twelve Contracting Parties whose currency is the euro have deposited their instrument of ratification, or on the first day of the month following the deposit of the twelfth instrument of ratification by a Contracting Party whose currency is the euro, whichever is the earlier.

3. This Treaty shall apply as from the date of entry into force amongst the Contracting Parties whose currency is the euro which have ratified it. It shall apply to the other Contracting Parties whose currency is the euro as from the first day of the month following the deposit of their respective instrument of ratification.

4. By derogation from paragraphs 3 and 5, Title V shall apply to all Contracting Parties concerned as from the date of entry into force of this Treaty.

5. This Treaty shall apply to the Contracting Parties with a derogation, as defined in Article 139(1) of the Treaty on the Functioning of the European Union, or with an exemption, as referred to in Protocol (No 16) on certain provisions related to Denmark annexed to the European Union Treaties, which have ratified this Treaty, as from the date when the decision abrogating that derogation or exemption takes effect, unless the Contracting Party concerned declares its intention to be bound at an earlier date by all or part of the provisions in Titles III and IV of this Treaty.

Article 15

This Treaty shall be open to accession by Member States of the European Union other than the Contracting Parties. Accession shall be effective upon depositing the instrument of accession with the Depositary, which shall notify the other Contracting Parties thereof. Following authentication by the Contracting Parties, the text of this Treaty in the official language of the acceding Member State that is also an official language and a working language of the institutions of the Union, shall be deposited in the archives of the Depositary as an authentic text of this Treaty.

ARTICLE 16

Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.

Done at Brussels this second day of March in the year two thousand and twelve.

§7. Declaration ESM, Brussels, September 27th, 2012, available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ecofin/132615.pdf

The representatives of the parties to the Treaty establishing the European Stability Mechanism (ESM) signed on 2 February 2012, meeting in Brussels on 27 September 2012, agree on the following interpretative declaration:

"Article 8(5) of the Treaty Establishing the European Stability Mechanism ("the Treaty") limits all payment liabilities of the ESM Members under the Treaty in the sense that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member's representative and due regard to national procedures.

Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.

The above mentioned elements constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty."

II. SECONDARY LAW

II.1 MACROPRUDENTIAL SUPERVISION

§8. Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board OJ L 331, December 15th, 2010, pp. 1-11

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) Financial stability is a precondition for the real economy to provide jobs, credit and growth. The financial crisis has revealed important shortcomings in financial supervision, which has failed to anticipate adverse macro-prudential developments and to prevent the accumulation of excessive risks within the financial system.

(2) The European Parliament called repeatedly for the reinforcement of a true level playing field for all actors at the level of the Union while pointing out significant failures in the Union's supervision of ever more integrated financial markets (in its resolutions of 13 April 2000 on the Commission communication on implementing the framework for financial markets: Action Plan,[4] of 21 November 2002 on prudential supervision rules in the European Union,[5] of 11 July 2007 on financial services policy (2005 to 2010) – White Paper,[6] of 23 September 2008 with recommendations to the Commission on hedge funds and private equity[7] and of 9 October 2008 with recommendations to the Commission on Lamfalussy follow-up: future structure of supervision,[8] and in its positions of 22 April 2009 on the amended proposal for a directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[9] and of 23 April 2009 on the proposal for a regulation of the European Parliament and of the Council on Credit Rating Agencies[10]).

(3) In November 2008, the Commission mandated a High-Level Group chaired by Jacques de Larosière to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting the citizen and rebuilding trust in the financial system.

(4) In its final report presented on 25 February 2009 (the "de Larosière Report"), the High-Level Group recommended, inter alia, the establishment of a Union level body charged with overseeing risk in the financial system as a whole.

(5) In its Communication of 4 March 2009 entitled "Driving European Recovery", the Commission welcomed and broadly supported the recommendations of the de Larosière Report. At its meeting of 19 and 20 March 2009, the European Council agreed on the need to improve the regulation and supervision of financial institutions within the Union and to use the de Larosière Report as a basis for action.

(6) In its Communication of 27 May 2009 entitled "European Financial Supervision", the Commission suggested a series of reforms to the

[1] OJ C 270, 11.11.2009, p. 1.
[2] Opinion of 22 January 2010 (OJ C 355 December 29 th 2010).
[3] Position of the European Parliament of 22 September 2010 (OJ C 50 February 21 th 2012) and decision of the Council of 17 November 2010.
[4] OJ C 40, 7.2.2001, p. 453.
[5] OJ C 25 E, 29.1.2004, p. 394.
[6] OJ C 175 E, 10.7.2008, p. 392.
[7] OJ C 8 E, 14.1.2010, p. 26.
[8] OJ C 9 E, 15.1.2010, p. 48.
[9] OJ C 184 E, 8.7.2010, p. 214.
[10] OJ C 184 E, 8.7.2010, p. 292.

current arrangements for safeguarding financial stability at the Union level, in particular including the creation of a European Systemic Risk Board (ESRB) responsible for macro-prudential oversight. The Council on 9 June 2009 and the European Council at its meeting of 18 and 19 June 2009 supported the Commission's suggestions and welcomed its intention to put forward legislative proposals for the new framework to be in place in the course of 2010. In line with the views of the Commission, the Council concluded, inter alia, that the European Central Bank (ECB) "should provide analytical, statistical, administrative and logistical support to the ESRB, also drawing on technical advice from national central banks and supervisors". The support provided by the ECB to the ESRB, as well as the tasks assigned to the ESRB, should be without prejudice to the principle of the independence of the ECB in the performance of its tasks pursuant to the Treaty on the Functioning of the European Union (TFEU).

(7) Given the integration of international financial markets and the contagion risk of financial crises, there is a need for a strong commitment on the part of the Union at the global level. The ESRB should draw expertise from a high-level scientific committee and take on all the global responsibilities required in order to ensure that the voice of the Union is heard on issues relating to financial stability, in particular by cooperating closely with the International Monetary Fund (IMF) and the Financial Stability Board (FSB), which are expected to provide early warnings of macro-prudential risks at the global level, and the partners of the Group of Twenty (G-20).

(8) The ESRB should contribute, inter alia, towards implementing the recommendations of the IMF, the FSB and the Bank for International Settlements (BIS) to the G-20.

(9) The report of the IMF, the BIS and the FSB, of 28 October 2009, presented to the G-20 Finance Ministers and Central Bank Governors, entitled "Guidance to Assess the Systemic Importance of Financial Institutions, Markets and Instruments: Initial Considerations" also states that the assessment of systemic risk is likely to vary depending on the economic environment. It will also be conditioned by the financial infrastructure and crisis management arrangements and the capacity to deal with failures when they occur. Financial institutions may be systemically important for local, national or international financial systems and economies. The key criteria helping to identify the systemic importance of markets and institutions are size (the volume of financial services provided by the individual component of the financial system), substitutability (the extent to which other components of the system can provide the same services in the event of failure) and interconnectedness (linkages with other components of the system). An assessment based on those three criteria should be supplemented by a reference to financial vulnerabilities and the capacity of the institutional framework to deal with financial failures and should consider a wide range of additional factors such as, inter alia, the complexity of specific structures and business models, the degree of financial autonomy, intensity and scope of supervision, transparency of financial arrangements and linkages that may affect the overall risk of institutions.

(10) The ESRB's task should be to monitor and assess systemic risk in normal times for the purpose of mitigating the exposure of the system to the risk of failure of systemic components and enhancing the financial system's resilience to shocks. In that respect, the ESRB should contribute to ensuring financial stability and mitigating the negative impacts on the internal market and the real economy. In order to accomplish its objectives, the ESRB should analyse all the relevant information.

(11) The present arrangements of the Union place too little emphasis on macro-prudential oversight and on inter-linkages between developments in the broader macroeconomic environment and the financial system. Responsibility for macro-prudential analysis remains fragmented, and is conducted by various authorities at different levels with no mechanism to ensure that macro-prudential risks are adequately identified and that warnings and recommendations are issued clearly, followed up and translated into action. A proper functioning of Union and global financial systems and the mitigation of threats thereto require enhanced consistency between macro- and micro-prudential supervision.

(12) A newly designed system of macro-prudential oversight requires credible and high-profile leadership. Therefore, given its key role and its international and internal credibility, and in the spirit of the recommendations of the de Larosière Report, the President of the ECB should be the Chair of the ESRB for a first term of 5 years following the entry into force of this Regulation. In addition, the accountability requirements should be increased and the ESRB bodies should be able to draw on a wide range of experience, backgrounds and opinions.

(13) The de Larosière Report also states that macro-prudential oversight is not meaningful unless it can somehow impact on supervision at the micro level whilst micro-prudential supervision cannot effectively safeguard financial stability without adequately taking account of macro-level developments.

(14) A European System of Financial Supervision (ESFS) should be established, bringing together the actors of financial supervision at national level and at the level of the Union, to act as a network. Pursuant to the principle of sincere cooperation in accordance with Article 4(3) of the Treaty on European Union, the parties to the ESFS should cooperate with trust and full mutual respect, in particular to ensure that appropriate and reliable information flows between them. At the level of the Union, the network should comprise the ESRB and three micro-supervisory authorities: the European Supervisory Authority (European Banking Authority), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council, the European Supervisory Authority (European Insurance and Occupational Pensions Authority), established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council, and the European Supervisory Authority (European Securities and Markets Authority), established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council (hereinafter collectively referred to as the "ESAs").

(15) The Union needs a specific body responsible for macro-prudential oversight across its financial system, which would identify risks to financial stability and, where necessary, issue risk warnings and recommendations for action to address such risks. Consequently, the ESRB should be established as a new independent body, covering all financial sectors as well as guarantee schemes. The ESRB should be responsible for conducting macro-prudential oversight at the level of the Union and should have no legal personality.

(16) The ESRB should comprise a General Board, a Steering Committee, a Secretariat, an Advisory Scientific Committee and an Advisory Technical Committee. The composition of the Advisory Scientific Committee should take into account adequate rules of conflict of interests adopted by the General Board. The establishment of the Advisory Technical Committee should take into account existing structures with a view to avoiding any duplication.

(17) The ESRB should issue warnings and, where it deems necessary, recommendations either of a general or a specific nature, which should be addressed in particular to the Union as a whole or to one or more Member States, or to one or more of the ESAs, or to one or more of the national supervisory authorities with a specified timeline for the relevant policy response.

(18) The ESRB should elaborate a colour code in order to allow interested parties better to assess the nature of the risk.

(19) In order to increase their influence and legitimacy, such warnings and recommendations should also be transmitted, subject to strict rules of confidentiality, to the Council and the Commission and, where addressed to one or more national supervisory authorities, to the ESAs. The deliberations of the Council should be prepared by the Economic and Financial Committee (EFC) in accordance with its role as defined in the TFEU. In order to prepare the Council's discussions and provide it with timely policy advice, the ESRB should inform the EFC regularly and should send the texts of any warnings and recommendations as soon as they have been adopted.

(20) The ESRB should also monitor compliance with its warnings and recommendations, based on reports from addressees, in order to ensure that its warnings and recommendations are effectively followed. Addressees of recommendations should act on them and provide an adequate justification in case of inaction ("act or explain" mechanism). If the ESRB considers that the reaction is inadequate, it should inform, subject to strict confidentiality rules, the addressees, the Council and, where appropriate, the European Supervisory Authority concerned.

(21) The ESRB should decide, on a case-by-case basis and after having informed the Council sufficiently in advance so that it is able to react, whether a recommendation should be kept confidential or made public, bearing in mind that public disclosure can help to foster compliance with the recommendations in certain circumstances.

(22) If the ESRB detects a risk which could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the Union's financial system, it should promptly inform the Council of the situation. If the ESRB determines that an emergency situation may arise, it should contact

the Council and provide an assessment of the situation. The Council should then assess the need to adopt a decision addressed to the ESAs determining the existence of an emergency situation. During that process, due protection of confidentiality is of the outmost importance.

(23) The ESRB should report to the European Parliament and the Council at least annually, and more frequently in the event of widespread financial distress. Where appropriate, the European Parliament and the Council should be able to invite the ESRB to examine specific issues related to financial stability.

(24) The ECB and the national central banks should have a leading role in macro-prudential oversight because of their expertise and their existing responsibilities in the area of financial stability. National supervisors should be involved in providing their specific expertise. The participation of micro-prudential supervisors in the work of the ESRB is essential to ensure that the assessment of macro-prudential risk is based on complete and accurate information about developments in the financial system. Accordingly, the chairpersons of the ESAs should be members with voting rights. One representative of the competent national supervisory authorities of each Member State should attend meetings of the General Board, without voting rights. In a spirit of openness, 15 independent persons should provide the ESRB with external expertise through the Advisory Scientific Committee.

(25) The participation of a Member of the Commission in the ESRB will help to establish a link with the macroeconomic and financial surveillance of the Union, while the presence of the President of the EFC will reflect the role of Member States' ministries responsible for finance and the Council in safeguarding financial stability and performing economic and financial oversight.

(26) It is essential that the members of the ESRB perform their duties impartially and consider only the financial stability of the Union as a whole. Where consensus cannot be reached, voting on warnings and recommendations within the ESRB should not be weighted and decisions should, as a rule, be taken by simple majority.

(27) The interconnectedness of financial institutions and markets implies that the monitoring and assessment of potential systemic risks should be based on a broad set of relevant macroeconomic and micro-financial data and indicators. Those systemic risks include risks of disruption to financial services caused by a significant impairment of all or parts of the Union's financial system that have the potential to have serious negative consequences for the internal market and the real economy. Any type of financial institution and intermediary, market, infrastructure and instrument has the potential to be systemically significant. The ESRB should therefore have access to all the information necessary to perform its duties while preserving the confidentiality of that information as required.

(28) The measures for the collection of information set out in this Regulation are necessary for the performance of the tasks of the ESRB and should be without prejudice to the legal framework of the European Statistical System in the field of statistics. This Regulation should therefore be without prejudice to Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[11] and to Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.[12]

(29) Market participants can provide valuable input to the understanding of the evolutions affecting the financial system. Where appropriate, the ESRB should therefore consult private sector stakeholders, including financial sector representatives, consumer associations, user groups in the financial services area established by the Commission or by Union legislation, and give them a fair opportunity to make observations.

(30) The establishment of the ESRB should contribute directly to achieving the objectives of the internal market. The Union macro-prudential oversight of the financial system is an integral part of the overall new supervisory arrangements in the Union as the macro-prudential aspect is closely linked to the micro-prudential supervisory tasks attributed to the ESAs. Only with arrangements in place that properly acknowledge the interdependence of micro- and macro-prudential risks can all stakeholders have sufficient confidence to engage in cross-border financial activities. The ESRB should monitor and assess risks to financial stability arising from developments that can impact on a sectoral level or at the level of the financial system as a whole. By addressing such risks, the ESRB should contribute directly to an integrated Union supervisory structure necessary to promote

[11] OJ L 87, 31.3.2009, p. 164.
[12] OJ L 318, 27.11.1998, p. 8.

timely and consistent policy responses among the Member States, thus preventing diverging approaches and improving the functioning of the internal market.

(31) The Court of Justice in its judgment of 2 May 2006 in Case C-217/04 (*United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union*) held that "nothing in the wording of Article 95 EC [now Article 114 TFEU] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate".[13] The ESRB should contribute to the financial stability necessary for further financial integration in the internal market by monitoring systemic risks and issuing warnings and recommendations where appropriate. Those tasks are closely linked to the objectives of the Union legislation concerning the internal market for financial services. The ESRB should therefore be established on the basis of Article 114 TFEU.

(32) As suggested in the de Larosière Report, a step-by-step approach is necessary and the European Parliament and the Council should conduct a full review of the ESFS, the ESRB and the ESAs by 17 December 2013.

(33) Since the objective of this Regulation, namely an effective macro-prudential oversight of the Union financial system, cannot be sufficiently achieved by the Member States because of the integration of the Union financial markets, and can therefore be better achieved at the Union level, the Union may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – GENERAL PROVISIONS

Article 1 – *Establishment*

1. A European Systemic Risk Board (ESRB) is established. It shall have its seat in Frankfurt am Main.

2. The ESRB shall be part of the European System of Financial Supervision (ESFS), the purpose of which is to ensure the supervision of the Union's financial system.

3. The ESFS shall comprise:

(a) the ESRB;

(b) the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010;

(c) the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010;

(d) the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010;

(e) the Joint Committee of the European Supervisory Authorities (Joint Committee) provided for by Article 54 of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010;

(f) the competent or supervisory authorities in the Member States as specified in the Union acts referred to in Article 1(2) of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010.

4. Pursuant to the principle of sincere cooperation in accordance with Article 4(3) of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular to ensure that appropriate and reliable information flows between them.

Article 2 – *Definitions*

For the purpose of this Regulation, the following definitions shall apply:

(a) "financial institution" means any undertaking that falls within the scope of the legislation referred to in Article 1(2) of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010, as well as any other undertaking or entity in the Union whose main business is of a similar nature;

[13] European Court Reports 2006 Page I-03771, para 44.

(b) "financial system" means all financial institutions, markets, products and market infrastructures;

(c) "systemic risk" means a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructure may be potentially systemically important to some degree.

Article 3 – *Mission, objectives and tasks*

1. The ESRB shall be responsible for the macro-prudential oversight of the financial system within the Union in order to contribute to the prevention or mitigation of systemic risks to financial stability in the Union that arise from developments within the financial system and taking into account macroeconomic developments, so as to avoid periods of widespread financial distress. It shall contribute to the smooth functioning of the internal market and thereby ensure a sustainable contribution of the financial sector to economic growth.

2. For the purposes of paragraph 1, the ESRB shall carry out the following tasks:

(a) determining and/or collecting and analysing all the relevant and necessary information, for the purposes of achieving the objectives described in paragraph 1;

(b) identifying and prioritising systemic risks;

(c) issuing warnings where such systemic risks are deemed to be significant and, where appropriate, making those warnings public;

(d) issuing recommendations for remedial action in response to the risks identified and, where appropriate, making those recommendations public;

(e) when the ESRB determines that an emergency situation may arise pursuant to Article 18 of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010 issuing a confidential warning addressed to the Council and providing the Council with an assessment of the situation, in order to enable the Council to assess the need to adopt a decision addressed to the ESAs determining the existence of an emergency situation;

(f) monitoring the follow-up to warnings and recommendations;

(g) cooperating closely with all the other parties to the ESFS; where appropriate, providing the ESAs with the information on systemic risks required for the performance of their tasks; and, in particular, in collaboration with the ESAs, developing a common set of quantitative and qualitative indicators (risk dashboard) to identify and measure systemic risk;

(h) participating, where appropriate, in the Joint Committee;

(i) coordinating its actions with those of international financial organisations, particularly the IMF and the FSB as well as the relevant bodies in third countries on matters related to macro-prudential oversight;

(j) carrying out other related tasks as specified in Union legislation.

CHAPTER II – ORGANISATION

Article 4 – *Structure*

1. The ESRB shall have a General Board, a Steering Committee, a Secretariat, an Advisory Scientific Committee and an Advisory Technical Committee.

2. The General Board shall take the decisions necessary to ensure the performance of the tasks entrusted to the ESRB, pursuant to Article 3(2).

3. The Steering Committee shall assist in the decision-making process of the ESRB by preparing the meetings of the General Board, reviewing the documents to be discussed and monitoring the progress of the ESRB's ongoing work.

4. The Secretariat shall be responsible for the day-to-day business of the ESRB. It shall provide high-quality analytical, statistical, administrative and logistical support to the ESRB under the direction of the Chair and the Steering Committee in accordance with Council Regulation (EU) No 1096/2010. It shall also draw on technical advice from the ESAs, national central banks and national supervisors.

5. The Advisory Scientific Committee and the Advisory Technical Committee referred to in Articles 12 and 13 shall provide advice and assistance on issues relevant to the work of the ESRB.

Article 5 – *Chair and Vice-Chairs of the ESRB*

1. The ESRB shall be chaired by the President of the ECB for a term of 5 years following the entry into force of this Regulation. For the

subsequent terms, the Chair of the ESRB shall be designated in accordance with the modalities determined on the basis of the review provided for in Article 20.

2. The first Vice-Chair shall be elected by and from the members of the General Council of the ECB for a term of 5 years, with regard to the need for a balanced representation of Member States overall and between those whose currency is the euro and those whose currency is not the euro. The first Vice-Chair may be re-elected once.

3. The second Vice-Chair shall be the Chair of the Joint Committee as appointed pursuant to Article 55(3) of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010.

4. The Chair and the Vice-Chairs shall present to the European Parliament, during a public hearing, how they intend to discharge their duties under this Regulation.

5. The Chair shall preside at the meetings of the General Board and the Steering Committee.

6. The Vice-Chairs, in order of precedence, shall preside at the General Board and/or the Steering Committee when the Chair is unable to participate in a meeting.

7. If the term of office of a member of the General Council of the ECB elected as first Vice-Chair ends before the completion of the five-year term or if for any reason the first Vice-Chair is unable to discharge his duties, a new first Vice-Chair shall be elected in accordance with paragraph 2.

8. The Chair shall represent the ESRB externally.

Article 6 – *General Board*

1. Members of the General Board with voting rights shall comprise:

(a) the President and the Vice-President of the ECB;

(b) the Governors of the national central banks;

(c) a Member of the Commission;

(d) the Chairperson of the European Supervisory Authority (European Banking Authority);

(e) the Chairperson of the European Supervisory Authority (European Insurance and Occupational Pensions Authority);

(f) the Chairperson of the European Supervisory Authority (European Securities and Markets Authority);

(g) the Chair and the two Vice-Chairs of the Advisory Scientific Committee;

(h) the Chair of the Advisory Technical Committee.

2. Members of the General Board without voting rights shall comprise:

(a) one high-level representative per Member State of the competent national supervisory authorities, in accordance with paragraph 3;

(b) the President of the Economic and Financial Committee (EFC).

3. With regard to the representation of the national supervisory authorities under paragraph 2(a), the respective high-level representatives shall rotate depending on the item discussed, unless the national supervisory authorities of a particular Member State have agreed on a common representative.

4. The General Board shall establish rules of procedure for the ESRB.

Article 7 – *Impartiality*

1. When participating in the activities of the General Board and of the Steering Committee or when conducting any other activity relating to the ESRB, the members of the ESRB shall perform their duties impartially and solely in the interest of the Union as a whole. They shall not seek nor take instructions from the Member States, the Union institutions or any other public or private body.

2. No member of the General Board (whether voting or non-voting) shall have a function in the financial industry.

3. Neither the Member States, the Union institutions nor any other public or private body shall seek to influence the members of the ESRB in the performance of the tasks set out in Article 3(2).

Article 8 – *Professional secrecy*

1. Members of the General Board and any other persons who work or who have worked for or in connection with the ESRB (including the

relevant staff of central banks, the Advisory Scientific Committee, the Advisory Technical Committee, the ESAs and the Member States' competent national supervisory authorities) shall not disclose information that is subject to professional secrecy, even after their duties have ceased.

2. Information received by members of the ESRB shall be used only in the course of their duties and in performing the tasks set out in Article 3(2).

3. Without prejudice to Article 16 and the application of criminal law, no confidential information received by the persons referred to in paragraph 1 whilst performing their duties shall be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified.

4. The ESRB shall, together with the ESAs, agree on and establish specific confidentiality procedures in order to safeguard information regarding individual financial institutions and information from which individual financial institutions can be identified.

Article 9 – *Meetings of the General Board*

1. Ordinary plenary meetings of the General Board shall be convened by the Chair of the ESRB and shall take place at least four times a year. Extraordinary meetings may be convened at the initiative of the Chair of the ESRB or at the request of at least one third of the members of the General Board with voting rights.

2. Each member shall be present in person at the meetings of the General Board and shall not be represented.

3. By way of derogation from paragraph 2, a member who is prevented from attending the meetings for a period of at least 3 months may appoint an alternate. That member may also be replaced by a person who has been formally appointed under the rules governing the institution concerned for the substitution of representatives on a temporary basis.

4. Where appropriate, high-level representatives from international financial organisations carrying out activities directly related to the tasks of the ESRB set out in Article 3(2) may be invited to attend the meetings of the General Board.

5. Participation in the work of the ESRB may be open to high-level representatives of the relevant authorities from third countries, in particular from EEA countries, strictly limited to issues of particular relevance to those countries. Arrangements may be made by the ESRB specifying, in particular, the nature, scope and procedural aspects of the involvement of those third countries in the work of the ESRB. Such arrangements may provide for representation, on an ad-hoc basis, as an observer, on the General Board and should concern only items of relevance to those countries, excluding any case where the situation of individual financial institutions or Member States may be discussed.

6. The proceedings of the meetings shall be confidential.

Article 10 – *Voting modalities of the General Board*

1. Each member of the General Board with a voting right shall have one vote.

2. Without prejudice to the voting procedures set out in Article 18(1), the General Board shall act by a simple majority of members present with voting rights. In the event of a tie, the Chair of the ESRB shall have the casting vote.

3. By derogation from paragraph 2, a majority of two-thirds of the votes cast shall be required to adopt a recommendation or to make a warning or recommendation public.

4. A quorum of two-thirds of the members with voting rights shall be required for any vote to be taken by the General Board. If the quorum is not met, the Chair of the ESRB may convene an extraordinary meeting at which decisions may be taken with a quorum of one-third. The rules of procedure referred to in Article 6(4) shall provide for adequate notice for convening an extraordinary meeting.

Article 11 – *Steering Committee*

1. The Steering Committee shall be composed of:

(a) the Chair and first Vice-Chair of the ESRB;

(b) the Vice-President of the ECB;

(c) four other members of the General Board who are also members of the General Council of the ECB, with regard to the need for a balanced representation of Member States overall and between those whose currency is the euro and those whose currency is not the euro. They shall be elected by and from among the members of the General Board who are also members of the

General Council of the ECB, for a period of 3 years;

(d) a Member of the Commission;

(e) the Chairperson of the European Supervisory Authority (European Banking Authority);

(f) the Chairperson of the European Supervisory Authority (European Insurance and Occupational Pensions Authority);

(g) the Chairperson of the European Supervisory Authority (European Securities and Markets Authority);

(h) the President of the EFC;

(i) the Chair of the Advisory Scientific Committee; and

(j) the Chair of the Advisory Technical Committee.

Any vacancy for an elected member of the Steering Committee shall be filled by the election of a new member by the General Board.

2. Meetings of the Steering Committee shall be convened by the Chair of the ESRB at least quarterly, before each meeting of the General Board. The Chair of the ESRB may also convene ad-hoc meetings.

Article 12 – *Advisory Scientific Committee*

1. The Advisory Scientific Committee shall be composed of the Chair of the Advisory Technical Committee and 15 experts representing a wide range of skills and experiences proposed by the Steering Committee and approved by the General Board for a four-year, renewable mandate. The nominees shall not be members of the ESAs and shall be chosen on the basis of their general competence and their diverse experience in academic fields or other sectors, in particular in small and medium-sized enterprises or trade-unions, or as providers or consumers of financial services.

2. The Chair and the two Vice-Chairs of the Advisory Scientific Committee shall be appointed by the General Board following a proposal from the Chair of the ESRB and they shall each have a high level of relevant expertise and knowledge, for example by virtue of their academic background in the sectors of banking, securities markets, or insurance and occupational pensions. The chairmanship of the Advisory Scientific Committee should rotate between those three persons.

3. The Advisory Scientific Committee shall provide advice and assistance to the ESRB in accordance with Article 4(5), at the request of the Chair of the ESRB.

4. The ESRB Secretariat shall support the work of the Advisory Scientific Committee and the head of the Secretariat shall participate in its meetings.

5. Where appropriate, the Advisory Scientific Committee shall organise consultations at an early stage with stakeholders such as market participants, consumer bodies and academic experts, in an open and transparent manner, while taking into account the requirement of confidentiality.

6. The Advisory Scientific Committee shall be provided with all necessary means in order to successfully complete its tasks.

Article 13 – *Advisory Technical Committee*

1. The Advisory Technical Committee shall be composed of:

(a) a representative of each national central bank and a representative of the ECB;

(b) one representative per Member State of the competent national supervisory authorities, in accordance with the second subparagraph;

(c) a representative of the European Supervisory Authority (European Banking Authority);

(d) a representative of the European Supervisory Authority (European Insurance and Occupational Pensions Authority);

(e) a representative of the European Supervisory Authority (European Securities and Markets Authority);

(f) two representatives of the Commission;

(g) a representative of the EFC; and

(h) a representative of the Advisory Scientific Committee.

The supervisory authorities of each Member State shall choose one representative in the Advisory Technical Committee. With regard to the representation of national supervisory authorities under point (b) of the first subparagraph, the respective representatives shall rotate depending on the item discussed, unless the national supervisory authorities of a particular Member State have agreed on a common representative.

2. The Chair of the Advisory Technical Committee shall be appointed by the General Board following a proposal from the Chair of the ESRB.

3. The Advisory Technical Committee shall provide advice and assistance to the ESRB in accordance with Article 4(5) at the request of the Chair of the ESRB.

4. The ESRB Secretariat shall support the work of the Advisory Technical Committee and the head of the Secretariat shall participate in its meetings.

5. The Advisory Technical Committee shall be provided with all necessary means in order to successfully complete its tasks.

Article 14 – *Other sources of advice*

In performing the tasks set out in Article 3(2), the ESRB shall, where appropriate, seek the views of relevant private sector stakeholders.

CHAPTER III – TASKS

Article 15 – *Collection and exchange of information*

1. The ESRB shall provide the ESAs with the information on risks necessary for the achievement of their tasks.

2. The ESAs, the European System of Central Banks (ESCB), the Commission, the national supervisory authorities and national statistics authorities shall cooperate closely with the ESRB and shall provide it with all the information necessary for the fulfilment of its tasks in accordance with Union legislation.

3. Subject to Article 36(2) of Regulation (EU) No 1093/2010, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010, the ESRB may request information from the ESAs, as a rule in summary or aggregate form such that individual financial institutions cannot be identified.

4. Before requesting information in accordance with this Article, the ESRB shall first take account of the existing statistics produced, disseminated and developed by the European Statistical System and the ESCB.

5. If the requested information is not available or is not made available in a timely manner, the ESRB may request the information from the ESCB, the national supervisory authorities or the national statistics authorities. If the information remains unavailable, the ESRB may request it from the Member State concerned, without prejudice to the prerogatives conferred, respectively, on the Council, the Commission (Eurostat), the ECB, the Eurosystem and the ESCB in the field of statistics and data collection.

6. If the ESRB requests information that is not in summary or aggregate form, the reasoned request shall explain why data on the respective individual financial institution is deemed to be systemically relevant, and necessary, considering the prevailing market situation.

7. Before each request for information which is not in summary or aggregate form, the ESRB shall duly consult the relevant European Supervisory Authority in order to ensure that the request is justified and proportionate. If the relevant European Supervisory Authority does not consider the request to be justified and proportionate, it shall, without delay, send the request back to the ESRB and ask for additional justification. After the ESRB has provided the relevant European Supervisory Authority with such additional justification, the requested information shall be transmitted to the ESRB by the addressees of the request, provided that they have legal access to the relevant information.

Article 16 – *Warnings and recommendations*

1. When significant risks to the achievement of the objective in Article 3(1) are identified, the ESRB shall provide warnings and, where appropriate, issue recommendations for remedial action, including, where appropriate, for legislative initiatives.

2. Warnings or recommendations issued by the ESRB in accordance with Article 3(2)(c) and (d) may be of either a general or a specific nature and shall be addressed in particular to the Union as a whole or to one or more Member States, or to one or more of the ESAs, or to one or more of the national supervisory authorities. If a warning or a recommendation is addressed to one or more of the national supervisory authorities, the Member State(s) concerned shall also be informed thereof. Recommendations shall include a specified timeline for the policy response. Recommendations may also be addressed to the Commission in respect of the relevant Union legislation.

3. At the same time as they are transmitted to the addressees in accordance with paragraph 2, the warnings or recommendations shall be transmitted, in accordance with strict rules of confidentiality, to the Council and the Commission and, where addressed to one or

more national supervisory authorities, to the ESAs.

4. In order to enhance the awareness of risks in the economy of the Union and to prioritise such risks, the ESRB, in close cooperation with the other parties to the ESFS, shall elaborate a colour-coded system corresponding to situations of different risk levels.

Once the criteria for such classification have been elaborated, the ESRB's warnings and recommendations shall indicate, on a case-by-case basis, and where appropriate, to which category the risk belongs.

Article 17 – *Follow-up of the ESRB recommendations*

1. If a recommendation referred to in Article 3(2)(d) is addressed to the Commission, to one or more Member States, to one or more ESAs, or to one or more national supervisory authorities, the addressees shall communicate to the ESRB and to the Council the actions undertaken in response to the recommendation and shall provide adequate justification for any inaction. Where relevant, the ESRB shall, subject to strict rules of confidentiality, inform the ESAs without delay of the answers received.

2. If the ESRB decides that its recommendation has not been followed or that the addressees have failed to provide adequate justification for their inaction, it shall, subject to strict rules of confidentiality, inform the addressees, the Council and, where relevant, the European Supervisory Authority concerned.

3. If the ESRB has made a decision under paragraph 2 on a recommendation that has been made public following the procedure set out in Article 18(1), the European Parliament may invite the Chair of the ESRB to present that decision and the addressees may request to participate in an exchange of views.

Article 18 – *Public warnings and recommendations*

1. The General Board shall decide on a case-by-case basis, after having informed the Council sufficiently in advance so that it is able to react, whether a warning or a recommendation should be made public. Notwithstanding Article 10(3), a quorum of two-thirds shall always apply to decisions taken by the General Board under this paragraph.

2. If the General Board decides to make a warning or recommendation public, it shall inform the addressees in advance.

3. The addressees of warnings and recommendations made public by the ESRB shall also be provided with the right of making public their views and reasoning in response thereto.

4. Where the General Board decides not to make a warning or a recommendation public, the addressees and, where appropriate, the Council and the ESAs shall take all the measures necessary for the protection of their confidential nature.

CHAPTER IV – FINAL PROVISIONS

Article 19 – *Accountability and reporting obligations*

1. At least annually and more frequently in the event of widespread financial distress, the Chair of the ESRB shall be invited to an annual hearing in the European Parliament, marking the publication of the ESRB's annual report to the European Parliament and the Council. That hearing shall be conducted separately from the monetary dialogue between the European Parliament and the President of the ECB.

2. The annual report referred to in paragraph 1 shall contain the information that the General Board decides to make public in accordance with Article 18. The annual report shall be made available to the public.

3. The ESRB shall also examine specific issues at the invitation of the European Parliament, the Council or the Commission.

4. The European Parliament may request the Chair of the ESRB to attend a hearing of the competent Committees of the European Parliament.

5. The Chair of the ESRB shall hold confidential oral discussions at least twice a year and more often if deemed appropriate, behind closed doors with the Chair and Vice-Chairs of the Economic and Monetary Affairs Committee of the European Parliament on the ongoing activity of the ESRB. An agreement shall be concluded between the European Parliament and the ESRB on the detailed modalities of organising those meetings, with a view to ensuring full confidentiality in accordance with Article 8. The ESRB shall provide a copy of that agreement to the Council.

Article 20 – *Review*

By 17 December 2013, the European Parliament and the Council shall examine this Regulation on the basis of a report from the Commission

and, after having received an opinion from the ECB and the ESAs, shall determine whether the mission and organisation of the ESRB need to be reviewed.

They shall, in particular, review the modalities for the designation or election of the Chair of the ESRB.

Article 21 – *Entry into force*

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

§9. Council Regulation (EU) No 1096/2010 of 17 November 2010 conferring specific tasks upon the European Central Bank concerning the functioning of the European Systemic Risk Board, OJ L 331, December 15th, 2010, pp. 162-4

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 127(6) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament,[1]

Having regard to the opinion of the European Central Bank,[2]

Whereas:

(1) The financial crisis has revealed important shortcomings in financial supervision, which has failed to anticipate adverse macro-prudential developments and prevent the accumulation of excessive risks in the financial sector, and has in particular highlighted the weaknesses of the existing macro-prudential oversight.

(2) In November 2008, the Commission mandated a High Level Group chaired by Mr Jacques de Larosière (the de Larosière Group) to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting the citizen and rebuilding trust in the financial system.

(3) In its final report presented on 25 February 2009, the de Larosière Group recommended, among other things, the establishment of a body at the level of the Union charged with overseeing risk in the financial system as a whole.

(4) In its Communication of 4 March 2009 entitled "Driving European Recovery", the Commission welcomed and broadly supported the recommendations of the de Larosière Group. At its meeting of 19 and 20 March 2009, the European Council agreed on the need to improve the regulation and supervision of financial institutions within the Union and to use the de Larosière Group's report as a basis for action.

(5) In its Communication of 27 May 2009 entitled "European Financial Supervision", the Commission set out a series of reforms to the current arrangements for safeguarding financial stability at the level of the Union, notably including the creation of a European Systemic Risk Board (ESRB) responsible for macro-prudential oversight. The Council, on 9 June 2009, and the European Council, at its meeting of 18 and 19 June 2009, supported the view of the Commission and welcomed the Commission's intention to bring forward legislative proposals so that the new framework could be fully established.

(6) Regulation (EU) No 1092/2010 of the European Parliament and of the Councilestablished macro-prudential oversight of the financial system at the level of the Union and a European Systemic Risk Board (ESRB).

(7) Given its expertise on macro-prudential issues, the European Central Bank (ECB) can make a significant contribution to the effective macro-prudential oversight of the Union's financial system.

[1] Opinion of 22 September 2010 (OJ L 276 October 20th 2010).
[2] OJ C 270, 11.11.2009, p. 1.

(8) The Secretariat of the ESRB (the Secretariat) should be ensured by the ECB and, to this effect, the ECB should provide sufficient human and financial resources. The staff of the Secretariat should therefore be subject to the Conditions of Employment for Staff of the ECB. In particular, according to the preamble of the Decision of the ECB of 9 June 1998 on the adoption of the Conditions of Employment for Staff of the European Central Bank as amended on 31 March 1999 (ECB/1998/4),[3] the staff of the ECB should be recruited on the broadest possible geographical basis from among nationals of the Member States.

(9) On 9 June 2009, the Council concluded that the ECB should provide analytical, statistical, administrative and logistical support to the ESRB. As it is the task of the ESRB to cover all aspects and areas of financial stability, the ECB should involve national central banks and supervisors to provide their specific expertise. The option to confer specific tasks concerning policies relating to prudential supervision upon the ECB provided for by the Treaty on the Functioning of the European Union should therefore be exercised, by conferring on the ECB the task of ensuring the Secretariat to the ESRB.

(10) The ECB should be entrusted with the task of providing statistical support to the ESRB. The collection and processing of information as set out in this Regulation and as necessary for the performance of the tasks of the ESRB should therefore fall under Article 5 of the Statute of the European System of Central Banks and of the ECB, and under Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.[4] Accordingly, confidential statistical information collected by the ECB or the European System of Central Banks should be shared with the ESRB. In addition, this Regulation should be without prejudice to Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics.[5]

(11) The Secretariat should prepare the meetings of the ESRB and support the work of the General Board, the Steering Committee, the Advisory Technical Committee and the Advisory Scientific Committee of the ESRB. On behalf of the ESRB, the Secretariat should collect all information necessary for the achievement of the tasks of the ESRB,

[3] OJ L 125, 19.5.1999, p. 32.
[4] OJ L 318, 27.11.1998, p. 8.
[5] OJ L 87, 31.3.2009, p. 164.

HAS ADOPTED THIS REGULATION:

Article 1 – *Membership*

The President and Vice-President of the European Central Bank (ECB) shall be Members of the General Board of the European Systemic Risk Board (ESRB) as set up by Regulation (EU) No 1092/2010.

Article 2 – *Support of the ESRB*

The ECB shall ensure a Secretariat, and thereby provide analytical, statistical, logistical and administrative support to the ESRB. The mission of the Secretariat as defined in Article 4(4) of Regulation (EU) No 1092/2010, shall include in particular:

(a) the preparation of the ESRB meetings;

(b) in accordance with Article 5 of the Statute of the European System of Central Banks and the European Central Bank and Article 5 of this Regulation, the collection and processing of information, including statistical information, on behalf and for the benefit of the fulfilment of the tasks of the ESRB;

(c) the preparation of the analyses necessary to carry out the tasks of the ESRB, drawing on technical advice from national central banks and supervisors;

(d) the support to the ESRB in its international cooperation at administrative level with other relevant bodies on macro-prudential issues;

(e) the support to the work of the General Board, the Steering Committee, the Advisory Technical Committee and the Advisory Scientific Committee.

Article 3 – *Organisation of the Secretariat*

1. The ECB shall provide sufficient human and financial resources for the fulfilment of its task of ensuring the Secretariat.

2. The head of the Secretariat shall be appointed by the ECB, in consultation with the General Board of the ESRB.

Article 4 – *Management*

1. The ESRB's Chair and its Steering Committee shall give directions to the head of the Secretariat on behalf of the ESRB.

2. The head of the Secretariat or his representative shall attend the meetings of the General Board, the Steering Committee, the

Advisory Technical Committee and the Advisory Scientific Committee of the ESRB.

Article 5 – *Collection of information on behalf of the ESRB*

1. The ESRB shall determine the information necessary for the purposes of the performance of its tasks, as set out in Article 3 of Regulation (EU) No 1092/2010. In view thereof, the Secretariat shall collect all the necessary information on behalf of the ESRB on a regular and ad hoc basis, in accordance with Article 15 of Regulation (EU) No 1092/2010 and subject to Article 6 of this Regulation.

2. On behalf of the ESRB, the Secretariat shall make available to the European Supervisory Authorities the information on risks necessary for the performance of their tasks.

Article 6 – *Confidentiality of information and documents*

1. Without prejudice to the application of criminal law, any confidential information received by the Secretariat while performing its duties may not be divulged to any person or authority outside the ESRB whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified.

2. The Secretariat shall ensure that documents are submitted to the ESRB in a manner which ensures their confidentiality.

3. The ECB shall ensure the confidentiality of the information received by the Secretariat for the performance of the tasks of the ECB under this Regulation. The ECB shall establish internal mechanisms and adopt internal rules to ensure the protection of information collected by the Secretariat on behalf of the ESRB. The ECB staff shall comply with the applicable rules relating to professional secrecy.

4. Information acquired by the ECB as a result of the application of this Regulation shall only be used for the purposes mentioned in Article 2.

Article 7 – *Access to documents*

1. The Secretariat shall ensure the application of Decision of the European Central Bank of 4 March 2004 on public access to European Central Bank documents (ECB/2004/3).[6]

2. The practical arrangements for the application of Decision ECB/2004/3 to documents relating to the ESRB, shall be adopted by 17 June 2011.

Article 8 – *Review*

By 17 December 2013, the Council shall examine this Regulation, on the basis of a report from the Commission. After having received opinions from the ECB and from the European Supervisory Authorities, it shall determine whether this Regulation should be reviewed.

Article 9 – *Entry into force*

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply from 16 December 2010.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

[6] OJ L 80, 18.3.2004, p. 42.

II.2 FINANCIAL SUPERVISION

§10. Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC, OJ L 331, December 15th, 2010, pp. 12-47.

Original version (OJ L 331, 15.12.2010, p. 12); amended by Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 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 (OJ L 287, 29.10.2013, p. 5) [the text amended then is underlined]; and by Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 (OJ L 60, 28.2.2014, p. 34) [the text amended then is discontinuously underlined].

ORIGINAL PREAMBLE

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) The financial crisis in 2007 and 2008 exposed important shortcomings in financial supervision, both in particular cases and in relation to the financial system as a whole. Nationally based supervisory models have lagged behind financial globalisation and the integrated and interconnected reality of European financial markets, in which many financial institutions operate across borders. The crisis exposed shortcomings in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors.

(2) Before and during the financial crisis, the European Parliament has called for a move towards more integrated European supervision in order to ensure a true level playing field for all actors at the level of the Union and to reflect the increasing integration of financial markets in the Union (in its resolutions of 13 April 2000 on the Commission communication on implementing the framework for financial markets: Action Plan,[4] of 21 November 2002 on prudential supervision rules in the European Union,[5] of 11 July 2007 on financial services policy (2005 to 2010) – White Paper,[6] of 23 September 2008 with recommendations to the Commission on hedge funds and private equity[7] and of 9 October 2008 with recommendations to the Commission on Lamfalussy follow-up: future structure of supervision,[8] and in its positions of 22 April 2009 on the amended proposal for a directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[9] and of 23 April 2009 on the proposal for a regulation of the European

[1] OJ C 13, 20.1.2010, p. 1.
[2] Opinion of 22 January 2010 (not yet published in the Official Journal).
[3] Position of the European Parliament of 22 September 2010 (, OJ L 276 October 20th 2010) and decision of the Council of 17 November 2010.
[4] OJ C 40, 7.2.2001, p. 453.
[5] OJ C 25 E, 29.1.2004, p. 394.
[6] OJ C 175 E, 10.7.2008, p. 392.
[7] OJ C 8 E, 14.1.2010, p. 26.
[8] OJ C 9 E, 15.1.2010, p. 48.
[9] OJ C 184 E, 8.7.2010, p. 214.

Parliament and of the Council on Credit Rating Agencies[10]).

(3) In November 2008, the Commission mandated a High-Level Group chaired by Jacques de Larosière to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting the citizen and rebuilding trust in the financial system. In its final report presented on 25 February 2009 (the "de Larosière Report"), the High-Level Group recommended that the supervisory framework be strengthened to reduce the risk and severity of future financial crises. It recommended reforms to the structure of supervision of the financial sector in the Union. The group also concluded that a European System of Financial Supervisors should be created, comprising three European Supervisory Authorities, one for the banking sector, one for the securities sector and one for the insurance and occupational pensions sector, and recommended the creation of a European Systemic Risk Council. The report represented the reforms the experts considered were needed and on which work had to begin immediately.

(4) In its Communication of 4 March 2009 entitled "Driving European Recovery", the Commission proposed to put forward draft legislation creating a European system of financial supervision and a European systemic risk board. In its Communication of 27 May 2009 entitled "European Financial Supervision", it provided more detail about the possible architecture of such a new supervisory framework reflecting the main thrust of the de Larosière Report.

(5) The European Council, in its conclusions of 19 June 2009, confirmed that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, should be established. The system should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups and establishing a European single rule book applicable to all financial institutions in the internal market. It emphasised that the European Supervisory Authorities should also have supervisory powers in relation to credit rating agencies and invited the Commission to prepare concrete proposals on how the European System of Financial Supervisors could play a strong role in crisis situations, while stressing that decisions taken by the European Supervisory Authorities should not impinge on the fiscal responsibilities of Member States.

[10] OJ C 184 E, 8.7.2010, p. 292.

(6) On 17 June 2010, the European Council agreed that "Member States should introduce systems of levies and taxes on financial institutions to ensure fair burden-sharing and to set incentives to contain systemic risk. Such levies or taxes should be part of a credible resolution framework. Further work is urgently required on their main features and issues of level playing field and cumulative impacts of various regulatory measures should be carefully assessed".

(7) The financial and economic crisis has created real and serious risks to the stability of the financial system and the functioning of the internal market. Restoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, and thereby to preserve and improve the conditions for the establishment of a fully integrated and functioning internal market in the field of financial services. Moreover, deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks.

(8) The Union has reached the limits of what can be done with the present status of the Committees of European Supervisors. The Union cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border financial institutions; where there is insufficient cooperation and information exchange between national supervisors; where joint action by national authorities requires complicated arrangements to take account of the patchwork of regulatory and supervisory requirements; where national solutions are most often the only feasible option in responding to problems at the level of the Union, and where different interpretations of the same legal text exist. The European System of Financial Supervision (hereinafter "the ESFS") should be designed to overcome those deficiencies and provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network.

(9) The ESFS should be an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level. Greater harmonisation and the coherent application of rules for financial institutions and markets across the Union should also be achieved. In addition to the European Supervisory Authority (European Banking

Authority) (hereinafter "the Authority"), a European Supervisory Authority (European Insurance and Occupational Pensions Authority) and a European Supervisory Authority (European Securities and Markets Authority) as well as a Joint Committee of the European Supervisory Authorities (hereinafter "the Joint Committee") should be established. A European Systemic Risk Board (hereinafter "the ESRB") should form part of the ESFS for the purposes of the tasks as specified in this Regulation and in Regulation (EU) No 1092/2010 of the European Parliament and of the Council.

(10) The European Supervisory Authorities (hereinafter collectively referred to as the "ESAs") should replace the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC,[11] the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC[12] and the Committee of European Securities Regulators established by Commission Decision 2009/77/EC,[13] and should assume all of the tasks and competences of those committees including the continuation of ongoing work and projects, where appropriate. The scope of each European Supervisory Authority's action should be clearly defined. The ESAs should be accountable to the European Parliament and the Council. When that accountability relates to cross-sectoral issues that have been coordinated through the Joint Committee, the ESAs should be accountable, through the Joint Committee, for such coordination.

(11) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions. The Authority should protect public values such as the stability of the financial system, the transparency of markets and financial products, and the protection of depositors and investors. The Authority should also prevent regulatory arbitrage and guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, consumers and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the areas of banking, payments, e-money regulation and supervision, and related corporate governance, auditing and financial reporting issues. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.

(12) The Authority should also be able to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in this Regulation. If required to make such temporary prohibition in the case of an emergency situation, the Authority should do so in accordance with and under the conditions laid down in this Regulation. In cases where a temporary prohibition or restriction of certain financial activities has a cross-sectoral impact, sectoral legislation should provide that the Authority should consult and coordinate its action with, where relevant, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and with the European Supervisory Authority (European Securities and Markets Authority), through the Joint Committee.

(13) The Authority should take due account of the impact of its activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth.

(14) In order to fulfil its objectives, the Authority should have legal personality as well as administrative and financial autonomy.

(15) Based on the work of international bodies, systemic risk should be defined as a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructures may be potentially systemically important to some degree.

(16) Cross-border risk includes all risks caused by economic imbalances or financial failures in all or parts of the Union that have the potential to have significant negative consequences for the transactions between economic operators of two or more Member States, for the functioning of the internal market or for the public finances of the Union or any of its Member States.

(17) The Court of Justice of the European Union in its judgment of 2 May 2006 in Case C-217/04 (United Kingdom of Great Britain and Northern

[11] OJ L 25, 29.1.2009, p. 23.
[12] OJ L 25, 29.1.2009, p. 28.
[13] OJ L 25, 29.1.2009, p. 18.

Ireland v. European Parliament and Council of the European Union) held that "nothing in the wording of Article 95 EC [now Article 114 of the Treaty on the Functioning of the European Union (TFEU)] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate".[14] The purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Union acquis concerning the internal market for financial services. The Authority should therefore be established on the basis of Article 114 TFEU.

(18) The following legislative acts lay down the tasks for the competent authorities of Member States, including cooperating with each other and with the Commission: Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions,[15] Directive 2006/49/EC of the European Parliament and of the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions[16] and Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes.[17]

(19) Existing Union legislation regulating the field covered by this Regulation also includes Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate,[18] Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group,[19] Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds,[20] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions,[21] and the relevant parts of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,[22] of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services[23] and of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market.[24]

(20) It is desirable that the Authority promote a consistent approach in the area of deposit guarantees to ensure a level playing field and the equitable treatment of depositors across the Union. As deposit guarantee schemes are subject to oversight in their Member States rather than regulatory supervision, the Authority should be able to exercise its powers under this Regulation in relation to the deposit guarantee scheme itself and its operator.

(21) In accordance with the Declaration (No 39) on Article 290 of the Treaty on the Functioning of the European Union (TFEU), annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the elaboration of regulatory technical standards requires assistance of technical expertise in a form which is specific to the financial services area. It is necessary to allow the Authority to provide such expertise also on standards or parts of standards that are not based on a draft technical standard that it has elaborated.

(22) There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of depositors, investors and consumers across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices.

[14] European Court Reports 2006 Page I-03771, para. 44.
[15] OJ L 177, 30.6.2006, p. 1.
[16] OJ L 177, 30.6.2006, p. 201.
[17] OJ L 135, 31.5.1994, p. 5.
[18] OJ L 35, 11.2.2003, p. 1.
[19] OJ L 330, 5.12.1998, p. 1.
[20] OJ L 345, 8.12.2006, p. 1.
[21] OJ L 267, 10.10.2009, p. 7.
[22] OJ L 309, 25.11.2005, p. 15.
[23] OJ L 271, 9.10.2002, p. 16.
[24] OJ L 319, 5.12.2007, p. 1.

(23) The Commission should endorse those draft regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in order to give them binding legal effect. They should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation. The Commission should not change the content of the draft regulatory technical standards prepared by the Authority without prior coordination with the Authority. To ensure a smooth and expeditious adoption process for those standards, the Commission's decision to endorse draft regulatory technical standards should be subject to a time limit.

(24) Given the technical expertise of the Authority in the areas where regulatory technical standards should be developed, note should be taken of the Commission's stated intention to rely, as a rule, on the draft regulatory technical standards submitted to it by the Authority in view of the adoption of the corresponding delegated acts. However, in cases where the Authority fails to submit a draft regulatory technical standard within the time limits set out by the relevant legislative act, it should be ensured that the result of the exercise of delegated power is actually achieved, and the efficiency of the decision-making process be maintained. In those cases, the Commission should therefore be empowered to adopt regulatory technical standards in the absence of a draft by the Authority.

(25) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts pursuant to Article 291 TFEU.

(26) In areas not covered by regulatory or implementing technical standards, the Authority should have the power to issue guidelines and recommendations on the application of Union law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with those guidelines and recommendations, it should be possible for the Authority to publish the reasons for supervisory authorities' non-compliance with those guidelines and recommendations.

(27) Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Union. A mechanism should therefore be established whereby the Authority addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations.

(28) To allow for a proportionate response to instances of incorrect or insufficient application of Union law, a three-step mechanism should apply. First, the Authority should be empowered to investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. Second, where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account the Authority's recommendation, requiring the competent authority to take the actions necessary to ensure compliance with Union law.

(29) Third, to overcome exceptional situations of persistent inaction by the competent authority concerned, the Authority should be empowered, as a last resort, to adopt decisions addressed to individual financial institutions. That power should be limited to exceptional circumstances in which a competent authority does not comply with the formal opinion addressed to it and in which Union law is directly applicable to financial institutions by virtue of existing or future Union regulations.

(30) Serious threats to the orderly functioning and integrity of financial markets or the stability of the financial system in the Union require a swift and concerted response at Union level. The Authority should therefore be able to require national supervisory authorities to take specific actions to remedy an emergency situation. The power to determine the existence of an emergency situation should be conferred on the Council, following a request by any of the ESAs, the Commission or the ESRB.

(31) The Authority should be able to require national supervisory authorities to take specific action to remedy an emergency situation. The action undertaken by the Authority in this respect should be without prejudice to the Commission's powers pursuant to Article 258 TFEU to initiate infringement proceedings

against the Member State of that supervisory authority for its failure to take such action, and without prejudice to the Commission's right in such circumstances to seek interim measures in accordance with the rules of procedure of the Court of Justice of the European Union. Furthermore, it should be without prejudice to any liability that that Member State might incur in accordance with the case law of the Court of Justice of the European Union if its supervisory authorities fail to take the action required by the Authority.

(32) In order to ensure efficient and effective supervision and a balanced consideration of the positions of the competent authorities in different Member States, the Authority should be able to settle disagreements in cross-border situations between those competent authorities with binding effect, including within colleges of supervisors. A conciliation phase should be provided for during which the competent authorities may reach an agreement. The Authority's competence should cover disagreements on the procedure or content of an action or inaction by a competent authority of a Member State in cases specified in the legally binding Union acts referred to in this Regulation. In such a situation, one of the supervisors involved should be entitled to refer the issue to the Authority, which should act in accordance with this Regulation. The Authority should be empowered to require the competent authorities concerned to take specific action or to refrain from action in order to settle the matter in order to ensure compliance with Union law, with binding effects for the competent authorities concerned. If a competent authority does not comply with the settlement decision addressed to it, the Authority should be empowered to adopt decisions directly addressed to financial institutions in areas of Union law directly applicable to them. The power to adopt such decisions should apply only as a last resort and then only to ensure the correct and consistent application of Union law. In cases where the relevant Union legislation confers discretion on Member States' competent authorities, decisions taken by the Authority cannot replace the exercise in compliance with Union law of that discretion.

(33) The crisis has proven that the current system of cooperation between national authorities whose powers are limited to individual Member States is insufficient as regards financial institutions that operate across borders.

(34) Expert Groups set up by Member States to examine the causes of the crisis and make suggestions to improve the regulation and supervision of the financial sector have confirmed that the current arrangements are not a sound basis for the future regulation and supervision of cross-border financial institutions across the Union.

(35) As the de Larosière Report indicates, "[i]n essence, we have two alternatives: the first "chacun pour soi" beggar-thy-neighbour solutions; or the second – enhanced, pragmatic, sensible European cooperation for the benefit of all to preserve an open world economy. This will bring undoubted economic gains".

(36) Colleges of supervisors play an important role in the efficient, effective and consistent supervision of financial institutions operating across borders. The Authority should contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors and, in that respect, have a leading role in ensuring the consistent and coherent functioning of colleges of supervisors for cross-border financial institutions across the Union. The Authority should therefore have full participation rights in colleges of supervisors with a view to streamlining the functioning of and the information exchange process in the colleges of supervisors and to foster convergence and consistency across colleges in the application of Union law. As the de Larosière Report states, "competition distortions and regulatory arbitrage stemming from different supervisory practices must be avoided, because they have the potential of undermining financial stability – inter alia by encouraging a shift of financial activity to countries with lax supervision. The supervisory system has to be perceived as fair and balanced".

(37) Convergence in the fields of crisis prevention, management and resolution, including funding mechanisms, is necessary in order to ensure the internalisation of costs by the financial system and the ability of public authorities to resolve failing financial institutions whilst minimising the impact of failures on the financial system, reliance on taxpayer funds to bail out banks and the use of public sector resources, limiting damage to the economy, and coordinating the application of national resolution measures. In this regard it is imperative to develop a common set of rules on a complete set of tools for the prevention and resolution of failing banks, to deal in particular with the crisis of large, cross-border or interconnected institutions, and the need to confer additional relevant powers to the Authority should be assessed as well as how

banks and savings institutions could prioritise the protection of savers.

(38) In the current review of Directive 94/19/EC and Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes,[25] the Commission's intention to pay special attention to the need to ensure further harmonisation throughout the Union is noted. In the insurance sector, the Commission's intention to examine the possibility of introducing Union rules protecting insurance policy holders in case of a failing insurance company is also noted. The ESAs should play an important role in those areas and appropriate powers concerning the European guarantee scheme systems should be conferred upon them.

(39) The delegation of tasks and responsibilities can be a useful instrument in the functioning of the network of supervisors in order to reduce the duplication of supervisory tasks, to foster cooperation and thereby streamline the supervisory process, as well as to reduce the burden imposed on financial institutions. This Regulation should therefore provide a clear legal basis for such delegation. Whilst respecting the general rule that delegation should be allowed, Member States should be able to introduce specific conditions for the delegation of responsibilities, for example, regarding information about, and the notification of, delegation arrangements. Delegation of tasks means that tasks are carried out by the Authority or by a national supervisory authority other than the responsible authority, while the responsibility for supervisory decisions remains with the delegating authority. By the delegation of responsibilities, the Authority or a national supervisory authority (the delegate) should be able to decide upon a certain supervisory matter in its own name in lieu of the delegating authority. Delegations should be governed by the principle of allocating supervisory competence to a supervisor which is best placed to take action in the subject matter. A reallocation of responsibilities would be appropriate, for example, for reasons of economies of scale or scope, of coherence in group supervision, and of optimal use of technical expertise among national supervisory authorities. Decisions by the delegate should be recognised by the delegating authority and by other competent authorities as determinative if those decisions are within the scope of the delegation. Relevant Union legislation could further specify the principles for the reallocation of responsibilities upon agreement. The Authority should facilitate and monitor delegation agreements between national supervisory authorities by all appropriate means.

It should be informed in advance of intended delegation agreements, in order to be able to express an opinion where appropriate. It should centralise the publication of such agreements to ensure timely, transparent and easily accessible information about agreements for all parties concerned. It should identify and disseminate best practices regarding delegation and delegation agreements.

(40) The Authority should actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture.

(41) Peer reviews are an efficient and effective tool for fostering consistency within the network of financial supervisors. The Authority should therefore develop the methodological framework for such reviews and conduct them on a regular basis. Reviews should focus not only on the convergence of supervisory practices, but also on the capacity of supervisors to achieve high-quality supervisory outcomes, as well as on the independence of those competent authorities. The outcome of peer reviews should be made public with the agreement of the competent authority subject to the review. Best practices should also be identified and made public.

(42) The Authority should actively promote a coordinated Union supervisory response, in particular to ensure the orderly functioning and integrity of financial markets and the stability of the financial system in the Union. In addition to its powers for action in emergency situations, the Authority should therefore be entrusted with a general coordination function within the ESFS. The smooth flow of all relevant information between competent authorities should be a particular focus of the Authority's actions.

(43) In order to safeguard financial stability it is necessary to identify, at an early stage, trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sectors. The Authority should monitor and assess such developments in the area of its competence and, where necessary, inform the European Parliament, the Council, the Commission, the other European Supervisory Authorities and the ESRB on a regular and, as necessary, on an ad hoc basis.

[25] OJ L 84, 26.3.1997, p. 22.

The Authority should also, in cooperation with the ESRB, initiate and coordinate Union-wide stress tests to assess the resilience of financial institutions to adverse market developments, and it should ensure that an as consistent as possible methodology is applied at the national level to such tests. In order to perform its functions properly, the Authority should conduct economic analyses of the markets and the impact of potential market developments.

(44) Given the globalisation of financial services and the increased importance of international standards, the Authority should foster dialogue and cooperation with supervisors outside the Union. It should be empowered to develop contacts and enter into administrative arrangements with the supervisory authorities and administrations of third countries and with international organisations, while fully respecting the existing roles and respective competences of the Member States and the Union institutions. Participation in the work of the Authority should be open to countries which have concluded agreements with the Union whereby they have adopted and are applying Union law, and the Authority should be able to cooperate with third countries which apply legislation that has been recognised as equivalent to that of the Union.

(45) The Authority should serve as an independent advisory body to the European Parliament, the Council, and the Commission in the area of its competence. Without prejudice to the competencies of the competent authorities concerned, the Authority should be able to provide its opinion on the prudential assessment of mergers and acquisitions under Directive 2006/48/EC, as amended by Directive 2007/44/EC[26] in those cases in which that Directive requires consultation between competent authorities from two or more Member States.

(46) In order to carry out its duties effectively, the Authority should have the right to request all necessary information. To avoid the duplication of reporting obligations for financial institutions, that information should normally be provided by the national supervisory authorities which are closest to the financial markets and institutions and should take into account already existing statistics. However, as a last resort, the Authority should be able to address a duly justified and reasoned request for information directly to a financial institution where a national competent authority does not or cannot provide such information in a timely fashion. Member States' authorities should be obliged to assist the Authority in enforcing such direct requests. In that context, the work on common reporting formats is essential. The measures for the collection of information should be without prejudice to the legal framework of the European Statistical System and the European System of Central Banks in the field of statistics. This Regulation should therefore be without prejudice both to Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[27] and to Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.[28]

(47) Close cooperation between the Authority and the ESRB is essential to give full effectiveness to the functioning of the ESRB and the follow-up to its warnings and recommendations. The Authority and the ESRB should share any relevant information with each other. Data related to individual undertakings should be provided only upon reasoned request. Upon receipt of warnings or recommendations addressed by the ESRB to the Authority or a national supervisory authority, the Authority should ensure follow-up as appropriate.

(48) The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, a Banking Stakeholder Group should be used for that purpose, and should represent, in balanced proportions, Union credit and investment institutions, representing the diverse models and sizes of financial institutions and businesses, including, as appropriate, institutional investors and other financial institutions which themselves use financial services; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; and other retail users of banking services. The Banking Stakeholder Group should work as an interface with other user groups in the financial services area

[26] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ L 247, 21.9.2007, p. 1).

[27] OJ L 87, 31.3.2009, p. 164.

[28] OJ L 318, 27.11.1998, p. 8.

established by the Commission or by Union legislation.

(49) Members of the Banking Stakeholder Group representing non-profit organisations or academics should receive adequate compensation in order to allow persons that are neither well-funded nor industry representatives to take part fully in the debate on financial regulation.

(50) Member States have a core responsibility for ensuring coordinated crisis management and preserving financial stability in crisis situations, in particular with regard to stabilising and resolving individual failing financial institutions. Decisions by the Authority in emergency or settlement situations affecting the stability of a financial institution should not impinge on the fiscal responsibilities of Member States. A mechanism should be established whereby Member States may invoke this safeguard and ultimately bring the matter before the Council for a decision. However, that safeguard mechanism should not be abused, in particular in relation to a decision taken by the Authority which does not have a significant or material fiscal impact, such as a reduction of income linked to the temporary prohibition of specific activities or products for consumer protection purposes. When taking decisions under the safeguard mechanism, the Council should vote in accordance with the principle where each member has one vote. It is appropriate to confer on the Council a role in this matter given the particular responsibilities of the Member States in this respect. Given the sensitivity of the issue, strict confidentiality arrangements should be ensured.

(51) In its decision-making procedures, the Authority should be bound by Union rules and general principles on due process and transparency. The right of the addressees of the Authority's decisions to be heard should be fully respected. The Authority's acts should form an integral part of Union law.

(52) A Board of Supervisors composed of the heads of the relevant competent authorities in each Member State, and chaired by the Chairperson of the Authority, should be the principal decision-making organ of the Authority. Representatives of the Commission, the ESRB, the European Central Bank, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) should participate as observers. Members of the Board of Supervisors should act independently and only in the Union's interest.

(53) As a general rule, the Board of Supervisors should take its decisions by simple majority in accordance with the principle where each member has one vote. However, for acts of a general nature, including those relating to regulatory and implementing technical standards, guidelines and recommendations, for budgetary matters as well as in respect of requests by a Member State to reconsider a decision by the Authority to temporarily prohibit or restrict certain financial activities, it is appropriate to apply the rules of qualified majority voting as laid down in Article 16(4) of the Treaty on European Union and in the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. Cases concerning the settlement of disagreements between national supervisory authorities should be examined by a restricted, objective panel, composed of members who neither are representatives of the competent authorities which are party to the disagreement nor have any interest in the conflict or direct links to the competent authorities concerned. The composition of the panel should be appropriately balanced. The decision taken by the panel should be approved by the Board of Supervisors by simple majority in accordance with the principle where each member has one vote. However, with regard to decisions taken by the consolidating supervisor, the decision proposed by the panel could be rejected by members representing a blocking minority of the votes as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

(54) A Management Board, composed of the Chairperson of the Authority, of representatives of national supervisory authorities and of the Commission, should ensure that the Authority carries out its mission and performs the tasks assigned to it. The Management Board should be entrusted with the necessary powers, inter alia, to propose the annual and multi-annual work programme, to exercise certain budgetary powers, to adopt the Authority's staff policy plan, to adopt special provisions on the right to access to documents and to propose the annual report.

(55) The Authority should be represented by a full-time Chairperson, appointed by the Board of Supervisors, on the basis of merit, skills, knowledge of financial institutions and markets, and of experience relevant to financial

supervision and regulation, following an open selection procedure organised and managed by the Board of Supervisors assisted by the Commission. For the designation of the first Chairperson of the Authority, the Commission should, inter alia, draw up a shortlist of candidates on the basis of merit, skills, knowledge of financial institutions and markets, and experience relevant to financial supervision and regulation. For the subsequent designations, the opportunity of having a shortlist drawn up by the Commission should be reviewed in a report to be established pursuant to this Regulation. Before the selected person takes up his duties, and up to 1 month after his selection by the Board of Supervisors, the European Parliament should be entitled, after having heard the person selected, to object to his designation.

(56) The management of the Authority should be entrusted to an Executive Director, who should have the right to participate in meetings of the Board of Supervisors and the Management Board without the right to vote.

(57) In order to ensure cross-sectoral consistency in the activities of the ESAs, they should coordinate closely through a Joint Committee and reach common positions where appropriate. The Joint Committee should coordinate the functions of the ESAs in relation to financial conglomerates and other cross-sectoral matters. Where relevant, acts also falling within the area of competence of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) or the European Supervisory Authority (European Securities and Markets Authority) should be adopted in parallel by the European Supervisory Authorities concerned. The Joint Committee should be chaired for a 12-month term on a rotating basis by the Chairpersons of the ESAs. The Chairperson of the Joint Committee should be a Vice-Chair of the ESRB. The Joint Committee should have dedicated staff provided by the ESAs to allow for informal information sharing and the development of a common supervisory culture approach across the ESAs.

(58) It is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the ESAs, independent from their administrative and regulatory structures. The decisions of the Board of Appeal should be subject to appeal before the Court of Justice of the European Union.

(59) In order to guarantee its full autonomy and independence, the Authority should be granted an autonomous budget with revenues mainly from obligatory contributions from national supervisory authorities and from the General Budget of the European Union. Union financing of the Authority is subject to an agreement by the budgetary authority in accordance with Point 47 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 17 May 2006 on budgetary discipline and sound financial management.[29] The Union budgetary procedure should be applicable. The auditing of accounts should be undertaken by the Court of Auditors. The overall budget is subject to the discharge procedure.

(60) Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)[30] should apply to the Authority. The Authority should also accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF).[31]

(61) In order to ensure open and transparent employment conditions and equal treatment of staff, the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities[32] should apply to the staff of the Authority.

(62) It is essential that business secrets and other confidential information be protected. The confidentiality of information made available to the Authority and exchanged in the network should be subject to stringent and effective confidentiality rules.

(63) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[33] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December

[29] OJ C 139, 14.6.2006, p. 1.
[30] OJ L 136, 31.5.1999, p. 1.
[31] OJ L 136, 31.5.1999, p. 15.
[32] OJ L 56, 4.3.1968, p. 1.
[33] OJ L 281, 23.11.1995, p. 31.

2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[34] are fully applicable to the processing of personal data for the purposes of this Regulation.

(64) In order to ensure the transparent operation of the Authority, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[35] should apply to the Authority.

(65) Third countries should be allowed to participate in the work of the Authority in accordance with appropriate agreements to be concluded by the Union.

(66) Since the objectives of this Regulation, namely improving the functioning of the internal market by means of ensuring a high, effective and consistent level of prudential regulation and supervision, protecting depositors and investors, protecting the integrity, efficiency and orderly functioning of financial markets, maintaining the stability of the financial system, and strengthening international supervisory coordination, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(67) The Authority should assume all current tasks and powers of the Committee of European Banking Supervisors. Commission Decision 2009/78/EC should therefore be repealed on the date of the establishment of the Authority and Decision No 716/2009/EC of the European Parliament and of the Council of 16 September 2009 establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing[36] should be amended accordingly. Given the existing structures and operations of the Committee of European Banking Supervisors, it is important to ensure very close cooperation between the Committee of European Banking Supervisors and the Commission when establishing appropriate transitional arrangements, to ensure that the period during which the Commission is responsible for the administrative establishment and initial administrative operation of the Authority be as limited as possible.

(68) It is appropriate to set a time limit for the application of this Regulation in order to ensure that the Authority is adequately prepared to begin operations and a smooth transition from the Committee of European Banking Supervisors. The Authority should be appropriately financed. At least initially, it should be financed 40 % from Union funds and 60 % through contributions from Member States, made in accordance with the weighting of votes set out in Article 3(3) of the Protocol (No 36) on transitional provisions.

(69) In order to enable the Authority to be established on 1 January 2011, this Regulation should enter into force on the day following its publication in the Official Journal of the European Union,

HAVE ADOPTED THIS REGULATION:

[34] OJ L 8, 12.1.2001, p. 1.
[35] OJ L 145, 31.5.2001, p. 43.
[36] OJ L 253, 25.9.2009, p. 8.

PREAMBLE REGULATION 1022/2013

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) On 29 June 2012, the Euro Area Heads of State or Government called on the Commission to present proposals to provide for a single supervisory mechanism involving the European Central Bank (ECB). In its conclusions of 29 June 2012, the European Council invited its President to develop, in close collaboration with the President of the Commission, the President of the Eurogroup and the President of the ECB, a specific and time-bound road map for the achievement of a genuine economic and monetary union, which includes concrete proposals on preserving the unity and integrity of the internal market in financial services.

(2) Provision for a single supervisory mechanism is the first step towards the creation of a European banking union, underpinned by a true single rulebook for financial services and new frameworks for deposit insurance and for resolution.

(3) In order to provide for a single supervisory mechanism, Council Regulation (EU) No 1024/2013 (§http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:287:0063:0089:EN:PDF), confers specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions in Member States whose currency is the euro and allows other Member States to establish close cooperation with the ECB.

(4) The conferral of supervisory tasks on the ECB relating to credit institutions in some of the Member States should not in any way hamper the functioning of the internal market for financial services. The European Supervisory Authority (European Banking Authority) ('EBA'), established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council (§http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R1093&from=EN), should therefore maintain its role and retain all its existing powers and tasks: it should continue to develop and to contribute to the consistent application of the single rulebook applicable to all Member States and to enhance convergence of supervisory practices across the Union as a whole.

(5) It is crucial that the banking union contain democratic accountability mechanisms.

(6) When carrying out the tasks conferred on it, and with due regard to the objective of ensuring the safety and soundness of credit institutions, EBA should have full regard to the diversity of credit institutions and their size and business models, as well as to the systemic benefits of diversity in the European banking industry.

(7) In order to promote best supervisory practices in the internal market, it is fundamentally important that the single rulebook be accompanied by a European supervisory handbook on the supervision of financial institutions, drawn up by EBA in consultation with the competent authorities. That supervisory handbook should identify best practices across the Union as regards supervisory methodologies and processes to achieve adherence to core international and Union principles. The handbook should not take the form of legally binding acts or restrict judgement-led supervision. It should cover all matters which are within EBA's remit, including, to the extent applicable, consumer protection and the fight against money laundering. It should set out metrics and methodologies for risk assessment, early warnings and criteria for supervisory action. Competent authorities should use the handbook. The use of the handbook should be considered as a significant element in the assessment of the convergence of supervisory practices and for the peer review under Regulation (EU) No 1093/2010.

[1] OJ C 30, 1.2.2013, p. 6.
[2] OJ C 11, 15.1.2013, p. 34.
[3] Position of the European Parliament of 12 September 2013 (not yet published in the Official Journal) and decision of the Council of 15 October 2013.

(8) EBA should be able to request information from financial institutions in accordance with Regulation (EU) No 1093/2010 in relation to any information to which those financial institutions have legal access, including information held by persons remunerated by those financial institutions for carrying out relevant activities, audits provided to those financial institutions by external auditors and copies of relevant documents, books and records.

(9) Requests for information by EBA should be duly justified and reasoned. Objections to specific requests for information on grounds of non-compliance with Regulation (EU) No 1093/2010 should be raised in accordance with the relevant procedures. Where an addressee of a request for information raises such objections, this should not absolve him from providing the information requested. The Court of Justice of the European Union should be competent to decide, in accordance with the procedures set out in the Treaty on the Functioning of the European Union, whether a specific request for information by EBA complies with that Regulation.

(10) The internal market and the cohesion of the Union should be secured and in this context concerns relating to EBA's governance and voting arrangements should be considered carefully and the equal treatment between Member States participating in the Single Supervisory Mechanism (SSM) as established in Regulation (EU) No 1024/2013 and other Member States should be guaranteed.

(11) Since EBA, in which all Member States participate with equal rights, was established with the aim of developing and contributing towards the consistent application of the single rulebook and of enhancing the coherence of supervisory practices within the Union and since the ECB has a leading role within the SSM, EBA should be equipped with adequate instruments to enable it to carry out efficiently the tasks conferred on it concerning the integrity of the internal market.

(12) In view of the supervisory tasks conferred on the ECB by Regulation (EU) No 1024/2013, EBA should be able to carry out its tasks also in relation to the ECB in the same manner as in relation to the other competent authorities. In particular, existing mechanisms for settlement of disagreements and actions in emergency situations should be adjusted accordingly to remain effective.

(13) In order to be able to perform its facilitating and coordinating role in emergency situations, EBA should be fully informed of any relevant developments, and should be invited to participate as an observer in any relevant gathering by the relevant competent authorities, including the right to take the floor or to make any other contributions.

(14) In order to ensure that the interests of all Member States are adequately taken into account and to allow for the proper functioning of EBA with a view to maintaining and deepening the internal market for financial services, the voting arrangements within its Board of Supervisors should be adapted.

(15) Decisions concerning breaches of Union law and concerning the settlement of disagreements should be examined by an independent panel composed of voting members of the Board of Supervisors which do not have any conflicts of interest, appointed by the Board of Supervisors. The decisions proposed by the panel to the Board of Supervisors should be adopted by a simple majority of the voting members of the Board of Supervisors, which should include a simple majority of its members from competent authorities of Member States participating in the SSM ("participating Member States") and a simple majority of its members from competent authorities of Member States that are not participating Member States ("non-participating Member States").

(16) Decisions concerning actions in emergency situations should be adopted by a simple majority of the Board of Supervisors, which should include a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States.

(17) Decisions concerning the acts specified in Articles 10 to 16 of Regulation (EU) No 1093/2010 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI of that Regulation should be adopted by a qualified majority of the Board of Supervisors, which should include at least a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States.

(18) EBA should develop rules of procedure for the panel that ensure its independence and objectivity.

(19) The composition of the Management Board should be balanced and proper representation of non-participating Member States should be ensured.

(20) Appointments of the members of EBA internal bodies and committees should ensure a geographical balance among Member States.

(21) In order to ensure the proper functioning of EBA and adequate representation of all Member States, the voting arrangements, the composition of the Management Board, and the composition of the independent panel should be monitored. They should be reviewed after an appropriate period of time, taking into account any experience gained and developments.

(22) No Member State or group of Member States should be discriminated against, directly or indirectly, as a venue for financial services.

(23) EBA should be provided with appropriate financial and human resources to enable it adequately to carry out any additional tasks conferred on it under this Regulation. The procedure for the establishment, implementation and control of its budget, as set out in Articles 63 and 64 of Regulation (EU) No 1093/2010, should take due account of those additional tasks. EBA should ensure that the highest standards of efficiency are met.

(24) Since the objectives of this Regulation, namely ensuring a high level of effective and consistent prudential regulation and supervision across all Member States, protecting the integrity, efficiency and orderly functioning of the internal market, and maintaining the stability of the financial system, cannot be sufficiently achieved by the Member States but can rather, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(25) Regulation (EU) No 1093/2010 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

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CHAPTER I: ESTABLISHMENT AND LEGAL STATUS

Article 1: Establishment and scope of action

1. This Regulation establishes a European Supervisory Authority (European Banking Authority) (hereinafter "the Authority").

2. The Authority shall act within the powers conferred by this Regulation and within the scope of Directive 94/19/EC, Directive 2002/87/EC, Regulation (EC) No 1781/2006, Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms,[1] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms[2] and, to the extent that those acts apply to credit and financial institutions and the competent authorities that supervise them, within the relevant parts of Directive 2002/65/EC, Directive 2005/60/EC, Directive 2007/64/EC and Directive 2009/110/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority. The Authority shall also act in accordance with Council Regulation (EU) No 1024/2013.[3]

3. The Authority shall also act in the field of activities of credit institutions, financial conglomerates, investment firms, payment institutions and e-money institutions in relation to issues not directly covered in the acts referred to in paragraph 2, including matters of corporate governance, auditing and financial reporting, provided that such actions by the Authority are necessary to ensure the effective and consistent application of those acts.

4. The provisions of this Regulation are without prejudice to the powers of the Commission, in particular pursuant to Article 258 TFEU, to ensure compliance with Union law.

5. The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and

[1] OJ L 176, 27.6.2013, p. 1.
[2] OJ L 176, 27.6.2013, p. 338.
[3] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (OJ L 287, 29.10.2013, p. 63).

effectiveness of the financial system, for the Union economy, its citizens and businesses. The Authority shall contribute to:

(a) improving the functioning of the internal market, including, in particular, a sound, effective and consistent level of regulation and supervision;

(b) ensuring the integrity, transparency, efficiency and orderly functioning of financial markets;

(c) strengthening international supervisory coordination;

(d) preventing regulatory arbitrage and promoting equal conditions of competition;

(e) ensuring the taking of credit and other risks are appropriately regulated and supervised; and

(f) enhancing customer protection.

For those purposes, the Authority shall contribute to the consistent, efficient and effective application of the acts referred to in paragraph 2, foster supervisory convergence, provide opinions to the European Parliament, the Council, and the Commission and undertake economic analyses of the markets to promote the achievement of the Authority's objective.

In the exercise of the tasks conferred upon it by this Regulation, the Authority shall pay particular attention to any systemic risk posed by financial institutions, the failure of which may impair the operation of the financial system or the real economy.

When carrying out its tasks, the Authority shall act independently and objectively and in a non-discriminatory manner, in the interest of the Union alone.

Article 2: European System of Financial Supervision

1. The Authority shall form part of a European System of Financial Supervision (ESFS). The main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.

2. The ESFS shall comprise the following:

(a) the European Systemic Risk Board (ESRB), for the purposes of the tasks as specified in Regulation (EU) No 1092/2010 and this Regulation;

(b) the Authority;

(c) the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council;

(d) the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council;

(e) the Joint Committee of the European Supervisory Authorities (Joint Committee) for the purposes of carrying out the tasks as specified in Articles 54 to 57 of this Regulation, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010;

(f) the competent or supervisory authorities as specified in the Union acts referred to in Article 1(2) of this Regulation, including the European Central Bank with regard to the tasks conferred on it by Regulation (EU) No 1024/2013, of Regulation (EU) No 1094/2010 and of Regulation (EU) No 1095/2010.

3. The Authority shall cooperate regularly and closely with the ESRB as well as with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) through the Joint Committee, ensuring cross-sectoral consistency of work and reaching joint positions in the area of supervision of financial conglomerates and on other cross-sectoral issues.

4. In accordance with the principle of sincere cooperation pursuant to Article 4(3) of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them.

5. Those supervisory authorities that are party to the ESFS shall be obliged to supervise financial institutions operating in the Union in accordance with the acts referred to in Article 1(2).

Article 3: Accountability of the Authorities

The Authorities referred to in points (a) to (d) of Article 2(2) shall be accountable to the European Parliament and to the Council. The

European Central Bank shall be accountable to the European Parliament and to the Council with regard to the exercise of the supervisory tasks conferred on it by Regulation (EU) No 1024/2013 in accordance with that Regulation.

Article 4: Definitions

For the purposes of this Regulation the following definitions apply:

(1) "financial institutions" means "credit institutions" as defined in Article 4(1) of Directive 2006/48/EC, "investment firms" as defined in Article 3(1)(b) of Directive 2006/49/EC, and "financial conglomerates" as defined in Article 2(14) of Directive 2002/87/EC, save that, with regard to Directive 2005/60/EC, "financial institutions" means credit institutions and financial institutions as defined in Article 3(1) and (2) of that Directive;

(2) "competent authorities" means:

(i) competent competent authorities as defined in point (40) of Article 4(1) of Regulation (EU) No 575/2013, including the European Central Bank with regard to matters relating to the tasks conferred on it by Regulation (EU) No 1024/2013, in Directive 2007/64/EC, and as referred to in Directive 2009/110/EC;

(ii) with regard to Directives 2002/65/EC and 2005/60/EC, the authorities competent for ensuring compliance with the requirements of those Directives by credit and financial institutions; and

(iii) with regard to deposit guarantee schemes, bodies which administer deposit-guarantee schemes pursuant to Directive 94/19/EC, or, where the operation of the deposit-guarantee scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive.

Article 5: Legal status

1. The Authority shall be a Union body with legal personality.

2. In each Member State, the Authority shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.

3. The Authority shall be represented by its Chairperson.

Article 6: Composition

The Authority shall comprise:

(1) a Board of Supervisors, which shall exercise the tasks set out in Article 43;

(2) a Management Board, which shall exercise the tasks set out in Article 47;

(3) a Chairperson, who shall exercise the tasks set out in Article 48;

(4) an Executive Director, who shall exercise the tasks set out in Article 53;

(5) a Board of Appeal, which shall exercise the tasks set out in Article 60.

Article 7: Seat

The Authority shall have its seat in London.

CHAPTER II: TASKS AND POWERS OF THE AUTHORITY

Article 8: Tasks and powers of the Authority

1. The Authority shall have the following tasks:

(a) to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, in particular by providing opinions to the Union institutions and by developing guidelines, recommendations, and draft regulatory and implementing technical standards, which shall be based on the legislative acts referred to in Article 1(2);

(aa) to develop and maintain up to date, taking into account, inter alia, changing business practices and business models of financial institutions, a European supervisory handbook on the supervision of financial institutions in the Union as a whole, which sets out supervisory best practices for methodologies and processes;

(b) to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2), preventing regulatory arbitrage, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions, ensuring a coherent functioning of colleges of supervisors and taking actions, inter alia, in emergency situations;

(c) to facilitate the delegation of tasks and responsibilities among competent authorities;

(d) to cooperate closely with the ESRB, in particular by providing the ESRB with the necessary information for the achievement of its tasks and by ensuring a proper follow up to the warnings and recommendations of the ESRB;

(e) to organise and conduct peer review analyses of competent authorities, including issuing guidelines and recommendations and identifying best practices, in order to strengthen consistency in supervisory outcomes;

(f) to monitor and assess market developments in the area of its competence, including where appropriate trends in credit, in particular, to households and SMEs;

(g) to undertake economic analyses of markets to inform the discharge of the Authority's functions;

(h) to foster depositor and investor protection;

(i) to promote the consistent and coherent functioning of colleges of supervisors, the monitoring, assessment and measurement of systemic risk, the development and coordination of recovery and resolution plans, providing a high level of protection to depositors and investors throughout the Union and developing methods for the resolution of failing financial institutions and an assessment of the need for appropriate financing instruments, with a view to fostering cooperation between competent authorities involved in the management of crisis concerning cross-border institutions that have the potential to pose a systemic risk, in accordance with Articles 21 to 26;

(j) to fulfil any other specific tasks set out in this Regulation or in other legislative acts;

(k) to publish on its website, and to update regularly, information relating to its field of activities, in particular, within the area of its competence, on registered financial institutions, in order to ensure information is easily accessible by the public;

1a. When carrying out its tasks in accordance with this Regulation, the Authority shall:

(a) use the full powers available to it; and

(b) with due regard to the objective to ensure the safety and soundness of credit institutions, take fully into account the different types, business models and sizes of credit institutions.

2. To achieve the tasks set out in paragraph 1, the Authority shall have the powers set out in this Regulation, in particular to:

(a) develop draft regulatory technical standards in the specific cases referred to in Article 10;

(b) develop draft implementing technical standards in the specific cases referred to in Article 15;

(c) issue guidelines and recommendations, as laid down in Article 16;

(d) issue recommendations in specific cases, as referred to in Article 17(3);

(e) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 18(3) and 19(3);

(f) in cases concerning directly applicable Union law, take individual decisions addressed to financial institutions, in the specific cases referred to in Article 17(6), 18(4) and 19(4);

(g) issue opinions to the European Parliament, the Council, or the Commission as provided for in Article 34;

(h) collect the necessary information concerning financial institutions as provided for in Article 35;

(i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on consumer protection;

(j) provide a centrally accessible database of registered financial institutions in the area of its competence where specified in the acts referred to in Article 1(2).

2a. When carrying out the tasks referred to in paragraph 1 and exercising the powers referred to in paragraph 2, the Authority shall have due regard to the principles of better regulation, including the results of cost-benefit analyses produced in accordance with this Regulation.

Article 9: Tasks related to consumer protection and financial activities

1. The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by:

(a) collecting, analysing and reporting on consumer trends;

(b) reviewing and coordinating financial literacy and education initiatives by the competent authorities;

(c) developing training standards for the industry; and

(d) contributing to the development of common disclosure rules.

2. The Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice.

3. The Authority may also issue warnings in the event that a financial activity poses a serious threat to the objectives laid down in Article 1(5).

4. The Authority shall establish, as an integral part of the Authority, a Committee on financial innovation, which brings together all relevant competent supervisory authorities with a view to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice for the Authority to present to the European Parliament, the Council and the Commission.

5. The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or, if so required, in the case of an emergency situation in accordance with and under the conditions laid down in Article 18.

The Authority shall review the decision referred to in the first subparagraph at appropriate intervals and at least every 3 months. If the decision is not renewed after a 3-month period, it shall automatically expire.

A Member State may request the Authority to reconsider its decision. In that case, the Authority shall decide, in accordance with the procedure set out in the second subparagraph of Article 44(1), whether it maintains its decision.

The Authority may also assess the need to prohibit or restrict certain types of financial activity and, where there is such a need, inform the Commission and the competent authorities in order to facilitate the adoption of any such prohibition or restriction.

Article 10: Regulatory technical standards

1. Where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts pursuant to Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2), the Authority may develop draft regulatory technical standards. The Authority shall submit its draft standards to the Commission for endorsement.

Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.

Before submitting them to the Commission, the Authority shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the Banking Stakeholder Group referred to in Article 37.

Where the Authority submits a draft regulatory technical standard, the Commission shall immediately forward it to the European Parliament and the Council.

Within 3 months of receipt of a draft regulatory technical standard, the Commission shall decide whether to endorse it. The Commission may endorse the draft regulatory technical standards in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft regulatory technical standard or to endorse it in part or with amendments, it shall send the draft regulatory technical standard back to the Authority, explaining why it does not endorse it, or, as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft regulatory technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of that six-week period, the Authority has not submitted an amended draft

regulatory technical standard, or has submitted a draft regulatory technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the regulatory technical standard with the amendments it considers relevant, or reject it.

The Commission may not change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. Where the Authority has not submitted a draft regulatory technical standard within the time limit set out in the legislative acts referred to in Article 1(2), the Commission may request such a draft within a new time limit.

3. Only where the Authority does not submit a draft regulatory technical standard to the Commission within the time limits in accordance with paragraph 2, may the Commission adopt a regulatory technical standard by means of a delegated act without a draft from the Authority.

The Commission shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter. The Commission shall also request the opinion or advice of the Banking Stakeholder Group referred to in Article 37.

The Commission shall immediately forward the draft regulatory technical standard to the European Parliament and the Council.

The Commission shall send its draft regulatory technical standard to the Authority. Within a period of 6 weeks, the Authority may amend the draft regulatory technical standard and submit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If on the expiry of the six-week period referred to in the fourth subparagraph, the Authority has not submitted an amended draft regulatory technical standard, the Commission may adopt the regulatory technical standard.

If the Authority has submitted an amended draft regulatory technical standard within the six-week period, the Commission may amend the draft regulatory technical standard on the basis of the Authority's proposed amendments or adopt the regulatory technical standard with the amendments it considers relevant. The Commission shall not change the content of the draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

4. The regulatory technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

Article 11: Exercise of the delegation

1. The power to adopt regulatory technical standards referred to in Article 10 shall be conferred on the Commission for a period of 4 years from 16 December 2010. The Commission shall draw up a report in respect of the delegated power not later than 6 months before the end of the 4-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 14.

2. As soon as it adopts a regulatory technical standard, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The power to adopt regulatory technical standards is conferred on the Commission subject to the conditions laid down in Articles 12 to 14.

Article 12: Revocation of the delegation

1. The delegation of power referred to in Article 10 may be revoked at any time by the European Parliament or by the Council.

2. The institution which has commenced an internal procedure for deciding whether to revoke a delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation.

3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the regulatory technical standards already in force. It shall be published in the Official Journal of the European Union.

Article 13: Objections to regulatory technical standards

1. The European Parliament or the Council may object to a regulatory technical standard within a period of 3 months from the date of notification of the regulatory technical standard adopted by the Commission. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.

Where the Commission adopts a regulatory technical standard which is the same as the draft regulatory technical standard submitted by the Authority, the period during which the European Parliament and the Council may object shall be 1 month from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended for an initial period of 1 month and shall be extendable for a further period of 1 month.

2. If, on the expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the regulatory technical standard, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

The regulatory technical standard may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to a regulatory technical standard within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the institution which objects shall state the reasons for objecting to the regulatory technical standard.

Article 14: Non-endorsement or amendment of draft regulatory technical standards

1. In the event that the Commission does not endorse a draft regulatory technical standard or amends it as provided for in Article 10, the Commission shall inform the Authority, the European Parliament and the Council, stating its reasons.

2. Where appropriate, the European Parliament or the Council may invite the responsible Commissioner, together with the Chairperson of the Authority, within 1 month of the notice referred to in paragraph 1, for an ad hoc meeting of the competent committee of the European Parliament or the Council to present and explain their differences.

Article 15: Implementing technical standards

1. The Authority may develop implementing technical standards, by means of implementing acts pursuant to Article 291 TFEU, in the areas specifically set out in the legislative acts referred to in Article 1(2). Implementing technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be to determine the conditions of application of those acts. The Authority shall submit its draft implementing technical standards to the Commission for endorsement.

Before submitting draft implementing technical standards to the Commission, the Authority shall conduct open public consultations and shall analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft implementing technical standards concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the Banking Stakeholder Group referred to in Article 37.

Where the Authority submits a draft implementing technical standard, the Commission shall immediately forward it to the European Parliament and the Council.

Within 3 months of receipt of a draft implementing technical standard, the Commission shall decide whether to endorse it. The Commission may extend that period by 1 month. The Commission may endorse the draft implementing technical standard in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft implementing technical standard or intends to endorse it in part or with amendments, it shall send it back to the Authority explaining why it does not intend to endorse it, or, as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fifth subparagraph, the Authority has not submitted an amended draft implementing technical standard, or has submitted a draft implementing technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the implementing technical standard with the amendments it considers relevant or reject it.

The Commission shall not change the content of a draft implementing technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. In cases where the Authority has not submitted a draft implementing technical standard within the time limit set out in the legislative acts referred to in Article 1(2), the Commission may request such a draft within a new time limit.

3. Only where the Authority does not submit a draft implementing technical standard to the Commission within the time limits in accordance with paragraph 2, may the Commission adopt an implementing technical standard by means of an implementing act without a draft from the Authority.

The Commission shall conduct open public consultations on draft implementing technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft implementing technical standards concerned or in relation to the particular urgency of the matter. The Commission shall also request the opinion or advice of the Banking Stakeholder Group referred to in Article 37.

The Commission shall immediately forward the draft implementing technical standard to the European Parliament and the Council.

The Commission shall send the draft implementing technical standard to the Authority. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard and submit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fourth subparagraph, the Authority has not submitted an amended draft implementing technical standard, the Commission may adopt the implementing technical standard.

If the Authority has submitted an amended draft implementing technical standard within that six-week period, the Commission may amend the draft implementing technical standard on the basis of the Authority's proposed amendments or adopt the implementing technical standard with the amendments it considers relevant.

The Commission shall not change the content of the draft implementing technical standards prepared by the Authority without prior coordination with the Authority, as set out in this Article.

4. The implementing technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

Article 16: Guidelines and recommendations

1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions.

2. The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations and analyse the related potential costs and benefits. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations. The Authority shall, where appropriate, also request opinions or advice from the Banking Stakeholder Group referred to in Article 37.

3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.

The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for

not complying with that guideline or recommendation. The competent authority shall receive advanced notice of such publication.

If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.

4. In the report referred to in Article 43(5) the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how the Authority intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.

Article 17: Breach of Union law

1. Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.

2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Banking Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.

Without prejudice to the powers laid down in Article 35, the competent authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation including as to how the acts referred to in Article 1(2) are applied in accordance with Union law.

3. The Authority may, not later than 2 months from initiating its investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law.

The competent authority shall, within 10 working days of receipt of the recommendation, inform the Authority of the steps it has taken or intends to take to ensure compliance with Union law.

4. Where the competent authority has not complied with Union law within 1 month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority, or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account the Authority's recommendation.

The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.

The Authority and the competent authorities shall provide the Commission with all necessary information.

5. The competent authority shall, within 10 working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with that formal opinion.

6. Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the acts referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.

The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4.

7. Decisions adopted under paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter.

When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4 or a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.

8. In the report referred to in Article 43(5), the Authority shall set out which competent authorities and financial institutions have not complied with the formal opinions or decisions referred to in paragraphs 4 and 6 of this Article.

Article 18: Action in emergency situations

1. In the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant competent supervisory authorities.

In order to be able to perform that facilitating and coordinating role, the Authority shall be fully informed of any relevant developments, and shall be invited to participate as an observer in any relevant gathering by the relevant competent supervisory authorities.

2. The Council, in consultation with the Commission and the ESRB and, where appropriate, the ESAs, may adopt a decision addressed to the Authority, determining the existence of an emergency situation for the purposes of this Regulation, following a request by the Authority, the Commission or the ESRB. The Council shall review that decision at appropriate intervals and at least once a month. If the decision is not renewed at the end of a 1-month period, it shall automatically expire. The Council may declare the discontinuation of the emergency situation at any time.

Where the ESRB or the Authority considers that an emergency situation may arise, it shall issue a confidential recommendation addressed to the Council and provide it with an assessment of the situation. The Council shall then assess the need for a meeting. In that process, due care of confidentiality shall be guaranteed.

If the Council determines the existence of an emergency situation, it shall duly inform the European Parliament and the Commission without delay.

3. Where the Council has adopted a decision pursuant to paragraph 2, and in exceptional circumstances where coordinated action by competent authorities is necessary to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority may adopt individual decisions requiring competent authorities to take the necessary action in accordance with the legislation referred to in Article 1(2) to address any such developments by ensuring that financial institutions and competent authorities satisfy the requirements laid down in that legislation.

4. Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the decision of the Authority referred to in paragraph 3 within the period laid down in that decision, the Authority may, where the relevant requirements laid down in the legislative acts referred to in Article 1(2) including in regulatory technical standards and implementing technical standards adopted in accordance with those acts are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under that legislation, including the cessation of any practice. This shall apply only in situations in which a competent authority does not apply the legislative acts referred to in Article 1(2), including regulatory technical standards and implementing technical standards adopted in accordance with those acts, or applies them in a way which appears to be a manifest breach of those acts, and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.

5. Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter.

Any action by the competent authorities in relation to issues which are subject to a decision pursuant to paragraph 3 or 4 shall be compatible with those decisions.

Article 19: Settlement of disagreements between competent authorities in cross-border situations

1. Without prejudice to the powers laid down in Article 17, where a competent authority disagrees about the procedure or content of an action or inaction of a competent authority in cases specified in the acts referred to in Article 1(2), the Authority, at the request of one or more of the competent authorities concerned, may assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4 of this Article.

In cases specified in the legislation referred to in Article 1(2), and where on the basis of objective criteria, disagreement between competent authorities from different Member States can be determined, the Authority may, on its own initiative, assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4.

2. The Authority shall set a time limit for conciliation between the competent authorities taking into account any relevant time periods specified in the acts referred to in Article 1(2) and the complexity and urgency of the matter. At that stage the Authority shall act as a mediator.

3. If the competent authorities concerned fail to reach an agreement within the conciliation phase referred to in paragraph 2, the Authority may, in accordance with the procedure set out in the third and fourth subparagraph of Article 44(1) take a decision requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law.

4. Without prejudice to the powers of the Commission pursuant to Article 258 TFEU, where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial institution complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2), the Authority may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice.

5. Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter. Any action by the competent authorities in relation to facts which are subject to a decision pursuant to paragraph 3 or 4 shall be compatible with those decisions.

6. In the report referred to in Article 50(2), the Chairperson of the Authority shall set out the nature and type of disagreements between competent authorities, the agreements reached and the decisions taken to settle such disagreements.

Article 20: Settlement of disagreements between competent authorities across sectors

The Joint Committee shall, in accordance with the procedure laid down in Articles 19 and 56, settle cross-sectoral disagreements that may arise between competent authorities as defined in Article 4(2) of this Regulation, of Regulation (EU) 1094/2010 and of Regulation (EU)1095/2010 respectively.

Article 20a: Convergence of supervisory review process

The Authority shall promote, within the scope of its powers, convergence of the supervisory review and evaluation process in accordance with Directive 2013/36/EU in order to bring about strong supervisory standards in the Union.

Article 21: Colleges of supervisors

1. The Authority shall promote, within the scope of its powers, the efficient, effective and consistent functioning of the colleges of supervisors referred to in Regulation (EU) No 575/2013 and Directive 2013/36/EU and foster the consistency of the application of Union law among the colleges of supervisors. With the objective of converging supervisory best practices, the Authority shall promote joint supervisory plans and joint examinations, and staff from the Authority may participate in the activities of the colleges of supervisors, including on-site examinations, carried out jointly by two or more competent authorities.

2. The Authority shall lead in ensuring a consistent and coherent functioning of colleges of supervisors for cross-border institutions across the Union, taking account of the systemic risk posed by financial institutions referred to in Article 23, and shall, where appropriate, convene a meeting of a college.

For the purpose of this paragraph and of paragraph 1 of this Article, the Authority shall be considered a "competent authority" within the meaning of the relevant legislation.

The Authority may:

(a) collect and share all relevant information in cooperation with the competent authorities in order to facilitate the work of the college and establish and manage a central system to make such information accessible to the competent authorities in the college;

(b) initiate and coordinate Union-wide stress tests in accordance with Article 32 to assess the resilience of financial institutions, in particular the systemic risk posed by financial institutions as referred to in Article 23, to adverse market developments, and evaluate the potential for systemic risk to increase in situations of stress, ensuring that a consistent methodology is

applied at the national level to such tests and, where appropriate, address a recommendation to the competent authority to correct issues identified in the stress test;

(c) promote effective and efficient supervisory activities, including evaluating the risks to which financial institutions are or might be exposed as determined under the supervisory review process or in stress situations;

(d) oversee, in accordance with the tasks and powers specified in this Regulation, the tasks carried out by the competent authorities; and

(e) request further deliberations of a college in any cases where it considers that the decision would result in an incorrect application of Union law or would not contribute to the objective of convergence of supervisory practices. It may also require the consolidating supervisor to schedule a meeting of the college or add a point to the agenda of a meeting.

3. The Authority may develop draft regulatory and implementing technical standards to ensure uniform conditions of application with respect to the provisions regarding the operational functioning of colleges of supervisors and issue guidelines and recommendations adopted pursuant to Article 16 to promote convergence in supervisory functioning and best practices adopted by the colleges of supervisors.

4. The Authority shall have a legally binding mediation role to resolve disputes between competent authorities in accordance with the procedure set out in Article 19. The Authority may take supervisory decisions directly applicable to the institution concerned in accordance with Article 19.

Article 22: General provisions

1. The Authority shall duly consider systemic risk as defined by Regulation (EU) No 1092/2010. It shall address any risk of disruption in financial services that:

(a) is caused by an impairment of all or parts of the financial system; and

(b) has the potential to have serious negative consequences for internal market and the real economy.

The Authority shall consider, where appropriate, the monitoring and assessment of systemic risk as developed by the ESRB and the Authority and respond to warnings and recommendations by the ESRB in accordance with Article 17 of Regulation (EU) No 1092/2010.

1a. At least annually, the Authority shall consider whether it is appropriate to carry out Union-wide assessments of the resilience of financial institutions, in accordance with Article 32, and shall inform the European Parliament, the Council and the Commission of its reasoning. Where such Union-wide assessments are carried out and the Authority considers it appropriate to do so, it shall disclose the results for each participating financial institution.

2. The Authority shall, in collaboration with the ESRB, develop a common set of quantitative and qualitative indicators (risk dashboard) to identify and measure systemic risk.

The Authority shall also develop an adequate stress-testing regime to help identifying those institutions that may pose systemic risk. These institutions shall be subject to strengthened supervision, and where necessary, to the recovery and resolution procedures referred to in Article 25.

3. Without prejudice to the acts referred to in Article 1(2), the Authority shall draw up, as necessary, additional guidelines and recommendations for financial institutions, to take account of the systemic risk posed by them.

The Authority shall ensure that the systemic risk posed by financial institutions is taken into account when developing draft regulatory and implementing technical standards in the areas laid down in the legislative acts referred to in Article 1(2).

4. Upon a request from one or more competent authorities, the European Parliament, the Council or the Commission, or on its own initiative, the Authority may conduct an inquiry into a particular type of financial institution or type of product or type of conduct in order to assess potential threats to the stability of the financial system and make appropriate recommendations for action to the competent authorities concerned.

For those purposes, the Authority may use the powers conferred on it under this Regulation, including Article 35.

5. The Joint Committee shall ensure overall and cross-sectoral coordination of the activities carried out in accordance with this Article.

Article 23: Identification and measurement of systemic risk

1. The Authority shall, in consultation with the ESRB, develop criteria for the identification and measurement of systemic risk and an adequate

stress-testing regime which includes an evaluation of the potential for systemic risk posed by financial institutions to increase in situations of stress. The financial institutions that may pose a systemic risk shall be subject to strengthened supervision, and where necessary, the recovery and resolution procedures referred to in Article 25.

2. The Authority shall take fully into account the relevant international approaches when developing the criteria for the identification and measurement of systemic risk posed by financial institutions, including those established by the Financial Stability Board, the International Monetary Fund and the Bank for International Settlements.

Article 24: Permanent capacity to respond to systemic risks

1. The Authority shall ensure it has specialised and ongoing capacity to respond effectively to the materialisation of systemic risks as referred to in Articles 22 and 23, in particular, with respect to institutions that pose a systemic risk.

2. The Authority shall fulfil the tasks conferred upon it in this Regulation and in the legislation referred to in Article 1(2), and shall contribute to ensuring a coherent and coordinated crisis management and resolution regime in the Union.

Article 25: Recovery and resolution procedures

1. The Authority shall contribute to, and participate actively in, the development and coordination of effective, consistent and up-to-date recovery and resolution plans for financial institutions. The Authority shall also, where provided for in the Union acts referred to in Article 1(2), assist in developing procedures in emergency situations and preventive measures to minimise the systemic impact of any failure.

2. The Authority may identify best practices aimed at facilitating the resolution of failing institutions and, in particular, cross-border groups, in ways which avoid contagion, ensuring that appropriate tools, including sufficient resources, are available and allow the institution or the group to be resolved in an orderly, cost-efficient and timely manner.

3. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 10 to 15.

Article 26: European system of deposit guarantee schemes

1. The Authority shall contribute to strengthening the European system of national deposit guarantee schemes by acting under the powers conferred to it in this Regulation to ensure the correct application of Directive 94/19/EC with the aim of ensuring that national deposit guarantee schemes are adequately funded by contributions from financial institutions including from those financial institutions established and taking deposits within the Union but headquartered outside the Union as provided for in Directive 94/19/EC and provide a high level of protection to all depositors in a harmonised framework throughout the Union, which leaves the stabilising safeguard role of mutual guarantee schemes intact, provided they comply with Union legislation.

2. Article 16 concerning the Authority's powers to adopt guidelines and recommendations shall apply to deposit guarantee schemes.

3. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 10 to 15.

4. The review of this Regulation provided for in Article 81 shall, in particular, examine the convergence of the European system of national deposit guarantee schemes.

Article 27: European system of bank resolution and funding arrangements

1. The Authority shall contribute to developing methods for the resolution of failing financial institutions, in particular those that may pose a systemic risk, in ways which avoid contagion and allow them to be wound down in an orderly and timely manner, including, where applicable, coherent and robust funding mechanisms as appropriate.

2. The Authority shall provide its assessment of the need for a system of coherent, robust and credible funding mechanisms, with appropriate financing instruments linked to a set of coordinated crisis management arrangements.

The Authority shall contribute to the work on the level playing field issues and cumulative impacts of any systems of levies and contributions on financial institutions that may be introduced to ensure fair burden sharing and

incentives to contain systemic risk as a part of a coherent and credible resolution framework.

The review of this Regulation provided for in Article 81 shall, in particular, examine the possible enhancement of the role of the Authority in a framework of crisis prevention, management and resolution, and, if necessary, the creation of a European resolution fund.

Article 28: Delegation of tasks and responsibilities

1. Competent authorities may, with the consent of the delegate, delegate tasks and responsibilities to the Authority or other competent authorities subject to the conditions set out in this Article. Member States may set out specific arrangements regarding the delegation of responsibilities that have to be complied with before their competent authorities enter into such delegation agreements, and may limit the scope of delegation to what is necessary for the effective supervision of cross-border financial institutions or groups.

2. The Authority shall stimulate and facilitate the delegation of tasks and responsibilities between competent authorities by identifying those tasks and responsibilities that can be delegated or jointly exercised and by promoting best practices.

3. The delegation of responsibilities shall result in the reallocation of competences laid down in the acts referred to in Article 1(2). The law of the delegate authority shall govern the procedure, enforcement and administrative and judicial review relating to the delegated responsibilities.

4. The competent authorities shall inform the Authority of delegation agreements into which they intend to enter. They shall put the agreements into effect at the earliest 1 month after informing the Authority.

The Authority may give an opinion on the intended agreement within 1 month of being informed.

The Authority shall publish, by appropriate means, any delegation agreement as concluded by the competent authorities, in order to ensure that all parties concerned are informed appropriately.

Article 29: Common supervisory culture

1. The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union. The Authority shall carry out, at a minimum, the following activities:

(a) providing opinions to competent authorities;

(b) promoting an effective bilateral and multilateral exchange of information between competent authorities, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation;

(c) contributing to developing high-quality and uniform supervisory standards, including reporting standards, and international accounting standards in accordance with Article 1(3);

(d) reviewing the application of the relevant regulatory and implementing technical standards adopted by the Commission, and of the guidelines and recommendations issued by the Authority and proposing amendments where appropriate; and

(e) establishing sectoral and cross-sectoral training programmes, facilitating personnel exchanges and encouraging competent authorities to intensify the use of secondment schemes and other tools.

2. The Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.

For the purpose of building a common supervisory culture, the Authority shall develop and maintain up to date, taking into account, inter alia, changing business practices and business models of financial institutions, a European supervisory handbook on the supervision of financial institutions for the Union as a whole. The European supervisory handbook shall set out supervisory best practices for methodologies and processes.

Article 30: Peer reviews of competent authorities

1. The Authority shall periodically organise and conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. To that end, the Authority shall develop methods to allow for objective assessment and comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with

regard to the competent authority concerned shall be taken into account.

2. The peer review shall include an assessment of, but shall not be limited to:

(a) the adequacy of resources and governance arrangements of the competent authority, with particular regard to the effective application of the regulatory technical standards and implementing technical standards referred to in Articles 10 to 15 and of the acts referred to in Article 1(2) and the capacity to respond to market developments;

(b) the degree of convergence reached in the application of Union law and in supervisory practice, including regulatory technical standards and implementing technical standards, guidelines and recommendations adopted pursuant to Articles 10 to 16, and the extent to which the supervisory practice achieves the objectives set out in Union law;

(c) best practices developed by some competent authorities which might be of benefit for other competent authorities to adopt;

(d) the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law, including the administrative measures and sanctions imposed against persons responsible where those provisions have not been complied with.

3. On the basis of a peer review, the Authority may issue guidelines and recommendations pursuant to Article 16. In accordance with Article 16(3), the competent authorities shall endeavour to follow those guidelines and recommendations. When developing draft regulatory technical or implementing technical standards in accordance with Articles 10 to 15, the Authority shall take into account the outcome of the peer review, along with any other information acquired in carrying out its tasks, in order to ensure convergence of the standards and practices of the highest quality.

3a. The Authority shall submit an opinion to the Commission where the peer review or any other information acquired in carrying out its tasks shows that a legislative initiative is necessary to ensure the further harmonisation of prudential rules.

4. The Authority shall make the best practices that can be identified from those peer reviews publicly available. In addition, all other results of peer reviews may be disclosed publicly, subject to the agreement of the competent authority that is the subject of the peer review.

Article 31: Coordination function

The Authority shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union.

The Authority shall promote a coordinated Union response, inter alia, by:

(a) facilitating the exchange of information between the competent authorities;

(b) determining the scope and, where possible and appropriate, verifying the reliability of information that should be made available to all the competent authorities concerned;

(c) without prejudice to Article 19, carrying out non-binding mediation upon a request from the competent authorities or on its own initiative;

(d) notifying the ESRB, the Council and the Commission of any potential emergency situations without delay;

(e) taking all appropriate measures in case of developments which may jeopardise the functioning of the financial markets with a view to the coordination of actions undertaken by relevant competent authorities;

(f) centralising information received from competent authorities in accordance with Articles 21 and 35 as the result of the regulatory reporting obligations for institutions. The Authority shall share that information with the other competent authorities concerned.

Article 32: Assessment of market developments

1. The Authority shall monitor and assess market developments in the area of its competence and, where necessary, inform the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), the ESRB and the European Parliament, the Council and the Commission about the relevant micro-prudential trends, potential risks and vulnerabilities. The Authority shall include in its assessments an economic analysis of the markets in which financial institutions operate and an assessment of the impact of potential market developments on such institutions.

2. The Authority shall, in cooperation with the ESRB, initiate and coordinate Union-wide assessments of the resilience of financial institutions to adverse market developments. To that end it shall develop:

(a) common methodologies for assessing the effect of economic scenarios on an institution's financial position;

(b) common approaches to communication on the outcomes of those assessments of the resilience of financial institutions;

(c) common methodologies for assessing the effect of particular products or distribution processes on an;and

(d) common methodologies for asset evaluation, as necessary, for the purpose of the stress testing.

3. Without prejudice to the tasks of the ESRB set out in Regulation (EU) No 1092/2010, the Authority shall, at least once a year, and more frequently as necessary, provide assessments to the European Parliament, the Council, the Commission and the ESRB of trends, potential risks and vulnerabilities in its area of competence.

The Authority shall include a classification of the main risks and vulnerabilities in these assessments and, where necessary, recommend preventative or remedial actions.

3a. For the purpose of running the Union-wide assessments of the resilience of financial institutions under this Article, the Authority may, in accordance with Article 35 and subject to the conditions set out therein, request information directly from those financial institutions. It may also require competent authorities to conduct specific reviews. It may request competent authorities to carry out on-site inspections, and may participate in such on-site inspections in accordance with Article 21 and subject to the conditions set out therein, in order to ensure comparability and reliability of methods, practices and results.

3b. The Authority may request that the competent authorities require that financial institutions subject to an independent audit information that they must provide under paragraph 3a.

4. The Authority shall ensure an adequate coverage of cross-sectoral developments, risks and vulnerabilities by closely cooperating with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority) through the Joint Committee.

Article 33: International relations

1. Without prejudice to the respective competences of the Member States and the Union institutions, the Authority may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries. Those arrangements shall not create legal obligations in respect of the Union and its Member States nor shall they prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with those third countries.

2. The Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the acts referred to in Article 1(2).

3. In the report referred to in Article 43(5), the Authority shall set out the administrative arrangements agreed upon with international organisations or administrations in third countries and the assistance provided in preparing equivalence decisions.

Article 34: Other tasks

1. The Authority may, upon a request from the European Parliament, the Council or the Commission, or on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence.

2. With regard to prudential assessments of mergers and acquisitions falling within the scope of Directive 2006/48/EC, as amended by Directive 2007/44/EC, and which according to that Directive require consultation between competent authorities from two or more Member States, the Authority may, on application of one of the competent authorities concerned, issue and publish an opinion on a prudential assessment, except in relation to the criteria in Article 19a(1)(e) of Directive 2006/48/EC. The opinion shall be issued promptly and in any event before the end of the assessment period in accordance with Directive 2006/48/EC, as amended by Directive 2007/44/EC. Article 35 shall apply to the areas in respect of which the Authority may issue an opinion.

Article 35: Collection of information

1. At the request of the Authority, the competent authorities shall provide the Authority with all the necessary information, in specified formats, to carry out the tasks conferred on it by this Regulation, provided that they have legal access to the relevant information. The information shall be accurate, coherent, complete and timely.

2. The Authority may also request information to be provided at recurring intervals and in specified formats or by way of comparable templates approved by the Authority. Such requests shall, where possible, be made using common reporting formats.

3. Upon a duly justified request from a competent authority ~~of a Member State~~, the Authority shall provide any information that is necessary to enable the competent authority to carry out its tasks in accordance with the professional secrecy obligations laid down in sectoral legislation and in Article 70.

4. Before requesting information in accordance with this Article and in order to avoid the duplication of reporting obligations, the Authority shall take account of any relevant existing statistics produced and disseminated by the European Statistical System and the European System of Central Banks.

5. Where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, to the national central bank or to the statistical office of the Member State concerned.

6. Where complete or accurate information is not available or is not made available in a timely fashion under paragraph 1 or 5, the Authority may request information, by way of a duly justified and reasoned request, directly from:

(a) relevant financial institutions;

(b) holding companies or branches of a relevant financial institution;

(c) non-regulated operational entities within a financial group or conglomerate that are significant to the financial activities of the relevant financial institutions.

The addressees of such a request shall provide the Authority promptly and without undue delay with clear, accurate and complete information.

The Authority shall inform the relevant competent authorities of requests in accordance with this paragraph and with paragraph 5.

At the request of the Authority, the competent authorities shall assist the Authority in collecting the information.

7. The Authority may use confidential information received pursuant to this Article only for the purposes of carrying out the duties assigned to it by this Regulation.

7a. Where the addressees of a request under paragraph 6 do not provide clear, accurate and complete information promptly, the Authority shall inform the European Central Bank where applicable and the relevant authorities in the Member States concerned which, subject to national law, shall cooperate with the Authority with a view of ensuring full access to the information and to any originating documents, books or records to which the addressees have legal access in order to verify the information.

Article 36: Relationship with the ESRB

1. The Authority shall cooperate closely and on a regular basis with the ESRB.

2. The Authority shall provide the ESRB with regular and timely information necessary for the achievement of its tasks. Any data necessary for the achievement of its tasks that are not in summary or aggregate form shall be provided, without delay, to the ESRB upon a reasoned request, as specified in Article 15 of Regulation (EU) No 1092/2010. The Authority, in cooperation with the ESRB, shall have in place adequate internal procedures for the transmission of confidential information, in particular information regarding individual financial institutions.

3. The Authority shall, in accordance with paragraphs 4 and 5, ensure a proper follow-up to ESRB warnings and recommendations referred to in Article 16 of Regulation (EU) No 1092/2010.

4. On receipt of a warning or recommendation from the ESRB addressed to the Authority, the Authority shall convene a meeting of the Board of Supervisors without delay and assess the implications of such a warning or recommendation for the fulfilment of its tasks.

It shall decide, by the relevant decision-making procedure, on any actions to be taken in accordance with the powers conferred upon it by this Regulation for addressing the issues

identified in the warnings and recommendations.

If the Authority does not act on a recommendation, it shall explain to the Council and to the ESRB its reasons for not doing so. The ESRB shall inform the European Parliament thereof in accordance with Article 19(5) of Regulation (EU) No 1092/2010.

5. On receipt of a warning or recommendation from the ESRB addressed to a competent national supervisory authority, the Authority shall, where relevant, use the powers conferred upon it by this Regulation to ensure a timely follow-up.

Where the addressee intends not to follow the recommendation of the ESRB, it shall inform and discuss with the Board of Supervisors its reasons for not acting.

5. Where the competent authority, in accordance with Article 17(1) of Regulation (EU) No 1092/2010, informs the Council and the ESRB of the actions it has undertaken in response to a recommendation of the ESRB, it shall take due account of the views of the Board of Supervisors and shall also inform the Commission.

6. In discharging the tasks set out in this Regulation, the Authority shall take the utmost account of the warnings and recommendations of the ESRB.

Article 37: Banking Stakeholder Group

1. To help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority, a Banking Stakeholder Group shall be established. The Banking Stakeholder Group shall be consulted on actions taken in accordance with Articles 10 to 15 concerning regulatory technical standards and implementing technical standards and, to the extent that these do not concern individual financial institutions, Article 16 concerning guidelines and recommendations. If actions must be taken urgently and consultation becomes impossible, the Banking Stakeholder Group shall be informed as soon as possible.

The Banking Stakeholder Group shall meet on its own initiative as necessary, and in any event at least four times a year.

2. The Banking Stakeholder Group shall be composed of 30 members, representing in balanced proportions credit and investment institutions operating in the Union, their employees' representatives as well as consumers, users of banking services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial institutions, three of whom shall represent cooperative and savings banks.

3. The members of the Banking Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders. In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical and gender balance and representation of stakeholders across the Union.

4. The Authority shall provide all necessary information subject to professional secrecy as set out in Article 70 and ensure adequate secretarial support for the Banking Stakeholder Group. Adequate compensation shall be provided to members of the Banking Stakeholder Group representing non-profit organisations, excluding industry representatives. Such compensation shall be at least equivalent to the reimbursement rates of officials pursuant to Title V, Chapter 1, Section 2 of the Staff Regulations of Officials of the European Union and the Conditions of Employment of Other Servants of the European Union laid down in Council Regulation (EEC, Euratom, ECSC) No 259/68[4] (Staff Regulations). The Banking Stakeholder Group may establish working groups on technical issues. Members of the Banking Stakeholder Group shall serve for a period of two-and-a-half years, following which a new selection procedure shall take place.

The members of the Banking Stakeholder Group may serve two successive terms.

5. The Banking Stakeholder Group may submit opinions and advice to the Authority on any issue related to the tasks of the Authority with particular focus on the tasks set out in Articles 10 to 16 and Articles 29, 30 and 32.

6. The Banking Stakeholder Group shall adopt its rules of procedure by a majority of two-thirds of its members.

7. The Authority shall make public the opinions and advice of the Banking Stakeholder Group and the results of its consultations.

Article 38: Safeguards

1. The Authority shall ensure that no decision adopted pursuant to Article 18 or 19 impinges in

[4] OJ L 56, 4.3.1968, p. 1.

any way on the fiscal responsibilities of Member States.

2. Where a Member State considers that a decision taken pursuant to Article 19(3) impinges on its fiscal responsibilities, it may notify the Authority and the Commission within 2 weeks after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In the case of such notification, the decision of the Authority shall be suspended.

Within a period of 1 month from the notification by the Member State, the Authority shall inform the Member State as to whether it maintains its decision or whether it amends or revokes it. If the decision is maintained or amended, the Authority shall state that fiscal responsibilities are not affected.

Where the Authority maintains its decision, the Council shall take a decision, by a majority of the votes cast, at one of its meetings not later than 2 months after the Authority has informed the Member State as set out in the fourth subparagraph, as to whether the Authority's decision is maintained.

Where the Council, after having considered the matter, does not take a decision to maintain the Authority's decision in accordance with the fifth subparagraph, the Authority's decision shall be terminated.

3. Where a Member State considers that a decision taken pursuant to Article 18(3) impinges on its fiscal responsibilities, it may notify the Authority, the Commission and the Council within 3 working days after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In the case of such notification, the decision of the Authority shall be suspended.

The Council shall, within 10 working days, convene a meeting and take a decision, by a simple majority of its members, as to whether the Authority's decision is revoked.

Where the Council, after having considered the matter, does not take a decision to revoke the Authority's decision in accordance with the fourth subparagraph, the suspension of the Authority's decision shall be terminated.

4. Where the Council has taken a decision in accordance with paragraph 3 not to revoke a decision of the Authority relating to Article 18(3), and the Member State concerned still considers that the decision of the Authority impinges upon its fiscal responsibilities, that Member State may notify the Commission and the Authority and request the Council to re-examine the matter. The Member State concerned shall clearly set out the reasons for its disagreement with the decision of the Council.

Within a period of 4 weeks after the notification referred to in the first subparagraph, the Council shall confirm its original decision or take a new decision in accordance with paragraph 3.

The period of 4 weeks may be extended by four additional weeks by the Council, if the particular circumstances of the case so require.

5. Any abuse of this Article, in particular in relation to a decision by the Authority which does not have a significant or material fiscal impact, shall be prohibited as incompatible with the internal market.

Article 39: Decision-making procedures

1. Before taking the decisions provided for in this Regulation, the Authority shall inform any named addressee of its intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter. This applies mutatis mutandis to recommendations as referred to in Article 17(3).

2. The decisions of the Authority shall state the reasons on which they are based.

3. The addressees of decisions of the Authority shall be informed of the legal remedies available under this Regulation.

4. Where the Authority has taken a decision pursuant to Article 18(3) or (4), it shall review that decision at appropriate intervals.

5. The decisions which the Authority takes pursuant to Article 17, 18 or 19 shall be made public and shall state the identity of the

competent authority or financial institution concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of financial institutions in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union.

CHAPTER III: ORGANISATION

SECTION 1: Board of Supervisors

Article 40: Composition

1. The Board of Supervisors shall be composed of:

(a) the Chairperson, who shall be non-voting;

(b) the head of the national public authority competent for the supervision of credit institutions in each Member State, who shall meet in person at least twice a year;

(c) one representative of the Commission, who shall be non-voting;

(d) one representative nominated by the Supervisory Board of the European Central Bank, who shall be non-voting;

(e) one representative of the ESRB, who shall be non-voting;

(f) one representative of each of the other two European Supervisory Authorities, who shall be non-voting.

2. The Board of Supervisors shall convene meetings with the Banking Stakeholder Group regularly, at least twice a year.

3. Each competent authority shall be responsible for nominating a high-level alternate from its authority, who may replace the member of the Board of Supervisors referred to in paragraph 1(b), where that person is prevented from attending.

4. Where the authority referred to in paragraph 1(b) is not a central bank, the member of the Board of Supervisors referred to in that point may decide to bring a representative from the Member State's central bank, who shall be non-voting.

4a. In discussions not relating to individual financial institutions, as provided in Article 44(4), the representative nominated by the Supervisory Board of the European Central Bank may be accompanied by a representative of the European Central Bank with expertise on central banking tasks.

5. In Member States where more than one authority is responsible for the supervision according to this Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by the member referred to in paragraph 1(b), that member may bring a representative from the relevant national authority, who shall be non-voting.

6. For the purpose of acting within the scope of Directive 94/19/EC, the member of the Board of Supervisors referred to in paragraph 1(b) may, where appropriate, be accompanied by a representative from the relevant bodies which administer deposit-guarantee schemes in each Member State, who shall be non-voting.

7. The Board of Supervisors may decide to admit observers.

The Executive Director may participate in meetings of the Board of Supervisors, without the right to vote.

Article 41: Internal committees and panels

1. The Board of Supervisors may establish internal committees or panels for specific tasks attributed to the Board of Supervisors, and may provide for the delegation of certain clearly defined tasks and decisions to internal committees or panels, to the Management Board or to the Chairperson.

1a. For the purposes of Article 17, the Board of Supervisors shall convoke an independent panel, consisting of the Chairperson of the Board of Supervisors and six other members, who are not representatives of the competent authority alleged to have breached Union law and who have neither any interest in the matter nor direct links to the competent authority concerned.

Each member of the panel shall have one vote.

Decisions of the panel shall be taken where at least four members vote in favour.

2. For the purposes of Article 19, the Board of Supervisors shall convoke an independent panel consisting of the Chairperson of the Board of Supervisors, and of six other members who are not representatives of the competent authorities party to the disagreement and who have neither

any interest in the conflict nor direct links to the competent authorities concerned.

Each member of the panel shall have one vote.

Decisions of the panel shall be taken where at least four members vote in favour.

3. The panels referred to in this Article shall propose decisions under Article 17 or Article 19 for final adoption by the Board of Supervisors.

4. The Board of Supervisors shall adopt rules of procedure for the panel referred to in this Article.

Article 42: Independence

When carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks.

The first and second paragraphs are without prejudice to the tasks conferred on the European Central Bank by Regulation (EU) No 1024/2013.

Article 43: Tasks

1. The Board of Supervisors shall give guidance to the work of the Authority and shall be in charge of taking the decisions referred to in Chapter II.

2. The Board of Supervisors shall adopt the opinions, recommendations, and decisions, and issue the advice referred to in Chapter II.

3. The Board of Supervisors shall appoint the Chairperson.

4. The Board of Supervisors shall adopt, before 30 September of each year, on the basis of a proposal by the Management Board, the work programme of the Authority for the coming year, and shall transmit it for information to the European Parliament, the Council and the Commission.

The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

5. The Board of Supervisors shall, on the basis of a proposal by the Management Board, adopt the annual report on the activities of the Authority, including on the performance of the Chairperson's duties, on the basis of the draft report referred to in Article 53(7) and shall transmit that report to the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee by 15 June each year. The report shall be made public.

6. The Board of Supervisors shall adopt the multi-annual work programme of the Authority, and shall transmit it for information to the European Parliament, the Council and the Commission.

The multi-annual work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

7. The Board of Supervisors shall adopt the budget in accordance with Article 63.

8. The Board of Supervisors shall exercise disciplinary authority over the Chairperson and the Executive Director and may remove them from office in accordance with Article 48(5) or 51(5) respectively.

Article 44: Decision-making

1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.

With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions, which shall include at least a simple majority of its members from competent authorities of Member States that are participating Member States as defined in point 1 of Article 2 of Regulation (EU) No 1024/2013 (participating Member States) and a simple majority of its members from competent authorities of Member States that are not participating Member States as defined in point 1 of Article 2 of Regulation (EU) No 1024/2013 (non-participating Member States).

With regard to decisions in accordance with Articles 17 and 19, the decision proposed by the panel shall be adopted by a simple majority of the voting members of the Board of Supervisors, which shall include a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States.

By way of derogation from the third subparagraph, from the date when four or fewer voting members are from competent authorities of non-participating Member States, the decision proposed by the panel shall be adopted by a simple majority of the voting members of the Board of Supervisors, which shall include at least one vote from members from competent authorities of non-participating Member States.

Each voting member shall have one vote.

With regard to the composition of the panel in accordance with Article 41(2), the Board of Supervisors shall strive for consensus. In the absence of consensus, decisions of the Board of Supervisors shall be taken by a majority of three quarters of its voting members. Each voting member shall have one vote.

With regard to decisions adopted under Article 18(3) and (4), and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a simple majority of its voting members, which shall include a simple majority of its members from competent authorities of participating Member States and a simple majority of its members from competent authorities of non-participating Member States.

2. Meetings of the Board of Supervisors shall be convened by the Chairperson at his own initiative or at the request of one third of its members, and shall be chaired by the Chairperson.

3. The Board of Supervisors shall adopt and make public its rules of procedure.

4. The non-voting members and the observers, with the exception of the Chairperson and the Executive Director, shall not attend any discussions within the Board of Supervisors relating to individual financial institutions, unless otherwise provided for in Article 75(3) or in the acts referred to in Article 1(2).

4a. The Authority's Chair shall have the prerogative to call a vote at any time. Without prejudice to that power and to the effectiveness of the Authority's decision-making procedures, the Board of Supervisors of the Authority shall strive for consensus when taking its decisions.

SECTION 2: Management Board

Article 45: Composition

1. The Management Board shall be composed of the Chairperson and six other members of the Board of Supervisors, elected by and from the voting members of the Board of Supervisors.

Other than the Chairperson, each member of the Management Board shall have an alternate, who may replace him if he is prevented from attending.

The term of office of the members elected by the Board of Supervisors shall be two-and-a-half years. That term may be extended once. The composition of the Management Board shall be balanced and proportionate and shall reflect the Union as a whole. The Management Board shall include at least two representatives of non-participating Member States. Mandates shall be overlapping and an appropriate rotating arrangement shall apply.

2. Decisions by the Management Board shall be adopted on the basis of a majority of the members present. Each member shall have one vote.

The Executive Director and a representative of the Commission shall participate in meetings of the Management Board without the right to vote.

The representative of the Commission shall have the right to vote on matters referred to in Article 63.

The Management Board shall adopt and make public its rules of procedure.

3. Meetings of the Management Board shall be convened by the Chairperson at his own initiative or at the request of at least a third of its members, and shall be chaired by the Chairperson.

The Management Board shall meet prior to every meeting of the Board of Supervisors and as often as the Management Board deems necessary. It shall meet at least five times a year.

4. The members of the Management Board may, subject to the rules of procedure, be assisted by advisers or experts. The non-voting members, with the exception of the Executive Director,

shall not attend any discussions within the Management Board relating to individual financial institutions.

Article 46: Independence

The members of the Management Board shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Management Board in the performance of their tasks.

Article 47: Tasks

1. The Management Board shall ensure that the Authority carries out its mission and performs the tasks assigned to it in accordance with this Regulation.

2. The Management Board shall propose, for adoption by the Board of Supervisors, an annual and multi-annual work programme.

3. The Management Board shall exercise its budgetary powers in accordance with Articles 63 and 64.

4. The Management Board shall adopt the Authority's staff policy plan and, pursuant to Article 68(2), the necessary implementing measures of the Staff Regulations.

5. The Management Board shall adopt the special provisions on right of access to the documents of the Authority, in accordance with Article 72.

6. The Management Board shall propose an annual report on the activities of the Authority, including on the Chairperson's duties, on the basis of the draft report referred to in Article 53(7) to the Board of Supervisors for approval.

7. The Management Board shall adopt and make public its rules of procedure.

8. The Management Board shall appoint and remove the members of the Board of Appeal in accordance with Article 58(3) and (5).

SECTION 3: Chairperson

Article 48: Appointment and tasks

1. The Authority shall be represented by a Chairperson, who shall be a full-time independent professional.

The Chairperson shall be responsible for preparing the work of the Board of Supervisors and shall chair the meetings of the Board of Supervisors and the Management Board.

2. The Chairperson shall be appointed by the Board of Supervisors on the basis of merit, skills, knowledge of financial institutions and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure.

Before taking up his duties, and up to 1 month after the selection by the Board of Supervisors, the European Parliament may, after having heard the candidate selected by the Board of Supervisors, object to the designation of the selected person.

The Board of Supervisors shall also elect, from among its members, an alternate who shall carry out the functions of the Chairperson in his absence. That alternate shall not be elected from among the members of the Management Board.

3. The Chairperson's term of office shall be 5 years and may be extended once.

4. In the course of the 9 months preceding the end of the 5-year term of office of the Chairperson, the Board of Supervisors shall evaluate:

(a) the results achieved in the first term of office and the way they were achieved;

(b) the Authority's duties and requirements in the coming years.

The Board of Supervisors, taking into account the evaluation, may extend the term of office of the Chairperson once subject to confirmation by the European Parliament.

5. The Chairperson may be removed from office only by the European Parliament following a decision of the Board of Supervisors.

The Chairperson shall not prevent the Board of Supervisors from discussing matters relating to the Chairperson, in particular the need for his removal, and shall not be involved in deliberations concerning such a matter.

Article 49: Independence

Without prejudice to the role of the Board of Supervisors in relation to the tasks of the

Chairperson, the Chairperson shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Chairperson in the performance of his tasks.

In accordance with the Staff Regulations referred to in Article 68, the Chairperson shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Article 49a: Expenses

The Chair shall make public meetings held and hospitality received. Expenses shall be recorded publicly in accordance with the Staff Regulations.

Article 50: Report

1. The European Parliament and the Council may invite the Chairperson or his alternate to make a statement, while fully respecting his independence. The Chairperson shall make a statement before the European Parliament and answer any questions put by its members, whenever so requested.

2. The Chairperson shall report in writing on the main activities of the Authority to the European Parliament when requested and at least 15 days before making the statement referred to in paragraph 1.

3. In addition to the information referred to in Articles 11 to 18 and Articles 20 and 33, the report shall also include any relevant information requested by the European Parliament on an ad-hoc basis.

SECTION 4: Executive Director

Article 51: Appointment

1. The Authority shall be managed by an Executive Director, who shall be a full-time independent professional.

2. The Executive Director shall be appointed by the Board of Supervisors, after confirmation by the European Parliament, on the basis of merit, skills, knowledge of financial institutions and markets, and experience relevant to financial supervision and regulation and managerial experience, following an open selection procedure.

3. The Executive Director's term of office shall be 5 years and may be extended once.

4. In the course of the 9 months preceding the end of the Executive Director's term of office, the Board of Supervisors shall evaluate in particular:

(a) the results achieved in the first term of office and the way they were achieved;

(b) the Authority's duties and requirements in the coming years.

The Board of Supervisors, taking into account the evaluation referred to in the first subparagraph, may extend the term of office of the Executive Director once.

5. The Executive Director may be removed from office only upon a decision of the Board of Supervisors.

Article 52: Independence

Without prejudice to the respective roles of the Management Board and the Board of Supervisors in relation to the tasks of the Executive Director, the Executive Director shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Executive Director in the performance of his tasks.

In accordance with the Staff Regulations referred to in Article 68, the Executive Director shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Article 52a: Expenses

The Executive Director shall make public meetings held and hospitality received. Expenses shall be recorded publicly in accordance with the Staff Regulations.

Article 53: Tasks

1. The Executive Director shall be in charge of the management of the Authority and shall prepare the work of the Management Board.

2. The Executive Director shall be responsible for implementing the annual work programme of the Authority under the guidance of the

Board of Supervisors and under the control of the Management Board.

3. The Executive Director shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Authority, in accordance with this Regulation.

4. The Executive Director shall prepare a multi-annual work programme, as referred to in Article 47(2).

5. Each year, by 30 June, the Executive Director shall prepare a work programme for the following year, as referred to in Article 47(2).

6. The Executive Director shall draw up a preliminary draft budget of the Authority pursuant to Article 63 and shall implement the budget of the Authority pursuant to Article 64.

7. Each year the Executive Director shall prepare a draft report with a section on the regulatory and supervisory activities of the Authority and a section on financial and administrative matters.

8. The Executive Director shall exercise in respect to the Authority's staff the powers laid down in Article 68 and manage staff matters.

CHAPTER IV: JOINT BODIES OF THE EUROPEAN SUPERVISORY AUTHORITIES

SECTION 1: Joint Committee of European Supervisory Authorities

Article 54: Establishment

1. The Joint Committee of the European Supervisory Authorities is hereby established.

2. The Joint Committee shall serve as a forum in which the Authority shall cooperate regularly and closely and ensure cross-sectoral consistency with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority), in particular regarding:

- financial conglomerates,

- accounting and auditing,

- micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability,

- retail investment products,

- measures combating money laundering, and

- information exchange with the ESRB and developing the relationship between the ESRB and the ESAs.

3. The Joint Committee shall have a dedicated staff provided by the ESAs that shall act as a secretariat. The Authority shall contribute adequate resources to administrative, infrastructure and operational expenses.

4. In the event that a financial institution reaches across different sectors, the Joint Committee shall resolve disagreements in accordance with Article 56.

Article 55: Composition

1. The Joint Committee shall be composed of the Chairpersons of the ESAs, and, where applicable, the Chairperson of any Sub-Committee established pursuant to Article 57.

2. The Executive Director, a representative of the Commission and the ESRB shall be invited to the meetings of the Joint Committee, as well as of any Sub-Committees referred to in Article 57, as observers.

3. The Chairperson of the Joint Committee shall be appointed on an annual rotational basis from among the Chairpersons of the ESAs. The Chairperson of the Joint Committee shall be a Vice-Chair of the ESRB.

4. The Joint Committee shall adopt and publish its own rules of procedure. The rules may specify further participants in the meetings of the Joint Committee.

The Joint Committee shall meet at least once every 2 months.

Article 56: Joint positions and common acts

Within the scope of its tasks in Chapter II, and in particular with respect to the implementation of Directive 2002/87/EC, where relevant, the Authority shall reach joint positions with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and with the European Supervisory Authority (European Securities and Markets Authority), as appropriate.

Acts pursuant to Articles 10 to 15, 17, 18 or 19 of this Regulation in relation to the application of Directive 2002/87/EC and of any other Union acts referred to in Article 1(2) that also fall

within the area of competence of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) or the European Supervisory Authority (European Securities and Markets Authority) shall be adopted, in parallel, by the Authority, the European Supervisory Authority (European Insurance and Occupational Pensions Authority), and the European Supervisory Authority (European Securities and Markets Authority), as appropriate.

Article 57: Sub-Committees

1. For the purposes of Article 56, a Sub-Committee on Financial Conglomerates to the Joint Committee shall be established.

2. The Sub-Committee shall be composed of the individuals referred to in Article 55(1), and one high-level representative from the current staff of the relevant competent authority from each Member State.

3. The Sub-Committee shall elect a Chairperson from among its members, who shall also be a member of the Joint Committee.

4. The Joint Committee may establish further Sub-Committees.

SECTION 2: Board of Appeal

Article 58: Composition and operation

1. The Board of Appeal shall be a joint body of the ESAs.

2. The Board of Appeal shall be composed of six members and six alternates, who shall be individuals of a high repute with a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking, insurance, occupational pensions, securities markets or other financial services, excluding current staff of the competent authorities or other national or Union institutions involved in the activities of the Authority. The Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers.

The Board of Appeal shall designate its President.

3. Two members of the Board of Appeal and two alternates shall be appointed by the Management Board of the Authority from a short-list proposed by the Commission, following a public call for expressions of interest published in the Official Journal of the European Union, and after consultation of the Board of Supervisors.

The other members shall be appointed in accordance with Regulation (EU) No 1094/2010 and Regulation (EU) No 1095/2010.

4. The term of office of the members of the Board of Appeal shall be 5 years. That term may be extended once.

5. A member of the Board of Appeal appointed by the Management Board of the Authority shall not be removed during his term of office, unless he has been found guilty of serious misconduct and the Management Board takes a decision to that effect after consulting the Board of Supervisors.

6. The decisions of the Board of Appeal shall be adopted on the basis of a majority of at least four of its six members. Where the appealed decision falls within the scope of this Regulation, the deciding majority shall include at least one of the two members of the Board of Appeal appointed by the Authority.

7. The Board of Appeal shall be convened by its President when necessary.

8. The ESAs shall ensure adequate operational and secretarial support for the Board of Appeal through the Joint Committee.

Article 59: Independence and impartiality

1. The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in relation to the Authority, its Management Board or its Board of Supervisors.

2. Members of the Board of Appeal shall not take part in any appeal proceedings in which they have any personal interest, if they have previously been involved as representatives of one of the parties to the proceedings, or if they have participated in the decision under appeal.

3. If, for one of the reasons referred to in paragraphs 1 and 2 or for any other reason, a member of a Board of Appeal considers that another member should not take part in any appeal proceedings, he shall inform the Board of Appeal accordingly.

4. Any party to the appeal proceedings may object to the participation of a member of the Board of Appeal on any of the grounds referred to in paragraphs 1 and 2, or if suspected of bias.

No objection may be based on the nationality of members nor shall it be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has nonetheless taken a procedural step other than objecting to the composition of the Board of Appeal.

5. The Board of Appeal shall decide on the action to be taken in the cases specified in paragraphs 1 and 2 without the participation of the member concerned.

For the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate. Where the alternate is in a similar situation, the Chairperson shall designate a replacement from among the available alternates.

6. The members of the Board of Appeal shall undertake to act independently and in the public interest.

For that purpose, they shall make a declaration of commitments and a declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence.

Those declarations shall be made public, annually and in writing.

CHAPTER V: REMEDIES

Article 60: Appeals

1. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

2. The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision.

The Board of Appeal shall decide upon the appeal within 2 months after the appeal has been lodged.

3. An appeal lodged pursuant to paragraph 1 shall not have suspensive effect.

However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.

4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations.

5. The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.

6. The Board of Appeal shall adopt and make public its rules of procedure.

7. The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority.

Article 61: Actions before the Court of Justice of the European Union

1. Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority.

2. Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the Authority, in accordance with Article 263 TFEU.

3. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU.

4. The Authority shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

CHAPTER VI: FINANCIAL PROVISIONS

Article 62: Budget of the Authority

1. The revenues of the Authority, a European body in accordance with Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities[5] (hereinafter the "Financial Regulation"), shall consist, in particular, of any combination of the following:

(a) obligatory contributions from the national public authorities competent for the supervision of financial institutions, which shall be made in accordance with a formula based on the weighting of votes set out in Article 3(3) of Protocol (No 36) on transitional provisions. For the purposes of this Article, Article 3(3) of Protocol (No 36) on transitional provisions shall continue to apply beyond the deadline of 31 October 2014 therein established;

(b) a subsidy from the Union, entered in the General Budget of the European Union (Commission Section);

(c) any fees paid to the Authority in the cases specified in the relevant instruments of Union law.

2. The expenditure of the Authority shall include, at least, staff, remuneration, administrative, infrastructure, professional training and operational expenses.

3. Revenue and expenditure shall be in balance.

4. Estimates of all Authority revenue and expenditure shall be prepared for each financial year, corresponding to the calendar year, and shall be presented in the budget of the Authority.

Article 63: Establishment of the budget

1. By 15 February each year, the Executive Director shall draw up a draft statement of estimates of revenue and expenditure for the following financial year, and shall forward it to the Management Board and the Board of Supervisors, together with the establishment plan. Each year, the Board of Supervisors shall, on the basis of the draft statement drawn up by the Executive Director and approved by the Management Board, produce a statement of estimates of revenue and expenditure of the Authority for the following financial year. That statement of estimates, including a draft establishment plan, shall be transmitted by the Board of Supervisors to the Commission by 31 March. Prior to adoption of the statement of estimates, the draft prepared by the Executive Director shall be approved by the Management Board.

2. The statement of estimates shall be transmitted by the Commission to the European Parliament and to the Council (hereinafter referred to together as the "budgetary authority"), together with the draft budget of the European Union.

3. On the basis of the statement of estimates, the Commission shall enter in the draft budget of the European Union the estimates it deems necessary in respect of the establishment plan and the amount of the subsidy to be charged to the General Budget of the European Union in accordance with Articles 313 and 314 TFEU.

4. The budgetary authority shall adopt the establishment plan for the Authority. The budgetary authority shall authorise the appropriations for the subsidy to the Authority.

5. The budget of the Authority shall be adopted by the Board of Supervisors. It shall become final after the final adoption of the General Budget of the European Union. Where necessary, it shall be adjusted accordingly.

6. The Management Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any project relating to property, such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budgetary authority intends to issue an opinion, it shall, within 2 weeks of receipt of the information on the project, notify the Authority of its intention to issue such an opinion. In the absence of a reply, the Authority may proceed with the planned operation.

Article 64: Implementation and control of the budget

1. The Executive Director shall act as authorising officer and shall implement the Authority's budget.

2. By 1 March following the completion of each financial year, the Authority's accounting officer shall forward to the Commission's accounting officer and to the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management during the financial year. The Authority's accounting officer shall also send the report on

[5] OJ L 248, 16.9.2002, p. 1.

budgetary and financial management to the members of the Board of Supervisors, the European Parliament and the Council by 31 March of the following year.

The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of the Financial Regulation.

3. After receiving the observations of the Court of Auditors on the provisional accounts of the Authority in accordance with Article 129 of the Financial Regulation, the Executive Director, acting on his own responsibility, shall draw up the final accounts of the Authority and transmit them, for opinion, to the Management Board.

4. The Management Board shall deliver an opinion on the final accounts of the Authority.

5. The Executive Director shall transmit those final accounts, accompanied by the opinion of the Management Board, by 1 July following the completion of the financial year, to the Members of the Board of Supervisors, the European Parliament, the Council, the Commission and the Court of Auditors.

6. The final accounts shall be published.

7. The Executive Director shall send the Court of Auditors a reply to the latter's observations by 30 September. He shall also send a copy of that reply to the Management Board and the Commission.

8. The Executive Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of the Financial Regulation, any information necessary for the smooth application of the discharge procedure for the financial year in question.

9. The European Parliament, following a recommendation from the Council acting by qualified majority, shall, before 15 May of the year N + 2, grant a discharge to the Authority for the implementation of the budget comprising revenue from the General Budget of the European Union and competent authorities for the financial year N.

Article 65: Financial rules

The financial rules applicable to the Authority shall be adopted by the Management Board after consulting the Commission. Those rules may not depart from Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities[6] unless the specific operational needs for the functioning of the Authority so require and only with the prior agreement of the Commission.

Article 66: Anti-fraud measures

1. For the purposes of combating fraud, corruption and any other illegal activity, Regulation (EC) No 1073/1999 shall apply to the Authority without any restriction.

2. The Authority shall accede to the Interinstitutional Agreement concerning internal investigations by OLAF and shall immediately adopt appropriate provisions for all staff of the Authority.

3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Authority as well as on the staff responsible for allocating these monies.

CHAPTER VII: GENERAL PROVISIONS

Article 67: Privileges and immunities

The Protocol (No 7) on the privileges and immunities of the European Union annexed to the Treaty on European Union and to the TFEU shall apply to the Authority and its staff.

Article 68: Staff

1. The Staff Regulations, the Conditions of Employment of Other Servants and the rules adopted jointly by the Union institutions for the purpose of applying them shall apply to the staff of the Authority, including its Executive Director and its Chairperson.

2. The Management Board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations.

3. In respect of its staff, the Authority shall exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of Employment of Other Servants.

[6] OJ L 357, 31.12.2002, p. 72.

4. The Management Board shall adopt provisions to allow national experts from Member States to be seconded to the Authority.

Article 69: Liability of the Authority

1. In the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Union shall have jurisdiction in any dispute over the remedying of such damage.

2. The personal financial liability and disciplinary liability of Authority staff towards the Authority shall be governed by the relevant provisions applying to the staff of the Authority.

Article 70: Obligation of professional secrecy

1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.

Article 16 of the Staff Regulations shall apply to them.

In accordance with the Staff Regulations, the staff shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence staff members of the Authority in the performance of their tasks.

2. Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified.

Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.

3. Paragraphs 1 and 2 shall not prevent the Authority from exchanging information with national supervisory authorities in accordance with this Regulation and other Union legislation applicable to financial institutions.

That information shall be subject to the conditions of professional secrecy referred to in paragraphs 1 and 2. The Authority shall lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.

4. The Authority shall apply Commission Decision 2001/844/EC/ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure.[7]

Article 71: Data protection

This Regulation shall be without prejudice to the obligations of Member States relating to their processing of personal data under Directive 95/46/EC or the obligations of the Authority relating to its processing of personal data under Regulation (EC) No 45/2001 when fulfilling its responsibilities.

Article 72: Access to documents

1. Regulation (EC) No 1049/2001 shall apply to documents held by the Authority.

2. The Management Board shall, by 31 May 2011, adopt practical measures for applying Regulation (EC) No 1049/2001.

3. Decisions taken by the Authority pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice of the European Union, following an appeal to the Board of Appeal, as appropriate, in accordance with the conditions laid down in Articles 228 and 263 TFEU respectively.

Article 73: Language arrangements

1. Council Regulation No 1 determining the languages to be used by the European Economic Community[8] shall apply to the Authority.

2. The Management Board shall decide on the internal language arrangements for the Authority.

[7] OJ L 317, 3.12.2001, p. 1.
[8] OJ 17, 6.10.1958, p. 385.

3. The translation services required for the functioning of the Authority shall be provided by the Translation Centre for the Bodies of the European Union.

Article 74: Headquarters Agreement

The necessary arrangements concerning the accommodation to be provided for the Authority in the Member State where its seat is located and the facilities to be made available by that Member State, as well as the specific rules applicable in that Member State to the Executive Director, the members of the Management Board, the staff of the Authority and members of their families shall be laid down in a Headquarters Agreement between the Authority and that Member State concluded after obtaining the approval of the Management Board.

That Member State shall provide the best possible conditions to ensure the proper functioning of the Authority, including multilingual, European-oriented schooling and appropriate transport connections.

Article 75: Participation of third countries

1. Participation in the work of the Authority shall be open to third countries which have concluded agreements with the Union whereby they have adopted and are applying Union law in the areas of competence of the Authority as referred to in Article 1(2).

2. The Authority may cooperate with the countries referred to in paragraph 1, applying legislation which has been recognised as equivalent in the areas of competence of the Authority referred to in Article 1(2), as provided for in international agreements concluded by the Union in accordance with Article 216 TFEU.

3. Under the relevant provisions of the agreements referred to in paragraphs 1 and 2, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of the countries referred to in paragraph 1 in the work of the Authority, including provisions relating to financial contributions and to staff. They may provide for representation, as an observer, on the Board of Supervisors, but shall ensure that those countries do not attend any discussions relating to individual financial institutions, except where there is a direct interest.

CHAPTER VIII: TRANSITIONAL AND FINAL PROVISIONS

Article 76: Preparatory actions

1. Following the entry into force of this Regulation, and before the establishment of the Authority, CEBS shall act in close cooperation with the Commission to prepare for the replacement of CEBS by the Authority.

2. Once the Authority has been established, the Commission shall be responsible for the administrative establishment and initial administrative operation of the Authority until the Authority has appointed an Executive Director.

For that purpose, until such time as the Executive Director takes up his duties following his appointment by the Board of Supervisors in accordance with Article 51, the Commission may assign one official on an interim basis in order to fulfil the functions of the Executive Director. That period shall be limited to the time necessary for the appointment of an Executive Director of the Authority.

The interim Executive Director may authorise all payments covered by credits provided in the budget of the Authority, once approved by the Management Board and may conclude contracts, including staff contracts following the adoption of the Authority's establishment plan.

3. Paragraphs 1 and 2 are without prejudice to the powers of the Board of Supervisors and the Management Board.

4. The Authority shall be considered the legal successor of CEBS. By the date of establishment of the Authority, all assets and liabilities and all pending operations of CEBS shall be automatically transferred to the Authority. CEBS shall establish a statement showing its closing asset and liability situation as of the date of that transfer. That statement shall be audited and approved by CEBS and by the Commission.

Article 77: Transitional staff provisions

1. By way of derogation from Article 68, all employment contracts and secondment agreements concluded by CEBS or its Secretariat and in force on 1 January 2011 shall be honoured until their expiry date. They may not be extended.

2. All members of staff under contracts referred to in paragraph 1 shall be offered the possibility of concluding temporary agent contracts pursuant to Article 2(a) of the Conditions of Employment of Other Servants at the various grades as set out in the Authority's establishment plan.

An internal selection limited to staff who have contracts with CEBS or its Secretariat shall be carried out after the entry into force of this Regulation by the authority authorised to conclude contracts in order to check the ability, efficiency and integrity of those to be engaged. The internal selection procedure shall take full account of the skills and experience demonstrated by the individuals' performance prior to the engagement.

3. Depending on the type and level of functions to be performed, successful applicants shall be offered temporary agents' contracts of a duration corresponding at least to the time remaining under the prior contract.

4. The relevant national law relating to labour contracts and other relevant instruments shall continue to apply to staff members with prior contracts who choose not to apply for temporary agent's contracts or who are not offered temporary agents contracts in accordance with paragraph 2.

Article 78: National provisions

The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

Article 79: Amendments

Decision No 716/2009/EC is hereby amended in so far as CEBS is removed from the list of beneficiaries set out in Section B of the Annex to that Decision.

Article 80: Repeal

Commission Decision 2009/78/EC, establishing CEBS, is hereby repealed with effect from 1 January 2011.

Article 81: Review

1. By 2 January 2014, and every 3 years thereafter, the Commission shall publish a general report on the experience acquired as a result of the operation of the Authority and the procedures laid down in this Regulation. That report shall evaluate, inter alia:

(a) the convergence in supervisory practices reached by competent authorities:

(i) the convergence in functional independence of the competent authorities and in standards equivalent to corporate governance;

(ii) the impartiality, objectivity and autonomy of the Authority;

(b) the functioning of the colleges of supervisors;

(c) the progress achieved towards convergence in the fields of crisis prevention, management and resolution, including Union funding mechanisms;

(d) the role of the Authority as regards systemic risk;

(e) the application of the safeguard clause established in Article 38;

(f) the application of the binding mediation role established in Article 19.

2. The report referred to in paragraph 1 shall also examine whether:

(a) it is appropriate to continue separate supervision of banking, insurance, occupational pensions, securities and financial markets;

(b) it is appropriate to undertake prudential supervision and supervise the conduct of business separately or by the same supervisor;

(c) it is appropriate to simplify and reinforce the architecture of the ESFS in order to increase the coherence between the macro and the micro levels and between the ESAs;

(d) the evolution of the ESFS is consistent with that of the global evolution;

(e) there is sufficient diversity and excellence within the ESFS;

(f) accountability and transparency in relation to publication requirements are adequate;

(g) the resources of the Authority are adequate to carry out its responsibilities;

(h) it is appropriate for the seat of the Authority to be maintained or to move the ESAs to a single seat to enhance better coordination between them.

3. Concerning the issue of direct supervision of institutions or infrastructures of pan-European reach and taking account of market developments, the stability of the internal market and the cohesion of the Union as a whole, the Commission shall draw up an annual report on the appropriateness of entrusting the Authority with further supervisory responsibilities in this area.

4. The report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council.

Article 81a: Review of voting arrangements

From the date on which the number of non-participating Member States reaches four, the Commission shall review and report to the European Parliament, the European Council and the Council on the operation of the voting arrangements described in Articles 41 and 44, taking into account any experience gained in the application of this Regulation.

Article 82: Entry into force

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply from 1 January 2011, with the exception of Article 76 and Article 77(1) and (2), which shall apply as from the date of its entry into force.

The Authority shall be established on 1 January 2011.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 24 November 2010.

§12. Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJ L 331, December 15th 2010, pp. 48-83

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) The financial crisis in 2007 and 2008 exposed important shortcomings in financial supervision, both in particular cases and in relation to the financial system as a whole. Nationally based supervisory models have lagged behind financial globalisation and the integrated and interconnected reality of European financial markets, in which many financial institutions operate across borders. The crisis exposed shortcomings in the areas of cooperation, coordination, consistent application

[1] OJ C 13, 20.1.2010, p. 1.
[2] Opinion of 22 January 2010 (not yet published in the Official Journal).
[3] Position of the European Parliament of 22 September 2010 (OJ L 276 October 20th 2010) and decision of the Council of 17 November 2010.

of Union law and trust between national supervisors.

(2) Before and during the financial crisis, the European Parliament has called for a move towards more integrated European supervision in order to ensure a true level playing field for all actors at the level of the Union and to reflect the increasing integration of financial markets in the Union (in its resolutions of 13 April 2000 on the Commission communication on implementing the framework for financial markets: Action Plan,[4] of 21 November 2002 on prudential supervision rules in the European Union,[5] of 11 July 2007 on financial services policy (2005 to 2010) – White Paper,[6] of 23 September 2008 with recommendations to the Commission on hedge funds and private equity[7] and of 9 October 2008 with recommendations to the Commission on Lamfalussy follow-up: future structure of supervision,[8] and in its positions of 22 April 2009 on the amended proposal for a directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[9] and of 23 April 2009 on the proposal for a regulation of the European Parliament and of the Council on Credit Rating Agencies[10]).

(3) In November 2008, the Commission mandated a High-Level Group chaired by Jacques de Larosière to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting the citizen and rebuilding trust in the financial system. In its final report presented on 25 February 2009 (the "de Larosière Report"), the High-Level Group recommended that the supervisory framework be strengthened to reduce the risk and severity of future financial crises. It recommended reforms to the structure of supervision of the financial sector in the Union. The group also concluded that a European System of Financial Supervisors should be created, comprising three European Supervisory Authorities, one for the banking sector, one for the securities sector and one for the insurance and occupational pensions sector, and recommended the creation of a European Systemic Risk Council. The report represented the reforms the experts considered were needed and on which work had to begin immediately.

(4) In its Communication of 4 March 2009 entitled "Driving European Recovery", the Commission proposed to put forward draft legislation creating a European system of financial supervision and a European systemic risk board. In its Communication of 27 May 2009 entitled "European Financial Supervision", it provided more detail about the possible architecture of such a new supervisory framework reflecting the main thrust of the de Larosière Report.

(5) The European Council, in its conclusions of 19 June 2009, confirmed that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, should be established. The system should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups and establishing a European single rule book applicable to all financial institutions in the internal market. It emphasised that the European Supervisory Authorities should also have supervisory powers in relation to credit rating agencies and invited the Commission to prepare concrete proposals on how the European System of Financial Supervisors could play a strong role in crisis situations, while stressing that decisions taken by the European Supervisory Authorities should not impinge on the fiscal responsibilities of Member States.

(6) The financial and economic crisis has created real and serious risks to the stability of the financial system and the functioning of the internal market. Restoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, and thereby to preserve and improve the conditions for the establishment of a fully integrated and functioning internal market in the field of financial services. Moreover, deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks.

(7) The Union has reached the limits of what can be done with the present status of the Committees of European Supervisors. The Union cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border financial institutions; where there is insufficient cooperation and information exchange between national supervisors; where joint action by national authorities requires complicated arrangements to take account of the patchwork

[4] OJ C 40, 7.2.2001, p. 453.
[5] OJ C 25 E, 29.1.2004, p. 394.
[6] OJ C 175 E, 10.7.2008, p. 392.
[7] OJ C 8 E, 14.1.2010, p. 26.
[8] OJ C 9 E, 15.1.2010, p. 48.
[9] OJ C 184 E, 8.7.2010, p. 214.
[10] OJ C 184 E, 8.7.2010, p. 292.

of regulatory and supervisory requirements; where national solutions are most often the only feasible option in responding to problems at the level of the Union; and where different interpretations of the same legal text exist. The European System of Financial Supervision (hereinafter the ESFS') should be designed to overcome those deficiencies and provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network.

(8) The ESFS should be an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level. Greater harmonisation and the coherent application of rules for financial institutions and markets across the Union should also be achieved. In addition to the European Supervisory Authority (European Insurance and Occupational Pensions Authority) (hereinafter the Authority'), a European Supervisory Authority (European Banking Authority) and a European Supervisory Authority (European Securities and Markets Authority) as well as a Joint Committee of the European Supervisory Authorities (hereinafter the Joint Committee') should be established. A European Systemic Risk Board (hereinafter the ESRB') should form part of the ESFS for the purposes of the tasks as specified in this Regulation and in Regulation (EU) No 1092/2010 of the European Parliament and of the Council.

(9) The European Supervisory Authorities (hereinafter collectively referred to as the "ESAs") should replace the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC,[11] the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC[12] and the Committee of European Securities Regulators established by Commission Decision 2009/77/EC,[13] and should assume all of the tasks and competences of those committees including the continuation of ongoing work and projects, where appropriate. The scope of each European Supervisory Authority's action should be clearly defined. The ESAs should be accountable to the European Parliament and the Council. When that accountability relates to cross-sectoral issues that have been coordinated through the Joint Committee, the ESAs should be accountable, through the Joint Committee, for such coordination.

(10) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial institutions. The Authority should protect public values such as the stability of the financial system, the transparency of markets and financial products, and the protection of policyholders, pension scheme members and beneficiaries. The Authority should also prevent regulatory arbitrage, guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, consumers and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the area of insurance, reinsurance and occupational retirement provision regulation and supervision, and related corporate governance, auditing and financial reporting issues. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.

(11) The Authority should also be able to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in this Regulation. If required to make such temporary prohibition in the case of an emergency situation, the Authority should do so in accordance with and under the conditions laid down in this Regulation. In cases where a temporary prohibition or restriction of certain financial activities has a cross-sectoral impact, sectoral legislation should provide that the Authority consult and coordinate its action with, where relevant, the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority), through the Joint Committee.

(12) The Authority should take due account of the impact of its activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth.

(13) In order to fulfil its objectives, the Authority should have legal personality as well as administrative and financial autonomy.

[11] OJ L 25, 29.1.2009, p. 23.
[12] OJ L 25, 29.1.2009, p. 28.
[13] OJ L 25, 29.1.2009, p. 18.

(14) Based on the work of international bodies, systemic risk should be defined as a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructures may be potentially systemically important to some degree.

(15) Cross-border risk includes all risks caused by economic imbalances or financial failures in all or parts of the Union that have the potential to have significant negative consequences for the transactions between economic operators of two or more Member States, for the functioning of the internal market or for the public finances of the Union or any of its Member States.

(16) The Court of Justice of the European Union in its judgment of 2 May 2006 in Case C-217/04 (United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union) held that "nothing in the wording of Article 95 EC [now Article 114 of the Treaty on the Functioning of the European Union (TFEU)] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate".[14] The purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Union acquis concerning the internal market for financial services. The Authority should therefore be established on the basis of Article 114 TFEU.

(17) The following legislative acts lay down the tasks for the competent authorities of Member States, including cooperating with each other and with the Commission: Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II),[15] with the exception of Title IV thereof, Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation,[16] Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision,[17] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate,[18] Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession,[19] Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance,[20] Council Directive 73/240/EEC of 24 July 1973 abolishing restrictions on freedom of establishment in the business of direct insurance other than life assurance,[21] Council Directive 76/580/EEC of 29 June 1976 amending Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life assurance,[22] Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance,[23] Council Directive 84/641/EEC of 10 December 1984 amending, particularly as regards tourist assistance, the First Council Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance,[24] Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance,[25] Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services,[26] Council Directive 92/49/EEC of 18 June 1992

[14] European Court Reports 2006 Page I-03771, para. 44.
[15] OJ L 335, 17.12.2009, p. 1.
[16] OJ L 9, 15.1.2003, p. 3.
[17] OJ L 235, 23.9.2003, p. 10.
[18] OJ L 35, 11.2.2003, p. 1.
[19] OJ 56, 4.4.1964, p. 878.
[20] OJ L 228, 16.8.1973, p. 3.
[21] OJ L 228, 16.8.1973, p. 20.
[22] OJ L 189, 13.7.1976, p. 13.
[23] OJ L 151, 7.6.1978, p. 25.
[24] OJ L 339, 27.12.1984, p. 21.
[25] OJ L 185, 4.7.1987, p. 77.
[26] OJ L 172, 4.7.1988, p. 1.

on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (third non-life insurance Directive),[27] Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group,[28] Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings,[29] Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[30] and Directive 2005/68/EC of the European Parliament and of the Council of 16 November 2005 on reinsurance.[31] However, with regard to institutions for occupational retirement provision, the Authority's actions should be without prejudice to national social and labour law.

(18) Existing Union legislation regulating the field covered by this Regulation also includes the relevant parts of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing,[32] and of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.[33]

(19) It is desirable that the Authority contribute to the assessment of the need for a European network of national insurance guarantee schemes which is adequately funded and sufficiently harmonised.

(20) In accordance with the Declaration (No 39) on Article 290 of the Treaty on the Functioning of the European Union (TFEU), annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the elaboration of regulatory technical standards requires assistance of technical expertise in a form which is specific to the financial services area. It is necessary to allow the Authority to provide such expertise also on standards or parts of standards that are not based on a draft technical standard that it has elaborated.

(21) There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of policyholders, pension scheme members and other beneficiaries across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices.

(22) The Commission should endorse those draft regulatory technical standards by means of delegated acts under Article 290 TFEU in order to give them binding legal effect. They should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation. The Commission should not change the content of the draft regulatory technical standards prepared by the Authority without prior coordination with the Authority. To ensure a smooth and expeditious adoption process for those standards, the Commission's decision to endorse draft regulatory technical standards should be subject to a time limit.

(23) Given the technical expertise of the Authority in the areas where regulatory technical standards should be developed, note should be taken of the Commission's stated intention to rely, as a rule, on the draft regulatory technical standards submitted to it by the Authority in view of the adoption of the corresponding delegated acts. However, in cases where the Authority fails to submit a draft regulatory technical standard within the time limits set out by the relevant legislative act, it should be ensured that the result of the exercise of delegated power is actually achieved, and the efficiency of the decision-making process be maintained. In those cases, the Commission should therefore be empowered to adopt regulatory technical standards in the absence of a draft by the Authority.

(24) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts under Article 291 TFEU.

(25) In areas not covered by regulatory or implementing technical standards, the Authority

[27] OJ L 228, 11.8.1992, p. 1.
[28] OJ L 330, 5.12.1998, p. 1.
[29] OJ L 110, 20.4.2001, p. 28.
[30] OJ L 345, 19.12.2002, p. 1.
[31] OJ L 323, 9.12.2005, p. 1.
[32] OJ L 309, 25.11.2005, p. 15.
[33] OJ L 271, 9.10.2002, p. 16.

should have the power to issue guidelines and recommendations on the application of Union law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with those guidelines and recommendations, it should be possible for the Authority to publish the reasons for supervisory authorities' non-compliance with those guidelines and recommendations.

(26) Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial institutions in the Union. A mechanism should therefore be established whereby the Authority addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations.

(27) To allow for a proportionate response to instances of incorrect or insufficient application of Union law, a three-step mechanism should apply. First, the Authority should be empowered to investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. Second, where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account the Authority's recommendation, requiring the competent authority to take the actions necessary to ensure compliance with Union law.

(28) Third, to overcome exceptional situations of persistent inaction by the competent authority concerned, the Authority should be empowered, as a last resort, to adopt decisions addressed to individual financial institutions. That power should be limited to exceptional circumstances in which a competent authority does not comply with the formal opinion addressed to it and in which Union law is directly applicable to financial institutions by virtue of existing or future Union regulations.

(29) Serious threats to the orderly functioning and integrity of financial markets or the stability of the financial system in the Union require a swift and concerted response at Union level. The Authority should therefore be able to require national supervisory authorities to take specific actions to remedy an emergency situation. The power to determine the existence of an emergency situation should be conferred on the Council, following a request by any of the ESAs, the Commission or the ESRB.

(30) The Authority should be able to require national supervisory authorities to take specific action to remedy an emergency situation. The action undertaken by the Authority in this respect should be without prejudice to the Commission's powers under Article 258 TFEU to initiate infringement proceedings against the Member State of that supervisory authority for its failure to take such action, and without prejudice to the Commission's right in such circumstances to seek interim measures in accordance with the rules of procedure of the Court of Justice of the European Union. Furthermore, it should be without prejudice to any liability that that Member State might incur in accordance with the case law of the Court of Justice of the European Union if its supervisory authorities fail to take the action required by the Authority.

(31) In order to ensure efficient and effective supervision and a balanced consideration of the positions of the competent authorities in different Member States, the Authority should be able to settle disagreements in cross-border situations between those competent authorities with binding effect, including within colleges of supervisors. A conciliation phase should be provided for during which the competent authorities may reach an agreement. The Authority's competence should cover disagreements on the procedure or content of an action or inaction by a competent authority of a Member State in cases specified in the legally binding Union acts referred to in this Regulation. In such a situation, one of the supervisors involved should be entitled to refer the issue to the Authority, which should act in accordance with this Regulation. The Authority should be empowered to require the competent authorities concerned to take specific action or to refrain from action in order to settle the matter in order to ensure compliance with Union law, with binding effects for the competent authorities concerned. If a competent authority does not comply with the settlement decision addressed to it, the Authority should be empowered to adopt decisions directly addressed to financial institutions in areas of Union law directly applicable to them. The power to adopt such decisions should apply only as a last resort and then only to ensure the correct and consistent application of Union law. In cases where the relevant Union legislation confers discretion on Member States' competent authorities, decisions taken by the Authority cannot replace the exercise in compliance with Union law of that discretion.

(32) The crisis has proven that the current system of cooperation between national authorities whose powers are limited to individual Member States is insufficient as regards financial institutions that operate across borders.

(33) Expert Groups set up by Member States to examine the causes of the crisis and make suggestions to improve the regulation and supervision of the financial sector have confirmed that the current arrangements are not a sound basis for the future regulation and supervision of cross-border financial institutions across the Union.

(34) As the de Larosière Report indicates, "[i]n essence, we have two alternatives: the first "chacun pour soi" beggar-thy-neighbour solutions; or the second – enhanced, pragmatic, sensible European cooperation for the benefit of all to preserve an open world economy. This will bring undoubted economic gains".

(35) Colleges of supervisors play an important role in the efficient, effective and consistent supervision of financial institutions operating across borders. The Authority should contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors and, in that respect, have a leading role in ensuring the consistent and coherent functioning of colleges of supervisors for cross-border financial institutions across the Union. The Authority should therefore have full participation rights in colleges of supervisors with a view to streamlining the functioning of and the information exchange process in the colleges of supervisors and to foster convergence and consistency across colleges in the application of Union law. As the de Larosière Report states, "competition distortions and regulatory arbitrage stemming from different supervisory practices must be avoided, because they have the potential of undermining financial stability – inter alia by encouraging a shift of financial activity to countries with lax supervision. The supervisory system has to be perceived as fair and balanced".

(36) Convergence in the fields of crisis prevention, management and resolution, including funding mechanisms, is necessary in order to ensure that public authorities are able to resolve failing financial institutions whilst minimising the impact of failures on the financial system, reliance on taxpayer funds to bail out insurance or reinsurance undertakings and the use of public sector resources, limiting damage to the economy, and coordinating the application of national resolution measures. In this regard, the Commission should be able to request the Authority to contribute to the assessment referred to in Article 242 of Directive 2009/138/EC, in particular as regards the cooperation of supervisory authorities within, and functionality of, the colleges of supervisors; the supervisory practices concerning setting the capital add-ons; the assessment of the benefit of enhancing group supervision and capital management within a group of insurance or reinsurance undertakings, including possible measures to enhance the sound cross-border management of insurance groups, notably in respect of risks and assets; and reporting on any new developments and progress concerning a set of coordinated national crisis management arrangements, including the necessity or otherwise of a system of coherent and credible funding mechanisms, with appropriate financing instruments.

(37) In the current review of Directive 94/19/EC of the European Parliament and the Council of 30 May 1994 on deposit-guarantee schemes[34] and Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes,[35] the Commission's intention to pay special attention to the need to ensure further harmonisation throughout the Union is noted. In the insurance sector, the Commission's intention to examine the possibility of introducing Union rules protecting insurance policy holders in case of a failing insurance company is also noted. The ESAs should play an important role in those areas and appropriate powers concerning the European network of national insurance guarantee schemes should be conferred upon them.

(38) The delegation of tasks and responsibilities can be a useful instrument in the functioning of the network of supervisors in order to reduce the duplication of supervisory tasks, to foster cooperation and thereby streamline the supervisory process, as well as to reduce the burden imposed on financial institutions. This Regulation should therefore provide a clear legal basis for such delegation. Whilst respecting the general rule that delegation should be allowed, Member States should be able to introduce specific conditions for the delegation of responsibilities, for example, regarding information about, and the notification of, delegation arrangements. Delegation of tasks means that tasks are carried out by the Authority or by a national supervisory authority other than the responsible

[34] OJ L 135, 31.5.1994, p. 5.
[35] OJ L 84, 26.3.1997, p. 22.

authority, while the responsibility for supervisory decisions remains with the delegating authority. By the delegation of responsibilities, the Authority or a national supervisory authority (the delegate) should be able to decide upon a certain supervisory matter in its own name in lieu of the delegating authority. Delegations should be governed by the principle of allocating supervisory competence to a supervisor which is best placed to take action in the subject matter. A reallocation of responsibilities would be appropriate, for example, for reasons of economies of scale or scope, of coherence in group supervision, and of optimal use of technical expertise among national supervisory authorities. Decisions by the delegate should be recognised by the delegating authority and by other competent authorities as determinative if those decisions are within the scope of the delegation. Relevant Union legislation could further specify the principles for the reallocation of responsibilities upon agreement.

The Authority should facilitate and monitor delegation agreements between national supervisory authorities by all appropriate means. It should be informed in advance of intended delegation agreements, in order to be able to express an opinion where appropriate. It should centralise the publication of such agreements to ensure timely, transparent and easily accessible information about agreements for all parties concerned. It should identify and disseminate best practices regarding delegation and delegation agreements.

(39) The Authority should actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture.

(40) Peer reviews are an efficient and effective tool for fostering consistency within the network of financial supervisors. The Authority should therefore develop the methodological framework for such reviews and conduct them on a regular basis. Reviews should focus not only on the convergence of supervisory practices, but also on the capacity of supervisors to achieve high-quality supervisory outcomes, as well as on the independence of those competent authorities. The outcome of peer reviews should be made public with the agreement of the competent authority subject to the review. Best practices should also be identified and made public.

(41) The Authority should actively promote a coordinated Union supervisory response, in particular to ensure the orderly functioning and integrity of financial markets and the stability of the financial system in the Union. In addition to its powers for action in emergency situations, the Authority should therefore be entrusted with a general coordination function within the ESFS. The smooth flow of all relevant information between competent authorities should be a particular focus of the Authority's actions.

(42) In order to safeguard financial stability it is necessary to identify, at an early stage, trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sectors. The Authority should monitor and assess such developments in the area of its competence and, where necessary, inform the European Parliament, the Council, the Commission, the other European Supervisory Authorities and the ESRB on a regular and, as necessary, on an ad hoc basis. The Authority should also, in cooperation with the ESRB, initiate and coordinate Union-wide stress tests to assess the resilience of financial institutions to adverse market developments, and it should ensure that an as consistent as possible methodology is applied at the national level to such tests. In order to perform its functions properly, the Authority should conduct economic analyses of the markets and the impact of potential market developments.

(43) Given the globalisation of financial services and the increased importance of international standards, the Authority should foster dialogue and cooperation with supervisors outside the Union. It should be empowered to develop contacts and enter into administrative arrangements with the supervisory authorities and administrations of third countries and with international organisations, while fully respecting the existing roles and respective competences of the Member States and the Union institutions. Participation in the work of the Authority should be open to countries which have concluded agreements with the Union whereby they have adopted and are applying Union law, and the Authority should be able to cooperate with third countries which apply legislation that has been recognised as equivalent to that of the Union.

(44) The Authority should serve as an independent advisory body to the European Parliament, the Council, and the Commission in the area of its competence. Without prejudice to the competencies of the competent authorities concerned, the Authority should be able to provide its opinion on the prudential assessment of mergers and acquisitions under Directive 92/49/EEC and Directives 2002/83/EC and

2005/68/EC, as amended by Directive 2007/44/EC[36] in those cases in which that Directive requires consultation between competent authorities from two or more Member States.

(45) In order to carry out its duties effectively, the Authority should have the right to request all necessary information. To avoid the duplication of reporting obligations for financial institutions, that information should normally be provided by the national supervisory authorities which are closest to the financial markets and institutions and should take into account already existing statistics. However, as a last resort, the Authority should be able to address a duly justified and reasoned request for information directly to a financial institution where a national competent authority does not or cannot provide such information in a timely fashion. Member States' authorities should be obliged to assist the Authority in enforcing such direct requests. In that context, the work on common reporting formats is essential. The measures for the collection of information should be without prejudice to the legal framework of the European Statistical System and the European System of Central Banks in the field of statistics. This Regulation should therefore be without prejudice both to Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[37] and to Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.[38]

(46) Close cooperation between the Authority and the ESRB is essential to give full effectiveness to the functioning of the ESRB and the follow-up to its warnings and recommendations. The Authority and the ESRB should share any relevant information with each other. Data related to individual undertakings should be provided only upon reasoned request. Upon receipt of warnings or recommendations addressed by the ESRB to the Authority or a national supervisory authority, the Authority should ensure follow-up as appropriate.

(47) The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, an Insurance and Reinsurance Stakeholder Group and an Occupational Pensions Stakeholder Group should be used for that purpose and should represent, in balanced proportions and respectively, the relevant financial institutions operating in the Union, representing the diverse business models and sizes of financial institutions and businesses; small and medium-sized enterprises (SMEs); trade unions; academics; consumers; other retail users of those financial institutions; and representatives of relevant professional associations. Those stakeholder groups should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation.

(48) Members of the stakeholder groups representing non-profit organisations or academics should receive adequate compensation in order to allow persons that are neither well-funded nor industry representatives to take part fully in the debate on financial regulation.

(49) The stakeholder groups should be consulted by the Authority and should be able to submit opinions and advice to the Authority on issues related to the optional application to institutions covered by Directive 2002/83/EC or Directive 2003/41/EC.

(50) Member States have a core responsibility for ensuring coordinated crisis management and preserving financial stability in crisis situations, in particular with regard to stabilising and resolving individual failing financial institutions. Decisions by the Authority in emergency or settlement situations affecting the stability of a financial institution should not impinge on the fiscal responsibilities of Member States. A mechanism should be established whereby Member States may invoke this safeguard and ultimately bring the matter before the Council for a decision. However, that safeguard mechanism should not be abused, in particular in relation to a decision taken by the Authority which does not have a significant or material fiscal impact, such as a reduction of income linked to the temporary prohibition of specific activities or products for consumer protection purposes. When taking decisions under the safeguard mechanism, the Council should vote in accordance with the principle where each member has one vote. It is

[36] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ L 247, 21.9.2007, p. 1).
[37] OJ L 87, 31.3.2009, p. 164.
[38] OJ L 318, 27.11.1998, p. 8.

appropriate to confer on the Council a role in this matter given the particular responsibilities of the Member States in this respect. Given the sensitivity of the issue, strict confidentiality arrangements should be ensured.

(51) In its decision-making procedures, the Authority should be bound by Union rules and general principles on due process and transparency. The right of the addressees of the Authority's decisions to be heard should be fully respected. The Authority's acts should form an integral part of Union law.

(52) A Board of Supervisors composed of the heads of the relevant competent authorities in each Member State, and chaired by the Chairperson of the Authority, should be the principal decision-making organ of the Authority. Representatives of the Commission, the ESRB, the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority) should participate as observers. Members of the Board of Supervisors should act independently and only in the Union's interest.

(53) As a general rule, the Board of Supervisors should take its decisions by simple majority in accordance with the principle where each member has one vote. However, for acts of a general nature, including those relating to regulatory and implementing technical standards, guidelines and recommendations, for budgetary matters as well as in respect of requests by a Member State to reconsider a decision by the Authority to temporarily prohibit or restrict certain financial activities, it is appropriate to apply the rules of qualified majority voting as laid down in Article 16(4) of the Treaty on European Union and in the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. Cases concerning the settlement of disagreements between national supervisory authorities should be examined by a restricted, objective panel, composed of members who neither are representatives of the competent authorities which are party to the disagreement nor have any interest in the conflict or direct links to the competent authorities concerned. The composition of the panel should be appropriately balanced. The decision taken by the panel should be approved by the Board of Supervisors by simple majority in accordance with the principle where each member has one vote. However, with regard to decisions taken by the consolidating supervisor, the decision proposed by the panel could be rejected by members representing a blocking minority of the votes as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

(54) A Management Board, composed of the Chairperson of the Authority, of representatives of national supervisory authorities and of the Commission, should ensure that the Authority carries out its mission and performs the tasks assigned to it. The Management Board should be entrusted with the necessary powers, inter alia, to propose the annual and multi-annual work programme, to exercise certain budgetary powers, to adopt the Authority's staff policy plan, to adopt special provisions on the right to access to documents and to propose the annual report.

(55) The Authority should be represented by a full-time Chairperson, appointed by the Board of Supervisors, on the basis of merit, skills, knowledge of financial institutions and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure organised and managed by the Board of Supervisors assisted by the Commission. For the designation of the first Chairperson of the Authority, the Commission should, inter alia, draw up a shortlist of candidates on the basis of merit, skills, knowledge of financial institutions and markets, and experience relevant to financial supervision and regulation. For the subsequent designations, the opportunity of having a shortlist drawn up by the Commission should be reviewed in a report to be established pursuant to this Regulation. Before the selected person takes up his duties, and up to 1 month after his selection by the Board of Supervisors, the European Parliament should be entitled, after having heard the person selected, to object to his designation.

(56) The management of the Authority should be entrusted to an Executive Director, who should have the right to participate in meetings of the Board of Supervisors and the Management Board without the right to vote.

(57) In order to ensure cross-sectoral consistency in the activities of the ESAs, they should coordinate closely through a Joint Committee and reach common positions where appropriate. The Joint Committee should coordinate the functions of the ESAs in relation to financial conglomerates and other cross-sectoral matters. Where relevant, acts also falling within the area of competence of the European Supervisory Authority (European Banking Authority) or the European

Supervisory Authority (European Securities and Markets Authority) should be adopted in parallel by the European Supervisory Authorities concerned. The Joint Committee should be chaired for a 12-month term on a rotating basis by the Chairpersons of the ESAs. The Chairperson of the Joint Committee should be a Vice-Chair of the ESRB. The Joint Committee should have dedicated staff provided by the ESAs to allow for informal information sharing and the development of a common supervisory culture approach across the ESAs.

(58) It is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the ESAs, independent from their administrative and regulatory structures. The decisions of the Board of Appeal should be subject to appeal before the Court of Justice of the European Union.

(59) In order to guarantee its full autonomy and independence, the Authority should be granted an autonomous budget with revenues mainly from obligatory contributions from national supervisory authorities and from the General Budget of the European Union. Union financing of the Authority is subject to an agreement by the budgetary authority in accordance with Point 47 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 17 May 2006 on budgetary discipline and sound financial management.[39] The Union budgetary procedure should be applicable. The auditing of accounts should be undertaken by the Court of Auditors. The overall budget is subject to the discharge procedure.

(60) Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)[40] should apply to the Authority. The Authority should also accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF).[41]

(61) In order to ensure open and transparent employment conditions and equal treatment of staff, the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities[42] should apply to the staff of the Authority.

(62) It is essential that business secrets and other confidential information be protected. The confidentiality of information made available to the Authority and exchanged in the network should be subject to stringent and effective confidentiality rules.

(63) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[43] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[44] are fully applicable to the processing of personal data for the purposes of this Regulation.

(64) In order to ensure the transparent operation of the Authority, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[45] should apply to the Authority.

(65) Third countries should be allowed to participate in the work of the Authority in accordance with appropriate agreements to be concluded by the Union.

(66) Since the objectives of this Regulation, namely improving the functioning of the internal market by means of ensuring a high, effective and consistent level of prudential regulation and supervision, protecting policyholders, pension scheme members and other beneficiaries, protecting the integrity, efficiency and orderly functioning of financial markets, maintaining the stability of the financial system, and strengthening international supervisory coordination, cannot be sufficiently achieved by the Member States and can,

[39] OJ C 139, 14.6.2006, p. 1.
[40] OJ L 136, 31.5.1999, p. 1.
[41] OJ L 136, 31.5.1999, p. 15.
[42] OJ L 56, 4.3.1968, p. 1.
[43] OJ L 281, 23.11.1995, p. 31.
[44] OJ L 8, 12.1.2001, p. 1.
[45] OJ L 145, 31.5.2001, p. 43.

therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(67) The Authority should assume all current tasks and powers of the Committee of European Insurance and Occupational Pensions Supervisors. Commission Decision 2009/79/EC should therefore be repealed on the date of the establishment of the Authority, and Decision No 716/2009/EC of the European Parliament and of the Council of 16 September 2009 establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing[46] should be amended accordingly. Given the existing structures and operations of the Committee of European Insurance and Occupational Pensions Supervisors, it is important to ensure very close cooperation between the Committee of European Insurance and Occupational Pensions Supervisors and the Commission when establishing appropriate transitional arrangements, to ensure that the period during which the Commission is responsible for the administrative establishment and initial administrative operation of the Authority be as limited as possible.

(68) It is appropriate to set a time limit for the application of this Regulation in order to ensure that the Authority is adequately prepared to begin operations and a smooth transition from the Committee of European Insurance and Occupational Pensions Supervisors. The Authority should be appropriately financed. At least initially, it should be financed 40 % from Union funds and 60 % through contributions from Member States, made in accordance with the weighting of votes set out in Article 3(3) of the Protocol (No 36) on transitional provisions.

(69) In order to enable the Authority to be established on 1 January 2011, this Regulation should enter into force on the day following its publication in the Official Journal of the European Union,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – ESTABLISHMENT AND LEGAL STATUS

Article 1 – *Establishment and scope of action*

1. This Regulation establishes a European Supervisory Authority (European Insurance and Occupational Pensions Authority) (hereinafter the Authority').

2. The Authority shall act within the powers conferred by this Regulation and within the scope of Directive2009/138/EC with the exception of Title IV thereof, of Directives 2002/92/EC, 2003/41/EC, 2002/87/EC, 64/225/EEC, 73/239/EEC, 73/240/EEC, 76/580/EEC, 78/473/EEC, 84/641/EEC, 87/344/EEC, 88/357/EEC, 92/49/EEC, 98/78/EC, 2001/17/EC, 2002/83/EC, 2005/68/EC and, to the extent that those acts apply to insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision and insurance intermediaries, within the relevant parts of Directives 2005/60/EC and 2002/65/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.

3. The Authority shall also act in the field of activities of insurance undertakings, reinsurance undertakings, financial conglomerates, institutions for occupational retirement provision and insurance intermediaries, in relation to issues not directly covered in the acts referred to in paragraph 2, including matters of corporate governance, auditing and financial reporting, provided that such actions by the Authority are necessary to ensure the effective and consistent application of those acts.

4. With regard to institutions for occupational retirement provision, the Authority shall act without prejudice to national social and labour law.

5. The provisions of this Regulation are without prejudice to the powers of the Commission, in particular under Article 258 TFEU, to ensure compliance with Union law.

6. The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses. The Authority shall contribute to:

(a) improving the functioning of the internal market, including in particular a sound, effective and consistent level of regulation and supervision,

[46] OJ L 253, 25.9.2009, p. 8.

(b) ensuring the integrity, transparency, efficiency and orderly functioning of financial markets,

(c) strengthening international supervisory coordination,

(d) preventing regulatory arbitrage and promoting equal conditions of competition,

(e) ensuring the taking of risks related to insurance, reinsurance and occupational pensions activities is appropriately regulated and supervised, and

(f) enhancing customer protection.

For those purposes, the Authority shall contribute to ensuring the consistent, efficient and effective application of the acts referred to in paragraph 2, foster supervisory convergence, provide opinions to the European Parliament, the Council, and the Commission and undertake economic analyses of the markets to promote the achievement of the Authority's objective.

In the exercise of the tasks conferred upon it by this Regulation, the Authority shall pay particular attention to any potential systemic risk posed by financial institutions, the failure of which may impair the operation of the financial system or the real economy.

When carrying out its tasks, the Authority shall act independently and objectively and in the interest of the Union alone.

Article 2 – *European System of Financial Supervision*

1. The Authority shall form part of a European System of Financial Supervision (ESFS). The main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.

2. The ESFS shall comprise the following:

(a) the European Systemic Risk Board (ESRB), for the purposes of the tasks as specified in Regulation (EU) No 1092/2010 and this Regulation;

(b) the Authority;

(c) the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council;

(d) the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council;

(e) the Joint Committee of the European Supervisory Authorities (Joint Committee) for the purposes of carrying out the tasks as specified in Articles 54 to 57 of this Regulation, of Regulation (EU) No 1093/2010 and of Regulation (EU) No 1095/2010;

(f) the competent or supervisory authorities in the Member States as specified in the Union acts referred to in Article 1(2) of this Regulation, of Regulation (EU) No 1093/2010 and of Regulation (EU) No 1095/2010;

3. The Authority shall cooperate regularly and closely with the ESRB as well as with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority) through the Joint Committee, ensuring cross-sectoral consistency of work and reaching joint positions in the area of supervision of financial conglomerates and on other cross-sectoral issues.

4. In accordance with the principle of sincere cooperation under Article 4(3) of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them.

5. Those supervisory authorities that are party to the ESFS shall be obliged to supervise financial institutions operating in the Union in accordance with the acts referred to in Article 1(2).

Article 3 – *Accountability of the Authorities*

The Authorities referred to in Article 2(2)(a) to (d) shall be accountable to the European Parliament and the Council.

Article 4 – *Definitions*

For the purposes of this Regulation the following definitions apply:

(1) "financial institutions" means undertakings, entities and natural and legal persons subject to any of the legislative acts referred to in Article 1(2). With regard to Directive 2005/60/EC, "financial institutions" means only insurance

undertakings and insurance intermediaries as defined in that Directive;

(2) "competent authorities" means:

(i) supervisory authorities as defined in Directive 2009/138/EC, and competent authorities as defined in Directive 2003/41/EC and 2002/92/EC;

(ii) with regard to Directives 2002/65/EC and 2005/60/EC, the authorities competent for ensuring compliance with the requirements of those Directives by financial institutions as defined in point (1).

Article 5 – *Legal status*

1. The Authority shall be a Union body with legal personality.

2. In each Member State, the Authority shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.

3. The Authority shall be represented by its Chairperson.

Article 6 – *Composition*

The Authority shall comprise:

(1) a Board of Supervisors, which shall exercise the tasks set out in Article 43;

(2) a Management Board, which shall exercise the tasks set out in Article 47;

(3) a Chairperson, who shall exercise the tasks set out in Article 48;

(4) an Executive Director, who shall exercise the tasks set out in Article 53;

(5) a Board of Appeal, which shall exercise the tasks set out in Article 60.

Article 7 – *Seat*

The Authority shall have its seat in Frankfurt am Main.

CHAPTER II – TASKS AND POWERS OF THE AUTHORITY

Article 8 – *Tasks and powers of the Authority*

1. The Authority shall have the following tasks:

(a) to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, in particular by providing opinions to the Union institutions and by developing guidelines, recommendations, and draft regulatory and implementing technical standards which shall be based on the legislative acts referred to in Article 1(2);

(b) to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2), preventing regulatory arbitrage, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial institutions, ensuring a coherent functioning of colleges of supervisors and taking actions, inter alia, in emergency situations;

(c) to stimulate and facilitate the delegation of tasks and responsibilities among competent authorities;

(d) to cooperate closely with the ESRB, in particular by providing the ESRB with the necessary information for the achievement of its tasks and by ensuring a proper follow up to the warnings and recommendations of the ESRB;

(e) to organise and conduct peer review analyses of competent authorities, including issuing guidelines and recommendations and identifying best practices, in order to strengthen consistency in supervisory outcomes;

(f) to monitor and assess market developments in the area of its competences;

(g) to undertake economic analyses of markets to inform the discharge of the Authority's functions;

(h) to foster the protection of policyholders, pension scheme members and beneficiaries

(i) to contribute to the consistent and coherent functioning of colleges of supervisors, the monitoring, assessment and measurement of systemic risk, the development and coordination of recovery and resolution plans, providing a high level of protection to policy holders, to beneficiaries and throughout the Union, in accordance with Articles 21 to 26;

(j) to fulfil any other specific tasks set out in this Regulation or in other legislative acts;

(k) to publish on its website, and to update regularly, information relating to its field of

activities, in particular, within the area of its competence, on registered financial institutions, in order to ensure information is easily accessible by the public;

(l) to take over, as appropriate, all existing and ongoing tasks from the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS);

2. To achieve the tasks set out in paragraph 1, the Authority shall have the powers set out in this Regulation, in particular to:

(a) develop draft regulatory technical standards in the specific cases referred to in Article 10;

(b) develop draft implementing technical standards in the specific cases referred to in Article 15;

(c) issue guidelines and recommendations, as laid down in Article 16;

(d) issue recommendations in specific cases, as referred to in Article 17(3);

(e) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 18(3) and 19(3);

(f) in cases concerning directly applicable Union law, take individual decisions addressed to financial institutions, in the specific cases referred to in Article 17(6), in Article 18(4) and in Article 19(4);

(g) issue opinions to the European Parliament, the Council, or the Commission as provided for in Article 34;

(h) collect the necessary information concerning financial institutions as provided for in Article 35;

(i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of institutions and on consumer protection;

(j) provide a centrally accessible database of registered financial institutions in the area of its competence where specified in the acts referred to in Article 1(2).

Article 9 – *Tasks related to consumer protection and financial activities*

1. The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by:

(a) collecting, analysing and reporting on consumer trends;

(b) reviewing and coordinating financial literacy and education initiatives by the competent authorities;

(c) developing training standards for the industry; and

(d) contributing to the development of common disclosure rules.

2. The Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice.

3. The Authority may also issue warnings in the event that a financial activity poses a serious threat to the objectives laid down in Article 1(6).

4. The Authority shall establish, as an integral part of the Authority, a Committee on financial innovation, which brings together all relevant competent national supervisory authorities with a view to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice for the Authority to present to the European Parliament, the Council and the Commission.

5. The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or, if so required, in the case of an emergency situation in accordance with and under the conditions laid down in Article 18.

The Authority shall review the decision referred to in the first subparagraph at appropriate intervals and at least every 3 months. If the decision is not renewed after a three-month period, it shall automatically expire.

A Member State may request the Authority to reconsider its decision. In that case, the Authority shall decide in accordance with the procedure set out in the second subparagraph of Article 44(1), whether it maintains its decision.

The Authority may also assess the need to prohibit or restrict certain types of financial activity and, where there is such a need, inform the Commission in order to facilitate the adoption of any such prohibition or restriction.

Article 10 – *Regulatory technical standards*

1. Where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2), the Authority may develop draft regulatory technical standards. The Authority shall submit its draft standards to the Commission for endorsement.

Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.

Before submitting them to the Commission, the Authority shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the relevant stakeholder group referred to in Article 37.

Where the Authority submits a draft regulatory technical standard, the Commission shall immediately forward it to the European Parliament and the Council.

Within 3 months of receipt of a draft regulatory technical standard, the Commission shall decide whether to endorse it. The Commission may endorse the draft regulatory technical standards in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft regulatory technical standard, or to endorse it in part or with amendments, it shall send the draft regulatory technical standard back to the Authority, explaining why it does not endorse it, or, as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft regulatory technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of that six-week period, the Authority has not submitted an amended draft regulatory technical standard, or has submitted a draft regulatory technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the regulatory technical standard with the amendments it considers relevant or reject it.

The Commission may not change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. Where the Authority has not submitted a draft regulatory technical standard within the time limit set out in the legislative acts referred to in Article 1(2), the Commission may request such a draft within a new time limit.

3. Only where the Authority does not submit a draft regulatory technical standard to the Commission within the time limits in accordance with paragraph 2, may the Commission adopt a regulatory technical standard by means of a delegated act without a draft from the Authority.

The Commission shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter. The Commission shall also request the opinion or advice of the relevant stakeholder group referred to in Article 37.

The Commission shall immediately forward the draft regulatory technical standard to the European Parliament and the Council.

The Commission shall send its draft regulatory technical standard to the Authority. Within a period of 6 weeks, the Authority may amend the draft regulatory technical standard and submit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fourth subparagraph, the Authority has not submitted an amended draft regulatory

technical standard, the Commission may adopt the regulatory technical standard.

If the Authority has submitted an amended draft regulatory technical standard within the six-week period, the Commission may amend the draft regulatory technical standard on the basis of the Authority's proposed amendments or adopt the regulatory technical standard with the amendments it considers relevant. The Commission shall not change the content of the draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

4. The regulatory technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

Article 11 – *Exercise of the delegation*

1. The power to adopt regulatory technical standards referred to in Article 10 shall be conferred on the Commission for a period of four years from 16 December 2010. The Commission shall draw up a report in respect of the delegated power not later than 6 months before the end of the four-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 14.

2. As soon as it adopts a regulatory technical standard, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The power to adopt regulatory technical standards is conferred on the Commission subject to the conditions laid down in Articles 12 to 14.

Article 12 – *Revocation of the delegation*

1. The delegation of power referred to in Article 10 may be revoked at any time by the European Parliament or by the Council.

2. The institution which has commenced an internal procedure for deciding whether to revoke a delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation.

3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the regulatory technical standards already in force. It shall be published in the Official Journal of the European Union.

Article 13 – *Objections to regulatory technical standards*

1. The European Parliament or the Council may object to a regulatory technical standard within a period of 3 months from the date of notification of the regulatory technical standard adopted by the Commission. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.

Where the Commission adopts a regulatory technical standard which is the same as the draft regulatory technical standard submitted by the Authority, the period during which the European Parliament and the Council may object shall be 1 month from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 1 month.

2. If, on the expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the regulatory technical standard, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein. The regulatory technical standard may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to a regulatory technical standard within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the institution which objects shall state the reasons for objecting to the regulatory technical standard.

Article 14 – *Non-endorsement or amendment of draft regulatory technical standards*

1. In the event that the Commission does not endorse a draft regulatory technical standard or amends it as provided for in Article 10, the Commission shall inform the Authority, the European Parliament and the Council, stating its reasons.

2. Where appropriate, the European Parliament or the Council may invite the responsible

Commissioner, together with the Chairperson of the Authority, within 1 month of the notice referred to in paragraph 1, for an ad hoc meeting of the competent committee of the European Parliament or the Council to present and explain their differences.

Article 15 – *Implementing technical standards*

1. The Authority may develop implementing technical standards, by means of implementing acts under Article 291 TFEU, in the areas specifically set out in the legislative acts referred to in Article 1(2). Implementing technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be to determine the conditions of application of those acts. The Authority shall submit its draft implementing technical standards to the Commission for endorsement.

Before submitting draft implementing technical standards to the Commission, the Authority shall conduct open public consultations and shall analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft implementing technical standards concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the relevant stakeholder group referred to in Article 37.

Where the Authority submits a draft implementing technical standard, the Commission shall immediately forward it to the European Parliament and the Council.

Within 3 months of receipt of a draft implementing technical standard, the Commission shall decide whether to endorse it. The Commission may extend that period by 1 month. The Commission may endorse the draft implementing technical standard in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft implementing technical standard or intends to endorse it in part or with amendments, it shall send it back to the Authority explaining why it does not intend to endorse it, or, as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fifth subparagraph, the Authority has not submitted an amended draft implementing technical standard, or has submitted a draft implementing technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the implementing technical standard with the amendments it considers relevant or reject it.

The Commission shall not change the content of a draft implementing technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. In cases where the Authority has not submitted a draft implementing technical standard within the time limit set out in the legislative acts referred to in Article 1(2), the Commission may request such a draft within a new time limit.

3. Only where the Authority does not submit a draft implementing technical standard to the Commission within the time limits in accordance with paragraph 2, may the Commission adopt an implementing technical standard by means of an implementing act without a draft from the Authority.

The Commission shall conduct open public consultations on draft implementing technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft implementing technical standards concerned or in relation to the particular urgency of the matter. The Commission shall also request the opinion or advice of the relevant stakeholder group referred to in Article 37.

The Commission shall immediately forward the draft implementing technical standard to the European Parliament and the Council.

The Commission shall send the draft implementing technical standard to the Authority. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard and submit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fourth subparagraph, the Authority has not submitted an amended draft implementing technical standard, the Commission may adopt the implementing technical standard.

If the Authority has submitted an amended draft implementing technical standard within that six-week period, the Commission may amend the draft implementing technical standard on the basis of the Authority's proposed amendments or adopt the implementing technical standard with the amendments it considers relevant.

The Commission shall not change the content of the draft implementing technical standards prepared by the Authority without prior coordination with the Authority, as set out in this Article.

4. The implementing technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

Article 16 – *Guidelines and recommendations*

1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial institutions.

2. The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations and analyse the related potential costs and benefits. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations. The Authority shall, where appropriate, also request opinions or advice from the relevant stakeholder group referred to in Article 37.

3. The competent authorities and financial institutions shall make every effort to comply with those guidelines and recommendations.

Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.

The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case-by-case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advanced notice of such publication.

If required by that guideline or recommendation, financial institutions shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.

4. In the report referred to in Article 43(5) the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how the Authority intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.

Article 17 – *Breach of Union law*

1. Where a competent authority has not applied the acts referred to in Article 1(2) or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial institution satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.

2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the relevant stakeholder group, or on its own initiative and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.

Without prejudice to the powers laid down in Article 35, the competent authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation.

3. The Authority may, not later than 2 months from initiating its investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law.

The competent authority shall, within ten working days of receipt of the recommendation, inform the Authority of the steps it has taken or intends to take to ensure compliance with Union law.

4. Where the competent authority has not complied with Union law within 1 month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority, or on its own initiative, issue a formal opinion requiring the competent authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account the Authority's recommendation.

The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.

The Authority and the competent authorities shall provide the Commission with all necessary information.

5. The competent authority shall, within ten working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with that formal opinion.

6. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner such non-compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the acts referred to in Article 1(2) are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.

The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4.

7. Decisions adopted under paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter.

When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4 or a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.

8. In the report referred to in Article 43(5), the Authority shall set out which competent authorities and financial institutions have not complied with the formal opinions or decisions referred to in paragraphs 4 and 6 of this Article.

Article 18 – *Action in emergency situations*

1. In the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities.

In order to be able to perform that facilitating and coordinating role, the Authority shall be fully informed of any relevant developments, and shall be invited to participate as an observer in any relevant gathering by the relevant national competent supervisory authorities.

2. The Council, in consultation with the Commission and the ESRB and, where appropriate, the ESAs, may adopt a decision addressed to the Authority, determining the existence of an emergency situation for the purposes of this Regulation, following a request by the Authority, the Commission or the ESRB. The Council shall review that decision at appropriate intervals and at least once a month. If the decision is not renewed at the end of a one-month period, it shall automatically expire. The Council may declare the discontinuation of the emergency situation at any time.

Where the ESRB or the Authority considers that an emergency situation may arise, it shall issue a confidential recommendation addressed to the Council and provide it with an assessment of the situation. The Council shall then assess the need for a meeting. In that process, due care of confidentiality shall be guaranteed.

If the Council determines the existence of an emergency situation, it shall duly inform the European Parliament and the Commission without delay.

3. Where the Council has adopted a decision pursuant to paragraph 2, and in exceptional circumstances where coordinated action by national authorities is necessary to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority may adopt individual decisions requiring competent authorities to take the

necessary action in accordance with the legislation referred to in Article 1(2) to address any such developments by ensuring that financial institutions and competent authorities satisfy the requirements laid down in that legislation.

4. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the decision of the Authority referred to in paragraph 3 within the period laid down in that decision, the Authority may, where the relevant requirements laid down in the legislative acts referred to in Article 1(2) including in regulatory technical standards and implementing technical standards adopted in accordance with those acts are directly applicable to financial institutions, adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under that legislation, including the cessation of any practice. This shall apply only in situations in which a competent authority does not apply the legislative acts referred to in Article 1(2), including regulatory technical standards and implementing technical standards adopted in accordance with those acts, or applies them in a way which appears to be a manifest breach of those acts, and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.

5. Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter.

Any action by the competent authorities in relation to issues which are subject to a decision pursuant to paragraph 3 or 4 shall be compatible with those decisions.

Article 19 – *Settlement of disagreements between competent authorities in cross-border situations*

1. Without prejudice to the powers laid down in Article 17, where a competent authority disagrees about the procedure or content of an action or inaction of a competent authority of another Member State in cases specified in the acts referred to in Article 1(2), the Authority, at the request of one or more of the competent authorities concerned, may assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4 of this Article.

In cases specified in the legislation referred to in Article 1(2), and where on the basis of objective criteria, disagreement between competent authorities from different Member States can be determined, the Authority may, on its own initiative, assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4.

2. The Authority shall set a time limit for conciliation between the competent authorities taking into account any relevant time periods specified in the acts referred to in Article 1(2) and the complexity and urgency of the matter. At that stage the Authority shall act as a mediator.

3. If the competent authorities concerned fail to reach an agreement within the conciliation phase referred to in paragraph 2, the Authority may, in accordance with the procedure set out in the third and fourth subparagraph of Article 44(1) take a decision requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law.

4. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial institution complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2), the Authority may adopt an individual decision addressed to a financial institution requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice.

5. Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter. Any action by the competent authorities in relation to facts which are subject to a decision pursuant to paragraph 3 or 4 shall be compatible with those decisions.

6. In the report referred to in Article 50(2), the Chairperson of the Authority shall set out the nature and type of disagreements between competent authorities, the agreements reached and the decisions taken to settle such disagreements.

Article 20 – *Settlement of disagreements between competent authorities across sectors*

The Joint Committee shall, in accordance with the procedure laid down in Article 19 and

Article 56, settle cross-sectoral disagreements that may arise between competent authorities as defined in Article 4(2) of this Regulation, of Regulation (EU) No 1093/2010 and of Regulation (EU) No 1095/2010 respectively.

Article 21 – *Colleges of supervisors*

1. The Authority shall contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors referred to in Directive 2009/138/EC and foster the coherence of the application of Union law among the colleges of supervisors. With the objective of converging supervisory best practices, staff from the Authority shall be able to participate in the activities of the colleges of supervisors, including on-site examinations, carried out jointly by two or more competent authorities.

2. The Authority shall lead in ensuring a consistent and coherent functioning of colleges of supervisors for cross-border institutions across the Union, taking account of the systemic risk posed by financial institutions referred to in Article 23.

For the purpose of this paragraph and of paragraph 1 of this Article, the Authority shall be considered a "competent authority" within the meaning of the relevant legislation.

The Authority may:

(a) collect and share all relevant information in cooperation with the competent authorities in order to facilitate the work of the college and establish and manage a central system to make such information accessible to the competent authorities in the college;

(b) initiate and coordinate Union-wide stress tests in accordance with Article 32 to assess the resilience of financial institutions, in particular the systemic risk posed by financial institutions as referred to in Article 23, to adverse market developments, and evaluate the potential for systemic risk to increase in situations of stress, ensuring that a consistent methodology is applied at the national level to such tests and, where appropriate, address a recommendation to the competent authority to correct issues identified in the stress test;

(c) promote effective and efficient supervisory activities, including evaluating the risks to which financial institutions are or might be exposed as determined under the supervisory review process or in stress situations;

(d) oversee, in accordance with the tasks and powers specified in this Regulation, the tasks carried out by the competent authorities; and

(e) request further deliberations of a college in any cases where it considers that the decision would result in an incorrect application of Union law or would not contribute to the objective of convergence of supervisory practices. It may also require the group supervisor to schedule a meeting of the college or add a point to the agenda of a meeting.

3. The Authority may develop draft regulatory and implementing technical standards to ensure uniform conditions of application with respect to the provisions regarding the operational functioning of colleges of supervisors and issue guidelines and recommendations adopted under Article 16 to promote convergence in supervisory functioning and best practices adopted by the colleges of supervisors.

4. The Authority shall have a legally binding mediation role to resolve disputes between competent authorities in accordance with the procedure set out in Article 19. The Authority may take supervisory decisions directly applicable to the institution concerned in accordance with Article 19.

Article 22 – *General provisions*

1. The Authority shall duly consider systemic risk as defined by Regulation (EU) No 1092/2010. It shall address any risk of disruption in financial services that:

(a) is caused by an impairment of all or parts of the financial system; and

(b) has the potential to have serious negative consequences for internal market and the real economy.

The Authority shall consider, where appropriate, the monitoring and assessment of systemic risk as developed by the ESRB and the Authority and respond to warnings and recommendations by the ESRB in accordance with Article 17 of Regulation (EU) No 1092/2010.

2. The Authority shall, in collaboration with the ESRB, and in accordance with Article 23(1), develop a common approach to the identification and measurement of systemic importance, including quantitative and qualitative indicators as appropriate.

These indicators shall be a critical element in the determination of appropriate supervisory actions. The Authority shall monitor the degree

of convergence in the determinations made, with a view to promoting a common approach.

3. Without prejudice to the acts referred to in Article 1(2), the Authority shall draw up, as necessary, additional guidelines and recommendations for financial institutions, to take account of the systemic risk posed by them.

The Authority shall ensure that the systemic risk posed by financial institutions is taken into account when developing draft regulatory and implementing technical standards in the areas laid down in the legislative acts referred to in Article 1(2).

4. Upon a request from one or more competent authorities, the European Parliament, the Council or the Commission, or on its own initiative, the Authority may conduct an inquiry into a particular type of financial institution or type of product or type of conduct in order to assess potential threats to the stability of the financial system and make appropriate recommendations for action to the competent authorities concerned.

For those purposes, the Authority may use the powers conferred on it under this Regulation, including Article 35.

5. The Joint Committee shall ensure overall and cross-sectoral coordination of the activities carried out in accordance with this Article.

Article 23 – *Identification and measurement of systemic risk*

1. The Authority shall, in consultation with the ESRB, develop criteria for the identification and measurement of systemic risk and an adequate stress testing regime which includes an evaluation of the potential for systemic risk that may be posed by financial institutions to increase in situations of stress.

The Authority shall develop an adequate stress testing regime to help identify those financial institutions that may pose a systemic risk. These institutions shall be subject to strengthened supervision, and where necessary, to the recovery and resolution procedures referred to in Article 25.

2. The Authority shall take fully into account the relevant international approaches when developing the criteria for the identification and measurement of systemic risk that may be posed by insurance, re-insurance and occupational pensions institutions, including those established by the Financial Stability Board, the International Monetary Fund, the International Association of Insurance Supervisors and the Bank for International Settlements.

Article 24 – *Permanent capacity to respond to systemic risks*

1. The Authority shall ensure it has specialised and ongoing capacity to respond effectively to the materialisation of systemic risks as referred to in Articles 22 and 23, in particular with respect to institutions that pose a systemic risk.

2. The Authority shall fulfil the tasks conferred upon it in this Regulation and in the legislation referred to in Article 1(2), and shall contribute to ensuring a coherent and coordinated crisis management and resolution regime in the Union.

Article 25 – *Recovery and resolution procedures*

1. The Authority shall contribute to and participate actively in the development and coordination of effective and consistent recovery and resolution plans, procedures in emergency situations and preventive measures to minimise the systemic impact of any failure.

2. The Authority may identify best practices aimed at facilitating the resolution of failing institutions and, in particular, cross-border groups, in ways which avoid contagion, ensuring that appropriate tools, including sufficient resources, are available and allow the institution or the group to be resolved in an orderly, cost-efficient and timely manner.

3. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 10 to 15.

Article 26 – *Development of a European network of national insurance guarantee schemes*

The Authority may contribute to the assessment of the need for a European network of national insurance guarantee schemes which is adequately funded and sufficiently harmonised.

Article 27 – *Crisis prevention, management and resolution*

The Authority may be requested by the Commission to contribute to the assessment referred to in Article 242 of Directive 2009/138/EC, in particular as regards the cooperation of supervisory authorities within, and functionality of, colleges of supervisors; the

supervisory practices concerning setting the capital add-ons; the assessment of the benefit of enhancing group supervision and capital management within a group of insurance or reinsurance undertakings, including possible measures to enhance a sound cross-border management of insurance groups, in particular in respect of risks and asset management; and may report on any new developments and progress concerning:

(a) a harmonised framework for early intervention;

(b) practices in centralised group risk management and functioning of group internal models including stress testing;

(c) intra-group transactions and risk concentrations;

(d) the behaviour of diversification and concentration effects over time;

(e) a harmonised framework for asset transferability, insolvency and winding-up procedures which eliminates the relevant national company or corporate law barriers to asset transferability;

(f) an equivalent level of protection of policy holders and beneficiaries of the undertakings of the same group, particularly in crisis situations;

(g) a harmonised and adequately funded Union-wide solution for insurance guarantee schemes.

Having regard to point (f), the Authority may also report on any new developments and progress concerning a set of coordinated national crisis management arrangements and including the necessity or otherwise of a system of coherent and credible funding mechanisms, with appropriate financing instruments.

The review of this Regulation provided for in Article 81 shall, in particular, examine the possible enhancement of the role of the Authority in a framework of crisis prevention, management and resolution.

Article 28 – *Delegation of tasks and responsibilities*

1. Competent authorities may, with the consent of the delegate, delegate tasks and responsibilities to the Authority or other competent authorities subject to the conditions set out in this Article. Member States may set out specific arrangements regarding the delegation of responsibilities that have to be complied with before their competent authorities enter into such delegation agreements, and may limit the scope of delegation to what is necessary for the effective supervision of cross-border financial institutions or groups.

2. The Authority shall stimulate and facilitate the delegation of tasks and responsibilities between competent authorities by identifying those tasks and responsibilities that can be delegated or jointly exercised and by promoting best practices.

3. The delegation of responsibilities shall result in the reallocation of competences laid down in the acts referred to in Article 1(2). The law of the delegate authority shall govern the procedure, enforcement and administrative and judicial review relating to the delegated responsibilities.

4. The competent authorities shall inform the Authority of delegation agreements into which they intend to enter. They shall put the agreements into effect at the earliest 1 month after informing the Authority.

The Authority may give an opinion on the intended agreement within 1 month of being informed.

The Authority shall publish, by appropriate means, any delegation agreement as concluded by the competent authorities, in order to ensure that all parties concerned are informed appropriately.

Article 29 – *Common supervisory culture*

1. The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union. The Authority shall carry out, at a minimum, the following activities:

(a) providing opinions to competent authorities;

(b) promoting an effective bilateral and multilateral exchange of information between competent authorities, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation;

(c) contributing to developing high quality and uniform supervisory standards, including reporting standards, and international accounting standards in accordance with Article 1(3);

(d) reviewing the application of the relevant regulatory and implementing technical standards adopted by the Commission, and of the guidelines and recommendations issued by the Authority and proposing amendments where appropriate; and

(e) establishing sectoral and cross-sectoral training programmes, facilitating personnel exchanges and encouraging competent authorities to intensify the use of secondment schemes and other tools.

2. The Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.

Article 30 – *Peer reviews of competent authorities*

1. The Authority shall periodically organise and conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. To that end, the Authority shall develop methods to allow for objective assessment and comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with regard to the competent authority concerned shall be taken into account.

2. The peer review shall include an assessment of, but shall not be limited to:

(a) the adequacy of resources and governance arrangements of the competent authority, with particular regard to the effective application of the regulatory technical standards and implementing technical standards referred to in Articles 10 to 15 and of the acts referred to in Article 1(2) and the capacity to respond to market developments;

(b) the degree of convergence reached in the application of Union law and in supervisory practice, including regulatory technical standards and implementing technical standards, guidelines and recommendations adopted under Articles 10 to 16, and the extent to which the supervisory practice achieves the objectives set out in Union law;

(c) best practices developed by some competent authorities which might be of benefit for other competent authorities to adopt;

(d) the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law, including the administrative measures and sanctions imposed against persons responsible where those provisions have not been complied with.

3. On the basis of a peer review, the Authority may issue guidelines and recommendations pursuant to Article 16. In accordance with Article 16(3), the competent authorities shall endeavour to follow those guidelines and recommendations. The Authority shall take into account the outcome of the peer review when developing draft regulatory technical or implementing technical standards in accordance with Articles 10 to 15.

4. The Authority shall make the best practices that can be identified from those peer reviews publicly available. In addition, all other results of peer reviews may be disclosed publicly, subject to the agreement of the competent authority that is the subject of the peer review.

Article 31 – *Coordination function*

The Authority shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union.

The Authority shall promote a coordinated Union response, inter alia, by:

(a) facilitating the exchange of information between the competent authorities;

(b) determining the scope and, where possible and appropriate, verifying the reliability of information that should be made available to all the competent authorities concerned;

(c) without prejudice to Article 19, carrying out non-binding mediation upon a request from the competent authorities or on its own initiative;

(d) notifying the ESRB of any potential emergency situations without delay;

(e) taking all appropriate measures in case of developments which may jeopardise the functioning of the financial markets with a view to facilitating the coordination of actions undertaken by relevant competent authorities;

(f) centralising information received from competent authorities in accordance with Articles 21 and 35 as the result of the regulatory reporting obligations for institutions active in more than one Member State. The Authority shall share that information with the other competent authorities concerned.

Article 32 – *Assessment of market developments*

1. The Authority shall monitor and assess market developments in the area of its competence and, where necessary, inform the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority), the ESRB and the European Parliament, the Council and the Commission about the relevant micro-prudential trends, potential risks and vulnerabilities. The Authority shall include in its assessments an economic analysis of the markets in which financial institutions operate and an assessment of the impact of potential market developments on such institutions.

2. The Authority shall, in cooperation with the ESRB, initiate and coordinate Union-wide assessments of the resilience of financial institutions to adverse market developments. To that end, it shall develop the following, for application by the competent authorities:

(a) common methodologies for assessing the effect of economic scenarios on an institution's financial position;

(b) common approaches to communication on the outcomes of these assessments of the resilience of financial institutions;

(c) common methodologies for assessing the effect of particular products or distribution processes on an institution's financial position and on policyholders, pension scheme members, beneficiaries and customer information.

3. Without prejudice to the tasks of the ESRB set out in Regulation (EU) No 1092/2010, the Authority shall, at least once a year, and more frequently as necessary, provide assessments to the European Parliament, the Council, the Commission and the ESRB of trends, potential risks and vulnerabilities in its area of competence.

The Authority shall include a classification of the main risks and vulnerabilities in these assessments and, where necessary, recommend preventative or remedial actions.

4. The Authority shall ensure an adequate coverage of cross-sectoral developments, risks and vulnerabilities by closely cooperating with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority) through the Joint Committee.

Article 33 – *International relations*

1. Without prejudice to the respective competences of the Member States and the Union institutions, the Authority may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries. Those arrangements shall not create legal obligations in respect of the Union and its Member States nor shall they prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with those third countries.

2. The Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the acts referred to in Article 1(2).

3. In the report referred to in Article 43(5), the Authority shall set out the administrative arrangements agreed upon with international organisations or administrations in third countries and the assistance provided in preparing equivalence decisions.

Article 34 – *Other tasks*

1. The Authority may, upon a request from the European Parliament, the Council or the Commission, or on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence.

2. With regard to prudential assessments of mergers and acquisitions falling within the scope of Directive 92/49/EEC and Directives 2002/83/EC and 2005/68/EC, as amended by Directive 2007/44/EC, and which, according to those Directives, require consultation between competent authorities from two or more Member States, the Authority may, on application of one of the competent authorities concerned, issue and publish an opinion on a prudential assessment, except in relation to the criteria in Article 15b(1)(e) of Directive 92/49/EEC, Article 15b(1)(e) of Directive 2002/83/EC and Article 19a(1)(e) of Directive 2005/68/EC. The opinion shall be issued promptly and in any event before the end of the assessment period in accordance with Directive 92/49/EEC and Directives 2002/83/EC and 2005/68/EC, as amended by Directive 2007/44/EC. Article 35 shall apply to the areas in respect of which the Authority may issue an opinion.

Article 35 – *Collection of information*

1. At the request of the Authority, the competent authorities of the Member States shall provide the Authority with all the necessary information to carry out the duties assigned to it by this Regulation, provided that they have legal access to the relevant information and that the request for information is necessary in relation to the nature of the duty in question.

2. The Authority may also request information to be provided at recurring intervals and in specified formats. Such requests shall, where possible, be made using common reporting formats.

3. Upon a duly justified request from a competent authority of a Member State, the Authority may provide any information that is necessary to enable the competent authority to carry out its duties, in accordance with the professional secrecy obligations laid down in sectoral legislation and in Article 70.

4. Before requesting information in accordance with this Article and in order to avoid the duplication of reporting obligations, the Authority shall take account of any relevant existing statistics produced and disseminated by the European Statistical System and the European System of Central Banks.

5. Where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, to the national central bank or to the statistical office of the Member State concerned.

6. Where information is not available or is not made available under paragraph 1 or 5 in a timely fashion, the Authority may address a duly justified and reasoned request directly to the relevant financial institutions. The reasoned request shall explain why the information concerning the respective individual financial institutions is necessary.

The Authority shall inform the relevant competent authorities of requests in accordance with this paragraph and with paragraph 5.

At the request of the Authority, the competent authorities shall assist the Authority in collecting the information.

7. The Authority may use confidential information received under this Article only for the purposes of carrying out the duties assigned to it by this Regulation.

Article 36 – *Relationship with the ESRB*

1. The Authority shall cooperate closely and on a regular basis with the ESRB.

2. The Authority shall provide the ESRB with regular and timely information necessary for the achievement of its tasks. Any data necessary for the achievement of its tasks that are not in summary or aggregate form shall be provided, without delay, to the ESRB upon a reasoned request, as specified in Article 15 of Regulation (EU) No 1092/2010. The Authority, in cooperation with the ESRB, shall have in place adequate internal procedures for the transmission of confidential information, in particular information regarding individual financial institutions.

3. The Authority shall, in accordance with paragraphs 4 and 5, ensure a proper follow-up to ESRB warnings and recommendations referred to in Article 16 of Regulation (EU) No 1092/2010.

4. On receipt of a warning or recommendation from the ESRB addressed to the Authority, the Authority shall convene a meeting of the Board of Supervisors without delay and assess the implications of such a warning or recommendation for the fulfilment of its tasks.

It shall decide, by the relevant decision-making procedure, on any actions to be taken in accordance with the powers conferred upon it by this Regulation for addressing the issues identified in the warnings and recommendations.

If the Authority does not act on a recommendation, it shall explain to the ESRB and the Council its reasons for not doing so.

5. On receipt of a warning or recommendation from the ESRB addressed to a competent national supervisory authority, the Authority shall, where relevant, use the powers conferred upon it by this Regulation to ensure a timely follow-up.

Where the addressee intends not to follow the recommendation of the ESRB, it shall inform and discuss with the Board of Supervisors its reasons for not acting.

The competent authority shall take due account of the views of the Board of Supervisors when informing the Council and the ESRB in

accordance with Article 17 of Regulation (EU) No 1092/2010.

6. In discharging the tasks set out in this Regulation, the Authority shall take the utmost account of the warnings and recommendations of the ESRB.

Article 37 – *Insurance and Reinsurance Stakeholder Group and Occupational Pensions Stakeholder Group*

1. To help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority, an Insurance and Reinsurance Stakeholder Group and an Occupational Pensions Stakeholder Group shall be established (hereinafter collectively referred to as the "Stakeholder Groups"). The Stakeholder Groups shall be consulted on actions taken in accordance with Articles 10 to 15 concerning regulatory technical standards and implementing technical standards, and, to the extent that these do not concern individual financial institutions, Article 16 concerning guidelines and recommendations. If actions must be taken urgently and consultation becomes impossible, the Stakeholder Groups shall be informed as soon as possible.

The Stakeholder Groups shall meet at least four times a year. They may, together, discuss areas of mutual interest and shall inform each other of the other issues being discussed.

Members of one stakeholder group may be also members of the other stakeholder group.

2. The Insurance and Reinsurance Stakeholder Group shall be composed of 30 members, representing in balanced proportions insurance and reinsurance undertakings and insurance intermediaries operating in the Union, and their employees' representatives, as well as consumers, users of insurance and reinsurance services, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent insurance undertakings, reinsurance undertakings or insurance intermediaries, three of whom shall represent cooperative and mutual insurers or reinsurers.

3. The Occupational Pensions Stakeholder Group shall be composed of 30 members, representing in balanced proportions institutions for occupational retirement provision operating in the Union, representatives of employees, representatives of beneficiaries, representatives of SMEs and representatives of relevant professional associations. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent institutions for occupational retirement provision.

4. The members of the Stakeholder Groups shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders. In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical and gender balance and representation of stakeholders across the Union.

5. The Authority shall provide all necessary information subject to professional secrecy as set out in Article 70 and ensure adequate secretarial support for the Stakeholder Groups. Adequate compensation shall be provided to members of the Stakeholder Groups representing non-profit organisations, excluding industry representatives. The Stakeholder Groups may establish working groups on technical issues. Members of the Stakeholder Groups shall serve for a period of two-and-a-half years, following which a new selection procedure shall take place.

The members of the Stakeholder Groups may serve two successive terms.

6. The Stakeholder Groups may submit opinions and advice to the Authority on any issue related to the tasks of the Authority with particular focus on the tasks set out in Articles 10 to 16, and Articles 29, 30 and 32.

7. The Stakeholder Groups shall adopt their rules of procedure on the basis of the agreement of a two-thirds majority of their respective members.

8. The Authority shall make public the opinions and advice of the Stakeholder Groups and the results of their consultations.

Article 38 – *Safeguards*

1. The Authority shall ensure that no decision adopted under Articles 18 or 19 impinges in any way on the fiscal responsibilities of Member States.

2. Where a Member State considers that a decision taken under Article 19(3) impinges on its fiscal responsibilities, it may notify the Authority and the Commission within 2 weeks after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In the case of such notification, the decision of the Authority shall be suspended.

Within a period of 1 month from the notification by the Member State, the Authority shall inform the Member State as to whether it maintains its decision or whether it amends or revokes it. If the decision is maintained or amended, the Authority shall state that fiscal responsibilities are not affected.

Where the Authority maintains its decision, the Council shall take a decision, by a majority of the votes cast, at one of its meetings not later than 2 months after the Authority has informed the Member State as set out in the fourth subparagraph, as to whether the Authority's decision is maintained.

Where the Council, after having considered the matter, does not take a decision to maintain the Authority's decision in accordance with the fifth subparagraph, the Authority's decision shall be terminated.

3. Where a Member State considers that a decision taken under Article 18(3) impinges on its fiscal responsibilities, it may notify the Authority, the Commission and the Council, within three working days after notification of the Authority's decision to the competent authority, that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In the case of such notification, the decision of the Authority shall be suspended.

The Council shall, within ten working days, convene a meeting and take a decision, by a simple majority of its members, as to whether the Authority's decision is revoked.

Where the Council, after having considered the matter, does not take a decision to revoke the Authority's decision in accordance with the fourth subparagraph, the suspension of the Authority's decision shall be terminated.

4. Where the Council has taken a decision in accordance with paragraph 3 not to revoke a decision of the Authority relating to Article 18(3), and the Member State concerned still considers that the decision of the Authority impinges upon its fiscal responsibilities, that Member State may notify the Commission and the Authority and request the Council to re-examine the matter. The Member State concerned shall clearly set out the reasons for its disagreement with the decision of the Council.

Within a period of 4 weeks after the notification referred to in the first subparagraph, the Council shall confirm its original decision or take a new decision in accordance with paragraph 3.

The period of 4 weeks may be extended by four additional weeks by the Council, if the particular circumstances of the case so require.

5. Any abuse of this Article, in particular in relation to a decision by the Authority which does not have a significant or material fiscal impact, shall be prohibited as incompatible with the internal market.

Article 39 – *Decision-making procedures*

1. Before taking the decisions provided for in this Regulation, the Authority shall inform any named addressee of its intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter. This applies mutatis mutandis to recommendations as referred to in Article 17(3).

2. The decisions of the Authority shall state the reasons on which they are based.

3. The addressees of decisions of the Authority shall be informed of the legal remedies available under this Regulation.

4. Where the Authority has taken a decision pursuant to Article 18(3) or (4), it shall review that decision at appropriate intervals.

5. The decisions which the Authority takes pursuant to Articles 17, 18 or 19 shall be made public and shall state the identity of the competent authority or financial institution concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of financial institutions in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union.

CHAPTER III – ORGANISATION

SECTION 1 – Board of Supervisors

Article 40 – *Composition*

1. The Board of Supervisors shall be composed of:

(a) the Chairperson, who shall be non-voting;

(b) the head of the national public authority competent for the supervision of financial institutions in each Member State, who shall meet in person at least twice a year;

(c) one representative of the Commission, who shall be non-voting;

(d) one representative of the ESRB, who shall be non-voting;

(e) one representative of each of the other two European Supervisory Authorities, who shall be non-voting;

2. The Board of Supervisors shall convene meetings with the Stakeholder Groups regularly, at least twice a year.

3. Each competent authority shall be responsible for nominating a high-level alternate from its authority, who may replace the member of the Board of Supervisors referred to in paragraph 1(b), where that person is prevented from attending.

4. In Member States where more than one authority is responsible for the supervision according to this Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by the member referred to in paragraph 1(b), that member may bring a representative from the relevant national authority, who shall be non-voting.

5. The Board of Supervisors may decide to admit observers.

The Executive Director may participate in meetings of the Board of Supervisors, without the right to vote.

Article 41 – *Internal committees and panels*

1. The Board of Supervisors may establish internal committees or panels for specific tasks attributed to the Board of Supervisors, and may provide for the delegation of certain clearly defined tasks and decisions to internal committees or panels, to the Management Board or to the Chairperson.

2. For the purposes of Article 19, the Board of Supervisors shall convoke an independent panel to facilitate an impartial settlement of the disagreement, consisting of the Chairperson and two of its members, who are not representatives of the competent authorities which are party to the disagreement and who have neither any interest in the conflict nor direct links to the competent authorities concerned.

3. Subject to Article 19(2), the panel shall propose a decision for final adoption by the Board of Supervisors, in accordance with the procedure set out in the third subparagraph of Article 44(1).

4. The Board of Supervisors shall adopt rules of procedure for the panel referred to in paragraph 2.

Article 42 – *Independence*

When carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks.

Article 43 – *Tasks*

1. The Board of Supervisors shall give guidance to the work of the Authority and shall be in charge of taking the decisions referred to in Chapter II.

2. The Board of Supervisors shall adopt the opinions, recommendations, and decisions, and issue the advice referred to in Chapter II.

3. The Board of Supervisors shall appoint the Chairperson.

4. The Board of Supervisors shall adopt, before 30 September of each year, on the basis of a proposal by the Management Board, the work programme of the Authority for the coming year, and shall transmit it for information to the European Parliament, the Council and the Commission.

The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

5. The Board of Supervisors shall, on the basis of a proposal by the Management Board, adopt the annual report on the activities of the Authority, including on the performance of the Chairperson's duties, on the basis of the draft report referred to in Article 53(7) and shall transmit that report to the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee by 15 June each year. The report shall be made public.

6. The Board of Supervisors shall adopt the multi-annual work programme of the Authority, and shall transmit it for information to the European Parliament, the Council and the Commission.

The multi-annual work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

7. The Board of Supervisors shall adopt the budget in accordance with Article 63.

8. The Board of Supervisors shall exercise disciplinary authority over the Chairperson and the Executive Director and may remove them from office in accordance with Article 48(5) or Article 51(5) respectively.

Article 44 – *Decision making*

1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.

With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

With regard to decisions in accordance with Article 19(3), for decisions taken by the group supervisor, the decision proposed by the panel shall be considered as adopted, if approved by a simple majority, unless it is rejected by members representing a blocking minority of the votes as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

For all other decisions in accordance with Article 19(3), the decision proposed by the panel shall be adopted by a simple majority of the members of the Board of Supervisors. Each member shall have one vote.

2. Meetings of the Board of Supervisors shall be convened by the Chairperson at his own initiative or at the request of one third of its members, and shall be chaired by the Chairperson.

3. The Board of Supervisors shall adopt and make public its rules of procedure.

4. The rules of procedure shall set out in detail the arrangements governing voting, including, where appropriate, the rules governing quorums. The non-voting members and the observers, with the exception of the Chairperson and the Executive Director, shall not attend any discussions within the Board of Supervisors relating to individual financial institutions, unless otherwise provided for in Article 75(3) or in the acts referred to in Article 1(2).

SECTION 2 – Management Board

Article 45 – *Composition*

1. The Management Board shall be composed of the Chairperson and six other members of the Board of Supervisors, elected by and from the voting members of the Board of Supervisors.

Other than the Chairperson, each member of the Management Board shall have an alternate, who may replace him if he is prevented from attending.

The term of office of the members elected by the Board of Supervisors shall be two-and-a-half years. That term may be extended once. The composition of the Management Board shall be balanced and proportionate and shall reflect the Union as a whole. Mandates shall be overlapping and an appropriate rotating arrangement shall apply.

2. Decisions by the Management Board shall be adopted on the basis of a majority of the members present. Each member shall have one vote.

The Executive Director and a representative of the Commission shall participate in meetings of the Management Board without the right to vote.

The representative of the Commission shall have the right to vote on matters referred to in Article 63.

The Management Board shall adopt and make public its rules of procedure.

3. Meetings of the Management Board shall be convened by the Chairperson at his own initiative or at the request of at least a third of its members, and shall be chaired by the Chairperson.

The Management Board shall meet prior to every meeting of the Board of Supervisors and as often as the Management Board deems necessary. It shall meet at least five times a year.

4. The members of the Management Board may, subject to the rules of procedure, be assisted by advisers or experts. The non-voting members, with the exception of the Executive Director, shall not attend any discussions within the Management Board relating to individual financial institutions.

Article 46 – *Independence*

The members of the Management Board shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Management Board in the performance of their tasks.

Article 47 – *Tasks*

1. The Management Board shall ensure that the Authority carries out its mission and performs the tasks assigned to it in accordance with this Regulation.

2. The Management Board shall propose, for adoption by the Board of Supervisors, an annual and multi-annual work programme.

3. The Management Board shall exercise its budgetary powers in accordance with Articles 63 and 64.

4. The Management Board shall adopt the Authority's staff policy plan and, pursuant to Article 68(2), the necessary implementing measures of the Staff Regulations of Officials of the European Communities (hereinafter the Staff Regulations').

5. The Management Board shall adopt the special provisions on right of access to the documents of the Authority, in accordance with Article 72.

6. The Management Board shall propose an annual report on the activities of the Authority, including on the Chairperson's duties, on the basis of the draft report referred to in Article 53(7) to the Board of Supervisors for approval.

7. The Management Board shall adopt and make public its rules of procedure.

8. The Management Board shall appoint and remove the members of the Board of Appeal in accordance with Article 58(3) and (5).

SECTION 3 – Chairperson

Article 48 – *Appointment and tasks*

1. The Authority shall be represented by a Chairperson, who shall be a full-time independent professional.

The Chairperson shall be responsible for preparing the work of the Board of Supervisors and shall chair the meetings of the Board of Supervisors and the Management Board.

2. The Chairperson shall be appointed by the Board of Supervisors on the basis of merit, skills, knowledge of financial institutions and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure.

Before taking up his duties, and up to 1 month after the selection by the Board of Supervisors, the European Parliament may, after having heard the candidate selected by the Board of Supervisors, object to the designation of the selected person.

The Board of Supervisors shall also elect, from among its members, an alternate who shall carry out the functions of the Chairperson in his absence. That alternate shall not be elected from among the members of the Management Board.

3. The Chairperson's term of office shall be 5 years and may be extended once.

4. In the course of the 9 months preceding the end of the five-year term of office of the Chairperson, the Board of Supervisors shall evaluate:

(a) the results achieved in the first term of office and the way they were achieved;

(b) the Authority's duties and requirements in the coming years.

The Board of Supervisors, taking into account the evaluation, may extend the term of office of the Chairperson once subject to confirmation by the European Parliament.

5. The Chairperson may be removed from office only by the European Parliament following a decision of the Board of Supervisors.

The Chairperson shall not prevent the Board of Supervisors from discussing matters relating to the Chairperson, in particular the need for his removal, and shall not be involved in deliberations concerning such a matter.

Article 49 – *Independence*

Without prejudice to the role of the Board of Supervisors in relation to the tasks of the Chairperson, the Chairperson shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies nor any other public or private body shall seek to influence the Chairperson in the performance of his tasks.

In accordance with the Staff Regulations referred to in Article 68, the Chairperson shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Article 50 – *Report*

1. The European Parliament and the Council may invite the Chairperson or his alternate to make a statement, while fully respecting his independence. The Chairperson shall make a statement before the European Parliament and answer any questions put by its members whenever so requested.

2. The Chairperson shall report in writing on the main activities of the Authority to the European Parliament when requested and at least 15 days before making the statement referred to in paragraph 1.

3. In addition to the information referred to in Articles 11 to 18 and Articles 20 and 33, the report shall also include any relevant information requested by the European Parliament on an ad-hoc basis.

SECTION 4 – Executive Director

Article 51 – *Appointment*

1. The Authority shall be managed by an Executive Director, who shall be a full-time independent professional.

2. The Executive Director shall be appointed by the Board of Supervisors, after confirmation by the European Parliament, on the basis of merit, skills, knowledge of financial institutions and markets, and experience relevant to financial supervision and regulation and managerial experience, following an open selection procedure.

3. The Executive Director's term of office shall be 5 years and may be extended once.

4. In the course of the 9 months preceding the end of the Executive Director's term of office, the Board of Supervisors shall evaluate in particular:

(a) the results achieved in the first term of office and the way they were achieved;

(b) the Authority's duties and requirements in the coming years.

The Board of Supervisors, taking into account the evaluation referred to in the first subparagraph, may extend the term of office of the Executive Director once.

5. The Executive Director may be removed from office only upon a decision of the Board of Supervisors.

Article 52 – *Independence*

Without prejudice to the respective roles of the Management Board and the Board of Supervisors in relation to the tasks of the Executive Director, the Executive Director shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State, or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Executive Director in the performance of his tasks.

In accordance with the Staff Regulations referred to in Article 68, the Executive Director shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Article 53 – *Tasks*

1. The Executive Director shall be in charge of the management of the Authority and shall prepare the work of the Management Board.

2. The Executive Director shall be responsible for implementing the annual work programme of the Authority under the guidance of the Board of Supervisors and under the control of the Management Board.

3. The Executive Director shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Authority, in accordance with this Regulation.

4. The Executive Director shall prepare a multi-annual work programme, as referred to in Article 47(2).

5. Each year, by 30 June, the Executive Director shall prepare a work programme for the following year, as referred to in Article 47(2).

6. The Executive Director shall draw up a preliminary draft budget of the Authority pursuant to Article 63 and shall implement the budget of the Authority pursuant to Article 64.

7. Each year the Executive Director shall prepare a draft report with a section on the regulatory and supervisory activities of the Authority and a section on financial and administrative matters.

8. The Executive Director shall exercise in respect to the Authority's staff the powers laid down in Article 68 and manage staff matters.

CHAPTER IV – JOINT BODIES OF THE EUROPEAN SUPERVISORY AUTHORITIES

SECTION 1 – Joint Committee of European Supervisory Authorities

Article 54 – *Establishment*

1. The Joint Committee of the European Supervisory Authorities is hereby established.

2. The Joint Committee shall serve as a forum in which the Authority shall cooperate regularly and closely and ensure cross-sectoral consistency with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Securities and Markets Authority), in particular regarding:

- financial conglomerates,

- accounting and auditing,

- micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability,

- retail investment products,

- measures combating money laundering; and,

- information exchange with the ESRB and developing the relationship between the ESRB and the ESAs,

3. The Joint Committee shall have a dedicated staff provided by the ESAs that shall act as a secretariat. The Authority shall contribute adequate resources to administrative, infrastructure and operational expenses.

4. In the event that a financial institution reaches across different sectors, the Joint Committee shall resolve disagreements in accordance with Article 56.

Article 55 – *Composition*

1. The Joint Committee shall be composed of the Chairpersons of the ESAs, and, where applicable, the Chairperson of any Sub-Committee established under Article 57.

2. The Executive Director, a representative of the Commission and the ESRB shall be invited to the meetings of the Joint Committee, as well as of any Sub-Committees referred to in Article 57, as observers.

3. The Chairperson of the Joint Committee shall be appointed on an annual rotational basis from among the Chairpersons of the ESAs. The Chairperson of the Joint Committee shall be a Vice-Chair of the ESRB.

4. The Joint Committee shall adopt and publish its own rules of procedure. The rules may specify further participants in the meetings of the Joint Committee.

The Joint Committee shall meet at least once every 2 months.

Article 56 – *Joint positions and common acts*

Within the scope of its tasks in Chapter II, and in particular with respect to the implementation of Directive 2002/87/EC, where relevant, the Authority shall reach joint positions with the European Supervisory Authority (European Banking Authority) and with the European Supervisory Authority (European Securities and Markets Authority), as appropriate.

Acts under Articles 10 to 15, 17, 18 or 19 of this Regulation in relation to the application of Directive 2002/87/EC and of any other Union acts referred to in Article 1(2) that also fall within the area of competence of the European Supervisory Authority (European Banking Authority) or the European Supervisory Authority (European Securities and Markets Authority) shall be adopted, in parallel, by the Authority, the European Supervisory Authority (European Banking Authority), and the European Supervisory Authority (European Securities and Market Authority), as appropriate.

Article 57 – *Sub-Committees*

1. For the purposes of Article 56, a Sub-Committee on Financial Conglomerates to the Joint Committee shall be established.

2. The Sub-Committee shall be composed of the individuals referred to in Article 55(1), and one high-level representative from the current staff of the relevant competent authority from each Member State.

3. The Sub-Committee shall elect a Chairperson from among its members, who shall also be a member of the Joint Committee.

4. The Joint Committee may establish further Sub-Committees.

SECTION 2 – Board of Appeal

Article 58 – *Composition and operation*

1. The Board of Appeal shall be a joint body of the ESAs.

2. The Board of Appeal shall be composed of six members and six alternates, who shall be individuals of a high repute with a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking, insurance, occupational pensions, securities markets or other financial services, excluding current staff of the competent authorities or other national or Union institutions involved in the activities of the Authority. The Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers.

The Board of Appeal shall designate its President.

3. Two members of the Board of Appeal and two alternates shall be appointed by the Management Board of the Authority from a short-list proposed by the Commission, following a public call for expressions of interest published in the Official Journal of the European Union, and after consultation of the Board of Supervisors.

The other members shall be appointed in accordance with Regulation (EU) No 1093/2010 and Regulation (EU) No 1095/2010.

4. The term of office of the members of the Board of Appeal shall be 5 years. That term may be extended once.

5. A member of the Board of Appeal appointed by the Management Board of the Authority shall not be removed during his term of office unless he has been found guilty of serious misconduct and the Management Board takes a decision to that effect after consulting the Board of Supervisors.

6. The decisions of the Board of Appeal shall be adopted on the basis of a majority of at least four of its six members. Where the appealed decision falls within the scope of this Regulation, the deciding majority shall include at least one of the two members of the Board of Appeal appointed by the Authority.

7. The Board of Appeal shall be convened by its President when necessary.

8. The ESAs shall ensure adequate operational and secretarial support for the Board of Appeal through the Joint Committee.

Article 59 – *Independence and impartiality*

1. The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in relation to the Authority, its Management Board or its Board of Supervisors.

2. Members of the Board of Appeal shall not take part in any appeal proceedings in which they have any personal interest if they have previously been involved as representatives of one of the parties to the proceedings, or if they have participated in the decision under appeal.

3. If, for one of the reasons referred to in paragraphs 1 and 2 or for any other reason, a member of a Board of Appeal considers that another member should not take part in any appeal proceedings, he shall inform the Board of Appeal accordingly.

4. Any party to the appeal proceedings may object to the participation of a member of the

Board of Appeal on any of the grounds referred to in paragraphs 1 and 2, or if suspected of bias.

No objection may be based on the nationality of members nor shall it be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has nonetheless taken a procedural step other than objecting to the composition of the Board of Appeal.

5. The Board of Appeal shall decide on the action to be taken in the cases specified in paragraphs 1 and 2 without the participation of the member concerned.

For the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate. Where the alternate is in a similar situation, the Chairperson shall designate a replacement from among the available alternates.

6. The members of the Board of Appeal shall undertake to act independently and in the public interest.

For that purpose, they shall make a declaration of commitments and a declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence.

Those declarations shall be made public, annually and in writing.

CHAPTER V - REMEDIES

Article 60 – *Appeals*

1. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

2. The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision.

The Board of Appeal shall decide upon the appeal within 2 months after the appeal has been lodged.

3. An appeal lodged pursuant to paragraph 1 shall not have suspensive effect.

However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.

4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations.

5. The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.

6. The Board of Appeal shall adopt and make public its rules of procedure.

7. The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority.

Article 61 – *Actions before the Court of Justice of the European Union*

1. Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority.

2. Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the Authority, in accordance with Article 263 TFEU.

3. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU.

4. The Authority shall be required to take the necessary measures to comply with the

judgment of the Court of Justice of the European Union.

CHAPTER VI - FINANCIAL PROVISIONS

Article 62 – *Budget of the Authority*

1. The revenues of the Authority, a European body in accordance with Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities[47] (hereinafter the 'Financial Regulation'), shall consist, in particular, of any combination of the following:

(a) obligatory contributions from the national public authorities competent for the supervision of financial institutions, which shall be made in accordance with a formula based on the weighting of votes set out in Article 3(3) of Protocol (No 36) on transitional provisions. For the purposes of this Article, Article 3(3) of Protocol (No 36) on transitional provisions shall continue to apply beyond the deadline of 31 October 2014 therein established;

(b) a subsidy from the Union, entered in the General Budget of the European Union (Commission Section);

(c) any fees paid to the Authority in the cases specified in the relevant instruments of Union law.

2. The expenditure of the Authority shall include, at least, staff, remuneration, administrative, infrastructure, professional training and operational expenses.

3. Revenue and expenditure shall be in balance.

4. Estimates of all Authority revenue and expenditure shall be prepared for each financial year, corresponding to the calendar year, and shall be presented in the budget of the Authority.

Article 63 – *Establishment of the budget*

1. By 15 February each year, the Executive Director shall draw up a draft statement of estimates of revenue and expenditure for the following financial year, and shall forward it to the Management Board and the Board of Supervisors, together with the establishment plan. Each year, the Board of Supervisors shall, on the basis of the draft statement drawn up by the Executive Director and approved by the Management Board, produce a statement of estimates of revenue and expenditure of the Authority for the following financial year. That statement of estimates, including a draft establishment plan, shall be transmitted by the Board of Supervisors to the Commission by 31 March. Prior to adoption of the statement of estimates, the draft prepared by the Executive Director shall be approved by the Management Board.

2. The statement of estimates shall be transmitted by the Commission to the European Parliament and to the Council (hereinafter referred to together as the "budgetary authority"), together with the draft budget of the European Union.

3. On the basis of the statement of estimates, the Commission shall enter in the draft budget of the European Union the estimates it deems necessary in respect of the establishment plan and the amount of the subsidy to be charged to the General Budget of the European Union in accordance with Articles 313 and 314 TFEU.

4. The budgetary authority shall adopt the establishment plan for the Authority. The budgetary authority shall authorise the appropriations for the subsidy to the Authority.

5. The budget of the Authority shall be adopted by the Board of Supervisors. It shall become final after the final adoption of the General Budget of the European Union. Where necessary, it shall be adjusted accordingly.

6. The Management Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any project relating to property, such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budgetary authority intends to issue an opinion, it shall, within 2 weeks of receipt of the information on the project, notify the Authority of its intention to issue such an opinion. In the absence of a reply, the Authority may proceed with the planned operation.

7. For the first year of operation of the Authority, ending on 31 December 2011, the financing of the Authority by the Union is subject to an agreement by the budgetary authority as provided for in Point 47 of the Interinstitutional Agreement on budgetary discipline and sound financial management.

Article 64 – *Implementation and control of the budget*

[47] OJ L 248, 16.9.2002, p. 1.

1. The Executive Director shall act as authorising officer and shall implement the Authority's budget.

2. By 1 March following the completion of each financial year, the Authority's accounting officer shall forward to the Commission's accounting officer and to the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management during the financial year. The Authority's accounting officer shall also send the report on budgetary and financial management to the members of the Board of Supervisors, the European Parliament and the Council by 31 March of the following year.

The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of the Financial Regulation.

3. After receiving the observations of the Court of Auditors on the provisional accounts of the Authority in accordance with Article 129 of the Financial Regulation, the Executive Director, acting on his own responsibility, shall draw up the final accounts of the Authority and transmit them, for opinion, to the Management Board.

4. The Management Board shall deliver an opinion on the final accounts of the Authority.

5. The Executive Director shall transmit those final accounts, accompanied by the opinion of the Management Board, by 1 July following the completion of the financial year, to the Members of the Board of Supervisors, the European Parliament, the Council, the Commission and the Court of Auditors.

6. The final accounts shall be published.

7. The Executive Director shall send the Court of Auditors a reply to the latter's observations by 30 September. He shall also send a copy of that reply to the Management Board and the Commission.

8. The Executive Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of the Financial Regulation, any information necessary for the smooth application of the discharge procedure for the financial year in question.

9. The European Parliament, following a recommendation from the Council acting by qualified majority, shall, before 15 May of the year N +2, grant a discharge to the Authority for the implementation of the budget comprising revenue from the General Budget of the European Union and competent authorities for the financial year N.

Article 65 – *Financial rules*

The financial rules applicable to the Authority shall be adopted by the Management Board after consulting the Commission. Those rules may not depart from Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities[48] unless the specific operational needs for the functioning of the Authority so require and only with the prior agreement of the Commission.

Article 66 – *Anti-fraud measures*

1. For the purposes of combating fraud, corruption and any other illegal activity, Regulation (EC) No 1073/1999 shall apply to the Authority without any restriction.

2. The Authority shall accede to the Interinstitutional Agreement concerning internal investigations by OLAF and shall immediately adopt appropriate provisions for all staff of the Authority.

3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Authority as well as on the staff responsible for allocating these monies.

CHAPTER VII - GENERAL PROVISIONS

Article 67 – *Privileges and immunities*

The Protocol (No 7) on the privileges and immunities of the European Union annexed to the Treaty on European Union and to the TFEU shall apply to the Authority and its staff.

Article 68 – *Staff*

1. The Staff Regulations, the Conditions of Employment of Other Servants and the rules adopted jointly by the Union institutions for the purpose of applying them shall apply to the staff of the Authority, including its Executive Director and its Chairperson.

[48] OJ L 357, 31.12.2002, p. 72.

2. The Management Board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations.

3. In respect of its staff, the Authority shall exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of Employment of Other Servants.

4. The Management Board shall adopt provisions to allow national experts from Member States to be seconded to the Authority.

Article 69 – *Liability of the Authority*

1. In the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Union shall have jurisdiction in any dispute over the remedying of such damage.

2. The personal financial liability and disciplinary liability of Authority staff towards the Authority shall be governed by the relevant provisions applying to the staff of the Authority.

Article 70 – *Obligation of professional secrecy*

1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.

Article 16 of the Staff Regulations shall apply to them.

In accordance with the Staff Regulations, the staff shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence staff members of the Authority in the performance of their tasks.

2. Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial institutions cannot be identified.

Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.

3. Paragraphs 1 and 2 shall not prevent the Authority from exchanging information with national supervisory authorities in accordance with this Regulation and other Union legislation applicable to financial institutions.

That information shall be subject to the conditions of professional secrecy referred to in paragraphs 1 and 2. The Authority shall lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.

4. The Authority shall apply Commission Decision 2001/844/EC, ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure.[49]

Article 71 – *Data protection*

This Regulation shall be without prejudice to the obligations of Member States relating to their processing of personal data under Directive 95/46/EC or the obligations of the Authority relating to its processing of personal data under Regulation (EC) No 45/2001 when fulfilling its responsibilities.

Article 72 – *Access to documents*

1. Regulation (EC) No 1049/2001 shall apply to documents held by the Authority.

2. The Management Board shall, by 31 May 2011, adopt practical measures for applying Regulation (EC) No 1049/2001.

3. Decisions taken by the Authority pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice of the European Union, following an appeal to the Board of Appeal, as appropriate, in accordance with the conditions laid down in Articles 228 and 263 TFEU respectively.

[49] OJ L 317, 3.12.2001, p. 1.

Article 73 – *Language arrangements*

1. Council Regulation No 1 determining the languages to be used by the European Economic Community[50] shall apply to the Authority.

2. The Management Board shall decide on the internal language arrangements for the Authority.

3. The translation services required for the functioning of the Authority shall be provided by the Translation Centre for the Bodies of the European Union.

Article 74 – *Headquarters Agreement*

The necessary arrangements concerning the accommodation to be provided for the Authority in the Member State where its seat is located and the facilities to be made available by that Member State, as well as the specific rules applicable in that Member State to the Executive Director, the members of the Management Board, the staff of the Authority and members of their families shall be laid down in a Headquarters Agreement between the Authority and that Member State concluded after obtaining the approval of the Management Board.

That Member State shall provide the best possible conditions to ensure the proper functioning of the Authority, including multilingual, European-oriented schooling and appropriate transport connections.

Article 75 – *Participation of third countries*

1. Participation in the work of the Authority shall be open to third countries which have concluded agreements with the Union whereby they have adopted and are applying Union law in the areas of competence of the Authority as referred to in Article 1(2).

2. The Authority may cooperate with the countries referred to in paragraph 1 applying legislation which has been recognised as equivalent in the areas of competence of the Authority referred to in Article 1(2), as provided for in international agreements concluded by the Union in accordance with Article 216 TFEU.

3. Under the relevant provisions of the agreements referred to in paragraphs 1 and 2, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of the countries referred to in paragraph 1 in the work of the Authority, including provisions relating to financial contributions and to staff. They may provide for representation, as an observer, on the Board of Supervisors, but shall ensure that those countries do not attend any discussions relating to individual financial institutions, except where there is a direct interest.

CHAPTER VIII – TRANSITIONAL AND FINAL PROVISIONS

Article 76 – *Preparatory actions*

1. Following the entry into force of this Regulation, and before the establishment of the Authority, CEIOPS shall act in close cooperation with the Commission to prepare for the replacement of CEIOPS by the Authority.

2. Once the Authority has been established, the Commission shall be responsible for the administrative establishment and initial administrative operation of the Authority until the Authority has appointed an Executive Director.

For that purpose, until such time as the Executive Director takes up his duties following his appointment by the Board of Supervisors in accordance with Article 51, the Commission may assign one official on an interim basis in order to fulfil the functions of the Executive Director. That period shall be limited to the time necessary for the appointment of an Executive Director of the Authority.

The interim Executive Director may authorise all payments covered by credits provided in the budget of the Authority, once approved by the Management Board and may conclude contracts, including staff contracts following the adoption of the Authority's establishment plan.

3. Paragraphs 1 and 2 are without prejudice to the powers of the Board of Supervisors and the Management Board.

4. The Authority shall be considered the legal successor of CEIOPS. By the date of establishment of the Authority, all assets and liabilities and all pending operations of CEIOPS shall be automatically transferred to the Authority. CEIOPS shall establish a statement showing its closing asset and liability situation as of the date of that transfer. That statement shall be audited and approved by CEIOPS and by the Commission.

Article 77 – *Transitional staff provisions*

1. By way of derogation from Article 68, all employment contracts and secondment

[50] OJ 17, 6.10.1958, p. 385.

agreements concluded by CEIOPS or its Secretariat and in force on 1 January 2011 shall be honoured until their expiry date. They may not be extended.

2. All members of staff under contracts referred to in paragraph 1 shall be offered the possibility of concluding temporary agent contracts under Article 2(a) of the Conditions of Employment of Other Servants at the various grades as set out in the Authority's establishment plan.

An internal selection limited to staff who have contracts with CEIOPS or its Secretariat shall be carried out after the entry into force of this Regulation by the authority authorised to conclude contracts in order to check the ability, efficiency and integrity of those to be engaged. The internal selection procedure shall take full account of the skills and experience demonstrated by the individuals' performance prior to the engagement.

3. Depending on the type and level of functions to be performed, successful applicants shall be offered temporary agents' contracts of a duration corresponding at least to the time remaining under the prior contract.

4. The relevant national law relating to labour contracts and other relevant instruments shall continue to apply to staff members with prior contracts who choose not to apply for temporary agent's contracts or who are not offered temporary agents contracts in accordance with paragraph 2.

Article 78 – *National provisions*

The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

Article 79 – *Amendments*

Decision No 716/2009/EC is hereby amended in so far as CEIOPS is removed from the list of beneficiaries set out in Section B of the Annex to that Decision.

Article 80 – *Repeal*

Commission Decision 2009/79/EC, establishing CEIOPS, is hereby repealed with effect from 1 January 2011.

Article 81 – *Review*

1. By 2 January 2014, and every 3 years thereafter, the Commission shall publish a general report on the experience acquired as a result of the operation of the Authority and the procedures laid down in this Regulation. That report shall evaluate, inter alia:

(a) the convergence in supervisory practices reached by competent authorities,

(i) the convergence in functional independence of the competent authorities and in standards equivalent to corporate governance;

(ii) the impartiality, objectivity and autonomy of the Authority;

(b) the functioning of the colleges of supervisors;

(c) the progress achieved towards convergence in the fields of crisis prevention, management and resolution, including Union funding mechanisms;

(d) the role of the Authority as regards systemic risk;

(e) the application of the safeguard clause established in Article 38;

(f) the application of the binding mediation role established in Article 19.

2. The report referred to in paragraph 1 shall also examine whether:

(a) it is appropriate to continue separate supervision of banking, insurance, occupational pensions, securities and financial markets;

(b) it is appropriate to undertake prudential supervision and supervise the conduct of business separately or by the same supervisor;

(c) it is appropriate to simplify and reinforce the architecture of the ESFS in order to increase the coherence between the macro and the micro levels and between the ESAs;

(d) the evolution of the ESFS is consistent with that of the global evolution;

(e) there is sufficient diversity and excellence within the ESFS;

(f) accountability and transparency in relation to publication requirements are adequate;

(g) the resources of the Authority are adequate to carry out its responsibilities;

(h) it is appropriate for the seat of the Authority to be maintained or to move the ESAs to a single seat to enhance better coordination between them.

3. Concerning the issue of direct supervision of institutions or infrastructures of pan-European reach and taking account of market developments, the Commission shall draw up an annual report on the appropriateness of entrusting the Authority with further supervisory responsibilities in this area.

4. The report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council.

Article 82 – *Entry into force*

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply from 1 January 2011, with the exception of Article 76 and Article 77(1) and (2), which shall apply as from the date of its entry into force.

The Authority shall be established on 1 January 2011.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 24 November 2010.

For the Council

The President

J. Buzek

For the European Parliament

The President

O. Chastel

§13. Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC, OJ L 331, December 15th 2010, pp. 84-119

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

[1] OJ C 13, 20.1.2010, p. 1.
[2] Opinion of 22 January 2010 (not yet published in the Official Journal).
[3] Position of the European Parliament of 22 September 2010 (OJ L 276 October 20th) and decision of the Council of 17 November 2010.

Whereas:

(1) The financial crisis in 2007 and 2008 exposed important shortcomings in financial supervision, both in particular cases and in relation to the financial system as a whole. Nationally based supervisory models have lagged behind financial globalisation and the integrated and interconnected reality of European financial markets, in which many financial institutions operate across borders. The crisis exposed shortcomings in the areas of cooperation, coordination, consistent application of Union law and trust between national supervisors.

(2) Before and during the financial crisis, the European Parliament has called for a move towards more integrated European supervision in order to ensure a true level playing field for all actors at the level of the Union and to reflect the increasing integration of financial markets in the Union (in its resolutions of 13 April 2000 on the Commission communication on

implementing the framework for financial markets: Action Plan,[4] of 21 November 2002 on prudential supervision rules in the European Union,[5] of 11 July 2007 on financial services policy (2005 to 2010) – White Paper,[6] of 23 September 2008 with recommendations to the Commission on hedge funds and private equity[7] and of 9 October 2008 with recommendations to the Commission on Lamfalussy follow-up: future structure of supervision,[8] and in its positions of 22 April 2009 on the amended proposal for a directive of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)[9] and of 23 April 2009 on the proposal for a regulation of the European Parliament and of the Council on Credit Rating Agencies[10]).

(3) In November 2008, the Commission mandated a High-Level Group chaired by Jacques de Larosière to make recommendations on how to strengthen European supervisory arrangements with a view to better protecting the citizen and rebuilding trust in the financial system. In its final report presented on 25 February 2009 (the "de Larosière Report"), the High-Level Group recommended that the supervisory framework be strengthened to reduce the risk and severity of future financial crises. It recommended reforms to the structure of supervision of the financial sector in the Union. The group also concluded that a European System of Financial Supervisors should be created, comprising three European Supervisory Authorities, one for the banking sector, one for the securities sector and one for the insurance and occupational pensions sector and recommended the creation of a European Systemic Risk Council. The report represented the reforms the experts considered were needed and on which work had to begin immediately.

(4) In its Communication of 4 March 2009 entitled "Driving European Recovery", the Commission proposed to put forward draft legislation creating a European system of financial supervision and a European systemic risk board. In its Communication of 27 May 2009 entitled "European Financial Supervision", it provided more detail about the possible architecture of such a new supervisory framework reflecting the main thrust of the de Larosière Report.

(5) The European Council, in its conclusions of 19 June 2009, confirmed that a European System of Financial Supervisors, comprising three new European Supervisory Authorities, should be established. The system should be aimed at upgrading the quality and consistency of national supervision, strengthening oversight of cross-border groups and establishing a European single rule book applicable to all financial market participants in the internal market. It emphasised that the European Supervisory Authorities should also have supervisory powers in relation to credit rating agencies and invited the Commission to prepare concrete proposals on how the European System of Financial Supervisors could play a strong role in crisis situations, while stressing that decisions taken by the European Supervisory Authorities should not impinge on the fiscal responsibilities of Member States. The Commission has presented a Proposal for a Regulation amending Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies.[11] The European Parliament and the Council should consider that proposal in order to ensure that European Supervisory Authority (European Securities and Markets Authority) (hereinafter the Authority') will have adequate supervisory powers over credit rating agencies, bearing in mind that the Authority should execute exclusive supervisory powers over Credit Rating Agencies entrusted to it in Regulation (EC) No 1060/2009. For that purpose, the Authority should have appropriate powers of investigation and enforcement as specified in the relevant legislation, as well as the possibility of charging fees.

(6) On 17 June 2010, the European Council agreed that "Member States should introduce systems of levies and taxes on financial institutions to ensure fair burden-sharing and to set incentives to contain systemic risk. Such levies or taxes should be part of a credible resolution framework. Further work is urgently required on their main features and issues of level playing field and cumulative impacts of various regulatory measures should be carefully assessed".

(7) The financial and economic crisis has created real and serious risks to the stability of the financial system and the functioning of the internal market. Restoring and maintaining a stable and reliable financial system is an absolute prerequisite to preserving trust and coherence in the internal market, and thereby to preserve and improve the conditions for the establishment of a fully integrated and

[4] OJ C 40, 7.2.2001, p. 453.
[5] OJ C 25 E, 29.1.2004, p. 394.
[6] OJ C 175 E, 10.7.2008, p. 392.
[7] OJ C 8 E, 14.1.2010, p. 26.
[8] OJ C 9 E, 15.1.2010, p. 48.
[9] OJ C 184 E, 8.7.2010, p. 214.
[10] OJ C 184 E, 8.7.2010, p. 292.
[11] OJ L 302, 17.11.2009, p. 1.

functioning internal market in the field of financial services. Moreover, deeper and more integrated financial markets offer better opportunities for financing and risk diversification, and thus help to improve the capacity of the economies to absorb shocks.

(8) The Union has reached the limits of what can be done with the present status of the Committees of European Supervisors. The Union cannot remain in a situation where there is no mechanism to ensure that national supervisors arrive at the best possible supervisory decisions for cross-border financial market participants; where there is insufficient cooperation and information exchange between national supervisors; where joint action by national authorities requires complicated arrangements to take account of the patchwork of regulatory and supervisory requirements; where national solutions are most often the only feasible option in responding to problems at the level of the Union; and where different interpretations of the same legal text exist. The European System of Financial Supervision (hereinafter the ESFS') should be designed to overcome those deficiencies and provide a system that is in line with the objective of a stable and single Union financial market for financial services, linking national supervisors within a strong Union network.

(9) The ESFS should be an integrated network of national and Union supervisory authorities, leaving day-to-day supervision to the national level. Greater harmonisation and the coherent application of rules for financial market participants across the Union should also be achieved. In addition to the Authority, a European Supervisory Authority (European Banking Authority) and a European Supervisory Authority (European Insurance and Occupational Pensions Authority) as well as a Joint Committee of the European Supervisory Authorities (hereinafter the Joint Committee') should be established. A European Systemic Risk Board (hereinafter the ESRB') should form part of the ESFS for the purposes of the tasks as specified in this Regulation and in Regulation (EU) No 1092/2010 of the European Parliament and of the Council.

(10) The European Supervisory Authorities (hereinafter collectively referred to as the "ESAs") should replace the Committee of European Banking Supervisors established by Commission Decision 2009/78/EC,[12] the Committee of European Insurance and Occupational Pensions Supervisors established by Commission Decision 2009/79/EC[13] and the Committee of European Securities Regulators established by Commission Decision 2009/77/EC,[14] and should assume all of the tasks and competences of those committees including the continuation of ongoing work and projects, where appropriate. The scope of each European Supervisory Authority's action should be clearly defined. The ESAs should be accountable to the European Parliament and the Council. When that accountability relates to cross-sectoral issues that have been coordinated through the Joint Committee, the ESAs should be accountable, through the Joint Committee, for such coordination.

(11) The Authority should act with a view to improving the functioning of the internal market, in particular by ensuring a high, effective and consistent level of regulation and supervision taking account of the varying interests of all Member States and the different nature of financial market participants. The Authority should protect public values such as the integrity and stability of the financial system, the transparency of markets and financial products and the protection of investors. The Authority should also prevent regulatory arbitrage and guarantee a level playing field, and strengthen international supervisory coordination, for the benefit of the economy at large, including financial institutions and other stakeholders, consumers and employees. Its tasks should also include promoting supervisory convergence and providing advice to the Union institutions in the areas of its responsibility. The Authority should also be entrusted with certain responsibilities for existing and new financial activities.

(12) The Authority should also be able to temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in this Regulation. If required to make such temporary prohibition in the case of an emergency situation, the Authority should do so in accordance with and under the conditions laid down in this Regulation. In cases where a temporary prohibition or restriction of certain financial activities has a cross-sectoral impact, sectoral legislation should provide that the Authority should consult and coordinate its action with, where relevant, the European Supervisory Authority (European Banking

[12] OJ L 25, 29.1.2009, p. 23.

[13] OJ L 25, 29.1.2009, p. 28.

[14] OJ L 25, 29.1.2009, p. 18.

Authority) and the European Supervisory Authority (European Insurance and Occupational Pensions Authority), through the Joint Committee.

(13) The Authority should take due account of the impact of its activities on competition and innovation within the internal market, on the Union's global competitiveness, on financial inclusion, and on the Union's new strategy for jobs and growth.

(14) In order to fulfil its objectives, the Authority should have legal personality as well as administrative and financial autonomy.

(15) Based on the work of international bodies, systemic risk should be defined as a risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy. All types of financial intermediaries, markets and infrastructures may be potentially systemically important to some degree.

(16) Cross-border risk includes all risks caused by economic imbalances or financial failures in all or parts of the Union that have the potential to have significant negative consequences for the transactions between economic operators of two or more Member States, for the functioning of the internal market or for the public finances of the Union or any of its Member States.

(17) The Court of Justice of the European Union in its judgment of 2 May 2006 in Case C-217/04 (United Kingdom of Great Britain and Northern Ireland v. European Parliament and Council of the European Union) held that: "nothing in the wording of Article 95 EC [now Article 114 of the Treaty on the Functioning of the European Union (TFEU)] implies that the addressees of the measures adopted by the Community legislature on the basis of that provision can only be the individual Member States. The legislature may deem it necessary to provide for the establishment of a Community body responsible for contributing to the implementation of a process of harmonisation in situations where, in order to facilitate the uniform implementation and application of acts based on that provision, the adoption of non-binding supporting and framework measures seems appropriate".[15] The purpose and tasks of the Authority – assisting competent national supervisory authorities in the consistent interpretation and application of Union rules and contributing to financial stability necessary for financial integration – are closely linked to the objectives of the Union acquis concerning the internal market for financial services. The Authority should therefore be established on the basis of Article 114 TFEU.

(18) The following legislative acts lay down the tasks for competent authorities of Member States, including cooperating with each other and with the Commission: Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes,[16] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems,[17] Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities,[18] Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements,[19] Directive 2003/6/EC of the European Parliament and of the Council of 28 January 2003 on insider dealing and market manipulation (market abuse),[20] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC,[21] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments,[22] Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market,[23] Directive 2006/49/EC of the European Parliament and the Council of 14 June 2006 on the capital adequacy of investment firms and credit institutions,[24] without prejudice to the competence of the European Supervisory Authority (European Banking Authority), as far as prudential supervision is concerned, Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS),[25] any future

[15] European Court Reports 2006 Page I-03771, para 44.

[16] OJ L 84, 26.3.1997, p. 22.
[17] OJ L 166, 11.6.1998, p. 45.
[18] OJ L 184, 6.7.2001, p. 1.
[19] OJ L 168, 27.6.2002, p. 43.
[20] OJ L 96, 12.4.2003, p. 16.
[21] OJ L 345, 31.12.2003, p. 64.
[22] OJ L 145, 30.4.2004, p. 1.
[23] OJ L 390, 31.12.2004, p. 38.
[24] OJ L 177, 30.6.2006, p. 201.
[25] OJ L 302, 17.11.2009, p. 32.

legislation in the area of Alternative Investment Fund Managers (AIFM) and Regulation (EC) No 1060/2009.

(19) Existing Union legislation regulating the field covered by this Regulation also includes Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate,[26] Directive 98/78/EC of the European Parliament and of the Council of 27 October 1998 on the supplementary supervision of insurance undertakings in an insurance group,[27] Regulation (EC) No 1781/2006 of the European Parliament and of the Council of 15 November 2006 on information on the payer accompanying transfers of funds,[28] and the relevant parts of Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing[29] and of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services.[30]

(20) It is desirable that the Authority promote a consistent approach in the area of investor compensation schemes to ensure a level playing field and the equitable treatment of investors across the Union. As investor compensation schemes are subject to oversight in their Member States rather than regulatory supervision, the Authority should be able to exercise its powers under this Regulation in relation to the investor compensation scheme itself and its operator.

(21) In accordance with the Declaration (No 39) on Article 290 of the Treaty on the Functioning of the European Union (TFEU), annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, the elaboration of regulatory technical standards requires assistance of technical expertise in a form which is specific to the financial services area. It is necessary to allow the Authority to provide such expertise also on standards or parts of standards that are not based on a draft technical standard that it has elaborated.

(22) There is a need to introduce an effective instrument to establish harmonised regulatory technical standards in financial services to ensure, also through a single rulebook, a level playing field and adequate protection of investors and consumers across the Union. As a body with highly specialised expertise, it is efficient and appropriate to entrust the Authority, in areas defined by Union law, with the elaboration of draft regulatory technical standards, which do not involve policy choices.

(23) The Commission should endorse those draft regulatory technical standards by means of delegated acts under Article 290 TFEU in order to give them binding legal effect. They should be subject to amendment only in very restricted and extraordinary circumstances, since the Authority is the actor in close contact with and knowing best the daily functioning of financial markets. Draft regulatory technical standards would be subject to amendment if they were incompatible with Union law, did not respect the principle of proportionality or ran counter to the fundamental principles of the internal market for financial services as reflected in the acquis of Union financial services legislation. The Commission should not change the content of the draft regulatory technical standards prepared by the Authority without prior coordination with the Authority. To ensure a smooth and expeditious adoption process for those standards, the Commission's decision to endorse draft regulatory technical standards should be subject to a time limit.

(24) Given the technical expertise of the Authority in the areas where regulatory technical standards should be developed, note should be taken of the Commission's stated intention to rely, as a rule, on the draft regulatory technical standards submitted to it by the Authority in view of the adoption of the corresponding delegated acts. However, in cases where the Authority fails to submit a draft regulatory technical standard within the time limits set out by the relevant legislative act, it should be ensured that the result of the exercise of delegated power is actually achieved, and the efficiency of the decision-making process be maintained. In those cases, the Commission should therefore be empowered to adopt regulatory technical standards in the absence of a draft by the Authority.

(25) The Commission should also be empowered to adopt implementing technical standards by means of implementing acts under Article 291 TFEU.

(26) In areas not covered by regulatory or implementing technical standards, the Authority should have the power to issue guidelines and

[26] OJ L 35, 11.2.2003, p. 1.
[27] OJ L 330, 5.12.1998, p. 1.
[28] OJ L 345, 8.12.2006, p. 1.
[29] OJ L 309, 25.11.2005, p. 15.
[30] OJ L 271, 9.10.2002, p. 16.

recommendations on the application of Union law. In order to ensure transparency and to strengthen compliance by national supervisory authorities with those guidelines and recommendations, it should be possible for the Authority to publish the reasons for supervisory authorities' non-compliance with those guidelines and recommendations.

(27) Ensuring the correct and full application of Union law is a core prerequisite for the integrity, transparency, efficiency and orderly functioning of financial markets, the stability of the financial system, and for neutral conditions of competition for financial market participants in the Union. A mechanism should therefore be established whereby the Authority addresses instances of non-application or incorrect application of Union law amounting to a breach thereof. That mechanism should apply in areas where Union law defines clear and unconditional obligations.

(28) To allow for a proportionate response to instances of incorrect or insufficient application of Union law, a three-step mechanism should apply. First, the Authority should be empowered to investigate alleged incorrect or insufficient application of Union law obligations by national authorities in their supervisory practice, concluded by a recommendation. Second, where the competent national authority does not follow the recommendation, the Commission should be empowered to issue a formal opinion taking into account the Authority's recommendation, requiring the competent authority to take the actions necessary to ensure compliance with Union law.

(29) Third, to overcome exceptional situations of persistent inaction by the competent authority concerned, the Authority should be empowered, as a last resort, to adopt decisions addressed to individual financial market participants. That power should be limited to exceptional circumstances in which a competent authority does not comply with the formal opinion addressed to it and in which Union law is directly applicable to financial market participants by virtue of existing or future Union regulations.

(30) Serious threats to the orderly functioning and integrity of financial markets or the stability of the financial system in the Union require a swift and concerted response at Union level. The Authority should therefore be able to require national supervisory authorities to take specific actions to remedy an emergency situation. The power to determine the existence of an emergency situation should be conferred on the Council, following a request by any of the ESAs, the Commission or the ESRB.

(31) The Authority should be able to require national supervisory authorities to take specific action to remedy an emergency situation. The action undertaken by the Authority in this respect should be without prejudice to the Commission's powers under Article 258 TFEU to initiate infringement proceedings against the Member State of that supervisory authority for its failure to take such action, and without prejudice to the Commission's right in such circumstances to seek interim measures in accordance with the rules of procedure of the Court of Justice of the European Union. Furthermore, it should be without prejudice to any liability that that Member State might incur in accordance with the case law of the Court of Justice of the European Union if its supervisory authorities fail to take the action required by the Authority.

(32) In order to ensure efficient and effective supervision and a balanced consideration of the positions of the competent authorities in different Member States, the Authority should be able to settle disagreements in cross-border situations between those competent authorities with binding effect, including within colleges of supervisors. A conciliation phase should be provided for during which the competent authorities may reach an agreement. The Authority's competence should cover disagreements on the procedure or content of an action or inaction by a competent authority of a Member State in cases specified in the legally binding Union acts referred to in this Regulation. In such a situation, one of the supervisors involved should be entitled to refer the issue to the Authority, which should act in accordance with this Regulation. The Authority should be empowered to require the competent authorities concerned to take specific action or to refrain from action in order to settle the matter in order to ensure compliance with Union law, with binding effects for the competent authorities concerned. If a competent authority does not comply with the settlement decision addressed to it, the Authority should be empowered to adopt decisions directly addressed to financial market participants in areas of Union law directly applicable to them. The power to adopt such decisions should apply only as a last resort and then only to ensure the correct and consistent application of Union law. In cases where the relevant Union legislation confers discretion on Member States' competent authorities, decisions taken by the Authority cannot replace the exercise in compliance with Union law of that discretion.

(33) The crisis has proven that the current system of cooperation between national authorities whose powers are limited to individual Member States is insufficient as regards financial institutions that operate across borders.

(34) Expert Groups set up by Member States to examine the causes of the crisis and make suggestions to improve the regulation and supervision of the financial sector have confirmed that the current arrangements are not a sound basis for the future regulation and supervision of cross-border financial institutions across the Union.

(35) As the de Larosière Report indicates, "[i]n essence, we have two alternatives: the first "chacun pour soi" beggar-thy-neighbour solutions; or the second – enhanced, pragmatic, sensible European cooperation for the benefit of all to preserve an open world economy. This will bring undoubted economic gains".

(36) Colleges of supervisors play an important role in the efficient, effective and consistent supervision of financial market participants operating across borders. The Authority should contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors and, in that respect, have a leading role in ensuring the consistent and coherent functioning of colleges of supervisors for cross-border financial institutions across the Union. The Authority should therefore have full participation rights in colleges of supervisors with a view to streamlining the functioning of and the information exchange process in the colleges of supervisors and to foster convergence and consistency across colleges in the application of Union law. As the de Larosière Report states, "competition distortions and regulatory arbitrage stemming from different supervisory practices must be avoided, because they have the potential of undermining financial stability – inter alia by encouraging a shift of financial activity to countries with lax supervision. The supervisory system has to be perceived as fair and balanced".

(37) In the areas of its competence, the Authority should contribute to, and participate actively in the development and coordination of effective and consistent recovery and resolution plans, procedures in emergency situations and preventive measures to ensure the internalisation of costs by the financial system, in order to minimise the systemic impact of any failure and the reliance on taxpayer funds to bail out financial market participants. It should contribute to developing methods for the resolution of failing key financial market participants in ways which avoid contagion, which allow them to be wound down in an orderly and timely manner, and which, where applicable, include coherent and credible funding mechanisms as appropriate.

(38) In the current review of Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes[31] and Directive 97/9/EC, the Commission's intention to pay special attention to the need to ensure further harmonisation throughout the Union is noted. In the insurance sector, the Commission's intention to examine the possibility of introducing Union rules protecting insurance policy holders in case of a failing insurance company is also noted. The ESAs should play an important role in those areas and appropriate powers concerning the European guarantee scheme systems should be conferred upon them.

(39) The delegation of tasks and responsibilities can be a useful instrument in the functioning of the network of supervisors in order to reduce the duplication of supervisory tasks, to foster cooperation and thereby streamline the supervisory process, as well as to reduce the burden imposed on financial market participants. This Regulation should therefore provide a clear legal basis for such delegation. Whilst respecting the general rule that delegation should be allowed, Member States should be able to introduce specific conditions for the delegation of responsibilities, for example regarding information about, and the notification of, delegation arrangements. Delegation of tasks means that tasks are carried out by the Authority or by a national supervisory authority other than the responsible authority, while the responsibility for supervisory decisions remains with the delegating authority. By the delegation of responsibilities, the Authority or a national supervisory authority (the delegate) should be able to decide upon a certain supervisory matter in its own name in lieu of the delegating authority. Delegations should be governed by the principle of allocating supervisory competence to a supervisor which is best placed to take action in the subject matter. A reallocation of responsibilities would be appropriate, for example, for reasons of economies of scale or scope, of coherence in group supervision, and of optimal use of technical expertise among national supervisory authorities. Decisions by the delegate should be

[31] OJ L 135, 31.5.1994, p. 5.

recognised by the delegating authority and by other competent authorities as determinative if those decisions are within the scope of the delegation. Relevant Union legislation could further specify the principles for the reallocation of responsibilities upon agreement. The Authority should facilitate and monitor delegation agreements between national supervisory authorities by all appropriate means.

It should be informed in advance of intended delegation agreements, in order to be able to express an opinion where appropriate. It should centralise the publication of such agreements to ensure timely, transparent and easily accessible information about agreements for all parties concerned. It should identify and disseminate best practices regarding delegation and delegation agreements.

(40) The Authority should actively foster supervisory convergence across the Union with the aim of establishing a common supervisory culture.

(41) Peer reviews are an efficient and effective tool for fostering consistency within the network of financial supervisors. The Authority should therefore develop the methodological framework for such reviews and conduct them on a regular basis. Reviews should focus not only on the convergence of supervisory practices but also on the capacity of supervisors to achieve high quality supervisory outcomes as well as on the independence of those competent authorities. The outcome of peer reviews should be made public with the agreement of the competent authority subject to the review. Best practices should also be identified and made public.

(42) The Authority should actively promote a coordinated Union supervisory response, in particular to ensure the orderly functioning and integrity of financial markets and the stability of the financial system in the Union. In addition to its powers for action in emergency situations, the Authority should therefore be entrusted with a general coordination function within the ESFS. The smooth flow of all relevant information between competent authorities should be a particular focus of the Authority's actions.

(43) In order to safeguard financial stability it is necessary to identify, at an early stage, trends, potential risks and vulnerabilities stemming from the micro-prudential level, across borders and across sectors. The Authority should monitor and assess such developments in the area of its competence and, where necessary, inform the European Parliament, the Council, the Commission, the other European Supervisory Authorities and the ESRB on a regular and, as necessary, on an ad hoc basis. The Authority should also, in cooperation with the ESRB, initiate and coordinate Union-wide stress tests to assess the resilience of financial market participants to adverse market developments, and it should ensure that an as consistent as possible methodology is applied at the national level to such tests. In order to perform its functions properly, the Authority should conduct economic analyses of the markets and the impact of potential market developments.

(44) Given the globalisation of financial services and the increased importance of international standards, the Authority should foster dialogue and cooperation with supervisors outside the Union. It should be empowered to develop contacts and enter into administrative arrangements with the supervisory authorities and administrations of third countries and with international organisations, while fully respecting the existing roles and respective competences of the Member States and the Union institutions. Participation in the work of the Authority should be open to countries which have concluded agreements with the Union whereby they have adopted and are applying Union law, and the Authority should be able to cooperate with third countries which apply legislation that has been recognised as equivalent to that of the Union.

(45) The Authority should serve as an independent advisory body to the European Parliament, the Council, and the Commission in the area of its competence. Without prejudice to the competencies of the competent authorities concerned, the Authority should be able to provide its opinion on the prudential assessment of mergers and acquisitions under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, as amended by Directive 2007/44/EC[32] in those cases in which that Directive requires consultation between competent authorities from two or more Member States.

[32] Directive 2007/44/EC of the European Parliament and of the Council of 5 September 2007 amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector (OJ L 247, 21.9.2007, p. 1).

(46) In order to carry out its duties effectively, the Authority should have the right to request all necessary information. To avoid the duplication of reporting obligations for financial market participants, that information should normally be provided by the national supervisory authorities which are closest to the financial markets and financial market participants and should take into account already existing statistics. However, as a last resort, the Authority should be able to address a duly justified and reasoned request for information directly to a financial market participant where a national competent authority does not or cannot provide such information in a timely fashion. Member States' authorities should be obliged to assist the Authority in enforcing such direct requests. In that context, the work on common reporting formats is essential. The measures for the collection of information should be without prejudice to the legal framework of the European Statistical System and the European System of Central Banks in the field of statistics. This Regulation should therefore be without prejudice both to Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[33] and to Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank.[34]

(47) Close cooperation between the Authority and the ESRB is essential to give full effectiveness to the functioning of the ESRB and the follow-up to its warnings and recommendations. The Authority and the ESRB should share any relevant information with each other. Data related to individual undertakings should be provided only upon reasoned request. Upon receipt of warnings or recommendations addressed by the ESRB to the Authority or a national supervisory authority, the Authority should ensure follow-up as appropriate.

(48) The Authority should consult interested parties on regulatory or implementing technical standards, guidelines and recommendations and provide them with a reasonable opportunity to comment on proposed measures. Before adopting draft regulatory or implementing technical standards, guidelines and recommendations, the Authority should carry out an impact study. For reasons of efficiency, a Securities and Markets Stakeholder Group should be used for that purpose, and should represent, in balanced proportions, financial market participants, small and medium-sized enterprises (SMEs), academics and consumers and other retail users of financial services. The Securities and Markets Stakeholder Group should work as an interface with other user groups in the financial services area established by the Commission or by Union legislation.

(49) Members of the Securities and Markets Stakeholder Group representing non-profit organisations or academics should receive adequate compensation in order to allow persons that are neither well-funded nor industry representatives to take part fully in the debate on financial regulation.

(50) Member States have a core responsibility for ensuring coordinated crisis management and preserving financial stability in crisis situations, in particular with regard to stabilising and resolving individual failing financial market participants. Decisions by the Authority in emergency or settlement situations affecting the stability of a financial market participant should not impinge on the fiscal responsibilities of Member States. A mechanism should be established whereby Member States may invoke this safeguard and ultimately bring the matter before the Council for a decision. However, that safeguard mechanism should not be abused, in particular in relation to a decision taken by the Authority which does not have a significant or material fiscal impact, such as a reduction of income linked to the temporary prohibition of specific activities or products for consumer protection purposes. When taking decisions under the safeguard mechanism, the Council should vote, in accordance with the principle where each member has one vote. It is appropriate to confer on the Council a role in this matter given the particular responsibilities of the Member States in this respect. Given the sensitivity of the issue, strict confidentiality arrangements should be ensured.

(51) In its decision-making procedures, the Authority should be bound by Union rules and general principles on due process and transparency. The right of the addressees of the Authority's decisions to be heard should be fully respected. The Authority's acts should form an integral part of Union law.

(52) A Board of Supervisors composed of the heads of the relevant competent authorities in each Member State, and chaired by the Chairperson of the Authority, should be the principal decision-making organ of the Authority. Representatives of the Commission, the ESRB, the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory

[33] OJ L 87, 31.3.2009, p. 164.
[34] OJ L 318, 27.11.1998, p. 8.

Authority (European Banking Authority) should participate as observers. Members of the Board of Supervisors should act independently and only in the Union's interest.

(53) As a general rule, the Board of Supervisors should take its decisions by simple majority in accordance with the principle where each member has one vote. However, for acts of a general nature, including those relating to regulatory and implementing technical standards, guidelines and recommendations, for budgetary matters as well as in respect of requests by a Member State to reconsider a decision by the Authority to temporarily prohibit or restrict certain financial activities, it is appropriate to apply the rules of qualified majority voting as laid down in Article 16(4) of the Treaty on European Union and in the Protocol (No 36) on transitional provisions annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union. Cases concerning the settlement of disagreements between national supervisory authorities should be examined by a restricted, objective panel, composed of members who neither are representatives of the competent authorities which are party to the disagreement nor have any interest in the conflict or direct links to the competent authorities concerned. The composition of the panel should be appropriately balanced. The decision taken by the panel should be approved by the Board of Supervisors by simple majority in accordance with the principle where each member has one vote. However, with regard to decisions taken by the consolidating supervisor, the decision proposed by the panel could be rejected by members representing a blocking minority of the votes as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

(54) A Management Board, composed of the Chairperson of the Authority, of representatives of national supervisory authorities and of the Commission, should ensure that the Authority carries out its mission and performs the tasks assigned to it. The Management Board should be entrusted with the necessary powers, inter alia, to propose the annual and multi-annual work programme, to exercise certain budgetary powers, to adopt the Authority's staff policy plan, to adopt special provisions on the right to access to documents and to propose the annual report.

(55) The Authority should be represented by a full time Chairperson, appointed by the Board of Supervisors on the basis of merit, skills, knowledge of financial institutions and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure organised and managed by the Board of Supervisors assisted by the Commission. For the designation of the first Chairperson of the Authority, the Commission should, inter alia, draw up a shortlist of candidates on the basis of merit, skills, knowledge of financial institutions and markets, and experience relevant to financial supervision and regulation. For the subsequent designations, the opportunity of having a shortlist drawn up by the Commission should be reviewed in a report to be established pursuant to this Regulation. Before the selected person takes up his duties, and up to 1 month after his selection by the Board of Supervisors, the European Parliament should be entitled, after having heard the person selected, to object to his designation.

(56) The management of the Authority should be entrusted to an Executive Director, who should have the right to participate in meetings of the Board of Supervisors and the Management Board without the right to vote.

(57) In order to ensure cross-sectoral consistency in the activities of the ESAs, they should coordinate closely through a Joint Committee and reach common positions where appropriate. The Joint Committee should coordinate the functions of the ESAs in relation to financial conglomerates and other cross sectoral matters. Where relevant, acts also falling within the area of competence of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) or the European Supervisory Authority (European Banking Authority) should be adopted in parallel by the European Supervisory Authorities concerned. The Joint Committee should be chaired for a 12-month term on a rotating basis by the Chairpersons of the ESAs. The Chairperson of the Joint Committee should be a Vice-Chair of the ESRB. The Joint Committee should have dedicated staff provided by the ESAs to allow for informal information sharing and the development of a common supervisory culture approach across the ESAs.

(58) It is necessary to ensure that the parties affected by decisions adopted by the Authority may have recourse to the necessary remedies. To protect effectively the rights of parties, and for reasons of procedural economy, where the Authority has decision-making powers, parties should be granted a right of appeal to a Board of Appeal. For reasons of efficiency and consistency, the Board of Appeal should be a joint body of the ESAs, independent from their

administrative and regulatory structures. The decisions of the Board of Appeal should be subject to appeal before the Court of Justice of the European Union.

(59) In order to guarantee its full autonomy and independence, the Authority should be granted an autonomous budget with revenues mainly from obligatory contributions from national supervisory authorities and from the General Budget of the European Union. Union financing of the Authority is subject to an agreement by the budgetary authority in accordance with Point 47 of the Interinstitutional Agreement between the European Parliament, the Council and the Commission of 17 May 2006 on budgetary discipline and sound financial management.[35] The Union budgetary procedure should be applicable. The auditing of accounts should be undertaken by the Court of Auditors. The overall budget is subject to the discharge procedure.

(60) Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)[36] should apply to the Authority. The Authority should also accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-Fraud Office (OLAF).[37]

(61) In order to ensure open and transparent employment conditions and equal treatment of staff, Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities[38] should apply to the staff of the Authority.

(62) It is essential that business secrets and other confidential information be protected. The confidentiality of information made available to the Authority and exchanged in the network should be subject to stringent and effective confidentiality rules.

(63) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[39] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[40] are fully applicable to the processing of personal data for the purposes of this Regulation.

(64) In order to ensure the transparent operation of the Authority, Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents[41] should apply to the Authority.

(65) Third countries should be allowed to participate in the work of the Authority in accordance with appropriate agreements to be concluded by the Union.

(66) Since the objectives of this Regulation, namely improving the functioning of the internal market by means of ensuring a high, effective and consistent level of prudential regulation and supervision, protecting investors, protecting the integrity, efficiency and orderly functioning of financial markets, maintaining the stability of the financial system, and strengthening international supervisory coordination, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale of the action, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.

(67) The Authority should assume all current tasks and powers of the Committee of European Securities Regulators. Commission Decision 2009/77/EC should therefore be repealed on the date of the establishment of the Authority and Decision No 716/2009/EC of the European Parliament and of the Council of 16 September 2009 establishing a Community programme to support specific activities in the field of financial services, financial reporting and auditing,[42] should be amended accordingly. Given the existing structures and operations of the Committee of European Securities Regulators, it is important to ensure very close cooperation between the Committee of European Securities Regulators and the Commission when establishing appropriate

[35] OJ C 139, 14.6.2006, p. 1.
[36] OJ L 136, 31.5.1999, p. 1.
[37] OJ L 136, 31.5.1999, p. 15.
[38] OJ L 56, 4.3.1968, p. 1.
[39] OJ L 281, 23.11.1995, p. 31.
[40] OJ L 8, 12.1.2001, p. 1.
[41] OJ L 145, 31.5.2001, p. 43.
[42] OJ L 253, 25.9.2009, p. 8.

transitional arrangements, to ensure that the period during which the Commission is responsible for the administrative establishment and initial administrative operation of the Authority be as limited as possible.

(68) It is appropriate to set a time limit for the application of this Regulation in order to ensure that the Authority is adequately prepared to begin operations and a smooth transition from the Committee of European Securities Regulators. The Authority should be appropriately financed. At least initially, it should be financed 40 % from Union funds and 60 % through contributions from Member States, made in accordance with the weighting of votes set out in Article 3(3) of the Protocol (No 36) on transitional provisions.

(69) In order to enable the Authority to be established on 1 January 2011, this Regulation should enter into force on the day following its publication in the Official Journal of the European Union,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – ESTABLISHMENT AND LEGAL STATUS

Article 1 – *Establishment and scope of action*

1. This Regulation establishes a European Supervisory Authority (European Securities and Markets Authority) (hereinafter the Authority').

2. The Authority shall act within the powers conferred by this Regulation and within the scope of Directive 97/9/EC, Directive 98/26/EC, Directive 2001/34/EC, Directive 2002/47/EC, Directive 2003/6/EC, Directive 2003/71/EC, Directive 2004/39/EC, Directive 2004/109/EC, Directive 2009/65/EC and to Directive 2006/49/EC, without prejudice to the competence of the European Supervisory Authority (European Banking Authority) in terms of prudential supervision, any future legislation in the area of Alternative Investment Fund Managers (AIFM), and Regulation (EC) No 1060/2009, and, to the extent that these acts apply to firms providing investment services or to collective investment undertakings marketing their units or shares and the competent authorities that supervise them, within the relevant parts of, Directive 2002/87/EC, Directive 2005/60/EC, Directive 2002/65/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority.

3. The Authority shall also act in the field of activities of market participants in relation to issues not directly covered in the acts referred to in paragraph 2, including matters of corporate governance, auditing and financial reporting, provided that such actions by the Authority are necessary to ensure the effective and consistent application of those acts. The Authority shall also take appropriate action in the context of take-over bids, clearing and settlement and derivative issues.

4. The provisions of this Regulation are without prejudice to the powers of the Commission, in particular under Article 258 TFEU, to ensure compliance with Union law.

5. The objective of the Authority shall be to protect the public interest by contributing to the short, medium and long-term stability and effectiveness of the financial system, for the Union economy, its citizens and businesses. The Authority shall contribute to:

(a) improving the functioning of the internal market, including in particular a sound, effective and consistent level of regulation and supervision,

(b) ensuring the integrity, transparency, efficiency and orderly functioning of financial markets,

(c) strengthening international supervisory coordination,

(d) preventing regulatory arbitrage and promoting equal conditions of competition,

(e) ensuring the taking of investment and other risks are appropriately regulated and supervised, and

(f) enhancing customer protection.

For those purposes, the Authority shall contribute to ensuring the consistent, efficient and effective application of the acts referred to in paragraph 2, foster supervisory convergence, provide opinions to the European Parliament, the Council, and the Commission and undertake economic analyses of the markets to promote the achievement of the Authority's objective.

In the exercise of the tasks conferred upon it by this Regulation, the Authority shall pay particular attention to any systemic risk posed by financial market participants, the failure of which may impair the operation of the financial system or the real economy.

When carrying out its tasks, the Authority shall act independently and objectively and in the interest of the Union alone.

Article 2 – *European System of Financial Supervision*

1. The Authority shall form part of a European System of Financial Supervision (ESFS). The main objective of the ESFS shall be to ensure that the rules applicable to the financial sector are adequately implemented to preserve financial stability and to ensure confidence in the financial system as a whole and sufficient protection for the customers of financial services.

2. The ESFS shall comprise the following:

(a) the European Systemic Risk Board (ESRB), for the purposes of the tasks as specified in Regulation (EU) No 1092/2010 and this Regulation;

(b) the Authority;

(c) the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council;

(d) the European Supervisory Authority (European Insurance and Occupational Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council;

(e) the Joint Committee of the European Supervisory Authorities ("Joint Committee") for the purposes of carrying out the tasks as specified in Articles 54 to 57 of this Regulation, of Regulation (EU) No 1093/2010 and of Regulation (EU) No 1094/2010;

(f) the competent or supervisory authorities in the Member States as specified in the Union acts referred to in Article 1(2) of this Regulation, of Regulation (EU) No 1093/2010 and of Regulation (EU) No 1094/2010.

3. The Authority shall cooperate regularly and closely with the ESRB as well as with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Insurance and Occupational Pensions Authority) through the Joint Committee, ensuring cross-sectoral consistency of work and reaching joint positions in the area of supervision of financial conglomerates and on other cross-sectoral issues.

4. In accordance with the principle of sincere cooperation under Article 4(3) of the Treaty on European Union, the parties to the ESFS shall cooperate with trust and full mutual respect, in particular in ensuring the flow of appropriate and reliable information between them.

5. Those supervisory authorities that are party to the ESFS shall be obliged to supervise financial market participants operating in the Union in accordance with the acts referred to in Article 1(2).

Article 3 – *Accountability of the Authorities*

The Authorities referred to in Article 2(2)(a) to (d) shall be accountable to the European Parliament and the Council.

Article 4 – *Definitions*

For the purposes of this Regulation the following definitions apply:

(1) "financial market participant" means any person in relation to whom a requirement in the legislation referred to in Article 1(2) or a national law implementing such legislation applies;

(2) "key financial market participant" means a financial market participant whose regular activity or financial viability has or is likely to have a significant effect on the stability, integrity or efficiency of the financial markets in the Union;

(3) "competent authorities" means:

(i) competent authorities and/or supervisory authorities as defined in the legislation referred to in Article 1(2);

(ii) with regard to Directives 2002/65/EC and 2005/60/EC, the authorities competent for ensuring compliance with the requirements of those Directives by firms providing investment services and by collective investment undertakings marketing their units or shares;

(iii) with regard to investor compensation schemes, bodies which administer national compensation schemes pursuant to Directive 97/9/EC, or in the case where the operation of the investor compensation scheme is administered by a private company, the public authority supervising those schemes pursuant to that Directive.

Article 5 – *Legal status*

1. The Authority shall be a Union body with legal personality.

2. In each Member State, the Authority shall enjoy the most extensive legal capacity accorded to legal persons under national law. It may, in particular, acquire or dispose of movable and immovable property and be a party to legal proceedings.

3. The Authority shall be represented by its Chairperson.

Article 6 – *Composition*

The Authority shall comprise:

(1) a Board of Supervisors, which shall exercise the tasks set out in Article 43;

(2) a Management Board, which shall exercise the tasks set out in Article 47;

(3) a Chairperson, who shall exercise the tasks set out in Article 48;

(4) an Executive Director, who shall exercise the tasks set out in Article 53;

(5) a Board of Appeal, which shall exercise the tasks set out in Article 60.

Article 7 – *Seat*

The Authority shall have its seat in Paris.

CHAPTER II – TASKS AND POWERS OF THE AUTHORITY

Article 8 – *Tasks and powers of the Authority*

1. The Authority shall have the following tasks:

(a) to contribute to the establishment of high-quality common regulatory and supervisory standards and practices, in particular by providing opinions to the Union institutions and by developing guidelines, recommendations, and draft regulatory and implementing technical standards which shall be based on the legislative acts referred to in Article 1(2);

(b) to contribute to the consistent application of legally binding Union acts, in particular by contributing to a common supervisory culture, ensuring consistent, efficient and effective application of the acts referred to in Article 1(2), preventing regulatory arbitrage, mediating and settling disagreements between competent authorities, ensuring effective and consistent supervision of financial market participants, ensuring a coherent functioning of colleges of supervisors and taking actions, inter alia, in emergency situations;

(c) to stimulate and facilitate the delegation of tasks and responsibilities among competent authorities;

(d) to cooperate closely with the ESRB, in particular by providing the ESRB with the necessary information for the achievement of its tasks and by ensuring a proper follow up to the warnings and recommendations of the ESRB;

(e) to organise and conduct peer review analyses of competent authorities, including issuing guidelines and recommendations and identifying best practices, in order to strengthen consistency in supervisory outcomes;

(f) to monitor and assess market developments in the area of its competence;

(g) to undertake economic analyses of markets to inform the discharge of the Authority's functions;

(h) to foster investor protection;

(i) to contribute to the consistent and coherent functioning of colleges of supervisors, the monitoring, assessment and measurement of systemic risk, the development and coordination of recovery and resolution plans, providing a high level of protection to investors throughout the Union and developing methods for the resolution of failing financial market participants and an assessment of the need for appropriate financing instruments, in accordance with Articles 21 to 26;

(j) to fulfil any other specific tasks set out in this Regulation or in other legislative acts;

(k) to publish on its website, and to update regularly, information relating to its field of activities, in particular, within the area of its competence, on registered financial market participants, in order to ensure information is easily accessible by the public;

(l) to take over, as appropriate, all existing and ongoing tasks from the Committee of European Securities Regulators (CESR).

2. To achieve the tasks set out in paragraph 1, the Authority shall have the powers set out in this Regulation, in particular to:

(a) develop draft regulatory technical standards in the specific cases referred to in Article 10;

(b) develop draft implementing technical standards in the specific cases referred to in Article 15;

(c) issue guidelines and recommendations, as laid down in Article 16;

(d) issue recommendations in specific cases, as referred to in Article 17(3);

(e) take individual decisions addressed to competent authorities in the specific cases referred to in Articles 18(3) and 19(3);

(f) in cases concerning directly applicable Union law, take individual decisions addressed to financial market participants, in the specific cases referred to in Article 17(6), in Article 18(4) and in Article 19(4);

(g) issue opinions to the European Parliament, the Council, or the Commission as provided for in Article 34;

(h) collect the necessary information concerning financial market participants as provided for in Article 35;

(i) develop common methodologies for assessing the effect of product characteristics and distribution processes on the financial position of financial market participants and on consumer protection;

(j) provide a centrally accessible database of registered financial market participants in the area of its competence where specified in the acts referred to in Article 1(2).

Article 9 – *Tasks related to consumer protection and financial activities*

1. The Authority shall take a leading role in promoting transparency, simplicity and fairness in the market for consumer financial products or services across the internal market, including by:

(a) collecting, analysing and reporting on consumer trends;

(b) reviewing and coordinating financial literacy and education initiatives by the competent authorities;

(c) developing training standards for the industry; and

(d) contributing to the development of common disclosure rules.

2. The Authority shall monitor new and existing financial activities and may adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice.

3. The Authority may also issue warnings in the event that a financial activity poses a serious threat to the objectives laid down in Article 1(5).

4. The Authority shall establish, as an integral part of the Authority, a Committee on financial innovation, which brings together all relevant competent national supervisory authorities with a view to achieving a coordinated approach to the regulatory and supervisory treatment of new or innovative financial activities and providing advice for the Authority to present to the European Parliament, the Council and the Commission.

5. The Authority may temporarily prohibit or restrict certain financial activities that threaten the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union in the cases specified and under the conditions laid down in the legislative acts referred to in Article 1(2) or if so required in the case of an emergency situation in accordance with and under the conditions laid down in Article 18.

The Authority shall review the decision referred to in the first subparagraph at appropriate intervals and at least every 3 months. If the decision is not renewed after a three-month period, it shall automatically expire.

A Member State may request the Authority to reconsider its decision. In that case, the Authority shall decide in accordance with the procedure set out in the second subparagraph of Article 44(1), whether it maintains its decision.

The Authority may also assess the need to prohibit or restrict certain types of financial activity and, where there is such a need, inform the Commission in order to facilitate the adoption of any such prohibition or restriction.

Article 10 – *Regulatory technical standards*

1. Where the European Parliament and the Council delegate power to the Commission to adopt regulatory technical standards by means of delegated acts under Article 290 TFEU in order to ensure consistent harmonisation in the areas specifically set out in the legislative acts referred to in Article 1(2), the Authority may develop draft regulatory technical standards.

The Authority shall submit its draft standards to the Commission for endorsement.

Regulatory technical standards shall be technical, shall not imply strategic decisions or policy choices and their content shall be delimited by the legislative acts on which they are based.

Before submitting them to the Commission, the Authority shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the Securities and Markets Stakeholder Group referred to in Article 37.

Where the Authority submits a draft regulatory technical standard, the Commission shall immediately forward it to the European Parliament and the Council.

Within 3 months of receipt of a draft regulatory technical standard, the Commission shall decide whether to endorse it. The Commission may endorse the draft regulatory technical standards in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft regulatory technical standard or to endorse it in part or with amendments, it shall send the draft regulatory technical standard back to the Authority, explaining why it does not endorse it, or, as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft regulatory technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of that six-week period, the Authority has not submitted an amended draft regulatory technical standard, or has submitted a draft regulatory technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the regulatory technical standard with the amendments it considers relevant, or reject it.

The Commission may not change the content of a draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. Where the Authority has not submitted a draft regulatory technical standard within the time limit set out in the legislative acts referred to in Article 1(2), the Commission may request such a draft within a new time limit.

3. Only where the Authority does not submit a draft regulatory technical standard to the Commission within the time limits in accordance with paragraph 2, may the Commission adopt a regulatory technical standard by means of a delegated act without a draft from the Authority.

The Commission shall conduct open public consultations on draft regulatory technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft regulatory technical standards concerned or in relation to the particular urgency of the matter. The Commission shall also request the opinion or advice of the Securities and Markets Stakeholder Group referred to in Article 37.

The Commission shall immediately forward the draft regulatory technical standard to the European Parliament and the Council.

The Commission shall send its draft regulatory technical standard to the Authority. Within a period of 6 weeks, the Authority may amend the draft regulatory technical standard and submit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fourth subparagraph, the Authority has not submitted an amended draft regulatory technical standard, the Commission may adopt the regulatory technical standard.

If the Authority has submitted an amended draft regulatory technical standard within the six-week period, the Commission may amend the draft regulatory technical standard on the basis of the Authority's proposed amendments or adopt the regulatory technical standard with the amendments it considers relevant. The Commission shall not change the content of the draft regulatory technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

4. The regulatory technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

Article 11 – *Exercise of the delegation*

1. The power to adopt regulatory technical standards referred to in Article 10 shall be conferred on the Commission for a period of 4 years from 16 December 2010. The Commission shall draw up a report in respect of the delegated power not later than 6 months before the end of the four-year period. The delegation of power shall be automatically extended for periods of an identical duration, unless the European Parliament or the Council revokes it in accordance with Article 14.

2. As soon as it adopts a regulatory technical standard, the Commission shall notify it simultaneously to the European Parliament and to the Council.

3. The power to adopt regulatory technical standards is conferred on the Commission subject to the conditions laid down in Articles 12 to 14.

Article 12 – *Revocation of the delegation*

1. The delegation of power referred to in Article 10 may be revoked at any time by the European Parliament or by the Council.

2. The institution which has commenced an internal procedure for deciding whether to revoke a delegation of power shall endeavour to inform the other institution and the Commission within a reasonable time before the final decision is taken, indicating the delegated power which could be subject to revocation.

3. The decision of revocation shall put an end to the delegation of the power specified in that decision. It shall take effect immediately or at a later date specified therein. It shall not affect the validity of the regulatory technical standards already in force. It shall be published in the Official Journal of the European Union.

Article 13 – *Objections to regulatory technical standards*

1. The European Parliament or the Council may object to a regulatory technical standard within a period of 3 months from the date of notification of the regulatory technical standard adopted by the Commission. At the initiative of the European Parliament or the Council that period shall be extended by 3 months.

Where the Commission adopts a regulatory technical standard which is the same as the draft regulatory technical standard submitted by the Authority, the period during which the European Parliament and the Council may object shall be 1 month from the date of notification. At the initiative of the European Parliament or the Council that period shall be extended by 1 month.

2. If, on the expiry of the period referred to in paragraph 1, neither the European Parliament nor the Council has objected to the regulatory technical standard, it shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

The regulatory technical standard may be published in the Official Journal of the European Union and enter into force before the expiry of that period if the European Parliament and the Council have both informed the Commission of their intention not to raise objections.

3. If either the European Parliament or the Council objects to a regulatory technical standard within the period referred to in paragraph 1, it shall not enter into force. In accordance with Article 296 TFEU, the institution which objects shall state the reasons for objecting to the regulatory technical standard.

Article 14 – *Non-endorsement or amendment of draft regulatory technical standards*

1. In the event that the Commission does not endorse a draft regulatory technical standard or amends it as provided for in Article 10, the Commission shall inform the Authority, the European Parliament and the Council, stating its reasons.

2. Where appropriate, the European Parliament or the Council may invite the responsible Commissioner, together with the Chairperson of the Authority, within 1 month of the notice referred to in paragraph 1, for an ad hoc meeting of the competent committee of the European Parliament or the Council to present and explain their differences.

Article 15 – *Implementing technical standards*

1. The Authority may develop implementing technical standards, by means of implementing acts under Article 291 TFEU, in the areas specifically set out in the legislative acts referred to in Article 1(2). Implementing technical standards shall be technical, shall not

imply strategic decisions or policy choices and their content shall be to determine the conditions of application of those acts. The Authority shall submit its draft implementing technical standards to the Commission for endorsement.

Before submitting draft implementing technical standards to the Commission, the Authority shall conduct open public consultations and shall analyse the potential, related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft implementing technical standards concerned or in relation to the particular urgency of the matter. The Authority shall also request the opinion of the Securities and Markets Stakeholder Group referred to in Article 37.

Where the Authority submits a draft implementing technical standard, the Commission shall immediately forward it to the European Parliament and the Council.

Within 3 months of receipt of a draft implementing technical standard, the Commission shall decide whether to endorse it. The Commission may extend that period by 1 month. The Commission may endorse the draft implementing technical standard in part only, or with amendments, where the Union's interests so require.

Where the Commission intends not to endorse a draft implementing technical standard or intends to endorse it in part or with amendments, it shall send it back to the Authority explaining why it does not intend to endorse it, or as the case may be, explaining the reasons for its amendments. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fifth subparagraph, the Authority has not submitted an amended draft implementing technical standard, or has submitted a draft implementing technical standard that is not amended in a way consistent with the Commission's proposed amendments, the Commission may adopt the implementing technical standard with the amendments it considers relevant or reject it.

The Commission shall not change the content of a draft implementing technical standard prepared by the Authority without prior coordination with the Authority, as set out in this Article.

2. In cases where the Authority has not submitted a draft implementing technical standard within the time limit set out in the legislative acts referred to in Article 1(2), the Commission may request such a draft within a new time limit.

3. Only where the Authority does not submit a draft implementing technical standard to the Commission within the time limits in accordance with paragraph 2, may the Commission adopt an implementing technical standard by means of an implementing act without a draft from the Authority.

The Commission shall conduct open public consultations on draft implementing technical standards and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the draft implementing technical standards concerned or in relation to the particular urgency of the matter. The Commission shall also request the opinion or advice of the Securities and Markets Stakeholder Group referred to in Article 37.

The Commission shall immediately forward the draft implementing technical standard to the European Parliament and the Council.

The Commission shall send the draft implementing technical standard to the Authority. Within a period of 6 weeks, the Authority may amend the draft implementing technical standard and submit it in the form of a formal opinion to the Commission. The Authority shall send a copy of its formal opinion to the European Parliament and to the Council.

If, on the expiry of the six-week period referred to in the fourth subparagraph, the Authority has not submitted an amended draft implementing technical standard, the Commission may adopt the implementing technical standard.

If the Authority has submitted an amended draft implementing technical standard within that six-week period, the Commission may amend the draft implementing technical standard on the basis of the Authority's proposed amendments or adopt the implementing technical standard with the amendments it considers relevant.

The Commission shall not change the content of the draft implementing technical standards prepared by the Authority without prior coordination with the Authority, as set out in this Article.

4. The implementing technical standards shall be adopted by means of regulations or decisions. They shall be published in the Official Journal of the European Union and shall enter into force on the date stated therein.

Article 16 – *Guidelines and recommendations*

1. The Authority shall, with a view to establishing consistent, efficient and effective supervisory practices within the ESFS, and to ensuring the common, uniform and consistent application of Union law, issue guidelines and recommendations addressed to competent authorities or financial market participants.

2. The Authority shall, where appropriate, conduct open public consultations regarding the guidelines and recommendations and analyse the related potential costs and benefits. Such consultations and analyses shall be proportionate in relation to the scope, nature and impact of the guidelines or recommendations. The Authority shall, where appropriate, also request opinions or advice from the Securities and Markets Stakeholder Group referred to in Article 37.

3. The competent authorities and financial market participants shall make every effort to comply with those guidelines and recommendations.

Within 2 months of the issuance of a guideline or recommendation, each competent authority shall confirm whether it complies or intends to comply with that guideline or recommendation. In the event that a competent authority does not comply or does not intend to comply, it shall inform the Authority, stating its reasons.

The Authority shall publish the fact that a competent authority does not comply or does not intend to comply with that guideline or recommendation. The Authority may also decide, on a case by case basis, to publish the reasons provided by the competent authority for not complying with that guideline or recommendation. The competent authority shall receive advanced notice of such publication.

If required by that guideline or recommendation, financial market participants shall report, in a clear and detailed way, whether they comply with that guideline or recommendation.

4. In the report referred to in Article 43(5) the Authority shall inform the European Parliament, the Council and the Commission of the guidelines and recommendations that have been issued, stating which competent authority has not complied with them, and outlining how the Authority intends to ensure that the competent authority concerned follow its recommendations and guidelines in the future.

Article 17 – *Breach of Union law*

1. Where a competent authority has not applied the acts referred to in Article 1(2), or has applied them in a way which appears to be a breach of Union law, including the regulatory technical standards and implementing technical standards established in accordance with Articles 10 to 15, in particular by failing to ensure that a financial market participant satisfies the requirements laid down in those acts, the Authority shall act in accordance with the powers set out in paragraphs 2, 3 and 6 of this Article.

2. Upon a request from one or more competent authorities, the European Parliament, the Council, the Commission or the Securities and Markets Stakeholder Group, or on its own initiative, and after having informed the competent authority concerned, the Authority may investigate the alleged breach or non-application of Union law.

Without prejudice to the powers laid down in Article 35, the competent authority shall, without delay, provide the Authority with all information which the Authority considers necessary for its investigation.

3. The Authority may, not later than 2 months from initiating its investigation, address a recommendation to the competent authority concerned setting out the action necessary to comply with Union law.

The competent authority shall, within ten working days of receipt of the recommendation, inform the Authority of the steps it has taken or intends to take to ensure compliance with Union law.

4. Where the competent authority has not complied with Union law within 1 month from receipt of the Authority's recommendation, the Commission may, after having been informed by the Authority or on its own initiative, issue a formal opinion requiring the competent

authority to take the action necessary to comply with Union law. The Commission's formal opinion shall take into account the Authority's recommendation.

The Commission shall issue such a formal opinion no later than 3 months after the adoption of the recommendation. The Commission may extend this period by 1 month.

The Authority and the competent authorities shall provide the Commission with all necessary information.

5. The competent authority shall, within ten working days of receipt of the formal opinion referred to in paragraph 4, inform the Commission and the Authority of the steps it has taken or intends to take to comply with that formal opinion.

6. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the formal opinion referred to in paragraph 4 within the period of time specified therein, and where it is necessary to remedy in a timely manner such non compliance in order to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system, the Authority may, where the relevant requirements of the acts referred to in Article 1(2) are directly applicable to financial market participants, adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law including the cessation of any practice.

The decision of the Authority shall be in conformity with the formal opinion issued by the Commission pursuant to paragraph 4.

7. Decisions adopted under paragraph 6 shall prevail over any previous decision adopted by the competent authorities on the same matter.

When taking action in relation to issues which are subject to a formal opinion pursuant to paragraph 4 or a decision pursuant to paragraph 6, competent authorities shall comply with the formal opinion or the decision, as the case may be.

8. In the report referred to in Article 43(5), the Authority shall set out which competent authorities and financial market participants have not complied with the formal opinions or decisions referred to in paragraphs 4 and 6 of this Article.

Article 18 – *Action in emergency situations*

1. In the case of adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority shall actively facilitate and, where deemed necessary, coordinate any actions undertaken by the relevant national competent supervisory authorities.

In order to be able to perform that facilitating and coordinating role, the Authority shall be fully informed of any relevant developments, and shall be invited to participate as an observer in any relevant gathering by the relevant national competent supervisory authorities.

2. The Council, in consultation with the Commission and the ESRB and, where appropriate, the ESAs, may adopt a decision addressed to the Authority, determining the existence of an emergency situation for the purposes of this Regulation, following a request by the Authority, the Commission or the ESRB. The Council shall review that decision at appropriate intervals and at least once a month. If the decision is not renewed at the end of a one-month period, it shall automatically expire. The Council may declare the discontinuation of the emergency situation at any time.

Where the ESRB or the Authority considers that an emergency situation may arise, it shall issue a confidential recommendation addressed to the Council and provide it with an assessment of the situation. The Council shall then assess the need for a meeting. In that process, due care of confidentiality shall be guaranteed.

If the Council determines the existence of an emergency situation, it shall duly inform the European Parliament and the Commission without delay.

3. Where the Council has adopted a decision pursuant to paragraph 2, and in exceptional circumstances where coordinated action by national authorities is necessary to respond to adverse developments which may seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union, the Authority may adopt individual decisions requiring competent authorities to take the necessary action in accordance with the legislation referred to in Article 1(2) to address any such developments by ensuring that

financial market participants and competent authorities satisfy the requirements laid down in that legislation.

4. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the decision of the Authority referred to in paragraph 3 within the period laid down in that decision, the Authority may, where the relevant requirements laid down in the legislative acts referred to in Article 1(2) including in regulatory technical standards and implementing technical standards adopted in accordance with those acts are directly applicable to financial market participants, adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under that legislation, including the cessation of any practice. This shall apply only in situations in which a competent authority does not apply the legislative acts referred to in Article 1(2), including regulatory technical standards and implementing technical standards adopted in accordance with those acts, or applies them in a way which appears to be a manifest breach of those acts, and where urgent remedying is necessary to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.

5. Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter.

Any action by the competent authorities in relation to issues which are subject to a decision pursuant to paragraph 3 or 4 shall be compatible with those decisions.

Article 19 – *Settlement of disagreements between competent authorities in cross-border situations*

1. Without prejudice to the powers laid down in Article 17, where a competent authority disagrees about the procedure or content of an action or inaction of a competent authority of another Member State in cases specified in the acts referred to in Article 1(2), the Authority, at the request of one or more of the competent authorities concerned may assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4 of this Article.

In cases specified in the legislation referred to in Article 1(2), and where on the basis of objective criteria, disagreement between competent authorities from different Member States can be determined, the Authority may, on its own initiative, assist the authorities in reaching an agreement in accordance with the procedure set out in paragraphs 2 to 4.

2. The Authority shall set a time limit for conciliation between the competent authorities taking into account any relevant time periods specified in the acts referred to in Article 1(2) and the complexity and urgency of the matter. At that stage the Authority shall act as a mediator.

3. If the competent authorities concerned fail to reach an agreement within the conciliation phase referred to in paragraph 2, the Authority may, in accordance with the procedure set out in the third and fourth subparagraph of Article 44(1) take a decision requiring them to take specific action or to refrain from action in order to settle the matter, with binding effects for the competent authorities concerned, in order to ensure compliance with Union law.

4. Without prejudice to the powers of the Commission under Article 258 TFEU, where a competent authority does not comply with the decision of the Authority, and thereby fails to ensure that a financial market participant complies with requirements directly applicable to it by virtue of the acts referred to in Article 1(2), the Authority may adopt an individual decision addressed to a financial market participant requiring the necessary action to comply with its obligations under Union law, including the cessation of any practice.

5. Decisions adopted under paragraph 4 shall prevail over any previous decision adopted by the competent authorities on the same matter. Any action by the competent authorities in relation to facts which are subject to a decision pursuant to paragraph 3 or 4 shall be compatible with those decisions.

6. In the report referred to in Article 50(2), the Chairperson of the Authority shall set out the nature and type of disagreements between competent authorities, the agreements reached and the decisions taken to settle such disagreements.

Article 20 – *Settlement of disagreements between competent authorities across sectors*

The Joint Committee shall, in accordance with the procedure laid down in Article 19 and Article 56, settle cross-sectoral disagreements that may arise between competent authorities as defined in Article 4(2) of this Regulation, of

Regulation (EU) No 1093/2010 and of Regulation (EU) No 1094/2010 respectively.

Article 21 – Colleges of supervisors

1. The Authority shall contribute to promoting and monitoring the efficient, effective and consistent functioning of the colleges of supervisors established in the legislative acts referred to in Article 1(2) and foster the coherence of the application of Union law among the colleges of supervisors. With the objective of converging supervisory best practices, staff from the Authority shall be able to participate in the activities of the colleges of supervisors, including on-site examinations, carried out jointly by two or more competent authorities.

2. The Authority shall lead in ensuring a consistent and coherent functioning of colleges of supervisors for cross-border institutions across the Union, taking account of the systemic risk posed by financial market participants referred to in Article 23.

For the purpose of this paragraph and of paragraph 1 of this Article, the Authority shall be considered a "competent authority" within the meaning of the relevant legislation.

The Authority may:

(a) collect and share all relevant information in cooperation with the competent authorities in order to facilitate the work of the college and establish and manage a central system to make such information accessible to the competent authorities in the college;

(b) initiate and coordinate Union-wide stress tests in accordance with Article 32 to assess the resilience of financial market participants, in particular the systemic risk posed by key financial market participants as referred to in Article 23, to adverse market developments, and evaluate the potential for systemic risk posed by key financial market participants to increase in situations of stress, ensuring that a consistent methodology is applied at the national level to such tests and, where appropriate, address a recommendation to the competent authority to correct issues identified in the stress test;

(c) promote effective and efficient supervisory activities, including evaluating the risks to which financial market participants are or might be exposed in stress situations;

(d) oversee, in accordance with the tasks and powers specified in this Regulation, the tasks carried out by the competent authorities, and

(e) request further deliberations of a college in any cases where it considers that the decision would result in an incorrect application of Union law or would not contribute to the objective of convergence of supervisory practices. It may also require to schedule a meeting of the college or add a point to the agenda of a meeting.

3. The Authority may develop draft regulatory and implementing technical standards to ensure uniform conditions of application with respect to the provisions regarding the operational functioning of colleges of supervisors and issue guidelines and recommendations adopted under Article 16 to promote convergence in supervisory functioning and best practices adopted by the colleges of supervisors.

4. The Authority shall have a legally binding mediation role to resolve disputes between competent authorities in accordance with the procedure set out in Article 19. The Authority may take supervisory decisions directly applicable to the financial market participant concerned in accordance with Article 19.

Article 22 – *General provisions*

1. The Authority shall duly consider systemic risk as defined by Regulation (EU) No 1092/2010. It shall address any risk of disruption in financial services that:

(a) is caused by an impairment of all or parts of the financial system; and

(b) has the potential to have serious negative consequences for internal market and the real economy.

The Authority shall consider, where appropriate, the monitoring and assessment of systemic risk as developed by the ESRB and the Authority and respond to warnings and recommendations by the ESRB in accordance with Article 17 of Regulation (EU) No 1092/2010.

2. The Authority shall, in collaboration with the ESRB, and in accordance with Article 23 develop a common approach for the identification and measurement of systemic risk posed by key financial market participants, including quantitative and qualitative indicators as appropriate.

Those indicators shall be a critical element in the determination of appropriate supervisory actions. The Authority shall monitor the degree of convergence in the determinations made, with a view to promoting a common approach.

3. Without prejudice to the acts referred to in Article 1(2), the Authority shall draw up, as necessary, additional guidelines and recommendations for key financial market participants, to take account of the systemic risk posed by them.

The Authority shall ensure that the systemic risk posed by key financial market participants is taken into account when developing draft regulatory and implementing technical standards in the areas laid down in the legislative acts referred to in Article 1(2).

4. Upon a request from one or more competent authorities, the European Parliament, the Council or the Commission, or on its own initiative, the Authority may conduct an inquiry into a particular type of financial activity or type of product or type of conduct in order to assess potential threats to the integrity of financial markets or the stability of the financial system and make appropriate recommendations for action to the competent authorities concerned.

For those purposes, the Authority may use the powers conferred on it under this Regulation, including Article 35.

5. The Joint Committee shall ensure overall and cross-sectoral coordination of the activities carried out in accordance with this Article.

Article 23 – *Identification and measurement of systemic risk*

1. The Authority shall, in consultation with the ESRB, develop criteria for the identification and measurement of systemic risk and an adequate stress testing regime which includes an evaluation of the potential for systemic risk posed by financial market participants to increase in situations of stress. The financial market participants that may pose a systemic risk shall be subject to strengthened supervision, and where necessary, the recovery and resolution procedures referred to in Article 25.

2. The Authority shall take fully into account the relevant international approaches when developing the criteria for the identification and measurement of systemic risk posed by financial market participants, including those established by the Financial Stability Board, the International Monetary Fund and the Bank for International Settlements.

Article 24 – *Permanent capacity to respond to systemic risks*

1. The Authority shall ensure it has specialised and ongoing capacity to respond effectively to the materialisation of systemic risks as referred to in Articles 22 and 23, in particular with respect to institutions that pose a systemic risk.

2. The Authority shall fulfil the tasks conferred upon it in this Regulation and in the legislation referred to in Article 1(2), and shall contribute to ensuring a coherent and coordinated crisis management and resolution regime in the Union.

Article 25 – *Recovery and resolution procedures*

1. The Authority shall contribute to and participate actively in the development and coordination of effective and consistent recovery and resolution plans, procedures in emergency situations and preventive measures to minimise the systemic impact of any failure.

2. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 10 to 15.

Article 26 – *European system of national Investor Compensation Schemes*

1. The Authority shall contribute to strengthening the European system of national Investor Compensation Schemes (ICS) by acting under the powers conferred to it in this Regulation to ensure the correct application of Directive 97/9/EC with the aim of ensuring that national Investor Compensation Schemes are adequately funded by contributions from the concerned financial market participants, including where appropriate financial market participants headquartered in third-countries, and provide a high level of protection to all investors in a harmonised framework throughout the Union.

2. Article 16 concerning the Authority's powers to adopt guidelines and recommendations shall apply to Investor Compensation Schemes.

3. The Authority may develop regulatory and implementing technical standards as specified in the legislative acts referred to in Article 1(2) in accordance with the procedure laid down in Articles 10 to 15.

4. The review of this Regulation provided for in Article 81 shall in particular examine the convergence of the European system of national Investor Compensation Schemes.

Article 27 – *European system of resolution and funding arrangements*

1. In the areas of its competence, the Authority shall contribute to developing methods for the resolution of failing key financial market participants in ways which avoid contagion, allow them to be wound down in an orderly and timely manner, and, where applicable, including coherent and credible funding mechanisms as appropriate.

2. The Authority shall contribute to the work on the level playing field issues and cumulative impacts of any systems of levies and contributions on financial institutions that may be introduced to ensure fair burden sharing and incentives to contain systemic risk as a part of a coherent and credible resolution framework.

The review of this Regulation provided for in Article 81 shall in particular examine the possible enhancement of the role of the Authority in a framework of crisis prevention, management and resolution.

Article 28 – *Delegation of tasks and responsibilities*

1. Competent authorities may, with the consent of the delegate, delegate tasks and responsibilities to the Authority or other competent authorities subject to the conditions set out in this Article. Member States may set out specific arrangements regarding the delegation of responsibilities that have to be complied with before their competent authorities enter into such delegation agreements, and may limit the scope of delegation to what is necessary for the effective supervision of cross-border financial market participants or groups.

2. The Authority shall stimulate and facilitate the delegation of tasks and responsibilities between competent authorities by identifying those tasks and responsibilities that can be delegated or jointly exercised and by promoting best practices.

3. The delegation of responsibilities shall result in the reallocation of competences laid down in the acts referred to in Article 1(2). The law of the delegate authority shall govern the procedure, enforcement and administrative and judicial review relating to the delegated responsibilities.

4. The competent authorities shall inform the Authority of delegation agreements into which they intend to enter. They shall put the agreements into effect at the earliest 1 month after informing the Authority.

The Authority may give an opinion on the intended agreement within 1 month of being informed.

The Authority shall publish, by appropriate means, any delegation agreement as concluded by the competent authorities, in order to ensure that all parties concerned are informed appropriately.

Article 29 – *Common supervisory culture*

1. The Authority shall play an active role in building a common Union supervisory culture and consistent supervisory practices, as well as in ensuring uniform procedures and consistent approaches throughout the Union. The Authority shall carry out, at a minimum, the following activities:

(a) providing opinions to competent authorities;

(b) promoting an effective bilateral and multilateral exchange of information between competent authorities, with full respect for the applicable confidentiality and data protection provisions provided for in the relevant Union legislation;

(c) contributing to developing high-quality and uniform supervisory standards, including reporting standards, and international accounting standards in accordance with Article 1(3);

(d) reviewing the application of the relevant regulatory and implementing technical standards adopted by the Commission, and of the guidelines and recommendations issued by the Authority and proposing amendments where appropriate; and

(e) establishing sectoral and cross-sectoral training programmes, facilitating personnel exchanges and encouraging competent authorities to intensify the use of secondment schemes and other tools.

2. The Authority may, as appropriate, develop new practical instruments and convergence tools to promote common supervisory approaches and practices.

Article 30 – *Peer reviews of competent authorities*

1. The Authority shall periodically organise and conduct peer reviews of some or all of the activities of competent authorities, to further strengthen consistency in supervisory outcomes. To that end, the Authority shall develop methods to allow for objective assessment and

comparison between the authorities reviewed. When conducting peer reviews, existing information and evaluations already made with regard to the competent authority concerned shall be taken into account.

2. The peer review shall include an assessment of, but shall not be limited to:

(a) the adequacy of resources and governance arrangements of the competent authority, with particular regard to the effective application of the regulatory technical standards and implementing technical standards referred to in Articles 10 to 15 and of the acts referred to in Article 1(2) and the capacity to respond to market developments;

(b) the degree of convergence reached in the application of Union law and in supervisory practice, including regulatory technical standards and implementing technical standards, guidelines and recommendations adopted under Articles 10 to 16, and the extent to which the supervisory practice achieves the objectives set out in Union law;

(c) best practices developed by some competent authorities which might be of benefit for other competent authorities to adopt;

(d) the effectiveness and the degree of convergence reached with regard to the enforcement of the provisions adopted in the implementation of Union law, including the administrative measures and sanctions imposed against persons responsible where those provisions have not been complied with.

3. On the basis of a peer review, the Authority may issue guidelines and recommendations pursuant to Article 16. In accordance with Article 16(3), the competent authorities shall endeavour to follow those guidelines and recommendations. The Authority shall take into account the outcome of the peer review when developing draft regulatory technical or implementing technical standards in accordance with Articles 10 to 15.

4. The Authority shall make the best practices that can be identified from those peer reviews publicly available. In addition, all other results of peer reviews may be disclosed publicly, subject to the agreement of the competent authority that is the subject of the peer review.

Article 31 – *Coordination function*

The Authority shall fulfil a general coordination role between competent authorities, in particular in situations where adverse developments could potentially jeopardise the orderly functioning and integrity of financial markets or the stability of the financial system in the Union.

The Authority shall promote a coordinated Union response, inter alia, by:

(a) facilitating the exchange of information between the competent authorities;

(b) determining the scope and, where possible and appropriate, verifying the reliability of information that should be made available to all the competent authorities concerned;

(c) without prejudice to Article 19, carrying out non-binding mediation upon a request from the competent authorities or on its own initiative;

(d) notifying the ESRB of any potential emergency situations without delay.

(e) taking all appropriate measures in case of developments which may jeopardise the functioning of the financial markets with a view to facilitating the coordination of actions undertaken by relevant competent authorities;

(f) centralising information received from competent authorities in accordance with Articles 21 and 35 as the result of the regulatory reporting obligations for financial market participants active in more than one Member State. The Authority shall share that information with the other competent authorities concerned.

Article 32 – *Assessment of market developments*

1. The Authority shall monitor and assess market developments in the area of its competence and, where necessary, inform the European Supervisory Authority (European Banking Authority), and the European Supervisory Authority (European Insurance and Occupational Pensions Authority), the ESRB and the European Parliament, the Council and the Commission about the relevant micro-prudential trends, potential risks and vulnerabilities. The Authority shall include in its assessments an economic analysis of the markets in which financial market participants operate, and an assessment of the impact of potential market developments on such financial market participants.

2. The Authority shall, in cooperation with the ESRB, initiate and coordinate Union-wide assessments of the resilience of financial market participants to adverse market developments. To that end, it shall develop the following, for application by the competent authorities:

(a) common methodologies for assessing the effect of economic scenarios on the financial position of a financial market participant;

(b) common approaches to communication on the outcomes of these assessments of the resilience of financial market participants;

(c) common methodologies for assessing the effect of particular products or distribution processes on the financial position of a financial market participant and on investors and customer information.

3. Without prejudice to the tasks of the ESRB set out in Regulation (EU) No 1092/2010, the Authority shall, at least once a year, and more frequently as necessary, provide assessments to the European Parliament, the Council, the Commission and the ESRB of trends, potential risks and vulnerabilities in its area of competence.

The Authority shall include a classification of the main risks and vulnerabilities in these assessments and, where necessary, recommend preventative or remedial actions.

4. The Authority shall ensure an adequate coverage of cross-sectoral developments, risks and vulnerabilities by closely cooperating with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Insurance and Occupational Pensions Authority) through the Joint Committee.

Article 33 – *International relations*

1. Without prejudice to the respective competences of the Member States and the Union institutions, the Authority may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries. Those arrangements shall not create legal obligations in respect of the Union and its Member States nor shall they prevent Member States and their competent authorities from concluding bilateral or multilateral arrangements with those third countries.

2. The Authority shall assist in preparing equivalence decisions pertaining to supervisory regimes in third countries in accordance with the acts referred to in Article 1(2).

3. In the report referred to in Article 43(5), the Authority shall set out the administrative arrangements agreed upon with international organisations or administrations in third countries and the assistance provided in preparing equivalence decisions.

Article 34 – *Other tasks*

1. The Authority may, upon a request from the European Parliament, the Council or the Commission, or on its own initiative, provide opinions to the European Parliament, the Council and the Commission on all issues related to its area of competence.

2. With regard to prudential assessments of mergers and acquisitions falling within the scope of Directive 2004/39/EC, as amended by Directive 2007/44/EC, and which according to that Directive require consultation between competent authorities from two or more Member States, the Authority may, on application of one of the competent authorities concerned, issue and publish an opinion on a prudential assessment, except in relation to the criteria in Article 10b(e) of Directive 2004/39/EC. The opinion shall be issued promptly and in any event before the end of the assessment period in accordance with Directive 2004/39/EC, as amended by Directive 2007/44/EC. Article 35 shall apply to the areas in respect of which the Authority may issue an opinion.

Article 35 – *Collection of information*

1. At the request of the Authority, the competent authorities of the Member States shall provide the Authority with all the necessary information to carry out the duties assigned to it by this Regulation, provided that they have legal access to the relevant information, and that the request for information is necessary in relation to the nature of the duty in question.

2. The Authority may also request information to be provided at recurring intervals and in specified formats. Such requests shall, where possible, be made using common reporting formats.

3. Upon a duly justified request from a competent authority of a Member State, the Authority may provide any information that is necessary to enable the competent authority to carry out its duties, in accordance with the professional secrecy obligations laid down in sectoral legislation and in Article 70.

4. Before requesting information in accordance with this Article and in order to avoid the duplication of reporting obligations, the Authority shall take account of any relevant existing statistics produced and disseminated by

the European Statistical System and the European System of Central Banks.

5. Where information is not available or is not made available by the competent authorities in a timely fashion, the Authority may address a duly justified and reasoned request to other supervisory authorities, to the ministry responsible for finance where it has at its disposal prudential information, to the national central bank or to the statistical office of the Member State concerned.

6. Where information is not available or is not made available under paragraph 1 or 5 in a timely fashion, the Authority may address a duly justified and reasoned request directly to the relevant financial market participants. The reasoned request shall explain why the information concerning the respective individual financial market participants is necessary.

The Authority shall inform the relevant competent authorities of requests in accordance with this paragraph and with paragraph 5.

At the request of the Authority, the competent authorities shall assist the Authority in collecting the information.

7. The Authority may use confidential information received under this Article only for the purposes of carrying out the duties assigned to it by this Regulation.

Article 36 – *Relationship with the ESRB*

1. The Authority shall cooperate closely and on a regular basis with the ESRB.

2. The Authority shall provide the ESRB with regular and timely information necessary for the achievement of its tasks. Any data necessary for the achievement of its tasks that are not in summary or aggregate form shall be provided, without delay, to the ESRB upon a reasoned request, as specified in Article 15 of Regulation (EU) No 1092/2010. The Authority, in cooperation with the ESRB, shall have in place adequate internal procedures for the transmission of confidential information, in particular information regarding individual financial market participants.

3. The Authority shall, in accordance with paragraphs 4 and 5, ensure a proper follow-up to ESRB warnings and recommendations referred to in Article 16 of Regulation (EU) No 1092/2010.

4. On receipt of a warning or recommendation from the ESRB addressed to the Authority, the Authority shall convene a meeting of the Board of Supervisors without delay and assess the implications of such a warning or recommendation for the fulfilment of its tasks.

It shall decide, by the relevant decision-making procedure, on any actions to be taken in accordance with the powers conferred upon it by this Regulation for addressing the issues identified in the warnings and recommendations.

If the Authority does not act on a recommendation, it shall explain to the ESRB and the Council its reasons for not doing so.

5. On receipt of a warning or recommendation from the ESRB addressed to a competent national supervisory authority, the Authority shall, where relevant, use the powers conferred upon it by this Regulation to ensure a timely follow-up.

Where the addressee intends not to follow the recommendation of the ESRB, it shall inform and discuss with the Board of Supervisors its reasons for not acting.

The competent authority shall take due account of the views of the Board of Supervisors when informing the Council and the ESRB in accordance with Article 17 of Regulation (EU) No 1092/2010.

6. In discharging the tasks set out in this Regulation, the Authority shall take the utmost account of the warnings and recommendations of the ESRB.

Article 37 – *Securities and Markets Stakeholder Group*

1. To help facilitate consultation with stakeholders in areas relevant to the tasks of the Authority, a Securities and Markets Stakeholder Group shall be established. The Securities and Markets Stakeholder Group shall be consulted on actions taken in accordance with Articles 10 to 15 concerning regulatory technical standards and implementing technical standards and, to the extent that these do not concern individual financial market participants, Article 16 concerning guidelines and recommendations. If actions must be taken urgently and consultation becomes impossible, the Securities and Markets Stakeholder Group shall be informed as soon as possible.

The Securities and Markets Stakeholder Group shall meet at least four times a year.

2. The Securities and Markets Stakeholder Group shall be composed of 30 members, representing in balanced proportions financial market participants operating in the Union, their employees' representatives as well as consumers, users of financial services and representatives of SMEs. At least five of its members shall be independent top-ranking academics. Ten of its members shall represent financial market participants.

3. The members of the Securities and Markets Stakeholder Group shall be appointed by the Board of Supervisors, following proposals from the relevant stakeholders. In making its decision, the Board of Supervisors shall, to the extent possible, ensure an appropriate geographical and gender balance and representation of stakeholders across the Union.

4. The Authority shall provide all necessary information, subject to professional secrecy, as set out in Article 70, and ensure adequate secretarial support for the Securities and Markets Stakeholder Group. Adequate compensation shall be provided to members of the Securities and Markets Stakeholder Group that are representing non-profit organisations, excluding industry representatives. The Securities and Markets Stakeholder Group may establish working groups on technical issues. Members of the Securities and Markets Stakeholder Group shall serve for a period of two-and-a-half years, following which a new selection procedure shall take place.

The members of the Securities and Markets Stakeholder Group may serve two successive terms.

5. The Securities and Markets Stakeholder Group may submit opinions and advice to the Authority on any issue related to the tasks of the Authority with particular focus on the tasks set out in Articles 10 to 16 and Articles 29, 30 and 32.

6. The Securities and Markets Stakeholder Group shall adopt its rules of procedure by a majority of two-thirds of its members.

7. The Authority shall make public the opinions and advice of the Securities and Markets Stakeholder Group and the results of its consultations.

Article 38 – *Safeguards*

1. The Authority shall ensure that no decision adopted under Articles 18 or 19 impinges in any way on the fiscal responsibilities of Member States.

2. Where a Member State considers that a decision taken under Article 19(3) impinges on its fiscal responsibilities, it may notify the Authority and the Commission within 2 weeks after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In the case of such notification, the decision of the Authority shall be suspended.

Within a period of 1 month from the notification by the Member State, the Authority shall inform the Member State as to whether it maintains its decision or whether it amends or revokes it. If the decision is maintained or amended, the Authority shall state that fiscal responsibilities are not affected.

Where the Authority maintains its decision, the Council shall take a decision, by a majority of the votes cast, at one of its meetings not later than 2 months after the Authority has informed the Member State as set out in the fourth subparagraph, as to whether the Authority's decision is maintained.

Where the Council, after having considered the matter, does not take a decision to maintain the Authority's decision in accordance with the fifth subparagraph, the Authority's decision shall be terminated.

3. Where a Member State considers that a decision taken under Article 18(3) impinges on its fiscal responsibilities, it may notify the Authority, the Commission and the Council within three working days after notification of the Authority's decision to the competent authority that the decision will not be implemented by the competent authority.

In its notification, the Member State shall clearly and specifically explain why and how the decision impinges on its fiscal responsibilities.

In the event of such notification, the decision of the Authority shall be suspended.

The Council shall, within ten working days, convene a meeting and take a decision, by a simple majority of its members, as to whether the Authority's decision is revoked.

Where the Council, after having considered the matter, does not take a decision to revoke the Authority's decision in accordance with the fourth subparagraph, the suspension of the Authority's decision shall be terminated.

4. Where the Council has taken a decision in accordance with paragraph 3 not to revoke a decision of the Authority relating to Article 18(3), and the Member State concerned still considers that the decision of the Authority impinges upon its fiscal responsibilities, that Member State may notify the Commission and the Authority and request the Council to re-examine the matter. The Member State concerned shall clearly set out the reasons for its disagreement with the decision of the Council.

Within a period of 4 weeks after the notification referred to in the first subparagraph, the Council shall confirm its original decision or take a new decision in accordance with paragraph 3.

The period of 4 weeks may be extended by four additional weeks by the Council, if the particular circumstances of the case so require.

5. Any abuse of this Article, in particular in relation to a decision by the Authority which does not have a significant or material fiscal impact, shall be prohibited as incompatible with the internal market.

Article 39 – *Decision-making procedures*

1. Before taking the decisions provided for in this Regulation, the Authority shall inform any named addressee of its intention to adopt the decision, setting a time limit within which the addressee may express its views on the matter, taking full account of the urgency, complexity and potential consequences of the matter. This applies mutatis mutandis to recommendations as referred to in Article 17(3).

2. The decisions of the Authority shall state the reasons on which they are based.

3. The addressees of decisions of the Authority shall be informed of the legal remedies available under this Regulation.

4. Where the Authority has taken a decision pursuant to Article 18(3) or (4), it shall review that decision at appropriate intervals.

5. The decisions which the Authority takes pursuant to Articles 17, 18 or 19 shall be made public and shall state the identity of the competent authority or financial market participant concerned and the main content of the decision, unless such publication is in conflict with the legitimate interests of financial market participants in the protection of their business secrets or could seriously jeopardise the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system of the Union.

CHAPTER III – ORGANISATION

SECTION 1 – Board of Supervisors

Article 40 – *Composition*

1. The Board of Supervisors shall be composed of:

(a) the Chairperson, who shall be non-voting;

(b) the head of the national public authority competent for the supervision of financial market participants in each Member State, who shall meet in person at least twice a year;

(c) one representative of the Commission, who shall be non-voting;

(d) one representative of the ESRB, who shall be non-voting;

(e) one representative of each of the other two European Supervisory Authorities who shall be non-voting;

2. The Board of Supervisors shall convene meetings with the Securities and Markets Stakeholder Group regularly, at least twice a year.

3. Each competent authority shall be responsible for nominating a high-level alternate from its authority, who may replace the member of the Board of Supervisors referred to in paragraph 1(b), where that person is prevented from attending.

4. In Member States where more than one authority is responsible for the supervision according to this Regulation, those authorities shall agree on a common representative. Nevertheless, when an item to be discussed by the Board of Supervisors does not fall within the competence of the national authority being represented by the member referred to in paragraph 1(b), that member may bring a representative from the relevant national authority, who shall be non-voting.

5. For the purpose of acting within the scope of Directive 97/9/EC, the member of the Board of Supervisors referred to in paragraph 1(b) may, where appropriate, be accompanied by a representative from the relevant bodies which

administer investor compensation schemes in each Member State, who shall be non-voting.

6. The Board of Supervisors may decide to admit observers.

The Executive Director may participate in meetings of the Board of Supervisors without the right to vote.

Article 41 – *Internal committees and panels*

1. The Board of Supervisors may establish internal committees or panels for specific tasks attributed to the Board of Supervisors, and may provide for the delegation of certain clearly defined tasks and decisions to internal committees or panels, to the Management Board or to the Chairperson.

2. For the purposes of Article 19, the Board of Supervisors shall convoke an independent panel to facilitate an impartial settlement of the disagreement, consisting of the Chairperson and two of its members, who are not representatives of the competent authorities which are party to the disagreement and who have neither any interest in the conflict nor direct links to the competent authorities concerned.

3. Subject to Article 19(2), the panel shall propose a decision for final adoption by the Board of Supervisors, in accordance with the procedure set out in the third subparagraph of Article 44(1).

4. The Board of Supervisors shall adopt rules of procedure for the panel referred to in paragraph 2.

Article 42 – *Independence*

When carrying out the tasks conferred upon it by this Regulation, the Chairperson and the voting members of the Board of Supervisors shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Board of Supervisors in the performance of their tasks.

Article 43 – *Tasks*

1. The Board of Supervisors shall give guidance to the work of the Authority and shall be in charge of taking the decisions referred to in Chapter II.

2. The Board of Supervisors shall adopt the opinions, recommendations, and decisions, and issue the advice referred to in Chapter II.

3. The Board of Supervisors shall appoint the Chairperson.

4. The Board of Supervisors shall adopt, before 30 September of each year, on the basis of a proposal by the Management Board, the work programme of the Authority for the coming year, and shall transmit it for information to the European Parliament, the Council and the Commission.

The work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

5. The Board of Supervisors shall, on the basis of a proposal by the Management Board, adopt the annual report on the activities of the Authority, including on the performance of the Chairperson's duties, on the basis of the draft report referred to in Article 53(7) and shall transmit that report to the European Parliament, the Council, the Commission, the Court of Auditors and the European Economic and Social Committee by 15 June each year. The report shall be made public.

6. The Board of Supervisors shall adopt the multi-annual work programme of the Authority, and shall transmit it for information to the European Parliament, the Council and the Commission.

The multi-annual work programme shall be adopted without prejudice to the annual budgetary procedure and shall be made public.

7. The Board of Supervisors shall adopt the budget in accordance with Article 63.

8. The Board of Supervisors shall exercise disciplinary authority over the Chairperson and the Executive Director and may remove them from office in accordance with Article 48(5) or Article 51(5) respectively.

Article 44 – *Decision making*

1. Decisions of the Board of Supervisors shall be taken by a simple majority of its members. Each member shall have one vote.

With regard to the acts specified in Articles 10 to 16 and measures and decisions adopted under the third subparagraph of Article 9(5) and

Chapter VI and by way of derogation from the first subparagraph of this paragraph, the Board of Supervisors shall take decisions on the basis of a qualified majority of its members, as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

With regard to decisions in accordance with Article 19(3), for decisions taken by the consolidating supervisor, the decision proposed by the panel shall be considered as adopted, if approved by a simple majority, unless it is rejected by members representing a blocking minority of the votes as defined in Article 16(4) of the Treaty on European Union and in Article 3 of the Protocol (No 36) on transitional provisions.

For all other decisions in accordance with Article 19(3), the decision proposed by the panel shall be adopted by a simple majority of the members of the Board of Supervisors. Each member shall have one vote.

2. Meetings of the Board of Supervisors shall be convened by the Chairperson at his own initiative or at the request of one third of its members, and shall be chaired by the Chairperson.

3. The Board of Supervisors shall adopt and make public its rules of procedure.

4. The rules of procedure shall set out in detail the arrangements governing voting, including, where appropriate, the rules governing quorums. The non-voting members and the observers, with the exception of the Chairperson and the Executive Director, shall not attend any discussions within the Board of Supervisors relating to individual financial market participants, unless otherwise provided for in Article 75(3) or in the acts referred to in Article 1(2).

SECTION 2 – Management Board

Article 45 – *Composition*

1. The Management Board shall be composed of the Chairperson and six other members of the Board of Supervisors, elected by and from the voting members of the Board of Supervisors.

Other than the Chairperson, each member of the Management Board shall have an alternate, who may replace him if he is prevented from attending.

The term of office of the members elected by the Board of Supervisors shall be two-and-a-half years. That term may be extended once. The composition of the Management Board shall be balanced and proportionate and shall reflect the Union as a whole. Mandates shall be overlapping and an appropriate rotating arrangement shall apply.

2. Decisions by the Management Board shall be adopted on the basis of a majority of the members present. Each member shall have one vote.

The Executive Director and a representative of the Commission shall participate in meetings of the Management Board without the right to vote.

The representative of the Commission shall have the right to vote on matters referred to in Article 63.

The Management Board shall adopt and make public its rules of procedure.

3. Meetings of the Management Board shall be convened by the Chairperson at his own initiative or at the request of at least a third of its members, and shall be chaired by the Chairperson.

The Management Board shall meet prior to every meeting of the Board of Supervisors and as often as the Management Board deems necessary. It shall meet at least five times a year.

4. The members of the Management Board may, subject to the rules of procedure, be assisted by advisers or experts. The non-voting members, with the exception of the Executive Director, shall not attend any discussions within the Management Board relating to individual financial market participants.

Article 46 – *Independence*

The members of the Management Board shall act independently and objectively in the sole interest of the Union as a whole and shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the members of the Management Board in the performance of their tasks.

Article 47 – *Tasks*

1. The Management Board shall ensure that the Authority carries out its mission and performs the tasks assigned to it in accordance with this Regulation.

2. The Management Board shall propose, for adoption by the Board of Supervisors, an annual and multi-annual work programme.

3. The Management Board shall exercise its budgetary powers in accordance with Articles 63 and 64.

4. The Management Board shall adopt the Authority's staff policy plan and, pursuant to Article 68(2), the necessary implementing measures of the Staff Regulations of Officials of the European Communities (hereinafter the Staff Regulations').

5. The Management Board shall adopt the special provisions on right of access to the documents of the Authority, in accordance with Article 72.

6. The Management Board shall propose an annual report on the activities of the Authority, including on the Chairperson's duties, on the basis of the draft report referred to in Article 53(7) to the Board of Supervisors for approval.

7. The Management Board shall adopt and make public its rules of procedure.

8. The Management Board shall appoint and remove the members of the Board of Appeal in accordance with Article 58(3) and (5).

SECTION 3 – Chairperson

Article 48 – *Appointment and tasks*

1. The Authority shall be represented by a Chairperson, who shall be a full-time independent professional.

The Chairperson shall be responsible for preparing the work of the Board of Supervisors and shall chair the meetings of the Board of Supervisors and the Management Board.

2. The Chairperson shall be appointed by the Board of Supervisors on the basis of merit, skills, knowledge of financial market participants and markets, and of experience relevant to financial supervision and regulation, following an open selection procedure.

Before taking up his duties, and up to 1 month after the selection by the Board of Supervisors, the European Parliament may, after having heard the candidate selected by the Board of Supervisors, object to the designation of the selected person.

The Board of Supervisors shall also elect, from among its members, an alternate who shall carry out the functions of the Chairperson in his absence. That alternate shall not be elected from among the members of the Management Board.

3. The Chairperson's term of office shall be 5 years and may be extended once.

4. In the course of the 9 months preceding the end of the five-year term of office of the Chairperson, the Board of Supervisors shall evaluate:

(a) the results achieved in the first term of office and the way they were achieved;

(b) the Authority's duties and requirements in the coming years.

The Board of Supervisors, taking into account the evaluation may extend the term of office of the Chairperson once subject to confirmation by the European Parliament.

5. The Chairperson may be removed from office only by the European Parliament following a decision of the Board of Supervisors.

The Chairperson shall not prevent the Board of Supervisors from discussing matters relating to the Chairperson, in particular the need for his removal, and shall not be involved in deliberations concerning such a matter.

Article 49 – *Independence*

Without prejudice to the role of the Board of Supervisors in relation to the tasks of the Chairperson, the Chairperson shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Chairperson in the performance of his tasks.

In accordance with the Staff Regulations referred to in Article 68, the Chairperson shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Article 50 – *Report*

1. The European Parliament and the Council may invite the Chairperson or his alternate to make a statement, while fully respecting his independence. The Chairperson shall, make a statement before the European Parliament and answer any questions put by its members, whenever so requested.

2. The Chairperson shall report in writing on the main activities of the Authority to the European Parliament when requested and at least 15 days before making the statement referred to in paragraph 1.

3. In addition to the information referred to in Articles 11 to 18 and Articles 20 and 33, the report shall also include any relevant information requested by the European Parliament on an ad-hoc basis.

SECTION 4 – Executive Director

Article 51 – *Appointment*

1. The Authority shall be managed by an Executive Director, who shall be a full-time independent professional.

2. The Executive Director shall be appointed by the Board of Supervisors, after confirmation by the European Parliament, on the basis of merit, skills, knowledge of financial market participants and markets, and experience relevant to financial supervision and regulation and managerial experience, following an open selection procedure.

3. The Executive Director's term of office shall be 5 years and may be extended once.

4. In the course of the 9 months preceding the end of the Executive Director's term of office, the Board of Supervisors shall evaluate in particular:

(a) the results achieved in the first term of office and the way they were achieved;

(b) the Authority's duties and requirements in the coming years.

The Board of Supervisors, taking into account the evaluation referred to in the first subparagraph, may extend the term of office of the Executive Director once.

5. The Executive Director may be removed from office only upon a decision of the Board of Supervisors.

Article 52 – *Independence*

Without prejudice to the respective roles of the Management Board and the Board of Supervisors in relation to the tasks of the Executive Director, the Executive Director shall neither seek nor take instructions from the Union institutions or bodies, from any government of a Member State or from any other public or private body.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence the Executive Director in the performance of his tasks.

In accordance with the Staff Regulations referred to in Article 68, the Executive Director shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Article 53 – *Tasks*

1. The Executive Director shall be in charge of the management of the Authority and shall prepare the work of the Management Board.

2. The Executive Director shall be responsible for implementing the annual work programme of the Authority under the guidance of the Board of Supervisors and under the control of the Management Board.

3. The Executive Director shall take the necessary measures, notably the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Authority, in accordance with this Regulation.

4. The Executive Director shall prepare a multi-annual work programme, as referred to in Article 47(2).

5. Each year by 30 June, the Executive Director shall prepare a work programme for the following year, as referred to in Article 47(2).

6. The Executive Director shall draw up a preliminary draft budget of the Authority pursuant to Article 63 and shall implement the budget of the Authority pursuant to Article 64.

7. Each year the Executive Director shall prepare a draft report with a section on the regulatory and supervisory activities of the Authority and a section on financial and administrative matters.

8. The Executive Director shall exercise in respect to the Authority's staff the powers laid down in Article 68 and manage staff matters.

CHAPTER IV – JOINT BODIES OF THE EUROPEAN SUPERVISORY AUTHORITIES

SECTION 1 – Joint Committee of European Supervisory Authorities

Article 54 - *Establishment*

1. The Joint Committee of the European Supervisory Authorities is hereby established.

2. The Joint Committee shall serve as a forum in which the Authority shall cooperate regularly and closely and ensure cross-sectoral consistency with the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Insurance and Occupational Pensions Authority), in particular regarding:

- financial conglomerates,

- accounting and auditing,

- micro-prudential analyses of cross-sectoral developments, risks and vulnerabilities for financial stability,

- retail investment products,

- measures combating money laundering; and,

- information exchange with the ESRB and developing the relationship between the ESRB and the ESAs,

3. The Joint Committee shall have a dedicated staff provided by the ESAs that shall act as a secretariat. The Authority shall contribute adequate resources to administrative, infrastructure and operational expenses.

4. In the event that a financial market participant reaches across different sectors, the Joint Committee shall resolve disagreements in accordance with Article 56.

Article 55 – *Composition*

1. The Joint Committee shall be composed of the Chairpersons of the ESAs, and, where applicable, the Chairperson of any Sub-Committee established under Article 57.

2. The Executive Director, a representative of the Commission and the ESRB shall be invited to the meetings of the Joint Committee, as well as of any Sub-Committees referred to in Article 57, as observers.

3. The Chairperson of the Joint Committee shall be appointed on an annual rotational basis from among the Chairpersons of the ESAs. The Chairperson of the Joint Committee shall be a Vice-Chair of the ESRB.

4. The Joint Committee shall adopt and publish its own rules of procedure. The rules may specify further participants in the meetings of the Joint Committee.

The Joint Committee shall meet at least once every 2 months.

Article 56 – *Joint positions and common acts*

Within the scope of its tasks in Chapter II, and, in particular with respect to the implementation of Directive 2002/87/EC, where relevant, the Authority shall reach joint positions with the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and with the European Supervisory Authority (European Banking Authority), as appropriate.

Acts under Articles 10 to 15, 17, 18 or 19 of this Regulation in relation to the application of Directive 2002/87/EC and of any other Union acts referred to in Article 1(2) that also fall within the area of competence of the European Supervisory Authority (European Banking Authority) or the European Supervisory Authority (European Insurance and Occupational Pensions Authority) shall be adopted, in parallel, by the Authority, the European Supervisory Authority (European Banking Authority) and the European Supervisory Authority (European Insurance and Occupational Pensions Authority), as appropriate.

Article 57 – *Sub-Committees*

1. For the purposes of Article 56, a Sub-Committee on Financial Conglomerates to the Joint Committee shall be established.

2. The Sub-Committee shall be composed of the individuals referred to in Article 55(1), and one high-level representative from the current staff of the relevant competent authority from each Member State.

3. The Sub-Committee shall elect a Chairperson from among its members, who shall also be a member of the Joint Committee.

4. The Joint Committee may establish further Sub Committees.

SECTION 2 – Board of Appeal

Article 58 – *Composition and operation*

1. The Board of Appeal shall be a joint body of the ESAs.

2. The Board of Appeal shall be composed of six members and six alternates, who shall be individuals of a high repute with a proven record of relevant knowledge and professional experience, including supervisory, experience to a sufficiently high level in the fields of banking, insurance, occupational pensions, securities markets or other financial services, excluding current staff of the competent authorities or other national or Union institutions involved in the activities of the Authority. The Board of Appeal shall have sufficient legal expertise to provide expert legal advice on the legality of the Authority's exercise of its powers.

The Board of Appeal shall designate its President.

3. Two members of the Board of Appeal and two alternates shall be appointed by the Management Board of the Authority from a short-list proposed by the Commission, following a public call for expressions of interest published in the Official Journal of the European Union, and after consultation of the Board of Supervisors.

The other members shall be appointed in accordance with Regulation (EU) No 1093/2010 and Regulation (EU) No 1094/2010.

4. The term of office of the members of the Board of Appeal shall be 5 years. That term may be extended once.

5. A member of the Board of Appeal appointed by the Management Board of the Authority shall not be removed during his term of office, unless he has been found guilty of serious misconduct and the Management Board takes a decision to that effect after consulting the Board of Supervisors.

6. The decisions of the Board of Appeal shall be adopted on the basis of a majority of at least four of its six members. Where the appealed decision falls within the scope of this Regulation, the deciding majority shall include at least one of the two members of the Board of Appeal appointed by the Authority.

7. The Board of Appeal shall be convened by its President when necessary.

8. The ESAs shall ensure adequate operational and secretarial support for the Board of Appeal through the Joint Committee.

Article 59 – *Independence and impartiality*

1. The members of the Board of Appeal shall be independent in making their decisions. They shall not be bound by any instructions. They shall not perform any other duties in relation to the Authority, its Management Board or its Board of Supervisors.

2. Members of the Board of Appeal shall not take part in any appeal proceedings in which they have any personal interest, if they have previously been involved as representatives of one of the parties to the proceedings, or if they have participated in the decision under appeal.

3. If, for one of the reasons referred to in paragraphs 1 and 2 or for any other reason, a member of a Board of Appeal considers that another member should not take part in any appeal proceedings, he shall inform the Board of Appeal accordingly.

4. Any party to the appeal proceedings may object to the participation of a member of the Board of Appeal on any of the grounds referred to in paragraphs 1 and 2, or if suspected of bias.

No objection may be based on the nationality of members nor shall it be admissible if, while being aware of a reason for objecting, the party to the appeal proceedings has nonetheless taken a procedural step other than objecting to the composition of the Board of Appeal.

5. The Board of Appeal shall decide on the action to be taken in the cases specified in paragraphs 1 and 2 without the participation of the member concerned.

For the purpose of taking that decision, the member concerned shall be replaced on the Board of Appeal by his alternate. Where the alternate is in a similar situation, the Chairperson shall designate a replacement from among the available alternates.

6. The members of the Board of Appeal shall undertake to act independently and in the public interest.

For that purpose, they shall make a declaration of commitments and a declaration of interests indicating either the absence of any interest which may be considered prejudicial to their independence or any direct or indirect interest which might be considered prejudicial to their independence.

Those declarations shall be made public, annually and in writing.

CHAPTER V – REMEDIES

Article 60 – *Appeals*

1. Any natural or legal person, including competent authorities, may appeal against a decision of the Authority referred to in Articles 17, 18 and 19 and any other decision taken by the Authority in accordance with the Union acts referred to in Article 1(2) which is addressed to that person, or against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to that person.

2. The appeal, together with a statement of grounds, shall be filed in writing at the Authority within 2 months of the date of notification of the decision to the person concerned, or, in the absence of a notification, of the day on which the Authority published its decision.

The Board of Appeal shall decide upon the appeal within 2 months after the appeal has been lodged.

3. An appeal lodged pursuant to paragraph 1 shall not have suspensive effect.

However, the Board of Appeal may, if it considers that circumstances so require, suspend the application of the contested decision.

4. If the appeal is admissible, the Board of Appeal shall examine whether it is well-founded. It shall invite the parties to the appeal proceedings to file observations on its own notifications or on communications from the other parties to the appeal proceedings, within specified time limits. Parties to the appeal proceedings shall be entitled to make oral representations.

5. The Board of Appeal may confirm the decision taken by the competent body of the Authority, or remit the case to the competent body of the Authority. That body shall be bound by the decision of the Board of Appeal and that body shall adopt an amended decision regarding the case concerned.

6. The Board of Appeal shall adopt and make public its rules of procedure.

7. The decisions taken by the Board of Appeal shall be reasoned and shall be made public by the Authority.

Article 61 – *Actions before the Court of Justice of the European Union*

1. Proceedings may be brought before the Court of Justice of the European Union, in accordance with Article 263 TFEU, contesting a decision taken by the Board of Appeal or, in cases where there is no right of appeal before the Board of Appeal, by the Authority.

2. Member States and the Union institutions, as well as any natural or legal person, may institute proceedings before the Court of Justice of the European Union against decisions of the Authority, in accordance with Article 263 TFEU.

3. In the event that the Authority has an obligation to act and fails to take a decision, proceedings for failure to act may be brought before the Court of Justice of the European Union in accordance with Article 265 TFEU.

4. The Authority shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

CHAPTER VI – FINANCIAL PROVISIONS

Article 62 – *Budget of the Authority*

1. The revenues of the Authority, a European body in accordance with Article 185 of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities[43] (hereinafter the "Financial Regulation"), shall consist, in particular, of any combination of the following:

(a) obligatory contributions from the national public authorities competent for the supervision of financial market participants which shall be made in accordance with a formula based on the weighting of votes set out in Article 3(3) of Protocol (No 36) on transitional provisions. For the purposes of this Article, Article 3(3) of Protocol (No 36) on transitional provisions shall continue to apply beyond the deadline of 31 October 2014 therein established;

(b) a subsidy from the Union, entered in the General Budget of the European Union (Commission Section);

(c) any fees paid to the Authority in the cases specified in the relevant instruments of Union law.

2. The expenditure of the Authority shall include, at least, staff, remuneration,

[43] OJ L 248, 16.9.2002, p. 1.

administrative, infrastructure professional training and operational expenses.

3. Revenue and expenditure shall be in balance.

4. Estimates of all Authority revenue and expenditure shall be prepared for each financial year, corresponding to the calendar year, and shall be presented in the budget of the Authority.

Article 63 – *Establishment of the budget*

1. By 15 February each year, the Executive Director shall draw up a draft statement of estimates of revenue and expenditure for the following financial year, and shall forward it to the Management Board and the Board of Supervisors, together with the establishment plan. Each year, the Board of Supervisors shall, on the basis of the draft statement drawn up by the Executive Director and approved by the Management Board, produce a statement of estimates of revenue and expenditure of the Authority for the following financial year. That statement of estimates, including a draft establishment plan, shall be transmitted by the Board of Supervisors to the Commission by 31 March. Prior to adoption of the statement of estimates, the draft prepared by the Executive Director shall be approved by the Management Board.

2. The statement of estimates shall be transmitted by the Commission to the European Parliament and to the Council (hereinafter referred to together as the "budgetary authority"), together with the draft budget of the European Union.

3. On the basis of the statement of estimates, the Commission shall enter in the draft budget of the European Union the estimates it deems necessary in respect of the establishment plan and the amount of the subsidy to be charged to the General Budget of the European Union in accordance with Articles 313 and 314 TFEU.

4. The budgetary authority shall adopt the establishment plan for the Authority. The budgetary authority shall authorise the appropriations for the subsidy to the Authority.

5. The budget of the Authority shall be adopted by the Board of Supervisors. It shall become final after the final adoption of the General Budget of the European Union. Where necessary, it shall be adjusted accordingly.

6. The Management Board shall, without delay, notify the budgetary authority of its intention to implement any project which may have significant financial implications for the funding of its budget, in particular any project relating to property, such as the rental or purchase of buildings. It shall inform the Commission thereof. If either branch of the budgetary authority intends to issue an opinion, it shall, within 2 weeks of receipt of the information on the project, notify the Authority of its intention to issue such an opinion. In the absence of a reply, the Authority may proceed with the planned operation.

7. For the first year of operation of the Authority, ending on 31 December 2011, the financing of the Authority by the Union is subject to an agreement by the budgetary authority as provided for in Point 47 of the Interinstitutional Agreement on budgetary discipline and sound financial management.

Article 64 – *Implementation and control of the budget*

1. The Executive Director shall act as authorising officer and shall implement the Authority's budget.

2. By 1 March following the completion of each financial year, the Authority's accounting officer shall forward to the Commission's accounting officer and to the Court of Auditors the provisional accounts, accompanied by the report on budgetary and financial management during the financial year. The Authority's accounting officer shall also send the report on budgetary and financial management to the members of the Board of Supervisors, the European Parliament and the Council by 31 March of the following year.

The Commission's accounting officer shall then consolidate the provisional accounts of the institutions and decentralised bodies in accordance with Article 128 of the Financial Regulation.

3. After receiving the observations of the Court of Auditors on the provisional accounts of the Authority in accordance with Article 129 of the Financial Regulation, the Executive Director, acting on his own responsibility, shall draw up the final accounts of the Authority and transmit them, for opinion, to the Management Board.

4. The Management Board shall deliver an opinion on the final accounts of the Authority.

5. The Executive Director shall transmit those final accounts, accompanied by the opinion of the Management Board, by 1 July following the completion of the financial year, to the

Members of the Board of Supervisors, the European Parliament, the Council, the Commission and the Court of Auditors.

6. The final accounts shall be published.

7. The Executive Director shall send the Court of Auditors a reply to the latter's observations by 30 September. He shall also send a copy of that reply to the Management Board and the Commission.

8. The Executive Director shall submit to the European Parliament, at the latter's request and as provided for in Article 146(3) of the Financial Regulation, any information necessary for the smooth application of the discharge procedure for the financial year in question.

9. The European Parliament, following a recommendation from the Council acting by qualified majority, shall, before 15 May of the year N +2, grant a discharge to the Authority for the implementation of the budget comprising revenue from the General Budget of the European Union and competent authorities for the financial year N.

Article 65 – *Financial rules*

The financial rules applicable to the Authority shall be adopted by the Management Board after consulting the Commission. Those rules may not depart from Commission Regulation (EC, Euratom) No 2343/2002 of 19 November 2002 on the framework Financial Regulation for the bodies referred to in Article 185 of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities[44] unless the specific operational needs for the functioning of the Authority so require and only with the prior agreement of the Commission.

Article 66 – *Anti-fraud measures*

1. For the purposes of combating fraud, corruption and any other illegal activity, Regulation (EC) No 1073/1999 shall apply to the Authority without any restriction.

2. The Authority shall accede to the Interinstitutional Agreement concerning internal investigations by OLAF and shall immediately adopt appropriate provisions for all staff of the Authority.

3. The funding decisions and the agreements and the implementing instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may, if need be, carry out on-the-spot checks on the beneficiaries of monies disbursed by the Authority as well as on the staff responsible for allocating these monies.

CHAPTER VII – GENERAL PROVISIONS

Article 67 – *Privileges and immunities*

The Protocol (No 7) on the privileges and immunities of the European Union annexed to the Treaty on European Union and to the TFEU shall apply to the Authority and its staff.

Article 68 – *Staff*

1. The Staff Regulations, the Conditions of Employment of Other Servants and the rules adopted jointly by the Union institutions for the purpose of applying them shall apply to the staff of the Authority, including its Executive Director and its Chairperson.

2. The Management Board, in agreement with the Commission, shall adopt the necessary implementing measures, in accordance with the arrangements provided for in Article 110 of the Staff Regulations.

3. In respect of its staff, the Authority shall exercise the powers conferred on the appointing authority by the Staff Regulations and on the authority entitled to conclude contracts by the Conditions of Employment of Other Servants.

4. The Management Board shall adopt provisions to allow national experts from Member States to be seconded to the Authority.

Article 69 – *Liability of the Authority*

1. In the case of non-contractual liability, the Authority shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its staff in the performance of their duties. The Court of Justice of the European Union shall have jurisdiction in any dispute over the remedying of such damage.

2. The personal financial liability and disciplinary liability of Authority staff towards the Authority shall be governed by the relevant provisions applying to the staff of the Authority.

Article 70 – *Obligation of professional secrecy*

1. Members of the Board of Supervisors and the Management Board, the Executive Director, and members of the staff of the Authority including officials seconded by Member States on a

[44] OJ L 357, 31.12.2002, p. 72.

temporary basis and all other persons carrying out tasks for the Authority on a contractual basis shall be subject to the requirements of professional secrecy pursuant to Article 339 TFEU and the relevant provisions in Union legislation, even after their duties have ceased.

Article 16 of the Staff Regulations shall apply to them.

In accordance with the Staff Regulations, the staff shall, after leaving service, continue to be bound by the duty to behave with integrity and discretion as regards the acceptance of certain appointments or benefits.

Neither Member States, the Union institutions or bodies, nor any other public or private body shall seek to influence staff members of the Authority in the performance of their tasks.

2. Without prejudice to cases covered by criminal law, any confidential information received by persons referred to in paragraph 1 whilst performing their duties may not be divulged to any person or authority whatsoever, except in summary or aggregate form, such that individual financial market participants cannot be identified.

Moreover, the obligation under paragraph 1 and the first subparagraph of this paragraph shall not prevent the Authority and the national supervisory authorities from using the information for the enforcement of the acts referred to in Article 1(2), and in particular for legal procedures for the adoption of decisions.

3. Paragraphs 1 and 2 shall not prevent the Authority from exchanging information with national supervisory authorities in accordance with this Regulation and other Union legislation applicable to financial market participants.

That information shall be subject to the conditions of professional secrecy referred to in paragraphs 1 and 2. The Authority shall lay down in its internal rules of procedure the practical arrangements for implementing the confidentiality rules referred to in paragraphs 1 and 2.

4. The Authority shall apply Commission Decision 2001/844/EC/ECSC, Euratom of 29 November 2001 amending its internal Rules of Procedure.[45]

Article 71 – *Data protection*

This Regulation shall be without prejudice to the obligations of Member States relating to their processing of personal data under Directive 95/46/EC or the obligations of the Authority relating to its processing of personal data under Regulation (EC) No 45/2001 when fulfilling its responsibilities.

Article 72 – *Access to documents*

1. Regulation (EC) No 1049/2001 shall apply to documents held by the Authority.

2. The Management Board shall, by 31 May 2011, adopt practical measures for applying Regulation (EC) No 1049/2001.

3. Decisions taken by the Authority pursuant to Article 8 of Regulation (EC) No 1049/2001 may be the subject of a complaint to the Ombudsman or of proceedings before the Court of Justice of the European Union, following an appeal to the Board of Appeal, as appropriate, in accordance with the conditions laid down in Articles 228 and 263 TFEU respectively.

Article 73 – *Language arrangements*

1. Council Regulation No 1 determining the languages to be used by the European Economic Community[46] shall apply to the Authority.

2. The Management Board shall decide on the internal language arrangements for the Authority.

3. The translation services required for the functioning of the Authority shall be provided by the Translation Centre for the Bodies of the European Union.

Article 74 – *Headquarters Agreement*

The necessary arrangements concerning the accommodation to be provided for the Authority in the Member State where its seat is located and the facilities to be made available by that Member State, as well as the specific rules applicable in that Member State to the Executive Director, the members of the Management Board, the staff of the Authority and members of their families shall be laid down in a Headquarters Agreement between the Authority and that Member State concluded after obtaining the approval of the Management Board.

That Member State shall provide the best possible conditions to ensure the proper functioning of the Authority, including

[45] OJ L 317, 3.12.2001, p. 1.

[46] OJ 17, 6.10.1958, p. 385.

multilingual, European-oriented schooling and appropriate transport connections.

Article 75 – *Participation of third countries*

1. Participation in the work of the Authority shall be open to third countries which have concluded agreements with the Union whereby they have adopted and are applying Union law in the areas of competence of the Authority as referred to in Article 1(2).

2. The Authority may cooperate with the countries referred to in paragraph 1, applying legislation which has been recognised as equivalent in the areas of competence of the Authority referred to in Article 1(2), as provided for in international agreements concluded by the Union in accordance with Article 216 TFEU.

3. Under the relevant provisions of the agreements referred to in paragraphs 1 and 2, arrangements shall be made specifying, in particular, the nature, scope and procedural aspects of the involvement of the countries referred to in paragraph 1 in the work of the Authority, including provisions relating to financial contributions and to staff. They may provide for representation, as an observer, on the Board of Supervisors, but shall ensure that those countries do not attend any discussions relating to individual financial market participants, except where there is a direct interest.

CHAPTER VIII – TRANSITIONAL AND FINAL PROVISIONS

Article 76 – *Preparatory actions*

1. Following the entry into force of this Regulation, and before the establishment of the Authority, CESR shall act in close cooperation with the Commission to prepare for the replacement of CESR by the Authority.

2. Once the Authority has been established, the Commission shall be responsible for the administrative establishment and initial administrative operation of the Authority until the Authority has appointed an Executive Director.

For that purpose, until such time as the Executive Director takes up his duties following his appointment by the Board of Supervisors in accordance with Article 51, the Commission may assign one official on an interim basis in order to fulfil the functions of the Executive Director. That period shall be limited to the time necessary for the appointment of an Executive Director of the Authority.

The interim Executive Director may authorise all payments covered by credits provided in the budget of the Authority, once approved by the Management Board and may conclude contracts, including staff contracts following the adoption of the Authority's establishment plan.

3. Paragraphs 1 and 2 are without prejudice to the powers of the Board of Supervisors and the Management Board.

4. The Authority shall be considered the legal successor of CESR. By the date of establishment of the Authority, all assets and liabilities and all pending operations of CESR shall be automatically transferred to the Authority. The CESR shall establish a statement showing its closing asset and liability situation as of the date of that transfer. That statement shall be audited and approved by CESR and by the Commission.

Article 77 – *Transitional staff provisions*

1. By way of derogation from Article 68, all employment contracts and secondment agreements concluded by CESR or its Secretariat and in force on 1 January 2011 shall be honoured until their expiry date. They may not be extended.

2. All members of staff under contracts referred to in paragraph 1 shall be offered the possibility of concluding temporary agent contracts under Article 2(a) of the Conditions of Employment of Other Servants at the various grades as set out in the Authority's establishment plan.

An internal selection limited to staff who have contracts with CESR or its Secretariat shall be carried out after the entry into force of this Regulation by the authority authorised to conclude contracts in order to check the ability, efficiency and integrity of those to be engaged. The internal selection procedure shall take full account of the skills and experience demonstrated by the individuals' performance prior to the engagement.

3. Depending on the type and level of functions to be performed, successful applicants shall be offered temporary agents' contracts of a duration corresponding at least to the time remaining under the prior contract.

4. The relevant national law relating to labour contracts and other relevant instruments shall continue to apply to staff members with prior contracts who choose not to apply for temporary agent's contracts or who are not offered

temporary agents contracts in accordance with paragraph 2.

Article 78 – *National provisions*

The Member States shall make such provision as is appropriate to ensure the effective application of this Regulation.

Article 79 – *Amendments*

Decision No 716/2009/EC is hereby amended in so far as CESR is removed from the list of beneficiaries set out in Section B of the Annex to that Decision.

Article 80 – *Repeal*

Commission Decision 2009/77/EC, establishing CESR, is hereby repealed with effect from 1 January 2011.

Article 81 – *Review*

1. By 2 January 2014 and every 3 years thereafter, the Commission shall publish a general report on the experience acquired as a result of the operation of the Authority and the procedures laid down in this Regulation. That report shall evaluate, inter alia:

(a) the convergence in supervisory practices reached by competent authorities,

(i) the convergence in functional independence of the competent authorities and in standards equivalent to corporate governance;

(ii) the impartiality, objectivity and autonomy of the Authority;

(b) the functioning of the colleges of supervisors;

(c) the progress achieved towards convergence in the fields of crisis prevention, management and resolution, including Union funding mechanisms;

(d) the role of the Authority as regards systemic risk;

(e) the application of the safeguard clause established in Article 38;

(f) the application of the binding mediation role established in Article 19.

2. The report referred to in paragraph 1 shall also examine whether:

(a) it is appropriate to continue separate supervision of banking, insurance, occupational pensions, securities and financial markets;

(b) it is appropriate to undertake prudential supervision and supervise the conduct of business separately or by the same supervisor;

(c) it is appropriate to simplify and reinforce the architecture of the ESFS in order to increase the coherence between the macro and the micro levels and between the ESAs;

(d) the evolution of the ESFS is consistent with that of the global evolution;

(e) there is sufficient diversity and excellence within the ESFS;

(f) accountability and transparency in relation to publication requirements are adequate;

(g) the resources of the Authority are adequate to carry out its responsibilities;

(h) it is appropriate for the seat of the Authority to be maintained or to move the ESAs to a single seat to enhance better coordination between them.

3. Concerning the issue of direct supervision of institutions or infrastructures of pan-European reach and taking account of market developments, the Commission shall draw up an annual report on the appropriateness of entrusting the Authority with further supervisory responsibilities in this area.

4. The report and any accompanying proposals, as appropriate, shall be forwarded to the European Parliament and to the Council.

Article 82 – *Entry into force*

This Regulation shall enter into force on the day following its publication in the Official Journal of the European Union.

It shall apply from 1 January 2011, with the exception of Article 76 and Article 77(1) and (2), which shall apply as from the date of its entry into force.

The Authority shall be established on 1 January 2011.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 24 November 2010.

§14. Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, October 29th 2013, pp. 63-89

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 127(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Central Bank,

Acting in accordance with a special legislative procedure,

Whereas:

(1) Over the past decades, the Union has made considerable progress in creating an internal market for banking services. Consequently, in many Member States, banking groups with their headquarters established in other Member States hold a significant market share, and credit institutions have geographically diversified their business, within both the euro area and non-euro area.

(2) The present financial and economic crisis has shown that the integrity of the single currency and the internal market may be threatened by the fragmentation of the financial sector. It is therefore essential to intensify the integration of banking supervision in order to bolster the Union, restore financial stability and lay the basis for economic recovery.

(3) Maintaining and deepening the internal market for banking services is essential in order to foster economic growth in the Union and adequate funding of the real economy. However this proves increasingly challenging. Evidence shows that the integration of banking markets in the Union is coming to a halt.

(4) At the same time, in addition to the adoption of an enhanced Union regulatory framework, supervisors must step up their supervisory scrutiny to take account of the lessons of the financial crisis in recent years, and be able to oversee highly complex and inter-connected markets and institutions.

(5) Competence for supervision of individual credit institutions in the Union remains mostly at national level. Coordination between supervisors is vital but the crisis has shown that mere coordination is not enough, in particular in the context of a single currency. In order to preserve financial stability in the Union and increase the positive effects of market integration on growth and welfare, integration of supervisory responsibilities should therefore be enhanced. This is particularly important to ensure a smooth and sound overview over an entire banking group and its overall health and would reduce the risk of different interpretations and contradictory decisions on the individual entity level.

(6) The stability of credit institutions is in many instances still closely linked to the Member State in which they are established. Doubts about the sustainability of public debt, economic growth prospects, and the viability of credit institutions have been creating negative, mutually reinforcing market trends. This may lead to risks to the viability of some credit institutions and to the stability of the financial system in the euro area and the Union as a whole, and may impose a heavy burden for already strained public finances of the Member States concerned.

(7) The European Supervisory Authority (European Banking Authority) (EBA), established in 2011 by Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority),[1] and the European System of Financial Supervision (ESFS) established by Article 2 of that Regulation, and Article 2 of Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority)[2] (EIOPA) and

[1] OJ L 331, 15.12.2010, p. 12.
[2] OJ L 331, 15.12.2010, p. 48.

Article 2 of Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority)[3] (ESMA) have significantly improved cooperation between banking supervisors within the Union. EBA is making important contributions to the creation of a single rulebook for financial services in the Union, and has been crucial in implementing in a consistent way the recapitalisation agreed by the euro Summit of 26 October 2011 of major Union credit institutions, consistent with the guidelines and conditions relating to State aid adopted by the Commission.

(8) The European Parliament has called on various occasions for a European body to be directly responsible for certain supervisory tasks over financial institutions, starting with its resolutions of 13 April 2000 on the Commission communication on implementing the framework for financial markets: Action Plan[4] and of 21 November 2002 on prudential supervision rules in the European Union.[5]

(9) The European Council conclusions of 29 June 2012 invited the President of the European Council to develop a road map for the achievement of a genuine economic and monetary union. On the same day, the euro Summit pointed out that when an effective single supervisory mechanism is established involving the European Central Bank (ECB) for banks in the euro area, the European Stability Mechanism (ESM) could, following a regular decision, have the possibility to recapitalise banks directly which would rely on appropriate conditionality, including compliance with State aid rules.

(10) The European Council on 19 October 2012 concluded that the process towards deeper economic and monetary union should build on the Union institutional and legal framework and be characterised by openness and transparency towards Member States whose currency is not the euro and by respect for the integrity of the internal market. The integrated financial framework will have a single supervisory mechanism which will be open to the extent possible to all Member States wishing to participate.

(11) A banking union should therefore be set up in the Union, underpinned by a comprehensive and detailed single rulebook for financial services for the internal market as a whole and composed of a single supervisory mechanism and new frameworks for deposit insurance and resolution. In view of the close links and interactions between Member States whose currency is the euro, the banking union should apply at least to all euro area Member States. With a view to maintaining and deepening the internal market, and to the extent that this is institutionally possible, the banking union should also be open to the participation of other Member States.

(12) As a first step towards a banking union, a single supervisory mechanism should ensure that the Union's policy relating to the prudential supervision of credit institutions is implemented in a coherent and effective manner, that the single rulebook for financial services is applied in the same manner to credit institutions in all Member States concerned, and that those credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations. In particular, the Single Supervisory Mechanism (SSM) should be consistent with the functioning of the internal market for financial services and with the free movement of capital. A single supervisory mechanism is the basis for the next steps towards the banking union. This reflects the principle that the ESM will, following a regular decision, have the possibility to recapitalise banks directly when an effective single supervisory mechanism is established. The European Council noted in its conclusions of 13/14 December 2012 that 'In a context where banking supervision is effectively moved to a single supervisory mechanism, a single resolution mechanism will be required, with the necessary powers to ensure that any bank in participating Member States can be resolved with the appropriate tools' and that 'the single resolution mechanism should be based on contributions by the financial sector itself and include appropriate and effective backstop arrangements'.

(13) As the euro area's central bank with extensive expertise in macroeconomic and financial stability issues, the ECB is well placed to carry out clearly defined supervisory tasks with a focus on protecting the stability of the financial system of the Union. Indeed many Member States' central banks are already responsible for banking supervision. Specific tasks should therefore be conferred on the ECB concerning policies relating to the supervision of credit institutions within the participating Member States.

[3] OJ L 331, 15.12.2010, p. 84.
[4] OJ C 40, 7.2.2001, p. 453.
[5] OJ C 25 E, 29.1.2004, p. 394.

(14) The ECB and the competent authorities of Member States that are not participating Member States ('non-participating Member States') should conclude a memorandum of understanding describing in general terms how they will cooperate with one another in the performance of their supervisory tasks under Union law in relation to the financial institutions referred to in this Regulation. The memorandum of understanding could, inter alia, clarify the consultation relating to decisions of the ECB having effect on subsidiaries or branches established in the non-participating Member State whose parent undertaking is established in a participating Member State, and the cooperation in emergency situations, including early warning mechanisms in accordance with the procedures set out in relevant Union law. The memorandum should be reviewed on a regular basis.

(15) Specific supervisory tasks which are crucial to ensure a coherent and effective implementation of the Union's policy relating to the prudential supervision of credit institutions should be conferred on the ECB, while other tasks should remain with national authorities. The ECB's tasks should include measures taken in pursuance of macroprudential stability, subject to specific arrangements reflecting the role of national authorities.

(16) The safety and soundness of large credit institutions is essential to ensure the stability of the financial system. However, recent experience shows that smaller credit institutions can also pose a threat to financial stability. Therefore, the ECB should be able to exercise supervisory tasks in relation to all credit institutions authorised in, and branches established in, participating Member States.

(17) When carrying out the tasks conferred on it, and without prejudice to the objective to ensure the safety and soundness of credit institutions, the ECB should have full regard to the diversity of credit institutions and their size and business models, as well as the systemic benefits of diversity in the banking industry of the Union.

(18) The exercise of the ECB's tasks should contribute in particular to ensure that credit institutions fully internalise all costs caused by their activities so as to avoid moral hazard and the excessive risk taking arising from it. It should take full account of the relevant macroeconomic conditions in Member States, in particular the stability of the supply of credit and facilitation of productive activities for the economy at large.

(19) Nothing in this Regulation should be understood as changing the accounting framework applicable pursuant to other acts of Union and national law.

(20) Prior authorisation for taking up the business of credit institutions is a key prudential technique to ensure that only operators with a sound economic basis, an organisation capable of dealing with the specific risks inherent to deposit taking and credit provision, and suitable directors carry out those activities. The ECB should therefore have the task of authorising credit institutions that are to be established in a participating Member State and should be responsible for the withdrawal of authorisations, subject to specific arrangements reflecting the role of national authorities.

(21) In addition to the conditions set out in Union law for the authorisation of credit institutions and the cases for withdrawal of such authorisations, Member States may currently provide for further conditions for authorisation and cases for withdrawal of authorisation. The ECB should therefore carry out its task with regard to authorisation of credit institutions and withdrawal of the authorisation in case of non-compliance with national law on a proposal by the relevant national competent authority, which assesses compliance with the relevant conditions laid down in national law.

(22) An assessment of the suitability of any new owner prior to the purchase of a significant stake in a credit institution is an indispensable tool for ensuring the continuous suitability and financial soundness of credit institutions' owners. The ECB as a Union institution is well placed to carry out such an assessment without imposing undue restrictions on the internal market. The ECB should have the task of assessing the acquisition and disposal of significant holdings in credit institutions, except in the context of bank resolution.

(23) Compliance with Union rules requiring credit institutions to hold certain levels of capital against risks inherent to the business of credit institutions, to limit the size of exposures to individual counterparties, to publicly disclose information on credit institutions' financial situation, to dispose of sufficient liquid assets to withstand situations of market stress, and to limit leverage is a prerequisite for credit institutions' prudential soundness. The ECB should have the task of ensuring compliance with those rules, including in particular by granting approvals, permissions, derogations, or exemptions foreseen for the purposes of those rules.

(24) Additional capital buffers, including a capital conservation buffer, a countercyclical capital buffer to ensure that credit institutions accumulate, during periods of economic growth, a sufficient capital base to absorb losses in stressed periods, global and other systemic institution buffers, and other measures aimed at addressing systemic or macroprudential risk, are key prudential tools. In order to ensure full coordination, where national competent authorities or national designated authorities impose such measures, the ECB should be duly notified. Moreover, where necessary the ECB should be able to apply higher requirements and more stringent measures, subject to close coordination with national authorities. The provisions in this Regulation on measures aimed at addressing systemic or macroprudential risk are without prejudice to any coordination procedures provided for in other acts of Union law. National competent authorities or national designated authorities and the ECB shall act in respect of any coordination procedure provided for in such acts after having followed the procedures provided for in this Regulation.

(25) The safety and soundness of a credit institution depend also on the allocation of adequate internal capital, having regard to the risks to which it may be exposed, and on the availability of appropriate internal organisation structures and corporate governance arrangements. The ECB should therefore have the task of applying requirements ensuring that credit institutions in the participating Member States have in place robust governance arrangements, processes and mechanisms, including strategies and processes for assessing and maintaining the adequacy of their internal capital. In case of deficiencies it should also have the task of imposing appropriate measures including specific additional own funds requirements, specific disclosure requirements, and specific liquidity requirements.

(26) Risks for the safety and soundness of a credit institution can arise both at the level of an individual credit institution and at the level of a banking group or of a financial conglomerate. Specific supervisory arrangements to mitigate those risks are important to ensure the safety and soundness of credit institutions. In addition to supervision of individual credit institutions, the ECB's tasks should include supervision at the consolidated level, supplementary supervision, supervision of financial holding companies and supervision of mixed financial holding companies, excluding the supervision of insurance undertakings.

(27) In order to preserve financial stability, the deterioration of an institution's financial and economic situation must be remedied at an early stage. The ECB should have the task of carrying out early intervention actions as laid down in relevant Union law. It should however coordinate its early intervention action with the relevant resolution authorities. As long as national authorities remain competent to resolve credit institutions, the ECB should, moreover, coordinate appropriately with the national authorities concerned to ensure a common understanding about respective responsibilities in case of crises, in particular in the context of the cross-border crisis management groups and the future resolution colleges established for those purposes.

(28) Supervisory tasks not conferred on the ECB should remain with the national authorities. Those tasks should include the power to receive notifications from credit institutions in relation to the right of establishment and the free provision of services, to supervise bodies which are not covered by the definition of credit institutions under Union law but which are supervised as credit institutions under national law, to supervise credit institutions from third countries establishing a branch or providing cross-border services in the Union, to supervise payments services, to carry out day-to-day verifications of credit institutions, to carry out the function of competent authorities over credit institutions in relation to markets in financial instruments, the prevention of the use of the financial system for the purpose of money laundering and terrorist financing and consumer protection.

(29) The ECB should cooperate, as appropriate, fully with the national authorities which are competent to ensure a high level of consumer protection and the fight against money laundering.

(30) The ECB should carry out the tasks conferred on it with a view to ensuring the safety and soundness of credit institutions and the stability of the financial system of the Union as well as of individual participating Member States and the unity and integrity of the internal market, thereby ensuring also the protection of depositors and improving the functioning of the internal market, in accordance with the single rulebook for financial services in the Union. In particular the ECB should duly take into account the principles of equality and non-discrimination.

(31) The conferral of supervisory tasks on the ECB should be consistent with the framework

of the ESFS and its underlying objective to develop the single rulebook and enhance convergence of supervisory practices across the whole Union. Cooperation between the banking supervisors and the supervisors of insurance and securities markets is important to deal with issues of joint interest and to ensure proper supervision of credit institutions operating also in the insurance and securities sectors. The ECB should therefore be required to cooperate closely with EBA, ESMA and EIOPA, the European Systemic Risk Board (ESRB), and the other authorities which form part of the ESFS. The ECB should carry out its tasks in accordance with the provisions of this Regulation and without prejudice to the competence and the tasks of the other participants within the ESFS. It should also be required to cooperate with relevant resolution authorities and facilities financing direct or indirect public financial assistance.

(32) The ECB should carry out its tasks subject to and in compliance with relevant Union law including the whole of primary and secondary Union law, Commission decisions in the area of State aid, competition rules and merger control and the single rulebook applying to all Member States. EBA is entrusted with developing draft technical standards and guidelines and recommendations ensuring supervisory convergence and consistency of supervisory outcomes within the Union. The ECB should not replace the exercise of those tasks by EBA, and should therefore exercise powers to adopt regulations in accordance with Article 132 of the Treaty on the Functioning of the European Union (TFEU) and in compliance with Union acts adopted by the Commission on the basis of drafts developed by EBA and subject to Article 16 of Regulation (EU) No 1093/2010.

(33) Where necessary the ECB should enter into memoranda of understanding with competent authorities responsible for markets in financial instruments describing in general terms how they will cooperate with one another in the performance of their supervisory tasks under Union law in relation to financial institutions referred to in this Regulation. Such memoranda should be made available to the European Parliament, to the Council and to the competent authorities of all Member States.

(34) For the carrying out of its tasks and the exercise of its supervisory powers, the ECB should apply the material rules relating to the prudential supervision of credit institutions. Those rules are composed of the relevant Union law, in particular directly applicable Regulations or Directives, such as those on capital requirements for credit institutions and on financial conglomerates. Where the material rules relating to the prudential supervision of credit institutions are laid down in Directives, the ECB should apply the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and in areas where, on the date of entry into force of this Regulation, those Regulations explicitly grant options for Member States, the ECB should also apply the national legislation exercising such options. Such options should be construed as excluding options available only to competent or designated authorities. This is without prejudice to the principle of the primacy of Union law. It follows that the ECB should, when adopting guidelines or recommendations or when taking decisions, base itself on, and act in accordance with, the relevant binding Union law.

(35) Within the scope of the tasks conferred on the ECB, national law confers on national competent authorities certain powers which are currently not required by Union law, including certain early intervention and precautionary powers. The ECB should be able to require national authorities in the participating Member States to make use of those powers in order to ensure the performance of full and effective supervision within the SSM.

(36) In order to ensure that supervisory rules and decisions are applied by credit institutions, financial holding companies and mixed financial holding companies, effective, proportionate and dissuasive penalties should be imposed in case of a breach. In accordance with Article 132(3) TFEU and Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions,[6] the ECB is entitled to impose fines or periodic penalty payments on undertakings for failure to comply with obligations under its regulations and decisions. Moreover, in order to enable the ECB to effectively carry out its tasks relating to the enforcement of supervisory rules set out in directly applicable Union law, the ECB should be empowered to impose pecuniary penalties on credit institutions, financial holding companies and mixed financial holding companies for breaches of such rules. National authorities should remain able to apply penalties in case of failure to comply with obligations stemming from national law transposing Union Directives. Where the ECB considers it appropriate for the fulfilment of its tasks that a penalty is applied for such breaches, it should be able to refer the

[6] OJ L 318, 27.11.1998, p. 4.

matter to national competent authorities for those purposes.

(37) National supervisors have important and long-established expertise in the supervision of credit institutions within their territory and their economic, organisational and cultural specificities. They have established a large body of dedicated and highly qualified staff for those purposes. Therefore, in order to ensure high-quality, Union-wide supervision, national competent authorities should be responsible for assisting the ECB in the preparation and implementation of any acts relating to the exercise of the ECB supervisory tasks. This should include, in particular, the ongoing day-to-day assessment of a credit institution's situation and related on-site verifications.

(38) The criteria laid down in this Regulation defining the scope of institutions that are less significant should be applied at the highest level of consolidation within participating Member States based on consolidated data. Where the ECB carries out the tasks conferred on it by this Regulation with regard to a group of credit institutions that is not less significant on a consolidated basis, it should carry out those tasks on a consolidated basis with regard to the group of credit institutions and on an individual basis with regard to the banking subsidiaries and branches of that group established in participating Member States.

(39) The criteria laid down in this Regulation defining the scope of institutions that are less significant should be specified in a framework adopted and published by the ECB in consultation with national competent authorities. On that basis, the ECB should be responsible to apply those criteria and verify, through its own calculations, whether those criteria are met. The ECB's request for information to perform its calculation should not force the institutions to apply accounting frameworks differing from those applicable to them pursuant to other acts of Union and national law.

(40) Where a credit institution has been considered significant or less significant, that assessment should generally not be modified more often than once every 12 months, except if there are structural changes in the banking groups, such as mergers or divestitures.

(41) When deciding, following a notification by a national competent authority, whether an institution is of significant relevance with regard to the domestic economy and should therefore be supervised by the ECB, the ECB should take into account all relevant circumstances, including level-playing field considerations.

(42) As regards the supervision of cross-border credit institutions active both inside and outside the euro area the ECB should cooperate closely with the competent authorities of non-participating Member States. As a competent authority the ECB should be subject to the related obligations to cooperate and exchange information under Union law and should participate fully in the colleges of supervisors. In addition, since the exercise of supervisory tasks by a Union institution brings about clear benefits in terms of financial stability and sustainable market integration, Member States whose currency is not the euro should therefore also have the possibility to participate in the SSM. However, it is a necessary pre-condition for an effective exercise of supervisory tasks, that supervisory decisions are implemented fully and without delay. Member States wishing to participate in the SSM should therefore undertake to ensure that their national competent authorities will abide by and adopt any measure in relation to credit institutions requested by the ECB. The ECB should be able to establish a close cooperation with the competent authorities of a Member State whose currency is not the euro. It should be obliged to establish the cooperation where the conditions set out in this Regulation are met.

(43) Taking into account that participating Member States whose currency is not the euro are not present in the Governing Council for as long as they have not adopted the euro in accordance with the TFEU, and they cannot fully benefit from other mechanisms provided for Member States whose currency is the euro, additional safeguards in the decision-making process are provided for in this Regulation. However, those safeguards, in particular the possibility of the participating Member States whose currency is not the euro to request the immediate termination of the close cooperation after informing the Governing Council of its reasoned disagreement with a draft decision of the Supervisory Board, should be used in duly justified, exceptional cases. They should only be used as long as those specific circumstances apply. The safeguards are due to the specific circumstances in which participating Member States whose currency is not the euro are under this Regulation, since they are not present in the Governing Council and cannot fully benefit from other mechanisms provided for Member States whose currency is the euro. Therefore, the safeguards cannot and should not be construed as a precedent for other areas of Union policy.

(44) Nothing in this Regulation should alter in any way the current framework regulating the change of legal form of subsidiaries or branches and the application of such framework, or be understood or applied as providing incentives in favour of such change. In this respect, the responsibility of competent authorities of non-participating Member States should be fully respected, so that those authorities continue to enjoy sufficient supervisory tools and powers over credit institutions operating in their territory in order to have the capacity to fulfil this responsibility and effectively safeguard financial stability and public interest. Moreover, in order to assist those competent authorities in fulfilling their responsibilities, timely information on a change of legal form of subsidiaries or branches should be provided to depositors and to the competent authorities.

(45) In order to carry out its tasks, the ECB should have appropriate supervisory powers. Union law on the prudential supervision of credit institutions provides for certain powers to be conferred on competent authorities designated by the Member States for those purposes. To the extent that those powers fall within the scope of the supervisory tasks conferred on the ECB, for participating Member States the ECB should be considered the competent authority and should have the powers conferred on competent authorities by Union law. This includes powers conferred by those acts on the competent authorities of the home and the host Member States and the powers conferred on designated authorities.

(46) The ECB should have the supervisory power to remove a member of a management body in accordance with this Regulation.

(47) In order to carry out its tasks effectively, the ECB should be able to require all necessary information, and to conduct investigations and on-site inspections, where appropriate in cooperation with national competent authorities. The ECB and the national competent authorities should have access to the same information without credit institutions being subject to double reporting requirements.

(48) Legal profession privilege is a fundamental principle of Union law, protecting the confidentiality of communications between natural or legal persons and their advisors, in accordance with the conditions laid down in the case-law of the Court of Justice of the European Union (CJEU).

(49) When the ECB needs to require information from a person established in a non-participating Member State but belonging to a credit institution, financial holding company or mixed financial holding company established in a participating Member State, or to which such credit institution, financial holding company or mixed financial holding company has outsourced operational functions or activities, and when such requirements will not apply and will not be enforceable in the non-participating Member State, the ECB should coordinate with the competent authority in the non-participating Member State concerned.

(50) This Regulation does not affect the application of the rules established by Articles 34 and 42 of Protocol No 4 on the statute of the European System of Central Banks and of the European Central Bank, attached to the Treaty on European Union (TEU) and to the TFEU ('Statute of the ESCB and of the ECB'). The acts adopted by the ECB under this Regulation should not create any rights or impose any obligations in non-participating Member States, except where such acts are in accordance with relevant Union law, in accordance with that Protocol and with Protocol No 15 on certain provisions related to the United Kingdom of Great Britain and Northern Ireland, attached to the TEU and to the TFEU.

(51) Where credit institutions exercise their right of establishment or to provide services in another Member State, or where several entities in a group are established in different Member States, Union law provides for specific procedures and for attribution of competences between the Member States concerned. To the extent that the ECB takes over certain supervisory tasks for all participating Member States, those procedures and attributions should not apply to the exercise of the right of establishment or to provide services in another participating Member State.

(52) When carrying out its tasks under this Regulation and when requesting assistance from national competent authorities, the ECB should have due regard to a fair balance between the involvement of all national competent authorities involved, in line with the responsibilities set out in applicable Union law for solo supervision and for supervision on a sub-consolidated basis and on a consolidated basis.

(53) Nothing in this Regulation should be understood as conferring on the ECB the power to impose penalties on natural or legal persons other than credit institutions, financial holding companies or mixed financial holding companies, without prejudice to the ECB's

power to require national competent authorities to act in order to ensure that appropriate penalties are imposed.

(54) As established by the Treaties, the ECB is an institution of the Union as a whole. It should be bound in its decision-making procedures by Union rules and general principles on due process and transparency. The right of the addressees of the ECB's decisions to be heard should be fully respected as well as their right to request a review of the decisions of the ECB according to the rules set out in this Regulation.

(55) The conferral of supervisory tasks implies a significant responsibility for the ECB to safeguard financial stability in the Union, and to use its supervisory powers in the most effective and proportionate way. Any shift of supervisory powers from the Member State to the Union level should be balanced by appropriate transparency and accountability requirements. The ECB should therefore be accountable for the exercise of those tasks towards the European Parliament and the Council as democratically legitimised institutions representing the citizens of the Union and the Member States. That should include regular reporting, and responding to questions by the European Parliament in accordance with its Rules of Procedure, and by the euro Group in accordance with its procedures. Any reporting obligations should be subject to the relevant professional secrecy requirements.

(56) The ECB should also forward the reports, which it addresses to the European Parliament and to the Council, to the national parliaments of the participating Member States. National parliaments of the participating Member States should be able to address any observations or questions to the ECB on the performance of its supervisory tasks, to which the ECB may reply. The internal rules of those national parliaments should take into account details of the relevant procedures and arrangements for addressing the observations and questions to the ECB. In this context particular attention should be attached to observations or questions related to the withdrawal of authorisations of credit institutions in respect of which actions necessary for resolution or to maintain financial stability have been taken by national authorities in accordance with the procedure set out in this Regulation. The national parliament of a participating Member State should also be able to invite the Chair or a representative of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority. This role for national parliaments is appropriate given the potential impact that supervisory measures may have on public finances, credit institutions, their customers and employees, and the markets in the participating Member States. Where national competent authorities take action under this Regulation, accountability arrangements provided for under national law should continue to apply.

(57) This Regulation is without prejudice to the right of the European Parliament to set up a temporary Committee of Inquiry to investigate alleged contraventions or maladministration in the implementation of Union law pursuant to Article 226 TFEU or to the exercise of its functions of political control as laid down in the Treaties, including the right for the European Parliament to take a position or adopt a resolution on matters which it considers appropriate.

(58) In its action, the ECB should comply with the principles of due process and transparency.

(59) The regulation referred to in Article 15(3) TFEU should determine detailed rules enabling access to documents held by the ECB resulting from the carrying out of supervisory tasks, in accordance with the TFEU.

(60) Pursuant to Article 263 TFEU, the CJEU is to review the legality of acts of, inter alia, the ECB, other than recommendations and opinions, intended to produce legal effects vis-à-vis third parties.

(61) In accordance with Article 340 TFEU, the ECB should, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. This should be without prejudice to the liability of national competent authorities to make good any damage caused by them or by their servants in the performance of their duties in accordance with national legislation.

(62) Council Regulation No 1 determining the languages to be used by the European Economic Community[7] applies to the ECB by virtue of Article 342 TFEU.

(63) When determining whether the right of access to the file by persons concerned should be limited, the ECB should respect the fundamental rights and observe the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to an effective remedy and to a fair trial.

[7] OJ 17, 6.10.1958, p. 385.

(64) The ECB should provide natural and legal persons with the possibility to request a review of decisions taken under the powers conferred on it by this Regulation and addressed to them, or which are of direct and individual concern to them. The scope of the review should pertain to the procedural and substantive conformity with this regulation of such decisions while respecting the margin of discretion left to the ECB to decide on the opportunity to take those decisions. For that purpose, and for reasons of procedural economy, the ECB should establish an administrative board of review to carry out such internal review. To compose the board, the Governing Council of the ECB should appoint individuals of a high repute. In making its decision, the Governing Council should, to the extent possible, ensure an appropriate geographical and gender balance across the Member States. The procedure laid down for the review should provide for the Supervisory Board to reconsider its former draft decision as appropriate.

(65) The ECB is responsible for carrying out monetary policy functions with a view to maintaining price stability in accordance with Article 127(1) TFEU. The exercise of supervisory tasks has the objective to protect the safety and soundness of credit institutions and the stability of the financial system. They should therefore be carried out in full separation, in order to avoid conflicts of interests and to ensure that each function is exercised in accordance with the applicable objectives. The ECB should be able to ensure that the Governing Council operates in a completely differentiated manner as regards monetary and supervisory functions. Such differentiation should at least include strictly separated meetings and agendas.

(66) Organisational separation of staff should concern all services needed for independent monetary policy purposes and should ensure that the exercise of the tasks conferred by this Regulation is fully subject to democratic accountability and oversight as provided for by this Regulation. The staff involved in carrying out the tasks conferred on the ECB by this Regulation should report to the Chair of the Supervisory Board.

(67) In particular, a Supervisory Board responsible for preparing decisions on supervisory matters should be set up within the ECB encompassing the specific expertise of national supervisors. The board should therefore be chaired by a Chair, have a Vice Chair and include representatives from the ECB and from national competent authorities. The appointments for the Supervisory Board in accordance with this Regulation should respect the principles of gender balance, experience and qualification. All members of the Supervisory Board should be timely and fully informed on the items on the agenda of its meetings, so as to facilitate the effectiveness of the discussion and the draft decision making process.

(68) When exercising its tasks, the Supervisory Board should take account of all relevant facts and circumstances in the participating Member States and should perform its duties in the interest of the Union as a whole.

(69) With full respect to the institutional and voting arrangements set by the Treaties, the Supervisory Board should be an essential body in the exercise of supervisory tasks by the ECB, tasks which until now have always been in the hands of national competent authorities. For this reason, the Council should be given the power to adopt an implementing decision to appoint the Chair and the Vice-Chair of the Supervisory Board. After hearing the Supervisory Board, the ECB should submit a proposal for the appointment of the Chair and the Vice-Chair to the European Parliament for approval. Following the approval of this proposal, the Council should adopt that implementing decision. The Chair should be chosen on the basis of an open selection procedure, on which the European Parliament and the Council should be kept duly informed.

(70) In order to allow for an appropriate rotation while ensuring the full independence of the Chair, the Chair's term of office should not exceed five years and should not be renewable. In order to ensure full coordination with the activities of EBA and with the prudential policies of the Union, the Supervisory Board should be able to invite EBA and the Commission as observers. The Chair of the European Resolution Authority, once established, should participate as observer in the meetings of the Supervisory Board.

(71) The Supervisory Board should be supported by a steering committee with a more limited composition. The steering committee should prepare the meetings of the Supervisory Board, perform its duties solely in the interest of the Union as a whole, and work in full transparency with the Supervisory Board.

(72) The Governing Council of the ECB should invite the representatives from participating Member States whose currency is not the euro whenever it is contemplated by the Governing Council to object to a draft decision prepared by

the Supervisory Board or whenever the concerned national competent authorities inform the Governing Council of their reasoned disagreement with a draft decision of the Supervisory Board, when such decision is addressed to the national authorities in respect of credit institutions from participating Member States whose currency is not the euro.

(73) With a view to ensuring separation between monetary policy and supervisory tasks, the ECB should be required to create a mediation panel. The setting up of the panel, and in particular its composition, should ensure that it resolves differences of views in a balanced way, in the interest of the Union as a whole.

(74) The Supervisory Board, the steering committee and staff of the ECB carrying out supervisory duties should be subject to appropriate professional secrecy requirements. Similar requirements should apply to the exchange of information with the staff of the ECB not involved in supervisory activities. This should not prevent the ECB from exchanging information within the limits and under the conditions set out in the relevant Union legislation, including with the Commission for the purposes of its tasks under Articles 107 and 108 TFEU and under Union law on enhanced economic and budgetary surveillance.

(75) In order to carry out its supervisory tasks effectively, the ECB should exercise the supervisory tasks conferred on it in full independence, in particular free from undue political influence and from industry interference which would affect its operational independence.

(76) The use of cooling-off periods in supervisory authorities forms an important part of ensuring the effectiveness and independence of the supervision conducted by those authorities. To this end, and without prejudice to the application of stricter national rules, the ECB should establish and maintain comprehensive and formal procedures, including proportionate review periods, to assess in advance and prevent possible conflicts with the legitimate interest of the SSM/ECB where a former member of the Supervisory Board begins work within the banking industry he or she once supervised.

(77) In order to carry out its supervisory tasks effectively, the ECB should dispose of adequate resources. Those resources should be obtained in a way that ensures the ECB's independence from undue influences by national competent authorities and market participants, and separation between monetary policy and supervisory tasks. The costs of supervision should be borne by the entities subject to it. Therefore, the exercise of supervisory tasks by the ECB should be financed by annual fees charged to credit institutions established in the participating Member States. It should also be able to levy fees on branches established in a participating Member State by a credit institution established in a non-participating Member State to cover the expenditure incurred by the ECB when carrying out its tasks as a host supervisor over these branches. In the case a credit institution or a branch is supervised on a consolidated basis, the fee should be levied on the highest level of a credit institution within the involved group with establishment in participating Member States. The calculation of the fees should exclude any subsidiaries established in non-participating Member States.

(78) Where a credit institution is included in supervision on a consolidated basis, the fee should be calculated at the highest level of consolidation within participating Member States and allocated to the credit institutions established in a participating Member State and included in the supervision on a consolidated basis, based on objective criteria relating to the importance and risk profile, including the risk weighted assets.

(79) Highly motivated, well-trained and impartial staff is indispensable to effective supervision. In order to create a truly integrated supervisory mechanism, appropriate exchange and secondment of staff with and among all national competent authorities and the ECB should be provided for. To ensure a peer control on an on-going basis, particularly in the supervision of large credit institutions, the ECB should be able to request that national supervisory teams involve also staff from competent authorities of other participating Member States, making it possible to install supervisory teams of geographical diversity with specific expertise and profile. The exchange and secondment of staff should establish a common supervisory culture. On a regular basis the ECB should provide information on how many staff members from the national competent authorities are seconded to the ECB for the purposes of the SSM.

(80) Given the globalisation of banking services and the increased importance of international standards, the ECB should carry out its tasks in respect of international standards and in dialogue and close cooperation with supervisors outside the Union, without duplicating the international role of EBA. It should be

empowered to develop contacts and enter into administrative arrangements with the supervisory authorities and administrations of third countries and with international organisations, while coordinating with EBA and while fully respecting the existing roles and respective competences of the Member States and the institutions of the Union.

(81) Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data[8] and Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data[9] are fully applicable to the processing of personal data by the ECB for the purposes of this Regulation.

(82) Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)[10] applies to the ECB. The ECB has adopted Decision ECB/2004/11[11] concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank.

(83) In order to ensure that credit institutions are subject to supervision of the highest quality, unfettered by other, non-prudential considerations, and that the negative mutually reinforcing impacts of market developments which concern credit institutions and Member States are addressed in a timely and effective way, the ECB should start carrying out specific supervisory tasks as soon as possible. However, the transfer of supervisory tasks from national supervisors to the ECB requires a certain amount of preparation. Therefore, an appropriate phasing-in period should be provided for.

(84) When adopting the detailed operational arrangements for the implementation of the tasks conferred on the ECB by this Regulation, the ECB should provide for transitional arrangements which ensure the completion of ongoing supervisory procedures, including any decision and/or measure adopted or investigation commenced prior to the entry into force of this Regulation.

(85) The Commission has stated in its Communication of 28 November 2012 on a Blueprint for a deep and genuine economic and monetary union that Article 127(6) TFEU could be amended to make the ordinary legislative procedure applicable and to eliminate some of the legal constraints it currently places on the design of the SSM (e.g. enshrine a direct and irrevocable opt-in by Member States whose currency is not the euro to the SSM, beyond the model of 'close cooperation', grant Member States whose currency is not the euro participating in the SSM fully equal rights in the ECB's decision-making, and go even further in the internal separation of decision-making on monetary policy and on supervision). It has also stated that a specific point to be addressed would be to strengthen democratic accountability over the ECB insofar as it acts as a banking supervisor. It is recalled that TEU provides that proposals for treaty change may be submitted by the Government of any Member State, the European Parliament, or the Commission, and may relate to any aspect of the Treaties.

(86) This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union, in particular the right to the protection of personal data, the freedom to conduct a business, the right to an effective remedy and to a fair trial, and has to be implemented in accordance with those rights and principles.

(87) Since the objectives of this Regulation, namely setting up an efficient and effective framework for the exercise of specific supervisory tasks over credit institutions by a Union institution, and ensuring the consistent application of the single rulebook to credit institutions, cannot be sufficiently achieved at the Member State level and can therefore, by reason of the pan-Union structure of the banking market and the impact of failures of credit institutions on other Member States, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives,

HAS ADOPTED THIS REGULATION:

[8] OJ L 281, 23.11.1995, p. 31.
[9] OJ L 8, 12.1.2001, p. 1.
[10] OJ L 136, 31.5.1999, p. 1.
[11] Decision ECB/2004/11 of the European Central Bank of 3 June 2004 concerning the terms and conditions for European Anti-Fraud Office investigations of the European Central Bank, in relation to the prevention of fraud, corruption and any other illegal activities detrimental to the European Communities' financial interests (OJ L 230, 30.6.2004, p. 56).

CHAPTER I – SUBJECT MATTER AND DEFINITIONS

Article 1 – *Subject matter and scope*

This Regulation confers on the ECB specific tasks concerning policies relating to the prudential supervision of credit institutions, with a view to contributing to the safety and soundness of credit institutions and the stability of the financial system within the Union and each Member State, with full regard and duty of care for the unity and integrity of the internal market based on equal treatment of credit institutions with a view to preventing regulatory arbitrage.

The institutions referred to in Article 2(5) of the Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms[12] are excluded from the supervisory tasks conferred on ECB in accordance with Article 4 of this Regulation. The scope of the ECB's supervisory tasks is limited to the prudential supervision of credit institutions pursuant to this Regulation. This Regulation shall not confer on the ECB any other supervisory tasks, such as tasks relating to the prudential supervision of central counterparties.

When carrying out its tasks according to this Regulation, and without prejudice to the objective to ensure the safety and soundness of credit institutions, the ECB shall have full regard to the different types, business models and sizes of credit institutions.

No action, proposal or policy of the ECB shall, directly or indirectly, discriminate against any Member State or group of Member States as a venue for the provision of banking or financial services in any currency.

This Regulation is without prejudice to the responsibilities and related powers of the competent authorities of the participating Member States to carry out supervisory tasks not conferred on the ECB by this Regulation.

This Regulation is also without prejudice to the responsibilities and related powers of the competent or designated authorities of the participating Member States to apply macroprudential tools not provided for in relevant acts of Union law.

Article 2 – *Definitions*

For the purposes of this Regulation, the following definitions shall apply:

(1) 'participating Member State' means a Member State whose currency is the euro or a Member State whose currency is not the euro which has established a close cooperation in accordance with Article 7;

(2) 'national competent authority' means a national competent authority designated by a participating Member State in accordance with Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms[13] and Directive 2013/36/EU;

(3) 'credit institution' means a credit institution as defined in point 1 of Article 4(1) of Regulation (EU) No 575/2013;

(4) 'financial holding company' means a financial holding company as defined in point 20 of Article 4(1) of Regulation (EU) No 575/2013;

(5) 'mixed financial holding company' means a mixed financial holding company as defined in point 15 of Article 2 of Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate;[14]

(6) 'financial conglomerate' means a financial conglomerate as defined in point 14 of Article 2 of Directive 2002/87/EC;

(7) 'national designated authority' means a designated authority of a participating Member State, within the meaning of the relevant Union law;

(8) 'qualifying holding' means a qualifying holding as defined in point 36 of Article 4(1) of Regulation (EU) No 575/2013;

(9) 'Single supervisory mechanism' (SSM) means the system of financial supervision composed by the ECB and national competent authorities of participating Member States as described in Article 6 of this Regulation.

[12] OJ L 176, 27.6.2013, p. 338.

[13] OJ L 176, 27.6.2013, p. 1.

[14] OJ L 35, 11.2.2003, p. 1.

CHAPTER II – COOPERATION AND TASKS

Article 3 – *Cooperation*

1. The ECB shall cooperate closely with EBA, ESMA, EIOPA and the European Systemic Risk Board (ESRB), and the other authorities which form part of the ESFS, which ensure an adequate level of regulation and supervision in the Union.

Where necessary the ECB shall enter into memoranda of understanding with competent authorities of Member States responsible for markets in financial instruments. Such memoranda shall be made available to the European Parliament, to the Council and to competent authorities of all Member States.

2. For the purposes of this Regulation, the ECB shall participate in the Board of Supervisors of EBA under the conditions set out in Article 40 of Regulation (EU) No 1093/2010.

3. The ECB shall carry out its tasks in accordance with this Regulation and without prejudice to the competence and the tasks of EBA, ESMA, EIOPA and the ESRB.

4. The ECB shall cooperate closely with the authorities empowered to resolve credit institutions, including in the preparation of resolution plans.

5. Subject to Articles 1, 4 and 6, the ECB shall cooperate closely with any public financial assistance facility including the European Financial Stability Facility (EFSF) and the ESM, in particular where such a facility has granted or is likely to grant, direct or indirect financial assistance to a credit institution which is subject to Article 4.

6. The ECB and the competent authorities of non-participating Member States shall conclude a memorandum of understanding describing in general terms how they will cooperate with one another in the performance of their supervisory tasks under Union law in relation to the financial institutions referred to in Article 2. The memorandum shall be reviewed on a regular basis.

Without prejudice to the first subparagraph the ECB shall conclude a memorandum of understanding with the competent authority of each non-participating Member State that is home to at least one global systemically important institution, as defined in Union law.

Each memorandum shall be reviewed on a regular basis and shall be published subject to appropriate treatment of confidential information.

Article 4 – *Tasks conferred on the ECB*

1. Within the framework of Article 6, the ECB shall, in accordance with paragraph 3 of this Article, be exclusively competent to carry out, for prudential supervisory purposes, the following tasks in relation to all credit institutions established in the participating Member States:

(a) to authorise credit institutions and to withdraw authorisations of credit institutions subject to Article 14;

(b) for credit institutions established in a participating Member State, which wish to establish a branch or provide cross-border services in a non participating Member State, to carry out the tasks which the competent authority of the home Member State shall have under the relevant Union law;

(c) to assess notifications of the acquisition and disposal of qualifying holdings in credit institutions, except in the case of a bank resolution, and subject to Article 15;

(d) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose prudential requirements on credit institutions in the areas of own funds requirements, securitisation, large exposure limits, liquidity, leverage, and reporting and public disclosure of information on those matters;

(e) to ensure compliance with the acts referred to in the first subparagraph of Article 4(3), which impose requirements on credit institutions to have in place robust governance arrangements, including the fit and proper requirements for the persons responsible for the management of credit institutions, risk management processes, internal control mechanisms, remuneration policies and practices and effective internal capital adequacy assessment processes, including Internal Ratings Based models;

(f) to carry out supervisory reviews, including where appropriate in coordination with EBA, stress tests and their possible publication, in order to determine whether the arrangements, strategies, processes and mechanisms put in place by credit institutions and the own funds held by these institutions ensure a sound

management and coverage of their risks, and on the basis of that supervisory review to impose on credit institutions specific additional own funds requirements, specific publication requirements, specific liquidity requirements and other measures, where specifically made available to competent authorities by relevant Union law;

(g) to carry out supervision on a consolidated basis over credit institutions' parents established in one of the participating Member States, including over financial holding companies and mixed financial holding companies, and to participate in supervision on a consolidated basis, including in colleges of supervisors without prejudice to the participation of national competent authorities in those colleges as observers, in relation to parents not established in one of the participating Member State;

(h) to participate in supplementary supervision of a financial conglomerate in relation to the credit institutions included in it and to assume the tasks of a coordinator where the ECB is appointed as the coordinator for a financial conglomerate in accordance with the criteria set out in relevant Union law;

(i) to carry out supervisory tasks in relation to recovery plans, and early intervention where a credit institution or group in relation to which the ECB is the consolidating supervisor, does not meet or is likely to breach the applicable prudential requirements, and, only in the cases explicitly stipulated by relevant Union law for competent authorities, structural changes required from credit institutions to prevent financial stress or failure, excluding any resolution powers.

2. For credit institutions established in a non-participating Member State, which establish a branch or provide cross-border services in a participating Member State, the ECB shall carry out, within the scope of paragraph 1, the tasks for which the national competent authorities are competent in accordance with relevant Union law.

3. For the purpose of carrying out the tasks conferred on it by this Regulation, and with the objective of ensuring high standards of supervision, the ECB shall apply all relevant Union law, and where this Union law is composed of Directives, the national legislation transposing those Directives. Where the relevant Union law is composed of Regulations and where currently those Regulations explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options.

To that effect, the ECB shall adopt guidelines and recommendations, and take decisions subject to and in compliance with the relevant Union law and in particular any legislative and non-legislative act, including those referred to in Articles 290 and 291 TFEU. It shall in particular be subject to binding regulatory and implementing technical standards developed by EBA and adopted by the Commission in accordance with Article 10 to 15 of Regulation (EU) No 1093/2010, to Article 16 of that Regulation, and to the provisions of that Regulation on the European supervisory handbook developed by EBA in accordance with that Regulation. The ECB may also adopt regulations only to the extent necessary to organise or specify the arrangements for the carrying out of the tasks conferred on it by this Regulation.

Before adopting a regulation, the ECB shall conduct open public consultations and analyse the potential related costs and benefits, unless such consultations and analyses are disproportionate in relation to the scope and impact of the regulations concerned or in relation to the particular urgency of the matter, in which case the ECB shall justify that urgency.

Where necessary the ECB shall contribute in any participating role to the development of draft regulatory technical standards or implementing technical standards by EBA in accordance with Regulation (EU) No 1093/2010 or shall draw the attention of EBA to a potential need to submit to the Commission draft standards amending existing regulatory or implementing technical standards.

Article 5 – *Macroprudential tasks and tools*

1. Whenever appropriate or deemed required, and without prejudice to paragraph 2 of this Article, the national competent authorities or national designated authorities of the participating Member States shall apply requirements for capital buffers to be held by credit institutions at the relevant level in accordance with relevant Union law in addition to own funds requirements referred to in point (d) of Article 4(1) of this Regulation, including countercyclical buffer rates, and any other measures aimed at addressing systemic or macro-prudential risks provided for, and subject to the procedures set out, in the Regulation (EU) No 575/2013 and Directive 2013/36/EU in the cases specifically set out in relevant Union law.

Ten working days prior to taking such a decision, the concerned authority shall duly notify its intention to the ECB. Where the ECB objects, it shall state its reasons in writing within five working days. The concerned authority shall duly consider the ECB's reasons prior to proceeding with the decision as appropriate.

2. The ECB may, if deemed necessary, instead of the national competent authorities or national designated authorities of the participating Member State, apply higher requirements for capital buffers than applied by the national competent authorities or national designated authorities of participating Member States to be held by credit institutions at the relevant level in accordance with relevant Union law in addition to own funds requirements referred to in point (d) of Article 4(1) of this Regulation, including countercyclical buffer rates, subject to the conditions set out in paragraphs 4 and 5 of this Article, and apply more stringent measures aimed at addressing systemic or macroprudential risks at the level of credit institutions subject to the procedures set out in the Regulation (EU) No 575/2013 and Directive 2013/36/EU in the cases specifically set out in relevant Union law.

3. Any national competent authority or a national designated authority may propose to the ECB to act under paragraph 2, in order to address the specific situation of the financial system and the economy in its Member State.

4. Where the ECB intends to act in accordance with paragraph 2, it shall cooperate closely with the national designated authorities in the Member States concerned. It shall in particular notify its intention to the concerned national competent authorities or national designated authorities ten working days prior to taking such a decision. Where any of the concerned authorities objects, it shall state its reasons in writing within five working days. The ECB shall duly consider those reasons prior to proceeding with the decision as appropriate.

5. When carrying out the tasks referred to in paragraph 2, the ECB shall take into account the specific situation of the financial system, economic situation and the economic cycle in individual Member States or parts thereof.

Article 6 – *Cooperation within the SSM*

1. The ECB shall carry out its tasks within a single supervisory mechanism composed of the ECB and national competent authorities. The ECB shall be responsible for the effective and consistent functioning of the SSM.

2. Both the ECB and national competent authorities shall be subject to a duty of cooperation in good faith, and an obligation to exchange information.

Without prejudice to the ECB's power to receive directly, or have direct access to information reported, on an ongoing basis, by credit institutions, the national competent authorities shall in particular provide the ECB with all information necessary for the purposes of carrying out the tasks conferred on the ECB by this Regulation.

3. Where appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by this Regulation, national competent authorities shall be responsible for assisting the ECB, under the conditions set out in the framework mentioned in paragraph 7 of this Article, with the preparation and implementation of any acts relating to the tasks referred to in Article 4 related to all credit institutions, including assistance in verification activities. They shall follow the instructions given by the ECB when performing the tasks mentioned in Article 4.

4. In relation to the tasks defined in Article 4 except for points (a) and (c) of paragraph 1 thereof, the ECB shall have the responsibilities set out in paragraph 5 of this Article and the national competent authorities shall have the responsibilities set out in paragraph 6 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article, for the supervision of the following credit institutions, financial holding companies or mixed financial holding companies, or branches, which are established in participating Member States, of credit institutions established in non-participating Member States:

— those that are less significant on a consolidated basis, at the highest level of consolidation within the participating Member States, or individually in the specific case of branches, which are established in participating Member States, of credit institutions established in non-participating Member States. The significance shall be assessed based on the following criteria:

(i) size;

(ii) importance for the economy of the Union or any participating Member State;

(iii) significance of cross-border activities.

With respect to the first subparagraph above, a credit institution or financial holding company or mixed financial holding company shall not be considered less significant, unless justified by particular circumstances to be specified in the methodology, if any of the following conditions is met:

(i) the total value of its assets exceeds EUR 30 billion;

(ii) the ratio of its total assets over the GDP of the participating Member State of establishment exceeds 20 %, unless the total value of its assets is below EUR 5 billion;

(iii) following a notification by its national competent authority that it considers such an institution of significant relevance with regard to the domestic economy, the ECB takes a decision confirming such significance following a comprehensive assessment by the ECB, including a balance-sheet assessment, of that credit institution.

The ECB may also, on its own initiative, consider an institution to be of significant relevance where it has established banking subsidiaries in more than one participating Member States and its cross-border assets or liabilities represent a significant part of its total assets or liabilities subject to the conditions laid down in the methodology.

Those for which public financial assistance has been requested or received directly from the EFSF or the ESM shall not be considered less significant.

Notwithstanding the previous subparagraphs, the ECB shall carry out the tasks conferred on it by this Regulation in respect of the three most significant credit institutions in each of the participating Member States, unless justified by particular circumstances.

5. With regard to the credit institutions referred to in paragraph 4, and within the framework defined in paragraph 7:

(a) the ECB shall issue regulations, guidelines or general instructions to national competent authorities, according to which the tasks defined in Article 4 excluding points (a) and (c) of paragraph 1 thereof are performed and supervisory decisions are adopted by national competent authorities.

Such instructions may refer to the specific powers in Article 16(2) for groups or categories of credit institutions for the purposes of ensuring the consistency of supervisory outcomes within the SSM;

(b) when necessary to ensure consistent application of high supervisory standards, the ECB may at any time, on its own initiative after consulting with national competent authorities or upon request by a national competent authority, decide to exercise directly itself all the relevant powers for one or more credit institutions referred to in paragraph 4, including in the case where financial assistance has been requested or received indirectly from the EFSF or the ESM;

(c) the ECB shall exercise oversight over the functioning of the system, based on the responsibilities and procedures set out in this Article, and in particular point (c) of paragraph 7;

(d) the ECB may at any time make use of the powers referred to in Articles 10 to 13;

(e) the ECB may also request, on an ad hoc or continuous basis, information from the national competent authorities on the performance of the tasks carried out by them under this Article.

6. Without prejudice to paragraph 5 of this Article, national competent authorities shall carry out and be responsible for the tasks referred to in points (b), (d) to (g) and (i) of Article 4(1) and adopting all relevant supervisory decisions with regard to the credit institutions referred to in the first subparagraph of paragraph 4 of this Article, within the framework and subject to the procedures referred to in paragraph 7 of this Article.

Without prejudice to Articles 10 to 13, the national competent authorities and national designated authorities shall maintain the powers, in accordance with national law, to obtain information from credit institutions, holding companies, mixed holding companies and undertakings included in the consolidated financial situation of a credit institution and to perform on site inspections at those credit institutions, holding companies, mixed holding companies and undertakings. The national competent authorities shall inform the ECB, in accordance with the framework set out in paragraph 7 of this Article, of the measures taken pursuant to this paragraph and closely coordinate those measures with the ECB.

The national competent authorities shall report to the ECB on a regular basis on the

performance of the activities performed under this Article.

7. The ECB shall, in consultation with national competent authorities, and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical arrangements for the implementation of this Article. The framework shall include, at least, the following:

(a) the specific methodology for the assessment of the criteria referred to in the first, second and third subparagraph of paragraph 4 and the criteria under which the fourth subparagraph of paragraph 4 ceases to apply to a specific credit institution and the resulting arrangements for the purposes of implementing paragraphs 5 and 6. Those arrangements and the methodology for the assessment of the criteria referred to in the first, second and third subparagraph of paragraph 4 shall be reviewed to reflect any relevant changes, and shall ensure that where a credit institution has been considered significant or less significant that assessment shall only be modified in case of substantial and non-transitory changes of circumstances, in particular those circumstances relating to the situation of the credit institution which are relevant for that assessment.

(b) the definition of the procedures, including time-limits, and the possibility to prepare draft decisions to be sent to the ECB for consideration, for the relation between the ECB and the national competent authorities regarding the supervision of credit institutions not considered as less significant in accordance with paragraph 4;

(c) the definition of the procedures, including time-limits, for the relation between the ECB and the national competent authorities regarding the supervision of credit institutions considered as less significant in accordance with paragraph 4. Such procedures shall in particular require national competent authorities, depending on the cases defined in the framework, to:

(i) notify the ECB of any material supervisory procedure;

(ii) further assess, on the request of the ECB, specific aspects of the procedure;

(iii) transmit to the ECB material draft supervisory decisions on which the ECB may express its views.

8. Wherever the ECB is assisted by national competent authorities or national designated authorities for the purpose of exercising the tasks conferred on it by this Regulation, the ECB and the national competent authorities shall comply with the provisions set out in the relevant Union acts in relation to the allocation of responsibilities and cooperation between competent authorities from different Member States.

Article 7 – *Close cooperation with the competent authorities of participating Member States whose currency is not the euro*

1. Within the limits set out in this Article, the ECB shall carry out the tasks in the areas referred to in Articles 4(1), 4(2) and 5 in relation to credit institutions established in a Member State whose currency is not the euro, where close cooperation has been established between the ECB and the national competent authority of such Member State in accordance with this Article.

To that end, the ECB may address instructions to the national competent authority or to the national designated authority of the participating Member State whose currency is not the euro.

2. Close cooperation between the ECB and the national competent authority of a participating Member State whose currency is not the euro shall be established, by a decision adopted by the ECB, where the following conditions are met:

(a) the Member State concerned notifies the other Member States, the Commission, the ECB and EBA the request to enter into a close cooperation with the ECB in relation to the exercise of the tasks referred to in Articles 4 and 5 with regard to all credit institutions established in the Member State concerned, in accordance with Article 6;

(b) in the notification, the Member State concerned undertakes:

— to ensure that its national competent authority or national designated authority will abide by any guidelines or requests issued by the ECB, and

— to provide all information on the credit institutions established in that Member State that the ECB may require for the purpose of carrying out a comprehensive assessment of those credit institutions;

(c) the Member State concerned has adopted relevant national legislation to ensure that its national competent authority will be obliged to adopt any measure in relation to credit

institutions requested by the ECB, in accordance with paragraph 4.

3. The decision referred to in paragraph 2 shall be published in the Official Journal of the European Union. The decision shall apply 14 days after its publication.

4. Where the ECB considers that a measure relating to the tasks referred to in paragraph 1 should be adopted by the national competent authority of a concerned Member State in relation to a credit institution, financial holding company or mixed-financial holding company, it shall address instructions to that authority, specifying a relevant timeframe.

That timeframe shall be no less than 48 hours unless earlier adoption is indispensable to prevent irreparable damage. The national competent authority of the concerned Member State shall take all the necessary measures in accordance with the obligation referred to in point (c) of paragraph 2.

5. The ECB may decide to issue a warning to the Member State concerned that the close cooperation will be suspended or terminated if no decisive corrective action is undertaken in the following cases:

(a) where, in the opinion of the ECB, the conditions set out in points (a) to (c) of paragraph 2 are no longer met by the Member State concerned; or

(b) where, in the opinion of the ECB, the national competent authority of the Member State concerned does not act in accordance with the obligation referred to in point (c) of paragraph 2.

If no such action has been undertaken within 15 days of notification of such a warning, the ECB may suspend or terminate the close cooperation with that Member State.

The decision to suspend or terminate the close cooperation shall be notified to the Member State concerned and shall be published in the Official Journal of the European Union. The decision shall indicate the date from which it applies, taking due consideration of supervisory effectiveness and legitimate interests of credit institutions.

6. The Member State may request the ECB to terminate the close cooperation at any time after a lapse of three years from the date of the publication in the Official Journal of the European Union of the decision adopted by the ECB for the establishment of the close cooperation. The request shall explain the reasons for the termination, including, when relevant, potential significant adverse consequences as regards the fiscal responsibilities of the Member State. In this case, the ECB shall immediately proceed to adopt a decision terminating the close cooperation and indicate the date from which it applies within a maximum period of three months, taking due consideration of supervisory effectiveness and legitimate interests of credit institutions. The decision shall be published in the Official Journal of the European Union.

7. If a participating Member State whose currency is not the euro notifies the ECB in accordance with Article 26(8) of its reasoned disagreement with an objection of the Governing Council to a draft decision of the Supervisory Board, the Governing Council shall, within a period of 30 days, give its opinion on the reasoned disagreement expressed by the Member State and, stating its reasons to do so, confirm or withdraw its objection.

Where the Governing Council confirms its objection, the participating Member State whose currency is not the euro may notify the ECB that it will not be bound by the potential decision related to a possible amended draft decision by the Supervisory Board.

The ECB shall then consider the possible suspension or termination of the close cooperation with that Member State, taking due consideration of supervisory effectiveness, and take a decision in that respect.

The ECB shall take into account, in particular, the following considerations:

(a) whether the absence of such suspension or termination could jeopardize the integrity of the SSM or have significant adverse consequences as regards the fiscal responsibilities of the Member States;

(b) whether such suspension or termination could have significant adverse consequences as regards the fiscal responsibilities in the Member State which has notified a reasoned disagreement in accordance with Article 26(8);

(c) whether or not it is satisfied that the national competent authority concerned has adopted measures which, in the ECB's opinion:

— ensure that credit institutions in the Member State which notified its reasoned disagreement pursuant to the previous subparagraph are not

subject to a more favourable treatment than credit institutions in the other participating Member States, and

— are equally effective as the decision of the Governing Council under the second subparagraph of this paragraph in achieving the objectives referred to in Article 1 and in ensuring compliance with relevant Union law.

The ECB shall include these considerations in its decision and communicate them to the Member State in question.

8. If a participating Member State whose currency is not the euro disagrees with a draft decision of the Supervisory Board, it shall inform the Governing Council of its reasoned disagreement within five working days of receiving the draft decision. The Governing Council shall then decide about the matter within five working days, taking fully into account those reasons, and explain in writing its decision to the Member State concerned. The Member State concerned may request the ECB to terminate the close cooperation with immediate effect and will not be bound by the ensuing decision.

9. A Member State which has terminated the close cooperation with the ECB may not enter into a new close cooperation before a lapse of three years from the date of the publication in the Official Journal of the European Union of the ECB decision terminating the close cooperation.

Article 8 – *International relations*

Without prejudice to the respective competences of the Member States and institutions and bodies of the Union, other than the ECB, including EBA, in relation to the tasks conferred on the ECB by this Regulation, the ECB may develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries, subject to appropriate coordination with EBA. Those arrangements shall not create legal obligations in respect of the Union and its Member States.

CHAPTER III – POWERS OF THE ECB

Article 9 – *Supervisory and investigatory powers*

1. For the exclusive purpose of carrying out the tasks conferred on it by Articles 4(1), 4(2) and 5(2), the ECB shall be considered, as appropriate, the competent authority or the designated authority in the participating Member States as established by the relevant Union law.

For the same exclusive purpose, the ECB shall have all the powers and obligations set out in this Regulation. It shall also have all the powers and obligations, which competent and designated authorities shall have under the relevant Union law, unless otherwise provided for by this Regulation. In particular, the ECB shall have the powers listed in Sections 1 and 2 of this Chapter.

To the extent necessary to carry out the tasks conferred on it by this Regulation, the ECB may require, by way of instructions, those national authorities to make use of their powers, under and in accordance with the conditions set out in national law, where this Regulation does not confer such powers on the ECB. Those national authorities shall fully inform the ECB about the exercise of those powers.

2. The ECB shall exercise the powers referred to in paragraph 1 of this Article in accordance with the acts referred to in the first subparagraph of Article 4(3). In the exercise of their respective supervisory and investigatory powers, the ECB and national competent authorities shall cooperate closely.

3. By derogation from paragraph 1 of this Article, with regard to credit institutions established in participating Member States whose currency is not the euro, the ECB shall exercise its powers in accordance with Article 7.

Section 1 – Investigatory powers

Article 10 – *Request for information*

1. Without prejudice to the powers referred to in Article 9(1), and subject to the conditions set out in relevant Union law, the ECB may require the following legal or natural persons, subject to Article 4, to provide all information that is necessary in order to carry out the tasks conferred on it by this Regulation, including information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes:

(a) credit institutions established in the participating Member States;

(b) financial holding companies established in the participating Member States;

(c) mixed financial holding companies established in the participating Member States;

(d) mixed-activity holding companies established in the participating Member States;

(e) persons belonging to the entities referred to in points (a) to (d);

(f) third parties to whom the entities referred to in points (a) to (d) have outsourced functions or activities.

2. The persons referred to in paragraph 1 shall supply the information requested. Professional secrecy provisions do not exempt those persons from the duty to supply that information. Supplying that information shall not be deemed to be in breach of professional secrecy.

3. Where the ECB obtains information directly from the legal or natural persons referred to in paragraph 1 it shall make that information available to the national competent authorities concerned.

Article 11 – *General investigations*

1. In order to carry out the tasks conferred on it by this Regulation, and subject to other conditions set out in relevant Union law, the ECB may conduct all necessary investigations of any person referred to in Article 10(1) established or located in a participating Member State.

To that end, the ECB shall have the right to:

(a) require the submission of documents;

(b) examine the books and records of the persons referred to in Article 10(1) and take copies or extracts from such books and records;

(c) obtain written or oral explanations from any person referred to in Article 10(1) or their representatives or staff;

(d) interview any other person who consents to be interviewed for the purpose of collecting information relating to the subject matter of an investigation;

2. The persons referred to in Article 10(1) shall be subject to investigations launched on the basis of a decision of the ECB.

When a person obstructs the conduct of the investigation, the national competent authority of the participating Member State where the relevant premises are located shall afford, in compliance with national law, the necessary assistance including, in the cases referred to in Articles 12 and 13, facilitating the access by the ECB to the business premises of the legal persons referred to in Article 10(1), so that the aforementioned rights can be exercised.

Article 12 – *On-site inspections*

1. In order to carry out the tasks conferred on it by this Regulation, and subject to other conditions set out in relevant Union law, the ECB may in accordance with Article 13 and subject to prior notification to the national competent authority concerned conduct all necessary on-site inspections at the business premises of the legal persons referred to in Article 10(1) and any other undertaking included in supervision on a consolidated basis where the ECB is the consolidating supervisor in accordance with point (g) of Article 4(1). Where the proper conduct and efficiency of the inspection so require, the ECB may carry out the on-site inspection without prior announcement to those legal persons.

2. The officials of and other persons authorised by the ECB to conduct an on-site inspection may enter any business premises and land of the legal persons subject to an investigation decision adopted by the ECB and shall have all the powers stipulated in Article 11(1).

3. The legal persons referred to in Article 10(1) shall be subject to on-site inspections on the basis of a decision of the ECB.

4. Officials and other accompanying persons authorised or appointed by the national competent authority of the Member State where the inspection is to be conducted shall, under the supervision and coordination of the ECB, actively assist the officials of and other persons authorised by the ECB. To that end, they shall enjoy the powers set out in paragraph 2. Officials of the national competent authority of the participating Member State concerned shall also have the right to participate in the on-site inspections.

5. Where the officials of and other accompanying persons authorised or appointed by the ECB find that a person opposes an inspection ordered pursuant to this Article, the national competent authority of the participating Member State concerned shall afford them the necessary assistance in accordance with national law. To the extent necessary for the inspection, this assistance shall include the sealing of any business premises and books or records. Where that power is not available to the national competent authority concerned, it shall use its powers to request the necessary assistance of other national authorities.

Article 13 – *Authorisation by a judicial authority*

1. If an on-site inspection provided for in Article 12(1) and (2) or the assistance provided for in Article 12(5) requires authorisation by a judicial authority according to national rules, such authorisation shall be applied for.

2. Where authorisation as referred to in paragraph 1 of this Article is applied for, the national judicial authority shall control that the decision of the ECB is authentic and that the coercive measures envisaged are neither arbitrary nor excessive having regard to the subject matter of the inspection. In its control of the proportionality of the coercive measures, the national judicial authority may ask the ECB for detailed explanations, in particular relating to the grounds the ECB has for suspecting that an infringement of the acts referred to in the first subparagraph of Article 4(3) has taken place and the seriousness of the suspected infringement and the nature of the involvement of the person subject to the coercive measures. However, the national judicial authority shall not review the necessity for the inspection or demand to be provided with the information on the ECB's file. The lawfulness of the ECB's decision shall be subject to review only by the CJEU.

Section 2 – Specific supervisory powers

Article 14 – *Authorisation*

1. Any application for an authorisation to take up the business of a credit institution to be established in a participating Member State shall be submitted to the national competent authorities of the Member State where the credit institution is to be established in accordance with the requirements set out in relevant national law.

2. If the applicant complies with all conditions of authorisation set out in the relevant national law of that Member State, the national competent authority shall take, within the period provided for by relevant national law, a draft decision to propose to the ECB to grant the authorisation. The draft decision shall be notified to the ECB and the applicant for authorisation. In other cases, the national competent authority shall reject the application for authorisation.

3. The draft decision shall be deemed to be adopted by the ECB unless the ECB objects within a maximum period of ten working days, extendable once for the same period in duly justified cases. The ECB shall object to the draft decision only where the conditions for authorisation set out in relevant Union law are not met. It shall state the reasons for the rejection in writing.

4. The decision taken in accordance with paragraphs 2 and 3 shall be notified by the national competent authority to the applicant for authorisation.

5. Subject to paragraph 6, the ECB may withdraw the authorisation in the cases set out in relevant Union law on its own initiative, following consultations with the national competent authority of the participating Member State where the credit institution is established, or on a proposal from such national competent authority. These consultations shall in particular ensure that before taking decisions regarding withdrawal, the ECB allows sufficient time for the national authorities to decide on the necessary remedial actions, including possible resolution measures, and takes these into account.

Where the national competent authority which has proposed the authorisation in accordance with paragraph 1 considers that the authorisation must be withdrawn in accordance with the relevant national law, it shall submit a proposal to the ECB to that end. In that case, the ECB shall take a decision on the proposed withdrawal taking full account of the justification for withdrawal put forward by the national competent authority.

6. As long as national authorities remain competent to resolve credit institutions, in cases where they consider that the withdrawal of the authorisation would prejudice the adequate implementation of or actions necessary for resolution or to maintain financial stability, they shall duly notify their objection to the ECB explaining in detail the prejudice that a withdrawal would cause. In those cases, the ECB shall abstain from proceeding to the withdrawal for a period mutually agreed with the national authorities. The ECB may extend that period if it is of the opinion that sufficient progress has been made. If, however, the ECB determines in a reasoned decision that proper actions necessary to maintain financial stability have not been implemented by the national authorities, the withdrawal of the authorisations shall apply immediately.

Article 15 – *Assessment of acquisitions of qualifying holdings*

1. Without prejudice to the exemptions provided for in point (c) of Article 4(1), any notification

of an acquisition of a qualifying holding in a credit institution established in a participating Member State or any related information shall be introduced with the national competent authorities of the Member State where the credit institution is established in accordance with the requirements set out in relevant national law based on the acts referred to in the first subparagraph of Article 4(3).

2. The national competent authority shall assess the proposed acquisition, and shall forward the notification and a proposal for a decision to oppose or not to oppose the acquisition, based on the criteria set out in the acts referred to in the first subparagraph of Article 4(3), to the ECB, at least ten working days before the expiry of the relevant assessment period as defined by relevant Union law, and shall assist the ECB in accordance with Article 6.

3. The ECB shall decide whether to oppose the acquisition on the basis of the assessment criteria set out in relevant Union law and in accordance with the procedure and within the assessment periods set out therein.

Article 16 – *Supervisory powers*

1. For the purpose of carrying out its tasks referred to in Article 4(1) and without prejudice to other powers conferred on the ECB, the ECB shall have the powers set out in paragraph 2 of this Article to require any credit institution, financial holding company or mixed financial holding company in participating Member States to take the necessary measures at an early stage to address relevant problems in any of the following circumstances:

(a) the credit institution does not meet the requirements of the acts referred to in the first subparagraph of Article 4(3);

(b) the ECB has evidence that the credit institution is likely to breach the requirements of the acts referred to in the first subparagraph of Article 4(3) within the next 12 months;

(c) based on a determination, in the framework of a supervisory review in accordance with point (f) of Article 4(1), that the arrangements, strategies, processes and mechanisms implemented by the credit institution and the own funds and liquidity held by it do not ensure a sound management and coverage of its risks.

2. For the purposes of Article 9(1), the ECB shall have, in particular, the following powers:

(a) to require institutions to hold own funds in excess of the capital requirements laid down in the acts referred to in the first subparagraph of Article 4(3) related to elements of risks and risks not covered by the relevant Union acts;

(b) to require the reinforcement of the arrangements, processes, mechanisms and strategies;

(c) to require institutions to present a plan to restore compliance with supervisory requirements pursuant to the acts referred to in the first subparagraph of Article 4(3) and set a deadline for its implementation, including improvements to that plan regarding scope and deadline;

(d) to require institutions to apply a specific provisioning policy or treatment of assets in terms of own funds requirements;

(e) to restrict or limit the business, operations or network of institutions or to request the divestment of activities that pose excessive risks to the soundness of an institution;

(f) to require the reduction of the risk inherent in the activities, products and systems of institutions;

(g) to require institutions to limit variable remuneration as a percentage of net revenues when it is inconsistent with the maintenance of a sound capital base;

(h) to require institutions to use net profits to strengthen own funds;

(i) to restrict or prohibit distributions by the institution to shareholders, members or holders of Additional Tier 1 instruments where the prohibition does not constitute an event of default of the institution;

(j) to impose additional or more frequent reporting requirements, including reporting on capital and liquidity positions;

(k) to impose specific liquidity requirements, including restrictions on maturity mismatches between assets and liabilities;

(l) to require additional disclosures;

(m) to remove at any time members from the management body of credit institutions who do not fulfil the requirements set out in the acts referred to in the first subparagraph of Article 4(3).

Article 17 – *Powers of host authorities and cooperation on supervision on a consolidated basis*

1. Between participating Member States the procedures set out in the relevant Union law for credit institutions wishing to establish a branch or to exercise the freedom to provide services by carrying on their activities within the territory of another Member State and the related competences of home and host Member States shall apply only for the purposes of the tasks not conferred on the ECB by Article 4.

2. The provisions set out in the relevant Union law in relation to the cooperation between competent authorities from different Member States for conducting supervision on a consolidated basis shall not apply to the extent that the ECB is the only competent authority involved.

3. In fulfilling its tasks as defined in Articles 4 and 5 the ECB shall respect a fair balance between all participating Member States in accordance with Article 6(8) and shall, in its relationship with non-participating Member States, respect the balance between home and host Member States established in relevant Union law.

Article 18 – *Administrative penalties*

1. For the purpose of carrying out the tasks conferred on it by this Regulation, where credit institutions, financial holding companies, or mixed financial holding companies, intentionally or negligently, breach a requirement under relevant directly applicable acts of Union law in relation to which administrative pecuniary penalties shall be made available to competent authorities under the relevant Union law, the ECB may impose administrative pecuniary penalties of up to twice the amount of the profits gained or losses avoided because of the breach where those can be determined, or up to 10 % of the total annual turnover, as defined in relevant Union law, of a legal person in the preceding business year or such other pecuniary penalties as may be provided for in relevant Union law.

2. Where the legal person is a subsidiary of a parent undertaking, the relevant total annual turnover referred to in paragraph 1 shall be the total annual turnover resulting from the consolidated account of the ultimate parent undertaking in the preceding business year.

3. The penalties applied shall be effective, proportionate and dissuasive. In determining whether to impose a penalty and in determining the appropriate penalty, the ECB shall act in accordance with Article 9(2).

4. The ECB shall apply this Article in accordance with the acts referred to in the first subparagraph of Article 4(3) of this Regulation, including the procedures contained in Regulation (EC) No 2532/98, as appropriate.

5. In the cases not covered by paragraph 1 of this Article, where necessary for the purpose of carrying out the tasks conferred on it by this Regulation, the ECB may require national competent authorities to open proceedings with a view to taking action in order to ensure that appropriate penalties are imposed in accordance with the acts referred to in the first subparagraph of Article 4(3) and any relevant national legislation which confers specific powers which are currently not required by Union law. The penalties applied by national competent authorities shall be effective, proportionate and dissuasive.

The first subparagraph of this paragraph shall be applicable in particular to pecuniary penalties to be imposed on credit institutions, financial holding companies or mixed financial holding companies for breaches of national law transposing relevant Directives, and to any administrative penalties or measures to be imposed on members of the management board of a credit institution, financial holding company or mixed financial holding company or any other individuals who under national law are responsible for a breach by a credit institution, financial holding company or mixed financial holding company.

6. The ECB shall publish any penalty referred to paragraph 1, whether it has been appealed or not, in the cases and in accordance with the conditions set out in relevant Union law.

7. Without prejudice to paragraphs 1 to 6, for the purposes of carrying out the tasks conferred on it by this Regulation, in case of a breach of ECB regulations or decisions, the ECB may impose sanctions in accordance with Regulation (EC) No 2532/98.

CHAPTER IV – ORGANISATIONAL PRINCIPLES

Article 19 – *Independence*

1. When carrying out the tasks conferred on it by this Regulation, the ECB and the national competent authorities acting within the SSM shall act independently. The members of the Supervisory Board and the steering committee shall act independently and objectively in the interest of the Union as a whole and shall neither seek nor take instructions from the

institutions or bodies of the Union, from any government of a Member State or from any other public or private body.

2. The institutions, bodies, offices and agencies of the Union and the governments of the Member States and any other bodies shall respect that independence.

3. Following an examination of the need for a Code of Conduct by the Supervisory Board, the Governing Council shall establish and publish a Code of Conduct for the ECB staff and management involved in banking supervision concerning in particular conflicts of interest.

Article 20 – *Accountability and reporting*

1. The ECB shall be accountable to the European Parliament and to the Council for the implementation of this Regulation, in accordance with this Chapter.

2. The ECB shall submit on an annual basis to the European Parliament, to the Council, to the Commission and to the euro Group a report on the execution of the tasks conferred on it by this Regulation, including information on the envisaged evolution of the structure and amount of the supervisory fees mentioned in Article 30.

3. The Chair of the Supervisory Board of the ECB shall present that report in public to the European Parliament, and to the euro Group in the presence of representatives from any participating Member State whose currency is not the euro.

4. The Chair of the Supervisory Board of the ECB may, at the request of the euro Group, be heard on the execution of its supervisory tasks by the euro Group in the presence of representatives from any participating Member States whose currency is not the euro.

5. At the request of the European Parliament, the Chair of the Supervisory Board of the ECB shall participate in a hearing on the execution of its supervisory tasks by the competent committees of the European Parliament.

6. The ECB shall reply orally or in writing to questions put to it by the European Parliament, or by the euro Group in accordance with the its own procedures and in the presence of representatives from any participating Member States whose currency is not the euro.

7. When the European Court of Auditors examines the operational efficiency of the management of the ECB under Article 27.2 of the Statute of the ESCB and of the ECB, it shall also take into account the supervisory tasks conferred on the ECB by this Regulation.

8. Upon request the Chair of the Supervisory Board of the ECB shall hold confidential oral discussions behind closed doors with the Chair and Vice-Chairs of the competent committee of the European Parliament concerning its supervisory tasks where such discussions are required for the exercise of the European Parliament's powers under the TFEU. An agreement shall be concluded between the European Parliament and the ECB on the detailed arrangements for organising such discussions, with a view to ensuring full confidentiality in accordance with the confidentiality obligations imposed on the ECB as a competent authority under relevant Union law.

9. The ECB shall cooperate sincerely with any investigations by the European Parliament, subject to the TFEU. The ECB and the European Parliament shall conclude appropriate arrangements on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB by this Regulation. Those arrangements shall cover, inter alia, access to information, cooperation in investigations and information on the selection procedure of the Chair of the Supervisory Board.

Article 21 – *National parliaments*

1. When submitting the report provided for in Article 20(2), the ECB shall simultaneously forward that report directly to the national parliaments of the participating Member States.

National parliaments may address to the ECB their reasoned observations on that report.

2. National parliaments of the participating Member States, through their own procedures, may request the ECB to reply in writing to any observations or questions submitted by them to the ECB in respect of the tasks of the ECB under this Regulation.

3. The national parliament of a participating Member State may invite the Chair or a member of the Supervisory Board to participate in an exchange of views in relation to the supervision of credit institutions in that Member State together with a representative of the national competent authority.

4. This Regulation is without prejudice to the accountability of national competent authorities to national parliaments in accordance with

national law for the performance of tasks not conferred on the ECB by this Regulation and for the performance of activities carried out by them in accordance with Article 6.

Article 22 – *Due process for adopting supervisory decisions*

1. Before taking supervisory decisions in accordance with Article 4 and Section 2 of Chapter III, the ECB shall give the persons who are the subject of the proceedings the opportunity of being heard. The ECB shall base its decisions only on objections on which the parties concerned have been able to comment.

The first subparagraph shall not apply if urgent action is needed in order to prevent significant damage to the financial system. In such a case, the ECB may adopt a provisional decision and shall give the persons concerned the opportunity to be heard as soon as possible after taking its decision.

2. The rights of defence of the persons concerned shall be fully respected in the proceedings. They shall be entitled to have access to the ECB's file, subject to the legitimate interest of other persons in the protection of their business secrets. The right of access to the file shall not extend to confidential information.

The decisions of the ECB shall state the reasons on which they are based.

Article 23 – *Reporting of violations*

The ECB shall ensure that effective mechanisms are put in place for reporting of breaches by credit institutions, financial holding companies or mixed financial holding companies or competent authorities in the participating Member States of the legal acts referred to in Article 4(3), including specific procedures for the receipt of reports of breaches and their follow-up. Such procedures shall be consistent with relevant Union legislation and shall ensure that the following principles are applied: appropriate protection for persons who report breaches, protection of personal data, and appropriate protection for the accused person.

Article 24 – *Administrative Board of Review*

1. The ECB shall establish an Administrative Board of Review for the purposes of carrying out an internal administrative review of the decisions taken by the ECB in the exercise of the powers conferred on it by this Regulation after a request for review submitted in accordance with paragraph 5. The scope of the internal administrative review shall pertain to the procedural and substantive conformity with this Regulation of such decisions.

2. The Administrative Board of Review shall be composed of five individuals of high repute, from Member States and having a proven record of relevant knowledge and professional experience, including supervisory experience, to a sufficiently high level in the fields of banking or other financial services, excluding current staff of the ECB, as well as current staff of competent authorities or other national or Union institutions, bodies, offices and agencies who are involved in the carrying out of the tasks conferred on the ECB by this Regulation. The Administrative Board of Review shall have sufficient resources and expertise to assess the exercise of the powers of the ECB under this Regulation. Members of the Administrative Board of Review and two alternates shall be appointed by the ECB for a term of five years, which may be extended once, following a public call for expressions of interest published in the Official Journal of the European Union. They shall not be bound by any instructions.

3. The Administrative Board of Review shall decide on the basis of a majority of at least three of its five members.

4. The members of the Administrative Board of Review shall act independently and in the public interest. For that purpose, they shall make a public declaration of commitments and a public declaration of interests indicating any direct or indirect interest which might be considered prejudicial to their independence or the absence of any such interest.

5. Any natural or legal person may in the cases referred to in paragraph 1 request a review of a decision of the ECB under this Regulation which is addressed to that person, or is of a direct and individual concern to that person. A request for a review against a decision of the Governing Council as referred to in paragraph 7 shall not be admissible.

6. Any request for review shall be made in writing, including a statement of grounds, and shall be lodged at the ECB within one month of the date of notification of the decision to the person requesting the review, or, in the absence thereof, of the day on which it came to the knowledge of the latter as the case may be.

7. After ruling on the admissibility of the review, the Administrative Board of Review shall express an opinion within a period appropriate to the urgency of the matter and no

later than two months from the receipt of the request and remit the case for preparation of a new draft decision to the Supervisory Board. The Supervisory Board shall take into account the opinion of the Administrative Board of Review and shall promptly submit a new draft decision to the Governing Council. The new draft decision shall abrogate the initial decision, replace it with a decision of identical content, or replace it with an amended decision. The new draft decision shall be deemed adopted unless the Governing Council objects within a maximum period of ten working days.

8. A request for review pursuant to paragraph 5 shall not have suspensory effect. However, the Governing Council, on a proposal by the Administrative Board of Review may, if it considers that circumstances so require, suspend the application of the contested decision.

9. The opinion expressed by the Administrative Board of Review, the new draft decision submitted by the Supervisory Board and the decision adopted by the Governing Council pursuant to this Article shall be reasoned and notified to the parties.

10. The ECB shall adopt a decision establishing the Administrative Board of Review's operating rules.

11. This Article is without prejudice to the right to bring proceedings before the CJEU in accordance with the Treaties.

Article 25 – *Separation from monetary policy function*

1. When carrying out the tasks conferred on it by this Regulation, the ECB shall pursue only the objectives set by this Regulation.

2. The ECB shall carry out the tasks conferred on it by this Regulation without prejudice to and separately from its tasks relating to monetary policy and any other tasks. The tasks conferred on the ECB by this Regulation shall neither interfere with, nor be determined by, its tasks relating to monetary policy. The tasks conferred on the ECB by this Regulation shall moreover not interfere with its tasks in relation to the ESRB or any other tasks. The ECB shall report to the European Parliament and to the Council as to how it has complied with this provision. The tasks conferred by this Regulation on the ECB shall not alter the ongoing monitoring of the solvency of its monetary policy counterparties.

The staff involved in carrying out the tasks conferred on the ECB by this Regulation shall be organisationally separated from, and subject to, separate reporting lines from the staff involved in carrying out other tasks conferred on the ECB.

3. For the purposes of paragraphs 1 and 2, the ECB shall adopt and make public any necessary internal rules, including rules regarding professional secrecy and information exchanges between the two functional areas.

4. The ECB shall ensure that the operation of the Governing Council is completely differentiated as regards monetary and supervisory functions. Such differentiation shall include strictly separated meetings and agendas.

5. With a view to ensuring separation between monetary policy and supervisory tasks, the ECB shall create a mediation panel. This panel shall resolve differences of views expressed by the competent authorities of participating Member States concerned regarding an objection of the Governing Council to a draft decision by the Supervisory Board. This panel shall include one member per participating Member State, chosen by each Member State among the members of the Governing Council and the Supervisory Board, and shall decide by simple majority, with each member having one vote. The ECB shall adopt and make public a regulation setting up such mediation panel and its rules of procedure.

Article 26 – *Supervisory board*

1. The planning and execution of the tasks conferred on the ECB shall be fully undertaken by an internal body composed of its Chair and Vice Chair, appointed in accordance with paragraph 3, and four representatives of the ECB, appointed in accordance with paragraph 5, and one representative of the national competent authority in each participating Member State ('Supervisory Board'). All members of the Supervisory Board shall act in the interest of the Union as a whole.

Where the competent authority is not a central bank, the member of the Supervisory Board referred to in this paragraph may decide to bring a representative from the Member State's central bank. For the purposes of the voting procedure set out in paragraph 6, the representatives of the authorities of any one Member State shall together be considered as one member.

2. The appointments for the Supervisory Board in accordance with this Regulation shall respect

the principles of gender balance, experience and qualification.

3. After hearing the Supervisory Board, the ECB shall submit a proposal for the appointment of the Chair and the Vice-Chair to the European Parliament for approval. Following the approval of this proposal, the Council shall adopt an implementing decision to appoint the Chair and the Vice-Chair of the Supervisory Board. The Chair shall be chosen on the basis of an open selection procedure, on which the European Parliament and the Council shall be kept duly informed, from among individuals of recognised standing and experience in banking and financial matters and who are not members of the Governing Council. The Vice Chair of the Supervisory Board shall be chosen from among the members of the Executive Board of the ECB. The Council shall act by qualified majority without taking into account the vote of the members of the Council which are not participating Member States.

Once appointed, the Chair shall be a full-time professional and shall not hold any offices at national competent authorities. The term of office shall be five years and shall not be renewable.

4. If the Chair of the Supervisory Board no longer fulfils the conditions required for the performance of his duties or has been guilty of serious misconduct, the Council may, following a proposal by the ECB, which has been approved by the European Parliament, adopt an implementing decision to remove the Chair from office. The Council shall act by qualified majority without taking into account the vote of the members of the Council which are not participating Member States.

Following a compulsory retirement of the Vice-Chair of the Supervisory Board as a member of the Executive Board, pronounced in accordance with the Statute of the ESCB and of the ECB, the Council may, following a proposal by the ECB, which has been approved by the European Parliament, adopt an implementing decision to remove the Vice-Chair from office. The Council shall act by qualified majority without taking into account the vote of the members of the Council which are not participating Member States.

For those purposes the European Parliament or the Council may inform the ECB that they consider that the conditions for the removal of the Chair or the Vice Chair of the Supervisory Board from office are fulfilled, to which the ECB shall respond.

5. The four representatives of the ECB appointed by the Governing Council shall not perform duties directly related to the monetary function of the ECB. All the ECB representatives shall have voting rights.

6. Decisions of the Supervisory Board shall be taken by a simple majority of its members. Each member shall have one vote. In case of a draw, the Chair shall have a casting vote.

7. By derogation from paragraph 6 of this Article, the Supervisory Board shall take decisions on the adoption of regulations pursuant to Article 4(3), on the basis of a qualified majority of its members, as defined in Article 16(4) TEU and in Article 3 of Protocol No 36 on transitional provisions attached to the TEU and to the TFEU, for the members representing the participating Member State's authorities. Each of the four representatives of the ECB appointed by the Governing Council shall have a vote equal to the median vote of the other members.

8. Without prejudice to Article 6, the Supervisory Board shall carry out preparatory works regarding the supervisory tasks conferred on the ECB and propose to the Governing Council of the ECB complete draft decisions to be adopted by the latter, pursuant to a procedure to be established by the ECB. The draft decisions shall be transmitted at the same time to the national competent authorities of the Member States concerned. A draft decision shall be deemed adopted unless the Governing Council objects within a period to be defined in the procedure mentioned above but not exceeding a maximum period of ten working days. However, if a participating Member State whose currency is not the euro disagrees with a draft decision of the Supervisory Board, the procedure set out in Article 7(8) shall apply. In emergency situations the aforementioned period shall not exceed 48 hours. If the Governing Council objects to a draft decision, it shall state the reasons for doing so in writing, in particular stating monetary policy concerns. If a decision is changed following an objection by the Governing Council, a participating Member State whose currency is not the euro may notify the ECB of its reasoned disagreement with the objection and the procedure set out in Article 7(7) shall apply.

9. A secretariat shall support the activities of the Supervisory Board, including preparing the meetings on a full time basis.

10. The Supervisory Board, voting in accordance with the rule set out in paragraph 6,

shall establish a steering committee from among its members with a more limited composition to support its activities, including preparing the meetings.

The steering committee of the Supervisory Board shall have no decision-making powers. The steering committee shall be chaired by the Chair or, in the exceptional absence of the Chair, the Vice-Chair of the Supervisory Board. The composition of the steering committee shall ensure a fair balance and rotation between national competent authorities. It shall consist of no more than ten members including the Chair, the Vice-Chair and one additional representative from the ECB. The steering committee shall execute its preparatory tasks in the interest of the Union as a whole and shall work in full transparency with the Supervisory Board.

11. A representative of the Commission may participate as an observer in the meetings of the Supervisory Board upon invitation. Observers shall not have access to confidential information relating to individual institutions.

12. The Governing Council shall adopt internal rules setting out in detail its relation with the Supervisory Board. The Supervisory Board shall also adopt its rules of procedure, voting in accordance with the rule set out in paragraph 6. Both sets of rules shall be made public. The rules of procedure of the Supervisory Board shall ensure equal treatment of all participating Member States.

Article 27 – *Professional secrecy and exchange of information*

1. Members of the Supervisory Board, staff of the ECB and staff seconded by participating Member States carrying out supervisory duties, even after their duties are ceased, shall be subject to the professional secrecy requirements set out in Article 37 of the Statute of the ESCB and of the ECB and in the relevant acts of Union law.

The ECB shall ensure that individuals who provide any service, directly or indirectly, permanently or occasionally, related to the discharge of supervisory duties are subject to equivalent professional secrecy requirements.

2. For the purpose of carrying out the tasks conferred on it by this Regulation, the ECB shall be authorised, within the limits and under the conditions set out in the relevant Union law, to exchange information with national or Union authorities and bodies in the cases where the relevant Union law allows national competent authorities to disclose information to those entities or where Member States may provide for such disclosure under the relevant Union law.

Article 28 – *Resources*

The ECB shall be responsible for devoting the necessary financial and human resources to the exercise of the tasks conferred on it by this Regulation.

Article 29 – *Budget and annual accounts*

1. The ECB's expenditure for carrying out the tasks conferred on it by this Regulation shall be separately identifiable within the budget of the ECB.

2. The ECB shall, as part of the report referred to in Article 20, report in detail on the budget for its supervisory tasks.The annual accounts of the ECB drawn up and published in accordance with Article 26.2 of the Statute of the ESCB and of the ECB shall include the income and expenses related to the supervisory tasks.

3. In line with Article 27.1 of the Statute of the ESCB and of the ECB the supervisory section of the annual accounts shall be audited.

Article 30 – *Supervisory fees*

1. The ECB shall levy an annual supervisory fee on credit institutions established in the participating Member States and branches established in a participating Member State by a credit institution established in a non-participating Member State. The fees shall cover expenditure incurred by the ECB in relation to the tasks conferred on it under Articles 4 to 6 of this Regulation. These fees shall not exceed the expenditure relating to these tasks.

2. The amount of the fee levied on a credit institution or branch shall be calculated in accordance with the arrangements established, and published in advance, by the ECB.

Before establishing those arrangements, the ECB shall conduct open public consultations and analyse the potential related costs and benefits, and publish the results of both.

3. The fees shall be calculated at the highest level of consolidation within participating Member States, and shall be based on objective criteria relating to the importance and risk profile of the credit institution concerned, including its risk weighted assets.

The basis for calculating the annual supervisory fee for a given calendar year shall be the expenditure relating to the supervision of credit institutions and branches in that year. The ECB may require advance payments in respect of the annual supervisory fee which shall be based on a reasonable estimate. The ECB shall communicate with the national competent authority before deciding on the final fee level so as to ensure that supervision remains cost-effective and reasonable for all credit institutions and branches concerned. The ECB shall communicate to credit institutions and branches the basis for the calculation of the annual supervisory fee.

4. The ECB shall report in accordance with Article 20.

5. This Article is without prejudice to the right of national competent authorities to levy fees in accordance with national law and, to the extent supervisory tasks have not been conferred on the ECB, or in respect of costs of cooperating with and assisting the ECB and acting on its instructions, in accordance with relevant Union law and subject to the arrangements made for the implementation of this Regulation, including Articles 6 and 12.

Article 31 – *Staff and staff exchange*

1. The ECB shall establish, together with all national competent authorities, arrangements to ensure an appropriate exchange and secondment of staff with and among national competent authorities.

2. The ECB may require as appropriate that supervisory teams of national competent authorities taking supervisory actions regarding a credit institution, financial holding company or mixed financial holding company located in one participating Member State in accordance with this Regulation also involve staff from national competent authorities of other participating Member States.

3. The ECB shall establish and maintain comprehensive and formal procedures including ethics procedures and proportionate periods to assess in advance and prevent possible conflicts of interest resulting from subsequent employment within two years of members of the Supervisory Board and ECB staff members engaged in supervisory activities, and shall provide for appropriate disclosures subject to applicable data protection rules.

Those procedures shall be without prejudice to the application of stricter national rules. For members of the Supervisory Board who are representatives of national competent authorities, those procedures shall be established and implemented in cooperation with national competent authorities, without prejudice to applicable national law.

For the ECB staff members engaged in supervisory activities, those procedures shall determine categories of positions to which such assessment applies, as well as periods that are proportionate to the functions of those staff members in the supervisory activities during their employment at the ECB.

4. The procedures referred to in paragraph 3 shall provide that the ECB shall assess whether there are objections that members of the Supervisory Board take paid work in private sector institutions for which the ECB has supervisory responsibility after they have ceased to hold office.

The procedures referred to in paragraph 3 shall apply as a rule for two years after the members of the Supervisory Board have ceased to hold office and may be adjusted, on the basis of due justification, proportionate to the functions performed during that term of office and the length of time that office was held.

5. The Annual Report of the ECB in accordance with Article 20 shall include detailed information, including statistical data on the application of the procedures referred to in paragraphs 3 and 4 of this Article.

CHAPTER V – GENERAL AND FINAL PROVISIONS

Article 32 – *Review*

By 31 December 2015, and subsequently every three years thereafter, the Commission shall publish a report on the application of this Regulation, with a special emphasis on monitoring the potential impact on the smooth functioning of the internal market. That report shall evaluate, inter alia:

(a) the functioning of the SSM within the ESFS and the impact of the supervisory activities of the ECB on the interests of the Union as a whole and on the coherence and integrity of the internal market in financial services, including its possible impact on the structures of the national banking systems within the Union, and regarding the effectiveness of cooperation and information sharing arrangements between the SSM and competent authorities of non-participating Member States;

(b) the division of tasks between the ECB and the national competent authorities within the SSM, the effectiveness of the practical arrangements of organisation adopted by the ECB, and the impact of the SSM on the functioning of the remaining supervisory colleges;

(c) the effectiveness of the ECB's supervisory and sanctioning powers and the appropriateness of conferring on the ECB additional sanctioning powers, including in relation to persons other than credit institutions, financial holding companies or mixed financial holding companies;

(d) the appropriateness of the arrangements set out respectively for macroprudential tasks and tools under Article 5 and for the granting and withdrawal of authorisations under Article 14;

(e) the effectiveness of independence and accountability arrangements;

(f) the interaction between the ECB and the EBA;

(g) the appropriateness of governance arrangements, including the composition of, and voting arrangements in, the Supervisory Board and its relation with the Governing Council, as well as the collaboration in the Supervisory Board between Member States whose currency is the euro and the other participating Member States in the SSM;

(h) the interaction between the ECB and the competent authorities of non-participating Member States and the effects of the SSM on these Member States;

(i) the effectiveness of the recourse mechanism against decisions of the ECB;

(j) the cost effectiveness of the SSM;

(k) the possible impact of the application of Article 7(6), 7(7) and 7(8) on the functioning and integrity of the SSM;

(l) the effectiveness of the separation between supervisory and monetary policy functions within the ECB and of the separation of financial resources devoted to supervisory tasks from the budget of the ECB, taking into account any modifications of the relevant legal provisions including at the level of primary law;

(m) the fiscal effects that supervisory decisions taken by the SSM have on participating Member States and the impact of any developments in relation to resolution financing arrangements;

(n) the possibilities of developing further the SSM, taking into account any modifications of the relevant provisions, including at the level of primary law, and taking into account whether the rationale of the institutional provisions in this Regulation is no longer present, including the possibility to fully align rights and obligations of Member States whose currency is the euro and other participating Member States.

The report shall be forwarded to the European Parliament and to the Council. The Commission shall make accompanying proposals, as appropriate.

Article 33 – *Transitional provisions*

1. The ECB shall publish the framework referred to in Article 6(7) by 4 May 2014.

2. The ECB shall assume the tasks conferred on it by this Regulation on 4 November 2014 subject to the implementation arrangements and measures set out in this paragraph.

After 3 November 2013, the ECB shall publish by means of regulations and decisions the detailed operational arrangements for the implementation of the tasks conferred on it by this Regulation.

From 3 November 2013, the ECB shall send a quarterly report to the European Parliament, to the Council and to the Commission on progress in the operational implementation of this Regulation.

If on the basis of the reports referred to in the third subparagraph of this paragraph and following discussions of the reports in the European Parliament and in the Council, it is shown that the ECB will not be ready for exercising in full its tasks on 4 November 2014, the ECB may adopt a decision to set a date later than the one referred to in the first subparagraph of this paragraph to ensure continuity during the transition from national supervision to the SSM, and based on the availability of staff, the setting up of appropriate reporting procedures and arrangements for cooperation with national competent authorities pursuant to Article 6.

3. Notwithstanding paragraph 2, and without prejudice to the exercise of investigatory powers conferred on it under this Regulation, from 3 November 2013, the ECB may start carrying out the tasks conferred on it by this Regulation other than adopting supervisory decisions in respect of any credit institution, financial holding company or mixed financial holding company and following a decision addressed to

the entities concerned and to the national competent authorities concerned.

Notwithstanding paragraph 2, if the ESM unanimously requests the ECB to take over direct supervision of a credit institution, financial holding company or mixed financial holding company as a precondition for its direct recapitalisation, the ECB may immediately start carrying out the tasks conferred on it by this Regulation in respect of that credit institution, financial holding company or mixed financial holding company, and following a decision addressed to the entities concerned and to the national competent authorities concerned.

4. From 3 November 2013, in view of the assumption of its tasks, the ECB may require the national competent authorities and the persons referred to in Article 10(1) to provide all relevant information for the ECB to carry out a comprehensive assessment, including a balance-sheet assessment, of the credit institutions of the participating Member State. The ECB shall carry out such an assessment at least in relation to the credit institutions not covered by Article 6(4). The credit institution and the competent authority shall supply the information requested.

5. Credit institutions authorised by participating Member States on 3 November 2013 or, where relevant, on the dates referred to in paragraphs 2 and 3 of this Article shall be deemed to be authorised in accordance with Article 14 and may continue to carry out their business. National competent authorities shall communicate to the ECB before the date of application of this Regulation or, where relevant, before the dates referred to in paragraphs 2 and 3 of this Article, the identity of those credit institutions together with a report indicating the supervisory history and the risk profile of the institutions concerned, and any further information requested by the ECB. The information shall be submitted in the format requested by the ECB.

6. Notwithstanding Article 26(7), until 31 December 2015, qualified majority voting and simple majority voting shall be applied together for the adoption of the regulations referred to in Article 4(3).

Article 34 – *Entry into force*

This Regulation shall enter into force on the fifth day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 15 October 2013.

§15. Regulation (EU) No 468/2014 of the European Central Bank of 16 April 2014 establishing the framework for cooperation within the Single Supervisory Mechanism between the European Central Bank and national competent authorities and with national designated authorities (SSM Framework Regulation), OJ L 141, May 14th, 2014, pp. 1-50

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 127(6) and Article 132 thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 34 thereof,

Having regard to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions,[1] and in particular Article 4(3), Article 6 and Article 33(2) thereof,

Having regard to the Inter-institutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism,[2]

Having regard to the public consultation and analysis carried out in accordance with Article 4(3) of Regulation (EU) No 1024/2013,

Having regard to the proposal from the Supervisory Board and in consultation with the national competent authorities,

[1] OJ L 287, 29.10.2013, p. 63.

[2] OJ L 320, 30.11.2013, p. 1.

Whereas:

(1) Regulation (EU) No 1024/2013 (hereinafter the 'SSM Regulation') establishes the Single Supervisory Mechanism (SSM) composed of the European Central Bank (ECB) and the national competent authorities (NCAs) of participating Member States.

(2) Within the framework of Article 6 of the SSM Regulation, the ECB is exclusively competent to carry out the micro-prudential tasks conferred on it by Article 4 thereof relating to credit institutions established in the participating Member States. The ECB is responsible for the effective and consistent functioning of the SSM and for exercising oversight over the functioning of the system, based on the responsibilities and procedures set out in Article 6 of the SSM Regulation.

(3) Where appropriate and without prejudice to the responsibility and accountability of the ECB for the tasks conferred on it by the SSM Regulation, NCAs are responsible for assisting the ECB, under the conditions laid down in the SSM Regulation and in this Regulation, with the preparation and implementation of any acts concerning the tasks referred to in Article 4 of the SSM Regulation relating to all credit institutions, including assistance in verification activities. For this purpose, the NCAs should follow the instructions given by the ECB when performing the tasks mentioned in Article 4 of the SSM Regulation.

(4) The ECB, NCAs and national designated authorities (NDAs) have to perform the macro-prudential tasks referred to in Article 5 of the SSM Regulation and follow the coordination procedures provided for therein, in this Regulation and in relevant Union law, without prejudice to the role of the Eurosystem and of the European Systemic Risk Board.

(5) Within the SSM, the respective ECB and NCA supervisory responsibilities are allocated on the basis of the significance of the entities that fall under the scope of the SSM. This Regulation sets out, in particular, the specific methodology for the assessment of such significance, as required by Article 6(7) of the SSM Regulation. The ECB has direct supervisory competence in respect of credit institutions, financial holding companies, mixed financial holding companies established in participating Member States, and branches in participating Member States of credit institutions established in non-participating Member States that are significant. The NCAs are responsible for directly supervising the entities that are less significant, without prejudice to the ECB's power to decide in specific cases to directly supervise such entities where this is necessary for the consistent application of supervisory standards.

(6) To take into account recent developments in Union legislation in the field of sanctions and the European Court of Human Rights case-law regarding the principle of separation between an investigation and the decision-taking phase, an independent investigating unit will be established by the ECB which is to autonomously investigate breaches of supervisory rules and decisions.

(7) Article 6(7) of the SSM Regulation states that the ECB must, in consultation with the NCAs and on the basis of a proposal from the Supervisory Board, adopt and make public a framework to organise the practical arrangements for cooperation between the ECB and the NCAs within the SSM.

(8) Article 33(2) of the SSM Regulation states that the ECB must publish by means of regulations and decisions the detailed operational arrangements for the implementation of the tasks conferred upon it by that Regulation. This Regulation contains the provisions implementing Article 33(2) relating to cooperation between the ECB and the NCAs within the SSM.

(9) As a result, this Regulation further develops and specifies the cooperation procedures established in the SSM Regulation between the ECB and the NCAs within the SSM as well as, where appropriate, with the national designated authorities, and thereby ensures the effective and consistent functioning of the SSM.

(10) The ECB attaches great importance to the comprehensive assessment of credit institutions, including the balance sheet assessment that it must carry out before the assumption of its tasks. This extends to any Member States joining the euro area and therefore joining the SSM after the date for the commencement of supervision in accordance with Article 33(2) of the SSM Regulation.

(11) It is essential for the smooth functioning of the SSM that there is full cooperation between the ECB and NCAs and that they exchange all the information that may have an impact on their respective tasks, in particular, all information that the NCAs avail of regarding procedures that may have an impact on the safety and soundness of a supervised entity or

that interact with the supervisory procedures in relation to such entities,

HAS ADOPTED THIS REGULATION:

PART I – GENERAL PROVISIONS

Article 1 *Subject matter and purpose*

1. This Regulation lays down rules on all of the following:

(a) the framework referred to in Article 6(7) of the SSM Regulation, namely a framework to organise the practical arrangements for implementing Article 6 of the SSM Regulation concerning cooperation within the SSM, to include:

(i) the specific methodology for the assessment and review of whether a supervised entity is classified as significant or less significant pursuant to the criteria laid down in Article 6(4) of the SSM Regulation, and the arrangements resulting from this assessment;

(ii) the definition of procedures, including time limits, also in relation to the possibility for NCAs to prepare draft decisions for the ECB's consideration, concerning the relation between the ECB and the NCAs regarding the supervision of significant supervised entities;

(iii) the definition of procedures, including time limits, concerning the relation between the ECB and the NCAs regarding the supervision of less significant supervised entities. In particular, such procedures shall require the NCAs, depending on the cases defined in this Regulation, to:

- notify the ECB of any material supervisory procedure;

- further assess, on the ECB's request, specific aspects of the procedure;

- transmit to the ECB material draft supervisory decisions, on which the ECB may express its views;

(b) cooperation and exchange of information between the ECB and the NCAs within the SSM with regard to the procedures relating to significant supervised entities and less significant supervised entities, including common procedures applying to authorisations to take up the business of a credit institution, withdrawals of such authorisations and the assessment of acquisitions and disposals of qualifying holdings;

(c) the procedures relating to cooperation between the ECB, the NCAs and the NDAs regarding macro-prudential tasks and tools within the meaning of Article 5 of the SSM Regulation;

(d) the procedures relating to the operation of close cooperation within the meaning of Article 7 of the SSM Regulation and applicable between the ECB, the NCAs and the NDAs;

(e) the procedures relating to cooperation between the ECB and the NCAs with regard to Articles 10 to 13 of the SSM Regulation, including on certain aspects relating to supervisory reporting;

(f) the procedures relating to the adoption of supervisory decisions addressed to supervised entities and other persons;

(g) the linguistic arrangements between the ECB and the NCAs and between the ECB and supervised entities and other persons;

(h) the procedures applicable to the ECB's and the NCAs' sanctioning powers within the SSM in relation to the tasks conferred on the ECB by the SSM Regulation;

(i) transitional provisions.

2. This Regulation does not affect the supervisory tasks that have not been conferred on the ECB by the SSM Regulation and that therefore remain with national authorities.

3. This Regulation shall be read in particular in conjunction with Decision ECB/2004/2[3] and the Rules of Procedure of the Supervisory Board of the European Central Bank,[4] in particular with regard to decision-making within the SSM, including the procedure applying between the Supervisory Board and the Governing Council as regards the non-objection by the Governing Council referred to in Article 26(8) of the SSM Regulation and other relevant ECB legal acts, including Decision ECB/2014/16.[5]

Article 2 Definitions

For the purposes of this Regulation, the definitions contained in the SSM Regulation

[3] Decision ECB/2004/2 of 19 February 2004 adopting the Rules of Procedure of the European Central Bank (OJ L 80,18.3.2004, p. 33).

[4] Adopted on 31 March 2014 and available on the ECB's website at www.ecb.europa.eu. Not yet published in the Official Journal.

[5] Decision ECB/2014/16 of 14 April 2014 concerning the establishment of an Administrative Board of Review and its Operating Rules.Not yet published in the Official Journal.

shall apply, unless otherwise provided for, together with the following definitions:

1. 'authorisation' means an authorisation as defined in point (42) of Article 4(1) of Regulation (EU) No 575/2013 of the European Parliament and of the Council;[6]

2. 'branch' means a branch as defined in point (17) of Article 4(1) of Regulation (EU) No 575/2013;

3. 'common procedures' means the procedures provided for in Part V with respect to an authorization to take up the business of a credit institution, withdrawal of an authorisation to pursue such business and decisions with regard to qualifying holdings;

4. 'euro area Member State' means a Member State whose currency is the euro;

5. 'group' means a group of undertakings of which at least one is a credit institution and which consists of a parent undertaking and its subsidiaries, or undertakings linked to each other by a relationship within the meaning of Article 22 of Directive 2013/34/EU of the European Parliament and of the Council,[7] including any sub-group thereof;

6. 'joint supervisory team' means a team of supervisors in charge of the supervision of a significant supervised entity or a significant supervised group;

7. 'less significant supervised entity' means both (a) a less significant supervised entity in a euro area Member State; and (b) a less significant supervised entity in a non-euro area Member State that is a participating Member State;

8. 'less significant supervised entity in a euro area Member State' means a supervised entity established in a euro area Member State and which does not have the status of a significant supervised entity within the meaning of Article 6(4) of the SSM Regulation;

9. 'national competent authority' (NCA) means a national competent authority as defined in point (2) of Article 2 of the SSM Regulation. This definition is without prejudice to arrangements under national law which assign certain supervisory tasks to a national central bank (NCB) not designated as an NCA. In this case, the NCB shall carry out these tasks within the framework set out in national law and this Regulation. A reference to an NCA in this Regulation shall in this case apply as appropriate to the NCB for the tasks assigned to it by national law;

10. 'NCA in close cooperation' means an NCA designated by a participating Member State in close cooperation in accordance with Directive 2013/36/EU of the European Parliament and of the Council;[8]

11. 'national designated authority' (NDA) means a national designated authority as defined in point (7) of Article 2 of the SSM Regulation;

12. 'NDA in close cooperation' means a non-euro area NDA designated by a participating Member State in close cooperation for the purposes of the tasks related to Article 5 of the SSM Regulation;

13. 'non-euro area Member State' means a Member State whose currency is not the euro;

14. 'parent undertaking' means a parent undertaking as defined in point (15) of Article 4(1) of Regulation (EU) No 575/2013;

15. 'participating Member State in close cooperation' means a non-euro area Member State that has entered into close cooperation with the ECB in accordance with Article 7 of the SSM Regulation;

16. 'significant supervised entity' means both (a) a significant supervised entity in a euro area Member State; and (b) a significant supervised entity in a participating non-euro area Member State;

17. 'significant supervised entity in a euro area Member State' means a supervised entity established in a euro area Member State which has the status of a significant supervised entity pursuant to an ECB decision based on Article 6(4) or Article 6(5)(b) of the SSM Regulation;

[6] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 (OJ L 176, 27.6.2013, p. 1).

[7] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

[8] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on the access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (OJ L 176, 27.6.2013, p. 338).

18. ‘significant supervised entity in a participating non-euro area Member State’ means a supervised entity established in a participating non-euro area Member State which has the status of a significant supervised entity pursuant to an ECB decision based on Article 6(4) or Article 6(5)(b) of the SSM Regulation;

19. ‘subsidiary’ means a subsidiary as defined in point (16) of Article 4(1) of Regulation (EU) No 575/2013;

20. ‘supervised entity’ means any of the following: (a) a credit institution established in a participating Member State; (b) a financial holding company established in a participating Member State; (c) a mixed financial holding company established in a participating Member State, provided that it fulfils the conditions laid down in point (21)(b); (d) a branch established in a participating Member State by a credit institution which is established in a non-participating Member State.

A central counterparty (CCP), as defined in Article 2(1) of Regulation (EU) No 648/2012 of the European Parliament and of the Council,[9] which qualifies as a credit institution within the meaning of Directive 2013/36/EU, shall be considered a supervised entity in accordance with the SSM Regulation, this Regulation and relevant Union law without prejudice to the supervision of CCPs by relevant NCAs as laid down under Regulation (EU) No 648/2012;

21. ‘supervised group’ means any of the following:

(a) a group whose parent undertaking is a credit institution or financial holding company that has its head office in a participating Member State;

(b) a group whose parent undertaking is a mixed financial holding company that has its head office in a participating Member State, provided that the coordinator of the financial conglomerate, within the meaning of Directive 2002/87/EC of the European Parliament and of the Council,[10] is an authority competent for the supervision of credit institutions and is also the coordinator in its function as supervisor of credit institutions;

(c) supervised entities each having their head office in the same participating Member State provided that they are permanently affiliated to a central body which supervises them under the conditions laid down in Article 10 of Regulation (EU) No 575/2013 and which is established in the same participating Member State;

22. ‘significant supervised group’ means a supervised group which has the status of significant supervised group pursuant to an ECB decision based on Article 6(4) or Article 6(5)(b) of the SSM Regulation;

23. ‘less significant supervised group’ means a supervised group which does not have the status of a significant supervised group within the meaning of Article 6(4) of the SSM Regulation;

24. ‘ECB supervisory procedure’ means any ECB activity directed towards preparing the issue of an ECB supervisory decision, including common procedures and the imposition of administrative pecuniary penalties. All ECB supervisory procedures are subject to Part III. Part III also applies to the imposition of administrative pecuniary penalties, unless Part X provides otherwise;

25. ‘NCA supervisory procedure’ means any NCA activity directed towards preparing the issue of a supervisory decision by the NCA, which is addressed to one or more supervised entities or supervised groups or one or more other persons, including the imposition of administrative penalties;

26. ‘ECB supervisory decision’ means a legal act adopted by the ECB in the exercise of the tasks and powers conferred on it by the SSM Regulation, which takes the form of an ECB decision, is addressed to one or more supervised entities or supervised groups or one or more other persons and is not a legal act of general application;

27. ‘third country’ means a country which is neither a Member State nor a European Economic Area Member State;

28. ‘working day’ means a day which is not a Saturday, Sunday or an ECB public holiday in accordance with the calendar applicable to the ECB.[11]

PART II: ORGANISATION OF THE SSM

[9] Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories (OJ L 201, 27.7.2012, p. 1).

[10] Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council (OJ L 35, 11.2.2003, p. 1).

[11] As published on the ECB’s website.

Title 1: Structures for the supervision of significant and less significant supervised entities

Chapter 1: Supervision of significant supervised entities

Article 3 *Joint supervisory teams*

1. A joint supervisory team shall be established for the supervision of each significant supervised entity or significant supervised group in participating Member States. Each joint supervisory team shall be composed of staff members from the ECB and from the NCAs appointed in accordance with Article 4 and working under the coordination of a designated ECB staff member (hereinafter the 'JST coordinator') and one or more NCA sub-coordinators, as further laid down in Article 6.

2. Without prejudice to other provisions of this Regulation, the tasks of a joint supervisory team shall include, but are not limited to, the following:

(a) performing the supervisory review and evaluation process (SREP) referred to in Article 97 of Directive 2013/36/EU for the significant supervised entity or significant supervised group that it supervises;

(b) taking into account the SREP, participating in the preparation of a supervisory examination programme to be proposed to the Supervisory Board, including an on-site inspection plan, as laid down in Article 99 of Directive 2013/36/EC, for such a significant supervised entity or significant supervised group;

(c) implementing the supervisory examination programme approved by the ECB and any ECB supervisory decisions with respect to the significant supervised entity or significant supervised group that it supervises;

(d) ensuring coordination with the on-site inspection team referred to in Part XI as regards the implementation of the on-site inspection plan;

(e) liaising with NCAs where relevant.

Article 4 Establishment and composition of joint supervisory teams

1. The ECB shall be in charge of the establishment and the composition of joint supervisory teams. The appointment of staff members from the NCAs to joint supervisory teams shall be made by the respective NCAs in accordance with paragraph 2.

2. In accordance with the principles laid down in Article 6(8) of the SSM Regulation and without prejudice to Article 31 thereof, the NCAs shall appoint one or more persons from their staff as a member or members of a joint supervisory team. An NCA staff member may be appointed as a member of more than one joint supervisory team.

3. Notwithstanding paragraph 2, the ECB may require the NCAs to modify the appointments they have made if appropriate for the purpose of the composition of a joint supervisory team.

4. Where more than one NCA exercises supervisory tasks in a participating Member State, or where in a participating Member State national law confers on an NCB specific supervisory tasks and the NCB is not an NCA, the relevant authorities shall coordinate their participation within the joint supervisory teams.

5. The ECB and NCAs shall consult with each other and agree on the use of NCA resources with regard to the joint supervisory teams.

Article 5 Involvement of staff members from NCBs of participating Member States

1. NCBs of participating Member States that are involved in the prudential supervision of a significant supervised entity or a significant supervised group under their national law but which are not NCAs may also appoint one or several members of their staff to a joint supervisory team.

2. The ECB shall be informed of such appointments and Article 4 shall apply accordingly.

3. Where staff members of NCBs of participating Member States are appointed to a joint supervisory team, references to NCAs in relation to joint supervisory teams shall be read as including a reference to those NCBs.

Article 6 JST coordinator and sub-coordinators

1. The JST coordinator, assisted by NCA sub-coordinators as defined in paragraph 2, shall ensure the coordination of the work within the joint supervisory team. For this purpose, joint supervisory team members shall follow the JST coordinator's instructions as regards their tasks in the joint supervisory team. This shall be without prejudice to their tasks and duties with their respective NCA.

2. Each NCA that appoints more than one staff member to the joint supervisory team shall designate one of them as sub-coordinator

(hereinafter an 'NCA sub-coordinator'). NCA sub-coordinators shall assist the JST coordinator as regards the organisation and coordination of the tasks in the joint supervisory team, in particular as regards the staff members that were appointed by the same NCA as the relevant NCA sub-coordinator. The NCA sub-coordinator may give instructions to the members of the joint supervisory team appointed by the same NCA, provided that these do not conflict with the instructions given by the JST coordinator.

Chapter 2: Supervision of less significant supervised entities

Article 7 Involvement of staff members from other NCAs in an NCA's supervisory team

Without prejudice to Article 31(1) of the SSM Regulation, when, in relation to the supervision of less significant supervised entities, the ECB determines that it is appropriate to involve staff members from one or more other NCAs in the supervisory team of an NCA, the ECB may require the latter to involve staff members of such other NCAs.

Title 2: Supervision on a consolidated basis and participation of the ECB and NCAs in colleges of supervisors

Article 8 Supervision on a consolidated basis

1. The ECB shall conduct supervision on a consolidated basis as provided for by Article 111 of Directive 2013/36/EU in respect of credit institutions, financial holding companies or mixed financial holding companies that are significant on a consolidated basis, where the parent undertaking is either a parent institution in a participating Member State or an EU parent institution established in a participating Member State.

2. The relevant NCA shall perform the task of the supervisor on a consolidated basis in respect of credit institutions, financial holding companies or mixed financial holding companies that are less significant on a consolidated basis.

Article 9 The ECB as chair of a college of supervisors

1. When the ECB is the consolidating supervisor, it shall chair the college established pursuant to Article 116 of Directive 2013/36/EU. The NCAs of the participating Member States where the parent, subsidiaries and significant branches within the meaning of Article 51 of Directive 2013/36/EU, if any, are established, shall have the right to participate in the college as observers.

2. If there is no college established pursuant to Article 116 of Directive 2013/36/EU, and a significant supervised entity has branches in non-participating Member States that are considered as significant in accordance with Article 51(1) of Directive 2013/36/EU, the ECB shall establish a college of supervisors with the competent authorities of the host Member States.

Article 10 The ECB and NCAs as members of a college of supervisors

If the consolidating supervisor is not in a participating Member State, the ECB and NCAs shall participate in the college of supervisors in accordance with the following rules and with the relevant Union law:

(a) if the supervised entities in participating Member States are all significant supervised entities, the ECB shall participate in the college of supervisors as a member, while the NCAs shall be entitled to participate in the same college as observers;

(b) if the supervised entities in participating Member States are all less significant supervised entities, the NCAs shall participate in the college of supervisors as members;

(c) if the supervised entities in participating Member States are both less significant supervised entities and significant supervised entities, the ECB and the NCAs shall participate in the college of supervisors as members. The NCAs of the participating Member States where the significant supervised entities are established shall be entitled to participate in the college of supervisors as observers.

Title 3: Procedures for the right of establishment and freedom to provide services

Chapter 1: ***Procedures for the right of establishment and freedom to provide services within the SSM***

Article 11 *Right of establishment of credit institutions within the SSM*

1. Any significant supervised entity wishing to establish a branch within the territory of another participating Member State shall notify the NCA of the participating Member State where the significant supervised entity has its head office, of its intention. Information shall be provided in accordance with the requirements

laid down in Article 35(2) of Directive 2013/36/EU. The NCA shall immediately inform the ECB on the receipt of this notification.

2. Any less significant supervised entity wishing to establish a branch within the territory of another participating Member State shall notify its NCA of its intention in accordance with the requirements laid down in Article 35(2) of Directive 2013/36/EU.

3. Where no decision to the contrary is taken by the ECB within two months of receipt of the notification, the branch referred to in paragraph 1 may be established and commence its activities. The ECB shall communicate this information to the NCA of the participating Member State where the branch will be established.

4. Where no decision to the contrary is taken by the NCA of the home Member State within two months of receipt of the notification, the branch referred to in paragraph 2 may be established and commence its activities. The NCA shall communicate this information to the ECB and to the NCA of the participating Member State where the branch will be established.

5. In the event of a change to any of the information communicated pursuant to paragraphs 1 and 2, the supervised entity shall give written notice of this change to the NCA that received the initial information at least one month before implementing the change. This NCA shall inform the NCA of the Member State where the branch is established.

Article 12 Exercise of the freedom to provide services by credit institutions within the SSM

1. Any significant supervised entity wishing to exercise the freedom to provide services by carrying on its activities within the territory of another participating Member State for the first time shall notify the NCA of the participating Member State where the significant supervised entity has its head office of its intention. Information shall be provided in accordance with the requirements laid down in Article 39(1) of Directive 2013/36/EU. The NCA shall immediately inform the ECB on the receipt of this notification. The NCA shall also communicate the notification to the NCA of the participating Member State where the services will be provided.

2. Any less significant supervised entity wishing to exercise the freedom to provide services by carrying on its activities within the territory of another participating Member State for the first time shall notify its NCA in accordance with the requirements laid down in Article 39(1) of Directive 2013/36/EU. The notification shall be communicated to the ECB and to the NCA of the participating Member State where the services will be provided.

Chapter 2: Procedures for the right of establishment and freedom of credit institutions established in nonparticipating Member States to provide services within the SSM

Article 13 Notification of the exercise of the right of establishment within the SSM by credit institutions established in non-participating Member States

1. Where the competent authority of a non-participating Member State communicates the information referred to in Article 35(2) of Directive 2013/36/EU in accordance with the procedure laid down in Article 35(3) thereof to the NCA of the participating Member State where the branch is to be established, such NCA shall immediately notify the ECB on the receipt of this communication.

2. Within two months of receipt of the communication from the competent authority of a nonparticipating Member State, the ECB, in the case of a branch that is significant pursuant to the criteria laid down in Article 6 of the SSM Regulation and in Part IV of this Regulation, or the relevant NCA in the case of a branch which is less significant on the basis of the criteria laid down in Article 6 of the SSM Regulation and in Part IV of this Regulation, shall prepare to supervise the branch in accordance with Articles 40 to 46 of Directive 2013/36/EU, and if necessary, indicate the conditions under which, in the interests of the general good, the branch may carry on its activity in the host Member State.

3. NCAs shall inform the ECB about the conditions under which, under national law and in the interests of the general good, activities can be carried out by a branch in their Member State.

4. A change to any information provided by the credit institution wishing to establish a branch pursuant to points (b), (c) or (d) of Article 35(2) of Directive 2013/36/EU shall be notified to the NCA referred to in paragraph 1.

Article 14 Competent authority of the host Member State for branches

1. In accordance with Article 4(2) of the SSM Regulation, the ECB shall exercise the powers of the competent authority of the host Member State where a branch is significant within the meaning of Article 6(4) thereof.

2. Where a branch is less significant within the meaning of Article 6(4) of the SSM Regulation, the NCA of the participating Member State where the branch is established shall exercise the powers of the competent authority of the host Member State.

Article 15 Notification of the exercise of the freedom to provide services within the SSM by credit institutions established in non-participating Member States

Where the competent authority of a non-participating Member State provides a notification within the meaning of Article 39(2) of Directive 2013/36/EU, the NCA of the participating Member State where the freedom to provide services shall be exercised shall be the addressee of the notification. The NCA shall immediately inform the ECB on the receipt of this notification.

Article 16 Competent authority of the host Member State for freedom to provide services

1. In accordance with Article 4(2) and within the scope of Article 4(1) of the SSM Regulation, the ECB shall carry out the tasks of the competent authority of the host Member State in respect of credit institutions established in non-participating Member States which exercise the freedom to provide services in participating Member States.

2. If the freedom to provide services is in the interest of the general good, subject to certain conditions under the national law of participating Member States, NCAs shall inform the ECB of these conditions.

Chapter 3: Procedures for the right of establishment and freedom to provide services in relation to nonparticipating Member States

Article 17 Right of establishment and exercise of the freedom to provide services in relation to nonparticipating Member States

1. A significant supervised entity wishing to establish a branch or to exercise the freedom to provide services within the territory of a non-participating Member State shall notify the relevant NCA of its intention in accordance with the applicable Union law. The NCA shall immediately inform the ECB on the receipt of this notification. The ECB shall exercise the powers of the competent authority of the home Member State.

2. A less significant supervised entity wishing to establish a branch or to exercise the freedom to provide services within the territory of a non-participating Member State shall notify the relevant NCA of its intention in accordance with the applicable Union law. The relevant NCA shall exercise the powers of the competent authority of the home Member State.

Title 4: Supplementary supervision of financial conglomerates

Article 18 Coordinator

1. The ECB shall assume the task of coordinator of a financial conglomerate in accordance with the criteria set out in relevant Union law in relation to a significant supervised entity.

2. The NCA shall assume the task of coordinator of a financial conglomerate in accordance with the criteria set out in relevant Union law in relation to a less significant supervised entity.

PART III: GENERAL PROVISIONS APPLYING TO THE OPERATION OF THE SSM

Title 1: Principles and obligations

Article 19 Overview

This Part lays down (a) general rules for the operation of the SSM by the ECB and NCAs, and (b) the provisions to be applied by the ECB when carrying out an ECB supervisory procedure.

The general principles and provisions applying between the ECB and NCAs in close cooperation are set out in Part IX.

Article 20 Duty to cooperate in good faith

The ECB and NCAs shall be subject to a duty to cooperate in good faith, and an obligation to exchange information.

Article 21 General obligation to exchange information

1. Without prejudice to the ECB's power to receive directly, or have direct access to information reported by supervised entities, on an on-going basis, NCAs shall, in particular, provide the ECB in a timely and accurate manner with all the information necessary for

the ECB to carry out the tasks conferred on it by the SSM Regulation. Such information shall include information stemming from the NCAs' verification and on-site activities.

2. In circumstances where the ECB obtains information directly from the legal or natural persons referred to in Article 10(1) of the SSM Regulation, it shall provide the NCAs concerned with such information in a timely and accurate manner. Such information shall include, in particular, information necessary for the NCAs to carry out their role in assisting the ECB.

3. Without prejudice to paragraph 2, the ECB shall provide NCAs with regular access to updated information necessary for NCAs to carry out their tasks related to prudential supervision.

Article 22 Right of the ECB to instruct NCAs or NDAs to make use of their powers and to take action if the ECB has a supervisory task but no related power

1. To the extent necessary to carry out the tasks conferred on it by the SSM Regulation, the ECB may require, by way of instructions, the NCAs or the NDAs or both to make use of their powers, under and in accordance with the conditions set out in national law and as provided for in Article 9 of the SSM Regulation, where the SSM Regulation does not confer such powers on the ECB.

2. The NCAs and/or, in respect of Article 5 of the SSM Regulation, the NDAs, shall inform the ECB about the exercise of these powers without undue delay.

Article 23 Language regime between the ECB and NCAs

The ECB and NCAs shall adopt arrangements for their communications within the SSM, including the language(s) to be used.

Article 24 Language regime between the ECB and legal or natural persons, including supervised entities

1. Any document which a supervised entity or any other legal or natural person individually subject to ECB supervisory procedures sends to the ECB may be drafted in any one of the official languages of the Union, chosen by the supervised entity or person.

2. The ECB, supervised entities and any other legal or natural person individually subject to ECB supervisory procedures may agree to exclusively use one Union official language in their written communication, including with regard to ECB supervisory decisions.

The revocation of such agreement on the use of one language shall only affect the aspects of the ECB supervisory procedure which have not yet been carried out.

Where participants in an oral hearing request to be heard in a Union official language other than the language of the ECB supervisory procedure, sufficient advance notice of this requirement shall be given to the ECB so that it can make the necessary arrangements.

Title 2: General provisions relating to due process for adopting ECB supervisory decisions

Chapter 1: ECB supervisory procedures

Article 25 General principles

1. Any ECB supervisory procedures initiated in accordance with Article 4 and Section 2 of Chapter III of the SSM Regulation shall be carried out in accordance with Article 22 of the SSM Regulation and the provisions of this Title.

2. The provisions of this Title shall not apply to procedures carried out by the Administrative Board of Review.

Article 26 *Parties*

1. Parties to an ECB supervisory procedure shall be:

(a) those making an application;

(b) those to which the ECB intends to address or has addressed an ECB supervisory decision.

2. NCAs are deemed not to be parties.

Article 27 Representation of a party

1. A party may be represented by its legal or statutory representatives or by any other representative empowered by written mandate to take any and all actions relating to the ECB supervisory procedure.

2. Any revocation of the mandate shall only be effective on the ECB's receipt of a written revocation. The ECB shall acknowledge receipt of such revocation.

3. Where a party has appointed a representative in an ECB supervisory procedure, the ECB shall contact only the appointed representative in that supervisory procedure unless the particular

circumstances require that the ECB contact the party directly. In the latter case, the representative shall be informed.

Article 28 General obligations of the ECB and parties to an ECB supervisory procedure

1. An ECB supervisory procedure may be initiated ex officio or at the request of a party. Subject to paragraph 3, the ECB shall determine the facts which will be relevant for adopting its final decision in each ECB supervisory procedure ex officio.

2. In its assessment, the ECB shall take account of all relevant circumstances.

3. Subject to Union law, a party shall be required to participate in an ECB supervisory procedure and to provide assistance to clarify the facts. In ECB supervisory procedures initiated on the request of a party, the ECB may limit its determination of the facts to requesting the party to provide the relevant factual information.

Article 29 Evidence in ECB supervisory procedures

1. In order to ascertain the facts of a case, the ECB shall make use of such evidence as, after due consideration, it deems appropriate.

2. The parties shall, subject to Union law, assist the ECB in ascertaining the facts of the case. In particular, subject to the limits relating to sanctioning procedures under Union law, the parties shall state truthfully the facts known to them.

3. The ECB may set a time limit by which evidence may be provided by the parties.

Article 30 Witnesses and experts in ECB supervisory procedures

1. The ECB may hear witnesses and experts if it deems it necessary.

2. When the ECB appoints an expert it shall define that expert's task in an agreement and set a time limit within which the expert shall submit his report.

3. When the ECB hears witnesses or experts, they shall be entitled on application to reimbursement of their travel and subsistence expenses. Witnesses shall be entitled to compensation for loss of earnings and experts to the agreed fees for their service after they have provided their statements. The compensation shall be provided in accordance with the appropriate provisions applying to the compensation of witnesses and remuneration of experts respectively by the Court of Justice of the European Union.

4. The ECB may require that the persons mentioned in Article 11(1)(c) of the SSM Regulation, attend as witnesses in the offices of the ECB or any other place in a participating Member State determined by the ECB. Where a person mentioned in Article 11(1)(c) of the SSM Regulation is a legal person, the natural persons representing such legal person shall be obliged to attend pursuant to the preceding sentence.

Article 31 Right to be heard

1. Before the ECB may adopt an ECB supervisory decision addressed to a party which would adversely affect the rights of such party, the party must be given the opportunity of commenting in writing to the ECB on the facts, objections and legal grounds relevant to the ECB supervisory decision. If the ECB deems it appropriate it may give the parties the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in a meeting. The notification by which the ECB gives the party the opportunity to provide its comments shall mention the material content of the intended ECB supervisory decision and the material facts, objections and legal grounds on which the ECB intends to base its decision. Section 1 of Chapter III of the SSM Regulation shall not be subject to the provisions of this Article.

2. If the ECB gives a party the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in a meeting, unless duly excused, the absence of the party is not a reason to postpone the meeting. If the party is duly excused, the ECB may postpone the meeting or give the party the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision in writing. The ECB shall prepare written minutes of the meeting that shall be signed by the parties and shall provide a copy of the minutes to the parties.

3. The party shall, in principle, be given the opportunity to provide its comments in writing within a time limit of two weeks following receipt of a statement setting out the facts, objections and legal grounds on which the ECB intends to base the ECB supervisory decision. On application of the party, the ECB may extend the time limit as appropriate. In particular circumstances, the ECB may shorten

the time limit to three working days. The time limit shall also be shortened to three working days in the situations covered by Articles 14 and 15 of the SSM Regulation.

4. Notwithstanding paragraph 3, and subject to paragraph 5, the ECB may adopt an ECB supervisory decision addressed to a party which would adversely affect the rights of such party without giving the party the opportunity to comment on the facts, objections and legal grounds relevant to the ECB supervisory decision prior to its adoption if an urgent decision appears necessary in order to prevent significant damage to the financial system.

5. If an urgent ECB supervisory decision is adopted in accordance with paragraph 4, the party shall be given the opportunity to comment in writing on the facts, objections and legal grounds relevant to the ECB supervisory decision without undue delay after its adoption. The party shall, in principle, be given the opportunity to provide its comments in writing within a time limit of two weeks from receipt of the ECB supervisory decision. On application of the party, the ECB may extend the time limit; however, the time limit may not exceed six months. The ECB shall review the ECB supervisory decision in the light of the party's comments and may either confirm it, revoke it, amend it or revoke it and replace it by a new ECB supervisory decision.

6. For ECB supervisory procedures relating to penalties pursuant to Article 18 of the SSM Regulation and Part X of this Regulation, paragraphs 4 and 5 shall not apply.

Article 32 Access to files in an ECB supervisory procedure

1. The rights of defence of the parties concerned shall be fully respected in ECB supervisory procedures. For this purpose, and after the opening of the ECB supervisory procedure, the parties shall be entitled to have access to the ECB's file, subject to the legitimate interest of legal and natural persons other than the relevant party, in the protection of their business secrets. The right of access to the file shall not extend to confidential information. The NCAs shall forward to the ECB, without undue delay, any request received by them related to the access to files connected with ECB supervisory procedures.

2. The files consist of all documents obtained, produced or assembled by the ECB during the ECB supervisory procedure, irrespective of the storage medium.

3. Nothing in this Article shall prevent the ECB or NCAs from disclosing and using information necessary to prove an infringement.

4. The ECB may determine that access to a file shall be granted in one or more of the following ways, taking due account of the technical capabilities of the parties:

(a) by means of CD-ROMs or any other electronic data storage device including any that may become available in future;

(b) through copies of the accessible file in paper form sent to them by mail;

(c) by inviting them to examine the accessible file in the offices of the ECB.

5. For the purpose of this article, confidential information may include internal documents of the ECB and NCAs and correspondence between the ECB and an NCA or between NCAs.

Chapter 2: ECB supervisory decisions

Article 33: Motivation of ECB supervisory decisions

1. Subject to paragraph 2, an ECB supervisory decision shall be accompanied by a statement of the reasons for that decision.

2. The statement of reasons shall contain the material facts and legal reasons on which the ECB supervisory decision is based.

3. Subject to Article 31(4), the ECB shall base an ECB supervisory decision only on facts and objections on which a party has been able to comment.

Article 34 Suspensory effect

Without prejudice to Article 278 TFEU and Article 24(8) of the SSM Regulation, the ECB may decide that the application of an ECB supervisory decision is suspended either (a) by stating it in the ECB supervisory decision, or (b) in cases other than a request for review by the Administrative Board of Review, on request of the addressee of an ECB supervisory decision.

Article 35 Notification of ECB supervisory decisions

1. The ECB may notify an ECB supervisory decision to a party (a) orally, (b) by serving or delivering by hand a copy of the supervisory decision, (c) by registered mail with a form for acknowledgment, (d) by express courier service,

(e) by telefax, or (f) electronically, in accordance with paragraph 10.

2. If a representative is empowered by a written mandate, the ECB may notify the ECB supervisory decision to the representative. In such cases the ECB is not obliged to also notify the ECB supervisory decision to the supervised entity represented by such representative.

3. In the case of an oral notification of an ECB supervisory decision, notification of the decision shall be deemed to be served on the addressee if a member of the staff of the ECB has informed (a) the relevant natural person, in the case of a natural person or (b) an authorised receiving agent of the legal person, in the case of a legal person, of the ECB supervisory decision. In such case without undue delay after such oral notification a written copy of the ECB supervisory decision shall be provided to the addressee.

4. In the case of a notification of an ECB supervisory decision by registered mail with a form for acknowledgment, notification of the ECB supervisory decision shall be deemed to be served on the addressee on the tenth day after the letter has been handed over to the mail provider, unless the acknowledgement of receipt indicates that the letter was received on a different date.

5. In the case of a notification of an ECB supervisory decision by express courier service, notification of the ECB supervisory decision shall be deemed to be served on the addressee on the tenth day after the letter has been handed over to the courier service, unless the delivery document of the courier service indicates that the letter was received on a different date.

6. For the purposes of paragraphs 4 and 5,the ECB supervisory decision must be addressed to an address suitable for service (valid address). A valid address is:

(a) in the case of an ECB supervisory procedure initiated on a request or application of the addressee of an ECB supervisory decision, the address provided by the addressee in its request or application;

(b) in the case of a supervised entity, the last business address of the head office provided to the ECB by the supervised entity;

(c) in the case of a natural person, the last address provided to the ECB and if no address is provided to the ECB and the natural person is an employee, a manager or a shareholder of a supervised entity, the business address of the supervised entity in accordance with (b).

7. Each person that is party to an ECB supervisory procedure shall provide to the ECB on request a valid address.

8. If a person is established or domiciled in a State that is not a Member State, the ECB may require the party to name, within a reasonable period of time, an authorised recipient who is resident in a Member State or who has business premises in a Member State. Should no authorised recipient be named upon such request and until such authorised recipient is named respectively, any communication may be served in accordance with paragraphs 3 to 5 and 9 to the address of the party available to the ECB.

9. Where the person who is the addressee of an ECB supervisory decision has provided a fax number to the ECB, the ECB may notify an ECB supervisory decision by transmitting a copy of the ECB supervisory decision by telefax. The ECB supervisory decision is deemed to be notified to the addressee if the ECB has received a completion report on the successful delivery of the telefax.

10. The ECB may determine the criteria under which an ECB supervisory decision may be served by electronic or other comparable means of communication.

Title 3: Reporting of breaches

Article 36 Reporting of breaches

Any person, in good faith, may submit a report directly to the ECB if that person has reasonable grounds for believing that the report will show breaches of the legal acts referred to in Article 4(3) of the SSM Regulation by credit institutions, financial holding companies, mixed financial holding companies or competent authorities (including the ECB itself).

Article 37 Appropriate protection for reports of breaches

1. Where a person makes a report in good faith about alleged breaches of the legal acts referred to in Article 4(3) of the SSM Regulation by supervised entities or competent authorities, the report shall be treated as a protected report.

2. All personal data concerning both the person who makes a protected report and the person who is allegedly responsible for a breach shall be protected in compliance with the applicable Union data protection framework.

3. The ECB shall not reveal the identity of a person who has made a protected report without first obtaining that person's explicit consent, unless such disclosure is required by a court order in the context of further investigations or subsequent judicial proceedings.

Article 38 Procedures for the follow-up of reports

1. The ECB shall assess all reports relating to significant supervised entities. It shall assess reports relating to less significant supervised entities in respect of breaches of ECB regulations or decisions. In the latter case, when NCAs receive these reports, they shall forward the reports to the ECB, without communicating the identity of the person who made the report, unless such person provides their explicit consent.

2. Without prejudice to paragraph 1, the ECB shall forward reports concerning a less significant supervised entity to the relevant NCA, without communicating the identity of the person who made the report, unless such person provides their explicit consent.

3. The ECB shall exchange information with NCAs: (a) in order to assess if the reports were sent to both the ECB and the relevant NCA and to coordinate efforts; and (b) to know the outcome of the follow-up of the reports forwarded to the NCAs.

4. The ECB shall use reasonable discretion when determining how to assess the reports received and the actions to be taken.

5. In the case of alleged breaches by supervised entities, the relevant supervised entity shall provide to the ECB any information and documents requested by it in order to assess the reports received.

6. In the case of alleged breaches by competent authorities (other than the ECB), the ECB shall request the relevant competent authority to provide their comments on the facts reported.

7. In its annual report, as described in Article 20(2) of the SSM Regulation, the ECB shall provide information on the reports received in abridged or aggregated form, such that individual supervised entities or persons cannot be identified.

PART IV: DETERMINING THE STATUS OF A SUPERVISED ENTITY AS SIGNIFICANT OR LESS SIGNIFICANT

Title 1: General provisions relating to the classification as significant or less significant

Article 39 Classifying a supervised entity on an individual basis as significant

1. A supervised entity shall be considered a significant supervised entity if the ECB so determines in an ECB decision addressed to the relevant supervised entity pursuant to Articles 43 to 49, explaining the underlying reasons for such decision.

2. A supervised entity shall cease to be classified as a significant supervised entity if the ECB determines, in an ECB decision addressed to the supervised entity explaining the underlying reasons for such decision, that it is a less significant supervised entity or is no longer a supervised entity.

3. A supervised entity can be classified as a significant supervised entity on the basis of any of the following:

(a) its size, as determined in accordance with Articles 50 to 55 (hereinafter the 'size criterion');

(b) its importance for the economy of the Union or any participating Member State, as determined in accordance with Articles 56 to 58 (hereinafter the 'economic importance criterion');

(c) its significance with regard to cross-border activities, as determined in accordance with Articles 59 and 60 (hereinafter the 'cross-border activities criterion');

(d) a request for or the receipt of direct public financial assistance from the European Stability Mechanism (ESM), as determined in accordance with Articles 61 to 64 (hereinafter the 'direct public financial assistance criterion');

(e) the fact that the supervised entity is one of the three most significant credit institutions in a participating Member State, as determined in accordance with Articles 65 and 66.

4. Significant supervised entities shall be directly supervised by the ECB unless particular circumstances justify supervision by the relevant NCA in accordance with Title 9 of this Part.

5. The ECB shall also directly supervise a less significant supervised entity or a less significant supervised group under an ECB decision adopted pursuant to Article 6(5)(b) of the SSM Regulation to the effect that the ECB will

exercise directly all relevant powers referred to in Article 6(4) of the SSM Regulation. For the purposes of the SSM, such a less significant supervised entity or less significant supervised group shall be classified as significant.

6. Prior to taking the ECB decisions referred to in this Article, the ECB shall consult with the relevant NCAs. Each ECB decision referred to in this Article shall also be notified to the relevant NCAs.

Article 40 Classifying supervised entities which are part of a group as significant

1. If one or more supervised entities are part of a supervised group, the criteria for determining significance shall be determined at the highest level of consolidation within participating Member States in accordance with the provisions laid down in Titles 3 to 7 of Part IV.

2. Each of the supervised entities forming part of a supervised group shall be deemed to be a significant supervised entity in any of the following circumstances:

(a) if the supervised group at its highest level of consolidation within the participating Member States fulfils the size criterion, the economic importance criterion, or the cross- border activities criterion;

(b) if one of the supervised entities forming part of the supervised group fulfils the direct public financial assistance criterion;

(c) if one of the supervised entities forming part of the supervised group is one of the three most significant credit institutions in a participating Member State.

3. Where a supervised group is determined to be significant or is determined to be no longer significant, the ECB shall adopt an ECB decision on the classification as a significant supervised entity, or on the lifting of the classification as a significant supervised entity, and shall provide the beginning and end dates of direct supervision by the ECB to each supervised entity forming part of the supervised group in question in accordance with the criteria and procedures provided for in Article 39.

Article 41 Specific provisions in respect of branches of credit institutions established in non-participating Member States

1. All branches opened in the same participating Member State by a credit institution which is established in a non-participating Member State shall be deemed to be a single supervised entity for the purposes of this Regulation.

2. Branches opened in different participating Member States by a credit institution which is established in a non-participating Member State shall be treated individually as separate supervised entities for the purposes of this Regulation.

3. Without prejudice to paragraph 1, branches of a credit institution which is established in a non-participating Member State shall be assessed individually as separate supervised entities, and separately from subsidiaries of the same credit institution, when determining whether any of the criteria provided for in Article 6(4) of the SSM Regulation is fulfilled.

Article 42 Specific provisions in respect of subsidiaries of credit institutions established in non-participating Member States and third countries

1. Subsidiaries established in one or more participating Member States by a credit institution that has its head office in a non-participating Member State or third country shall be assessed separately from the branches of that credit institution when determining whether any of the criteria provided for in Article 6(4) of the SSM Regulation is fulfilled.

2. The following subsidiaries shall be assessed separately when determining whether any of the criteria provided for in Article 6(4) of the SSM Regulation are fulfilled:

(a) those that are established in a participating Member State;

(b) those that belong to a group whose parent undertaking has its head office in a non-participating Member State or a third country; and

(c) those that do not belong to a supervised group within participating Member States.

Title 2: Procedure for classifying supervised entities as significant supervised entities

Chapter 1: Classifying a supervised entity as significant

Article 43 Review of the status of a supervised entity

1. Unless otherwise provided for in this Regulation, the ECB shall review, on at least an annual basis, whether a significant supervised entity or a significant supervised group

continues to fulfil any of the criteria provided for in Article 6(4) of the SSM Regulation.

2. Unless otherwise provided for in this Regulation, each NCA shall review, on at least an annual basis, whether a less significant supervised entity or a less significant supervised group fulfils any of the criteria provided for in Article 6(4) of the SSM Regulation. In the case of a less significant supervised group, the relevant NCA of the participating Member State in which the parent undertaking, determined at the highest level of consolidation within the participating Member States, is established shall carry out this review.

3. The ECB may review, at any time after it receives relevant information, in particular in the cases specified in Article 52, (a) whether a supervised entity fulfils any of the criteria provided for in Article 6(4) of the SSM Regulation and (b) whether a significant supervised entity no longer fulfils any of the criteria provided for in Article 6(4) of the SSM Regulation.

4. If an NCA assesses that a less significant supervised entity or a less significant supervised group fulfils any of the criteria provided for in Article 6(4) of the SSM Regulation, the relevant NCA shall, without undue delay, inform the ECB.

5. At the request of the ECB or an NCA, the ECB and the relevant NCA shall cooperate in determining whether any of the criteria provided for in Article 6(4) of the SSM Regulation are fulfilled in respect of a supervised entity or a supervised group.

6. If the ECB (a) decides to assume the direct supervision of a supervised entity or supervised group or (b) decides that the direct supervision of a supervised entity or supervised group by the ECB shall end, the ECB and the relevant NCA shall cooperate in order to ensure the smooth transition of supervisory competences. In particular, a report setting out the supervisory history and risk profile of the supervised entity shall be prepared by the relevant NCA when the ECB assumes the direct supervision of a supervised entity, and by the ECB when the relevant NCA becomes competent to supervise the entity concerned.

7. The ECB shall determine whether a supervised entity or a supervised group is significant using the criteria provided for in Article 6(4) of the SSM Regulation in the order set out therein, namely: (a) size; (b) importance for the economy of the Union or any participating Member State; (c) significance of cross-border activities; (d) request for or receipt of public financial assistance directly from the ESM; (e) the fact that it is one of the three most significant credit institutions in a participating Member State.

Article 44 Procedure to be applied in determining the significance of a supervised entity

1. When taking decisions on the classification of a supervised entity or a supervised group as significant under this Title, and unless otherwise provided, the ECB shall apply the procedural rules of Title 2 of Part III of this Regulation.

2. The ECB shall notify in writing, within the timeframe laid down in Article 45, an ECB decision on the classification as significant of a supervised entity or a supervised group to each supervised entity concerned and shall also communicate that decision to the relevant NCA. For supervised entities that are part of a significant supervised group, the ECB shall notify the ECB decision to the supervised entity at the highest level of consolidation within the participating Member States and shall ensure that all supervised entities within the significant supervised group are duly informed.

3. For supervised entities that are not notified by the ECB pursuant to paragraph 1, the list referred to in Article 49(2) shall serve as notification of their classification as less significant.

4. The ECB shall give each relevant supervised entity the opportunity to make submissions in writing prior to the adoption of an ECB decision pursuant to paragraph 1.

5. The ECB shall, in addition, give the relevant NCAs, in accordance with Article 39(6), the opportunity to provide observations and comments in writing, and these shall be duly considered by the ECB.

6. A supervised entity or a supervised group shall be classified as a significant supervised entity or a significant supervised group from the date of notification of the ECB decision determining that it is a significant supervised entity or a significant supervised group.

Chapter 2: Beginning and end of direct supervision by the ECB

Article 45 Beginning of direct supervision by the ECB

1. The ECB shall specify in an ECB decision the date on which it is to assume direct supervision of a supervised entity or a supervised group that has been classified as a significant supervised entity or significant supervised group. That ECB decision may be the same decision as the one referred to in Article 44(2). Subject to paragraph 2 the ECB shall notify that ECB decision to each supervised entity concerned, at least one month prior to the date on which it will assume direct supervision.

2. If the ECB assumes direct supervision of a supervised entity or a supervised group either on the basis of a request for or receipt of direct public financial assistance from the ESM, the ECB shall notify the ECB decision referred to in paragraph 1 to each supervised entity concerned in due time, at least one week prior to the date on which it will assume direct supervision.

3. The ECB shall provide copies of the ECB decisions referred to in paragraph 1 to the relevant NCAs.

4. The ECB shall assume direct supervision of a supervised entity or supervised group at the latest 12 months after the date on which the ECB notifies to that supervised entity or supervised group an ECB decision pursuant to Article 44(2).

5. For the purposes of this Article, in the case of a supervised group, the ECB shall notify the ECB decision to the supervised entity at the highest level of consolidation within the participating Member States and shall ensure that all supervised entities within that group are duly informed by the relevant deadline.

Article 46 End of direct supervision by the ECB

1. When the ECB determines that direct supervision by the ECB of a supervised entity or a supervised group will end, the ECB shall issue an ECB decision to each supervised entity concerned specifying the date and reasons why the direct supervision will end. The ECB shall adopt such decision at least one month prior to the date on which direct supervision by the ECB will end. The ECB shall also provide a copy of this ECB decision to the relevant NCAs. Article 45(5) shall apply accordingly.

2. The ECB shall give each relevant supervised entity the opportunity to make submissions in writing prior to the adoption of an ECB decision pursuant to paragraph 1.

3. Any ECB decision specifying the date on which direct supervision of a supervised entity by the ECB is to end may be issued together with the decision classifying that supervised entity as less significant.

Article 47 Reasons for ending direct supervision by the ECB

1. In the case of a significant supervised entity that is classified as such on the basis of its (a) size, (b) importance for the economy of the Union or any participating Member State, or (c) significance of cross border activities, or because it is part of a supervised group that fulfils at least one of these criteria, the ECB shall adopt an ECB decision ending its classification as a significant supervised entity and direct supervision if, for three consecutive calendar years, none of the above criteria provided for in Article 6(4) of the SSM Regulation has been met either on an individual basis or by the supervised group to which the supervised entity belongs.

2. In the case of a supervised entity that is classified as significant on the basis that direct public financial assistance from the ESM has been requested in respect of (a) itself, (b) the supervised group to which the supervised entity belongs, or (c) any supervised entity belonging to that group and which is not significant on other grounds, the ECB shall adopt an ECB decision ending its classification as a significant supervised entity and direct supervision, if the direct public financial assistance has been denied, fully returned or is terminated. Such decision may, in the case of the return or termination of direct public financial assistance, only be taken three calendar years after the complete return or termination of direct public financial assistance.

3. In the case of a supervised entity that is classified as significant on the basis that it is one of the three most significant credit institutions in a participating Member State, as determined in accordance with Articles 65 to 66, or belongs to the supervised group of such a credit institution, and which is not significant on other grounds, the ECB shall adopt an ECB decision ending its classification as a significant supervised entity and direct supervision if, for three consecutive calendar years, the relevant supervised entity has not been one of the three most significant credit institutions in a participating Member State.

4. In the case of a supervised entity that is directly supervised by the ECB under an ECB decision adopted pursuant to Article 6(5)(b) of

the SSM Regulation and which is not significant on other grounds, the ECB shall adopt an ECB decision ending direct supervision by the ECB if in its reasonable discretion direct supervision is no longer necessary to ensure consistent application of high supervisory standards.

Article 48 Pending procedures

1. If a change in competence between the ECB and an NCA is to take place, the authority whose competence is to end (hereinafter the 'authority whose competence ends') shall inform the authority which is to become competent (hereinafter the 'the authority assuming supervision') of any supervisory procedure formally initiated, which requires a decision. The authority whose competence ends shall provide this information immediately after becoming aware of the imminent change in competence. The authority whose competence ends shall update this information on a continual basis, and as a general rule on a monthly basis, when there is new information on a supervisory procedure to report. The authority assuming supervision may, in duly justified cases, allow reporting on a less frequent basis. For the purpose of Articles 48 and 49, a supervisory procedure shall mean an ECB or NCA supervisory procedure.

Prior to the change in competence, the authority whose competence ends shall liaise with the authority assuming supervision without undue delay after the formal initiation of any new supervisory procedure which requires a decision.

2. If the supervisory competence changes, the authority whose competence ends shall undertake efforts to complete any pending supervisory procedure which requires a decision prior to the date on which the change in the supervisory competence is to occur.

3. If a formally initiated supervisory procedure, which requires a decision, cannot be completed prior to the date on which a change in the supervisory competence occurs, the authority whose competence ends shall remain competent to complete such pending supervisory procedure. For this purpose, the authority whose competence ends shall also retain all relevant powers until the supervisory procedure has been completed. The authority whose competence ends shall complete the pending supervisory procedure in question in accordance with the applicable law under its retained powers. The authority whose competence ends shall inform the authority assuming supervision prior to taking any decision in a supervisory procedure which was pending prior to the change in competence. It shall provide to the authority assuming supervision a copy of the decision taken and any relevant documents relating to that decision.

4. By way of derogation from paragraph 3, the ECB may decide within one month of receiving the information necessary to complete its assessment of the relevant formally initiated supervisory procedure, and in consultation with the relevant NCA, to take over the supervisory procedure concerned. If, due to reasons of national law, an ECB decision is required prior to the end of the assessment period referred to in the preceding sentence, the NCA shall provide the ECB with the necessary information and specify in particular the timeframe within which the ECB has to decide whether or not it intends to take over the procedure. Where the ECB takes over a supervisory procedure, it shall notify the relevant NCA and the parties of its decision to take over the supervisory procedure concerned. The ECB shall specify in its ECB decision the consequences of taking over such supervisory procedure.

5. The ECB and the relevant NCA shall cooperate with regard to the completion of any pending procedure and may exchange any relevant information for this purpose.

6. This Article shall not apply to common procedures.

Chapter 3: List of supervised entities

Article 49 Publication

1. The ECB shall publish a list containing the name of each supervised entity and supervised group which is directly supervised by the ECB, indicating where relevant for the supervised entity the supervised group to which it belongs, and the specific legal basis for such direct supervision. The list shall include, in the case of a classification as significant on the basis of the size criterion, the total value of the supervised entity's or the supervised group's assets. The ECB shall also publish the name of supervised entities which, although they meet one of the criteria referred to in Article 6(4) of the SSM Regulation and would therefore qualify as significant, are nevertheless considered less significant by the ECB because of particular circumstances in accordance with Title 9 of Part IV, and therefore are not directly supervised by the ECB.

2. The ECB shall publish a list containing the name of each supervised entity which is

supervised by an NCA and the name of the relevant NCA.

3. The lists referred to in paragraphs 1 and 2 shall be published electronically and shall be accessible on the ECB's website.

4. The lists referred to in paragraphs 1 and 2 shall be updated on a regular basis.

Title 3: Determining significance on the basis of size

Article 50 Determining significance on the basis of size

1. Whether or not a supervised entity or a supervised group is significant on the basis of the size criterion shall be determined by reference to the total value of its assets.

2. A supervised entity or a supervised group shall be classified as significant if the total value of its assets exceeds EUR 30 billion (hereinafter the 'size threshold').

Article 51 Basis for determining whether or not a supervised entity is significant on the basis of size

1. If the supervised entity is part of a supervised group, the total value of its assets shall be determined on the basis of the year-end prudential consolidated reporting for the supervised group in accordance with applicable law.

2. If total assets cannot be determined on the basis of the data referred to in paragraph 1, the total value of assets shall be determined on the basis of the most recent audited consolidated annual accounts prepared in accordance with International Financial Reporting Standards (IFRS) as applicable within the Union in accordance with Regulation (EC) No 1606/2002of the European Parliament and of the Council[12] and, if those annual accounts are not available, the consolidated annual accounts prepared in accordance with applicable national accounting laws.

3. If the supervised entity is not part of a supervised group, the total value of assets shall be determined on the basis of the year-end prudential individual reporting in accordance with applicable law.

4. If total assets cannot be determined using the data referred to in paragraph 3, the total value of assets shall be determined on the basis of the most recent audited annual accounts prepared in accordance with IFRS, as applicable within the Union in accordance with Regulation (EC) No 1606/2002 and, if those annual accounts are not available, the annual accounts prepared in accordance with applicable national accounting laws.

5. If the supervised entity is a branch of a credit institution which is established in a non-participating Member State, the total value of its assets shall be determined on the basis of the statistical data reported pursuant to Regulation (EC) No 25/2009 (ECB/2008/32) of the European Central Bank.[13]

Article 52 Basis for determining significance on the basis of size in specific or exceptional circumstances

1. If, in respect of a less significant supervised entity, there is an exceptional substantial change in circumstances relevant for determining significance on the basis of the size criterion, the relevant NCA shall review whether or not the size threshold continues to be met.

If such a change occurs in respect of a significant supervised entity, the ECB shall review whether or not the size threshold continues to be met.

An exceptional substantial change in circumstances relevant for determining significance on the basis of the size criterion shall include any of the following: (a) the merger of two or more credit institutions, (b) the sale or transfer of a substantial business division, (c) the transfer of shares in a credit institution such that it no longer belongs to a supervised group to which it belonged prior to the sale, (d) the final decision to carry out an orderly winding up of the supervised entity (or group), (e) comparable factual situations.

2. A less significant supervised entity, and, in the case of a less significant supervised group, the less significant supervised entity at the highest level of consolidation within the participating Member States shall inform the relevant NCA of any change as referred to in paragraph 1.

[12] Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards (OJ L 243,11.9.2002, p.1).

[13] Regulation (EC) No 25/2009 of the European Central Bank of 19 December 2008 concerning the balance sheet of the monetary financial institutions sector (ECB/2008/32) (OJ L 15, 20.1.2009, p. 14).

A significant supervised entity and, in the case of a significant supervised group, the supervised entity at the highest level of consolidation within the participating Member States shall inform the ECB of any change as referred to in paragraph 1.

3. By way of derogation from the three-year rule provided for in Article 47(1) to (3), and in the case of exceptional circumstances, including those referred to in paragraph 1, the ECB shall decide, in consultation with NCAs, whether the affected supervised entities are significant or less significant and the date from which supervision shall be carried out by the ECB or NCAs.

Article 53 Groups of consolidated undertakings

1. For the purpose of determining significance on the basis of the size criterion, the supervised group of consolidated undertakings shall consist of the undertakings which have to be consolidated for prudential purposes in accordance with Union law.

2. For the purpose of determining significance on the basis of the size criterion, the supervised group of consolidated undertakings shall include subsidiaries and branches in non-participating Member States and third countries.

Article 54 Method of consolidation

The method of consolidation shall be the method of consolidation applicable in accordance with Union law for prudential purposes.

Article 55 Method for calculating total assets

For the purpose of determining the significance of a credit institution on the basis of the size criterion, the 'total value of assets' shall be derived from the line 'total assets' on a balance sheet prepared in accordance with Union law for prudential purposes.

Title 4 – Determining significance on the basis of importance for the economy of the Union or any participating Member State

Article 56 National economic importance threshold

A supervised entity established in a participating Member State or a supervised group whose parent undertaking is established in a participating Member State shall be classified as significant on the basis of its importance for the economy of the relevant participating Member State if:

$A : B \geq 0{,}2$ (national economic importance threshold) and

$A \geq$ EUR 5 billion

whereby

A is the total value of assets determined in accordance with Articles 51 to 55 for a given calendar year, and

B is the gross domestic product at market prices as defined in point 8.89 of Annex A to Regulation (EU) No 549/2013 of the European Parliament and of the Council[14] (ESA 2010) and published by Eurostat for the given calendar year.

Article 57 Criteria for determining significance on the basis of importance for the economy of the Union or any participating Member State

1. The ECB shall take into account the following criteria, in particular, when assessing whether or not a supervised entity or a supervised group is significant for the economy of the Union or a participating Member State for reasons other than those set out in Article 56:

(a) the significance of the supervised entity or supervised group for specific economic sectors in the Union or a participating Member State;

(b) the interconnectedness of the supervised entity or supervised group with the economy of the Union or a participating Member State;

(c) the substitutability of the supervised entity or supervised group as both a market participant and client service provider;

(d) the business, structural and operational complexity of the supervised entity or supervised group.

2. Article 52(3) shall apply accordingly.

Article 58 Determining significance on the basis of importance for the economy of any participating Member State at the request of an NCA

1. An NCA may notify the ECB that it considers a supervised entity to be significant with regard to its domestic economy.

[14] Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ L 174, 26.6.2013, p. 1).

2. The ECB shall assess the NCA's notification on the basis of the criteria set out in Article 57(1).

3. Article 57 shall apply accordingly.

Title 5: Determining significance on the basis of the significance of cross-border activities

Article 59 Criteria for determining significance on the basis of the significance of cross-border activities of a supervised group

1. A supervised group may be considered significant by the ECB on the basis of its cross-border activities only when the parent undertaking of a supervised group has established subsidiaries, which are themselves credit institutions, in more than one other participating Member State.

2. A supervised group may be considered significant by the ECB on the basis of its cross-border activities only if the total value of its assets exceeds EUR 5 billion and:

(a) the ratio of its cross-border assets to its total assets is above 20 %; or

(b) the ratio of its cross-border liabilities to its total liabilities is above 20 %.

3. Article 52(3) shall apply accordingly.

Article 60 Cross-border assets and liabilities

1. 'Cross- border assets', in the context of a supervised group, means the part of the total assets in respect of which the counterparty is a credit institution or other legal or natural person located in a participating Member State other than the Member State in which the parent undertaking of the relevant supervised group has its head office.

2. 'Cross-border liabilities', in the context of a supervised group, means the part of the total liabilities in respect of which the counterparty is a credit institution or other legal or natural person located in a participating Member State other than the Member State in which the parent undertaking of the relevant supervised group has its head office.

Title 6: Determining significance on the basis of a request for or the receipt of public financial assistance from the ESM

Article 61 Request for or receipt of direct public financial assistance from the ESM

1. Direct public financial assistance to a supervised entity is requested when a request is made by an ESM member for financial assistance to be granted by the ESM to that entity in accordance with a decision taken by the Board of Governors of the ESM under Article 19 of the Treaty establishing the European Stability Mechanism regarding the direct recapitalisation of a credit institution and with the instruments adopted under that decision.

2. Direct public financial assistance is received by a credit institution when the financial assistance has been received by the credit institution pursuant to the decision and instruments referred to in paragraph 1.

Article 62 Obligation of NCAs to inform the ECB of a possible request for or receipt of public financial assistance by a less significant supervised entity

1. Without prejudice to the obligation set out in Article 96 to inform the ECB of the deterioration of the financial situation of a less significant supervised entity, the NCA shall inform the ECB as soon as it becomes aware of the possible need for public financial assistance for a less significant supervised entity to be granted at national level indirectly from the ESM and/or by the ESM.

2. The NCA shall submit its assessment of the financial situation of the less significant supervised entity to the ECB, for its consideration, before submitting it to the ESM, except in duly justified cases of urgency.

Article 63 Beginning and end of direct supervision

1. A supervised entity in respect of which direct public financial assistance is requested from the ESM or which has received direct public financial assistance from the ESM shall be classified as a significant supervised entity from the date on which direct public financial assistance was requested on its behalf.

2. The date on which the ECB shall assume the direct supervision shall be specified in an ECB decision in accordance with Title 2.

3. Article 52(3) shall apply accordingly.

Article 64 *Scope*

If direct public financial assistance is requested in respect of a supervised entity which is part of a supervised group, all supervised entities which

are part of that supervised group shall be classified as significant.

Title 7: Determining significance on the basis that the supervised entity is one of the three most significant credit institutions in a participating Member State

Article 65 Criteria for determining the three most significant credit institutions in a participating Member State

1. A credit institution or a supervised group shall be classified as significant if it is one of the three most significant credit institutions or supervised groups in a participating Member State.

2. For the purposes of identifying the three most significant credit institutions or supervised groups in a participating Member State, the ECB and the relevant NCA shall take into account the size of the supervised entity and supervised group respectively, as determined in accordance with Articles 50 to 55.

Article 66 Review process

1. With regard to each participating Member State, the ECB shall establish by 1 October of each calendar year whether or not three credit institutions or supervised groups with a parent undertaking established in such participating Member State should be classified as significant supervised entities.

2. At the request of the ECB, the NCAs shall inform the ECB of the three most significant credit institutions or supervised groups established in their respective participating Member States by 1 October of the calendar year in question. The three most significant credit institutions or supervised groups shall be determined by the NCAs on the basis of the criteria laid down in Articles 50 to 55.

3. For each of the three most significant credit institutions or supervised groups in the participating Member States, the relevant NCA shall provide the ECB with a report setting out the supervisory history and risk profile in each case, unless the credit institution or supervised group is already classified as significant.

On receipt of the information referred to in paragraph 2, the ECB shall carry out its own assessment. The ECB may, for this purpose, request the relevant NCA to provide any relevant information.

4. If, on 1 October of a given year, one or more of the three most significant credit institutions or supervised groups in a participating Member State are not classified as significant supervised entities, the ECB shall adopt a decision in accordance with Title 2 in respect of any of the three most significant credit institutions or supervised groups which are not classified as significant.

5. Article 52(3) shall apply accordingly.

Title 8: ECB decision to directly supervise less significant supervised entities pursuant to Article 6(5)(b) of the SSM Regulation

Article 67 Criteria for an ECB decision pursuant to Article 6(5)(b) of the SSM Regulation

1. The ECB may, pursuant to Article 6(5)(b) of the SSM Regulation, decide at any time, by means of an ECB decision, to exercise directly the supervision of a less significant supervised entity or less significant supervised group where this is necessary to ensure consistent application of high supervisory standards.

2. Before taking the ECB decision referred to in paragraph 1, the ECB shall take into account, inter alia, any of the following factors:

(a) whether or not the less significant supervised entity or less significant supervised group is close to meeting one of the criteria contained in Article 6(4) of the SSM Regulation;

(b) the interconnectedness of the less significant supervised entity or less significant supervised group with other credit institutions;

(c) whether or not the less significant supervised entity concerned is a subsidiary of a supervised entity which has its head office in a non-participating Member State or a third country and has established one or more subsidiaries, which are also credit institutions, or one or more branches in participating Member States, of which one or more is significant;

(d) the fact that the ECB's instructions have not been followed by the NCA;

(e) the fact that the NCA has not complied with the acts referred to in the first subparagraph of Article 4(3) of the SSM Regulation;

(f) the fact that the less significant supervised entity has requested or received indirectly financial assistance from the EFSF or the ESM.

Article 68 Procedure for preparing an ECB decision pursuant to Article 6(5)(b) of the SSM Regulation at the request of an NCA

1. The ECB shall, at the request of an NCA, assess whether or not it is necessary to exercise direct supervision in accordance with the SSM Regulation in respect of a less significant supervised entity or less significant supervised group in order to ensure the consistent application of high supervisory standards.

2. The NCA's request shall: (a) identify the less significant supervised entity or less significant supervised group in respect of which the NCA is of the view that the ECB should assume direct supervision, and (b) state why supervision of the less significant supervised entity or less significant supervised group by the ECB is necessary in order to ensure the consistent application of high supervisory standards.

3. The NCA's request shall be accompanied by a report indicating the supervisory history and risk profile of the relevant less significant supervised entity or less significant supervised group.

4. If the ECB does not agree with the NCA's request, it shall consult with the NCA concerned prior to its final assessment as to whether supervision by the ECB of the less significant supervised entity or less significant supervised group is necessary in order to ensure the consistent application of high supervisory standards.

5. If the ECB decides that direct supervision by the ECB of the less significant supervised entity or less significant supervised group is necessary in order to ensure the consistent application of high supervisory standards, it shall adopt an ECB decision in accordance with Title 2.

Article 69 Procedure for preparing ECB decisions pursuant to Article 6(5)(b) of the SSM Regulation on the ECB's own initiative

1. The ECB may request an NCA to provide a report setting out the supervisory history and risk profile of a less significant supervised entity or less significant supervised group. The ECB shall specify the date by which such report should be submitted to it.

2. The ECB shall consult with the NCA prior to its final assessment as to whether supervision of the less significant supervised entity or the less significant supervised group by the ECB is necessary in order to ensure the consistent application of high supervisory standards.

3. If the ECB concludes that direct supervision by the ECB of the less significant supervised entity or less significant supervised group is necessary in order to ensure the consistent application of high supervisory standards, it shall adopt an ECB decision in accordance with Title 2.

Title 9: Particular circumstances that may justify the classification of a supervised entity as less significant although the criteria for classification as significant are fulfilled

Article 70 Particular circumstances leading to the classification of a significant supervised entity as less significant

1. Particular circumstances, as referred to in the second and fifth subparagraphs of Article 6(4) of the SSM Regulation (hereinafter the 'particular circumstances') exist where there are specific and factual circumstances that make the classification of a supervised entity as significant inappropriate, taking into account the objectives and principles of the SSM Regulation and, in particular, the need to ensure the consistent application of high supervisory standards.

2. The term 'particular circumstances' shall be strictly interpreted.

Article 71 Assessment of the existence of particular circumstances

1. Whether particular circumstances exist that justify classifying what would otherwise be a significant supervised entity as less significant shall be determined on a case-by-case basis and specifically for the supervised entity or supervised group concerned, but not for categories of supervised entities.

2. Article 40 shall apply accordingly.

3. Articles 44 to 46 and Articles 48 and 49 shall apply accordingly. The ECB shall state in an ECB decision the reasons leading to its conclusion that particular circumstances exist.

Article 72 *Review*

1. The ECB shall, with the support of the relevant NCAs, review at least once a year whether particular circumstances continue to exist with respect to a supervised entity or a supervised group that is classified as less significant because of particular circumstances.

2. The supervised entity concerned shall provide any information and documents requested by the ECB in order to carry out a review as referred to in paragraph 1.

3. If the ECB considers that particular circumstances no longer exist it shall adopt an ECB decision addressed to the relevant supervised entity determining that it is classified as significant and that particular circumstances no longer exist.

4. Title 2 of Part IV shall apply accordingly.

PART V: COMMON PROCEDURES

Title 1: Cooperation with regard to an application for an authorisation to take up the business of a credit institution

Article 73 Notification of the ECB of an application for an authorisation to take up the business of a credit institution

1. An NCA that receives an application for an authorisation to take up the business of a credit institution to be established in a participating Member State shall notify the ECB of the receipt of such application within 15 working days.

2. The NCA shall also inform the ECB of the time limit within which a decision on the application has to be taken and notified to the applicant in accordance with the relevant national law.

3. If the application is not complete, the NCA, either at its own initiative or at the ECB's request, shall ask the applicant to provide the required additional information. The NCA shall send any such additional information that it receives to the ECB within 15 working days following receipt thereof by the NCA.

Article 74 NCAs' assessment of applications

The NCA to which an application is submitted shall assess whether the applicant complies with all conditions for authorisation laid down in the relevant national law of the NCA's Member State.

Article 75 NCAs' decisions rejecting an application

NCAs shall reject applications that do not comply with the conditions for authorisation laid down in the relevant national law and send a copy of their decision to the ECB.

Article 76 NCAs' draft decisions on the authorisation to take up the business of a credit institution

1. If the NCA is satisfied that the application complies with all conditions for authorisation laid down in the relevant national law, it shall prepare a draft decision proposing that the ECB grant the applicant authorisation to take up the business of a credit institution (hereinafter a 'draft authorisation decision').

2. The NCA shall ensure that the draft authorisation decision is notified to the ECB and the applicant at least 20 working days before the end of the maximum assessment period provided for by the relevant national law.

3. The NCA may propose attaching recommendations, conditions and/or restrictions to a draft authorisation decision in accordance with national and Union law. In such cases, the NCA shall be responsible for assessing compliance with the conditions and/or restrictions.

Article 77 ECB's assessment of applications and hearing of applicants

1. The ECB shall assess the application on the basis of the conditions for authorisation laid down in the relevant Union law. If, in its view, these conditions are not met, the ECB shall give the applicant the opportunity to comment in writing on the facts and objections relevant to the assessment, in accordance with Article 31.

2. If a meeting is considered necessary and in any other cases that are duly justified, the ECB may extend the maximum period for deciding on an application in accordance with Article 14(3) of the SSM Regulation. The extension shall be notified to the applicant in accordance with Article 35 of this Regulation.

Article 78 ECB decisions on applications

1. The ECB shall take a decision on a draft authorisation decision it receives from the NCA within 10 working days, unless a decision on the extension of the maximum period has been taken in accordance with Article 77(2). It may support the draft authorisation decision and thereby agree to the authorisation or object to the draft authorisation decision.

2. The ECB shall base its decision on its assessment of the application, the draft authorization decision and any comments provided by the applicant pursuant to Article 77.

3. If the ECB does not take a decision within the period referred to in paragraph 1, the draft authorisation decision prepared by the NCA shall be deemed to be adopted.

4. The ECB shall adopt a decision granting authorisation if the applicant complies with all

the conditions for the authorisation in accordance with the relevant Union law and national law of the Member State in which the applicant is established.

5. The decision granting authorisation shall cover the applicant's activities as a credit institution as provided for in the relevant national law , without prejudice to any additional requirements for authorisation under the relevant national law for activities other than the business of taking deposits or other repayable funds from the public and granting credits for its own account.

Article 79 Procedure for the lapsing of the authorisation

The authorisation lapses in the situations referred to in Article 18(a) of Directive 2013/36/EU where the relevant national law so provides. NCAs shall inform the ECB of the individual cases where an authorisation lapses. The ECB shall then make public the lapsing of the authorisation in accordance with the relevant national law, after having informed the relevant NCA and the supervised entity concerned.

Title 2: Cooperation with regard to the withdrawal of an authorisation

Article 80 NCAs' proposal to withdraw an authorisation

1. If the relevant NCA considers that a credit institution's authorisation should be withdrawn in whole or in part in accordance with relevant Union or national law, including a withdrawal at the credit institution's request, it shall submit to the ECB a draft decision proposing the withdrawal of the authorisation (hereinafter a 'draft withdrawal decision'), together with any relevant supporting documents.

2. The NCA shall coordinate with the national authority competent for the resolution of credit institutions (hereinafter the 'national resolution authority') with regard to any draft withdrawal decision that is relevant to the national resolution authority.

Article 81 ECB's assessment of a draft withdrawal decision

1. The ECB shall assess the draft withdrawal decision without undue delay. In particular, it shall take into account reasons for urgency put forward by the NCA.

2. The right to be heard, as provided for in Article 31, shall apply.

Article 82 Assessment on the ECB's own initiative and consultation of NCAs

1. If the ECB becomes aware of circumstances that may warrant the withdrawal of an authorisation, it shall assess, on its own initiative, whether the authorisation should be withdrawn in accordance with the relevant Union law.

2. The ECB may consult at any time with the relevant NCAs. If the ECB intends to withdraw an authorisation, it shall consult with the NCA of the Member State where the credit institution is established at least 25 working days before the date on which it plans to make its decision. In duly justified urgent cases, the time limit for the consultation may be reduced to five working days.

3. If the ECB intends to withdraw an authorisation, it shall inform the relevant NCAs of any comments provided by the credit institution. The credit institution's right to be heard, as provided for in Article 31, shall apply.

4. The ECB shall coordinate with the national resolution authority with regard to a proposal to withdraw an authorisation in accordance with Article 14(5) of the SSM Regulation. The ECB shall inform the NCA immediately after initiating contact with the national resolution authority.

Article 83 ECB decision on the withdrawal of an authorisation

1. The ECB shall take a decision on the withdrawal of an authorisation without undue delay. In doing so it may accept or reject the relevant draft withdrawal decision.

2. In taking its decision, the ECB shall take into account all of the following: (a) its assessment of the circumstances justifying withdrawal; (b) where applicable, the NCA's draft withdrawal decision; (c) consultation with the relevant NCA and, where the NCA is not the national resolution authority, the national resolution authority (together with the NCA, the 'national authorities'); (d) any comments provided by the credit institution pursuant to Articles 81(2) and 82(3).

3. The ECB shall also take a decision in the cases described in Article 84 if the relevant national resolution authority does not object to the withdrawal of the authorisation, or the ECB determines that proper actions necessary to maintain financial stability have not been implemented by the national authorities.

Article 84 Procedure in case of potential resolution measures to be taken by national authorities

1. If the national resolution authority notifies its objection to the ECB's intention to withdraw an authorisation, the ECB and the national resolution authority shall agree on a time period during which the ECB shall abstain from proceeding with the withdrawal of the authorisation. The ECB shall inform the NCA immediately after initiating contact with the national resolution authority in order to reach this agreement.

2. After the expiry of the agreed time period, the ECB shall assess whether it intends to proceed to withdraw the authorisation or to extend the agreed time period in accordance with Article 14(6) of the SSM Regulation, taking into account any progress made. The ECB shall consult with both the relevant NCA and the national resolution authority, if different from the NCA. The NCA shall inform the ECB of the measures taken by these authorities and its assessment of the consequences of a withdrawal.

3. If the national resolution authority does not object to the withdrawal of an authorisation, or the ECB determines that proper actions necessary to maintain financial stability have not been implemented by national authorities, then Article 83 shall apply.

Title 3: Cooperation with regard to the acquisition of qualifying holdings

Article 85 Notification to NCAs of the acquisition of a qualifying holding

1. An NCA that receives a notification of an intention to acquire a qualifying holding in a credit institution established in that participating Member State shall notify the ECB of such notification no later than five working days following the acknowledgement of receipt in accordance with Article 22(2) of Directive 2013/36/EU.

2. The NCA shall notify the ECB if it has to suspend the assessment period due to a request for additional information. The NCA shall send any such additional information to the ECB within 5 working days following receipt thereof by the NCA.

3. The NCA shall also inform the ECB of the date by which the decision to oppose or not to oppose the acquisition of a qualifying holding has to be notified to the applicant pursuant to the relevant national law.

Article 86 Assessment of potential acquisitions

1. The NCA to which an intention to acquire a qualifying holding in a credit institution is notified shall assess whether the potential acquisition complies with all the conditions laid down in the relevant Union and national law. Following this assessment, the NCA shall prepare a draft decision for the ECB to oppose or not to oppose the acquisition.

2. The NCA shall submit the draft decision to oppose or not to oppose the acquisition to the ECB at least 15 working days before the expiry of the assessment period as defined by the relevant Union law.

Article 87 ECB decision on acquisition

The ECB shall decide whether or not to oppose the acquisition on the basis of its assessment of the proposed acquisition and the NCA's draft decision. The right to be heard, as provided for in Article 31, shall apply.

Title 4: Notification of decisions on common procedures

Article 88 Procedures for notification of decisions

1. The ECB shall notify the parties of the following decisions without undue delay in accordance with Article 35:

(a) an ECB decision on the withdrawal of an authorisation as a credit institution;

(b) an ECB decision on the acquisition of a qualifying holding in a credit institution.

2. The ECB shall notify the relevant NCA without undue delay of any of the following decisions:

(a) an ECB decision on an application for authorisation as a credit institution;

(b) an ECB decision on the withdrawal of an authorisation as a credit institution;

(c) an ECB decision on the acquisition of a qualifying holding in a credit institution.

3. The NCA shall notify the applicant for authorisation of the following decisions:

(a) a draft authorisation decision;

(b) an NCA decision to reject the application for authorisation where the applicant does not comply with the conditions for authorisation set out in the relevant national law;

(c) an ECB decision to object to the draft authorisation decision referred to in (a);

(d) an ECB decision of authorisation.

4. The NCA shall notify the relevant national resolution authority of the ECB decision on the withdrawal of an authorisation as a credit institution.

5. The ECB shall notify the European Banking Authority (EBA) of every ECB decision to grant or to withdraw an authorisation as a credit institution as well as of each lapsing of an authorisation. In doing so, the ECB shall specify the reasons for the decisions on the withdrawal of an authorization or for the lapsing of an authorisation.

PART VI: PROCEDURES FOR THE SUPERVISION OF SIGNIFICANT SUPERVISED ENTITIES

Title 1: Supervision of significant supervised entities and assistance by NCAs

Article 89 Supervision of significant supervised entities

The ECB shall perform the direct supervision of significant supervised entities in accordance with the procedures set out in Part II, in particular in respect of the tasks and the composition of joint supervisory teams.

Article 90 Role of the NCAs in assisting the ECB

1. An NCA shall assist the ECB in the performance of its tasks under the conditions set out in the SSM Regulation and this Regulation, and shall, in particular, perform all the following activities:

(a) submit draft decisions to the ECB in respect of significant supervised entities established in its participating Member State, in accordance with Article 91;

(b) assist the ECB in preparing and implementing any acts relating to the exercise of the tasks conferred on the ECB by the SSM Regulation, including assisting in verification activities and the day-to-day assessment of the situation of a significant supervised entity;

(c) assist the ECB in enforcing its decisions, using when necessary the powers referred to in the third subparagraph of Article 9(1) and Article 11(2) of the SSM Regulation.

2. When assisting the ECB, an NCA shall follow the ECB's instructions in relation to significant supervised entities.

Article 91 Draft decisions to be prepared by NCAs for the ECB's consideration

1. In accordance with Article 6(3) and Article 6(7)(b) of the SSM Regulation, the ECB may request an NCA to prepare a draft decision regarding the exercise of the tasks referred to in Article 4 of the SSM Regulation for its consideration.

The request shall specify the time limit for sending the draft decision to the ECB.

2. An NCA may also, on its own initiative, submit a draft decision in respect of a significant supervised entity to the ECB for its consideration through the joint supervisory team.

Article 92 Exchange of information

The ECB and the NCAs shall, without undue delay, exchange information relating to significant supervised entities where there is a serious indication that those significant supervised entities can no longer be relied on to fulfil their obligations towards their creditors and, in particular, can no longer provide security for the assets entrusted to them by their depositors, or where there is a serious indication of circumstances that could lead to a determination that the credit institution concerned is unable to repay the deposits as referred to in Article 1(3)(i) of Directive 94/19/EC of the European Parliament and of the Council.[15] The ECB and the NCAs shall do so prior to a decision relating to such a determination.

Title 2: Compliance with fit and proper requirements for persons responsible for managing credit institutions

Article 93 Assessment of the suitability of members of the management bodies of significant supervised entities

1. To ensure that institutions have in place robust governance arrangements, and without

[15] Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes (OJ L 135, 31.5.94, p. 5).

prejudice to relevant Union and national law and Part V, a significant supervised entity shall notify the relevant NCA of any change to the members of its management bodies in their managerial and supervisory functions (hereinafter the 'managers') within the meaning of Articles 3(1)(7) and 3(2) of Directive 2013/36/EU, including the renewal of the managers' term of office. The relevant NCA shall notify the ECB of any such change without undue delay informing it of the time limit within which a decision has to be taken and notified in accordance with the relevant national law.

2. To assess the suitability of managers of significant supervised entities, the ECB shall have the supervisory powers that competent authorities have under the relevant Union and national law.

Article 94 On-going review of managers' suitability

1. A significant supervised entity shall inform the relevant NCA of any new facts that may affect an initial assessment of suitability or any other issue which could impact on the suitability of a manager without undue delay once these facts or issues are known to the supervised entity or the relevant manager. The relevant NCA shall notify the ECB of such new facts or issues without undue delay.

2. The ECB may initiate a new assessment based on the new facts or issues referred in paragraph 1 or if the ECB becomes aware of any new facts that may have an impact on the initial assessment of the relevant manager or any other issue which could impact on the suitability of a manager. The ECB shall then decide on the appropriate action in accordance with the relevant Union and national law and shall inform the relevant NCA of such action without undue delay.

Title 3: Other procedures to be applied by significant supervised entities

Article 95 Requests, notifications or applications by significant supervised entities

1. Without prejudice to the specific procedures provided for in particular in Part V and to its ordinary interaction with its NCA, a significant supervised entity shall address to the ECB all its requests, notifications or applications relating to the exercise of the tasks conferred on the ECB.

2. The ECB shall make any such request, notification or application available to the relevant NCA and may request the NCA to prepare a draft decision in accordance with Article 91.

3. In case of substantial changes compared to the authorisation given for the initial request, notification or application, the significant supervised entity shall address a new request, notification or application to the ECB in accordance with the procedure referred to in paragraph 1.

PART VII: PROCEDURES FOR THE SUPERVISION OF LESS SIGNIFICANT SUPERVISED ENTITIES

Title 1: NCAs' notification to the ECB of material NCA supervisory procedures and material draft supervisory decisions

Article 96 Deterioration of the financial situation of a less significant supervised entity

NCAs shall inform the ECB where the situation of any less significant supervised entity deteriorates rapidly and significantly, especially if such deterioration could lead to a request for direct or indirect financial assistance from the ESM, without prejudice to the application of Article 62.

Article 97 NCAs' notification to the ECB of material NCA supervisory procedures

1. To enable the ECB to exercise oversight over the functioning of the system, as laid down in Article 6(5)(c) of the SSM Regulation, NCAs shall provide the ECB with information relating to material NCA supervisory procedures concerning less significant supervised entities. The ECB shall define general criteria, in particular taking into account the risk situation and potential impact on the domestic financial system of the less significant supervised entity concerned, to determine for which less significant supervised entities which information shall be notified. The information shall be provided by the NCAs ex ante or in duly justified cases of urgency simultaneously to opening a procedure.

2. The material NCA supervisory procedures referred to in paragraph 1 shall consist of:

(a) the removal of members of the management boards of the less significant supervised entities and the appointment of special managers to take over the management of the less significant supervised entities; and

(b) the procedures which have a significant impact on the less significant supervised entity.

3. In addition to the information requirements set out by the ECB in accordance with this Article, the ECB may, at any time, request from NCAs information on the performance of the tasks carried out by them in respect of less significant supervised entities.

4. In addition to the information requirements set out by the ECB in accordance with this Article, NCAs shall, on their own initiative, notify the ECB of any other NCA supervisory procedure which:

(a) they consider material; or

(b) may negatively affect the reputation of the SSM.

5. If the ECB requests an NCA to further assess specific aspects of a material NCA supervisory procedure, this request shall specify which aspects are concerned. The ECB and the NCA shall respectively ensure that the other party has sufficient time to enable the procedure and the SSM as a whole to function efficiently.

Article 98 Notification by NCAs to the ECB of material draft supervisory decisions

1. To enable the ECB to exercise oversight over the functioning of the system, as laid down in Article 6(5)(c) of the SSM Regulation, NCAs shall send to the ECB draft supervisory decisions that fulfil the criteria laid down in paragraphs 2 and 3 where the draft decision concerns the less significant supervised entities for which the ECB considers that, based on the general criteria defined by the ECB regarding their risk situation and potential impact on the domestic financial system, the information shall be notified to it.

2. Subject to paragraph 1, draft supervisory decisions shall be sent to the ECB prior to being addressed to less significant supervised entities if such decisions:

(a) relate to the removal of members of the management boards of the less significant supervised entities and the appointment of special managers; or

(b) have a significant impact on the less significant supervised entity.

3. In addition to the information requirements laid down in paragraphs 1 and 2, NCAs shall transmit to the ECB any other draft supervisory decisions:

(a) on which the ECB's views are sought; or

(b) which may negatively affect the reputation of the SSM.

4. NCAs shall send draft decisions meeting the criteria laid down in paragraphs 1, 2 and 3, and that therefore are deemed material draft supervisory decisions, to the ECB at least 10 days in advance of the planned date of adoption of the decision. The ECB shall express its views on the draft decision within a reasonable time before the planned adoption of the decision. In cases of urgency, a reasonable time period for sending a draft decision which meets the criteria laid down in paragraphs 1, 2 and 3 to the ECB shall be defined by the relevant NCA.

Title 2: Ex-post reporting by NCAs to the ECB regarding less significant supervised entities

Article 99 General obligation of NCAs to report to the ECB

1. To enable the ECB to exercise oversight over the functioning of the SSM pursuant to Article 6(5)(c) of the SSM Regulation, and without prejudice to Chapter 1, the ECB may require NCAs to report to the ECB on a regular basis on the measures they have taken and on the performance of the tasks they are to carry out in accordance with Article 6(6) of the SSM Regulation. The ECB shall inform the NCAs annually of the categories of less significant supervised entities and the nature of the information required.

2. The requirements laid down in accordance with paragraph 1 shall be without prejudice to the ECB's right to make use of the powers referred to in Articles 10 to 13 of the SSM Regulation in respect of less significant supervised entities.

Article 100 Frequency and scope of reports to be submitted by NCAs to the ECB

NCAs shall submit to the ECB an annual report on less significant supervised entities, less significant supervised groups or categories of less significant supervised entities in accordance with the ECB's requirements.

PART VIII: COOPERATION BETWEEN THE ECB, NCAs AND NDAs WITH REGARD TO MACROPRUDENTIAL TASKS AND TOOLS

Title 1: Definition of macro-prudential tools

Article 101 General provisions

1. For the purpose of this Part, macro-prudential tools means any of the following instruments:

(a) the capital buffers within the meaning of Articles 130 to 142 of Directive 2013/36/EU;

(b) the measures for domestically authorised credit institutions, or a subset of those credit institutions pursuant to Article 458 of Regulation (EU) No 575/2013;

(c) any other measures to be adopted by NDAs or NCAs aimed at addressing systemic or macroprudential risks provided for, and subject to the procedures set out, in Regulation (EU) No 575/2013 and Directive 2013/36/ EU in the cases specifically set out in relevant Union law.

2. The macro-prudential procedures referred to in Articles 5(1) and (2) of the SSM Regulation shall not constitute ECB or NCA supervisory procedures within the meaning of this Regulation, without prejudice to Article 22 of the SSM Regulation in relation to decisions addressed to individual supervised entities.

Article 102 Application of macro-prudential tools by the ECB

The ECB shall apply the macro-prudential tools referred to in Article 101 in accordance with this Regulation and with Articles 5(2) and 9(2) of the SSM Regulation, and where the macro-prudential tools are provided for in a directive, subject to implementation of that directive into national law. If an NDA does not set a buffer rate, this does not prevent the ECB from setting a buffer requirement in accordance with this Regulation and Article 5(2) of the SSM Regulation.

Title 2: Procedural provisions for the use of macro-prudential tools

Article 103 List of NCAs and NDAs responsible for macro-prudential tools

The ECB shall collect from NCAs and NDAs of participating Member States information regarding the identity of the authorities designated for the respective macro-prudential tools referred to in Article 101 and the macro-prudential tools that these authorities can use.

Article 104 Exchange of information and cooperation in respect of the use of macro-prudential tools by an NCA or an NDA

1. In accordance with Article 5(1) of the SSM Regulation, the relevant NCA or NDA, when it intends to apply such tools, shall notify its intention to the ECB ten working days prior to taking such a decision. This notwithstanding, if an NCA or NDA intends to make use of a macro-prudential tool, it shall inform the ECB as early as possible of its identification of a macro-prudential or systemic risk for the financial system and, where possible, of the details of the intended tool. Such information shall as far as possible include specificities of the intended measure, including the intended date of application.

2. The notification of intent shall be provided by the NCA or NDA to the ECB.

3. If the ECB objects to the intended measure of an NCA or NDA, the ECB shall state its reasons for doing so within five working days after the day of receipt of the notification of intent. Such objection shall be in writing and state the reasons for the objection. The NCA or NDA shall duly consider the ECB's reasons prior to proceeding with the decision as appropriate.

Article 105 Exchange of information and cooperation in respect of the ECB's use of macro-prudential tools

1. In accordance with Article 5(2) of the SSM Regulation, when the ECB intends on its own initiative, or on the proposal of an NCA or NDA, to apply higher requirements for capital buffers or to apply more stringent measures aimed at addressing systemic or macro-prudential risks it shall cooperate closely with the NDAs in the Member States concerned and, in particular, notify its intention to the NDA or NCA 10 working days prior to taking such a decision. This notwithstanding, if the ECB intends to apply higher requirements for capital buffers or to apply more stringent measures aimed at addressing systemic or macro-prudential risks at the level of credit institutions subject to the procedures set out in Regulation (EU) No 575/2013 and Directive 2013/36/EU in the cases specifically set out in Union law, it shall inform the relevant NCA or NDA as early as possible of its identification of a macro-prudential or systemic risk to the financial system and, where possible, of the details of the intended tool. Such information shall, as far as possible, include the specificities of the intended measure, including the intended date of application.

2. If any of the concerned NCAs or NDAs objects to the intended measure of the ECB, it shall state its reasons to the ECB within five working days after the day of receipt of the ECB's notification of intent. Such objection shall be in writing and state the reasons for the objection. The ECB shall duly consider those

reasons prior to proceeding with the decision as appropriate.

PART IX: PROCEDURES FOR CLOSE COOPERATION

Title 1: General principles and common provisions

Article 106 Procedure for the establishment of a close cooperation

The ECB shall assess requests from non-euro area Member States for the establishment of a close cooperation in accordance with the procedure set out in Decision ECB/2014/5.[16]

Article 107 Principles to be applied when a close cooperation has been established

1. From the date on which an ECB decision pursuant to Article 7(2) of the SSM Regulation establishing close cooperation between the ECB and an NCA of a non-euro area Member State applies, and until the termination or suspension of such close cooperation, the ECB shall carry out the tasks referred to in Article 4(1) and (2) and Article 5 of the SSM Regulation in relation to supervised entities and groups established in the relevant participating Member State in close cooperation, in accordance with Article 6 of the SSM Regulation.

2. If a close cooperation has been established pursuant to Article 7(2) of the SSM Regulation the ECB and the NCA in close cooperation shall, in respect of significant supervised entities and groups and less significant supervised entities and groups established in the participating Member State in close cooperation, be in a position comparable to significant supervised entities and groups and less significant supervised entities and groups established in euro area Member States, taking into account that the ECB does not have directly applicable powers over significant supervised entities and groups and less significant supervised entities and groups established in the participating Member State in close cooperation.

3. In accordance with Article 6 of the SSM Regulation, the ECB may issue to an NCA in close cooperation instructions in respect of significant supervised entities and groups and only general instructions in respect of less significant supervised entities and groups.

4. Close cooperation shall end on the date on which the derogation pursuant to Article 139 TFEU is abrogated in respect of a participating Member State in close cooperation in accordance with Article 140(2) TFEU, and the provisions of this Part shall then cease to apply.

Article 108 Legal instruments related to supervision in connection with close cooperation

1. With respect to the tasks referred to in Article 4(1) and (2) and Article 5 of the SSM Regulation, the ECB may give instructions, make requests or issue guidelines.

2. If the ECB considers that a measure relating to the tasks referred to in Article 4(1) and (2) of the SSM Regulation should be adopted by the NCA in close cooperation in relation to a supervised entity or group, it shall address to that NCA:

(a) in respect of a significant supervised entity or significant supervised group, a general or specific instruction, a request or a guideline requiring the issuance of a supervisory decision in relation to that significant supervised entity or significant supervised group in the participating Member State in close cooperation, or

(b) in respect of a less significant supervised entity or less significant supervised group, a general instruction or a guideline.

3. If the ECB considers that a measure relating to the tasks referred to in Article 5 of the SSM Regulation should be adopted by the NCA or NDA in close cooperation, it may address to that NCA or NDA a general or specific instruction, a request or a guideline requiring the application of higher requirements for capital buffers or the application of more stringent measures aimed at addressing systemic or macro-prudential risks.

4. The ECB shall specify in the instruction, request or guideline a relevant time limit for the adoption of the measure by the NCA in close cooperation, which shall be no less than 48 hours, unless earlier adoption is necessary to prevent irreparable damage. When determining the time limit, the ECB shall take into account the administrative and procedural law with which the relevant NCA in close cooperation has to comply.

5. An NCA in close cooperation shall take all necessary measures to comply with the ECB's instructions, requests or guidelines and it shall

[16] Decision ECB/2014/5 of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (not yet published in the Official Journal).

inform the ECB without undue delay of the measures it has taken.

Title 2: Close cooperation in relation to Parts III, IV, V, VIII, X and XI

Article 109 Language regime under the regime of close cooperation

The arrangements referred to in Article 23 shall apply *mutatis mutandis* in respect of NCAs in close cooperation.

Article 110 Assessment of significance of credit institutions under the regime of close cooperation

1. The provisions of Part IV on the determination of the status of supervised entities or supervised groups as significant or less significant shall apply mutatis mutandis in respect of supervised entities and supervised groups in participating Member States in close cooperation in accordance with the provisions of this Article.

2. An NCA in close cooperation shall ensure that the procedures laid down in Part IV can be applied in respect of supervised entities and supervised groups established in its Member State.

3. In circumstances where Part IV provides for the ECB to address a decision to a supervised entity or supervised group, the ECB shall, instead of addressing a decision to a supervised entity or supervised group, issue instructions to the NCA in close cooperation and that NCA shall address a decision to a supervised entity or supervised group in accordance with such instructions.

Article 111 Common procedures under the regime of close cooperation

1. The provisions of Part V on common procedures shall apply mutatis mutandis in respect of supervised entities and supervised groups in the participating Member States in close cooperation, subject to the provisions of this Article.

2. An NCA in close cooperation shall ensure that the procedures laid down in Part V can be applied in respect of supervised entities established in its Member State. In particular, the NCA in close cooperation shall ensure that the ECB receives any information and documentation needed to carry out the tasks conferred on it by the SSM Regulation.

3. In circumstances where Part V provides for the ECB to address a decision to a supervised entity or supervised group, the ECB shall, instead of addressing a decision to a supervised entity or supervised group, issue instructions to the NCA in close cooperation and that NCA shall address a decision to a supervised entity or supervised group in accordance with such instructions.

4. In circumstances where Part V provides for the relevant NCA to prepare a draft decision, an NCA in close cooperation shall submit a draft decision to the ECB and request instructions.

Article 112 Macro-prudential tools under the regime of close cooperation

The provisions of Part VIII on cooperation between the ECB, NCAs and NDAs with regard to macro-prudential tasks and tools shall apply mutatis mutandis in respect of supervised entities and supervised groups in participating Member States in close cooperation.

Article 113 Administrative penalties under the regime of close cooperation

1. The provisions of Part X on administrative penalties shall apply mutatis mutandis in respect of supervised entities and supervised groups in participating Member States in close cooperation.

2. In circumstances where Article 18 of the SSM Regulation in connection with Part X of this Regulation provide for the ECB to address a decision to a supervised entity or supervised group, the ECB shall, instead of addressing a decision to a supervised entity or supervised group, issue instructions to the NCA in close cooperation and that NCA shall address a decision to a supervised entity or supervised group in accordance with such instructions.

3. In cases where Article 18 of the SSM Regulation or Part X of this Regulation provides for the relevant NCA to address a decision to a significant supervised entity or significant supervised group, an NCA in close cooperation shall initiate proceedings with a view to taking action to ensure that appropriate administrative penalties are imposed only on the ECB's instructions. The NCA in close cooperation shall inform the ECB once a decision has been adopted.

Article 114 Investigatory powers pursuant to Articles 10 to 13 of the SSM Regulation under the regime of close cooperation

1. The provisions of Part XI which relate to cooperation with regard to Articles 10 to 13 of the SSM Regulation shall apply mutatis mutandis in respect of supervised entities and supervised groups in participating Member States in close cooperation.

2. An NCA in close cooperation shall make use of the investigatory powers pursuant to Articles 10 to 13 of the SSM Regulation in accordance with the ECB's instructions.

3. An NCA in close cooperation shall provide the ECB with findings resulting from the use of the investigatory powers pursuant to Articles 10 to 13 of the SSM Regulation.

4. An NCA in close cooperation shall ensure that designated ECB staff members can participate as observers in any investigation pursuant to Articles 10 to 13 of the SSM Regulation.

Title 3: Close cooperation in respect of significant supervised entities

Article 115 Supervision of significant supervised entities in a participating Member State in close cooperation

1. Parts II and VI shall apply mutatis mutandis to significant supervised entities and significant supervised groups established in a participating Member State in close cooperation in accordance with the provisions of this Article.

2. An NCA in close cooperation shall ensure that the ECB receives all the information and reporting from and in respect of significant supervised entities and significant supervised groups which the NCA in close cooperation itself receives and which are necessary to carry out the tasks conferred on the ECB by the SSM Regulation.

3. A joint supervisory team shall be established to supervise each significant supervised entity or significant supervised group established in a participating Member State in close cooperation. The members of the joint supervisory team shall be appointed in accordance with Article 4. The NCA in close cooperation shall appoint the NCA sub-coordinator to act directly in relation to the significant supervised entity or significant supervised group, in accordance with the instructions of the JST coordinator.

4. An NCA in close cooperation shall ensure that designated ECB staff members are invited to participate in any on-site inspection carried out in respect of a significant supervised entity or significant supervised group. The ECB may determine the number of ECB staff members who will participate as observers.

5. In the context of consolidated supervision and colleges of supervisors, in circumstances where a parent undertaking is established in a euro area Member State or in a non-euro area participating Member State, the ECB, as competent authority, shall be the consolidating supervisor and shall chair the college of supervisors. The ECB shall invite the relevant NCA in close cooperation to appoint an NCA staff member as observer. The ECB may act by giving instructions to the relevant NCA in close cooperation.

Article 116 Decisions in respect of significant supervised entities and significant supervised groups

1. Without prejudice to the powers of NCAs in respect of tasks not conferred on the ECB pursuant to the SSM Regulation, an NCA in close cooperation shall adopt decisions in respect of significant supervised entities and significant supervised groups in its Member State only on the ECB's instructions. The NCA in close cooperation may also request instructions from the ECB.

2. An NCA in close cooperation shall make any decision in respect of a significant supervised entity or significant supervised group available to the ECB immediately.

3. An NCA in close cooperation shall inform the ECB in relation to both: (a) decisions it adopts under its powers in respect of tasks not conferred on the ECB pursuant to the SSM Regulation; and (b) decisions it adopts pursuant to the ECB's instructions, or as provided for in this Part.

Title 4: Close cooperation in respect of less significant supervised entities and less significant supervised groups

Article 117 Supervision of less significant supervised entities and less significant supervised groups

1. Part VII shall apply *mutatis mutandis* to less significant supervised entities and less significant supervised groups in participating Member States in close cooperation in accordance with the following provisions.

2. For the purposes of ensuring the consistency of supervisory outcomes within the SSM, the ECB may issue general instructions and guidelines and make requests to an NCA in

close cooperation requiring it to adopt a supervisory decision in respect of less significant supervised entities or less significant supervised groups established in the participating Member State in close cooperation. Such general instructions, guidelines or requests may refer to groups or categories of credit institutions.

3. The ECB may also address to an NCA in close cooperation a request to further assess aspects of a material NCA procedure as provided for in Article 6(7)(c)(ii) of the SSM Regulation.

Title 5: Procedure in case of disagreement of a participating Member State in close cooperation

Article 118 Procedure in case of disagreement with the Supervisory Board's draft decision pursuant to Article 7(8) of the SSM Regulation

1. The ECB shall inform the NCA in close cooperation of the Supervisory Board's complete draft decision in relation to a supervised entity or supervised group located in a participating Member State in close cooperation, subject to confidentiality requirements under Union law.

2. If the NCA in close cooperation disagrees with the Supervisory Board's complete draft decision, it shall, within five working days of receipt of the complete draft decision, notify the Governing Council in writing of the reasons for its disagreement.

3. The Governing Council shall decide on the matter within five working days of receipt of such notification, taking the reasons stated for the disagreement fully into account, and it shall provide the NCA in close cooperation with written reasons for its decision.

4. A participating Member State in close cooperation may request the ECB to terminate its close cooperation with immediate effect and shall then not be bound by any ensuing decision of the Governing Council.

Article 119 Procedure in case of disagreement with an objection of the Governing Council to a Supervisory Board's draft decision pursuant to Article 7(7) of the SSM Regulation

1. The ECB shall inform an NCA in close cooperation of any objection of the Governing Council to a complete draft decision of the Supervisory Board.

2. If the NCA in close cooperation disagrees with the Governing Council's objection to the Supervisory Board's complete draft decision it shall, within five working days of receiving the Governing Council's objection, notify the ECB of its reasons for its disagreement.

3. The Governing Council shall give its written opinion on the reasoned disagreement expressed by the NCA in close cooperation within 30 days of receipt of the reasoned disagreement and, stating its reasons for doing so, shall either confirm or withdraw its objection. The ECB shall inform the NCA in close cooperation thereof.

4. If the Governing Council confirms its objection, the NCA in close cooperation may, within five days of being informed that the Governing Council has confirmed its objection, notify the ECB that it will not be bound by any decision taken following amendment of the initial complete draft decision to which the Governing Council objects.

The ECB shall then consider suspending or terminating the close cooperation with the NCA in close cooperation, taking due account of supervisory effectiveness, and shall take a decision in that respect. The ECB shall take into account, in particular, the factors referred to in Article 7(7) of the SSM Regulation.

PART X: ADMINISTRATIVE PENALTIES

Title 1: Definitions and relationship to Council Regulation (EC) No 2532/98[17]

Article 120 Definition of administrative penalties

For the purposes of this Part, 'administrative penalties' means either of the following:

(a) administrative pecuniary penalties provided for and imposed under Article 18(1) of the SSM Regulation;

(b) fines and periodic penalty payments provided for in Article 2 of Regulation (EC) No 2532/98 and imposed under Article 18(7) of the SSM Regulation.

Article 121 Relationship to Regulation (EC) No 2532/98

1. For the purposes of the procedures provided for in Article 18(1) of the SSM Regulation, the

[17] Council Regulation (EC) No 2532/98 of 23 November 1998 concerning the powers of the European Central Bank to impose sanctions (OJ L 318, 27.11.1998, p. 4).

procedural rules contained in this Regulation shall apply, in accordance with Article 18(4) of the SSM Regulation.

2. For the purposes of the procedures provided for in Article 18(7) of the SSM Regulation, the procedural rules contained in this Regulation shall complement those laid down in Regulation (EC) No 2532/98 and shall be applied in accordance with Articles 25 and 26 of the SSM Regulation.

Article 122 ECB powers to impose administrative penalties under Article 18(7) of the SSM Regulation

The ECB shall impose administrative penalties, as defined in Article 120(b), if there is a failure to comply with obligations under ECB regulations or decisions on:

(a) significant supervised entities, or

(b) less significant supervised entities where the relevant ECB regulations or decisions impose obligations on less significant supervised entities vis-à-vis the ECB.

Title 2: Procedural rules for the imposition of administrative penalties, other than periodic penalty payments, on supervised entities in euro area Member States

Article 123 Establishment of an independent investigating unit

1. The ECB shall establish an internal independent investigating unit (hereinafter the 'investigating unit') which shall be composed of investigating officers designated by the ECB.

2. The investigating officers shall not be involved, and shall not for the two years before taking up the position of investigating officer, have been involved in the direct or indirect supervision or authorisation of the relevant supervised entity.

3. The investigating officers shall perform their investigative functions independently of the Supervisory Board and Governing Council and shall not take part in the deliberations of the Supervisory Board and Governing Council.

Article 124 Referral of alleged breaches to the investigating unit

Where the ECB, in carrying out its tasks under the SSM Regulation, considers that there is reason to suspect that one or more breaches

(a) under relevant directly applicable Union law, as referred to in Article 18(1) of the SSM Regulation, are being, or have been, committed by a significant supervised entity having its head office in a euro area Member State, or

(b) of an ECB regulation or decision as referred to in Article 18(7) of the SSM Regulation are being or have been, committed by a supervised entity having its head office in an euro area Member State,

the ECB shall refer the matter to the investigating unit.

Article 125 Powers of the investigating unit

1. For the purpose of investigating alleged breaches as referred to in Article 124, the investigating unit may exercise the powers granted to the ECB under the SSM Regulation.

2. Where a request is made to the supervised entity concerned under the powers granted to the ECB pursuant to the SSM Regulation in the context of an investigation, the investigating unit shall specify the subject matter and the purpose of the investigation.

3. When carrying out its tasks, the investigating unit shall have access to all documents and information gathered by the ECB and, where appropriate, by the relevant NCAs in the course of their supervisory activities.

Article 126 Procedural rights

1. On completion of an investigation and before a proposal for a complete draft decision is prepared and submitted to the Supervisory Board, the investigating unit shall notify the supervised entity concerned in writing of the findings under the investigation carried out and of any objections raised thereto.

2. In the notification referred to in paragraph 1, the investigating unit shall inform the supervised entity concerned of its right to make submissions in writing to the investigating unit on the factual results and the objections raised against the entity as set out therein, including the individual provisions which have been allegedly infringed, and it shall set a reasonable time limit for receipt of such submissions. The ECB shall not be obliged to take into account written submissions received after the time limit set by the investigating unit has expired.

3. The investigating unit may also, following notification in accordance with paragraph 1, invite the supervised entity concerned to attend an oral hearing. The parties subject to

investigation may be represented and/or assisted by lawyers or other qualified persons at the hearing. Oral hearings shall not be held in public.

4. The right of access to the file of the investigating unit by the supervised entity under investigation shall be determined in accordance with Article 32.

Article 127 Examination of the file by the Supervisory Board

1. If an investigating unit considers that an administrative penalty should be imposed on a supervised entity, the investigating unit shall submit a proposal for a complete draft decision to the Supervisory Board, determining that the supervised entity concerned has committed a breach and specifying the administrative penalty to be imposed. The investigating unit shall also submit its file on the investigation to the Supervisory Board.

2. The investigating unit shall base its proposal for a complete draft decision only on facts and objections on which the supervised entity has had the opportunity to comment.

3. If the Supervisory Board considers that the file submitted by the investigating unit is incomplete, it may return the file to the investigating unit together with a reasoned request for additional information. Article 125 shall apply accordingly.

4. If the Supervisory Board, on the basis of a complete file, agrees with the proposal for a complete draft decision of the investigating unit in respect of one or more breaches and the factual basis for such decision, it shall adopt the complete draft decision proposed by the investigating unit regarding the breach or breaches it agrees have taken place. To the extent that the Supervisory Board does not agree with the proposal, a decision shall be taken pursuant to the relevant paragraphs of this Article.

5. If the Supervisory Board, on the basis of a complete file, considers that the facts described in the proposal for a complete draft decision as referred to in paragraph 1 do not appear to reveal sufficient evidence of a breach as referred to in Article 124, it may adopt a complete draft decision closing the case.

6. If the Supervisory Board, on the basis of a complete file, agrees with the determination in the proposal for a complete draft decision of the investigating unit that the supervised entity concerned has committed a breach, but disagrees with the proposed recommendation concerning administrative penalties, it shall adopt the complete draft decision, specifying the administrative penalty it considers appropriate.

7. If the Supervisory Board, on the basis of a complete file, does not agree with the proposal of the investigating unit, but concludes that a different breach has been committed by a supervised entity, or that there is a different factual basis for the proposal of the investigating unit, it shall inform the supervised entity concerned in writing of its findings and of the objections raised against the supervised entity concerned. Article 126(2) to (4) shall apply accordingly with regard to the Supervisory Board.

8. The Supervisory Board shall prepare a complete draft decision determining whether or not the supervised entity concerned has committed a breach and specifying the administrative penalties to be imposed, if any.

9. Complete draft decisions adopted by the Supervisory Board and to be proposed to the Governing Council shall be based only on facts and objections on which the supervised entity has had the opportunity to comment.

Article 128 Definition of total annual turnover for the purpose of determining the upper limit for administrative pecuniary penalties

The total annual turnover as referred to in Article 18(1) of the SSM Regulation shall mean the annual turnover, as defined in Article 67 of Directive 2013/36/EU, of a supervised entity according to the most recent available annual financial accounts of such supervised entity. Where the supervised entity that has committed the breach belongs to a supervised group, the relevant total annual turnover shall be the total annual turnover resulting from the most recent available consolidated annual financial accounts of the supervised group.

Title 3: Periodic penalty payments

Article 129 *Procedural rules applicable to periodic penalty payments*

1. In the event of a continuing breach of a regulation or supervisory decision of the ECB, the ECB may impose a periodic penalty payment with a view to compelling the persons concerned to comply with the regulation or supervisory decision. The ECB shall apply the procedural rules of Article 22 of the SSM

Regulation and Title 2 of Part III of this Regulation.

2. A periodic penalty payment shall be effective and proportionate. The periodic penalty payment shall be calculated for each day of infringement until the person concerned complies with the ECB regulation or supervisory decision concerned.

3. The upper limits for periodic penalty payments shall be as specified in Regulation (EC) No 2532/98. The relevant period shall begin to run on the date stipulated in the decision imposing the periodic penalty payment. The earliest date stipulated in the decision shall be the date on which the person concerned is notified in writing of the ECB's reasons for imposing a periodic penalty payment.

4. Periodic penalty payments may be imposed for periods of no longer than six months following the date specified in the decision referred to in paragraph 3.

Title 4: Time limits

Article 130 Limitation periods for imposing administrative penalties

1. The ECB's power to impose administrative penalties on supervised entities shall be subject to a limitation period of five years, which shall begin to run on the day on which the breach is committed. In the case of on-going or repeated breaches, the limitation period shall begin to run on the day on which the breach ceases.

2. Any action taken by the ECB for the purposes of the investigation or proceedings in respect of a breach under Article 124 shall cause the limitation period for imposing administrative pecuniary penalties to be interrupted. The limitation period shall be interrupted with effect from the date on which the action is notified to the supervised entity concerned.

3. Each interruption shall cause the limitation period to begin to run afresh. However, the limitation period shall expire at the latest on the day on which a period equal to twice the duration of the limitation period has elapsed without the ECB having imposed an administrative penalty. That period shall be extended by any period of time for which the limitation period is suspended pursuant to paragraph 5.

4. The limitation period for imposing administrative penalties shall be suspended for any period during which the decision of the ECB's Governing Council is subject to review proceedings before the Administrative Board of Review or appeal proceedings before the Court of Justice.

5. The limitation period shall also be suspended for such period as criminal proceedings are pending against the supervised entity in connection with the same facts.

Article 131 Limitation periods for the enforcement of administrative penalties

1. The ECB's power to enforce a decision taken pursuant to Article 18(1) and (7) of the SSM Regulation shall be subject to a limitation period of five years, which shall begin to run on the date of adoption of the decision in question.

2. Any action of the ECB designed to enforce payment or payment terms and conditions under the administrative penalty concerned shall cause the limitation period for the enforcement of administrative penalties to be interrupted.

3. Each interruption shall cause the limitation period to begin to run afresh.

4. The limitation period for the enforcement of administrative penalties shall be suspended for such period as:

(a) time to pay is allowed;

(b) enforcement of payment is suspended pursuant to a decision of either the ECB's Governing Council or the Court of Justice.

Title 5: Publication of decisions and exchange of information

Article 132 Publication of decisions regarding *administrative penalties*

1. The ECB shall publish on its website without undue delay, and after the decision has been notified to the supervised entity concerned, any decision imposing an administrative penalty, as defined in Article 120, on a supervised entity in a participating Member State, including information on the type and nature of the breach and the identity of the supervised entity concerned, unless publication in this manner would either:

(a) jeopardise the stability of the financial markets or an on-going criminal investigation; or

(b) cause, insofar as it can be determined, disproportionate damage to the supervised entity concerned.

In these circumstances, decisions regarding administrative penalties shall be published on an anonymised basis. Alternatively, where such circumstances are likely to cease within a reasonable period of time, publication under this paragraph may be postponed for such period of time.

2. If an appeal to the Court of Justice in respect of a decision under paragraph 1 is pending, the ECB shall, without undue delay, also publish on its official website information on the status of the appeal in question and the outcome thereof.

3. The ECB shall ensure that information published under paragraphs 1 and 2 remains on its official website for at least five years.

Article 133 Informing the EBA

Subject to the professional secrecy requirements referred to in Article 27 of the SSM Regulation, the ECB shall inform the EBA of all administrative penalties, as defined in Article 120, which are imposed on a supervised entity in a euro area Member State, including any appeal in relation to such penalties and the outcome thereof.

Title 6: Cooperation between the ECB and NCAs in euro area Member States under Article 18(5) of the SSM Regulation

Article 134 Significant supervised entities

1. In respect of significant supervised entities, an NCA shall open proceedings only at the request of the ECB where necessary for the purpose of carrying out the tasks conferred on the ECB under the SSM Regulation, with a view to taking action to ensure that appropriate penalties are imposed in cases not covered by Article 18(1) of the SSM Regulation. Such cases include the application of:

(a) non-pecuniary penalties in the event of a breach of directly applicable Union law by legal or natural persons, as well as any pecuniary penalties in the event of a breach of directly applicable Union law by natural persons;

(b) any pecuniary or non-pecuniary penalties in the event of a breach by legal or natural persons of any national law transposing relevant Union directives;

(c) any pecuniary or non-pecuniary penalties to be imposed in accordance with relevant national legislation which confers specific powers on the NCAs in euro area Member States which are currently not required by the relevant Union law.

The provisions of this paragraph shall be without prejudice to the possibility for an NCA to open proceedings on its own initiative regarding the application of national law for tasks not conferred on the ECB.

2. An NCA may ask the ECB to request it to open proceedings in the cases referred to in paragraph 1.

3. An NCA of a participating Member State shall notify the ECB of the completion of a penalty procedure initiated at the request of the ECB pursuant to paragraph 1. In particular, the ECB shall be informed of the penalties imposed, if any.

Article 135 Reporting in respect of less significant supervised entities

The relevant NCA shall notify the ECB on a regular basis of all administrative penalties imposed on less significant supervised entities in connection with the exercise of its supervisory tasks.

Title 7 – Criminal offences

Article 136 Evidence of facts potentially giving rise to a criminal offence

Where, in carrying out its tasks under the SSM Regulation, the ECB has reason to suspect that a criminal offence may have been committed, it shall request the relevant NCA to refer the matter to the appropriate authorities for investigation and possible criminal prosecution, in accordance with national law.

Title 8: Proceeds from penalties

Article 137 Proceeds from penalties

The proceeds from administrative penalties imposed by the ECB under Article 18(1) and (7) of the SSM Regulation shall be the ECB's property.

PART XI: ACCESS TO INFORMATION, REPORTING, INVESTIGATIONS AND ON-SITE INSPECTIONS

Title 1: General principles

Article 138 Cooperation between the ECB and NCAs as regards the powers referred to in Articles 10 to 13 of the SSM Regulation

The provisions laid down in this Part shall apply to significant supervised entities. They shall also apply to less significant supervised entities if the ECB decides, pursuant to Article 6(5)(d) of the

SSM Regulation, to make use of the powers referred to in Articles 10 to 13 of the SSM Regulation with respect to a less significant supervised entity. This shall however be without prejudice to the NCAs' competence to supervise less significant supervised entities directly pursuant to Article 6(6) of the SSM Regulation.

Title 2: Cooperation in respect of requests for information

Article 139 Ad-hoc requests for information under Article 10 of the SSM Regulation

1. In accordance with Article 10 of the SSM Regulation and subject to and in compliance with relevant Union law, the ECB may require a legal or natural person referred to in Article 10(1) thereof to provide all information that is necessary to exercise the tasks conferred on it by the SSM Regulation. The ECB shall specify the information concerned and a reasonable time limit within which it is to be provided to the ECB.

2. Before requiring information to be provided in accordance with Article 10(1) of the SSM Regulation, the ECB shall first take account of information already available to NCAs.

3. The ECB shall make available to the relevant NCA a copy of any information received from the legal or natural person to whom the request for information has been addressed.

Title 3: Reporting

Article 140 Tasks related to supervisory reporting to competent authorities

1. The ECB shall be responsible for ensuring compliance with relevant Union law which imposes requirements on credit institutions in the field of reporting to competent authorities.

2. For this purpose, the ECB shall have the tasks and powers with regard to significant supervised entities as laid down in relevant Union law on supervisory reporting. NCAs shall have the tasks and powers with regard to less significant supervised entities as laid down in relevant Union law on reporting to competent authorities.

3. Notwithstanding paragraph 2 and unless provided otherwise, each supervised entity shall communicate to its relevant NCA the information to be reported on a regular basis in accordance with relevant Union law. Unless specifically otherwise provided for, all information reported by supervised entities shall be submitted to the NCAs. They shall perform the initial data checks and make the information available to the ECB.

4. The ECB shall organise the processes relating to collection and quality review of data reported by supervised entities subject to, and in compliance with, relevant Union law and EBA implementing technical standards.

Article 141 Requests for information at recurring intervals under Article 10 of the SSM Regulation

1. In accordance with Article 10 of the SSM Regulation, in particular the power of the ECB to require information to be provided at recurring intervals and in specified formats for supervisory and related statistical purposes, and subject to and in compliance with relevant Union law, the ECB may require supervised entities to report additional supervisory information whenever such information is necessary for the ECB to carry out the tasks conferred on it by the SSM Regulation. Subject to the conditions set out in relevant Union law, the ECB may specify in particular the categories of information that should be reported as well as the processes, formats, frequencies and time limits for provision of the information concerned.

2. If the ECB requires legal or natural persons as specified in Article 10(1) of the SSM Regulation to provide information at recurring intervals, Article 140(3) and (4) of this Regulation shall apply accordingly.

Title 4 – Cooperation with regard to general investigations

Article 142 Launch of a general investigation under Article 11 of the SSM Regulation

The ECB shall conduct an investigation of any legal or natural person referred to in Article 10(1) of the SSM Regulation on the basis of an ECB decision. Such decision shall specify all of the following:

(a) the legal basis for the decision and its purpose;

(b) the intention to exercise the powers laid down in Article 11(1) of the SSM Regulation;

(c) the fact that any obstruction of the investigation by the person being investigated constitutes a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation.

Title 5: On-site inspections

Article 143 ECB decision to conduct an on-site inspection under Article 12 of the SSM Regulation

1. Pursuant to Article 12 of the SSM Regulation, in order to carry out the tasks assigned to it by the SSM Regulation, the ECB shall appoint on-site inspection teams as laid down in Article 144 to conduct all necessary on-site inspections on the premises of a legal person as referred to in Article 10(1) of the SSM Regulation.

2. Without prejudice to Article 142 and pursuant to Article 12(3) of the SSM Regulation, on-site inspections shall be conducted on the basis of an ECB decision, which shall at a minimum specify the following:

a) the subject matter and the purpose of the on-site inspection; and

b) the fact that any obstruction to the on-site inspection by the legal person subject thereto shall constitute a breach of an ECB decision within the meaning of Article 18(7) of the SSM Regulation, without prejudice to national law as laid down in Article 11(2) of the SSM Regulation.

3. If the on-site inspection follows an investigation conducted on the basis of an ECB decision, as referred to in Article 142, and provided that the on-site inspection has the same purpose and scope as the investigation, the officials and other persons authorised by the ECB and by an NCA shall be granted access to the business premises and land of the legal person subject to the investigation on the basis of the same decision, in accordance with Article 12(2) and (4) of the SSM Regulation and without prejudice to Article 13 thereof.

Article 144 Establishment and composition of on-site inspection teams

1. The ECB shall be in charge of the establishment and the composition of on-site inspection teams with the involvement of NCAs, in accordance with Article 12 of the SSM Regulation.

2. The ECB shall designate the head of the on-site inspection team from among ECB and NCA staff members.

3. The ECB and NCAs shall consult with each other and agree on the use of NCA resources with regard to the on-site inspection teams.

Article 145 Procedure and notification of an on-site inspection

1. The ECB shall notify the legal person subject to an on-site inspection of the ECB decision referred to in Article 143(2), and of the identity of the members of the on-site inspection team, at least five working days before the start of the on-site inspection. It shall notify the NCA of the Member State where the on-site inspection is to be conducted at least one week before notifying the legal person subject to the on-site inspection of such inspection.

2. If the proper conduct and efficiency of the inspection so require, the ECB may carry out an on-site inspection without notifying the supervised entity concerned beforehand. The NCA shall be notified as soon as possible before the start of such on-site inspection.

Article 146 Conduct of the on-site inspections

1. Those carrying out the on-site inspection shall follow the instructions of the head of the on-site inspection team.

2. Where the entity subject to the on-site inspection is a significant supervised entity, the head of the on-site inspection team shall be responsible for the coordination between the on-site inspection team and the joint supervisory team in charge of the supervision of that significant supervised entity.

PART XII: TRANSITIONAL AND FINAL PROVISIONS

Article 147 Start of direct supervision by the ECB when the ECB assumes its tasks for the first time

1. At least two months before 4 November 2014, the ECB shall address a decision to each supervised entity in respect of which it assumes the tasks conferred on it by the SSM Regulation confirming that it is a significant supervised entity. For entities that are members of a significant supervised group, the ECB shall notify the ECB decision to the supervised entity at the highest level of consolidation within the participating Member States and shall ensure that all supervised entities within the significant supervised group are duly informed. These decisions shall take effect from 4 November 2014.

2. Notwithstanding paragraph 1, if the ECB starts carrying out the tasks conferred on it before 4 November 2014, it shall address a decision to the entity concerned and to the relevant NCAs. Unless otherwise provided for

therein, such decision shall take effect on notification. The relevant NCAs shall be informed in advance of the intention to issue such a decision as soon as possible.

3. Prior to adopting a decision pursuant to paragraph 1, the ECB shall provide the relevant supervised entity with an opportunity to make submissions in writing.

Article 148 Defining the format of the report on supervisory history and risk profile to be provided by NCAs to the ECB

1. The NCAs shall, by 4 August 2014 at the latest, communicate to the ECB the identity of the credit institutions they have authorised as well as a report on these credit institutions in a format specified by the ECB.

2. Notwithstanding paragraph 1, if the ECB starts carrying out the tasks conferred on it before 4 November 2014, it may request NCAs to communicate to the ECB the identity of the relevant credit institutions as well as a report in a format specified by the ECB within a reasonable time limit, which shall be stated in the request.

Article 149 Continuity of existing procedures

1. Unless the ECB decides otherwise, if an NCA has initiated supervisory procedures for which the ECB becomes competent on the basis of the SSM Regulation, and this occurs before 4 November 2014, then the procedures laid down in Article 48 shall apply.

2. By derogation from Article 48, this Article shall apply to common procedures.

Article 150 Supervisory decisions taken by *NCAs*

Without prejudice to the exercise by the ECB of the powers conferred on it by the SSM Regulation, supervisory decisions taken by NCAs before 4 November 2014 shall remain unaffected.

Article 151 Member States whose currency becomes the euro

1. Subject to paragraph 2, in circumstances where a derogation pursuant to Article 139 TFEU is abrogated for a Member State in accordance with Article 140(2) TFEU, Articles 148 to 150 shall apply accordingly in respect of supervisory procedures or decisions initiated or taken by the NCA of such Member State.

2. The reference to 4 November 2014 in Articles 149 and 150 shall be construed as a reference to the date on which the euro is adopted in the relevant Member State.

Article 152 Continuity of existing arrangements

All existing cooperation arrangements with other authorities entered into by an NCA prior to 4 November 2014 that cover at least in part tasks transferred to the ECB by the SSM Regulation shall continue to apply. The ECB may decide to participate in such existing cooperation arrangements in accordance with the procedure applicable to the arrangements in question or establish new cooperation arrangements with third parties for the tasks transferred to it by the SSM Regulation. An NCA shall continue to apply existing cooperation arrangements only to the extent they are not replaced by ECB cooperation arrangements. Where necessary for the execution of the existing cooperation arrangements, the NCA shall be responsible for assisting the ECB, in particular by exercising its rights and performing its responsibilities under the arrangements in coordination with the ECB.

Article 153 Final provisions

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Frankfurt am Main, 16 April 2014.

II.3 PROVISION OF FINANCIAL ASSISTANCE TO MEMBER STATES

§16. Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L 118, December 12th, 2010, pp. 1-4

Having regard to the Treaty on the Functioning of the European Union (TFEU), and in particular Article 122(2) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) Article 122(2) of the Treaty foresees the possibility of granting Union financial assistance to a Member State in difficulties or seriously threatened with severe difficulties caused by exceptional occurrences beyond its control.

(2) Such difficulties may be caused by a serious deterioration in the international economic and financial environment.

(3) The unprecedented global financial crisis and economic downturn that have hit the world over the last two years have seriously damaged economic growth and financial stability and provoked a strong deterioration in the deficit and debt positions of the Member States.

(4) The deepening of the financial crisis has led to a severe deterioration of the borrowing conditions of several Member States beyond what can be explained by economic fundamentals. At this point, this situation, if not addressed as a matter of urgency, could present a serious threat to the financial stability of the European Union as a whole.

(5) In order to address this exceptional situation beyond the control of the Member States, it appears necessary to put in place immediately a Union stabilisation mechanism to preserve financial stability in the European Union. Such a mechanism should allow the Union to respond in a coordinated, rapid and effective manner to acute difficulties in a particular Member State. Its activation will be in the context of a joint EU/International Monetary Fund (IMF) support.

(6) Given their particular financial implications, the decisions to grant Union financial assistance pursuant to this Regulation require the exercise of implementing powers, which should be conferred on the Council.

(7) Strong economic policy conditions should be imposed in case of activation of this mechanism with a view to preserving the sustainability of the public finances of the beneficiary Member State and restoring its capacity to finance itself on the financial markets.

(8) The Commission should regularly review whether the exceptional circumstances threatening the financial stability of the European Union as a whole still exist.

(9) The existing facility providing medium-term financial assistance for non-euro-area Member States, as established by Council Regulation (EC) No 332/2002,[1] should remain in place,

HAS ADOPTED THIS REGULATION:

Article 1 Aim and scope

With a view to preserving the financial stability of the European Union, this Regulation establishes the conditions and procedures under which Union financial assistance may be granted to a Member State which is experiencing, or is seriously threatened with, a severe economic or financial disturbance caused by exceptional occurrences beyond its control, taking into account the possible application of the existing facility providing medium-term financial assistance for non-euro-area Member States' balances of payments, as established by Regulation (EC) No 332/2002.

Article 2 Form of the Union financial assistance

1. Union financial assistance for the purposes of this Regulation shall take the form of a loan or of a credit line granted to the Member State concerned.

To this end, in accordance with a Council decision pursuant to Article 3, the Commission shall be empowered on behalf of the European Union to contract borrowings on the capital markets or with financial institutions.

2. The outstanding amount of loans or credit lines to be granted to Member States under this Regulation shall be limited to the margin

[1] Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments (OJ L 53, 23.2.2002, p. 1).

available under the own resources ceiling for payment appropriations.

Article 3 Procedure

1. The Member State seeking Union financial assistance shall discuss with the Commission, in liaison with the European Central Bank (ECB), an assessment of its financial needs and submit a draft economic and financial adjustment programme to the Commission and the Economic and Financial Committee.

2. Union financial assistance shall be granted by a decision adopted by the Council, acting by a qualified majority on a proposal from the Commission.

3. The decision to grant a loan shall contain:

(a) the amount, the average maturity, the pricing formula, the maximum number of instalments, the availability period of the Union financial assistance and the other detailed rules needed for the implementation of the assistance;

(b) the general economic policy conditions which are attached to the Union financial assistance with a view to re-establishing a sound economic or financial situation in the beneficiary Member State and to restoring its capacity to finance itself on the financial markets; these conditions will be defined by the Commission, in consultation with the ECB; and

(c) an approval of the adjustment programme prepared by the beneficiary Member State to meet the economic conditions attached to the Union financial assistance.

4. The decision to grant a credit line shall contain:

(a) the amount, the fee for the availability of the credit line, the pricing formula applicable for the release of funds and the availability period of the Union financial assistance and the other detailed rules needed for the implementation of the assistance;

(b) the general economic policy conditions which are attached to the Union financial assistance with a view to re-establishing a sound economic or financial situation in the beneficiary Member State; these conditions will be defined by the Commission, in consultation with the ECB; and

(c) an approval of the adjustment programme prepared by the beneficiary Member State to meet the economic conditions attached to the Union financial assistance.

5. The Commission and the beneficiary Member State shall conclude a Memorandum of Understanding detailing the general economic policy conditions laid down by the Council. The Commission shall communicate the Memorandum of Understanding to the European Parliament and to the Council.

6. The Commission shall re-examine, in consultation with the ECB, the general economic policy conditions referred to in paragraphs 3(b) and 4(b) at least every six months and discuss with the beneficiary Member State the changes that may be needed to its adjustment programme.

7. The Council, acting by a qualified majority on a proposal from the Commission, shall decide on any adjustments to be made to the initial general economic policy conditions and shall approve the revised adjustment programme as prepared by the beneficiary Member State.

8. If a financing outside the Union subject to economic policy conditions is envisaged, notably from the IMF, the Member State concerned shall first consult the Commission. The Commission shall examine the possibilities available under the Union financial assistance facility and the compatibility of the envisaged economic policy conditions with the commitments taken by the Member State concerned for the implementation of the Council recommendations and Council decisions adopted on the basis of Article 121, Article 126 and Article 136 of the TFEU. The Commission shall inform the Economic and Financial Committee.

Article 4 Disbursement of the loan

1. The loan shall, as a rule, be disbursed in instalments.

2. The Commission shall verify at regular intervals whether the economic policy of the beneficiary Member State accords with its adjustment programme and with the conditions laid down by the Council pursuant to Article 3(3)(b). To this end, that Member State shall provide all the necessary information to the Commission and give the latter its full cooperation.

3. On the basis of the findings of such verification, the Commission shall decide on the release of further instalments.

Article 5 Release of funds

1. The beneficiary Member State shall inform the Commission in advance of its intention to

draw down funds from its credit line. Detailed rules shall be laid down in the decision referred to in Article 3(4).

2. The Commission shall verify at regular intervals whether the economic policy of the beneficiary Member State accords with its adjustment programme and with the conditions laid down by the Council pursuant to Article 3(4)(b). To this end, that Member State shall provide all the necessary information to the Commission and give the latter its full cooperation.

3. On the basis of the findings of such verification, the Commission shall decide on the release of the funds.

Article 6 Borrowing and lending operations

1. The borrowing and lending operations referred to in Article 2 shall be carried out in euro.

2. The characteristics of the successive instalments released by the Union under the financial assistance facility shall be negotiated between the beneficiary Member State and the Commission.

3. Once the decision on a loan has been made by the Council, the Commission shall be authorised to borrow on the capital markets or from financial institutions at the most appropriate time in between planned disbursements so as to optimise the cost of funding and preserve its reputation as the Union's issuer in the markets. Funds raised but not yet disbursed shall be kept at all times on dedicated cash or securities account which are handled in accordance with rules applying to off-budget operations and cannot be used for any other goal than to provide financial assistance to Member States under the present mechanism.

4. Where a Member State receives a loan carrying an early repayment clause and decides to exercise this option, the Commission shall take the necessary steps.

5. At the request of the beneficiary Member State and where circumstances permit an improvement in the interest rate on the loan, the Commission may refinance all or part of its initial borrowing or restructure the corresponding financial conditions.

6. The Economic and Financial Committee shall be kept informed of the developments in the operations referred to in paragraph 5.

Article 7 Costs

The costs incurred by the Union in concluding and carrying out each operation shall be borne by the beneficiary Member State.

Article 8 Administration of the loans

1. The Commission shall establish the necessary arrangements for the administration of the loans with the ECB.

2. The beneficiary Member State shall open a special account with its National Central Bank for the management of the Union financial assistance received. It shall also transfer the principal and the interest due under the loan to an account with the ECB fourteen TARGET2 business days prior to the corresponding due date.

3. Without prejudice to Article 27 of the Statute of the European System of Central Banks and of the European Central Bank, the European Court of Auditors shall have the right to carry out in the beneficiary Member State any financial controls or audits that it considers necessary in relation to the management of that assistance. The Commission, including the European Anti-Fraud office, shall in particular have the right to send its officials or duly authorised representatives to carry out in the beneficiary Member State any technical or financial controls or audits that it considers necessary in relation to that assistance.

Article 9 Review and adaptation

1. The Commission shall forward to the Economic and Financial Committee and to the Council, within six months following the entry into force of this Regulation and where appropriate every six months thereafter, a report on the implementation of this Regulation and on the continuation of the exceptional occurrences that justify the adoption of this Regulation.

2. Where appropriate, the report shall be accompanied by a proposal for amendments to this Regulation with a view to adapting the possibility of granting financial assistance without affecting the validity of decisions already adopted.

Article 10 Entry into force

This Regulation shall enter into force on the day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 11 May 2010.

§17. Articles of Incorporation of the European Financial Stability Facility, available at http://www.efsf.europa.eu/attachments/efsf_Articles_of_incorporation_en.pdf

CHAPTER I: NAME, REGISTERED OFFICE, OBJECT, DURATION

1. FORM, CORPORATE NAME

1.1 There is hereby formed a Luxembourg public limited liability company (société anonyme) (the "Company") governed by the laws of the Grand Duehy of Luxembourg and in particular the law of 10 August 1915 on commercial companies, as amended (the "1915 Law") and by the present Articles (the "Ardeles").

1.2 The Company exists under the name of "European Financial Stability Facility".

2. REGISTERED OFFICE

2.1 The registered office of the Company is establishcd in Luxembourg-City (Grand Duchy of Luxembourg).

2.2 It may be transferred to any other municipality in the Grand Duchy of Luxembourg by means of a resolution of an extraordinary general meeting of its shareholders deliberating in the manner provided for amendments to the Articles.

2.3 The board of directors of the Company (the "Board of Directors") is authorised to change the address of the Company inside the municipality of the Company's registered office.

2.4 Should any political, economic or social event of an exceptional nature occur or threaten to occur which is likely to affect the normal functioning of the registered office or Communications with abroad, the registered office may be provisionally transferred abroad until such time as circumstances have completely retumed to normal. Such decisión will not affect the Company's nationality which will notwithstanding such transfer, remain that of a Luxembourg company. The decision as to the transfer abroad of the registered office will be made by the Board of Directors.

3. OBJECT

The object of the Company shall be to facilitate or provide financing to Member States of the European Union in financial difficultics whose currency is the Euro and which have entered into a memorandum of understanding with the European Commission containing policy conditionality. For that purpose, the Company shall be entitled to raise money by issuing financial instruments or by entering into financing arrangements with its shareholders or third parties, in respect of which the liabilitics of the Company may be guaranteed by some or all of its shareholders or may be otherwise collateralized or benefít from credit support mechanisms. To achieve this overall purpose, the Company may enter into such agreements and take such actions that in the opinion of the Board of Directors are incidental or necessary to the attainment of the Company's object, or the exercise of all or any of its powers.

4. DURATION

The Company is formed for an unlimited duration. It shall be dissolved and liquidated when its purpose is fulfilled, i.e., when the Company has received full payment of the financing granted to the Member States and has repaid its liabilities under the financial instruments issued and financing arrangements entered into. No new financing programme and no new loan facility agreements will be established or entered into after 30 June 2013 (it being understood that financings granted prior to such date may have scheduled maturities falling after such date and that disbursements thereunder (and related issuances of financial instruments by the Company) may occur after such date) provided that the general meeting of shareholders may resolve at any time to extend such date by a decision taken in conformity with the conditions set out in Article 17.7 final sentence.

CHAPTER II: CAPITAL

5. ISSUED AND AUTHORISED SHARE CAPITAL

5.1 The subscribed capital is set at twenty-eight million four hundred and forty thousand four hundred and fifty-three Euro and thirty-five Eurocents (EUR 28,440,453.35-), divided into two billion eight hundred and forty-four million forty-five thousand three hundred and thirty-five (2,844,045,335) registered sharcs with a par value of one Euro cent (EUR 0.01-) each.

5.2 In addition to the subscribed share capital, the Company has an un-issued but authorized share capital set at one million five hundred and ninety thousand five hundred and forty-six Euro and sixty-five Eurocents (EUR 1,590,546.65-) to be divided into one hundred and fifty-nine million fifty-four thousand six hundred and sixty-five (159,054,665) shares of a par value of one Eurocent (EUR 0.01-) each.

Within the limits of the authorized share capital set out in the present Article, the Board of Directors is authorized and empowered to realize any increase of the share capital, with or without share premium, within the limits of the authorized capital in one or more tranches, by the issuing of new shares, against payment in cash or in kind, by contribution of claims, by capitalization of reserves or in any other manner determined by the Board of Directors.

The Board of Directors is also authorized to determine the place and date of the issue or the successive issues, the issue price, the terms and conditions of the subscription of and paying up on the new shares. If the consideration payable to the Company for newly issued shares exceeds the par value of those shares, the excess is to be treated as share premium in respect of the shares in the books of the Company.

The Board of Directors is specially authorized to issue such new shares by cancelling or limiting the existing shareholders' preferential right to subscribe for the new shares.

The authorization will expire on June 7th, 2015 and can be renewed in accordance with the applicable legal provisions.

The Board of Directors is authorized to do all things necessary to amend Article 5 of the present Articles in order to record the change of the issued share capital and authorized share capital following any incrcase pursuant to the present Article. The Board of Directors is empowered to take or authorize the actions required for the execution and publication of such amendment in accordance with the law. Furthermore, the Board of Directors may delegate to any duly authorized director or officer of the Company, or to any other duly authorized person, the duties of accepting subscriptions and receiving payment for shares or to do all things necessary to amend Article 5 of the present Articles in order to record the change of share capital following any increase pursuant to the present Article.

6. FORM OF THE SHARES

6.1 The shares are issued in registered form.

6.2 Shares may be evidenced at the owner's option, in certificates representing single shares or in certificates representing two or more shares.

6.3 The Company may, to the extent and under the terms permitted by the 1915 Law, purchase its own shares.

7. PAYMENT OF SHARES

Payments on shares not fully paid up at the time of subscription may be made at the time and upon conditions, which the Board of Directors shall from time to time determine. Any amount called up on shares will be charged equally on all outstanding shares, which are not fully paid up.

8. MODIFICATION OF CAPITAL

Without prejudice to the authorisation given to the Board of Directors under Article 5.2, the issued and the authorised capital of the Company may be increascd or reduced by resolutions of the shareholders in accordance with the voting procedures laid down in Article 17.8 below for the modifícation of the Articles.

CHAPTER III: BONDS, NOTES AND OTHER DEBT INSTRUMENTS

9. REGISTERED OR BEARER FORM

The Company may issue bonds, notes or other debt instruments under registered or bcarer form. Bonds, notes or other debt instruments under registered form may not be exchanged or converted into bearer form.

CHAPTER IV: DIRECTORS. BOARD OF DIRECTORS, DELEGATION OF POWERS, REPRESENTATION, AUDITORS

10. BOARD OF DIRECTORS

10.1 The Company is managed by a Board of Directors consisting of as many directors (each a "Director") as there are shareholders

provided that the Board of Directors shall at any time be composed of at least three directors, except in case the Company has a single shareholder, in which case it may have a sole Director. Each shareholder shall have the right to propose one candidate for nomination as Director to the general meeting of shareholders.

10.2 The Directors are appointed by the general meeting of shareholders for a period not exceeding 6 (six) years and are re-eligible. They may be removed at any time by a resolution of the general meeting of shareholders. They will remain in function until their successors have been appointed. In case a Director is elected without mention of the term of his mandate, he is deemed to be elected for 6 (six) years from the date of his election.

10.3 In the event of vacancy of a position on the Board of Directors because of death, retirement or otherwise, the remaining Directors thus appointed may meet and elect, by Qualified Majority (as defined in Article 11.5.1. below) of the remaining Directors (any abstentions not being taken into account), a Director to fíll such vacancy until the next general meeting of shareholders which will be asked to ratify such election.

10.4 The Directors shall not be entitled to remuneration for their functions as board members of the Company.

11. MEETINGS OF THE BOARD OF DIRECTORS

11.1 The Board of Directors shall elect a chairman (the "Chairman"). If the Chairman is unable to be present, he will be replaced by a Director elected for this purpose from among the Directors present at the meeting. The Chairman (or any Director representing the Chairman) shall not have a casting vote.

11.2 The meetings of the Board of Directors are convened by the Chairman or by any two Directors. A convening notice for any meeting of the Board of Directors shall be sent to all the members of the Board of Directors and the observers, if any, in writing, or by fax or e-mail, at least 3 (three) calendar days before the date of the meeting except (i) in case of urgency or (ii) if all the Directors are present or represented at the meeting and waive the convening formalities or (iii) if all the Directors waive the convening formalities in writing, or by fax or e-mail, at or prior to the meeting. Furthermore, no specific convening notice shall be required for meetings of the Board of Directors to be held on dates previously scheduled and determined by the Board of Directors.

11.3 The Board of Directors can only validly meet and take decisions if at least half of the Directors are present or represented by proxies and if such Directors are Directors which have been proposed for nomination by shareholders holding in aggregate at least 80% (eighty percent) of the shares of the Company.

11.4 Any Director may act at any meeting of the Board of Directors by appointing in writing, by telegram or telefax another Director as his proxy. A Director may also appoint another Director to represent him by phone to be confirmed in writing at a later stage.

11.5 Except as provided for in Article 11.6, all decisions of the Board of Directors (including decisions to delegate certain decisions or functions, other than those referred to in Article 11.6, to an agent, committee, Director or other) shall be takcn by Qualified Majority as defined in Article 11.5.1.

11.5.1 "Qualified Majority" means the votes of at least 2/3 (two thirds) of the Directors present or represented which represent at least 80% (eighty percent) (on a weighted basis) of the votes expressed in respect of the relevant resolution (abstentions not being considered to establish such majority). For the determination of votes on a weighted basis hereunder, each Director shall be considered to have a number of votes corresponding to the number of shares in the Company held by the Member State shareholder that has proposed such Director for nomination.

11.5.2 If a decision is approved by at least 2/3 (two thirds) of the Directors but does not obtain an approval by a majority of 80% (eighty percent) on a weighted basis as set out in Article 11.5.1 above, the matter shall be referred to the shareholders' meeting, which shall decide on the basis of a majority of 80% (eighty percent) of the shares of the Company for which a vote is expressed (abstentions not being considered to establish such majority) and the Board of Directors shall take the necessary measures to implement such decision.

11.6 The following decisions shall require the unanimous consent of the Directors present or represented expressing a vote (i.e. abstentions are not taken into account when determining unanimous consent):

11.6.1 decisions in relation to the grant of a loan facility to a Member State (including the

approval of the relevant loan facility agreement) and the corresponding funding strategy;

11.6.2 decisions regarding the disbursement of loans under an existing Member State loan facility; and

11.6.3 call of any existing capital commitments and issuance of shares under the authorisation contained in Article 5.2 (authorised share capital).

11.7 The use of video-conferencing equipment and conference call shall be allowed, provided that each participating Director being able to hear and to be heard by all other participating Directors using this technology, shall be deemed to be present and shall be authorised to vote by video or by telephone.

11.8 Circular resolutions of the Board of Directors can be validly taken if approved in writing and signed by all Directors in person. Such approval may be in a single or in several separate documents sent by fax or e-mail. These resolutions shall have the same effect and validity as resolutions voted at the Directors' meetings, duly convened. The date of such resolutions shall be the date of the last signature.

11.9 Votes may also be cast by any other means, such as fax, e-mail, or by telephone provided in such latter event such vote is confirmed in writing.

11.10 The minutes of a meeting of the Board of Directors shall be signed by all Directors present at the meeting. Extracts shall be certified by the Chairman of the Board of Directors or by any two Directors.

11.11 The European Commission, the European Central Bank and any other European body as the Board of Directors may decide, shall each be entitled to appoint an observer who may take part in the meetings of the Board of Directors and may present its observations, without however having the power to vote.

12. GENERAL POWERS OF THE BOARD OF DIRECTORS

12.1 The Board of Directors is vested with the broadest powers to perform all acts of administration and disposition in the Company's interests. Without prejudice to specific provisions herein, all powers not expressly reserved by the 1915 Law to the general meeting of shareholders fall within the competence of the Board of Directors.

12.2 The Board of Directors is authorised to transfer, assign and dispose of the assets of the Company in such manner as the Board of Directors deems appropriate.

13. DELEGATION OF POWERS

13.1 The Board of Directors may confer all powers and special mandates to any persons who need not to be Directors, appoint and dismiss all officers and employees and fix their emoluments.

13.2 The Board of Directors may delegate its powers to conduct the daily management and affairs of the Company and the representation of the Company for such daily management and affairs to any member or members of the Board of Directors, managers, officers or other agents who need not be shareholders of the Company, under such terms and with such powers as the Board of Directors shall determine.

13.3 The first person entrusted with the daily management may be appointed by the first general meeting of shareholders.

13.4 The Board of Directors may also establish various committees which may include non board members chosen in particular for their technical skills. The Board of Directors shall ensure that each member of a committee who is not a Director will keep confidential all information received in relation to the Company or any of its related companies (comprised in the widest sense). The Board of Directors shall determine the composition, powers and functioning of any committee it establishes.

14. REPRESENTATION OF THE COMPANY

14.1 Towards third parties, in all circumstances, the Company shall be bound by the joint signature of 2 (two) Directors (one of whom needs to be the Chairman of the Board) or by the signature of its sole director (when the Company has a sole director) or by the signature of any person(s) to whom such signatory power shall be delegated by the Board of Directors, but only within the limits of such power.

14.2 Towards third parties, in all circumstances, the Company shall also be, in case a daily manager has been appointed in order to conduct the daily management and affairs of the Company and the representation of the Company for such daily management and affairs, bound by the sole signature of the daily manager, but only within the limits of such power.

15. AUDITOR(S)

15.1 The Company shall have one or more statutory auditors appointed by vote of the shareholders' meeting for a máximum duration of 6 (six years) except where Luxembourg law requires that the Company appoints one or more independent auditors (*réviseur(s) d'entreprises agréé(s)*). The independent auditor(s) is/are appointed amongst the members of the Institut des Réviseurs d'Entreprises for a determined period.

15.2 The auditor(s) are re-eligible.

16. CONFLICT OF INTERESTS

16.1 No contract or other transaction between the Company and any other company or firm shall be affected or invalidated by the fact that any one or more of the Directors or officers of the Company has an interest in, or is a director, associate, officer or employee of such other company or firm.

16.2 Any Director or officer of the Company who serves as director, officer or employee of any company or firm with which the Company shall contract or otherwise engage in business shall not, solely by reason of such affiliation with such other company or firm, be prevented from considering and voting or acting upon any matters with respect to such contract or other business.

16.3 In the event that any Director of the Company may have any opposing interest in any transaction of the Company to be decided upon by the Board of Directors, such Director shall make known to the Board of Directors such opposing interest and shall not consider or vote upon any such transaction, and such transaction, and such Director's interest therein, shall be reported to the next following general meeting of the shareholders of the Company.

16.4 The provisions of the preceding paragraphs are not applicablc when the decisions of the Board of Directors concern day-to-day operations engaged in normal conditions.

CHAPTER V: GENERAL MEETING OF SHAREHOLDERS

17. GENERAL MEETING OF SHAREHOLDERS

17.1 If there is only one shareholder, that sole shareholder shall assume all powers conferred to the general meeting of shareholders and shall take the decision in writing.

17.2 In the event of plurality of shareholders, the general meeting of shareholders shall represent the entire body of shareholders of the Company. It shall have the broadest powers to order, carry out or ratify acts relating to the operations of the Company.

17.3 A general meeting shall be convened by means of convening notice by registered letters as provided by Luxembourg law. In the event that all the shareholders are present or represented and if they declare that they have been informed of the agenda of the meeting, they may waive all convening requirements and formalities of publication.

17.4 A shareholder may be represented at a shareholders' meeting by appointing in writing (or by fax or e-mail or any similar means) a proxyholder who need not to be a shareholder and is therefore entitled to vote by proxy.

17.5 The shareholders are entitled to vote by correspondence, by means of a form providing the option for a positive or negative vote or for an abstention. For the calculation of the quorum, only the forms received by the company 3 (three) days prior to the general meeting of shareholders they relate to shall be taken into account.

17.6 The shareholders are entitled to participate in the meeting by teleconference or by way of telecommunications allowing their identification, and are deemed to be present, for the quorum conditions and the majority. These means of communication must comply with technical features guaranteeing effective participation in the meeting whereof the deliberations are transmitted on a continuous basis.

17.7 Except where lower thresholds are mandatorily required by Luxembourg law, (a) all decisions by an annual or ordinary general meeting of the shareholders shall be taken by a majority of at least 80% (eighty percent) of the shares of the Company present or represented for which a vote is expressed (abstentions not being considered to establish such majority) and (b) an annual or ordinary general meeting shall not validly deliberate unless shareholders holding at least 80% (eighty percent) of the shares of the Company are present or represented. However, the extension decision referred to in Article 4 (Duration) final sentence is subject to the quorum and unanimity requirements set out in Article 17.8.

17.8 An extraordinary general meeting convened to amend any provisions of the

Articles (including any modifications to the share capital (other than by application of Article 5.2.) or the object of the Company) shall not validly deliberate unless all the shareholders are present or represented and the agenda indicates the proposed amendments to the Articles. If the first of these conditions is not satisfied, a second meeting may be convened, in the manner prescribed by the Articles or by the 1915 Law. Such convening notice shall reproduce the agenda and indicate the date and the results of the previous meeting. The second meeting shall validly deliberate regardless of the proportion of the capital represented. At extraordinary general meetings, resolutions, in order to be adopted, must be adopted by the unanimous consent of the shareholders present or represented expressing a vote (i.e. abstentions are not taken into account when determining unanimous consent).

17.9 The nationality of the Company may be changed and the commitments of its shareholders may be increased only with the unanimous consent of all the shareholders and in compliance with any other legal requirement.

18. PLACE AND DATE OF THE ANNUAL GENERAL MEETING OF SHAREHOLDERS

The annual general meeting of shareholders is held in the City of Luxembourg, at a place specified in the notice convening the meeting in Luxembourg on the last Wednesday of June at 14h00, and for the first time in 2011. If such day is a public holiday, the annual general meeting of shareholders will be held on the next following business day.

19. OTHER GENERAL MEETINGS

The Board of Directors or any two Directors may convene other general meetings. A general meeting has to be convened at the request of the shareholders which together represent one tenth of the capital of the Company.

20. VOTES

Each share is entitled to one vote. A shareholder may act at any general meeting, by appointing another person as his proxy as provided in Article 17.4.

CHAPTER VI: BUSINESS YEAR, DISTRIBUTION OF PROFITS

21. BUSINESS YEAR

21.1 The business year of the Company begins on the first day of January and ends on the last day of December of each year, except for the first business year which commcnces on the date of incorporation of the Company and ends on December 31st, 2010.

21.2 The Board of Directors shall draw up the balance sheet and the profit and loss account. It shall submit these documents together with a report of the operations of the Company at least 1 (one) month prior to the annual general meeting of shareholders to the auditors who shall make a report containing comments on such documents.

22. DISTRIBUTION OF PROFITS

22.1 Each year at least 5 (five) per cent of the net profits has to be allocated to the legal reserve account. This allocation is no longer mandatory if and as long as such legal reserve amounts to at least one tenth of the capital of the Company.

22.2 After allocation to the legal reserve, the general meeting of shareholders determines the appropriation and distribution of net profits.

22.3 The Board of Directors may resolve to pay interim dividends in accordance with the terms prescribed by the 1915 Law.

CHAPTER VII: DISSOLUTION. LIOUIDATION

23. DISSOLUTION, LIQUIDATION

23.1 The Company may be dissolved by a decision of the general meeting of shareholders adopted in accordance with the procedure applicable to the amendment of the Articles.

23.2 Should the Company be dissolved, the liquidation will be carried out by one or more liquidators appointed by the general meeting of shareholders.

23.3 If no liquidators are appointed by the general meeting of shareholders, the Directors shall be deemed to be liquidator(s) vis-á-vis third parties.

CHAPTER VIII - APPLICABLE LAW

24. APPLICABLE LAW

All matters not governed by these Articles shall be determined in accordance with the 1915 Law.

§18. Framework Agreement of the European Financial Stability Facility, available at http://www.efsf.europa.eu/attachments/20111019_efsf_framework_agreement_en.pdf

EFSF FRAMEWORK AGREEMENT (the "Agreement") is made by and between:

(A) Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland and the Hellenic Republic (the "euro-area Member States" or "EFSF Shareholders"); and

(B) European Financial Stability Facility ("EFSF"), a société anonyme incorporated in Luxembourg, with its registered office at 3, rue de la Congrégation, L-1352 Luxembourg (the euro-area Member States and EFSF referred to hereafter as the "Parties").

PREAMBLE

Whereas:

(1) On 9 May 2010 a comprehensive package of measures has been decided including (a) a Council Regulation establishing the European Financial Stabilisation Mechanism ("EFSM") based on Article 122(2) of the Treaty on the functioning of the European Union and (b) the EFSF in order to financially support euro-area Member States in difficulties caused by exceptional circumstances beyond such Member States' control. It is envisaged that financial support to euro-area Member States shall be provided by EFSF in conjunction with the IMF and shall be on comparable terms to the stability support loans advanced by euro-area Member States to the Hellenic Republic.

(2) EFSF has been incorporated on 7 June 2010 for the purpose of making stability support to euro-area Member States in the form of loan facility agreements ("Loan Facility Agreements") and loans ("Loans") made thereunder of up to EUR 440 billion within a limited period of time. The availability of such Loan Facility Agreements will be conditional upon the relevant euro-area Member States which request such loans entering into memoranda of understanding (each an "MoU") with the European Commission, acting on behalf of the euro-area Member States, in relation to budgetary discipline and economic policy guidelines and their compliance with the terms of such MoU. With respect to each Loan Facility Agreement, the relevant beneficiary euro-area Member State shall be referred to as the "Borrower".

(3) By a decision of the representatives of the governments of the 16 euro-area Member States dated 7 June 2010, acting on the basis of the conclusions of the 27 Member States of 9 May 2010, the Commission was tasked with carrying out certain duties and functions as contemplated by the terms of this Agreement.

(4) EFSF shall finance the making of such loans by issuing or entering into bonds, notes, commercial paper, debt securities or other financing arrangements ("Funding Instruments") which are backed by irrevocable and unconditional guarantees (each a "Guarantee") of the euro-area Member States which shall act as guarantors in respect of such Funding Instruments as contemplated by the terms of this Agreement. The guarantors (the "Guarantors") of Funding Instruments issued or entered into by EFSF shall be comprised of each euro-area Member State (excluding any euro-area Member State which is or has become a Stepping-Out Guarantor under Article 2(7) prior to the issue of such Funding Instruments).

(5) A political decision has been taken by all euro-area Member States to provide Guarantee Commitments (as defined in Article 2(3)) pursuant to the terms of this Agreement.

(6) The euro-area Member States and EFSF have entered into this Agreement to set out the terms and conditions upon which EFSF may make Loans to euro- area Member States, finance such Loans by issuing or entering into Funding Instruments backed by Guarantees issued by the Guarantors, the terms and conditions on which the Guarantors shall issue Guarantees in respect of the Funding Instruments issued by or entered into by EFSF, the arrangements entered into between them in the event that a Guarantor is required to pay under a Guarantee more than its required proportion of liabilities in respect of a Funding Instrument and certain other matters relating to EFSF.

Now, therefore, the Parties have agreed as follows:

1. ENTRY INTO FORCE

(1) This Agreement (with the exception of the obligation of euro-area Member States to issue Guarantees under this Agreement) shall, upon at least five (5) euro-area Member States comprising at least two-thirds (2/3) of the total guarantee commitments set out in Annex 1 (the "Total Guarantee Commitments") providing written confirmation substantially in the form of Annex 3 to EFSF that they have concluded all procedures necessary under their respective national laws to ensure that their obligations under this Agreement shall come into immediate force and effect (a "Commitment Confirmation"), enter into force and become binding between EFSF and the euro-area Member Sates providing such Commitment Confirmations.

(2) The obligation of euro-area Member States to issue Guarantees under this Agreement shall enter into force and become binding between EFSF and the euro-area Member States which have provided Commitment Confirmations only when Commitment Confirmations have been received by EFSF from euro-area Member States whose Guarantee Commitments represent in aggregate ninety per cent (90%) or more of the Total Guarantee Commitments. Any euro-area Member State which applies for stability support from the euro-area Member States or which benefits from financial support under a similar programme or which is already a Stepping-Out Guarantor shall be excluded in computing whether this ninety per cent (90%) threshold of the Total Guarantee Commitments is satisfied.

(3) This Agreement and the obligation to provide Guarantees in accordance with the terms of this Agreement shall enter into force and become binding on any remaining euro-area Member States (which have not provided their Commitment Confirmations at the time the Agreement or the obligation to provide Guarantees comes into force pursuant to Article 1(1) or 1(2)) at the time when such euro-area Member States provide their Commitment Confirmation to EFSF copies of which should be addressed to the Commission.

2. GRANT OF LOANS, FUNDING INSTRUMENTS AND ISSUANCE OF GUARANTEES

(1) The euro-area Member States agree that in the event of a request made by a euro-area Member State to the other euro-area Member States for a stability support loan (i) the Commission (in liaison with the ECB and the IMF) shall be hereby authorised to negotiate the MoU with the relevant Borrower which shall be consistent with a decision the Council may adopt under Article 136 of the Treaty on the functioning of the European Union following a proposal of the Commission and the Commission shall be hereby authorised to finalise the terms of such MoU and to sign such MoU with the Borrower on behalf of the euro-area Member States once such MoU has been approved by the Eurogroup Working Group (unless an MoU has been already entered into between the Borrower and the Commission under the EFSM which MoU has been approved by all euro-area Member States in which case this latter MoU shall apply, provided that it covers both EFSM and EFSF stability support); (ii) following such approval of the relevant MoU, the Commission, in liaison with the ECB, shall make a proposal to the Eurogroup

Working Group of the main terms of the Loan Facility Agreement to be proposed to the Borrower based on its assessment of market conditions and provided that the terms of such Loan Facility Agreement contain financial terms compatible with the MoU and the compatibility of maturities with debt sustainability; (iii) following a decision of the Eurogroup Working Group, EFSF (in conjunction with the Eurogroup Working Group) shall negotiate the detailed, technical terms of the Loan Facility Agreements under which Loans will, subject to the terms and conditions set out therein, be made available to the relevant Borrower, provided that such Loan Facility Agreements shall be substantially in the form of a template Loan Facility Agreement which shall be approved by the euro-area Member States for the purpose of this Agreement and the financial parameters of such Loan Facility Agreements shall be based on the financial terms proposed by the Commission, in liaison with the ECB, and approved by the Eurogroup Working Group and (iv) EFSF shall collect, verify and hold in safe custody the conditions precedent to such Loan Facility Agreements and the executed versions of all related documents. The terms of Article 3(2) set out the basis upon which decisions shall be made in relation to Loans to be made under an existing Loan Facility Agreement. Given that EFSF is not a credit institution, Borrowers shall represent and warrant in each Loan Facility Agreement that no regulatory authorisation is required for EFSF to grant Loans to such Borrower under its applicable national law or that an exemption to such regulatory authorisation requirement exists under applicable national law. The Guarantors hereby authorise EFSF to sign such Loan Facility Agreements, subject to the prior unanimous approval by all of them participating in the relevant votes of Guarantors.

(2) In respect of each Loan Facility Agreement and the Loans to be made thereunder, the euro-area Member States agree that EFSF (in consultation with the Eurogroup Working Group) shall be authorised to structure and negotiate the terms on which EFSF may issue or enter into Funding Instruments on a stand-alone basis or pursuant to a debt issuance programme or programmes or facility (each an "EFSF Programme(s)") to finance the making of Loans to Borrowers. So long as market conditions permit and save as otherwise stated in this Agreement, such Funding Instruments shall have substantially the same financial profile as the related Loans (provided that (x) for operational reasons there will need to be delays between issue dates and payment dates to facilitate the transfers of funds and calling Guarantees and (y) notwithstanding the liability of each Guarantor to pay any amounts of interest and principal due but unpaid under the Funding Instruments, the recourse of investors against EFSF under the Funding Instruments shall be limited to the assets of EFSF including, in particular, the amounts it recovers in respect of the Loans. The interest rate which will apply to each Loan is intended to cover the cost of funding incurred by EFSF and shall include a margin (the "Margin") which shall provide remuneration for the Guarantors. The Service Fee may be used to cover the operational costs of EFSF and any costs and fees directly related to the issuance of Funding Instruments which have not otherwise been charged to the relevant Borrower.

(3) In respect of Funding Instruments issued or entered into under an EFSF Programme or on a stand-alone basis, each Guarantor shall be required to issue an irrevocable and unconditional Guarantee in a form to be approved by the Guarantors for the purpose of this Agreement and in an amount equal to the product of (a) the percentage set out next to each Guarantor's name in the third column (the "Contribution Key") in Annex 2 (as such percentage is adjusted from time to time in accordance with the terms of this Agreement and/or to reflect any euro-area Member State not yet having provided its Commitment Confirmation during the implementation period pursuant to Article 1 and notified in writing by EFSF to the Guarantors) (the "Adjusted Contribution Key Percentage"), (b) 120%, and (c) the obligations of EFSF (in respect of principal, interest or other amounts due) in respect of the Funding Instruments issued or entered into by EFSF on a stand-alone basis or under an EFSF Programme. If EFSF issues Funding Instruments under an EFSF Programme, each Guarantor shall issue its Guarantee to guarantee all Funding Instruments issued or entered into pursuant to the relevant EFSF Programme. The Offering Materials or contractual documentation for each issue or contracting of Funding Instruments made under an EFSF Programm shall confirm which Guarantors have Guarantees which cover the relevant Funding Instruments or issue or series thereof. EFSF may also request the Guarantors to issue Guarantees under this Agreement for other purposes which are closely-linked to an issue of Funding Instruments and which facilitates the obtaining and maintenance of a high quality rating for Funding Instruments issued by EFSF and efficient funding by EFSF. The decision to issue Guarantees for such other purposes in connection with an EFSF Programme or a stand-alone issue of or entry

into Funding Instruments shall be taken by a unanimous decision of the Guarantors. No Guarantor shall be required to issue Guarantees which would result in it having a Guarantee Exposure in excess of its aggregate guarantee commitment (its "Guarantee Commitment") set out alongside its name in Annex 1. For the purposes of this Agreement a Guarantor's "Guarantee Exposure" is equal to the aggregate of (i) the amount of Guarantees which it has issued but which are undrawn and (ii) the amount it has paid and not been reimbursed under Guarantees it has issued under this Agreement. Accordingly, if an outstanding, undrawn Guarantee expires or if an amount drawn under a Guarantee is reimbursed this will reduce a Guarantor's Guarantee Exposure and replenish its capacity to issue Guarantees under this Agreement.

(4) (a) The Guarantees shall irrevocably and unconditionally guarantee the due payment of scheduled payments of interest and principal due on Funding Instruments issued by EFSF. In the case of EFSF Programmes, the Guarantors shall issue Guarantees which guarantee all series of Funding Instruments issued from time to time under the relevant EFSF Programme. The Offering Materials and/or contractual documentation of each series shall confirm which Guarantees cover that series, in particular, if a Guarantor under the relevant EFSF Programme has subsequently become a Stepping-out Guarantor and no longer guarantees further issues or series under such EFSF Programme.

(b) The Guarantees may be issued to a bond trustee or other representative of bondholders or creditors (a "Noteholder Representative") who shall be entitled to make demands under the Guarantees on behalf of holders of Funding Instruments and enforce the claims of holders of Funding Instruments so as to facilitate the management of making demands on the Guarantees. The detailed terms and conditions of each issue of Funding Instruments and the Guarantees relating thereto shall be agreed by EFSF, subject to the approval of the Guarantors, and shall be as described in the relevant Offering Materials (as defined in Article 4(1) applicable thereto) and applicable contractual documentation.

(5) A Guarantor shall only be required to issue a Guarantee in accordance with this Agreement if:

(a) it is issued in respect of Funding Instruments issued or entered into under an EFSF Programme or on a stand-alone basis and such Funding Instruments finance the making of Loan(s) approved in accordance with the terms of this Agreement and the Articles of Association of EFSF or it is issued for such other closely-linked purpose as are approved under Article 2(3);

(b) the Guarantee is issued to facilitate the financing under Loan Facility Agreements entered into on or prior to 30 June 2013 (including the financing of Loans made pursuant to an existing Loan Facility Agreement after such date and any related issue of bonds or debt securities related thereto) and the Guarantee is in any event issued on or before 30 June 2013;

(c) the Guarantee is in the form approved by euro-area Member States for the purpose of this Agreement and the EFSF Programme;

(d) the liability of the Guarantor under such Guarantee is for a maximum amount which complies with the terms of Article 2(3); and

(e) it is denominated in euros or such other currency as is approved by the Guarantors for the purpose of this Agreement.

(6) The Guarantee Commitment of each Guarantor to provide Guarantees is irrevocable and firm and binding. Each Guarantor will be required, subject to the terms of this Agreement, to issue Guarantees up to its Guarantee Commitment for the amounts to be determined by EFSF and at the dates specified by EFSF in order to facilitate the issuance or entry into of Funding Instruments under the relevant EFSF Programme or stand-alone Funding Instrument in each case in accordance with the EFSF funding strategy.

(7) If a euro-area Member State encounters financial difficulties such that it makes a demand for a stability support loan from EFSF, it may by written notice together with supporting information satisfactory to the other Guarantors request the other Guarantors (with a copy to the Commission, the Eurogroup Working Group Chairman) to accept that the Guarantor in question does not participate in issuing a Guarantee in respect of any further debt issuance by EFSF. The decision of the euro-area Member States in relation to such a request is to be made at the latest when they decide upon making any further Loan Facility Agreements or further Loans.

(8) An up-front service fee (the "Service Fee") calculated as being 50 basis points on the aggregate principal amount of each Loan shall

be charged to each Borrower and deducted from the cash amount to be remitted to the Borrower in respect of each such Loan. In addition, the net present value (calculated on the basis of the internal rate of return of the Funding Instruments financing such Loan (or such other blended internal rate of return as is deemed appropriate in case of a Diversified Funding Strategy), the "Discount Rate") of the anticipated Margin that would accrue on each Loan to its scheduled maturity date shall be deducted from the cash amount to be remitted to the Borrower in respect of such Loan. The Service Fee and the net present value of the anticipated Margin, together with such other amounts as EFSF decides to retain as an additional cash buffer, will be deducted from the cash amount remitted to Borrower in respect of each Loan (such that on the disbursement date (the "Disbursement Date") the Borrower receives the net amount (the "Net Disbursement Amount")) but shall not reduce the principal amount of such Loan that the Borrower is liable to repay and on which interest accrues under the relevant Loan. These retained amounts shall be retained to provide a cash reserve to be used as credit enhancement and otherwise as described in Article 5 below. The "Cash Reserve" shall include these retained amounts together with all income and investments earned by investment of these amounts. The Cash Reserve shall be invested in accordance with investment guidelines approved by the board of directors of EFSF.

If, following the repayment of all Loans made under Loan Facility Agreements and all Funding Instruments issued by or entered into by EFSF, there remain amounts in the Cash Reserve (including amounts representing interest or investment income earned by investment of the Cash Reserve), these amounts shall be paid to the Guarantors as consideration for the issuance of their Guarantees. EFSF shall maintain ledger accounts and other records of the amounts of Service Fee and anticipated Margin retained in respect of each Loan Facility Agreement and the amount of all Guarantees issued by each Guarantor pursuant to this Agreement. These ledger accounts and records shall permit EFSF to calculate the consideration due to each Guarantor in respect of the Guarantees issued under this Agreement which shall be payable on a pro rata proportional basis to each Guarantor by reference to its participation in all the Guarantees issued under this Agreement.

Euro-area Member States which are potential Borrowers may only request and enter into Loan Facility Agreements in the period commencing on the date this Agreement enters into force and ending on 30 June 2013 (provided that Loans may be disbursed after this date under Loan Facility Agreements entered into prior to this date).

Following the execution of this Agreement, the Parties shall agree upon forms of (i) the Guarantees, (ii) the Loan Facility Agreements, (iii) the documentation for the Funding Instruments, (iv) the arrangements in respect of the appointment of Noteholder Representatives, (v) the dealer and subscription agreements for Funding Instruments and (vi) any agency or service level agreement with EIB or any other agency, institution or person.

PREPARATION AND AUTHORISATION OF LOAN DISBURSEMENTS

Before each disbursement of a Loan under a Loan Facility Agreement, the Commission will, in liaison with the ECB, present a report to the Eurogroup Working Group analysing compliance by the relevant Borrower with the terms and the conditions set out in the MoU and in the Council Decision (if any) relating to it. The Guarantors will evaluate such compliance and will unanimously decide on whether to permit disbursement of the relevant Loan. The first Loan to be made available to a Borrower under a Loan Facility Agreement is released following the initial signature of the relevant MoU and will not be the object of such a report.

(2) Following a request for funds (a "Request for Funds") from a Borrower complying with the terms of the relevant Loan Facility Agreement and requesting a Loan thereunder, the Guarantors shall (other than in respect of the first Loan) consider the report of the Commission regarding the Borrower's compliance with the MoU and the relevant Council decision (if any). If, acting unanimously, the Guarantors consider that the Borrower has complied with the conditions to drawdown under the Loan Facility Agreement and are satisfied with its compliance with the terms and conditions of the MoU then the Eurogroup Working Group Chairman shall request in writing EFSF to make a proposal of detailed terms of the Loan it would recommend to make to the Borrower within the parameters of the Loan Facility Agreement, the MoU, taking into account debt sustainability and the market situation for bond issuance. The EFSF proposal shall specify the amount which EFSF is authorised to make available by way of a Loan under the Loan Facility Agreement and on what terms including as to the amount of the Loan, the Net Disbursement Amount, the term,

the redemption schedule and the interest rate (including the Margin) in relation to such Loan. If the Eurogroup Working Group accepts this proposal the Eurogroup Working Group Chairman shall request EFSF to communicate an acceptance notice (an "Acceptance Notice") to the Borrower confirming the terms of the Loan.

(3) At the latest following the signature of a Loan Facility Agreement, EFSF shall commence the process for the issuance of or entry into Funding Instruments under the EFSF Programme(s) or otherwise and, to the extent necessary, shall request the Guarantors to issue Guarantees in accordance with Article 2 (above) such that EFSF has sufficient funds when needed to make disbursements under the relevant Loan.

(4) If applicable, and prior to the delivery of any Acceptance Notice, the Eurogroup Working Group Chairman shall communicate to the Commission and EFSF whether any Guarantor has notified it that the circumstances described in Article 2(7) apply to it and the decision of the euro-area Member States relating thereto. The Eurogroup Working Group Chairman shall communicate the decisions of the Guarantors to EFSF, the Commission and the euro-area Member States at least thirty (30) Business Days prior to the date of any related issue of or entry into Funding Instruments.

(5) On the relevant Disbursement Date, EFSF shall make the relevant Loan available to the Borrower by making available the Net Disbursement Amount through the accounts of EFSF and the relevant Borrower opened for the purpose of the Loan Facility Agreement with the ECB.

4. ISSUANCE OF OR ENTRY INTO FUNDING INSTRUMENTS

(1) In compliance with its funding strategy, EFSF may issue or enter into Funding Instruments benefitting from the Guarantees on a stand-alone basis or shall establish one or more EFSF Programme(s) for the purpose of issuing Funding Instruments benefitting from Guarantees which shall finance the making of Loans in accordance with the terms of this Agreement. EFSF may establish a base prospectus (the "Base Prospectus") for each EFSF Programme with each individual issue of Funding Instruments being issued pursuant to final terms ("Final Terms") setting out the detailed financial terms of each issue. Alternatively, EFSF may establish information memoranda (the "Information Memoranda") for the purpose of issuing Funding Instruments (which would not be prospectuses for the purposes of the Prospectus Directive 2003/71/EC). Any Base Prospectus, Final Terms, prospectus, Information Memorandum or related materials relating to the placement or syndication of Funding Instruments shall be referred to as "Offering Materials". It shall also enter into relevant contractual documentation relating to such Funding Instruments.

(2) EFSF shall devise standard terms and conditions for the Funding Instruments issued or entered into by EFSF. These may include provisions for the calling of Guarantees either by EFSF if it anticipates a shortfall prior to a scheduled payment date or by the relevant Noteholder Representative (if EFSF has failed to make a scheduled payment of interest or principal under a Funding Instrument when due). The standard terms and conditions shall clarify that there is no acceleration of Funding Instruments in the event that the Loan(s) financed by such Funding Instruments are accelerated or pre-paid for whatever reason.

(3) In connection with the structuring and negotiation of Funding Instruments on a stand-alone basis or under EFSF Programme(s) ESFS may:

(a) appoint, liaise and negotiate with arranging banks, lead managers and bookrunners;

(b) appoint, liaise and negotiate with rating agencies and rating agency advisers and supply them with such data and documentation and make such presentations as necessary to obtain requisite ratings;

(c) appoint, liaise and negotiate with paying agents, listing agents, Noteholder Representative, lawyers and other professional advisers;

(d) appoint, liaise and negotiate with common depositaries and clearing systems such as Euroclear and/or Clearstream for the settlement of Funding Instruments;

(e) attend investor presentations and road shows to assist in the placement or syndication of Funding Instruments pursuant to the EFSF Programme(s);

(f) negotiate, execute and sign all legal documentation related to the Funding Instruments and any EFSF Programme(s); and

(g) generally do such other things necessary for the successful structuring and

implementation of the EFSF Programme(s) and the issuance of or entry into Funding Instruments.

(4) EFSF shall, subject to market conditions and the terms of this Article 4, fund Loans by the issuance of or entry into Funding Instruments on a matched- funding basis such that the Funding Instruments financing a Loan have substantially the same financial profile as to amount, time of issue, currency, repayment profile, final maturity and interest basis, provided that, to the extent feasible, the scheduled payment dates for Loans shall be at least fourteen (14) Business Days prior to the scheduled payment dates under the related Funding Instruments to permit processing of payments.

(5) If, due to market condition or the volume of Funding Instruments to be issued or entered into by EFSF under the EFSF Programme(s) it is not practicable or feasible to issue or enter into Funding Instruments on a strict matched- funding basis, EFSF may request the Guarantors to permit EFSF certain flexibilities as to funding such that its funding is not matched to the Loans it makes, in particular as to (a) currency of Funding Instruments, (b) timing for the issue or entry into of Funding Instruments, (c) interest rate bases and/or

(d) maturity and repayment profile of the Funding Instruments to be issued or entered into (including the possibility of issuing short term debt instruments, commercial paper or other financing arrangements supported by Guarantees) and (e) the possibility of pre-funding of Loans under an existing Loan Facility Agreement. The Guarantors, acting unanimously, may permit EFSF to use a degree of funding flexibility and shall specify within which parameters and limits EFSF may adopt a non-matched funding strategy (a "Diversified Funding Strategy").

(6) Given that a Diversified Funding Strategy would require the management of transformation and basis risks, in the event that a Diversified Funding Strategy is authorised in relation to EFSF it may delegate the management of such funding activities, related asset and liability management activities and the conclusion of any related currency, interest rate or maturity mis-match hedging instruments to one or more debt management agencies of euro-area Member State or such other agencies or institutions as are approved unanimously by the Guarantors which shall be entitled to be compensated at an arm's length commercial rate for the provision of such services which remuneration shall constitute an operating cost for EFSF.

5. CREDIT ENHANCEMENT, LIQUIDITY AND TREASURY

(1) The credit enhancement for the EFSF Programme shall include the following elements:

(a) the Guarantees and, in particular, the fact that the participation of each Guarantor in issuing Guarantees shall be made on the basis of the Adjusted Contribution Key Percentage and that the Guarantee issued by each Guarantor is for 120% of its Adjusted Contribution Key Percentage of the amounts of the relevant Funding Instruments;

(b) the Cash Reserve shall act as a cash buffer. The Cash Reserve shall, pending its use, be invested in high quality liquid debt instruments. Upon repayment of all Loans made by EFSF and Funding Instruments issued by EFSF, the balance of the Cash Reserve shall be used firstly to repay any amounts paid by Guarantors which have not been repaid out of recoveries from the relevant underlying Borrowers and secondly, shall be paid to the Guarantors as consideration for their issuance of Guarantees under this Agreement as described in Article 2(9); and

(c) such other credit enhancement mechanisms as may be approved under this Article 5.

(2) In the event that there is a delay or failure to pay by a Borrower of a payment under a Loan and accordingly there is a shortfall in funds available to meet a scheduled payment of interest or principal under a Funding Instrument issued by EFSF then EFSF shall:

(a) first, make a demand on a pro rata pari passu basis on the Guarantors which have guaranteed such Funding Instrument up to 120% of their respective Adjusted Contribution Key Percentage of the amount due but unpaid;

(b) second, if the steps taken in Article 5(2)(a) do not fully cover the shortfall, to release an amount from the Cash Reserve to cover such shortfall; and

(c) third, take such other steps as may be available in the event that additional credit enhancement mechanisms have been approved under Article 5(3).

(3) The euro-area Member States may by unanimous decision approve and adopt such

other credit enhancement mechanisms as they consider appropriate or, as the case may be, modify the existing credit enhancement mechanisms in order to enhance or to maintain the creditworthiness of the Funding Instruments issued or contracted by EFSF or to enhance the efficiency of funding of EFSF. Such other credit enhancement measures might include, amongst other techniques, the provision of subordinated loans, warehousing arrangements, liquidity lines or backstop facilities to EFSF or the issuance by EFSF of subordinated notes.

(4) If a Guarantor has failed to make a payment which is due and payable in respect of a Guarantee and, as a consequence EFSF makes a withdrawal from the Cash Reserve to cover the shortfall pursuant to Article 5(2)(b) then such Guarantor shall reimburse such amount to EFSF on first written demand together with interest on such amount at a rate equal to one month EURIBOR plus 500 basis points from the date the amount is withdrawn from the Cash Reserve to the date such Guarantor reimburses such amount to EFSF together with such accrued interest. EFSF shall apply such reimbursed amounts (and the interest accrued thereon) to replenish the Cash Reserve.

(5) In order to facilitate the availability of adequate liquidity for the funding needs of EFSF:

(a) each euro-area Member State will ensure that EFSF will be eligible for receiving a counterparty limit for cash management operations of the debt management operations of the debt management agency of such euro-area Member State; and

(b) each euro-area Member State shall co-operate to assist EFSF to ensure that its Funding Instruments comply with applicable criteria to be eligible as collateral in Eurosystem operations.

(6) In order to minimise any negative-carry costs in the event of any Diversified Funding Strategy EFSF shall be entitled to make deposits or other placements which, in accordance with the investment strategy agreed by the board of directors of EFSF, minimi se the risk of a funding mis-match or negative- carry costs.

6. CLAIMS UNDER A GUARANTEE

(1) If EFSF becomes aware that it has not received in full a scheduled payment under a Loan and such shortfall will give rise to a shortfall in available funds to make a scheduled payment of principal or interest under Funding Instruments issued by EFSF or scheduled payment due from EFSF under any other instrument or agreement which benefits from a Guarantee issued under this Agreement, it shall immediately notify in writing the Chairman of the Eurogroup Working Group, the Commission and each Guarantor and inform each Guarantor of its share of the shortfall under the terms of this Agreement and the relevant Guarantee and demand in writing each Guarantor to remit to EFSF its share of such shortfall on the date (the "Guarantee Payment Date") which is at least two (2) Business Days prior to the scheduled date for payment of the relevant amounts by EFSF (an "EFSF Guarantee Demand").

(2) Each Guarantor shall remit to EFSF (or, if so specified in the relevant documentation, to the paying agent of the relevant Funding Instrument) its share of the amount demanded in the EFSF Guarantee Demand addressed to it by EFSF in cleared funds on the Guarantee Payment Date.

(3) In the event that EFSF fails to pay a scheduled payment of interest or a scheduled payment of principal on a date when such amount is due and payable under a Funding Instrument issued by EFSF then the relevant Noteholder Representative shall be entitled to demand in writing (a "Noteholder Representative Guarantee Demand") the Guarantors (with a copy to EFSF) to pay the unpaid amount of such scheduled payment of interest and/or such scheduled payment of principal. Similarly, in the event of a failure by EFSF to pay a scheduled payment under any other instrument or agreement entered into between EFSF and a counterparty (a "Counterparty") which benefits from a Guarantee issued under this Agreement (which has been issued for a purpose closely-linked to an issue of Funding Instruments pursuant to Article 2(3)) the relevant Counterparty shall be entitled to demand in writing (a "Counterparty Guarantee Demand") the Guarantors (with a copy to EFSF) the unpaid amount of such scheduled payment. In the event of receipt by the Guarantors and EFSF of a Noteholder Representative Guarantee Demand or a Counterparty Guarantee Demand each Guarantor shall in accordance with the terms of its Guarantee remit in cleared funds its share of the amount duly demanded in such Noteholder Representative Guarantee Demand or, as the case may be such Counterparty Guarantee Demand. The detailed payment mechanics for co-ordinating payments under the Guarantees shall be set out in the documentation for the issue of Funding Instruments and the related Guarantees.

(4) In the event that a shortfall of receipts under a Loan gives rise both to an EFSF Guarantee Demand and a Noteholder Representative Guarantee Demand (or Counterparty Guarantee Demand) the relevant Guarantors shall only be liable to make one payment under their respective Guarantees, without double counting.

(5) The Parties acknowledge and agree that each Guarantor shall be entitled to make payment in respect of any EFSF Guarantee Demand, Noteholder Representative Guarantee Demand or Counterparty Guarantee Demand which appears to be valid on its face without any reference by it to EFSF or any other Party or any other investigation or enquiry. EFSF irrevocably authorises each Guarantor to comply with any Guarantee Demand.

(6) EFSF and each of the other Parties acknowledges and agrees that each Guarantor:

(i) is not obliged to carry out any investigation or seek any confirmation

prior to paying a claim;

(ii) is not concerned with:

(1) the legality of a claim or any underlying transaction or any set- off, defence or counterclaim which may be available to any person;

(2) any amendment to any underlying document; or

(3) any unenforceability, illegality or invalidity of any document or security.

(7) EFSF shall be liable to reimburse each Guarantor in respect of any claim paid in respect of a Guarantee and shall indemnify each Guarantor in respect of any loss or liability incurred by a Guarantor in respect of a Guarantee. EFSF's reimbursement obligation is subject to and limited to the extent of funds actually received from the underlying Borrowers in respect of the Loans which gave rise to a shortfall of funds.

(8) In addition to the reimbursement obligation of EFSF under Article 6(5), if a Guarantor makes a payment under its Guarantee, EFSF shall assign and transfer to the relevant Guarantor an amount of EFSF's rights and interests under the relevant Loan corresponding to the shortfall in payments made by the Borrower and the related payment made by the Guarantor under the Guarantee. EFSF shall remain servicer of such portion of the Loan which has been assigned and transferred to the relevant Guarantor so as to facilitate the co-ordinated management of the Loan and the treatment of all Guarantors on aparipassu basis.

(9) All Guarantors shall rank equally and pari passu amongst themselves, in particular in respect of reimbursement of amounts paid by them under their Guarantees provided that, if a Guarantor owes sums to EFSF pursuant to Article 5(4) or sums to the other Guarantors pursuant to Article 7(1), sums recovered from underlying Borrowers which would otherwise be due from EFSF to such Guarantor shall be applied to repaying the amount due under 5(4) or paying the amount due to other Guarantors under Article 7(1) in priority to being applied to reimburse such Guarantor.

7. CONTRIBUTION BETWEEN GUARANTORS

(1) (a) If a Guarantor meets claims or demands in respect of any Guarantee it has issued or incurs costs, losses, expenses or liabilities in connection therewith ("Guarantee Liabilities"), and the aggregate amount of Guarantee Liabilities it makes or incurs exceeds its Required Proportion for the given Guarantee then it shall be entitled to be indemnified and receive contribution, upon first written demand, from the other Guarantors, in respect of such Guarantee Liabilities such that each Guarantor ultimately bears only its Required Proportion of such aggregate Guarantee Liabilities, provided that if the aggregate Guarantee Liabilities of any Guarantor in respect of any Guarantee is not reduced to its Required Proportion within three (3) Business Days, the other Guarantors (excluding Stepping-Out Guarantors) shall indemnify such Guarantor in an amount such that the excess over the Required Portion is allocated to each of the Guarantors (excluding Stepping-Out Guarantors) on a pro rata basis. The "Required Proportion" is equal to the Adjusted Contribution Key Percentage applicable to the relevant Guarantee. Any indemnity or contribution payment from one Guarantor to another under this Article 7 shall bear interest at a rate equal to one month EURIBOR plus 500 basis points which shall accrue from the date of demand of such payment to the date such payment is received by such Guarantor.

(b) The provisions of this Article 7 shall apply mutatis mutandis if a euro- area Member State issues any Guarantees according to an Adjusted Contribution Key Percentage in excess of that which would apply to it once 100% Total Guarantee Commitments have been obtained

provided that the term "Guarantor" shall include any euro-area Member State which has not yet provided its Commitment Confirmation prior to EFSF issuing or entering into the relevant Funding Instrument.

(2) The obligations of each Guarantor to make contributions or indemnity payments under this Article are continuing obligations which extend to the ultimate balance of sums due regardless of any intermediate payment or discharge in whole or in part.

(3) The indemnity and contribution obligations of any Guarantor under this Article will not be affected by any act, omission, matter or thing which, but for this Article, would reduce, release or prejudice any of its obligations under this Article (without limitation and whether or not known to it or any other person) including:

(i) any time, waiver or consent granted to, or composition with, any person;

(ii) the release of any person under the terms of any composition or arrangement;

(iii) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, any person; or any non-presentation or non- observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

(iv) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of any person;

(v) any amendment (however fundamental) or replacement of any Loan Facility Agreement, Loan or any document or security;

(vi) any unenforceability, illegality or invalidity of any obligation of any person under any document or security; or

(vii) any insolvency or similar proceedings.

8. CALCULATIONS AND ADJUSTMENT OF THE GUARANTEES

(1) The Parties agree that EFSF may appoint EIB (or such other agency, institution, EU institution or financial institution as is approved unanimously by the Guarantors) with the task of making the calculations for the purposes of this Agreement, each Loan Facility Agreement, the financing of EFSF by issuing or entering into Funding Instruments (or otherwise) and the Guarantees. If EIB (or such other agency, institution, EU institution or financial institution) accepts such appointment, it shall calculate the interest rate for each Loan in accordance with the terms of the relevant Loan Facility Agreement, calculate the amounts payable on each interest payment date and notify the relevant Borrower and EFSF thereof and make all such other calculations and notifications as are necessary for the purposes of this Agreement, the Guarantees and the Funding Instruments.

(2) In the event that a Guarantor experiences severe financial difficulties and requests a stability support loan or benefits from financial support under a similar programme, it (the "Stepping-Out Guarantor") may request the other Guarantors to suspend its commitment to provide further Guarantees under this Agreement. The remaining Guarantors, acting unanimously and meeting via the Eurogroup Working Group may decide to accept such a request and in this event, the Stepping-Out Guarantor shall not be required to issue its Guarantee in respect of any further issues of or entry into Funding Instruments by EFSF and any further Guarantees to be issued under this Agreement shall be issued by the remaining Guarantors and the Adjusted Contribution Key Percentage for the issuance of further Guarantees shall be adjusted accordingly. Such adjustments shall not affect the liability of the Stepping-Out Guarantor under existing Guarantees. It is acknowledged and agreed that the Hellenic Republic is deemed to be a Stepping-Out Guarantor with effect from the entry into force of this Agreement.

9. BREACH OF OBLIGATIONS UNDER A LOAN FACILITY AGREEMENT AND AMENDMENTS AND/OR WAIVERS

(1) If EFSF becomes aware of a breach of an obligation under a Loan Facility Agreement, it shall promptly inform the Guarantors (through the Eurogroup Working Group Chairman), the Commission and the ECB about this situation and shall propose how to react to it. The Euro Working Group Chairman will coordinate the position of the Guarantors and will inform EFSF, the Commission and the ECB of the decision taken. EFSF will thereafter implement the decision in accordance with the relevant Loan Facility Agreement.

(2) If EFSF becomes aware of a situation where amendments, a restructuring and/or waivers relating to any Loan made under a Loan Facility Agreement may become necessary, it

shall inform the Guarantors through the Eurogroup Working Group Chairman, the Commission and the ECB about this situation and shall propose how to react to it. The Eurogroup Working Group Chairman will coordinate the position of the Guarantors and will inform EFSF, the Commission and the ECB of the decision taken. EFSF will thereafter implement the decision and, following instructions of the Guarantors, negotiate and sign a corresponding amendment, a restructuring or waiver or a new loan agreement with the relevant Borrower or any other arrangement needed.

(3) In other cases than those referred to in Article 9(1) and 9(2), if EFSF becomes aware of a situation where there is a need for the Guarantors to express an opinion or take an action in relation to a Loan Facility Agreement, it shall inform the Guarantors through the Eurogroup Working Group Chairman about this situation, and shall propose how to react to it. The Eurogroup Working Group Chairman will coordinate the position of the Guarantors and will inform EFSF, the Commission and the ECB of the decision taken. EFSF will thereafter implement the decision taken in whichever form is needed.

(4) In the event that the euro-area Member States consent to the modification of any MoU entered into with a Borrower, the Commission shall be authorised to sign the amendment(s) to such MoU on behalf of the euro-area Member States.

10. EFSF, INTER-GUARANTOR DECISIONS, DIRECTORS AND GOVERNANCE

(1) EFSF shall have a board of directors consisting of as many directors as there are EFSF Shareholders. Each EFSF Shareholder shall be entitled to propose for nomination one person to act as a director of EFSF and the other EFSF Shareholders hereby irrevocably undertake that they shall use their votes as shareholders of EFSF in the relevant general meetings to approve as a director the person proposed by such euro-area Member State. They shall equally use their votes as EFSF Shareholders to remove a person as director of EFSF if this is so requested by the euro-area member State which proposed such director for nomination.

(2) Each EFSF Shareholder shall propose for nomination to the board of directors of EFSF its representative in the Eurogroup Working Group from time to time (or such person's alternate as representative on such group). The Commission and ECB shall each be entitled to appoint an observer who may take part in the meetings of the board of directors and may present its observations, without however having the power to vote. The board of directors may permit other institutions of the European Union to appoint such observers.

(3) In the event of a vacancy of a member of the board of directors each euro- area Member State shall ensure that the member of the Board nominated upon its proposal approves as a replacement director the person proposed for nomination by the relevant euro-area Member State which does not have a director nominated upon its proposal.

(4) The euro-area Member States acknowledge and agree that, in the event of a vote of the board of directors of EFSF, each director which has been proposed for nomination by a euro-area Member State shall have a weighted number of the total number of votes which corresponds to the number of shares which his/her nominating euro-area Member State holds in the issued share capital of EFSF.

(5) The Guarantors agree that the following matters affecting their roles and liabilities as Guarantors shall require to be approved by them on a unanimous basis:

(a) decisions in relation to the grant of a Loan Facility Agreement to a euro-area Member State including the approval of the relevant MoU and Loan Facility Agreement;

(b) decisions regarding the disbursement of Loans under an existing Loan Facility Agreement in particular as to whether conditionality criteria for a disbursement are satisfied on the basis of a report of the Commission;

(c) any modification to this Agreement including as to the availability period to grant Loan Facility Agreements;

(d) any modification to the following terms of any Loan Facility Agreement: aggregate principal amount of a Loan Facility Agreement, availability period, repayment profile or interest rate of any outstanding Loan;

(e) the terms of the EFSF Programme, the programme size and the approval of any Offering Materials;

(f) any decision to permit an existing Guarantor to cease to issue further guarantees;

(g) significant changes to the credit enhancement structure;

(h) the funding strategy of each EFSF Programme and any decision to permit a Diversified Funding Strategy (including the manner in which EFSF allocates its operating costs and the funding costs of Funding Instruments to Loans and Loan Facility Agreements if a Diversified Funding Strategy is adopted); or

(i) any increase in the aggregate amount of Guarantees which might be issued under this Agreement.

For the purpose of this Article 10(5) and any other provision of this Agreement which requires a unanimous decision of the Guarantors, unanimity means a positive or negative vote of all those Guarantors which are present and participate (by voting positively or negatively) in the relevant decision (ignoring any abstentions or absences) provided that any Guarantor which is no longer issuing new Guarantees (in particular, the Stepping-Out Guarantors) shall not be entitled to vote on any decision to make a new Loan Facility Agreement, a new Loan or a new issuance of Funding Instruments which are not guaranteed by it provided that it shall continue to have the right to vote on decisions in relation to Loans or Funding Instruments in respect of which it has issued a Guarantee which remains outstanding. It is a condition precedent to the validity of any such vote that a quorum of a majority of Guarantors able to vote whose Guarantee Commitments represent no less than 2/3 of the Total Guaranteed Commitments are present at the meeting.

(6) The Guarantors agree that all matters which are not reserved to unanimity decision of the Guarantors pursuant to Article 10(5) (above) or unanimity decision of the euro-area Member States pursuant to Article 10(7) (below) and, in particular, the following matters affecting their roles and liabilities as Guarantors shall be decided by a majority of Guarantors (excluding however the Stepping-Out Guarantors) (i) whose Guarantee Commitments represent 2/3 of the Total Guarantee Commitments (in the event that no Guarantees have been issued) or (ii) if Guarantees have been issued, 2/3 of the aggregate maximum face amount of Guarantees which have been issued and remain outstanding provided that, in calculating the satisfaction of this threshold the face amount of Guarantees of a Guarantor which is a Stepped-Out Obligor or which has failed to pay under a Guarantee shall not be taken into account (a "2/3 Majority"):

(a) all decisions in relation to existing Loan Facility Agreements or Loans which are not specifically reserved to unanimity pursuant to Article 10(5) including decisions on breaches, waivers, restructurings and whether to declare defaults in relation to Loan Facility Agreements or Loans;

(b) issuances under an existing EFSF Programme (which programme has been approved unanimously by the Guarantors);

(c) operational matters in relation to debt issuance (including appointment of arrangers, lead managers, rating agents, trustees etc);

(d) detailed implementation of an approved Diversified Funding Strategy;

(e) detailed implementation of any additional credit enhancement approved pursuant to Article 10(5).

The proviso to Article 10(5) relating to euro-area Member States which no longer issue new Guarantees and/or are Stepping-Out Guarantors shall apply to votes on decisions within the scope of this Article 10(6).

(7) The following corporate matters in relation to EFSF shall require the unanimous decision of all euro-area Member States:

- increases in authorized and/or issued and paid-up share capital;
- increase in the level of commitments to subscribe for share capital;
- reductions in share capital;
- dividends;
- employment of the CEO of the EFSF;
- approving accounts;
- prolonging duration of company;
- liquidation;
- changes to the Articles of Association;
- any other matter not specifically dealt with in the Articles of Association or in this Agreement.

(8) The Guarantors or the euro-area Member States (as the case may be) shall take the decisions affecting the Guarantors and EFSF contemplated by Articles 10(5), (6) and (7) at meetings within the framework of the Eurogroup with the possibility to delegate the

decision-making to the Eurogroup Working Group. All their decisions shall be communicated in writing by the Eurogroup Working Group Chairman to EFSF. For such decision-making, the Commission provides input on matters relating, in particular, to the MoU and the terms and conditions of the Loan Facility Agreements and other policy issues. The EFSF shall provide input relating, in particular, to the implementation of the Loan Facility Agreements, the issue of or entry into Financial Instruments and its general corporate matters.

(9) Each euro-area Member State hereby undertakes to the other euro-area Member States that it shall vote as shareholder of EFSF consistently with the decisions taken by the requisite majority of Guarantors or euro-area Member States (as the case may be) within the framework of such Eurogroup meetings and that it shall ensure that the director which has been proposed for nomination to the board of EFSF by it acts consistently with such decisions.

(10) Any decisions by the euro-area Member States to approve any MoU relating to a Loan Facility Agreement and Borrower and regarding any proposed modification to an MoU shall be taken by them acting unanimously.

(11) Euro-area Member States may, to the extent permissible under their national laws, provide indemnities to the persons proposed by them to be nominated as directors of EFSF.

(12) In the event that euro-area Member States agree unanimously to increase the issued paid-up capital of EFSF, each euro-area Member State shall subscribe and pay in full a percentage of such increase in paid up capital equal to its Contribution Key percentage of such increase in paid-up capital on or prior to the date specified by EFSF.

(13) Matters referred to decisions by euro-area Member State or Guarantors under this Agreement shall be decided as soon as reasonably practicable and necessary. In due course, operational guidelines may be adopted which may set out timelines for decisions to be taken in relation to this Agreement.

11. TERM AND LIQUIDATION OF EFSF

(1) This Agreement shall remain in full force and effect so long as there are amounts outstanding under any Loan Facility Agreements or Funding Instruments issued by EFSF under an EFSF Programme or under any reimbursement amounts due to Guarantors.

(2) The euro-area Member States undertake that they shall liquidate EFSF in accordance with its Articles of Association on the earliest date after 30 June 2013 on which there are no longer Loans outstanding to a euro-area Member State and all Funding Instruments issued by EFSF and any reimbursement amounts due to Guarantors have been repaid in full.

(3) In the event that there are any residual liabilities of EFSF on its liquidation the euro-area Member States shall in a final meeting of shareholders decide on what basis these may be divided between the euro-area Member States.

(4) In the event there is a surplus on liquidation of EFSF it shall be distributed to its shareholders on a pro rata basis calculated by reference to their participation in the share capital of EFSF.

Prior to the determination of whether there is such a surplus:

(a) the credit balance of the Cash Reserve shall be paid to the Guarantors as described in Article 2(9); and

(b) any operating profit or surplus derived by EFSF which results from its issuance of Funding Instruments guaranteed by the Guarantors shall be paid as additional remuneration to the Guarantors by reference to their respective Adjusted Contribution Key Percentage.

12. APPOINTMENT OF EIB, ECB, OUTSOURCING AND DELEGATION

(1) EFSF may appoint EIB (or such other agencies, institution, EU institution, financial institution or other persons as is approved unanimously by the euro- area Member States) for the purpose of:

(a) managing the receipt of funds from investors following the issue of bonds or securities under an EFSF Programme, the management of the transmission of these funds to Borrowers in the form of Loans and the receipt of funds from Borrowers and the application of such funds to meet scheduled payments of principal and interest under the bonds and debt securities and, following the making of payments under a Guarantee, the management of funds received from Borrowers and the distribution of reimbursement amounts to the Guarantors;

(b) the related management of the treasury of EFSF including in particular the Cash Reserve and any funds received by way of early repayment or prepayment of Loans pending the application of such funds to repay Funding Instruments;

(c) such other related cash and treasury management tasks as may be delegated from time to time;

(d) providing legal services, accounting services, human resources services, facilities management, procurement services, internal audit and such other services as require outsourcing and/or logistical support.

These appointments may be effected pursuant to a Service Level Contract between EFSF and EIB (or the relevant agency or institution).

(2) EFSF may contract the ECB to act as its paying agent. EFSF may appoint ECB (or another agency, institution, EU institution, financial institution or other persons approved unanimously by the Guarantors) to maintain its bank and securities accounts.

(3) EFSF shall, in the event of the adoption of a Diversified Funding Strategy and subject to the unanimous approval of the Guarantors (other than Stepping-Out Guarantors), be entitled to and may delegate asset and liability management functions and the other activities and functions described in Article 4(6) to one or more debt management agencies of a euro-area Member State or such other agencies, institutions, EU institutions or financial institutions as are approved unanimously by the Guarantors.

(4) EFSF shall be entitled to delegate and/or outsource on arm's length commercial terms to any agency, institution, EU institution, financial institution or other persons such other functions as its board of directors consider desirable for the efficient discharge of its functions.

13. ADMINISTRATIVE PROVISIONS

(1) The operating and out-of-pocket costs of EFSF shall be paid by EFSF out of its general revenues and resources. Fees and expenses directly related to funding may be re-invoiced to the relevant Borrowers (as appropriate).

(2) Upon the incorporation of EFSF it shall assume full responsibility for all costs and expenses incurred in its setting-up and incorporation. In addition, it shall assume all liabilities and obligations (including indemnity obligations) under contracts and arrangements entered into on its behalf and for its benefit (whether by a shareholder or a third party) prior to its incorporation.

(3) EFSF shall report to the euro-area Member States and the Commission on the outstanding claims and liabilities under the Loan Facility Agreements, EFSF Funding Instrument issues and the Guarantees on a quarterly basis.

(4) EFSF will report to the Guarantors and request instructions from the Eurogroup Working Group Chairman regarding unsettled claims and liabilities or any other issues that may arise under this Agreement or in connection with any Guarantee.

(5) The Parties shall not assign or transfer any of their rights or obligations under this Agreement without the prior written consent of all the other Parties to this Agreement.

(6)(a) The euro-area Member States hereby agree that the shares they hold in EFSF cannot be transferred by any EFSF Shareholder during a period of 10 (ten) years from the date of acquisition of the shares by the relevant EFSF Shareholder except with the unanimous consent of all EFSF Shareholders. Such restriction does not apply to (i) the initial transfer by the sole founding shareholder (if any) to the other euro-area Member States and (ii) proportionate transfers by each EFSF Shareholder to any new euro-area Member State which adopts the Euro as its currency after the incorporation of the Company.

(b) In the event that a euro-area Member State wishes to dispose of its shares in EFSF after expiry of the lock-up period in Article 6.4 of the Articles of Association of EFSF, it shall offer such shares to be purchased by the other shareholders of EFSF on a pro rata basis to their shareholdings in EFSF. Any shares which are not purchased by a shareholder to whom they are offered may be offered to and acquired by any other EFSF Shareholder. If no EFSF Shareholder wishes to purchase such shares then, to the extent it has funds available for this purpose, EFSF may acquire such shares at their fair market value.

(7) In the event that a new country becomes a euro-area Member State, the Parties hereto shall permit such new euro-area Member State to become a shareholder of EFSF by receiving a transfer of shares from other shareholders of EFSF such that its aggregate percentage holding of shares in EFSF

corresponds with its Contribution Key and to adhere to the terms of this Agreement. The Parties shall negotiate in good faith as to the basis upon which such new adhering euro-area Member State shall accede to this Agreement.

(8) In the event that one euro-area Member State incorporates EFSF, it shall promptly upon execution and entry into force of this Agreement transfer shares to the other euro-area Member States such that their respective percentage holdings of shares in EFSF corresponds with their respective Contribution Keys.

(9) The terms:

- "Business Day" means a day on which Target 2 is open for settlement of payments in Euro.

- "Target 2" means the Trans-European Automated Real-Time Gross Settlement Express Transfer payment system which utilises a single shared platform and which was launched on 19 November 2007.

14. COMMUNICATIONS

All notices in relation to this Agreement shall be validly given if in writing and sent to the addresses and contact details to be set out in the operating guidelines which shall be adopted by the Parties for the purpose of this Agreement.

15. MISCELLANEOUS

(1) If any one or more of the provisions contained in this Agreement should be or become fully or in part invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not be affected or impaired thereby. Provisions which are fully or in part invalid, illegal or unenforceable shall be interpreted and thus implemented according to the spirit and purpose of this Agreement.

(2) The Preamble to this Agreement forms an integral part of this Agreement.

(3) Each of the Parties hereby irrevocably and unconditionally waives all immunity to which it is or may become entitled, in respect of itself or its assets or revenues, from legal proceedings in relation to this Agreement, including, without limitation, immunity from suit, judgment or other order, from attachment, arrest, detention or injunction prior to judgment, and from any form of execution and enforcement against it, its assets or revenues after judgment to the extent not prohibited by mandatory law.

(4) A person who is not a party to this Agreement shall not be entitled under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement.

(5) This Agreement may be amended by the Parties in writing.

16. GOVERNING LAW AND JURISDICTION

(1) This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law.

(2) Any dispute arising from or in the context of this Agreement shall be settled amicably. In the absence of such amicable agreement, the euro-area Member States agree that to the extent it constitutes a dispute between them only, it shall be submitted to the exclusive jurisdiction of the Court of Justice of the European Union. To the extent there is a dispute between one or more euro- area Member States and EFSF, the Parties agree to submit the dispute to the exclusive jurisdiction of the Courts of the Grand Duchy of Luxembourg.

17. EXECUTION OF THE AGREEMENT

This Agreement may be executed in any number of counterparts signed by one or more of the Parties. The counterparts each form an integral part of the original Agreement and the signature of the counterparts shall have the same effect as if the signatures on the counterparts were on a single copy of the Agreement.

EFSF is authorised to promptly after the signature of this Agreement supply conformed copies of the Agreement to each of the Parties.

18. ANNEXES

The Annexes to this Agreement shall constitute an integral part thereof:

1. List of Guarantors with their respective Guarantee Commitments;

2. Contribution Key; and

3. Template Commitment Confirmation.

Signed in Luxembourg on 7 June 2010 (…)

ANNEX 1 – LIST OF GUARANTOR EURO-AREA MEMBER STATES WITH THEIR RESPECTIVE GUARANTEE COMMITMENTS

Country	EUR (millions)
Kingdom of Belgium	15,292.18
Federal Republic of Germany	119,390.07
Ireland	7,002.40
Kingdom of Spain	52,352.51
French Republic	89,657.45
Italian Republic	78,784.72
Republic of Cyprus	863.09
Grand Duchy of Luxembourg	1,101.39
Republic of Malta	398.44
Kingdom of the Netherlands	25,143.58
Republic of Austria	12,241.43
Portuguese Republic	11,035.38
Republic of Slovenia	2,072.92
Slovak Republic	4,371.54
Republic of Finland	7,905.20
Hellenic Republic	12,387.70
Total Guarantee Commitments	440,000.00

ANNEX 2 – CONTRIBUTION KEY

Member State	Subscription	Contribution Key
Kingdom of Belgium	2.4256	3,475494866853410%
Federal Republic of Germany	18.9373	27,134106588911300%
Ireland	1.1107	1,591454546757130%
Kingdom of Spain	8.3040	11,898297070560200%
French Republic	14.2212	20,376693436879900%
Italian Republic	12.4966	17,905618879089900%
Republic of Cyprus	0.1369	0,196155692312101%
Grand Duchy of Luxembourg	0.1747	0,250317015682425%
Republic of Malta	0.0632	0,090555440132394%
Kingdom of the Netherlands	3.9882	5,714449467342010%
Republic of Austria	1.9417	2,782143957358700%
Portuguese Republic	1.7504	2,508041810249100%
Republic of Slovenia	0.3288	0,471117542967267%
Slovak Republic	0.6934	0,993530730819656%
Republic of Finland	1.2539	1,796637126297610%
Hellenic Republic	1.9649	2,815385827787050%
Total	*67.8266*	*100,000000000000000%*

ANNEX 3 – TEMPLATE FOR COMMITMENT CONFIRMATION

[Letter-head of Authorities of Euro Area Member State]

By fax followed by registered mail:

European Financial Stability Facility [•]

Fax: [•]

Copy to: [•]

Fax: [•]

Re: European Financial Stability Facility ("EFSF") - Confirmation Commitment

Dear Sirs,

We refer to the EFSF Framework Agreement between the Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, Republic of Finland, the Hellenic Republic and EFSF (the "Parties") signed on 2010.

We hereby notify you that we are duly authorised under our national laws to permit us to be bound by the above mentioned Agreement with effect from [date].

Yours faithfully,

[Name of euro-area Member State]

§19. Framework Agreement of the Financial Stability Facility, Consolidated Version, 2012, available http://www.sv.uio.no/arena/english/people/aca/agustinm/crisis-documents-2012/14-efsf-frameworkagreement-consolidated-8sep11.pdf

EFSF FRAMEWORK AGREEMENT (the "Agreement")

is made by and between:

(A) Kingdom of Belgium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, and Republic of Finland (the "euro-area Member States" or "EFSF Shareholders"); and

(B) European Financial Stability Facility ("EFSF"), a société anonyme incorporated in Luxembourg, with its registered office at 43, avenue John F. Kennedy, L-1855 Luxembourg (R.C.S. Luxembourg B153.414) (the euro- area Member States and EFSF referred to hereafter as the "Parties").

PREAMBLE

Whereas:

(1) On 9 May 2010 a comprehensive package of measures has been decided including (a) a Council Regulation establishing the European Financial Stabilisation Mechanism ("EFSM") based on Article 122(2) of the Treaty on the functioning of the European Union and (b) the EFSF in order to financially support euro-area Member States in difficulties caused by exceptional circumstances beyond such euro-area Member States' control with the aim of safeguarding the financial stability of the euro area as a whole and of its Member States. It is envisaged that financial support to euro-area Member States shall be provided by EFSF in conjunction with the IMF and shall be on comparable terms to the stability support loans advanced by euro- area Member States to the Hellenic Republic on 8 May 2010 or on such other terms as may be agreed.

(2) EFSF has been incorporated on 7 June 2010 for the purpose of making stability support to euro-area Member States. In a statement

dated 21 July 2011 the Heads of State or Government of the euro area and EU institutions stated their intention to improve the effectiveness of EFSF and address contagion and they had agreed to increase the flexibility of EFSF linked to appropriate conditionality. As a consequence, whilst originally financial assistance was provided solely by way of loan facility agreements, financial assistance may now be granted in the form of financial assistance facility agreements ("Financial Assistance Facility Agreements", each a "Financial Assistance Facility Agreement") to provide financial assistance by way of loan disbursements, precautionary facilities, facilities to finance the recapitalisation of financial institutions in a euro-area Member State (through loans to the governments of such Member States including in non- programme countries), facilities for the purchase of bonds in the secondary markets on the basis of an ECB analysis recognizing the existence of exceptional financial market circumstances and risks to financial stability or facilities for the purchase of bonds in the primary market (each such utilization of a Financial Assistance Facility Agreement being a "Financial Assistance") with the Financial Assistance to be made under all Financial Assistance Facility Agreements being financed with the benefit of guarantees in an amount of up to EUR 779,783.14 million to be used within a limited period of time. This is intended to result in an effective capacity for EFSF to provide Financial Assistance of EUR 440,000 million. The availability of such Financial Assistance Facility Agreements will be conditional upon the relevant euro-area Member States which request such Financial Assistance Facility Agreements entering into memoranda of understanding (each an "MoU") with the European Commission, acting on behalf of the euro-area Member States, including conditions such as budgetary discipline and economic policy guidelines and their compliance with the terms of such MoU. With respect to each Financial Assistance Facility Agreement, the relevant beneficiary euro-area Member State shall be referred to as the "Beneficiary Member State". If Financial Assistance is in the form of facilities for the purchase of bonds in the primary or secondary market, the nature and terms, including as to pricing, policy conditionality, conditions to utilization and documentation of such arrangements shall be in accordance with guidelines adopted by the board of directors of EFSF acting unanimously pursuant to Article 2(1)(b). Similarly, if Financial Assistance is in the form of precautionary facilities and facilities to finance the recapitalisation of financial institutions of a euro-area Member State, the board of directors of EFSF acting unanimously shall adopt guidelines under Article 2(1)(c) in relation to such arrangements. The terms of an MoU shall impose appropriate policy conditionality for the full duration of a Financial Assistance Facility Agreement and not just limited to the period in which Financial Assistance is made available. The conditions attached to the provision of Financial Assistance by EFSF as well as the rules which apply to monitoring compliance must be fully consistent with the Treaty on the Functioning of the European Union and the acts of EU law.

(2)(a) On 20 June 2011, euro area Finance Ministers agreed that the pricing structure for EFSF loan facility agreements should be as follows:

"(a) EFSF Cost of Funding; plus

(b) the Margin.

The margin shall be equal to 200 basis points with such Margin being increased to 300 basis points in respect of any Loan which remains outstanding after the third anniversary of the date of disbursement.

In respect of fixed rated Loans with a scheduled maturity which exceeds three

(3) years, the Margin shall be equal to the weighted average of 200 basis points for the first three (3) years and 300 basis points for the period from (and including) the third anniversary of its drawdown and ending on (but excluding) the scheduled maturity date of such Loan."

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Subsequently, on 21 July 2011, Heads of State or Government of the euro area stated:

"We have decided to lengthen the maturity of future EFSF loans to Greece to the maximum extent possible from the current 7.5 years to a minimum of 15 years and up to 30 years with a grace period of 10 years. In this context, we will ensure adequate post programme monitoring. We will provide EFSF loans at lending rates equivalent to those of the Balance of Payments facility (currently approx. 3.5%), close to, without going below, the EFSF funding cost. We also decided to extend substantially the maturities of the existing Greek facility. This will be accompanied by a mechanism which ensures appropriate incentives to implement the programme."

They also stated:

"The EFSF lending rates and maturities we agreed upon for Greece will be applied also for Portugal and Ireland."

(3) By a decision of the representatives of the governments of the 16 euro-area Member States dated 7 June 2010, acting on the basis of the conclusions of the 27 European Union Member States of 9 May 2010, the Commission was tasked with carrying out certain duties and functions as contemplated by the terms of this Agreement.

(4) EFSF shall finance the making of Financial Assistance by issuing or entering into bonds, notes, commercial paper, debt securities or other financing arrangements ("Funding Instruments") which are backed by irrevocable and unconditional guarantees (each a "Guarantee") of the euro-area Member States which shall act as guarantors in respect of such Funding Instruments as contemplated by the terms of this Agreement. The guarantors (the "Guarantors") of Funding Instruments issued or entered into by EFSF shall be comprised of each euro-area Member State (excluding any euro-area Member State which is or has become a Stepping-Out Guarantor under Article 2(7) prior to the issue of such Funding Instruments). It is not anticipated that a request under Article 2(7) of this Agreement would be made by a euro-area Member State which has requested Financial Assistance in the form of a precautionary facility, so long as such facility is not drawn or utilised, a facility to finance the recapitalisation of financial institutions in such Member State by way of a loan made to such Member State or a facility for the purchase of bonds of such Member State in the secondary market.

(5) A political decision has been taken by all euro-area Member States to provide Guarantee Commitments (as defined in Article 2(3)) pursuant to the terms of this Agreement.

(6) The euro-area Member States and EFSF have entered into this Agreement to set out the terms and conditions upon which EFSF may enter into Financial Assistance Facility Agreements, make Financial Assistance available to euroarea Member States, finance such Financial Assistance by issuing or entering into Funding Instruments backed by Guarantees issued by the Guarantors, the terms and conditions on which the Guarantors shall issue Guarantees in respect of the Funding Instruments issued by or entered into by EFSF, the arrangements entered into between them in the event that a Guarantor is required to pay under a Guarantee more than its required proportion of liabilities in respect of a Funding Instrument and certain other matters relating to EFSF.

Now, therefore, the Parties have agreed as follows:

1. ENTRY INTO FORCE

(1) This Agreement (with the exception of the obligation of euro-area Member States to issue Guarantees under this Agreement) shall, upon at least five (5) euro-area Member States comprising at least two-thirds (2/3) of the total guarantee commitments set out in Annex 1 (the "Total Guarantee Commitments") providing written confirmation substantially in the form of Annex 3 to EFSF that they have concluded all procedures necessary under their respective national laws to ensure that their obligations under this Agreement shall come into immediate force and effect (a "Commitment Confirmation"), enter into force and become binding between EFSF and the euro-area Member Sates providing such Commitment Confirmations.

(2) The obligation of euro-area Member States to issue Guarantees under this Agreement shall enter into force and become binding between EFSF and the euro-area Member States which have provided Commitment Confirmations only when Commitment Confirmations have been received by EFSF from euro-area Member States whose Guarantee Commitments represent in aggregate ninety per cent (90%) or more of the Total Guarantee Commitments. Any euro-area Member State which applies for stability support from the euro-area Member States or which benefits from financial support under a similar programme or which is already a Stepping-Out Guarantor shall be excluded in computing whether this ninety per cent (90%) threshold of the Total Guarantee Commitments is satisfied.

(3) This Agreement and the obligation to provide Guarantees in accordance with the terms of this Agreement shall enter into force and become binding on any remaining euro-area Member States (which have not provided their Commitment Confirmations at the time the Agreement or the obligation to provide Guarantees comes into force pursuant to Article 1(1) or 1(2)) at the time when such euro-area Member States provide their Commitment Confirmation to EFSF copies of which should be addressed to the Commission.

2. FINANCIAL ASSISTANCE FACILITY AGREEMENTS, GRANT OF FINANCIAL ASSISTANCE, FUNDING INSTRUMENTS AND ISSUANCE OF GUARANTEES

(1) (a) The euro-area Member States agree that in the event of a request made by a euro-area Member State to the other euro-area Member States for a Financial Assistance Facility Agreement (i) the Commission (in liaison with the ECB and the IMF) shall be hereby authorised to negotiate the MoU with the relevant Beneficiary Member State which shall be consistent with a decision the Council may adopt under Article 136(1) of the Treaty on the functioning of the European Union following a proposal of the Commission and the Commission shall be hereby authorised to finalise the terms of such MoU and to sign such MoU with the Beneficiary Member State on behalf of the euro-area Member States once such MoU has been approved by the Eurogroup Working Group (unless an MoU has been already entered into between the Beneficiary Member State and the Commission under the EFSM which MoU has been approved by all euro-area Member States in which case this latter MoU shall apply, provided that it covers both EFSM and EFSF stability support); (ii) following such approval of the relevant MoU, the Commission, in liaison with the ECB, shall make a proposal to the Eurogroup Working Group of the main terms of the Financial Assistance Facility Agreement to be proposed to the Beneficiary Member State based on its assessment of market conditions and provided that the terms of such Financial Assistance Facility Agreement contain financial terms compatible with the MoU and the compatibility of maturities with debt sustainability; (iii) following a decision of the Eurogroup Working Group, EFSF (in conjunction with the Eurogroup Working Group) shall negotiate the detailed, technical terms of the Financial Assistance Facility Agreements under which Financial Assistance will, subject to the terms and conditions set out therein, be made available to the relevant Beneficiary Member State, provided that such Financial Assistance Facility Agreements shall be substantially in the form of template Financial Assistance Facility Agreements (each adapted to the particular form of financial assistance being provided to the relevant euro-area Member State) which shall be approved by the euro-area Member States for the purpose of this Agreement and the financial parameters of such Financial Assistance Facility Agreements shall be based on the financial terms proposed by the Commission, in liaison with the ECB, and approved by the Eurogroup Working Group and (iv) EFSF shall collect, verify and hold in safe custody the conditions precedent to such Financial Assistance Facility Agreements and the executed versions of all related documents. The terms of Article 3(2) set out the basis upon which decisions shall be made in relation to Financial Assistance to be made available under an existing Financial Assistance Facility Agreement subject to any other procedures which may be adopted pursuant to guidelines adopted by the board of directors of EFSF pursuant to Articles 2(1)(b) or 2(1)(c). Given that EFSF is not a credit institution, Beneficiary Member States shall represent and warrant in each Financial Assistance Facility Agreement that no regulatory authorisation is required for EFSF to grant Financial Assistance to such Beneficiary Member State under its applicable national law or that an exemption to such regulatory authorisation requirement exists under applicable national law. The Guarantors hereby authorise EFSF to sign such Financial Assistance Facility Agreements, subject to the prior unanimous approval by all of them participating in the relevant votes of Guarantors.

(b) Financial Assistance to a euro-area Member State may consist of facilities for the purchase of bonds in the secondary market to avoid contagion, on the basis of an ECB analysis recognising the existence of exceptional financial market circumstances and risks to financial stability or by way of facilities for the purchase of bonds in the primary market. The nature and terms, including as to pricing, conditions to and procedures for disbursement or utilisation, administration, documentation and monitoring of compliance with policy conditionality of such arrangements shall be in accordance with guidelines adopted by the board of directors of EFSF acting with unanimity. Bonds purchased by EFSF in the primary or secondary markets can either be held to maturity or sold in accordance with the applicable guidelines.

(c) To improve the effectiveness of EFSF and address contagion, Financial Assistance Facility Agreements to a euro-area Member State may consist of precautionary facilities or facilities to finance the re-capitalisation of financial institutions in a euro-area Member State by way of a loan to the government of such Member State (whether or not it is a programme country). If a Financial Assistance Facility Agreement covers such Financial Assistance, the nature and terms of such agreement, including as to pricing, conditions to and procedures for disbursement or utilisation, compliance with policy conditionality,

administration, documentation and monitoring of compliance with policy conditionality shall be in accordance with guidelines to be adopted by the board of directors of EFSF acting with unanimity.

(2) In respect of each Financial Assistance Facility Agreement and the Financial Assistance to be made thereunder, the euro-area Member States agree that EFSF (in consultation with the Eurogroup Working Group) shall be authorised to structure and negotiate the terms on which EFSF may issue or enter into Funding Instruments on a stand-alone basis or pursuant to a debt issuance programme or programmes or facility (each an "EFSF Programme(s)") to finance the making of Financial Assistance to Beneficiary Member States. So long as market conditions permit and save as otherwise stated in this Agreement, such Funding Instruments shall have substantially the same financial profile as the related Financial Assistance (provided that (x) for operational reasons there will need to be delays between issue dates and payment dates to facilitate the transfers of funds and calling Guarantees and (y) notwithstanding the liability of each Guarantor to pay any amounts of interest and principal due but unpaid under the Funding Instruments, the recourse of investors against EFSF under the Funding Instruments shall be limited to the assets of EFSF including, in particular, the amounts it recovers in respect of the Financial Assistance. The pricing which will apply to each Financial Assistance is intended to cover the cost of funding and operations incurred by EFSF and shall include a margin (the "Margin"). This shall provide remuneration for the Guarantors and shall be specified in the relevant Financial Assistance Facility Agreement. The EFSF shall review periodically the pricing structure applicable to its Financial Assistance Facility Agreements and any changes thereto shall be agreed by the Guarantors acting unanimously in accordance with Article 10(5). The Service Fee retained in respect of Financial Assistance disbursed prior to the Effective Date of the Amendments may be used to cover the operational costs of EFSF and any costs and fees directly related to the issuance of Funding Instruments which have not otherwise been charged to the relevant Beneficiary Member State.

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(3) In respect of Funding Instruments issued or entered into under an EFSF Programme or on a stand-alone basis, each Guarantor shall be required to issue an irrevocable and unconditional Guarantee in a form to be approved by the Guarantors for the purpose of this Agreement and in an amount equal to the product of (a) the percentage set out next to each Guarantor's name in the third column (the "Contribution Key") in Annex 2 (as such percentage is adjusted from time to time in accordance with the terms of this Agreement and/or to reflect any euro-area Member State not yet having provided its Commitment Confirmation during the implementation period pursuant to Article 1 and notified in writing by EFSF to the Guarantors) (the "Adjusted Contribution Key Percentage"), (b) up to 165% (the "Over-Guarantee Percentage") in respect of Funding Instruments issued or entered into after the Effective Date of the Amendments, and (c) the obligations of EFSF (in respect of principal, interest or other amounts due) in respect of the Funding Instruments issued or entered into by EFSF on a stand-alone basis or under an EFSF Programme. If EFSF issues Funding Instruments under an EFSF Programme, each Guarantor shall issue its Guarantee to guarantee all Funding Instruments issued or entered into pursuant to the relevant EFSF Programme. The Offering Materials or contractual documentation for each issue or contracting of Funding Instruments made under an EFSF Programme shall confirm which Guarantors have Guarantees which cover the relevant Funding Instruments or issue or series thereof. EFSF may also request the Guarantors to issue Guarantees under this Agreement for other purposes which are closely-linked to an issue of Funding Instruments and which facilitates the obtaining and maintenance of a high quality rating for Funding Instruments issued by EFSF and efficient funding by EFSF. The decision to issue Guarantees for such other purposes in connection with an EFSF Programme or a stand-alone issue of or entry into Funding Instruments shall be taken by a unanimous decision of the Guarantors. No Guarantor shall be required to issue Guarantees which would result in it having a Guarantee Notional Exposure in excess of its guarantee commitment (" Guarantee Commitment") set alongside its name in Annex 1. For the purposes of this Agreement, a Guarantor's "Guarantee Notional Exposure" is equal to the aggregate of:

(i) the principal amount of Funding Instruments issued or entered into (including Funding Instruments issued or entered into

1 [2]In respect of Funding Instruments issued or entered into prior to the Effective Date of the Amendments the Contribution Key and Adjusted Contribution Key Percentage shall be determined by the terms of this Agreement (including Annex 2) prior to the amendments.

pursuant to any Diversified Funding Strategy approved pursuant to Article 4(5), and other principal amounts guaranteed under Guarantees issued for other purposes pursuant to Article 2(3)) which benefit from Guarantees issued under this Agreement and which remain outstanding; and

(ii) without double counting, the aggregate amounts paid by the Guarantors following demands made under Guarantees issued under this Agreement which paid amounts have not been reimbursed to the Guarantors.

Accordingly, if an outstanding, undrawn Guarantee expires or if an amount drawn under a Guarantee is reimbursed this will reduce a Guarantor's Guarantee Notional Exposure and replenish its capacity to issue Guarantees under this Agreement.

It is acknowledged and agreed that the amendments to this Article 2(3) apply to Funding Instruments issued or entered into on or after the Effective Date of the Amendments. These amendments do not in any respect affect or reduce the liability of Guarantors (including any Guarantors which became Stepping-Out Guarantors) under Guarantees which guarantee Funding Instruments issued or entered into prior to the Effective Date of the Amendments in respect of which the Contribution Key and Adjusted Contribution Key Percentage and Guarantee Commitment of each Guarantor is that which applied on the date of issue of or entry into the relevant Funding Instrument.

(4) (a) The Guarantees shall irrevocably and unconditionally guarantee the due payment of scheduled payments of interest and principal due on Funding Instruments issued by EFSF. In the case of EFSF Programmes, the Guarantors shall issue Guarantees which guarantee all series of Funding Instruments issued from time to time under the relevant EFSF Programme. The Offering Materials and/or contractual documentation of each series shall confirm which Guarantees cover that series, in particular, if a Guarantor under the relevant EFSF Programme has subsequently become a Stepping-out Guarantor and no longer guarantees further issues or series under such EFSF Programme.

(b) The Guarantees may be issued to a bond trustee or other representative of bondholders or creditors (a "Noteholder Representative") who shall be entitled to make demands under the Guarantees on behalf of holders of Funding Instruments and enforce the claims of holders of Funding Instruments so as to facilitate the management of making demands on the Guarantees. The detailed terms and conditions of each issue of Funding Instruments and the Guarantees relating thereto shall be agreed by EFSF, subject to the approval of the Guarantors, and shall be as described in the relevant Offering Materials (as defined in Article 4(1) applicable thereto) and applicable contractual documentation.

(5) A Guarantor shall only be required to issue a Guarantee in accordance with this Agreement if:

(a) it is issued in respect of Funding Instruments issued or entered into under an EFSF Programme or on a stand-alone basis and such Funding Instruments finance the making of Financial Assistance approved in accordance with the terms of this Agreement and the Articles of Association of EFSF or it is issued for such other closely- linked purpose as are approved under Article 2(3);

(b) the Guarantee is issued to facilitate the financing under Financial Assistance Facility Agreements entered into on or prior to 30 June 2013 (including the financing of Financial Assistance made pursuant to an existing Financial Assistance Facility Agreement after such date and any related issue of bonds or debt securities related thereto) and the Guarantee is in any event issued on or before 30 June 2013;

(c) the Guarantee is in the form approved by euro-area Member States for the purpose of this Agreement and the EFSF Programme;

(d) the liability of the Guarantor under such Guarantee gives rise to a Guarantee Notional Exposure which complies with the terms of Article 2(3); and

(e) it is denominated in euros or such other currency as is approved by the Guarantors for the purpose of this Agreement.

(6) The Guarantee Commitment of each Guarantor to provide Guarantees is irrevocable and firm and binding. Each Guarantor will be required, subject to the terms of this Agreement, to issue Guarantees up to its Guarantee Commitment for the amounts to be determined by EFSF and at the dates specified by EFSF in order to facilitate the issuance or entry into of Funding Instruments under the relevant EFSF Programme or stand-alone Funding Instrument in each case in accordance with the EFSF funding strategy.

(7) If a euro-area Member State encounters financial difficulties such that it makes a demand for a Financial Assistance Facility Agreement from EFSF, it may by written notice together with supporting information satisfactory to the other Guarantors request the other Guarantors (with a copy to the Commission, the Eurogroup Working Group Chairman) to accept that the Guarantor in question does not participate in issuing a Guarantee or incurring new liabilities as a Guarantor in respect of any further debt issuance by EFSF. The decision of the euro-area Member States in relation to such a request is to be made at the latest when they decide upon making any further Financial Assistance Facility Agreements or make available further Financial Assistance.

(8) In respect of Financial Assistance disbursed prior to the Effective Date of the Amendments, an up-front service fee (the "Service Fee") calculated as being 50 basis points on the aggregate principal amount of each Financial Assistance shall be charged to each Beneficiary Member State and deducted from the cash amount to be remitted to the Beneficiary Member State in respect of each such Financial Assistance. In addition, the net present value (calculated on the basis of the internal rate of return of the Funding Instruments financing such Financial Assistance (or such other blended internal rate of return as is deemed appropriate in case of a Diversified Funding Strategy), the "Discount Rate") of the anticipated Margin that would accrue on each Financial Assistance to its scheduled maturity date (the "Prepaid Margin") shall be deducted from the cash amount to be remitted to the Beneficiary Member State in respect of such Financial Assistance. The Service Fee and the Prepaid Margin, together with such other amounts as EFSF decides to retain as an additional cash buffer, will be deducted from the cash amount remitted to the Beneficiary Member State in respect of each Financial Assistance (such that on the disbursement date (the "Disbursement Date") the Beneficiary Member State receives the net amount (the "Net Disbursement Amount")) but shall not reduce the principal amount of such Financial Assistance that the Beneficiary Member State is liable to repay and on which interest accrues under the relevant Financial Assistance. These retained amounts shall be retained to provide a cash reserve to be used as credit enhancement and otherwise as described in Article 5 below. The "Cash Reserve" shall include these retained amounts, the amounts credited to the Cash Reserve under Article 2(9), together with all income and investments earned by investment of these amounts. The Cash Reserve shall be invested in accordance with investment guidelines approved by the board of directors of EFSF.

(9) In respect of Financial Assistance disbursed after the Effective Date of the Amendments, if on the date of disbursement of such Financial Assistance, the Notes issued to finance such Financial Assistance obtain the highest credit ratings (without any additional credit enhancement), then, unless otherwise agreed:

(a) subject to Article 2(9)(c), the Margin shall be payable on such Financial Assistance in arrear at the end of each interest period;

(b) an amount calculated as being 50 basis points on the aggregate principal amount of each Financial Assistance shall be charged to the Beneficiary Member State as an advance payment of a portion of the Margin on such Financial Assistance (the "Advance Margin") and shall be deducted from the cash amount to be remitted to the Beneficiary Member State in respect of such Financial Assistance;

(c) on the first (and/or subsequent) interest payment date(s) of a Financial Assistance the amount payable in respect of the Margin shall be reduced by an amount equal to the Advance Margin and the interest cost related to the funding of the Advance Margin; and

(d) the only deduction from the cash amount of the Financial Assistance shall be the amount of Advance Margin and any fees and costs incurred in connection with the issue of Funding Instruments to finance such Financial Assistance and any adjustment for Funding Instruments being issued for an issue price less than par value ("Issuance Costs") and the Net Disbursement Amount shall be equal to the principal amount of the Financial Assistance less (i) the amount of Advance Margin and (ii) the Issuance Costs.

The deduction of an amount equal to the Issuance Costs and the amount of Advance Margin shall not reduce the principal amount of a Financial Assistance that the Beneficiary Member State is liable to repay and on which interest accrues.

Advance Margin and Margin amounts retained or received in respect of a Financial Assistance shall be credited to the Cash Reserve.

If, on the date of disbursement of a Financial Assistance, the Notes issued to finance such

Financial Assistance would not obtain the highest quality credit ratings (without any additional credit enhancement), then the euro-area Member States may adopt additional credit enhancement mechanisms under Article 5(3) of this Agreement and make consequent modifications to the relevant Financial Assistance Facility Agreement.

(10) If, following the repayment of all Financial Assistance made under Financial Assistance Facility Agreements and all Funding Instruments issued by or entered into by EFSF, there remain amounts in the Cash Reserve (including amounts representing interest or investment income earned by investment of the Cash Reserve), then, unless otherwise agreed, these amounts shall be paid to the Guarantors as consideration for the issuance of their Guarantees. EFSF shall maintain ledger accounts and other records of the amounts of Service Fee and anticipated Margin retained in respect of each Financial Assistance Facility Agreement and the amounts credited to the Cash Reserve under Article 2(9) and the amount of all Guarantees issued by each Guarantor pursuant to this Agreement. These ledger accounts and records shall permit EFSF to calculate the consideration due to each Guarantor in respect of the Guarantees issued under this Agreement which shall be payable on a pro rata proportional basis to each Guarantor by reference to its participation in all the Guarantees issued under this Agreement.

(11) Euro-area Member States which are potential Beneficiary Member States may only request and enter into Financial Assistance Facility Agreements in the period commencing on the date this Agreement enters into force and ending on 30 June 2013 (provided that Financial Assistance may be disbursed after this date under Financial Assistance Facility Agreements entered into prior to this date).

(12) Following the execution of this Agreement, the Parties shall agree upon forms of (i) the Guarantees, (ii) the Financial Assistance Facility Agreements (adapted as appropriate pursuant to guidelines adopted by the board of directors of EFSF under Articles 2(1)(b) or 2(1)(c)), (iii) the documentation for the Funding Instruments, (iv) the arrangements in respect of the appointment of Noteholder Representatives, (v) the dealer and subscription agreements for Funding Instruments and (vi) any agency or service level agreement with EIB or any other agency, institution or person.

3. PREPARATION AND AUTHORISATION OF DISBURSEMENTS

(1) Before each disbursement of a Financial Assistance under a Financial Assistance Facility Agreement, unless otherwise specified in the relevant Financial Assistance Facility Agreement (in accordance with guidelines adopted by the board of directors of EFSF pursuant to Articles 2(1)(b) or 2(1)(c) and applicable to the relevant category of Financial Assistance Facility Agreement), the Commission will, in liaison with the ECB, present a report to the Eurogroup Working Group analysing compliance by the relevant Beneficiary Member State with the terms and the conditions set out in the MoU and in the Council Decision (if any) relating to it. The Guarantors will evaluate such compliance and will unanimously decide on whether to permit disbursement of the relevant Financial Assistance. The first Financial Assistance to be made available to a Beneficiary Member State under a Financial Assistance Facility Agreement shall be released or utilised following the initial signature of the relevant MoU and will not be the object of such a report. The board of directors of EFSF acting with unanimity shall adopt guidelines under Article 2(1)(b) and 2(1)(c) regarding the conditions to and procedures for the disbursement and on-going monitoring of compliance with policy conditionality of Financial Assistance in the form of precautionary facilities, facilities for the recapitalisation of financial institutions in a Member State and facilities for the purchase of bonds in the primary or secondary markets.

(2) Unless otherwise specified in the relevant Financial Assistance Facility Agreement (in accordance with guidelines adopted by the board of directors of EFSF under Articles 2(1)(b) or 2(1)(c) and applicable to the relevant category of Financial Assistance Facility Agreement), following a request for financial assistance (a "Request for Financial Assistance") from a Beneficiary Member State complying with the terms of the relevant Financial Assistance Facility Agreement, the Guarantors shall (other than in respect of the first Financial Assistance) consider the report of the Commission regarding the Beneficiary Member State's compliance with the MoU and the relevant Council decision (if any). If, acting unanimously, the Guarantors consider that the Beneficiary Member State has complied with the conditions to drawdown under the Financial Assistance Facility Agreement and are satisfied with its compliance with the terms and conditions of the MoU then the Eurogroup Working Group Chairman shall request in writing EFSF to make a proposal of detailed terms of the Financial Assistance it would recommend to make to the Beneficiary Member

State within the parameters of the Financial Assistance Facility Agreement, the MoU, taking into account debt sustainability and the market situation for bond issuance. The EFSF proposal shall specify the amount which EFSF is authorised to make available by way of a Financial Assistance under the Financial Assistance Facility Agreement and on what terms including as to the amount of the Financial Assistance, the Net Disbursement Amount, the term, the redemption schedule and the interest rate (including the Margin) in relation to such Financial Assistance. If the Eurogroup Working Group accepts this proposal the Eurogroup Working Group Chairman shall request EFSF to communicate an acceptance notice (an "Acceptance Notice") to the Beneficiary Member State confirming the terms of the Financial Assistance.

(3) At the latest following the signature of a Financial Assistance Facility Agreement, EFSF shall commence the process for the issuance of or entry into Funding Instruments under the EFSF Programme(s) or otherwise and, to the extent necessary, shall request the Guarantors to issue Guarantees in accordance with Article 2 (above) such that EFSF has sufficient funds when needed to make disbursements under the relevant Financial Assistance .

(4) If applicable, and prior to the delivery of any Acceptance Notice, the Eurogroup Working Group Chairman shall communicate to the Commission and EFSF whether any Guarantor has notified it that the circumstances described in Article 2(7) apply to it and the decision of the euro-area Member States relating thereto. The Eurogroup Working Group Chairman shall communicate the decisions of the Guarantors to EFSF, the Commission and the euro-area Member States at least thirty (30) Business Days prior to the date of any related issue of or entry into Funding Instruments.

(5) On the relevant Disbursement Date, unless otherwise specified in the relevant Financial Assistance Facility Agreement (in accordance with guidelines adopted by the board of directors of EFSF under Articles 2(1)(b) or 2(1)(c) and applicable to the relevant category of Financial Assistance Facility Agreement) EFSF shall make the relevant Financial Assistance available to the Beneficiary Member State by making available the Net Disbursement Amount through the accounts of EFSF and the relevant Beneficiary Member State opened for the purpose of the Financial Assistance Facility Agreement with the ECB.

4. ISSUANCE OF OR ENTRY INTO FUNDING INSTRUMENTS

(1) In compliance with its funding strategy, EFSF may issue or enter into Funding Instruments benefitting from the Guarantees on a stand-alone basis or shall establish one or more EFSF Programme(s) for the purpose of issuing Funding Instruments benefitting from Guarantees which shall finance the making of Financial Assistance in accordance with the terms of this Agreement. EFSF may establish a base prospectus (the "Base Prospectus") for each EFSF Programme with each individual issue of Funding Instruments being issued pursuant to final terms ("Final Terms") setting out the detailed financial terms of each issue (including the Over-Guarantee Percentage applicable to such issue of Funding Instruments). Alternatively, EFSF may establish information memoranda (the "Information Memoranda") for the purpose of issuing Funding Instruments (which would not be prospectuses for the purposes of the Prospectus Directive 2003/71/EC). Any Base Prospectus, Final Terms, prospectus, Information Memorandum or related materials relating to the placement or syndication of Funding Instruments shall be referred to as "Offering Materials". It shall also enter into relevant contractual documentation relating to such Funding Instruments.

(2) EFSF shall devise standard terms and conditions for the Funding Instruments issued or entered into by EFSF. These may include provisions for the calling of Guarantees either by EFSF if it anticipates a shortfall prior to a scheduled payment date or by the relevant Noteholder Representative (if EFSF has failed to make a scheduled payment of interest or principal under a Funding Instrument when due). The standard terms and conditions shall clarify that there is no acceleration of Funding Instruments in the event that the Financial Assistance financed by such Funding Instruments are accelerated or pre-paid for whatever reason.

(3) In connection with the structuring and negotiation of Funding Instruments on a stand-alone basis or under EFSF Programme(s) EFSF may:

(a) appoint, liaise and negotiate with arranging banks, lead managers and book-runners;

(b) appoint, liaise and negotiate with rating agencies and rating agency advisers and supply them with such data and documentation and

make such presentations as necessary to obtain requisite ratings;

(c) appoint, liaise and negotiate with paying agents, listing agents, Noteholder Representative, lawyers and other professional advisers;

(d) appoint, liaise and negotiate with common depositaries and clearing systems such as Euroclear and/or Clearstream for the settlement of Funding Instruments;

(e) attend investor presentations and road shows to assist in the placement or syndication of Funding Instruments pursuant to the EFSF Programme(s);

(f) negotiate, execute and sign all legal documentation related to the Funding Instruments and any EFSF Programme(s); and

(g) generally do such other things necessary for the successful structuring and implementation of the EFSF Programme(s) and the issuance of or entry into Funding Instruments.

(4) EFSF shall, subject to market conditions and the terms of this Article 4, fund Financial Assistance by the issuance of or entry into Funding Instruments on a matched-funding basis such that the Funding Instruments financing a Financial Assistance have substantially the same financial profile as to amount, time of issue, currency, repayment profile, final maturity and interest basis, provided that, to the extent feasible, the scheduled payment dates for Financial Assistance shall be at least fourteen (14) Business Days prior to the scheduled payment dates under the related Funding Instruments to permit processing of payments.

(5) If, due to market condition or the volume of Funding Instruments to be issued or entered into by EFSF under the EFSF Programme(s) it is not practicable or feasible to issue or enter into Funding Instruments on a strict matched- funding basis, EFSF may request the Guarantors to permit EFSF certain flexibilities as to funding such that its funding is not matched to the Financial Assistance it makes, in particular as to (a) currency of Funding Instruments,

(b) timing for the issue or entry into of Funding Instruments, (c) interest rate bases and/or (d) maturity and repayment profile of the Funding Instruments to be issued or entered into (including the possibility of issuing short term debt instruments, commercial paper or other financing arrangements supported by Guarantees) and (e) the possibility of pre-funding of Financial Assistance under Financial Assistance Facility Agreements. The Guarantors, acting unanimously, may permit EFSF to use a degree of funding flexibility and shall specify within which parameters and limits EFSF may adopt a non- matched funding strategy (a "Diversified Funding Strategy").

(6) Given that a Diversified Funding Strategy would require the management of transformation and basis risks, in the event that a Diversified Funding Strategy is authorised in relation to EFSF it may delegate the management of such funding activities, related asset and liability management activities and the conclusion of any related currency, interest rate or maturity mis-match hedging instruments to one or more debt management agencies of euro-area Member State or such other agencies or institutions as are approved unanimously by the Guarantors which shall be entitled to be compensated at arm's length commercial rate for the provision of such services which remuneration shall constitute an operating cost for EFSF.

5. CREDIT ENHANCEMENT, LIQUIDITY AND TREASURY

(1) The credit enhancement for the EFSF Programme shall include the following elements:

(a) the Guarantees and, in particular, the fact that the participation of each Guarantor in issuing Guarantees shall be made on the basis of the Adjusted Contribution Key Percentage and that the Guarantee issued by each Guarantor is for an Over-Guarantee Percentage of up to 165% (as required to ensure the highest credit worthiness for Funding Instruments issued or entered into by EFSF on the date of issue) in respect of Funding Instruments issued or entered into after the Effective Date of the Amendments of its Adjusted Contribution Key Percentage of the amounts of the relevant Funding Instruments;

(b) the Cash Reserve (retained in respect of Financial Assistance disbursed prior to the Effective Date of the Amendments) shall act as a cash buffer. The Cash Reserve shall, pending its use, be invested in high quality liquid debt instruments. Upon repayment of all Financial Assistance made by EFSF and Funding Instruments issued by EFSF, the balance of the Cash Reserve shall be used firstly to repay any amounts paid by Guarantors which have not

been repaid out of recoveries from the relevant underlying Beneficiary Member States and secondly, shall be paid to the Guarantors as consideration for their issuance of Guarantees under this Agreement as described in Article 2(10); and

(c) such other credit enhancement mechanisms as may be approved under this Article 5.

(2) In the event that there is a delay or failure to pay by a Beneficiary Member State of a payment under a Financial Assistance and accordingly there is a shortfall in funds available to meet a scheduled payment of interest or principal under a Funding Instrument issued by EFSF then EFSF shall:

(a) first, make a demand on a pro rata, pari passu basis on the Guarantors which have guaranteed such Funding Instrument up to the applicable Over- Guarantee Percentage of their respective Adjusted Contribution Key Percentage of the amount due but unpaid;

(b) second, if the steps taken in Article 5(2)(a) do not fully cover the shortfall, to release an amount from the Cash Reserve (provided that EFSF may not use any amounts credited to the Cash Reserve prior to the Effective Date of the Amendments to cover shortfalls arising in respect of Financial Assistance Facility Agreements entered into after such date) to cover such shortfall; and

(c) third, take such other steps as may be available in the event that additional credit enhancement mechanisms have been approved under Article 5(3).

(3) The euro-area Member States may by unanimous decision approve and adopt such other credit enhancement mechanisms as they consider appropriate or, as the case may be, modify the existing credit enhancement mechanisms in order to enhance or to maintain the creditworthiness of the Funding Instruments issued or contracted by EFSF or to enhance the efficiency of funding of EFSF. Such other credit enhancement measures might include, amongst other techniques, the provision of subordinated loans, warehousing arrangements, liquidity lines or backstop facilities to EFSF or the issuance by EFSF of subordinated notes and/or the adoption of available credit enhancement mechanisms used by EFSF in relation to Financial Assistance disbursed prior to the Effective Date of the Amendments.

(4) If a Guarantor has failed to make a payment which is due and payable in respect of a Guarantee and, as a consequence EFSF makes a withdrawal from the Cash Reserve to cover the shortfall pursuant to Article 5(2)(b) then such Guarantor shall reimburse such amount to EFSF on first written demand together with interest on such amount at a rate equal to one month EURIBOR plus 500 basis points from the date the amount is withdrawn from the Cash Reserve to the date such Guarantor reimburses such amount to EFSF together with such accrued interest. EFSF shall apply such reimbursed amounts (and the interest accrued thereon) to replenish the Cash Reserve.

(5) In order to facilitate the availability of adequate liquidity for the funding needs of EFSF:

(a) each euro-area Member State will ensure that EFSF will be eligible for receiving a counterparty limit for cash management operations of the debt management operations of the debt management agency of such euro-area Member State; and

(b) each euro-area Member State shall co-operate to assist EFSF to ensure that its Funding Instruments comply with applicable criteria to be eligible as collateral in Eurosystem operations.

(6) In order to minimise any negative-carry costs in the event of any Diversified Funding Strategy EFSF shall be entitled to make deposits or other placements which, in accordance with the investment strategy agreed by the board of directors of EFSF, minimise the risk of a funding mis-match or negative- carry costs.

(7) In respect of Financial Assistance disbursed after the Effective Date of the Amendments:

(a) the Beneficiary Member States shall cover Issuance Costs (as described in Article 2(9));

(b) EFSF shall cover costs and expenses incurred in relation to a Financial Assistance Facility Agreement out of the Cash Reserve; Provided that, EFSF may not use any of the Cash Reserve established prior to the Effective Date of the Amendments to cover costs or expenses incurred in relation to Financial Assistance Facility Agreements entered into after such date unless the Cash Reserve is no longer required to serve as credit enhancement.

(c) This Article 5(7) shall be without prejudice to any undertaking of the Beneficiary Member State under the Financial Assistance Facility Agreement to cover costs and expenses of EFSF.

(8) The euro-area Member States may, by a decision made pursuant to Article 10(6), agree that EFSF may use part of the sums credited to the Cash Reserve under Article 2(9) to cover the general non-loan specific operating expenses or exceptional costs of EFSF. Provided that, EFSF may not release any Prepaid Margin which has been credited to the Cash Reserve to constitute credit enhancement prior to the Effective Date of the Amendments to cover such operating or exceptional costs so long as such portion of the Cash Reserve is needed to constitute credit enhancement.

(9) It is acknowledged and agreed that the provision of Article 5(7) and 5(8) are without prejudice to the general budgetary procedures of EFSF.

6. CLAIMS UNDER A GUARANTEE

(1) If EFSF becomes aware that it has not received in full a scheduled payment under a Financial Assistance and such shortfall will give rise to a shortfall in available funds to make a scheduled payment of principal or interest under Funding Instruments issued by EFSF or scheduled payment due from EFSF under any other instrument or agreement which benefits from a Guarantee issued under this Agreement, it shall immediately notify in writing the Chairman of the Eurogroup Working Group, the Commission and each Guarantor and inform each Guarantor of its share of the shortfall under the terms of this Agreement and the relevant Guarantee and demand in writing each Guarantor to remit to EFSF its share of such shortfall on the date (the "Guarantee Payment Date") which is at least two (2) Business Days prior to the scheduled date for payment of the relevant amounts by EFSF (an "EFSF Guarantee Demand").

(2) Each Guarantor shall remit to EFSF (or, if so specified in the relevant documentation, to the paying agent of the relevant Funding Instrument) its share of the amount demanded in the EFSF Guarantee Demand addressed to it by EFSF in cleared funds on the Guarantee Payment Date.

(3) In the event that EFSF fails to pay a scheduled payment of interest or a scheduled payment of principal on a date when such amount is due and payable under a Funding Instrument issued by EFSF then the relevant Noteholder Representative shall be entitled to demand in writing (a "Noteholder Representative Guarantee Demand") the Guarantors (with a copy to EFSF) to pay the unpaid amount of such scheduled payment of interest and/or such scheduled payment of principal. Similarly, in the event of a failure by EFSF to pay a scheduled payment under any other instrument or agreement entered into between EFSF and a counterparty (a "Counterparty") which benefits from a Guarantee issued under this Agreement (which has been issued for a purpose closely-linked to an issue of Funding Instruments pursuant to Article 2(3)) the relevant Counterparty shall be entitled to demand in writing (a "Counterparty Guarantee Demand") the Guarantors (with a copy to EFSF) the unpaid amount of such scheduled payment. In the event of receipt by the Guarantors and EFSF of a Noteholder Representative Guarantee Demand or a Counterparty Guarantee Demand each Guarantor shall in accordance with the terms of its Guarantee remit in cleared funds its share of the amount duly demanded in such Noteholder Representative Guarantee Demand or, as the case may be such Counterparty Guarantee Demand. The detailed payment mechanics for co-ordinating payments under the Guarantees shall be set out in the documentation for the issue of Funding Instruments and the related Guarantees.

(4) In the event that a shortfall of receipts in respect of a Financial Assistance gives rise both to an EFSF Guarantee Demand and a Noteholder Representative Guarantee Demand (or Counterparty Guarantee Demand) the relevant Guarantors shall only be liable to make one payment under their respective Guarantees, without double counting.

(5) The Parties acknowledge and agree that each Guarantor shall be entitled to make payment in respect of any EFSF Guarantee Demand, Noteholder Representative Guarantee Demand or Counterparty Guarantee Demand which appears to be valid on its face without any reference by it to EFSF or any other Party or any other investigation or enquiry. EFSF irrevocably authorises each Guarantor to comply with any Guarantee Demand.

(6) EFSF and each of the other Parties acknowledges and agrees that each Guarantor:

(i) is not obliged to carry out any investigation or seek any confirmation prior to paying a claim;

(ii) is not concerned with:

(1) the legality of a claim or any underlying transaction or any set- off, defence or counterclaim which may be available to any person;

(2) any amendment to any underlying document; or

(3) any unenforceability, illegality or invalidity of any document or security.

(7) EFSF shall be liable to reimburse each Guarantor in respect of any claim paid in respect of a Guarantee and shall indemnify each Guarantor in respect of any loss or liability incurred by a Guarantor in respect of a Guarantee. EFSF's reimbursement obligation is subject to and limited to the extent of funds actually received from the underlying Beneficiary Member States or otherwise recovered by EFSF in respect of the Financial Assistance which gave rise to a shortfall of funds.

(8) In addition to the reimbursement obligation of EFSF under Article 6(5), if a Guarantor makes a payment under its Guarantee, EFSF shall assign and transfer to the relevant Guarantor an amount of EFSF's rights and interests under the relevant Financial Assistance corresponding to the shortfall in payments made by the Beneficiary Member State and the related payment made by the Guarantor under the Guarantee. EFSF shall remain servicer of such portion of the Financial Assistance which has been assigned and transferred to the relevant Guarantor so as to facilitate the co-ordinated management of the Financial Assistance and the treatment of all Guarantors on a pari passu basis.

(9) All Guarantors shall rank equally and pari passu amongst themselves, in particular in respect of reimbursement of amounts paid by them under their Guarantees provided that, if a Guarantor owes sums to EFSF pursuant to Article 5(4) or sums to the other Guarantors pursuant to Article 7(1), sums recovered from underlying Beneficiary Member States which would otherwise be due from EFSF to such Guarantor shall be applied to repaying the amount due under 5(4) or paying the amount due to other Guarantors under Article 7(1) in priority to being applied to reimburse such Guarantor.

7. CONTRIBUTION BETWEEN GUARANTORS

(1) (a) If a Guarantor meets claims or demands in respect of any Guarantee it has issued or incurs costs, losses, expenses or liabilities in connection therewith ("Guarantee Liabilities"), and the aggregate amount of Guarantee Liabilities it makes or incurs exceeds its Required Proportion for the given Guarantee then it shall be entitled to be indemnified and receive contribution, upon first written demand, from the other Guarantors, in respect of such Guarantee Liabilities such that each Guarantor ultimately bears only its Required Proportion of such aggregate Guarantee Liabilities, provided that if the aggregate Guarantee Liabilities of any Guarantor in respect of any Guarantee is not reduced to its Required Proportion within three (3) Business Days, the other Guarantors (excluding Stepping-Out Guarantors) shall indemnify such Guarantor in an amount such that the excess over the Required Portion is allocated to each of the Guarantors (excluding Stepping-Out Guarantors) on a pro rata basis. The "Required Proportion" is equal to the Adjusted Contribution Key Percentage applicable to the relevant Guarantee as it applies to the relevant guaranteed obligation of EFSF. For the avoidance of doubt, in respect of the Republic of Estonia, it is only required to make or to receive contributions under this Article 7 in respect of Funding Instruments issued or entered into after the Effective Date of the Amendments. Any indemnity or contribution payment from one Guarantor to another under this Article 7 shall bear interest at a rate equal to one month EURIBOR plus 500 basis points which shall accrue from the date of demand of such payment to the date such payment is received by such Guarantor.

(b) The provisions of this Article 7 shall apply mutatis mutandis if a euro- area Member State issues any Guarantees according to an Adjusted Contribution Key Percentage in excess of that which would apply to it once 100% Total Guarantee Commitments have been obtained provided that the term "Guarantor" shall include any euro-area Member State which has not yet provided its Commitment Confirmation prior to EFSF issuing or entering into the relevant Funding Instrument.

(2) The obligations of each Guarantor to make contributions or indemnity payments under this Article are continuing obligations which extend to the ultimate balance of sums due regardless of any intermediate payment or discharge in whole or in part.

(3) The indemnity and contribution obligations of any Guarantor under this Article will not be affected by any act, omission, matter

or thing which, but for this Article, would reduce, release or prejudice any of its obligations under this Article (without limitation and whether or not known to it or any other person) including:

(i) any time, waiver or consent granted to, or composition with, any person;

(ii) the release of any person under the terms of any composition or arrangement;

(iii) the taking, variation, compromise, exchange, renewal or release of, or refusal or neglect to perfect, take up or enforce, any rights against, or security over assets of, any person; or any non-presentation or non- observance of any formality or other requirement in respect of any instrument or any failure to realise the full value of any security;

(iv) any incapacity or lack of power, authority or legal personality of or dissolution or change in the members or status of any person;

(v) any amendment (however fundamental) or replacement of any Financial Assistance Facility Agreement, Financial Assistance or any document or security;

(vi) any unenforceability, illegality or invalidity of any obligation of any person under any document or security; or

(vii) any insolvency or similar proceedings.

8. CALCULATIONS AND ADJUSTMENT OF THE GUARANTEES

(1) The Parties agree that EFSF may appoint EIB (or such other agency, institution, EU institution or financial institution as is approved unanimously by the Guarantors) with the task of making the calculations for the purposes of this Agreement, each Financial Assistance Facility Agreement, the financing of EFSF by issuing or entering into Funding Instruments (or otherwise) and the Guarantees. If EIB (or such other agency, institution, EU institution or financial institution) accepts such appointment, it shall calculate the interest rate for each Financial Assistance in accordance with the terms of the relevant Financial Assistance Facility Agreement, calculate the amounts payable on each interest payment date and notify the relevant Beneficiary Member State and EFSF thereof and make all such other calculations and notifications as are necessary for the purposes of this Agreement, the Guarantees and the Funding Instruments.

(2) In the event that a Guarantor experiences severe financial difficulties and requests a stability support loan or benefits from financial support under a similar programme, it (the "Stepping-Out Guarantor") may request the other Guarantors to suspend its commitment to provide further Guarantees under this Agreement. The remaining Guarantors, acting unanimously and meeting via the Eurogroup Working Group may decide to accept such a request and in this event, the Stepping-Out Guarantor shall not be required to issue its Guarantee or incur any new liabilities as Guarantor in respect of any further issues of or entry into Funding Instruments by EFSF and any further Guarantees to be issued under this Agreement or any new liabilities to be incurred as Guarantor shall be issued and/or incurred by the remaining Guarantors and the Adjusted Contribution Key Percentage for the issuance of further Guarantees or incurrence of any new liabilities as Guarantor shall be adjusted accordingly. Such adjustments shall not affect the liability of the Stepping-Out Guarantor under existing Guarantees. It is acknowledged and agreed that the Hellenic Republic is deemed to be a Stepping-Out Guarantor with effect from the entry into force of this Agreement, Ireland became a Stepping-Out Guarantor with effect from 3 December 2010 and Portugal, with effect from 16 May 2011.

9. BREACH OF OBLIGATIONS UNDER A FINANCIAL ASSISTANCE FACILITY AGREEMENT AND AMENDMENTS AND/OR WAIVERS

(1) If EFSF becomes aware of a breach of an obligation under a Financial Assistance Facility Agreement, it shall promptly inform the Guarantors (through the Eurogroup Working Group Chairman), the Commission and the ECB about this situation and shall propose how to react to it. The Euro Working Group Chairman will coordinate the position of the Guarantors and will inform EFSF, the Commission and the ECB of the decision taken. EFSF will thereafter implement the decision in accordance with the relevant Financial Assistance Facility Agreement.

(2) If EFSF becomes aware of a situation where amendments, a restructuring and/or waivers relating to any Financial Assistance made under a Financial Assistance Facility Agreement may become necessary, it shall inform the Guarantors through the Eurogroup Working Group Chairman, the Commission and the ECB about this situation and shall propose how to react to it. The Eurogroup Working Group Chairman will coordinate the position of

the Guarantors and will inform EFSF, the Commission and the ECB of the decision taken. EFSF will thereafter implement the decision and, following instructions of the Guarantors, negotiate and sign a corresponding amendment, a restructuring or waiver or a new loan agreement with the relevant Beneficiary Member State or any other arrangement needed.

(3) In other cases than those referred to in Article 9(1) and 9(2), if EFSF becomes aware of a situation where there is a need for the Guarantors to express an opinion or take an action in relation to a Financial Assistance Facility Agreement, it shall inform the Guarantors through the Eurogroup Working Group Chairman about this situation, and shall propose how to react to it. The Eurogroup Working Group Chairman will coordinate the position of the Guarantors and will inform EFSF, the Commission and the ECB of the decision taken. EFSF will thereafter implement the decision taken in whichever form is needed.

(4) In the event that the euro-area Member States consent to the modification of any MoU entered into with a Beneficiary Member State, the Commission shall be authorised to sign the amendment(s) to such MoU on behalf of the euro-area Member States.

10. EFSF, INTER-GUARANTOR DECISIONS, DIRECTORS AND GOVERNANCE

(1) EFSF shall have a board of directors consisting of as many directors as there are EFSF Shareholders. Each EFSF Shareholder shall be entitled to propose for nomination one person to act as a director of EFSF and the other EFSF Shareholders hereby irrevocably undertake that they shall use their votes as shareholders of EFSF in the relevant general meetings to approve as a director the person proposed by such euro-area Member State. They shall equally use their votes as EFSF Shareholders to remove a person as director of EFSF if this is so requested by the euro-area Member State which proposed such director for nomination.

(2) Each EFSF Shareholder shall propose for nomination to the board of directors of EFSF its representative in the Eurogroup Working Group from time to time (or such person's alternate as representative on such group). The Commission and ECB shall each be entitled to appoint an observer who may take part in the meetings of the board of directors and may present its observations, without however having the power to vote. The board of directors may permit other institutions of the European Union to appoint such observers.

(3) In the event of a vacancy of a member of the board of directors each euro- area Member State shall ensure that the member of the Board nominated upon its proposal approves as a replacement director the person proposed for nomination by the relevant euro-area Member State which does not have a director nominated upon its proposal.

(4) The euro-area Member States acknowledge and agree that, in the event of a vote of the board of directors of EFSF, each director which has been proposed for nomination by a euro-area Member State shall have a weighted number of the total number of votes which corresponds to the number of shares which his/her nominating euro-area Member State holds in the issued share capital of EFSF.

(5) The Guarantors agree that the following matters affecting their roles and liabilities as Guarantors shall require to be approved by them on a unanimous basis:

(a) decisions in relation to the grant of a Financial Assistance Facility Agreement to a euro-area Member State including the approval of the relevant MoU and Financial Assistance Facility Agreement, any decisions to change the pricing structure applicable to Financial Assistance Facility Agreements, and any decisions to include in a Financial Assistance Facility Agreement the faculty of providing Financial Assistance by way of the purchase of bonds in the primary markets or the purchase of bonds in the secondary markets based on an ECB analysis recognising the existence of exceptional financial market circumstances and risk to financial stability;

(b) decisions regarding the disbursement of Financial Assistance under an existing Financial Assistance Facility Agreement in particular as to whether conditionality criteria for a disbursement are satisfied. For secondary market purchases, the Financial Assistance Facility Agreement for the purchase of bonds in the secondary market adopted on the basis of Article 10(5)(a) may provide for alternative procedures for the technical implementation of individual bond purchases under such Financial Assistance Facility Agreement, in line with guidelines referred to in Article 2(1)(b);

(c) any modification to this Agreement including as to the availability period to grant Financial Assistance Facility Agreements;

(d) any modification to the following terms of any Financial Assistance Facility Agreement: aggregate principal amount of a Financial Assistance Facility Agreement, availability period, repayment profile or interest rate of any outstanding Financial Assistance;

(e) the terms of the EFSF Programme, the programme size and the approval of any Offering Materials;

(f) any decision to permit an existing Guarantor to cease to issue further guarantees;

(g) significant changes to the credit enhancement structure;

(h) the funding strategy of each EFSF Programme and any decision to permit a Diversified Funding Strategy (including the manner in which EFSF allocates its operating costs and the funding costs of Funding Instruments to Financial Assistance and Financial Assistance Facility Agreements if a Diversified Funding Strategy is adopted);

(i) any increase in the aggregate amount of Guarantees which might be issued under this Agreement;

(j) any transfer of rights, obligations and/or liabilities of EFSF to ESM pursuant to Article 13(10); and

(k) the adoption and the amendment of any guideline referred to in Article 2(1)(b) or 2(1)(c) .

For the purpose of this Article 10(5) and any other provision of this Agreement which requires a unanimous decision of the Guarantors, unanimity means a positive or negative vote of all those Guarantors which are present and participate (by voting positively or negatively) in the relevant decision (ignoring any abstentions or absences) provided that any Guarantor which is no longer issuing new Guarantees (in particular, the Stepping-Out Guarantors) shall not be entitled to vote on any decision to make a new Financial Assistance Facility Agreement, a new Financial Assistance or a new issuance of Funding Instruments which are not guaranteed by it provided that it shall continue to have the right to vote on decisions in relation to Financial Assistance or Funding Instruments in respect of which it has issued a Guarantee which remains outstanding. It is a condition precedent to the validity of any such vote that a quorum of a majority of Guarantors able to vote whose Guarantee Commitments represent no less than 2/3 of the Total Guaranteed Commitments are present at the meeting.

(6) The Guarantors agree that all matters which are not reserved to unanimity decision of the Guarantors pursuant to Article 10(5) (above) or unanimity decision of the euro-area Member States pursuant to Article 10(7) (below) and, in particular, the following matters affecting their roles and liabilities as Guarantors shall be decided by a majority of Guarantors (excluding however the Stepping-Out Guarantors) (i) whose Guarantee Commitments represent 2/3 of the Total Guarantee Commitments (in the event that no Guarantees have been issued) or (ii) if Guarantees have been issued, 2/3 of the aggregate maximum face amount of Guarantees which have been issued and remain outstanding provided that, in calculating the satisfaction of this threshold the face amount of Guarantees of a Guarantor which is a Stepped-Out Obligor or which has failed to pay under a Guarantee shall not be taken into account (a "2/3 Majority"):

(a) all decisions in relation to existing Financial Assistance Facility Agreements or Financial Assistance which are not specifically reserved to unanimity pursuant to Article 10(5) including decisions on breaches, waivers, restructurings and whether to declare defaults in relation to Financial Assistance Facility Agreements or Financial Assistance;

(b) issuances under an existing EFSF Programme (which programme has been approved unanimously by the Guarantors);

(c) operational matters in relation to debt issuance (including appointment of arrangers, lead managers, rating agents, trustees etc);

(d) detailed implementation of an approved Diversified Funding Strategy; and

(e) detailed implementation of any additional credit enhancement approved pursuant to Article 10(5).

The proviso to Article 10(5) relating to euro-area Member States which no longer issue new Guarantees and/or are Stepping-Out Guarantors shall apply to votes on decisions within the scope of this Article 10(6).

(7) The following corporate matters in relation to EFSF shall require the unanimous decision of all euro-area Member States:

- increases in authorized and/or issued and paid-up share capital;

- increase in the level of commitments to subscribe for share capital;

- reductions in share capital;

- dividends;

- employment of the CEO of the EFSF;

- approving accounts;

- prolonging duration of company;

- liquidation;

- changes to the Articles of Association;

- any other matter not specifically dealt with in the Articles of Association or in this Agreement.

(8) The Guarantors or the euro-area Member States (as the case may be) shall take the decisions affecting the Guarantors and EFSF contemplated by Articles 10(5), (6) and (7) at meetings within the framework of the Eurogroup with the possibility to delegate the decision-making to the Eurogroup Working Group. All their decisions shall be communicated in writing by the Eurogroup Working Group Chairman to EFSF. For such decision-making, the Commission provides input on matters relating, in particular, to the MoU and the terms and conditions of the Financial Assistance Facility Agreements and other policy issues. The EFSF shall provide input relating, in particular, to the implementation of the Financial Assistance Facility Agreements, the issue of or entry into Financial Instruments and its general corporate matters.

(9) Each euro-area Member State hereby undertakes to the other euro-area Member States that it shall vote as shareholder of EFSF consistently with the decisions taken by the requisite majority of Guarantors or euro-area Member States (as the case may be) within the framework of such Eurogroup meetings and that it shall ensure that the director which has been proposed for nomination to the board of EFSF by it acts consistently with such decisions.

(10) Any decisions by the euro-area Member States to approve any MoU relating to a Financial Assistance Facility Agreement and Beneficiary Member State and regarding any proposed modification to an MoU shall be taken by them acting unanimously.

(11) Euro-area Member States may, to the extent permissible under their national laws, provide indemnities to the persons proposed by them to be nominated as directors of EFSF.

(12) In the event that euro-area Member States agree unanimously to increase the issued paid-up capital of EFSF, each euro-area Member State shall subscribe and pay in full a percentage of such increase in paid up capital equal to its Contribution Key percentage of such increase in paid-up capital on or prior to the date specified by EFSF.

(13) Matters referred to decisions by euro-area Member State or Guarantors under this Agreement shall be decided as soon as reasonably practicable and necessary. In due course, operational guidelines may be adopted which may set out timelines for decisions to be taken in relation to this Agreement.

11. TERM AND LIQUIDATION OF EFSF

(1) This Agreement shall remain in full force and effect so long as there are amounts outstanding under any Financial Assistance Facility Agreements or Funding Instruments issued by EFSF under an EFSF Programme or under any reimbursement amounts due to Guarantors.

(2) The euro-area Member States undertake that they shall liquidate EFSF in accordance with its Articles of Association on the earliest date after 30 June 2013 on which there are no longer Financial Assistance outstanding to a euro-area Member State and all Funding Instruments issued by EFSF and any reimbursement amounts due to Guarantors have been repaid in full.

(3) In the event that there are any residual liabilities of EFSF on its liquidation the euro-area Member States shall in a final meeting of shareholders decide on what basis these may be divided between the euro-area Member States.

(4) In the event there is a surplus on liquidation of EFSF it shall be distributed to its shareholders on a pro rata basis calculated by reference to their participation in the share capital of EFSF.

Prior to the determination of whether there is such a surplus:

(a) the credit balance of the Cash Reserve shall be paid to the Guarantors as described in Article 2(10); and

(b) any operating profit or surplus derived by EFSF which results from its issuance of

Funding Instruments guaranteed by the Guarantors shall be paid as additional remuneration to the Guarantors by reference to their respective Adjusted Contribution Key Percentage.

12. APPOINTMENT OF EIB, ECB, OUTSOURCING AND DELEGATION

(1) EFSF may appoint EIB (or such other agencies, institution, EU institution, financial institution or other persons as is approved unanimously by the euro- area Member States) for the purpose of:

(a) managing the receipt of funds from investors following the issue of bonds or securities under an EFSF Programme, the management of the transmission of these funds to Beneficiary Member States in the form of Financial Assistance and the receipt of funds from Beneficiary Member States and the application of such funds to meet scheduled payments of principal and interest under the bonds and debt securities and, following the making of payments under a Guarantee, the management of funds received from Beneficiary Member States and the distribution of reimbursement amounts to the Guarantors;

(b) the related management of the treasury of EFSF including in particular the Cash Reserve and any funds received by way of early repayment or prepayment of Financial Assistance pending the application of such funds to repay Funding Instruments;

(c) such other related cash and treasury management tasks as may be delegated from time to time;

(d) providing legal services, accounting services, human resources services, facilities management, procurement services, internal audit and such other services as require outsourcing and/or logistical support.

These appointments may be effected pursuant to a Service Level Contract between EFSF and EIB (or the relevant agency or institution).

(2) EFSF may contract the ECB to act as its paying agent. EFSF may appoint ECB (or another agency, institution, EU institution, financial institution or other persons approved unanimously by the Guarantors) to maintain its bank and securities accounts.

(3) EFSF shall, in the event of the adoption of a Diversified Funding Strategy and subject to the unanimous approval of the Guarantors (other than Stepping-Out Guarantors), be entitled to and may delegate asset and liability management functions and the other activities and functions described in Article 4(6) to one or more debt management agencies of a euro-area Member State or such other agencies, institutions, EU institutions or financial institutions as are approved unanimously by the Guarantors.

(4) EFSF shall be entitled to delegate and/or outsource on arm's length commercial terms to any agency, institution, EU institution, financial institution or other persons such other functions as its board of directors consider desirable for the efficient discharge of its functions.

13. ADMINISTRATIVE PROVISIONS

(1) The operating and out-of-pocket costs of EFSF shall be paid by EFSF out of its general revenues and resources. Fees and expenses directly related to funding may be re-invoiced to the relevant Beneficiary Member States (as appropriate).

(2) Upon the incorporation of EFSF it shall assume full responsibility for all costs and expenses incurred in its setting-up and incorporation. In addition, it shall assume all liabilities and obligations (including indemnity obligations) under contracts and arrangements entered into on its behalf and for its benefit (whether by a shareholder or a third party) prior to its incorporation.

(3) EFSF shall report to the euro-area Member States and the Commission on the outstanding claims and liabilities under the Financial Assistance Facility Agreements, EFSF Funding Instrument issues and the Guarantees on a quarterly basis.

(4) EFSF will report to the Guarantors and request instructions from the Eurogroup Working Group Chairman regarding unsettled claims and liabilities or any other issues that may arise under this Agreement or in connection with any Guarantee.

(5) The Parties shall not assign or transfer any of their rights or obligations under this Agreement without the prior written consent of all the other Parties to this Agreement.

(6)(a) The euro-area Member States hereby agree that the shares they hold in EFSF cannot be transferred by any EFSF Shareholder during a period of 10 (ten) years from the date of acquisition of the shares by the relevant EFSF Shareholder except with the unanimous consent

of all EFSF Shareholders. Such restriction does not apply to (i) the initial transfer by the sole founding shareholder (if any) to the other euro-area Member States and (ii) proportionate transfers by each EFSF Shareholder to any new euro-area Member State which adopts the Euro as its currency after the incorporation of the Company.

(b) In the event that a euro-area Member State wishes to dispose of its shares in EFSF after expiry of the lock-up period in Article 6.4 of the Articles of Association of EFSF, it shall offer such shares to be purchased by the other shareholders of EFSF on a pro rata basis to their shareholdings in EFSF. Any shares which are not purchased by a shareholder to whom they are offered may be offered to and acquired by any other EFSF Shareholder. If no EFSF Shareholder wishes to purchase such shares then, to the extent it has funds available for this purpose, EFSF may acquire such shares at their fair market value.

(7) In the event that a new country becomes a euro-area Member State, the Parties hereto shall permit such new euro-area Member State to become a shareholder of EFSF by receiving a transfer of shares from other shareholders of EFSF such that its aggregate percentage holding of shares in EFSF corresponds with its Contribution Key and to adhere to the terms of this Agreement. The Parties shall negotiate in good faith as to the basis upon which such new adhering euro-area Member State shall accede to this Agreement.

(8) In the event that one euro-area Member State incorporates EFSF, it shall promptly upon execution and entry into force of this Agreement transfer shares to the other euro-area Member States such that their respective percentage holdings of shares in EFSF corresponds with their respective Contribution Keys.

(9) The terms:

- "Business Day" means a day on which Target 2 is open for settlement of payments in Euro.

- "Target 2" means the Trans-European Automated Real-Time Gross Settlement Express Transfer payment system which utilises a single shared platform and which was launched on 19 November 2007.

- The terms "Financial Assistance Facility Agreement" and "Financial Assistance" shall apply respectively to "Loan Facility Agreements" and "Loans" entered into or disbursed by EFSF prior to the Effective Date of the Amendments.

(10) Following the constitution of the European Stability Mechanism (the "ESM"), EFSF may, with the approval of a decision of the euro-area Member States acting with unanimity and after obtaining any requisite consents of investors in Funding Instruments, transfer all and any of its rights, obligations and liabilities, including under Financial Instruments, Financial Assistance Facility Agreements and/or Financial Assistance, to ESM.

14. COMMUNICATIONS

All notices in relation to this Agreement shall be validly given if in writing and sent to the addresses and contact details to be set out in the operating guidelines which shall be adopted by the Parties for the purpose of this Agreement.

15. MISCELLANEOUS

(1) If any one or more of the provisions contained in this Agreement should be or become fully or in part invalid, illegal or unenforceable in any respect under any applicable law, the validity, legality and enforceability of the remaining provisions contained in this Agreement shall not be affected or impaired thereby. Provisions which are fully or in part invalid, illegal or unenforceable shall be interpreted and thus implemented according to the spirit and purpose of this Agreement.

(2) The Preamble to this Agreement forms an integral part of this Agreement.

(3) Each of the Parties hereby irrevocably and unconditionally waives all immunity to which it is or may become entitled, in respect of itself or its assets or revenues, from legal proceedings in relation to this Agreement, including, without limitation, immunity from suit, judgment or other order, from attachment, arrest, detention or injunction prior to judgment, and from any form of execution and enforcement against it, its assets or revenues after judgment to the extent not prohibited by mandatory law.

(4) A person who is not a party to this Agreement shall not be entitled under the Contracts (Rights of Third Parties) Act 1999 to enforce or enjoy the benefit of any term of this Agreement.

(5) This Agreement may be amended by the Parties in writing.

16. GOVERNING LAW AND JURISDICTION

(1) This Agreement and any non-contractual obligations arising out of or in connection with it shall be governed by and shall be construed in accordance with English law.

(2) Any dispute arising from or in the context of this Agreement shall be settled amicably. In the absence of such amicable agreement, the euro-area Member States agree that to the extent it constitutes a dispute between them only, it shall be submitted to the exclusive jurisdiction of the Court of Justice of the European Union. To the extent there is a dispute between one or more euro- area Member States and EFSF, the Parties agree to submit the dispute to the exclusive jurisdiction of the Courts of the Grand Duchy of Luxembourg.

17. EXECUTION OF THE AGREEMENT

This Agreement may be executed in any number of counterparts signed by one or more of the Parties. The counterparts each form an integral part of the original Agreement and the signature of the counterparts shall have the same effect as if the signatures on the counterparts were on a single copy of the Agreement.

EFSF is authorised to promptly after the signature of this Agreement supply conformed copies of the Agreement to each of the Parties.

18. ANNEXES

The Annexes to this Agreement shall constitute an integral part thereof:

1. List of Guarantors with their respective Guarantee Commitments;

2. Contribution Key; and

3. Template Commitment Confirmation.

ANNEX1

LIST OF GUARANTOR EURO-AREA MEMBER STATES WITH THEIR RESPECTIVE GUARANTEE COMMITMENTS AS FROM THE EFFECTIVE DATE OF THE AMENDMENTS

Country	Guarantee Commitments EUR (millions)
Kingdom of Belgium	27,031.99
Federal Republic of Germany	211,045.90
Ireland	12,378.15
Kingdom of Spain	92,543.56
French Republic	158,487.53
Italian Republic	139,267.81
Republic of Cyprus	1,525.68
Grand Duchy of Luxembourg	1,946.94
Republic of Malta	704.33
Kingdom of the Netherlands	44,446.32
Republic of Austria	21,639.19
Portuguese Republic	19,507.26
Republic of Slovenia	3,664.30
Slovak Republic	7,727.57
Republic of Finland	13,974.03
Hellenic Republic	21,897.74
Republic of Estonia	1,994.86
Total Guarantee Commitments	779,783.14

The Hellenic Republic, Ireland and the Portuguese Republic have become Stepping-Out Guarantors. Portugal remains liable as Guarantor in respect of Notes issued prior to the time it became a Stepping-Out Guarantor. The Republic of Estonia is only a Guarantor in respect of Notes issued after the Effective Date of the Amendments.

This means that as of the Effective Date of the Amendments the aggregate of the active Guarantee Commitments for the Guarantors which are not Stepping-Out Guarantors is EUR 726,000.00 million.

ANNEX 2

CONTRIBUTION KEY IN RESPECT OF FUNDING INSTRUMENTS ISSUED OR ENTERED INTO AS FROM THE EFFECTIVE DATE OF THE AMENDMENTS

Member State	ECB Capital subscription key %	Contribution Key
Kingdom of Belgium	2.4256	3.4666%
Federal Republic of Germany	18.9373	27.0647%
Republic of Estonia	0.1790	0.2558%
Ireland*	1.1107	1.5874%
Hellenic Republic*	1.9649	2.8082%
Kingdom of Spain	8.3040	11.8679%
French Republic	14.2212	20.3246%
Italian Republic	12.4966	17.8598%
Republic of Cyprus	0.1369	0.1957%
Grand Duchy of Luxembourg	0.1747	0.2497%
Republic of Malta	0.0632	0.0903%
Kingdom of the Netherlands	3.9882	5.6998%
Republic of Austria	1.9417	2.7750%
Portuguese Republic*	1.7504	2.5016%
Republic of Slovenia	0.3288	0.4699%
Slovak Republic	0.6934	0.9910%
Republic of Finland	1.2539	1.7920%
Total	69.9705	100%

As at the Effective Date of the Amendments, the Hellenic Republic, Ireland and Portugal have become Stepping-Out Guarantors.

ANNEX3 TEMPLATE FOR COMMITMENT CONFIRMATION

[Letter-head of Authorities of Euro Area Member State]

By fax followed by registered mail:

European Financial Stability Facility [•]

Fax: [•]

Copy to:

[•]

[•]

Fax: [•]

Re: European Financial Stability Facility ("EFSF") - Confirmation Commitment

Dear Sirs,

We refer to the EFSF Framework Agreement 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, the Republic of Malta, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and EFSF (the "Parties").

We hereby notify you that we are duly authorised under our national laws to permit us to be bound by the above mentioned Agreement with effect from [date].

Yours faithfully,

[Name of euro-area Member State]

II.4 COORDINATION AND MONITORING OF NATIONAL FISCAL POLICIES

§20. Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (Codified version), OJ L 145 of June 10th, 2009, pp.1-9

Original version (OJ L 145, 10.6.2009, p.1) amended by Council Regulation (EU) No 679/2010 of 26 July 2010 amending Regulation (EC) No 479/2009 as regards the quality of statistical data in the context of the excessive deficit procedure (OJ L 198, 30.7.2010, p.1) [the text amended then is underlined].

ORIGINAL PREAMBLE

Having regard to the Treaty establishing the European Community, and in particular the third subparagraph of Article 104(14) thereof,

Having regard to the proposal from the Commission,

Having regard to the Opinion of the European Parliament,[218]

Having regard to the opinion of the European Central Bank,[219]

Whereas:

(1) Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community[220] has been substantially amended several times.[221] In the interests of clarity and rationality the said Regulation should be codified.

(2) The definitions of 'government', 'deficit' and 'investment' are laid down in the Protocol on the excessive deficit procedure by reference to the European System of Integrated Economic Accounts (ESA), replaced by the European system of national and regional accounts in the

[218] Opinion of 21 October 2008 (not yet published in the Official Journal).
[219] OJ C 88, 9.4.2008, p. 1.
[220] OJ L 332, 31.12.1993, p. 7
[221] See Annex I (not reproduced in this compilation).

Community (adopted by Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community and hereinafter referred to as 'ESA 95').[222] Precise definitions referring to the classification codes of ESA 95 are required. Those definitions may be subject to revision in the context of the necessary harmonisation of national statistics or for other reasons. Any revision of ESA will be decided by the Council in accordance with the rules on competence and procedure laid down in the Treaty.

(3) Under ESA 95, interest flows under swap contracts and forward rate agreements (FRAs) are to be classified in the financial account and require specific treatment for the data transmitted under the excessive deficit procedure.

(4) The definition of 'debt' laid down in the Protocol on the excessive deficit procedure needs to be amplified by a reference to the classification codes of ESA 95.

(5) In the case of financial derivatives, as defined in ESA 95, there is no nominal value identical to that for other debt instruments. Therefore, it is necessary that financial derivatives are not included with the liabilities making up government debt for the purposes of the Protocol on the excessive deficit procedure. For liabilities which are subject to agreements fixing the exchange rate, this rate should be taken into account in the conversion into national currency.

(6) ESA 95 provides a detailed definition of gross domestic product at current market prices, which is appropriate for the calculation of the ratios of government deficit to gross domestic product and of government debt to gross domestic product referred to in Article 104 of the Treaty.

(7) Consolidated government interest expenditure is an important indicator for monitoring the budgetary situation in the Member States. Interest expenditure is intrinsically linked to government debt. Government debt to be reported to the Commission by the Member States has to be consolidated within the government sector. The levels of government debt and of interest expenditure should be made mutually consistent. The methodology of ESA 95 (point 1.58) recognises that, for certain kinds of analysis, consolidated aggregates are more significant than overall gross figures.

(8) Pursuant to the terms of the Protocol on the excessive deficit procedure, the Commission is required to provide the statistical data to be used in that procedure.

(9) The role of the Commission, as statistical authority, in that context is specifically exercised by Eurostat, on behalf of the Commission. As the Commission department responsible for carrying out the tasks devolving on the Commission as regards the production of Community statistics, Eurostat is required to execute its tasks in accordance with the principles of impartiality, reliability, relevance, cost-effectiveness, statistical confidentiality and transparency, as laid down in Commission Decision 97/281/EC of 21 April 1997 on the role of Eurostat as regards the production of Community statistics.[223] The implementation by the national and Community statistical authorities of the Recommendation of the Commission of 25 May 2005 on the independence, integrity and accountability of the national and Community authorities should enhance the principle of professional independence, adequacy of resources and quality of statistical data.

(10) Eurostat is responsible, on behalf of the Commission, for assessing the quality of the data and for providing the data to be used within the context of the excessive deficit procedure, in accordance with Commission Decision 97/281/EC.

(11) A permanent dialogue should be established between the Commission and the Member States' statistical authorities in order to ensure the quality both of the data reported by Member States and of the underlying government sector accounts compiled in accordance with ESA 95.

(12) Detailed rules are required to organise prompt and regular reporting by the Member States to the Commission (Eurostat) of their planned and actual deficits and of the levels of their debt.

(13) Pursuant to Article 104c(2) and (3) of the Treaty, the Commission is to monitor the development of the budgetary situation and of the stock of government debt in the Member States and to examine compliance with budgetary discipline on the basis of criteria relating to government deficit and government

[222] OJ L 310, 30.11.1996, p. 1.

[223] OJ L 112, 29.4.1997, p. 56.

debt. If a Member State does not fulfil the requirements under one or both criteria, it is necessary for the Commission to take into account all relevant factors. The Commission has to examine whether there is a risk of an excessive deficit in a Member State,

HAS ADOPTED THIS REGULATION:

PREAMBLE COUNCIL REGULATION 679/2010

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the third subparagraph of Article 126(14) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament,

Having regard to the opinion of the European Central Bank,[224]

Whereas:

(1) The credibility of budgetary surveillance crucially hinges upon reliable budgetary statistics. It is of the utmost importance that data reported by Member States under Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community[225] are of high quality and reliability.

(2) The European Union governance framework for fiscal statistics has been further developed and institutional setting updated over the past years, notably with a view to improving the monitoring of the government accounts by the Commission (Eurostat).

(3) The revised governance framework for fiscal statistics has functioned well overall and, in general, has produced a satisfactory outcome in terms of the reporting of relevant fiscal data on government deficit and debt. In particular, the Member States have predominantly demonstrated a solid record of cooperation in good faith and an operational ability to report fiscal data of high quality.

(4) However, recent developments have also clearly demonstrated that the current governance framework for fiscal statistics still does not mitigate, to the extent necessary, the risk of incorrect or inaccurate data being notified to the Commission.

(5) In this connection, and in some exceptional cases (methodological visits), the Commission (Eurostat) should have additional rights of access to a widened scope of information for the needs of data quality assessment, in full compliance with Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[226] as regards professional independence.

(6) Therefore, in carrying out methodological visits to a Member State whose statistical information is under scrutiny, the Commission (Eurostat) should be entitled to have access to the accounts of government entities at central, state, local and social security levels, including the provision of underlying detailed accounting information, relevant statistical surveys and questionnaires and further related information, respecting the legislation on data protection as well as statistical confidentiality.

(7) Public accounts of individual general government units, as well as of public units classified outside the general government sector, should be the main object of the controls, and the public accounts should be assessed in terms of their statistical use.

(8) Member States should ensure that institutions and officials responsible for the reporting of the actual data to the Commission (Eurostat) and of the underlying government accounts fully respect the obligations related to the statistical principles.

(9) Regulation (EC) No 479/2009 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

[224] OJ C 103, 22.4.2010, p. 1.
[225] OJ L 145, 10.6.2009, p. 1.
[226] OJ L 87, 31.3.2009, p. 164.

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CHAPTER I: DEFINITIONS

Article 1

1. For the purposes of the Protocol on the excessive deficit procedure and of this Regulation, the terms given in paragraphs 2 to 6 are defined according to the European system of national and regional accounts in the Community (hereinafter referred to as ESA 95), adopted by Regulation (EC) No 2223/96. The codes in brackets refer to ESA 95.

2. 'Government' means the sector of 'general government' (S.13), that is 'central government' (S.1311), 'state government' (S.1312), 'local government' (S.1313) and 'social security funds' (S.1314), to the exclusion of commercial operations, as defined in ESA 95.

The exclusion of commercial operations means that the sector of 'general government' (S.13) comprises only institutional units producing non-market services as their main activity.

3. 'Government deficit (surplus)' means the net borrowing (net lending) (EDP B.9) of the sector of 'general government' (S.13), as defined in ESA 95. The interest comprised in the government deficit is the interest (EDP D.41), as defined in ESA 95.

4. 'Government investment' means the gross fixed capital formation (P.51) of the sector of 'general government' (S.13), as defined in ESA 95.

5. 'Government debt' means the total gross debt at nominal value outstanding at the end of the year of the sector of 'general government' (S.13), with the exception of those liabilities the corresponding financial assets of which are held by the sector of 'general government' (S.13).

Government debt is constituted by the liabilities of general government in the following categories: currency and deposits (AF.2); securities other than shares, excluding financial derivatives (AF.33) and loans (AF.4), as defined in ESA 95.

The nominal value of a liability outstanding at the end of the year is the face value.

The nominal value of an index-linked liability corresponds to its face value adjusted by the index-related change in the value of the principal accrued to the end of the year.

Liabilities denominated in a foreign currency, or exchanged from one foreign currency through contractual agreements to one or more other foreign currencies shall be converted into the other foreign currencies at the rate agreed on in those contracts and shall be converted into the national currency on the basis of the representative market exchange rate prevailing on the last working day of each year.

Liabilities denominated in the national currency and exchanged through contractual agreements to a foreign currency shall be converted into the foreign currency at the rate agreed on in those contracts and shall be converted into the national currency on the basis of the representative market exchange rate prevailing on the last working day of each year.

Liabilities denominated in a foreign currency and exchanged through contractual agreements to the national currency shall be converted into the national currency at the rate agreed on in those contracts.

6. 'Gross domestic product' means gross domestic product at current market prices (GDP mp) (B.1*g), as defined in ESA 95.

Article 2

1. 'Planned government deficit and government debt level figures' means the figures established for the current year by the Member States. They shall be the most recent official forecasts, taking into account the most recent budgetary decisions and economic developments and prospects. They should be produced in as short a time as possible before the reporting deadline.

2. 'Actual government deficit and government debt level figures' means estimated, provisional, half-finalised or final results for a past year. The planned data together with the actual data shall form a consistent time series as far as the definitions and concepts are concerned.

Article 2a

'Access' means that relevant documents and other information must be provided when requested, either immediately or as promptly afterwards as is consistent with the time needed to collect the requested information.

CHAPTER II: RULES AND COVERAGE OF REPORTING

Article 3

1. Member States shall report to the Commission (Eurostat) their planned and actual government deficits and levels of government debt twice a year, the first time before 1 April of the current year (year n) and the second time before 1 October of year n.

Member States shall inform the Commission (Eurostat) which national authorities are responsible for the excessive deficit procedure reporting.

2. Before 1 April of year n, Member States shall:

(a) report to the Commission (Eurostat) their planned government deficit for year n, an up-to-date estimate of their actual government deficit for year n-1 and their actual government deficits for years n-2, n-3 and n-4;

(b) simultaneously provide the Commission (Eurostat) with their planned data for year n and the actual data for years n-1, n-2, n-3 and n-4 of their corresponding public accounts budget deficits in accordance with the definition which is given most prominence nationally and with the figures which explain the transition between the public accounts budget deficit and their government deficit for the sub-sector S.1311;

(c) simultaneously provide the Commission (Eurostat) with their actual data for years n-1, n-2, n-3 and n-4 of their corresponding working balances and with the figures which explain the transition between the working balances of each government sub-sector and their government deficit for the sub-sectors S.1312, S.1313 and S.1314;

(d) report to the Commission (Eurostat) their planned level of government debt at the end of year n and their levels of actual government debt at the end of years n-1, n-2, n-3 and n-4;

(e) simultaneously provide the Commission (Eurostat), for years n-1, n-2, n-3 and n-4, with the figures which explain the contribution of the government deficit and other factors relevant to the variation in the level of their government debt by sub-sector.

3. Before 1 October of year n, Member States shall report to the Commission (Eurostat) their:

(a) updated planned government deficit for year n and their actual government deficits for years n-1, n-2, n-3 and n-4 and shall comply with the requirements of points (b) and (c) of paragraph 2;

(b) updated planned level of government debt at the end of year n and their levels of actual government debt at the end of years n-1, n-2, n-3 and n-4, and shall comply with the requirements of paragraph 2(e).

4. The figures for the planned government deficit reported to the Commission (Eurostat) in accordance with paragraphs 2 and 3 shall be expressed in national currency and in budget years.

The figures for actual government deficit and actual government debt level reported to the Commission (Eurostat) in accordance with paragraphs 2 and 3 shall be expressed in national currency and in calendar years, with the exception of the up-to-date estimates for year n-1, which may be expressed in budget years.

Where the budget year differs from the calendar year, Member States shall also report to the Commission (Eurostat) their figures for actual government deficit and actual government debt level in budget years for the two budget years preceding the current budget year.

Article 4

Member States shall, in accordance with the procedure laid down in Article 3(1), (2) and (3), provide the Commission (Eurostat) with the figures for their government investment expenditure and interest expenditure (consolidated).

Article 5

Member States shall provide the Commission (Eurostat) with a forecast of their gross domestic product for year n and the actual amount of their gross domestic product for years n-1, n-2, n-3 and n-4, under the same timing conditions as those indicated in Article 3(1).

Article 6

1. Member States shall inform the Commission (Eurostat), as soon as it becomes available, of any major revision in their actual and planned government deficit and debt figures already reported.

2. Major revisions in the actual deficit and debt figures already reported shall be properly documented. In any case, revisions which result in the reference values as specified in the Protocol on the excessive deficit procedure being exceeded, or revisions which mean that a Member State's data no longer exceed the reference values, shall be reported and properly documented.

Article 7

Member States shall make public the actual deficit and debt data and other data for past years reported to the Commission (Eurostat) in accordance with Articles 3 to 6.

CHAPTER III: QUALITY OF DATA

Article 8

1. The Commission (Eurostat) shall regularly assess the quality both of actual data reported by Member States and of the underlying government sector accounts compiled according to ESA 95 (hereinafter referred to as government accounts). Quality of actual data means compliance with accounting rules, completeness, reliability, timeliness, and consistency of the statistical data. The assessment will focus on areas specified in the inventories of Member States such as the delimitation of the government sector, the classification of government transactions and liabilities, and the time of recording.

2. Member States shall provide the Commission (Eurostat), as promptly as possible, with the relevant statistical information requested for the needs of the data quality assessment, without prejudice to the provisions of Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[227] relating to statistical confidentiality.

The statistical information referred to in the first subparagraph shall be limited to the information strictly necessary to check the compliance with ESA rules. In particular, 'statistical information' means:

(a) data from national accounts;

(b) inventories;

(c) EDP notification tables;

(d) additional questionnaires and clarification related to the notifications.

The format of the questionnaires shall be defined by the Commission (Eurostat) after consultation of the Committee on Monetary, Financial and Balance of Payments Statistics (hereinafter referred to as CMFB).

3. The Commission (Eurostat) shall report regularly to the European Parliament and to the Council on the quality of the actual data reported by Member States. The report shall address the overall assessment of the actual data reported by Member States as regards to the compliance with accounting rules, completeness, reliability, timeliness, and consistency of the data.

Article 9

1. Member States shall provide the Commission (Eurostat) with a detailed inventory of the methods, procedures and sources used to compile actual deficit and debt data and the underlying government accounts.

2. The inventories shall be prepared in accordance with guidelines adopted by the Commission (Eurostat) after consultation of CMFB.

3. The inventories shall be updated following revisions in the methods, procedures and sources adopted by Member States to compile their statistical data.

4. Member States shall make their inventories public.

5. The issues referred to in paragraphs 1, 2 and 3 may be addressed in the visits mentioned in Article 11.

Article 10

1. In the event of a doubt regarding the correct implementation of the ESA 95 accounting rules, the Member State concerned shall request clarification from the Commission (Eurostat). The Commission (Eurostat) shall promptly examine the issue and communicate its clarification to the Member State concerned and, when appropriate, to the CMFB.

2. For cases which are either complex or of general interest in the view of the Commission or the Member State concerned, the Commission (Eurostat) shall take a decision after consultation of the CMFB. The Commission (Eurostat) shall make decisions public, together with the opinion of the CMFB, without prejudice to the provisions relating to statistical confidentiality of Regulation (EC) No 322/97.

Article 11

1. The Commission (Eurostat) shall ensure a permanent dialogue with Member States' statistical authorities. To this end, the Commission (Eurostat) shall carry out in all Member States regular dialogue visits, as well as possible methodological visits.

[227] OJ L 87, 31.3.2009, p. 164.

2. When organising dialogue and methodological visits, the Commission (Eurostat) shall transmit its provisional findings to the Member States concerned for comments.

Article 11a

The dialogue visits are designed to review actual data reported according to Article 8, to examine methodological issues, to discuss statistical processes and sources described in the inventories, and to assess compliance with the accounting rules. The dialogue visits shall be used to identify risks or potential problems with respect to the quality of the reported data.

Article 11b

1. The methodological visits are designed to monitor the processes and verify the accounts which justify the reported data, and to draw detailed conclusions as to the quality of reported data, as described in Article 8(1).

2. The methodological visits shall only be undertaken in exceptional cases where significant risks or problems with respect to the quality of the data have been clearly identified.

3. For the purposes of this Regulation, it could be considered that there are significant risks or problems with the quality of the data notified by a Member State in such cases as:

(a) there are frequent and sizeable revisions of the deficit or debt that are not clearly and adequately explained;

(b) the Member State concerned is not sending to the Commission (Eurostat) all the statistical information requested in the context of the rounds for clarification of the EDP notification or as a consequence of a dialogue visit, in the period agreed between them and has not clearly and adequately explained the reason for the delay or non-response;

(c) the Member State concerned changes, unilaterally and without a clear explanation, the sources and methods for estimating the deficit and debts of the general government set out in the inventory, with a material effect on estimates;

(d) there are outstanding methodological issues likely to have a material effect on the debt or deficit statistics which have not been resolved between the Member State and the Commission (Eurostat) arising from the rounds for clarification or the previous dialogue visits, resulting in reservations from the Commission (Eurostat) in two subsequent EDP notifications;

(e) there are persistent, unusually high stock-flow adjustments not clearly explained.

4. Mainly taking into account the criteria mentioned in paragraph 3, the Commission (Eurostat), after informing the CMFB, shall decide to carry out a methodological visit.

5. The Commission should provide the Economic and Financial Committee with full information about the reasons behind the methodological visits.

Article 12

1. Member States are expected to provide, at the request of the Commission (Eurostat), and on a voluntary basis, the assistance of experts in national accounting, including for the preparation and carrying-out of the methodological visits. In the exercise of their duties, these experts shall provide independent expertise. A list of those experts in national accounting shall be constituted on the basis of proposals sent to the Commission (Eurostat) by the national authorities responsible for the excessive deficit reporting.

The Commission shall lay down the rules and procedures related to the selection of the experts, taking into account an appropriate distribution of experts across Member States and an appropriate rotation of experts between Member States, their working arrangements and the financial details. The Commission shall share with the Member States the full cost incurred by the Member States for the assistance of their national experts.

2. In the framework of the methodological visits, the Commission (Eurostat) shall have the right to access the accounts of all government entities at central, state, local and social security levels, including the provision of existing underlying detailed accounting and budgetary information.

In this context, accounting and budgetary information includes:

— transactions and balance sheets,

— relevant statistical surveys and questionnaires of general government and further related information, such as analytical documents,

— information from relevant national, regional and local authorities on the execution of the budget of all sub-sectors of the general government,

— the accounts of extra-budgetary bodies, corporations, and non-profit institutions and other similar bodies that are part of the general government sector in national accounts,

— the accounts of social security funds.

Member States shall take all necessary measures to facilitate the methodological visits. Those visits may be carried out at national authorities involved in the excessive deficit procedure reporting, as well as at all services directly or indirectly involved in the production of government accounts and debt. In both cases, the national statistical institutes as national coordinators according to Article 5(1) of Regulation (EC) No 223/2009, shall support the Commission (Eurostat) in the organisation and coordination of the visits. Member States shall ensure that those national authorities and services, and where necessary, their national authorities who have a functional responsibility for the control of the public accounts, provide the Commission officials or other experts referred to in paragraph 1 with the assistance necessary to carry out their duties, including making documents available to justify the reported actual deficit and debt data and the underlying government accounts. Confidential records of the national statistical system as well as other confidential data should be provided to the Commission (Eurostat) only for the purpose of assessing the quality thereof. Experts in national accounting assisting the Commission (Eurostat) in the framework of the methodological visits shall sign a commitment to respect the confidentiality before accessing those confidential records or data.

3. The Commission (Eurostat) shall ensure that officials and experts participating in these visits meet every guarantee as regards technical competence, professional independence and observance of confidentiality.

Article 13

The Commission (Eurostat) shall report to the Economic and Financial Committee on the findings of dialogue and methodological visits, including any comments on these findings made by the Member State concerned. Those reports, along with any comments made by the Member State concerned, after having been transmitted to the Economic and Financial Committee, shall be made public, without prejudice to the provisions concerning statistical confidentiality in Regulation (EC) No 322/97.

CHAPTER IV: PROVISION OF DATA BY THE COMMISSION (EUROSTAT)

Article 14

1. The Commission (Eurostat) shall provide the actual government deficit and debt data for the application of the Protocol on the excessive deficit procedure, within three weeks after the reporting deadlines referred to in Article 3(1) or after revisions as referred to in Article 6(1). That provision of data shall be effected through publication.

2. The Commission (Eurostat) shall not delay the provision of the actual government deficit and debt data of Member States where a Member State has not reported its own data.

Article 15

1. The Commission (Eurostat) may express a reservation on the quality of the actual data reported by the Member States. No later than three working days before the planned publication date, the Commission (Eurostat) shall communicate to the Member State concerned and to the President of the Economic and Financial Committee the reservation it intends to express and make public. Where the issue is resolved after publication of the data and the reservation, withdrawal of the reservation shall be made public immediately thereafter.

2. The Commission (Eurostat) may amend actual data reported by Member States and provide the amended data and a justification of the amendment where there is evidence that actual data reported by Member States do not comply with the requirements of Article 8(1). No later than three working days before the planned publication date, the Commission (Eurostat) shall communicate to the Member State concerned and to the President of the Economic and Financial Committee the amended data and the justification for the amendment.

CHAPTER V: GENERAL PROVISIONS

Article 16

1. Member States shall ensure that the actual data reported to the Commission (Eurostat) are provided in accordance with the principles established by Article 2 of Regulation (EC) No 223/2009. In this regard, the responsibility of the national statistical authorities is to ensure the compliance of reported data with Article 1 of this Regulation and the underlying ESA 95 accounting rules. Member States shall ensure

that the national statistical authorities are provided with access to all relevant information necessary to perform these tasks.

2. Member States shall take appropriate measures to ensure that institutions and officials responsible for the reporting of the actual data to the Commission (Eurostat) and of the underlying government accounts are accountable and act in accordance with principles established by Article 2 of Regulation (EC) No 223/2009.

Article 17

In the event of a revision of ESA 95 or of an amendment to its methodology decided on by the European Parliament and the Council or the Commission in accordance with the rules of competence and procedure laid down in the Treaty and in Regulation (EC) No 2223/96, the Commission shall introduce the new references to ESA 95 into Articles 1 and 3 of this Regulation.

Article 18

Regulation (EC) No 3605/93 is repealed.

References to the repealed Regulation shall be construed as references to this Regulation and be read in accordance with the correlation table set out in Annex II.

Article 19

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

§21. Council Regulation (EC) 1466/97 of 7 July 1997, on the strengthening of the surveillance of budgetary position and the surveillance and coordination of economic policies, Consolidated Version, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1466:20111213:EN:PDF

Original version (OJ L 209, 2.8.1997, p.1); amended by Council Regulation (EC) No 1055/2005 of 27 June 2005 (OJ L 174, 7.7.2005, p.1) [the text amended then is underlined] and Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 (OJ L 306, 23.11.2011, p.12) [the text amended then is discontinuously underlined].

ORIGINAL PREAMBLE

Having regard to the Treaty on the Functioning of the European Union and in particular Article 121 (5) thereof,

Having regard to the proposal from the Commission[1],

Acting in accordance with the procedure referred to in Article 189c of the Treaty[2],

(1) Whereas the Stability and Growth Pact is based on the objective of sound government finances as a means of strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation;

(2) Whereas the Stability and Growth Pact consists of this Regulation which aims to strengthen the surveillance of budgetary positions and the surveillance and coordination of economic policies, of Council Regulation (EC) No 1467/97 which aims to speed up and to clarify the implementation of the excessive deficit procedure and of the Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact[3], in which, in accordance with Article D of the Treaty on European Union, firm political guidelines are issued in order to implement the Stability and Growth Pact in a strict and timely manner and in particular to adhere to the medium term

[1] OJ No C 368, 6. 12. 1996, p. 9.

[2] Opinion of the European Parliament of 28 November 1996 (OJ No C 380, 16. 12. 1996, p. 28), Council Common Position of 14 April 1997 (OJ No C 146, 30. 5. 1997, p. 26) and Decision of the European Parliament of 29 May 1997 (OJ No C 182, 16. 6. 1997).

[3] OJ No C 236, 2. 8. 1997, p. 1

objective of budgetary positions of close to balance or in surplus, to which all Member States are committed, and to take the corrective budgetary action they deem necessary to meet the objectives of their stability and convergence programmes, whenever they have information indicating actual or expected significant divergence from the medium-term budgetary objective;

(3) Whereas in stage three of Economic and Monetary Union (EMU) the Member States are, according to Article 104c of the Treaty, under a clear Treaty obligation to avoid excessive general government deficits; whereas under Article 5 of Protocol (No 11) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland to the Treaty, Article 104c(1) does not apply to the United Kingdom unless it moves to the third stage; whereas the obligation under Article 109e(4) to endeavour to avoid excessive deficits will continue to apply to the United Kingdom;

(4) Whereas adherence to the medium-term objective of budgetary positions close to balance or in surplus will allow Member States to deal with normal cyclical fluctuations while keeping the government deficit within the 3 % of GDP reference value;

(5) Whereas it is appropriate to complement the multilateral surveillance procedure of Article 121 (3) and (4) with an early warning system, under which the Council will alert a Member State at an early stage to the need to take the necessary budgetary corrective action in order to prevent a government deficit becoming excessive;

(6) Whereas the multilateral surveillance procedure of Article 121 (3) and (4) should furthermore continue to monitor the full range of economic developments in each of the Member States and in the Community as well as the consistency of economic policies with the broad economic guidelines referred to in Article 121 (2); whereas for the monitoring of these developments, the presentation of information in the form of stability and convergence programmes is appropriate;

(7) Whereas there is a need to build upon the useful experience gained during the first two stages of economic and monetary union with convergence programmes;

(8) Whereas the Member States adopting the single currency, hereafter referred to as 'participating Member States', will, in accordance with Article 109j, have achieved a high degree of sustainable convergence and in particular a sustainable government financial position; whereas the maintenance of sound budgetary positions in these Member States will be necessary to support price stability and to strengthen the conditions for the sustained growth of output and employment; whereas it is necessary that participating Member States submit medium-term programmes, hereafter referred to as 'stability programmes'; whereas it is necessary to define the principal contents of such programmes;

(9) Whereas the Member States not adopting the single currency, hereafter referred to as 'non-participating Member States', will need to pursue policies aimed at a high degree of sustainable convergence; whereas it is necessary that these Member States submit medium-term programmes, hereafter referred to as 'convergence programmes'; whereas it is necessary to define the principal contents of such convergence programmes;

(10) Whereas in its Resolution of 16 June 1997 on the establishment of an exchange-rate mechanism in the third stage of Economic and Monetary Union, the European Council issued firm political guidelines in accordance with which an exchange-rate mechanism is established in the third stage of EMU, hereafter referred to as 'ERM2'; whereas the currencies of non-participating Member States joining ERM2 will have a central rate vis-a-vis the euro, thereby providing a reference point for judging the adequacy of their policies; whereas the ERM2 will also help to protect them and the Member States adopting the euro from unwarranted pressures in the foreign-exchange markets; whereas, so as to enable appropriate surveillance in the Council, non-participating Member States not joining ERM2 will nevertheless present policies in their convergence programmes oriented to stability thus avoiding real exchange rate misalignments and excessive nominal exchange rate fluctuations;

(11) Whereas lasting convergence of economic fundamentals is a prerequisite for sustainable exchange rate stability;

(12) Whereas it is necessary to lay down a timetable for the submission of stability programmes and convergence programmes and their updates;

(13) Whereas in the interest of transparency and informed public debate it is necessary that Member States make public their stability

programmes and their convergence programmes;

(14) Whereas the Council, when examining and monitoring the stability programmes and the convergence programmes and in particular their medium-term budgetary objective or the targeted adjustment path towards this objective, should take into account the relevant cyclical and structural characteristics of the economy of each Member State;

(15) Whereas in this context particular attention should be given to significant divergences of budgetary positions from the budgetary objectives of being close to balance or in surplus; whereas it is appropriate for the Council to give an early warning in order to prevent a government deficit in a Member State becoming excessive; whereas in the event of persistent budgetary slippage it will be appropriate for the Council to reinforce its recommendation and make it public; whereas for non-participating Member States the Council may make recommendations on action to be taken to give effect to their convergence programmes;

(16) Whereas both convergence and stability programmes lead to the fulfilment of the conditions of economic convergence referred to in Article 104c

2011 PREAMBLE

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 121(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Acting in accordance with the ordinary legislative procedure,[2]

Whereas:

(1) The coordination of the economic policies of the Member States within the Union, as provided for by the Treaty on the Functioning of the European Union (TFEU) should entail compliance with the guiding principles of stable prices, sound public finances and monetary conditions and a sustainable balance of payments.

(2) The Stability and Growth Pact (SGP) initially consisted of Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies,[3] Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure[4] and the Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact.[5] Regulations (EC) No 1466/97 and (EC) No 1467/97 were amended in 2005 by Regulations (EC) No 1055/2005[6] and (EC) No 1056/2005[7] respectively. In addition, the Council Report of 20 March 2005 on "Improving the implementation of the Stability and Growth Pact"[8] was adopted.

(3) The SGP is based on the objective of sound government finances as a means of strengthening the conditions for price stability and for strong sustainable growth underpinned by financial stability, thereby supporting the achievement of the Union's objectives for sustainable growth and employment.

(4) The preventive part of the SGP requires that Member States achieve and maintain a medium-term budgetary objective and submit stability and convergence programmes to that effect. It would benefit from more stringent forms of surveillance in order to ensure Member States' consistency and compliance with the Union's budgetary coordination framework.

[1] OJ C 150, 20.5.2011, p. 1.
[2] Position of the European Parliament of 28 September 2011 (not yet published in the Official Journal) and decision of the Council of 8 November 2011.
[3] OJ L 209, 2.8.1997, p. 1.
[4] OJ L 209, 2.8.1997, p. 6.
[5] OJ C 236, 2.8.1997, p. 1.
[6] Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 174, 7.7.2005, p. 1).
[7] Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 174, 7.7.2005, p. 5).
[8] See document 7423/3/05 on http://www.consilium.europa.eu/documents.aspx?lang=en.

(5) The content of the stability and convergence programmes as well as the procedure for their examination should further be developed both at national and at the level of the Union in the light of the experience gained with the implementation of the SGP.

(6) The budgetary targets in the stability and convergence programmes should explicitly take into account the measures adopted in line with the broad economic policy guidelines, the guidelines for the employment policies of the Member States and the Union and, in general, the national reform programmes.

(7) The submission and assessment of stability and convergence programmes should be made before key decisions on the national budgets for the succeeding years are taken. Therefore, an appropriate deadline for submission of the stability and convergence programmes should be established. Taking into account the specificities of the budgetary year of the United Kingdom, special provisions for the date for submission of its convergence programmes should be established.

(8) Experience gained and mistakes made during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on a stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies.

(9) The improved economic governance framework should rely on several interlinked and coherent policies for sustainable growth and employment, in particular a Union strategy for growth and jobs, with particular focus on developing and strengthening the internal market, fostering international trade and competitiveness, a European Semester for strengthened coordination of economic and budgetary policies (European Semester), an effective framework for preventing and correcting excessive government deficits (the SGP), a robust framework for preventing and correcting macroeconomic imbalances, minimum requirements for national budgetary frameworks, and enhanced financial market regulation and supervision, including macroprudential supervision by the European Systemic Risk Board.

(10) The SGP and the complete economic governance framework complement and support the Union strategy for growth and jobs. Interlinks between the different strands should not provide for exemptions from the provisions of the SGP.

(11) The strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments. While recognising that the counterparts of the European Parliament in the framework of the dialogue are the relevant institutions of the Union and their representatives, the competent committee of the European Parliament may offer an opportunity to participate in an exchange of views to a Member State which is the subject of a Council recommendation in accordance with Article 6(2) or Article 10(2). The Member State's participation in such an exchange of views is voluntary.

(12) The Commission should have a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on-site missions, recommendations and warnings.

(13) The stability and convergence programmes and the national reform programmes should be prepared in a coherent manner and the timing of their submissions should be aligned. Those programmes should be submitted to the Council and to the Commission. They should be made public.

(14) Under the European Semester the policy surveillance and coordination cycle starts early in the year with a horizontal review in which the European Council, based on input from the Commission and the Council, identifies the main challenges facing the Union and the euro area and gives strategic guidance on policies. Discussion should also take place in the European Parliament at the beginning of the annual cycle of surveillance in due time before the discussion takes place in the European Council. When preparing their stability or convergence programmes and national reform programmes, Member States should take into account the horizontal guidance by the European Council.

(15) In order to enhance national ownership of the SGP, national budgetary frameworks should be fully aligned with the objectives of multilateral surveillance in the Union, and, in particular, with the European Semester.

(16) In line with the legal and political arrangements of each Member State, national parliaments should be duly involved in the European Semester and in the preparation of stability programmes, convergence programmes

and national reform programmes in order to increase the transparency and ownership of, and accountability for the decisions taken. Where appropriate, the Economic and Financial Committee, the Economic Policy Committee, the Employment Committee and the Social Protection Committee should be consulted within the framework of the European Semester. Relevant stakeholders, in particular the social partners, should be involved, within the framework of the European Semester, on the main policy issues where appropriate, in accordance with the provisions of the TFEU and national legal and political arrangements.

(17) Adherence to the medium-term objective for budgetary positions should allow Member States to have a safety margin with respect to the 3 % of GDP reference value in order to ensure sustainable public finances, or rapid progress towards sustainability, while leaving room for budgetary manoeuvre, in particular taking into account the need for public investment. The medium-term budgetary objective should be updated regularly on the basis of a commonly agreed method reflecting appropriately the risks of explicit and implicit liabilities for public finance, as embodied in the aims of the SGP.

(18) The obligation to achieve and maintain the medium-term budgetary objective needs to be put into operation, through the specification of principles for the adjustment path towards the medium-term objective. Those principles should, inter alia, ensure that revenue windfalls, namely revenues in excess of what can normally be expected from economic growth, are allocated to debt reduction.

(19) The obligation to achieve and maintain the medium-term budgetary objective should apply to all Member States.

(20) Sufficient progress towards the medium-term budgetary objective should be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures. In this regard, and as long as the medium-term budgetary objective is not achieved, the growth rate of government expenditure should normally not exceed a reference medium-term rate of potential GDP growth, with increases in excess of that norm being matched by discretionary increases in government revenues and discretionary revenue reductions being compensated by reductions in expenditure. The reference medium-term rate of potential GDP growth should be calculated according to a commonly agreed method. The Commission should make public the calculation method for those projections and the resulting reference medium-term rate of potential GDP growth. The potentially very high variability of investment expenditure should be taken into account, especially in the case of small Member States.

(21) A faster adjustment path towards the medium-term budgetary objective should be required for Member States faced with a debt level exceeding 60 % of GDP, or with pronounced risks in terms of overall debt sustainability.

(22) A temporary departure from the adjustment path towards the medium-term budgetary objective should be allowed, when it results from an unusual event outside the control of the Member State concerned, which has a major impact on the financial position of the general government or in case of severe economic downturn for the euro area or the Union as a whole, provided that this does not endanger fiscal sustainability in the medium-term, in order to facilitate economic recovery. The implementation of major structural reforms should also be taken into account in allowing a temporary departure from the medium-term budgetary objective or the appropriate adjustment towards it, on condition of maintaining a safety margin with respect to the deficit reference value. Special attention should be paid in this context to systemic pension reforms, where the departure should reflect the direct incremental cost of the diversion of contributions from the publicly managed to the fully funded pillar. Measures transferring the assets of the fully funded pillar back to the publicly managed pillar should be considered one-off and temporary in nature and hence excluded from the structural balance used for assessing progress towards the medium-term budgetary objective.

(23) In the event of a significant deviation from the adjustment path towards the medium-term budgetary objective, a warning should be addressed by the Commission to the Member State concerned, to be followed within 1 month by an examination of the situation by the Council and a recommendation for the necessary adjustment measures. The recommendation should set a deadline of no more than 5 months for addressing the deviation. The Member State concerned should report to the Council on the action taken. If the Member State concerned fails to take appropriate action within the deadline set by the Council, the Council should adopt a decision establishing that no effective action has been

taken and should report to the European Council. It is important that failures by Member States to take appropriate action are established in due time, in particular where the failure persists. The Commission should be able to recommend to the Council to adopt revised recommendations. The Commission should be able to invite the ECB to participate in a surveillance mission for euro area Member States and for Member States that are participating in the Agreement of 16 March 2006 between the European Central Bank and the national central banks of the Member States outside the euro area laying down the operating procedures for an exchange rate mechanism in stage three of Economic and Monetary Union[9] (ERM2), when appropriate. The Commission should report to the Council on the outcome of the mission and, if appropriate, should be able to decide to make its findings public.

(24) The power to adopt individual decisions establishing non-compliance with the recommendations adopted by the Council on the basis of Article 121(4) TFEU establishing policy measures in case a Member State significantly deviates from the adjustment path towards the medium-term budgetary objective should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council, as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the referred recommendations adopted by the Council on the basis of Article 121(4) TFEU. The suspension of the voting rights of the members of the Council representing Member States whose currency is not the euro for adoption by the Council of a decision establishing non-compliance with the recommendations addressed to a Member State whose currency is the euro on the basis of Article 121(4) TFEU, is a direct consequence of such decision being an integral follow-up of that recommendation and the provision in Article 139(4) TFEU reserving the right to vote on such recommendations to the Member States whose currency is the euro.

(25) In order to ensure compliance with the budgetary surveillance framework of the Union for Member States whose currency is the euro, a specific enforcement mechanism should be established on the basis of Article 136 TFEU for cases of significant deviation from the adjustment path towards the medium-term budgetary objective.

(26) References contained in Regulation (EC) No 1466/97 should take account of the new Article numbering of the TFEU.

(27) Regulation (EC) No 1466/97 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

[9] OJ C 73, 25.3.2006, p. 21.

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SECTION 1: PURPOSE AND DEFINITIONS

Article 1

This Regulation sets out the rules covering the content, the submission, the examination and the monitoring of stability programmes and convergence programmes as part of multilateral surveillance by the Council and the Commission so as to prevent, at an early stage, the occurrence of excessive general government deficits and to promote the surveillance and coordination of economic policies thereby supporting the achievement of the Union's objectives for growth and employment.

Article 2

For the purpose of this Regulation:

(a) 'participating Member States' means those Member States whose currency is the euro;

(b) 'non-participating Member States' means Member States other than those whose currency is the euro.

SECTION 1-A: EUROPEAN SEMESTER FOR ECONOMIC POLICY COORDINATION

Article 2-a

1. In order to ensure closer coordination of economic policies and sustained convergence of the economic performance of the Member States, the Council shall conduct multilateral surveillance as an integral part of the European Semester for economic policy coordination in accordance with the objectives and requirements set out in the Treaty on the Functioning of the European Union (TFEU).

2. The European Semester shall include:

(a) the formulation, and the surveillance of the implementation, of the broad guidelines of the economic policies of the Member States and of the Union (broad economic policy guidelines) in accordance with Article 121(2) TFEU;

(b) the formulation, and the examination of the implementation, of the employment guidelines that must be taken into account by Member States in accordance with Article 148(2) TFEU (employment guidelines);

(c) the submission and assessment of Member States' stability or convergence programmes under this Regulation;

(d) the submission and assessment of Member States' national reform programmes supporting the Union's strategy for growth and jobs and established in line with the guidelines set out in point (a) and (b) and with the general guidance to Member States issued by the Commission and the European Council at the beginning of the annual cycle of surveillance;

(e) the surveillance to prevent and correct macroeconomic imbalances under Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.[1]

3. In the course of the European Semester, in order to provide timely and integrated policy advice on macrofiscal and macrostructural policy intentions, the Council shall, as a rule, following the assessment of these programmes on the basis of recommendations from the Commission, address guidance to the Member States making full use of the legal instruments provided under Articles 121 and 148 TFEU, and under this Regulation and Regulation (EU) No 1176/2011.

Member States shall take due account of the guidance addressed to them in the development of their economic, employment and budgetary policies before taking key decisions on their national budgets for the succeeding years. Progress shall be monitored by the Commission.

Failure by a Member State to act upon the guidance received may result in:

(a) further recommendations to take specific measures;

(b) a warning by the Commission under Article 121(4) TFEU;

(c) measures under this Regulation, Regulation (EC) No 1467/97 or Regulation (EU) No 1176/2011.

Implementation of the measures shall be subject to reinforced monitoring by the Commission and may include surveillance missions under Article -11 of this Regulation.

[1] OJ L 306, 23.11.2011, p. 25.

4. The European Parliament shall be duly involved in the European Semester in order to increase the transparency and ownership of, and the accountability for the decisions taken, in particular by means of the economic dialogue carried out pursuant to Article 2-ab of this Regulation. The Economic and Financial Committee, the Economic Policy Committee, the Employment Committee and the Social Protection Committee shall be consulted within the framework of the European Semester where appropriate. Relevant stakeholders, in particular the social partners, shall be involved within the framework of the European Semester, on the main policy issues where appropriate, in accordance with the provisions of the TFEU and national legal and political arrangements.

The President of the Council, and the Commission in accordance with Article 121 TFEU, and, where appropriate, the President of the Eurogroup, shall report annually to the European Parliament and to the European Council on the results of the multilateral surveillance. These reports should be a component of the Economic Dialogue referred to in Article 2-ab of this Regulation.

SECTION 1-Aa: ECONOMIC DIALOGUE

Article 2-ab

1. In order to enhance the dialogue between the institutions of the Union, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss:

(a) information provided to the committee by the Council on the broad guidelines of economic policy pursuant to Article 121(2) TFEU;

(b) general guidance to Member States issued by the Commission at the beginning of the annual cycle of surveillance;

(c) any conclusions drawn by the European Council on orientations for economic policies in the context of the European Semester;

(d) the results of multilateral surveillance carried out under this Regulation;

(e) any conclusions drawn by the European Council on the orientations for and results of multilateral surveillance;

(f) any review of the conduct of multilateral surveillance at the end of the European Semester;

(g) Council recommendations addressed to Member States in accordance with Article 121(4) TFEU in the event of significant deviation and the report made by the Council to the European Council as defined in Article 6(2) and Article 10(2) of this Regu- lation.

2. The Council is expected to, as a rule, follow the recommendations and proposals of the Commission or explain its position publicly.

3. The competent committee of the European Parliament may offer the opportunity to a Member State which is the subject of a Council recommendation under Article 6(2) or Article 10(2) to participate in an exchange of views.

4. The Council and the Commission shall regularly inform the European Parliament of the application of this Regulation.

SECTION 1A: MEDIUM-TERM BUDGETARY OBJECTIVES

Article 2a

Each Member State shall have a differentiated medium-term objective for its budgetary position. These country-specific medium-term budgetary objectives may diverge from the requirement of a close to balance or in surplus position, while providing a safety margin with respect to the 3 % of GDP government deficit ratio. The medium-term budgetary objectives shall ensure the sustainability of public finances or a rapid progress towards such sustainability while allowing room for budgetary manoeuvre, considering in particular the need for public investment.

Taking these factors into account, for participating Member States and for Member States that are participating in ERM2 the country-specific medium-term budgetary objectives shall be specified within a defined range between -1 % of GDP and balance or surplus, in cyclically adjusted terms, net of one-off and temporary measures.

The medium-term budgetary objective shall be revised every 3 years. A Member State's medium-term budgetary objective may be further revised in the event of the implementation of a structural reform with a major impact on the sustainability of public finances.

The respect of the medium-term budgetary objective shall be included in the national medium-term budgetary frameworks in accordance with Chapter IV of Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States.[2]

SECTION 2: STABILITY PROGRAMMES

Article 3

1. Each participating Member State shall submit to the Council and to the Commission information necessary for the purpose of multilateral surveillance at regular intervals under Article 121 TFEU in the form of a stability programme, which provides an essential basis for the sustain- ability of public finances which is conducive to price stability, strong sustainable growth and employment creation.

2.A stability programme shall present the following information:

(a) the medium-term budgetary objective and the adjustment path towards that objective for the general government balance as a percentage of GDP, the expected path of the general government debt ratio, the planned growth path of government expenditure, including the corresponding allocation for gross fixed capital formation, in particular bearing in mind the conditions and criteria to establish the expenditure growth under Article 5(1), the planned growth path of government revenue at unchanged policy and a quantification of the planned discretionary revenue measures;

(aa) information on implicit liabilities related to ageing, and contingent liabilities, such as public guarantees, with a potentially large impact on the general government accounts;

(ab) information on the consistency of the stability programme with the broad economic policy guidelines and the national reform programme;

(b) the main assumptions about expected economic developments and important economic variables which are relevant to the achievement of the stability programme, such as government investment expenditure, real GDP growth, employment and inflation;

(c) a quantitative assessment of the budgetary and other economic policy measures being taken or proposed to achieve the objectives of the programme, comprising a cost-benefit analysis of major structural reforms which have direct long-term positive budgetary effects, including by raising potential sustainable growth;

(d) an analysis of how changes in the main economic assumptions would affect the budgetary and debt position;

(e) if applicable, the reasons for a deviation from the required adjustment path towards the medium term budgetary objective.

2a. The stability programme shall be based on the most likely macro- fiscal scenario or on a more prudent scenario. The macroeconomic and budgetary forecasts shall be compared with the most updated Commission forecasts and, if appropriate, those of other independent bodies. Significant differences between the chosen macrofiscal scenario and the Commission's forecast shall be described with reasoning, in particular if the level or growth of external assumptions departs significantly from the values retained in the Commission's forecasts.

The exact nature of the information included in points (a), (aa), (b), (c) and (d) of paragraph 2 shall be set out in a harmonised framework established by the Commission in cooperation with the Member States.

3. The information about the paths for the general government balance and debt ratio, the growth of government expenditure, the planned growth path of government revenue at unchanged policy, the planned discretionary revenue measures, appropriately quantified, and the main economic assumptions referred to in points (a) and (b) of paragraph 2 shall be on an annual basis and shall cover the preceding year, the current year and at least the following 3 years.

4. Each programme shall include information on its status in the context of national procedures, in particular whether the programme was presented to the national parliament, and whether the national parliament had the opportunity to discuss the Council's opinion on the previous programme or, if relevant, any recommendation or warning, and whether there has been parliamentary approval of the programme.

Article 4

1. Stability programmes shall be submitted annually in April, preferably by mid-April and not later than 30 April.

[2] OJ L 306, 23.11.2011, p. 41.

2. Member States shall make public their stability programmes.

Article 5

1. Based on assessments by the Commission and the Economic and Financial Committee, the Council shall, within the framework of multilateral surveillance under Article 121 TFEU, examine the medium-term budgetary objectives presented by the Member States concerned in their stability programmes, assess whether the economic assumptions on which the programme is based are plausible, whether the adjustment path towards the medium-term budgetary objective is appropriate, including consideration of the accompanying path for the debt ratio, and whether the measures being taken or proposed to respect that adjustment path are sufficient to achieve the medium-term budgetary objective over the cycle.

The Council and the Commission, when assessing the adjustment path toward the medium-term budgetary objective, shall examine if the Member State concerned pursues an appropriate annual improvement of its cyclically-adjusted budget balance, net of one-off and other temporary measures, required to meet its medium-term budgetary objective, with 0,5 % of GDP as a benchmark. For Member States faced with a debt level exceeding 60 % of GDP or with pronounced risks of overall debt sustainability, the Council and the Commission shall examine whether the annual improvement of the cyclically-adjusted budget balance, net of one-off and other temporary measures is higher than 0,5 % of GDP. The Council and the Commission shall take into account whether a higher adjustment effort is made in economic good times, whereas the effort might be more limited in economic bad times. In particular, revenue windfalls and shortfalls shall be taken into account.

Sufficient progress towards the medium-term budgetary objective shall be evaluated on the basis of an overall assessment with the structural balance as the reference, including an analysis of expenditure net of discretionary revenue measures. To this end, the Council and the Commission shall assess whether the growth path of government expen- diture, taken in conjunction with the effect of measures being taken or planned on the revenue side, is in accordance with the following conditions:

(a) for Member States that have achieved their medium-term budgetary objective, annual expenditure growth does not exceed a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures;

(b) for Member States that have not yet reached their medium-term budgetary objective, annual expenditure growth does not exceed a rate below a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures. The size of the shortfall of the growth rate of government expenditure compared to a reference medium-term rate of potential GDP growth is set in such a way as to ensure an appropriate adjustment towards the medium-term budgetary objective;

(c) for Member States that have not yet reached their medium-term budgetary objective, discretionary reductions of government revenue items are matched either by expenditure reductions or by discretionary increases in other government revenue items or both.

The expenditure aggregate shall exclude interest expenditure, expen- diture on Union programmes fully matched by Union funds revenue and non-discretionary changes in unemployment benefit expenditure.

The excess expenditure growth over the medium-term reference shall not be counted as a breach of the benchmark to the extent that it is fully offset by revenue increases mandated by law.

The reference medium-term rate of potential GDP growth shall be determined on the basis of forward-looking projections and backward-looking estimates. Projections shall be updated at regular intervals. The Commission shall make public the calculation method for those projections and the resulting reference medium-term rate of potential GDP growth.

When defining the adjustment path to the medium-term budgetary objective for Member States that have not yet reached this objective, and in allowing a temporary deviation from this objective for Member States that have already reached it, provided that an appropriate safety margin with respect to the deficit reference value is preserved and that the budgetary position is expected to return to the medium-term budgetary objective within the programme period, the Council and the Commission shall take into account the implementation of major structural reforms which have direct long-term positive budgetary effects, including by raising potential sustainable growth, and therefore a verifiable impact on the long-term sustainability of public finances.

Particular attention shall be paid to pension reforms introducing a multi- pillar system that includes a mandatory, fully funded pillar. Member States implementing such reforms shall be allowed to deviate from the adjustment path to their medium-term budgetary objective or from the objective itself, with the deviation reflecting the amount of the direct incremental impact of the reform on the general government balance, provided that an appropriate safety margin with respect to the deficit reference value is preserved.

The Council and the Commission shall also examine whether the stability programme facilitates the achievement of sustained and real convergence within the euro area and the closer coordination of economic policies, and whether the economic policies of the Member State concerned are consistent with the broad economic policy guidelines and the employment guidelines of the Member States and of the Union.

In the case of an unusual event outside the control of the Member State concerned which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph, provided that this does not endanger fiscal sustainability in the medium term.

2. The Council and the Commission shall examine the stability programme within at most 3 months of its submission. The Council, on a recommendation from the Commission and after consulting the Economic and Financial Committee, shall, if necessary, adopt an opinion on the programme. Where the Council, in accordance with Article 121 TFEU, considers that the objectives and the content of the programme should be strengthened with particular reference to the adjustment path towards the medium-term budgetary objective, the Council shall in its opinion invite the Member State concerned to adjust its programme.

Article 6

1. As part of multilateral surveillance in accordance with Article 121 (3) TFEU, the Council and the Commission shall monitor the imple- mentation of stability programmes, on the basis of information provided by participating Member States and of assessments by the Commission and the Economic and Financial Committee, in particular with a view to identifying actual or expected significant divergences of the budgetary position from the medium-term budgetary objective, or from the appro- priate adjustment path towards it.

2. In the event of a significant observed deviation from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph of Article 5(1) of this Regulation, and in order to prevent the occurrence of an excessive deficit, the Commission shall address a warning to the Member State concerned in accordance with Article 121(4) TFEU.

The Council shall, within 1 month of the date of adoption of the warning referred to in the first subparagraph, examine the situation and adopt a recommendation for the necessary policy measures, on the basis of a Commission recommendation, based on Article 121(4) TFEU. The recommendation shall set a deadline of no more than 5 months for addressing the deviation. The deadline shall be reduced to 3 months if the Commission, in its warning, considers that the situation is particularly serious and warrants urgent action. The Council, on a proposal from the Commission, shall make the recommendation public.

Within the deadline set by the Council in the recommendation under Article 121(4) TFEU, the Member State concerned shall report to the Council on action taken in response to the recommendation.

If the Member State concerned fails to take appropriate action within the deadline specified in a Council recommendation under the second subparagraph, the Commission shall immediately recommend to the Council to adopt, by qualified majority, a decision establishing that no effective action has been taken. At the same time, the Commission may recommend to the Council to adopt a revised recommendation under Article 121(4) TFEU on necessary policy measures.

In the event that the Council does not adopt the decision on the Commission recommendation that no effective action has been taken, and failure to take appropriate action on the part of the Member State concerned persists, the Commission, after 1 month from its earlier recommendation, shall recommend to the Council to adopt the decision establishing that no effective action has been taken. The decision shall be deemed to be adopted by the Council unless it decides, by simple majority, to reject

the recommendation within 10 days of its adoption by the Commission. At the same time, the Commission may recommend to the Council to adopt a revised recom- mendation under Article 121(4) TFEU on necessary policy measures.

When taking the decision on non-compliance referred to in the fourth and fifth subparagraphs, only members of the Council representing participating Member States shall vote and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

The Council shall submit a formal report to the European Council on the decisions taken accordingly.

3. A deviation from the medium-term budgetary objective or from the appropriate adjustment path towards it shall be evaluated on the basis of an overall assessment with the structural balance as the reference, including an analysis of expenditure net of discretionary revenue measures, as defined in Article 5(1).

The assessment of whether the deviation is significant shall, in particular, include the following criteria:

(a) for a Member State that has not reached the medium-term budgetary objective, when assessing the change in the structural balance, whether the deviation is at least 0.5 % of GDP in a single year or at least 0.25 % of GDP on average per year in 2 consecutive years;

(b) when assessing expenditure developments net of discretionary revenue measures, whether the deviation has a total impact on the government balance of at least 0.5 % of GDP in a single year or cumulatively in 2 consecutive years.

The deviation of expenditure developments shall not be considered significant if the Member State concerned has overachieved the medium-term budgetary objective, taking into account the possibility of significant revenue windfalls and the budgetary plans laid out in the stability programme do not jeopardise that objective over the programme period.

Similarly, the deviation may be left out of consideration when it results from an unusual event outside the control of the Member State concerned and which has a major impact on the financial position of the general government or in case of severe economic downturn for the euro area or the Union as a whole, provided that this does not endanger fiscal sustainability in the medium-term.

SECTION 3: CONVERGENCE PROGRAMMES

Article 7

1. Each non-participating Member State shall submit to the Council and to the Commission information necessary for the purpose of multi-lateral surveillance at regular intervals under Article 121 TFEU in the form of a convergence programme, which provides an essential basis for the sustainability of public finances which is conducive to price stability, strong sustainable growth and employment creation.

2. A convergence programme shall present the following information in particular on variables related to convergence:

(a) the medium-term budgetary objective and the adjustment path towards this objective for the general government balance as a percentage of GDP, the expected path of the general government debt ratio, the planned growth path of government expenditure, including the corresponding allocation for gross fixed capital formation, in particular bearing in mind the conditions and criteria to establish the expenditure growth under Article 9(1), the planned growth path of government revenue at unchanged policy and a quantification of the planned discretionary revenue measures, the medium-term monetary policy objectives, the rela- tionship of those objectives to price and exchange rate stability and to the achievement of sustained convergence;

(aa) information on implicit liabilities related to ageing, and contingent liabilities, such as public guarantees, with a potentially large impact on the general government accounts;

(ab) information on the consistency of the convergence programme with the broad economic policy guidelines and the national reform programme;

(b) the main assumptions about expected economic developments and important economic variables which are relevant to the achievement of the convergence programme, such as government investment expenditure, real GDP growth, employment and inflation;

(c) a quantitative assessment of the budgetary and other economic policy measures being taken or proposed to achieve the objectives of the programme, comprising a cost-benefit analysis of major structural reforms, which have

direct long-term positive budgetary effects, including by raising potential sustainable growth;

(d) an analysis of how changes in the main economic assumptions would affect the budgetary and debt position ;

(e) if applicable, the reasons for a deviation from the required adjustment path towards the medium term budgetary objective.

2a. The convergence programme shall be based on the most likely macrofiscal scenario or on a more prudent scenario. The macroeconomic and budgetary forecasts shall be compared with the most updated Commission forecasts and, if appropriate, those of other independent bodies. Significant differences between the chosen macrofiscal scenario and the Commission forecast shall be described with reasoning, in particular if the level or growth of external assumptions departs significantly from the values retained in the Commission's forecasts.

The exact nature of the information included in points (a), (aa), (b), (c) and (d) of paragraph 2 shall be set out in a harmonised framework established by the Commission in cooperation with the Member States.

3. The information about the paths for the general government balance and debt ratio, the growth of government expenditure, the planned growth path of government revenue at unchanged policy, the planned discretionary revenue measures, appropriately quantified, and the main economic assumptions referred to in points (a) and (b) of paragraph 2 shall be on an annual basis and shall cover the preceding year, the current year and at least the following 3 years.

4. Each programme shall include information on its status in the context of national procedures, in particular whether the programme was presented to the national parliament, and whether the national parliament had the opportunity to discuss the Council opinion on the previous programme or, if relevant, any recommendation or warning, and whether there has been parliamentary approval of the programme.

Article 8

1. Convergence programmes shall be submitted annually in April, preferably by mid April and not later than 30 April.

2. Member States shall make public their convergence programmes.

Article 9

1. Based on assessments by the Commission and the Economic and Financial Committee, the Council shall, within the framework of multi-lateral surveillance under Article 121 TFEU, examine the medium-term budgetary objectives presented by the Member States concerned in their convergence programmes, assess whether the economic assumptions on which the programme is based are plausible, whether the adjustment path towards the medium-term budgetary objective is appropriate, including consideration of the accompanying path for the debt ratio, and whether the measures being taken or proposed to respect that adjustment path are sufficient to achieve the medium-term budgetary objective over the cycle and to achieve sustained convergence.

The Council and the Commission, when assessing the adjustment path toward the medium-term budgetary objective, shall take into account whether a higher adjustment effort is made in economic good times, whereas the effort might be more limited in economic bad times. In particular, revenue windfalls and shortfalls shall be taken into account. For Member States faced with a debt level exceeding 60 % of GDP or with pronounced risks of overall debt sustainability, the Council and the Commission shall examine whether the annual improvement of the cyclically-adjusted budget balance, net of one-off and other temporary measures, is higher than 0.5 % of GDP. For Member States that are participating in ERM2, the Council and the Commission shall examine if the Member State concerned pursues an appropriate annual improvement of its cyclically adjusted balance, net of one-off and other temporary measures, required to meet its medium-term budgetary objective, with 0.5 % of GDP as a benchmark.

Sufficient progress towards the medium-term budgetary objective shall be evaluated on the basis of an overall assessment with the structural balance as the reference, including an analysis of expenditure net of discretionary revenue measures. To this end, the Council and the Commission shall assess whether the growth path of government expen- diture, taken in conjunction with the effect of measures being taken or planned on the revenue side, is in accordance with the following conditions:

(a) for Member States that have achieved their medium-term budgetary objective, annual expenditure growth does not exceed a reference medium-term rate of potential GDP growth,

unless the excess is matched by discretionary revenue measures;

(b) for Member States that have not yet reached their medium-term budgetary objective, annual expenditure growth does not exceed a rate below a reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures. The size of the shortfall of the growth rate of government expenditure compared to a reference medium-term rate of potential GDP growth is set in such a way as to ensure an appropriate adjustment towards the medium-term budgetary objective;

(c) for Member States that have not yet reached their medium-term budgetary objective, discretionary reductions of government revenue items are matched either by expenditure reductions or by discretionary increases in other government revenue items or both.

The expenditure aggregate shall exclude interest expenditure, expenditure on Union programmes fully matched by Union funds revenue and non-discretionary changes in unemployment benefit expenditure.

The excess expenditure growth over the medium-term reference shall not be counted as a breach of the benchmark to the extent that it is fully offset by revenue increases mandated by law.

The reference medium-term rate of potential GDP growth shall be determined on the basis of forward-looking projections and backward-looking estimates. Projections shall be updated at regular intervals. The Commission shall make public the calculation method for those projections and the resulting reference medium-term rate of potential GDP growth.

When defining the adjustment path to the medium-term budgetary objective for Member States that have not yet reached this objective, and in allowing a temporary deviation from this objective for Member States that have already reached it, provided that an appropriate safety margin with respect to the deficit reference value is preserved and that the budgetary position is expected to return to the medium-term budgetary objective within the programme period, the Council and the Commission shall take into account the implementation of major structural reforms which have direct long-term positive budgetary effects, including by raising potential sustainable growth, and therefore a verifiable impact on the long-term sustainability of public finances.

Particular attention shall be paid to pension reforms introducing a multi- pillar system that includes a mandatory, fully funded pillar. Member States implementing such reforms shall be allowed to deviate from the adjustment path to their medium-term budgetary objective or from the objective itself, with the deviation reflecting the amount of the direct incremental impact of the reform on the general government balance, provided that an appropriate safety margin with respect to the deficit reference value is preserved.

The Council and the Commission shall also examine whether the convergence programme facilitates the achievement of sustained and real convergence and the closer coordination of economic policies, and whether the economic policies of the Member State concerned are consistent with the broad economic policy guidelines and the employment guidelines of the Member States and of the Union. In addition, for Member States that are participating in ERM2, the Council shall examine whether the convergence programme ensures a smooth participation in the exchange rate mechanism.

In the case of an unusual event outside the control of the Member State concerned, which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed temporarily to depart from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph, provided that this does not endanger fiscal sustainability in the medium term.

2. The Council and the Commission shall examine the convergence programme within at most 3 months of its submission. The Council, on a recommendation from the Commission and after consulting the Economic and Financial Committee, shall, if necessary, adopt an opinion on the programme. Where the Council, in accordance with Article 121 TFEU, considers that the objectives and the content of the programme should be strengthened with particular reference to the adjustment path towards the medium-term budgetary objective, the Council shall in its opinion invite the Member State concerned to adjust its programme.

Article 10

1. As part of multilateral surveillance in accordance with Article 121(3) TFEU, the Council and the Commission shall monitor the

imple- mentation of convergence programmes, on the basis of information provided by Member States with a derogation and of assessments by the Commission and the Economic and Financial Committee, in particular with a view to identifying actual or expected significant divergences of the budgetary position from the medium-term budgetary objective, or from the appropriate adjustment path towards it.

In addition, the Council and the Commission shall monitor the economic policies of non-participating Member States in the light of convergence programme objectives with a view to ensure that their policies are geared to stability and thus to avoid real exchange rate misalignments and excessive nominal exchange rate fluctuations.

2. In the event of a significant observed deviation from the adjustment path towards the medium-term budgetary objective referred to in the third subparagraph of Article 9(1) of this Regulation, and in order to prevent the occurrence of an excessive deficit, the Commission shall address a warning to the Member State concerned in accordance with Article 121(4) TFEU.

The Council shall, within 1 month of the date of adoption of the warning referred to in the first subparagraph, examine the situation and adopt a recommendation for the necessary policy measures, on the basis of a Commission recommendation, based on Article 121(4) TFEU. The recommendation shall set a deadline of no more than 5 months for addressing the deviation. The deadline shall be reduced to 3 months if the Commission, in its warning, considers that the situation is particularly serious and warrants urgent action. The Council, on a proposal from the Commission, shall make the recommendation public.

Within the deadline set by the Council in the recommendation under Article 121(4) TFEU, the Member State concerned shall report to the Council on action taken in response to the recommendation.

If the Member State concerned fails to take appropriate action within the deadline specified in a Council recommendation under the second subparagraph, the Commission shall immediately recommend to the Council to adopt, by qualified majority, a decision establishing that no effective action has been taken. At the same time, the Commission may recommend to the Council to adopt a revised recommendation under Article 121(4) TFEU on necessary policy measures.

In the event that the Council does not adopt the decision on the Commission recommendation that no effective action has been taken, and failure to take appropriate action on the part of the Member State concerned persists, the Commission, after 1 month from its earlier recommendation, shall recommend to the Council to adopt the decision establishing that no effective action has been taken. The decision shall be deemed to be adopted by the Council unless it decides, by simple majority, to reject the recommendation within 10 days of its adoption by the Commission. At the same time, the Commission may recommend to the Council to adopt a revised recom- mendation under Article 121(4) TFEU on necessary policy measures.

When taking the decision on non-compliance referred to in the fourth and fifth subparagraphs, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

The Council shall submit a formal report to the European Council on the decisions taken accordingly.

3. A deviation from the medium-term budgetary objective or from the appropriate adjustment path towards it shall be evaluated on the basis of an overall assessment with the structural balance as the reference, including an analysis of expenditure net of discretionary revenue measures, as defined in Article 9(1).

The assessment of whether the deviation is significant shall, in particular, include the following criteria:

(a) for a Member State that has not reached the medium-term budgetary objective, when assessing the change in the structural balance, whether the deviation is at least 0.5 % of GDP in a single year or at least 0.25 % of GDP on average per year in two consecutive years;

(b) when assessing expenditure developments net of discretionary revenue measures, whether the deviation has a total impact on the government balance of at least 0.5 % of GDP in a single year or cumulatively in two consecutive years.

The deviation of expenditure developments shall not be considered significant if the Member State concerned has overachieved the medium-term budgetary objective, taking into account the possibility of significant revenue windfalls and the budgetary plans laid out in the

convergence programme do not jeopardise that objective over the programme period.

Similarly, the deviation may be left out of consideration when resulting from an unusual event outside the control of the Member State concerned and which has a major impact on the financial position of the general government or in case of severe economic downturn for the euro area or the Union as a whole, on the condition that this does not endanger fiscal sustainability in the medium term.

SECTION 3A: PRINCIPLE OF STATISTICAL INDEPENDENCE

Article 10a

With a view to ensuring that the multilateral surveillance is based on sound and independent statistics, Member States shall ensure the profes- sional independence of national statistical authorities, which shall be consistent with the European statistics code of practice as laid down in Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European Statistics.[3] As a minimum this shall require:

(a) transparent recruitment and dismissal processes which must be solely based on professional criteria;

(b) budgetary allocations which must be made on an annual or a multi- annual basis;

(c) the date of publication of key statistical information which must be designated significantly in advance.

SECTION 4: COMMON PROVISIONS

Article – 11

1. The Commission shall ensure a permanent dialogue with the relevant authorities of the Member States in accordance with the objectives of this Regulation. To that end, the Commission shall, in particular, carry out missions for the purpose of the assessment of the economic situation in the Member State and the identification of any risks or difficulties in complying with the objectives of this Regulation.

2. The Commission may undertake enhanced surveillance missions in Member States which are the subject of recommendations issued under Article 6(2) or Article 10(2) for the purposes of on-site monitoring. The Member States concerned shall provide all necessary information for the preparation and the conduct of those missions.

3. When the Member State concerned is a participating Member State or a Member State that is participating in ERM2, the Commission may invite representatives of the European Central Bank, if appropriate, to participate in surveillance missions.

4. The Commission shall report to the Council on the outcome of the missions referred to in paragraph 2 and, if appropriate, may decide to make its findings public.

5. When organising the missions referred to in paragraph 2, the Commission shall transmit its provisional findings to the Member States concerned for comments.

Article 11

As part of the multilateral surveillance described in this Regulation, the Council shall carry out the overall assessment described in Article 121 (3).

Article 12

In accordance with the second subparagraph of Article 121 (4) the President of the Council and the Commission shall include in their report to the European Parliament the results of the multilateral surveillance carried out under this Regulation.

Article 12a

1. By 14 December 2014 and every 5 years thereafter, the Commission shall publish a report on the application of this Regulation.

That report shall evaluate, inter alia:

(a) the effectiveness of this Regulation, particularly whether the provisions governing decision-making have proved sufficiently robust;

(b) the progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States in accordance with the TFEU.

2. Where appropriate, this report shall be accompanied by a proposal for amendments to this Regulation, including to the decision-making procedures.

3. The report shall be forwarded to the European Parliament and the Council.

[3] OJ L 87, 31.3.2009, p. 164.

Article 13

This Regulation shall enter into force on 1 July 1998.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

§22. Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive déficit procedure, Consolidated Text, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R1467:20111213:EN:PDF

Original Regulation (OJ L 209, 2.8.1997, p. 6); amended by Council Regulation (EC) No 1056/2005 of June 2005 (OJ L 174, 7.7.2005, p. 5) and Council Regulation (EU) No 1177/2011 of 8 November 2011 (OJ L 306, 23.11.2011, p. 33).

ORIGINAL PREAMBLE

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the second subparagraph of Article 126(14) thereof,

Having regard to the proposal from the Commission,[1]

Having regard to the opinion of the European Parliament,[2]

Having regard to the opinion of the European Monetary Institute,

(1) Whereas it is necessary to speed up and to clarify the excessive deficit procedure set out in Article 126 TFEU in order to deter excessive general government deficits and, if they occur, to further their prompt correction; whereas the provisions of this Regulation, which are to the above effect and adopted under Article 126(14) second subparagraph, constitute, together with those of Protocol (No 5) to the Treaty, a new integrated set of rules for the application of Article 126;

(2) Whereas the Stability and Growth Pact is based on the objective of sound government finances as a means of strengthening the conditions for price stability and for strong sustainable growth conducive to employment creation;

(3) Whereas the Stability and Growth Pact consists of this Regulation, of Council Regulation (EC) No 1466/97 (§ http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997R1466&from=EN) which aims to strengthen the surveillance of budgetary positions and the surveillance and coordination of economic policies and of the Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact (§XXX http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:236:FULL&from=EN), in which, in accordance with Article 4 of the Treaty on European Union, firm political guidelines are issued in order to implement the manner and in particular to adhere to the medium term objective for budgetary positions of close to balance or in surplus, to which all Member States are committed, and to take the corrective budgetary action they deem necessary to meet the objectives of their stability and convergence programmes, whenever they have information indicating actual or expected significant divergence from the medium-term budgetary objective;

(4) Whereas in stage three of Economic and Monetary Union (EMU) the Member States are, according to Article 126 TFEU, under a clear Treaty obligation to avoid excessive government deficits; whereas under Article 5 of Protocol (No 11) to the Treaty, paragraphs 1, 9 and 11 of Article 126 do not apply to the United Kingdom unless it moves to the third stage; whereas the obligation under Article 116 (4) to endeavour to avoid excessive deficits will continue to apply to the United Kingdom;

[1] OJ No C 368, 6. 12. 1996, p. 12.
[2] OJ No C 380, 16. 12. 1996, p. 29.

(5) Whereas Denmark, referring to paragraph 1 of Protocol (No 12) to the Treaty has notified, in the context of the Edinburgh decision of 12 December 1992, that it will not participate in the third stage; whereas, therefore, in accordance with paragraph 2 of the said Protocol, paragraph 9 and 11 of Article 126 shall not apply to Denmark;

(6) Whereas in stage three of EMU Member States remain responsible for their national budgetary policies, subject to the provisions of the Treaty; whereas the Member States will take the necessary measures in order to meet their responsibilities in accordance with the provisions of the Treaty;

(7) Whereas adherence to the medium-term objective of budgetary positions close to balance or in surplus to which all Member States are committed, contributes to the creation of the appro- priate conditions for price stability and for sustained growth conducive to employment creation in all Member States and will allow them to deal with normal cyclical fluctuations while keeping the government deficit within the 3 % of GDP reference value;

(8) Whereas for EMU to function properly, it is necessary that convergence of economic and budgetary performances of Member States which have adopted the single currency, hereafter referred to as 'participating Member States', proves stable and durable; whereas budgetary discipline is necessary in stage three of EMU to safeguard price stability;

(9) Whereas according to Article 109k (3) Article 126(9) and (11) only apply to participating Member States;

(10) Whereas it is necessary to define the concept of an exceptional and temporary excess over the reference value as referred to in Article 126(2) (a); whereas the Council should in this context, inter alia, take account of the pluriannual budgetary forecasts provided by the Commission;

(11) Whereas a Commission report in accordance with Article 126(3) is also to take into account whether the government deficit exceeds government investment expen- diture and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State;

(12) Whereas there is a need to establish deadlines for the implementation of the excessive deficit procedure in order to ensure its expeditious and effective implementation; whereas it is necessary in this context to take account of the fact that the budgetary year of the United Kingdom does not coincide with the calendar year;

(13) Whereas there is a need to specify how the sanctions provided for in Article 126 could be imposed in order to ensure the effective implementation of the excessive deficit procedure;

(14) Whereas reinforced surveillance under the Council Regulation (EC) No 1466/97 together with the Commission's monitoring of budgetary positions in accordance with paragraph 2 of Article 126 should facilitate the effective and rapid implementation of the excessive deficit procedure;

(15) Whereas in the light of the above, in the event that a participating Member State fails to take effective action to correct an excessive deficit, an overall maximum period of ten months from the reporting date of the figures indicating the existence of an excessive deficit until the decision to impose sanctions, if necessary, seems both feasible and appropriate in order to exert pressure on the participating Member State concerned to take such action; in this event, and if the procedure starts in March, this would lead to sanctions being imposed within the calendar year in which the procedure had been started;

(16) Whereas the Council recommendation for the correction of an excessive deficit or the later steps of the excessive deficit procedure, should have been anticipated by the Member State concerned, which would have had an early warning; whereas the seriousness of an excessive deficit in stage three should call for urgent action from all those involved;

(17) Whereas it is appropriate to hold the excessive deficit procedure in abeyance if the Member State concerned takes appropriate action in response to a recommendation under Article 126(7) or a notice issued under Article 126(9) in order to provide an incentive to Member States to act accordingly; whereas the time period during which the procedure would be held in abeyance should not be included in the maximum period of ten months between the reporting date indicating the existence of an excessive deficit and the imposition of sanctions; whereas it is appropriate to resume the procedure immediately if the envisaged action is not being implemented or if the implemented action is proving to be inadequate;

(18) Whereas, in order to ensure that the excessive deficit procedure has a sufficient deterrent effect, a non-interest-bearing deposit of an appropriate size should be required from the participating Member State concerned, whenever the Council decides to impose a sanction;

(19) Whereas the definition of sanctions on a prescribed scale is conducive to legal certainty; whereas it is appropriate to relate the amount of the deposit to the GDP of the participating Member State concerned;

(20) Whereas, whenever the imposition of a non-interest-bearing deposit does not induce the participating Member State concerned to correct its excessive deficit in due time, it is appropriate to intensify the sanctions; whereas it is then appropriate to transform the deposit into a fine;

(21) Whereas appropriate action by the participating Member State concerned in order to correct its excessive deficit is the first step towards abrogation of sanctions; whereas significant progress in correcting the excessive deficit should allow for the lifting of sanctions in accordance with paragraph 12 of Article 126; whereas the abrogation of all outstanding sanctions should only occur once the excessive deficit has been totally corrected;

(22) Whereas Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (§XXX NON FOUND) contains detailed rules for the reporting of budgetary data by Member States;

(23) Whereas, according to Article 117 (8), where the Treaty provides for a consultative role for the European Central Bank (ECB), references to the ECB shall be read as referring to the European Monetary Institute before the establishment of the ECB,

HAS ADOPTED THIS REGULATION

2011 PREAMBLE

Having regard to the Treaty on the Functioning of the European Union, and in particular the second subparagraph of Article 126(14) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Parliament,[1]

Having regard to the opinion of the European Central Bank,[2]

Acting in accordance with a special legislative procedure,

Whereas:

(1) The coordination of the economic policies of the Member States within the Union, as provided for by the Treaty on the Functioning of the European Union (TFEU), should entail compliance with the guiding principles of stable prices, sound public finances and monetary conditions, and a sustainable balance of payments.

(2) The Stability and Growth Pact (SGP) initially consisted of Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies,[3] Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure[4] and the Resolution of the European Council of 17 June 1997 on the Stability and Growth Pact.[5] Regulations (EC) No 1466/97 and (EC) No 1467/97 were amended by Regulations (EC) No 1055/2005[6] and (EC) No 1056/2005[7] respectively. In addition, the Council Report of 20 March 2005 on "Improving the implementation of the Stability and Growth Pact"[8] was adopted.

[1] European Parliament opinion of 28 September 2011 (not yet published in the Official Journal).
[2] OJ C 150, 20.5.2011, p. 1.

[3] OJ L 209, 2.8.1997, p. 1.
[4] OJ L 209, 2.8.1997, p. 6.
[5] OJ C 236, 2.8.1997, p. 1.
[6] Council Regulation (EC) No 1055/2005 of 27 June 2005 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 174, 7.7.2005, p. 1).
[7] Council Regulation (EC) No 1056/2005 of 27 June 2005 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 174, 7.7.2005, p. 5).
[8] See document 7423/3/05 on http://www.consilium.europa.eu/documents.aspx?lang=en

(3) The SGP is based on the objective of sound and sustainable government finances as a means of strengthening the conditions for price stability and for strong sustainable growth underpinned by financial stability, thereby supporting the achievement of the Union's objectives for sustainable growth and employment.

(4) Experience gained and mistakes made during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies.

(5) The common framework for economic governance needs to be enhanced, including improved budgetary surveillance, in line with the high degree of integration between Member States' economies within the Union, and particularly within the euro area.

(6) The improved economic governance framework should rely on several interlinked and coherent policies for sustainable growth and jobs, in particular a Union strategy for growth and jobs, with particular focus on developing and strengthening the internal market, fostering international trade and competitiveness, a European Semester for strengthened coordination of economic and budgetary policies, an effective framework for preventing and correcting excessive government deficits (the SGP), a robust framework for preventing and correcting macroeconomic imbalances, minimum requirements for national budgetary frameworks, and enhanced financial market regulation and supervision, including macroprudential supervision by the European Systemic Risk Board.

(7) Achieving and maintaining a dynamic internal market should be considered an element of the proper and smooth functioning of the economic and monetary union.

(8) The SGP and the complete economic governance framework should complement and support the Union strategy for growth and jobs. The interlinks between different strands should not provide for exemptions from the provisions of the SGP.

(9) The strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments. While recognising that the counterparts of the European Parliament in the framework of this dialogue are the relevant institutions of the Union and their representatives, the competent committee of the European Parliament may offer an opportunity to participate in an exchange of views to a Member State to which the Council has addressed a decision under Article 126(6) TFEU, a recommendation under Article 126(7) TFEU, a notice under Article 126(9) TFEU or a decision under Article 126(11) TFEU. The Member State's participation in such an exchange of views is voluntary.

(10) The Commission should have a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on-site missions, recommendations and warnings.

(11) The Council and the Commission should, when applying this Regulation, take into account, as appropriate, all relevant factors and the economic and budgetary situation of the Member States concerned.

(12) The rules on budgetary discipline should be strengthened, in particular by giving a more prominent role to the level and evolution of debt and to overall sustainability. The mechanisms to ensure compliance with, and enforcement of, those rules should also be strengthened.

(13) Implementing the existing excessive deficit procedure on the basis of both the deficit criterion and the debt criterion requires a numerical benchmark, which takes into account the business cycle, against which to assess whether the ratio of the government debt to gross domestic product (GDP) is sufficiently diminishing and is approaching the reference value at a satisfactory pace.

A transitional period should be introduced in order to allow Member States subject to an excessive deficit procedure at the date of adoption of this Regulation to adapt their policies to the numerical benchmark for debt reduction. This should also apply to Member States which are subject to a Union or International Monetary Fund adjustment programme.

(14) Non-compliance with the numerical benchmark for debt reduction should not be sufficient to establish the existence of an excessive deficit, which should take into account the whole range of relevant factors covered by the Commission's report under Article 126(3) TFEU. In particular, the assessment of the effect of the cycle and the

composition of the stock-flow adjustment on debt developments may be sufficient to avoid that the existence of an excessive deficit be established on the basis of the debt criterion.

(15) In establishing the existence of an excessive deficit based on the deficit criterion and the steps leading to it, there is a need to take into account the whole range of relevant factors covered by the Commission's report under Article 126(3) TFEU if the ratio of government debt to GDP does not exceed the reference value.

(16) In taking into account systemic pension reforms among the relevant factors, the central consideration should be whether those reforms enhance the long-term sustainability of the overall pension system, while not increasing the risks to the medium-term budgetary position.

(17) The Commission's report under Article 126(3) TFEU should consider appropriately the quality of the national budgetary framework, as that plays a crucial role in supporting fiscal consolidation and sustainable public finances. That consideration should include the minimum requirements as laid down in Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States and other agreed desirable requirements for fiscal discipline.

(18) In order to support the monitoring of compliance with Council recommendations and notices for the correction of situations of excessive deficit, there is a need that these specify annual budgetary targets consistent with the required fiscal improvement in cyclically adjusted terms, net of one-off and temporary measures. In that context, the 0,5 % of GDP annual benchmark should be understood as an annual average.

(19) The assessment of effective action will benefit from taking compliance with general government expenditure targets as a reference, in conjunction with the implementation of planned specific revenue measures.

(20) In assessing the case for an extension of the deadline for correcting the excessive deficit, particular consideration should be given to severe economic downturns in the euro area or in the Union as a whole, provided that this does not endanger fiscal sustainability in the medium term.

(21) It is appropriate to step up the application of the financial sanctions provided for in Article 126(11) TFEU so that they constitute a real incentive for compliance with the notices under Article 126(9) TFEU.

(22) In order to ensure compliance with the fiscal surveillance framework of the Union for Member States whose currency is the euro, rules-based sanctions should be designed on the basis of Article 136 TFEU, ensuring fair, timely and effective mechanisms for compliance with the SGP.

(23) Fines referred to in this Regulation shall constitute other revenue, as referred to in Article 311 TFEU, and should be assigned to stability mechanisms to provide financial assistance, created by Member States whose currency is the euro in order to safeguard the stability of the euro area as a whole.

(24) References contained in Regulation (EC) No 1467/97 should take account of the new Article numbering of the Treaty on the Functioning of the European Union and to the replacement of Council Regulation (EC) No 3605/93[9] by Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community.[10]

(25) Regulation (EC) No 1467/97 should therefore be amended accordingly,

HAS ADOPTED THIS REGULATION:

[9] Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (OJ L 332, 31.12.1993, p. 7).
[10] OJ L 145, 10.6.2009, p. 1.

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SECTION 1: DEFINITIONS AND ASSESSMENTS

Article 1

1. This Regulation lays down the provisions for speeding up and clarifying the excessive deficit procedure. The objective of the excessive deficit procedure is to deter excessive government deficits and, if they occur, to further prompt their correction, where compliance with the budgetary discipline is examined on the basis of the government deficit and government debt criteria.

2. For the purposes of this Regulation, 'participating Member States' shall mean those Member States whose currency is the euro.

Article 2

1. The excess of a government deficit over the reference value shall be considered exceptional, in accordance with the second indent of point (a) of Article 126(2) of the Treaty on the Functioning of the European Union (TFEU), when resulting from an unusual event outside the control of the Member State concerned and with a major impact on the financial position of general government, or when resulting from a severe economic downturn.

In addition, the excess over the reference value shall be considered temporary if budgetary forecasts as provided by the Commission indicate that the deficit will fall below the reference value following the end of the unusual event or the severe economic downturn.

1a. When it exceeds the reference value, the ratio of the government debt to gross domestic product (GDP) shall be considered sufficiently diminishing and approaching the reference value at a satisfactory pace in accordance with point (b) of Article 126(2) TFEU if the differential with respect to the reference value has decreased over the previous three years at an average rate of one twentieth per year as a benchmark, based on changes over the last three years for which the data is available.

The requirement under the debt criterion shall also be considered to be fulfilled if the budgetary forecasts of the Commission indicate that the required reduction in the differential will occur over the three-year period encompassing the two years following the final year for which the data is available. For a Member State that is subject to an excessive deficit procedure on 8 November 2011 and for a period of three years from the correction of the excessive deficit, the requirement under the debt criterion shall be considered fulfilled if the Member State concerned makes sufficient progress towards compliance as assessed in the opinion adopted by the Council on its stability or convergence programme.

In implementing the debt ratio adjustment benchmark, account shall be taken of the influence of the cycle on the pace of debt reduction.

2. The Commission and the Council, when assessing and deciding upon the existence of an excessive deficit in accordance with Article 126(3) to (6) TFEU may consider an excess over the reference value resulting from a severe economic downturn as exceptional in the sense of the second indent of Article 126(2) (a) if the excess over the reference value results from a negative annual GDP volume growth rate or from an accumulated loss of output during a protracted period of very low annual GDP volume growth relative to its potential.

3. The Commission, when preparing a report under Article 126(3) TFEU, shall take into account all relevant factors as indicated in that Article, in so far as they significantly affect the assessment of compliance with the deficit and debt criteria by the Member State concerned. The report shall reflect, as appropriate:

(a) the developments in the medium-term economic position, in particular potential growth, including the various contributions provided by labour, capital accumulation and total factor productivity, cyclical developments, and the private sector net savings position;

(b) the developments in the medium-term budgetary positions, including, in particular, the record of adjustment towards the medium-term budgetary objective, the level of the primary balance and developments in primary expenditure, both current and capital, the implementation of policies in the context of the prevention and correction of excessive macroeconomic imbalances, the implementation of policies in the context of the common growth strategy of the Union, and the overall quality of public finances, in particular the effectiveness of national budgetary frameworks;

(c) the developments in the medium-term government debt position, its dynamics and

sustainability, including, in particular, risk factors including the maturity structure and currency denomination of the debt, stock-flow adjustment and its composition, accumulated reserves and other financial assets, guarantees, in particular those linked to the financial sector, and any implicit liabilities related to ageing and private debt, to the extent that it may represent a contingent implicit liability for the government.

The Commission shall give due and express consideration to any other factors which, in the opinion of the Member State concerned, are relevant in order to comprehensively assess compliance with deficit and debt criteria and which the Member State has put forward to the Council and the Commission. In that context, particular consideration shall be given to financial contributions to fostering international solidarity and achieving the policy goals of the Union, the debt incurred in the form of bilateral and multilateral support between Member States in the context of safeguarding financial stability, and the debt related to financial stabilisation operations during major financial disturbances.

4. The Council and the Commission shall make a balanced overall assessment of all the relevant factors, specifically, the extent to which they affect the assessment of compliance with the deficit and/or the debt criteria as aggravating or mitigating factors. When assessing compliance on the basis of the deficit criterion, if the ratio of the government debt to GDP exceeds the reference value, those factors shall be taken into account in the steps leading to the decision on the existence of an excessive deficit provided for in paragraphs 4, 5 and 6 of Article 126 TFEU only if the double condition of the overarching principle — that, before these relevant factors are taken into account, the general government deficit remains close to the reference value and its excess over the reference value is temporary — is fully met.

However, those factors shall be taken into account in the steps leading to the decision on the existence of an excessive deficit when assessing compliance on the basis of the debt criterion.

5. When assessing compliance with the deficit and debt criterion and in the subsequent steps of the excessive deficit procedure, the Council and the Commission shall give due consideration to the implementation of pension reforms introducing a multi-pillar system that includes a mandatory, fully funded pillar and the net cost of the publicly managed pillar. In particular, consideration shall be given to the features of the overall pension system created by the reform, namely whether it promotes long-term sustainability while not increasing risks for the medium-term budgetary position.

6. If the Council, acting under Article 126(6) TFEU, decides that an excessive deficit exists in a Member State, the Council and the Commission shall, in the subsequent procedural steps of that Article of the TFEU, take into account the relevant factors referred to in paragraph 3 of this Article, as they affect the situation of the Member State concerned, including as specified in Article 3(5) and Article 5(2) of this Regulation, in particular in establishing a deadline for the correction of the excessive deficit and eventually extending that deadline. However, those relevant factors shall not be taken into account for the decision of the Council under Article 126(12) TFEU on the abrogation of some or all of its decisions under paragraphs 6 to 9 and 11 of Article 126 TFEU.

7. In the case of Member States where the excess of the deficit over the reference value reflects the implementation of a pension reform introducing a multi-pillar system that includes a mandatory, fully funded pillar, the Council and the Commission shall also consider the cost of the reform when assessing developments of deficit figures in excessive deficit procedures as long as the deficit does not significantly exceed a level that can be considered close to the reference value, and the debt ratio does not exceed the reference value, provided that overall fiscal sustainability is maintained. The net cost shall be taken into account also for the decision of the Council under Article 126(12) TFEU on the abrogation of some or all of its decisions under paragraphs 6 to 9 and 11 of Article 126 TFEU, if the deficit has declined substantially and continuously and has reached a level that comes close to the reference value.

SECTION 1A: ECONOMIC DIALOGUE

Article 2a

1. In order to enhance the dialogue between the institutions of the Union, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup, to appear before the committee to discuss Council decisions under Article 126(6) TFEU, Council recommendations under Article 126(7) TFEU, notices under

Article 126(9) TFEU, or Council decisions under Article 126(11) TFEU.

The Council is, as a rule, expected to follow the recommendations and proposals of the Commission or explain its position publicly.

The competent committee of the European Parliament may offer the opportunity to the Member State concerned by such decisions, recommendations or notices to participate in an exchange of views.

2. The Council and the Commission shall regularly inform the European Parliament of the application of this Regulation.

SECTION 2: SPEEDING UP THE EXCESSIVE DEFICIT PROCEDURE

Article 3

1. Within two weeks of the adoption by the Commission of a report issued in accordance with Article 126(3), the Economic and Financial Committee shall formulate an opinion in accordance with Article 126(4

2. Taking fully into account the opinion referred to in paragraph 1, the Commission, if it considers that an excessive deficit exists, shall address an opinion and a proposal to the Council in accordance with paragraphs 5 and 6 of Article 126 TFEU and shall inform the European Parliament thereof.

3. The Council shall decide on the existence of an excessive deficit in accordance with Article 126(6) TFEU, as a rule within four months of the reporting dates established in Article 3(2) and (3) of Regulation (EC) No 479/2009. When it decides that an excessive deficit exists, the Council shall at the same time make recommendations to the Member State concerned in accordance with Article 126(7) TFEU.

4. The Council recommendation made in accordance with Article 126(7) TFEU shall establish a maximum deadline of six months for effective action to be taken by the Member State concerned. When warranted by the seriousness of the situation, the deadline for effective action may be three months. The Council recommendation shall also establish a deadline for the correction of the excessive deficit, which shall be completed in the year following its identification unless there are special circumstances. In its recommendation, the Council shall request that the Member State achieve annual budgetary targets which, on the basis of the forecast underpinning the recommendation, are consistent with a minimum annual improvement of at least 0.5 % of GDP as a benchmark, in its cyclically adjusted balance net of one-off and temporary measures, in order to ensure the correction of the excessive deficit within the deadline set in the recommendation.

4a. Within the deadline provided for in paragraph 4, the Member State concerned shall report to the Council and the Commission on action taken in response to the Council's recommendation under Article 126(7) TFEU. The report shall include the targets for government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side consistent with the Council's recommendation, as well as information on the measures taken and the nature of those envisaged to achieve the targets. The Member State shall make the report public.

5. If effective action has been taken in compliance with a recommendation under Article 126(7) TFEU and unexpected adverse economic events with major unfavourable consequences for government finances occur after the adoption of that recommendation, the Council may decide, on a recommendation from the Commission, to adopt a revised recommendation under Article 126(7) TFEU. The revised recommendation, taking into account the relevant factors referred to in Article 2(3) of this Regulation may, in particular, extend the deadline for the correction of the excessive deficit by one year as a rule. The Council shall assess the existence of unexpected adverse economic events with major unfavourable consequences for government finances against the economic forecasts in its recommendation. In the case of a severe economic downturn in the euro area or in the Union as a whole, the Council may also decide, on a recommendation from the Commission, to adopt a revised recommendation under Article 126(7) TFEU provided that this does not endanger fiscal sustainability in the medium term.

Article 4

1. Any decision by the Council under Article 126(8) TFEU to make public its recommendations where it is established that no effective action has been taken, shall be taken immediately after the expiry of the deadline set in accordance with Article 3(4) of this Regulation.

2. The Council, when considering whether effective action has been taken in

response to its recommendations made in accordance with Article 126(7) TFEU, shall base its decision on the report submitted by the Member State concerned in accordance with Article 3(4a) of this Regulation and its implementation, as well as on any other publicly announced decisions by the government of the Member State concerned.

Where the Council establishes, in accordance with Article 126(8) TFEU, that the Member State concerned has failed to take effective action, it shall report to the European Council accordingly.

Article 5

1. Any Council decision to give notice to the participating Member State concerned to take measures for the deficit reduction in accordance with Article 126(9) TFEU shall be taken within two months of the Council decision under Article 126(8) TFEU establishing that no effective action has been taken. In the notice, the Council shall request that the Member State achieve annual budgetary targets which, on the basis of the forecast underpinning the notice, are consistent with a minimum annual improvement of at least 0.5 % of GDP as a benchmark, in its cyclically adjusted balance net of one-off and temporary measures, in order to ensure the correction of the excessive deficit within the deadline set in the notice. The Council shall also indicate measures conducive to the achievement of those targets.

1a. Following a Council notice under Article 126(9) TFEU, the Member State concerned shall report to the Council and the Commission on action taken in response thereto. The report shall include the targets for the government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side, as well as information on the actions being taken in response to the specific Council recommendations so as to allow the Council to take, if necessary, a decision in accordance with Article 6(2) of this Regulation. The Member State shall make the report public.

2. If effective action has been taken in compliance with a notice under Article 126(9) TFEU and unexpected adverse economic events with major unfavourable consequences for government finances occur after the adoption of that notice, the Council may decide, on a recommendation from the Commission, to adopt a revised notice under Article 126(9) TFEU. The revised notice, taking into account the relevant factors referred to in Article 2(3) of this Regulation may, in particular, extend the deadline for the correction of the excessive deficit by one year as a rule. The Council shall assess the existence of unexpected adverse economic events with major unfavourable consequences for government finances against the economic forecasts in its notice. In the case of a severe economic downturn in the euro area or in the Union as a whole, the Council may also decide, on a recommendation from the Commission, to adopt a revised notice under Article 126(9) TFEU, on condition that this does not endanger fiscal sustainability in the medium term.

Article 6

1. The Council, when considering whether effective action has been taken in response to its notice made in accordance with Article 126(9) TFEU, shall base its decision on the report submitted by the Member State concerned in accordance with Article 5(1a) of this Regulation and its implementation, as well as on any other publicly announced decisions by the government of the Member State concerned. The outcome of the surveillance mission carried out by the Commission in accordance with Article 10a of this Regulation shall be taken into account.

2. Where the conditions to apply Article 126(11) TFEU are met, the Council shall impose sanctions in accordance with that Article. Any such decision shall be taken no later than four months after the Council decision under Article 126(9) TFEU giving notice to the participating Member State concerned to take measures.

Article 7

If a participating Member State fails to act in compliance with the successive acts of the Council in accordance with Article 126(7) and (9) TFEU, the decision of the Council under Article 126(11) tFEu to impose sanctions shall be taken as a rule within 16 months of the reporting dates established in Article 3(2) and (3) of Regulation (EC) No 479/2009. Where Article 3(5) or Article 5(2) of this Regulation is applied, the 16-month deadline shall be adjusted accordingly. An expedited procedure shall be used in the case of a deliberately planned deficit which the Council decides is excessive.

Article 8

Any Council decision under Article 126(11) TFEU to intensify sanctions shall be taken no later than two months after the reporting dates

pursuant to Regulation (EC) No 479/2009. Any Council decision under Article 126(12) TFEU to abrogate some or all of its decisions shall be taken as soon as possible and in any event no later than two months after the reporting dates pursuant to Regulation (EC) No 479/2009.

SECTION 3: ABEYANCE AND MONITORING

Article 9

1. The excessive deficit procedure shall be held in abeyance:

— if the Member State concerned acts in compliance with recommendations made in accordance with Article 126(7),

— if the participating Member State concerned acts in compliance with notices given in accordance with Article 126(9).

2. The period during which the procedure is held in abeyance shall be included neither in the period referred to in Article 6 nor in the period referred to in Article 7 of this Regulation.

3. Following the expiry of the period referred to in the first sentence of Article 3(4) and following the expiry of the period referred to in the second sentence of Article 6(2) of this Regulation, the Commission shall inform the Council if it considers that the measures taken seem sufficient to ensure adequate progress towards the correction of the excessive deficit within the time limits set by the Council, provided that they are fully implemented and that economic developments are in line with forecasts. The Commission statement shall be made public.

Article 10

1. The Council and the Commission shall regularly monitor the implementation of action taken:

— by the Member State concerned in response to recommendations made under Article 126(7),

— by the participating Member State concerned in response to notices given under Article 126(9).

2. If action by a participating Member State is not being implemented or, in the Council's view, is proving to be inadequate, the Council shall immediately take a decision under Article 126 (9) or Article 126(11) respectively.

3. If actual data pursuant to Regulation (EC) No 479/2009 indicate that an excessive deficit has not been corrected by a participating Member State within the time limits specified either in recommendations issued under Article 126(7) or notices issued under Article 126(9), the Council shall immediately take a decision under Article 126(9) or Article 126(11) respectively.

Article 10a

1. The Commission shall ensure a permanent dialogue with authorities of the Member States in accordance with the objectives of this Regulation. To that end, the Commission shall, in particular, carry out missions for the purpose of the assessment of the actual economic situation in the Member State and the identification of any risks or difficulties in complying with the objectives of this Regulation.

2. Enhanced surveillance may be undertaken for Member States which are the subject of recommendations and notices issued following a decision pursuant to Article 126(8) TFEU and decisions under Article 126(11) TFEU for the purposes of on-site monitoring. The Member States concerned shall provide all necessary information for the preparation and the conduct of the mission.

3. The Commission may invite representatives of the European Central Bank, if appropriate, to participate in surveillance missions in a Member State whose currency is the euro or which is participating in the Agreement of 16 March 2006 between the European Central Bank and the national central banks of the Member States outside the euro area laying down the operating procedures for an exchange rate mechanism in stage three of Economic and Monetary Union[1] (ERM II).

4. The Commission shall report to the Council on the outcome of the mission referred to in paragraph 2 and may decide to make its findings public.

5. When organising surveillance missions referred to in paragraph 2, the Commission shall transmit its provisional findings to the Member States concerned for comments.;

SECTION 4: SANCTIONS

Article 11

[1] OJ C 73, 25.3.2006, p. 21.

Whenever the Council decides under Article 126(11) TFEU to impose sanctions on a participating Member State, a fine shall, as a rule, be required. The Council may decide to supplement such a fine by the other measures provided for in Article 126(11) TFEU.

Article 12

1. The amount of the fine shall comprise a fixed component equal to 0,2 % of GDP, and a variable component. The variable component shall amount to one tenth of the absolute value of the difference between the balance as a percentage of GDP in the preceding year and either the reference value for government balance or, if non-compliance with budgetary discipline includes the debt criterion, the government balance as a percentage of GDP that should have been achieved in the same year according to the notice issued under Article 126(9) TFEU.

2. In each year following that in which a fine is imposed, until the decision on the existence of an excessive deficit is abrogated, the Council shall assess whether the participating Member State concerned has taken effective action in response to the Council notice in accordance with Article 126(9) TFEU. In this annual assessment the Council shall decide, in accordance with Article 126(11) TFEU, to intensify the sanctions, unless the participating Member State concerned has complied with the Council's notice. If the Council decides to impose an additional fine, it shall be calculated in the same way as for the variable component of the fine referred to in paragraph 1.

3. No single fine referred to in paragraphs 1 and 2 shall exceed 0,5 % of GDP.

Article 14

1. In accordance with Article 126(12), the Council shall abrogate the sanctions referred to in the first and second indents of Article 126(11) depending on the significance of the progress made by the participating Member State concerned in correcting the excessive deficit.

Article 15

In accordance with Article 126(12), the Council shall abrogate all outstanding sanctions if the decision on the existence of an excessive deficit is abrogated. Fines imposed in accordance with Article 12 of this Regulation will not be reimbursed to the participating Member State concerned.

Article 16

The fines referred to in Article 12 shall constitute other revenue, as referred to in Article 311 TFEU, and shall be assigned to the European Financial Stability Facility. When the participating Member States create another stability mechanism to provide financial assistance in order to safeguard the stability of the euro area as a whole, the amount of those fines shall be assigned to that mechanism.

SECTION 5: TRANSITIONAL AND FINAL PROVISIONS

Article 17

For the purpose of this Regulation and for as long as the United Kingdom has a budgetary year which is not a calendar year, the provisions of sections 2, 3 and 4 of this Regulation shall be applied to the United Kingdom in accordance with the Annex.

Article 17a

1. By 14 December 2014 and every five years thereafter, the Commission shall publish a report on the application of this Regulation.

That report shall evaluate, inter alia:

(a) the effectiveness of this Regulation;

(b) the progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States in accordance with the TFEU.

2. Where appropriate, the report referred to in paragraph 1 shall be accompanied by a proposal for amendments to this Regulation.

3. The report shall be forwarded to the European Parliament and to the Council.

Article 18

This Regulation shall enter into force on 1 January 1999.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

ANNEX: TIME LIMITS APPLICABLE TO THE UNITED KINGDOM

1. In order to ensure equal treatment of all Member States, the Council, when taking decisions in Sections 2, 3 and 4 of this Regulation, shall have regard to the different budgetary year of the United Kingdom, with a view to taking decisions with regard to the United Kingdom at a point in its budgetary year similar to that at which decisions have been or will be taken in the case of other Member States.

2. The provisions specified in Column I shall be substituted by the provisions specified in Column II.

Column I	Column II
'as a rule, within four months of the reporting dates established in Article 3(2) and (3) of Council Regulation (EC) No 479/2009' (§20,22,23,25,26,27) (Article 3(3))	'as a rule, within six months after the end of the budgetary year in which the deficit occurred'
'the year following its identification' (Article 3(4))	'the budgetary year following its identification'
'as a rule, within sixteen months of reporting dates established in Article 4(2) and (3) of Regulation (EC) No 3605/93' (Article 7)	'as a rule, within eighteen months from the end of the budgetary year in which the deficit occurred'
'the preceding year' (Article 12(1))	'the preceding budgetary year'

§23. Code of Conduct of the Growth and Stability Pact, September 3rd, 2012, http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/coc/code_of_conduct_en.pdf

Introduction

This Opinion updates and replaces the opinion of the Economic and Financial Committee on the content and format of the Stability and Convergence Programmes, endorsed by the Ecofin Council on 7 September 2010.

The Stability and Growth Pact fully entered into force on 1 January 1999 and consists of a rules-based framework with both preventive and corrective elements. It initially consisted of Council Regulation (EC) No 1466/97 of 7 July 1997 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 and the Resolution of 17 June 1997 on the Stability and Growth Pact. On 20 March 2005 the Council adopted a report entitled "Improving the implementation of the Stability and Growth Pact". The report was endorsed by the European Council in its conclusions of 22 March 2005, which stated that the report updates and complements the Stability and Growth Pact, of which it is now an integral part. On 27 June 2005 the Pact was complemented by two additional Regulations 1055/05 and 1056/05, amending the Regulations 1466/97 and 1467/97.

The Stability and Growth Pact is an essential part of the macroeconomic framework of the Economic and Monetary Union, which contributes to achieving macroeconomic stability in the EU and safeguarding the sustainability of public finances. A rules-based system is the best guarantee for commitments to be enforced and for all Member States to be treated equally. The two nominal anchors of the Stability and Growth Pact - the 3% of GDP reference value for the deficit ratio and the 60% of GDP reference value for the debt ratio - and the medium-term budgetary objectives are the centrepiece of multilateral surveillance.

On 16 November 2011 and 8 November 2011, Regulations 1466/97 and 1467/97 were further amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council and Council Regulation (EU) No 1177/2011 and flanked by Regulation (EU) No 1173/2011 of the European Parliament and of the Council, which endowed the Stability and Growth Pact with effective enforcement mechanisms for euro-area Member States and on 8 November 2011, the Council adopted Directive 2011/85/EU on requirements for budgetary frameworks of the Member States. While not a part of the Stability and Growth Pact, this Directive is instrumental to the achievement of its objectives.

Member States, the Commission and the Council are committed to deliver on their respective responsibilities, applying the Treaty and the Stability and Growth Pact in an effective and timely manner. In addition, since effectiveness of peer support and peer pressure is an integral part of the Stability and Growth Pact, the Council and the Commission are expected to motivate and make public their positions and decisions at all relevant stages of the procedure of the Stability and Growth Pact, also by means of economic dialogue with the European Parliament, where appropriate. The Council is expected to, as a rule, follow the recommendations and proposals of the Commission or explain its position publicly. Member States are expected to take into account guidance and recommendation(s) from the Council in particular when preparing their budgets, and to appropriately involve national Parliaments in the EU procedures, taking into account national parliamentary and budgetary procedures.

In order to enhance ownership of the EU budgetary framework, national budgetary rules and procedures should ensure compliance with the Stability and Growth Pact[1]. Without prejudice to the balance between national and Community competences, implementation of provisions going beyond the minimum requirements established by Directive 2011/85/EU, should be discussed at the European level in the context of the assessment of Stability and Convergence Programmes. The effectiveness of national budgetary frameworks is also a relevant factor to consider in the context of the Excessive Deficit Procedure.

These Guidelines for the implementation of the Stability and Growth Pact consist of 2 sections. The first section elaborates on the implementation of the Stability and Growth Pact. The second section consists of guidelines on the content and format of the Stability and Convergence programmes.

SECTION I: SPECIFICATIONS ON THE IMPLEMENTATION OF THE STABILITY AND GROWTH PACT

A. The preventive arm of the Stability and Growth Pact

1) The Medium term budgetary objective (MTO)

Definition of the MTO

The MTO is defined in cyclically adjusted terms, net of one-off and other temporary measures. The reference method for the estimation of potential output is the one adopted by the Council on 12 July 2002.[22] One-off and temporary measures are measures having a transitory budgetary effect that does not lead to a sustained change in the intertemporal budgetary position.[33]

The MTO pursues a triple aim:

(i) providing a safety margin with respect to the 3% of GDP deficit limit. This safety margin is assessed for each Member State taking into account past output volatility and the budgetary sensitivity to output fluctuations.

(ii) ensuring rapid progress towards sustainability. This is assessed against the need to ensure the convergence of debt ratios towards prudent levels taking into account the economic and budgetary impact of ageing populations.

(iii) taking (i) and (ii) into account, allowing room for budgetary manoeuvre, in particular taking into account the needs for public investment.

The MTOs are differentiated for individual Member States to take into account the diversity of economic and budgetary positions and developments as well as of fiscal risk to the

[1] As a result of Protocol 15 and Article 7(bis) of the Council Directive on requirements for budgetary frameworks of the Member States, articles 5 to 7 (on country-specific numerical fiscal rules) of the Directive do not apply to the United Kingdom.

[2] Due to data problems, a different method may be used for the estimation of potential output in the case of recently acceded member states (RAMS). The method used should be agreed by the Economic Policy Committee on the basis of a proposal of the Output Gap Working Group.

[3] Examples of one-off and temporary measures are the sales of non- financial assets; receipts of auctions of publicly owned licenses; short-term emergency costs emerging from natural disasters; tax amnesties; revenues resulting from the transfers of pension obligations and assets.

sustainability of public finances, also in face of prospective demographic changes. The country-specific MTOs may diverge from the requirement of a close to balance or in surplus position.

Specifically, the country-specific MTOs should take into account three components:

i) the debt-stabilising balance for a debt ratio equal to the (60% of GDP) reference value (dependent on long-term potential growth), implying room for budgetary manoeuvre for Member States with relatively low debt;

ii) a supplementary debt-reduction effort for Member States with a debt ratio in excess of the (60% of GDP) reference value, implying rapid progress towards it; and

iii) a fraction of the adjustment needed to cover the present value of the future increase in age-related government expenditure.

according to the formula

$$MTO = \max(MTO^{ILD}, MTO^{MB}, MTO^{Euro/ERM2})$$

where the components MTO^{MB} and $MTO^{Euro/ERM2}$ refer to the "minimum benchmark" as agreed by the EFC and to the Pact obligation for euro area Member States and Member States participating in ERM II to have an MTO not lower than -1% of GDP, respectively, while the component MTO^{ILD} relates to implicit and explicit liabilities:

$$MTO^{ILD} = \underbrace{Balance_{debt-stabilising(60\%ofGDP)}}_{(i)} + \\ + \underbrace{\alpha * AgeingCosts}_{(ii)} + \underbrace{Effort_{debt-reduction}}_{(iii)}$$

The first term on the right hand-side is the budgetary balance that would stabilise the debt ratio at 60% of GDP. The second term is the budgetary adjustment that would cover an agreed fraction of the present value of the increase in the age related expenditure. Alternatively, Member States can choose a fraction of the cost of ageing corresponding to the pre-financing of age-related expenditure up to an agreed number of years before the end of the AWG projections. The third term represents a supplementary debt-reduction effort, specific to countries with gross debt above 60% of GDP.

In order to operationalize this formula, explicit parameters will be made public through a Commission services paper, endorsed by the EFC.

This methodology implies a partial frontloading of the budgetary cost of ageing irrespective of the current level of debt. In addition to these criteria, MTOs should provide a safety margin with respect to the 3% of GDP deficit reference value and, for euro area Member States and Member States participating in ERM II, in any case not exceed a deficit of 1% of GDP. The examination of the country-specific MTOs by the Commission and the Council in the context of the assessment of Stability and Convergence programmes should indicate whether they adequately reflect the objectives of the Stability and Growth Pact on the basis of the above criteria. Potential growth and the budgetary cost of ageing should be assessed in a long-term perspective on the basis of the projections produced by the EPC.

Member States may present more ambitious MTOs than implied by the formula above if they feel their circumstances call for it.

For Member States outside of the euro area and not participating in ERM II, country-specific MTOs would be defined with a view to ensuring the respect of the triple aim mentioned above.

Art. 2a of Regulation (EC) No 1466/97 states that the respect of the MTO shall be included in the national budgetary framework in accordance with Chapter IV of Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States.[4]

Procedure for defining and revising the MTOs

In order to ensure a consistent application of the principles mentioned above for defining the country- specific MTOs, regular methodological discussions take place in the Economic and Financial Committee.

Taking into account the results of these discussions, Member States present their MTO in their Stability or Convergence programme. The MTOs are examined by the Commission and the Council in the context of the assessment of the Stability and Convergence Programmes. In accordance with Article 121(3) of the Treaty

[4] As a result of Protocol 15 and Article 7(bis) of the Council Directive on requirements for budgetary frameworks of the Member States, articles 5 to 7 (on country-specific numerical fiscal rules) of the Directive do not apply to the United Kingdom.

and Articles 5(2) and 9(2) of Regulation 1466/97, where the Council considers that the MTO presented in a Stability or Convergence programme should be strengthened, it shall, in its opinion, invite the Member State concerned to adjust its programme.

The MTO shall be revised every three years, preferably following the publication of the "Ageing Report". The MTOs could be further revised in the event of the implementation of a structural reform with a major impact on the sustainability of public finances. In particular, the MTO should be revised in the special case of systemic pension reforms with an impact on long term fiscal sustainability in line with the provision foreseen in section 2 below for major structural reforms.

2) The adjustment path toward the medium-term budgetary objective and deviations from it

Fiscal behaviour over the cycle and adjustment path toward the MTO

Member States should achieve a more symmetrical approach to fiscal policy over the cycle through enhanced budgetary discipline in periods of economic recovery, with the objective to avoid pro-cyclical policies and to gradually reach their medium-term budgetary objective, thus creating the necessary room to accommodate economic downturns and reduce government debt at a satisfactory pace, thereby contributing to the long-term sustainability of public finances.

Sufficient progress towards the MTO shall be evaluated on the basis of an overall assessment with the structural balance as the reference, including an analysis of expenditure net of discretionary revenue measures. The presumption is to use revenue windfalls, namely revenues in excess of what can normally be expected from economic growth, for deficit and debt reduction, while keeping expenditure on a stable sustainable path over the cycle. For that purpose, the Commission and the Council will assess the growth path of government expenditure against a reference medium-term rate of potential GDP growth. The reference-medium-term rate of potential GDP growth is based on regularly updated forward-looking projections and backward-looking estimates, taking into account the relevant calculation method provided by the EPC. The reference-medium-term rate of potential GDP growth will be the average of the estimates of the previous 5 years, the estimate for the current year and the projections for the following 4 years.

The government expenditure aggregate to be assessed should exclude interest expenditure, expenditure on EU programmes fully matched by EU funds revenue, and non-discretionary changes in unemployment benefit expenditure. Due to the potentially very high variability of investment expenditure, especially in the case of small Member States, the government expenditure aggregate should be adjusted by averaging investment expenditure over 4 years.

- Member States that have already reached their MTO could let automatic stabilisers play freely over the cycle. They should in particular avoid pro-cyclical fiscal policies in 'good times'. Avoidance should be expected to result in annual expenditure growth not exceeding the reference medium-term rate of potential GDP growth, unless the excess is matched by discretionary revenue measures.
- Member States that have not yet reached their MTO should take steps to achieve it over the cycle. Their adjustment effort should be higher in good times; it could be more limited in bad times. In order to reach their MTO, Member States of the euro area or of ERM-II should pursue an annual adjustment in cyclically adjusted terms, net of one-off and other temporary measures, of 0.5 of a percentage point of GDP as a benchmark. In parallel, the growth rate of expenditure net of discretionary revenue measures in relation to the reference medium-term rate of potential GDP growth should be expected to yield an annual improvement in the government balance in cyclically adjusted terms net of one-offs and other temporary measures of 0.5 of a percentage point of GDP. The reasons for differences between the results yielded by the two benchmarks should be carefully assessed.
- A Member State that has overachieved the MTO could temporarily let annual expenditure growth exceed a reference medium-term rate of potential GDP growth as long as, taking into account the possibility of significant revenue windfalls, the MTO is respected throughout the programme period.

For Member States that have not yet reached their MTO and are faced with a debt level exceeding 60% of GDP or with pronounced

risks in terms of overall debt sustainability, a faster adjustment path towards the medium-term budgetary objectives should be expected, i.e. above 0.5 of a percentage point of GDP as a benchmark in cyclically adjusted terms, net of one-off and other temporary measures.

Member States that do not follow the appropriate adjustment path will explain the reasons for the deviation in the annual update of their Stability/Convergence Programme.

Based on the principles mentioned above and on the explanations provided by Member States, the Commission and the Council, in their assessments of the Stability or Convergence Programmes, should examine whether a higher adjustment effort is made in economic good times.

In case of an unusual event outside the control of the Member State concerned and which has a major impact on the financial position of the general government or in periods of severe economic downturn for the euro area or the Union as a whole, Member States may be allowed to temporarily depart from the adjustment path towards the medium-term objective implied by the benchmarks for the structural balance and expenditure, on condition that this does not endanger fiscal sustainability in the medium-term.

In case the Council considers that the adjustment path towards the MTO should be strengthened, it shall, in accordance with Article 121(3) of the Treaty and Articles 5(2) and 9(2) of Regulation 1466/97, invite the Member State concerned to adjust its programme.

Definition of economic 'good times'

The identification of periods of economic 'good times' should be made after an overall economic assessment.

In principle, economic 'good times' should be identified as periods where output exceeds its potential level, taking into account tax elasticities.

In this context, tax revenue windfalls and shortfalls should also be taken into account. Windfall tax revenues should be understood as revenues in excess of what can normally be expected from economic growth.

The reference for the estimation of potential output is the methodology adopted by the Council on 12 July 2002.[5] The reference to 'tax elasticities' should be understood as the overall elasticity of taxes to GDP, resulting from the influence of economic factors (fiscal leads and lags, supply and demand composition of growth), abstracting from the implementation of discretionary measures.

Differences between the adjustment implied by the structural balance and the expenditure benchmarks should be duly taken into account in the assessment of the adjustment effort in economic good versus bad times.

Given the uncertainty surrounding output gap levels' estimates, the change in the output gap could also be considered, especially when the output gap is estimated to be close to zero. For instance, periods where the output gap is slightly negative but moving rapidly towards positive values could be considered as 'good times'. Symmetrically, periods where the output gap is slightly positive but moving rapidly towards negative values could not be considered as 'good times'.

Structural reforms

In order to enhance the growth oriented nature of the Pact, structural reforms will be taken into account when defining the adjustment path to the mediumterm objective for countries that have not yet reached this objective and in allowing a temporary deviation from this objective for countries that have already reached it.

Only major reforms that have direct long-term positive budgetary effects, including by raising potential growth, and therefore a verifiable positive impact on the long-term sustainability of public finances will be taken into account. For instance, major health, pension and labour market reforms may be considered.

Special attention will be paid to pension reforms introducing a multi-pillar system that includes a mandatory fully funded pillar, which have a direct negative impact on the general government deficit (as defined in Article 1 of Regulation 3605/93). This impact stems from the fact that revenue, which used to be recorded as government revenue, is diverted to a pension fund, which is fully-funded and classified in a sector other than general government, and that some pensions and other social benefits, which used to be government expenditure, will be, after the reform, paid by the pension scheme.[6] In this specific case, the allowed deviation from

[5] See footnote 2.

[6] For more information on the classification of pension schemes, see 'Eurostat's Manual on Government Deficit and Debt'.

the adjustment path to the MTO or the objective itself should reflect the amount of the direct incremental impact of the reform on the general government balance, provided that an appropriate safety margin with respect to the deficit reference value is preserved.

The direct impact of a pension reform that involves a transfer of pension obligations to or from general government is made up of two elements[7]: i) the social contributions or other revenue collected by the pension scheme taking over the pension obligations and which is meant to cover for these obligations and

ii) the pension and other social benefits paid by this pension scheme in connection to the obligations transferred. The direct impact of such pension reforms does not include interest expenditure that is linked to the higher accumulation of debt due to forgone social contributions or other revenues.

Following such reforms, the MTO should be adjusted to reflect the new situation, in line with the procedures for defining and revising MTO in section I above.

Only adopted reforms should be considered, provided that sufficient, detailed information is provided in the Stability and Convergence Programmes (see Section II). The budgetary effects of the reforms over time are assessed by the Commission and the Council in a prudent way, making due allowance for the margin of uncertainties associated to such an exercise.

Major structural reforms as identified above will be taken into account when defining the adjustment path to the medium-term objective for countries that have not yet reached this objective and in allowing a temporary deviation from this objective for countries that have already reached it, with the clear understanding that:

(i) a safety margin to ensure the respect of the 3% of GDP reference value for the deficit is guaranteed. This safety margin will be assessed for each Member State taking into account past output volatility and the budgetary sensitivity to output fluctuations.

(ii) the budgetary position is expected to return to the MTO within the period covered by the Stability or Convergence Programme. For this purpose, the period under consideration will be limited to - at most - the four years following the year of the presentation of the programme.

In case a temporary deviation from the medium-term objective or the adjustment path toward it is allowed, this should be specified in the Council Opinion on the Stability/Convergence Programme.

3) A significant deviation from the appropriate adjustment path

The identification of a significant deviation from the medium-term budgetary objective or the appropriate adjustment path towards it should be based on outcomes as opposed to plans. It should follow an overall assessment, with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures.

For a Member State that has not reached its MTO, the deviation will be considered significant if:

both

(i) the deviation of the structural balance from the appropriate adjustment path is at least 0.5% of GDP in one single year or at least 0.25% of GDP on average per year in two consecutive years; and

(ii) an excess of the rate of growth of expenditure net of discretionary revenue measures over the appropriate adjustment path defined in relation to the reference medium-term rate of growth has had a negative impact on the government balance of at least 0.5 of a percentage point of GDP in one single year, or cumulatively in two consecutive years;

or if one of the two conditions (i) and (ii) is verified and the overall assessment evidences limited compliance also with respect to the other condition.

The government expenditure aggregate to be assessed should exclude interest expenditure, expenditure on EU programmes fully matched by EU funds revenue, and non-discretionary changes in unemployment benefit expenditure. Due to the potentially very high variability of investment expenditure, especially in the case of small Member States, the government expenditure aggregate should be adjusted by

[7] Such transfer of pension obligations occurs when a mandatory fully funded pillar is introduced, enhanced or scaled down with an equivalent change in the outstanding pension obligations of the public pension scheme. Therefore, a transfer of pension obligation effectively takes place between a pension scheme classified outside general government and another scheme that is classified inside.

averaging the investment expenditure over four years. The excess of expenditure growth over the mediumterm reference will not be counted as a breach of the expenditure benchmark to the extent that it is fully offset by revenue increases mandated by law.

For a Member State that has overachieved the MTO, the occurrence of condition (ii) is not considered in the assessment of the existence of a significant deviation, unless significant revenue windfalls are assessed to jeopardise the MTO over the programme period.

A deviation may not be considered significant in the case of severe economic downturn for the euro area or the EU as a whole or when resulting from an unusual event outside of the control of the Member State concerned which has a major impact on the financial position of the general government, provided that this does not endanger fiscal sustainability in the medium-term.

B. The excessive deficit procedure

In line with the provisions of the Treaty, the Commission has to examine compliance with budgetary discipline on the basis of both the deficit and the debt criteria.

1) Preparation of a Commission report under Article 126(3)

The Commission will always prepare a report under Article 126(3) of the Treaty when at least one of the conditions (a) or (b) below holds:

(a) a reported or planned government deficit exceeds the reference value of 3% of GDP;

(b) a reported government debt ratio is above the reference value of 60% of GDP and

(i) its differential with respect to the reference value has not decreased over the past three years at an average rate of one-twentieth as a benchmark, which is measured by an excess of the debt ratio reported for the year t over a backward-looking element of a benchmark for debt reduction computed as follows[8]

$$bb_t=60\%+0.95/3(b_{t-1}-60\%)+0.95^2/3(b_{t-2}-60\%)+0.95^3/3(b_{t-3}-60\%)$$

[8] bb_t stands for the benchmark debt ratio in year t and b_t stands for the debt-to-GDP ratio in year t.

(ii) the budgetary forecasts as provided by the Commission services indicate that, at unchanged policies, the required reduction in the differential will not occur over the three-year period encompassing the two years following the final year for which the data is available, which is measured by an excess of the debt ratio forecast by the Commission services for the year t+2 over a forward-looking element of a benchmark for debt reduction computed as follows

$bb_{t+2}=60\%+0.95/3(b_{t+1}-60\%)+0.95^2/3(b_t-60\%)+0.95^3/3(b_{t-1}-60\%)$, where bb_t stands for the benchmark debt ratio in year t and b_t stands for the debt-to-GDP ratio in year t

(iii) the breach of the benchmark cannot be attributed to the influence of the cycle, to be assessed according to a common methodology to be published by the Commission.

The Commission may, in accordance with Article 126(3), also prepare a report notwithstanding the fulfilment of the requirements under the criteria laid down in Article 126(2)(a) of the Treaty if it is of the opinion that there is a risk of an excessive deficit in a Member State.

For a Member State that is subject to an excessive deficit procedure on 8 November 2011 and for a period of three years from the correction of the excessive deficit, occurrence of condition (b) above will not trigger the preparation of a report under Article 126(3) of the Treaty, provided that the Member States concerned makes sufficient progress towards compliance with the debt reduction benchmark as assessed in the Opinion adopted by the Council on its Stability and Convergence Programmes. Specifically, the Member State concerned should present in its Stability or Convergence Programme budgetary objectives consistent with the respect of the debt reduction benchmark, including the forward-looking element, by the end of the three-year transitional period. The assessment should in particular consider whether the budgetary plans are adequate to the task of avoiding breaching the benchmark by the end of the programme period.

In order to define "sufficient progress towards compliance" during the transition period, the Commission will identify a minimum linear structural adjustment ensuring that - if followed - Member States will comply with the debt rule at the end of the transition period. This minimum linear structural adjustment path will

be built taking into account both the influence of the cycle and the forward-looking nature of the debt benchmark. Also, in order to ensure continuous and realistic progress towards compliance during the transition period, Member States should respect simultaneously the two below conditions:

- First, the annual structural adjustment should not deviate by more than % % of GDP from the minimum linear structural adjustment ensuring that the debt rule is met by the end of the transitional period.
- Second, at any time during the transition period, the remaining annual structural adjustment should not exceed % % of GDP.

When the deficit ratio exceeds the reference value, the Commission shall examine in its report if one or more of the exceptions foreseen in Article 126(2)(a) apply. In particular, the Commission shall consider whether the deficit ratio has declined substantially and continuously and reached a level that comes close to the reference value.

The Commission shall also consider whether the excess of the deficit ratio over the reference value is only exceptional and temporary and whether the ratio remains close to the reference value. In order to be considered as exceptional, the excess has to result from an unusual event outside the control of the Member State concerned and with a major impact on the financial position of the general government, or it has to result from a 'severe economic downturn'. The Commission and the Council may consider an excess over the reference value resulting from a 'severe economic downturn' as exceptional in the sense of the second indent of Article 126(2)(a) of the Treaty if the excess over the reference value results from a negative annual GDP volume growth rate or from an accumulated loss of output during a protracted period of very low annual GDP volume growth relative to its potential. The indicator for assessing accumulated loss of output is the output gap, as calculated according to the method agreed by the Council on 12 July 2002.[9] The excess over the reference value shall be considered as temporary if the forecasts provided by the Commission indicate that the deficit will fall below the reference value following the end of the unusual event or the severe economic downturn.

The Commission report under Article 126(3) shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors.

Before establishing that an excessive deficit exists on the basis of the debt criterion, the whole range of relevant factors covered by the Commission report under Article 126(3) should be taken into account.

The Commission report should appropriately reflect the following relevant factors:

- the developments in the medium-term economic position (in particular potential growth, including the different contributions provided by labour, capital accumulation and total factor productivity, cyclical developments and the private sector net savings position);
- the developments in the medium-term budgetary position (in particular, the record of adjustment towards the medium-term budgetary objective, the level of the primary balance and developments in primary expenditure, both current and capital, the implementation of policies in the context of the prevention and correction of excessive macroeconomic imbalances, the implementation of policies in the context of the common growth strategy of the Union and the overall quality of public finances, in particular the effectiveness of national budgetary frameworks);
- the developments in the medium-term government debt position, its dynamics and sustainability (in particular, risk factors including the maturity structure and currency denomination of the debt, stock-flow adjustment and its composition, accumulated reserves and other financial assets, guarantees, notably linked to the financial sector, and any implicit liabilities related to ageing and private debt, to the extent that it may represent a contingent implicit liability for the government);

Furthermore, due consideration will be given in the report to any other factors which, in the

[9] See footnote 2.

opinion of the Member State concerned, are relevant in order to comprehensively assess compliance with the deficit and debt criteria. To this end, the Member State concerned may put forward to the Council and to the Commission the specific factors that it considers relevant, in due time for the preparation of the report under Article 126(3) and as a rule within one month of the reporting dates established in Article 3 (2) and (3) of Regulation (EC) No 479/2009. The Member State shall provide the information necessary for the Commission and the Council to make a comprehensive assessment of the budgetary impact of these factors. In that context, special consideration will be given to: budgetary efforts towards increasing or maintaining at a high level financial contributions to fostering international solidarity and to achieving Union policy goals; the debt incurred in the form of bilateral and multilateral support between Member States in the context of safeguarding financial stability; the debt related to financial stabilisation operations during major financial disturbances. A balanced overall assessment has to encompass all these factors.

The Commission report will give due consideration to the implementation of pension reforms introducing a multi-pillar system that includes a mandatory fully funded pillar and to the net cost of the publicly managed pillar. The net cost of the reform is measured as its direct impact on the general government deficit (as defined in Article 1 of Regulation 479/2009). This impact stems from the fact that revenue, which used to be recorded as government revenue, is diverted to a pension fund, which is fully-funded and classified in a sector other than general government, and that some pensions and other social benefits, which used to be government expenditure, will be, after the reform, paid by the pension scheme. Thus, net costs do not include interest expenditure that is linked to the higher accumulation of debt due to forgone social contributions or other revenues. This consideration should be part of a broader assessment of the overall features of the pension system created by the reform, namely whether it promotes long-term sustainability while not increasing risks for the medium-term budgetary position.

2) The decision on the existence of an excessive deficit

When assessing compliance on the basis of the deficit criterion, if the debt ratio exceeds 60% of GDP, the relevant factors assessed in the Commission report under Article 126(3) will also be taken into account in the steps leading to the decision on the existence of an excessive deficit foreseen in paragraphs (4), (5) and (6) of Article 126 of the Treaty only if the double condition of the overarching principle - that, before the relevant factors mentioned in Article 2 (3) of Regulation 1467/97 are taken into account, the general government deficit remains close to the reference value and its excess over the reference value is temporary - is fully met. However, the relevant factors assessed in the Commission report under Article 126(3) will be taken into account in the steps leading to a decision on the existence of an excessive deficit foreseen in paragraphs (4), (5) and

(6) of Article 126 of the Treaty when assessing compliance on the basis of the debt criterion. . The balanced overall assessment to be made by the Council in accordance with Article 126(6) shall encompass all these factors.

Where the excess of the deficit over the reference value reflects the implementation of a pension reform introducing a multi-pillar system that includes a mandatory fully funded pillar, the Commission and the Council shall also consider the net cost of the reform to the publicly managed pillar when assessing developments in EDP deficit figures as long as the general government deficit does not significantly exceed a level that can be considered close to the 3% of GDP reference value and the debt ratio does not exceed the 60% of GDP reference value, on condition that overall fiscal sustainability is maintained.

The Council shall decide on the existence of an excessive deficit in accordance with Article 126 (6) of the Treaty, on the basis of a Commission recommendation, as a rule within four months of the reporting dates established in Article 3 (2) and (3) of Regulation (EC) No 479/2009. The Council may decide later on the cases in which the budgetary statistical data have not been validated by the Commission (Eurostat) shortly after the reporting dates established in Regulation (EC) No 479/2009.

3) The correction of an excessive deficit

Minimum fiscal effort for countries in excessive deficit and initial deadline for its correction

The Council recommendations under Article 126(7) and notices under Article 126(9), based on recommendations of the Commission, will request that the Member State concerned

achieves annual budgetary targets that, on the basis of the underlying forecast, are consistent with a minimum annual improvement in its cyclically adjusted balance net of one-off and temporary measures of at least 0.5 of a percentage point of GDP as a benchmark, in order to correct the excessive deficit within the deadline set in the recommendation.

As a rule, the initial deadline for correcting an excessive deficit should be the year after its identification and thus, normally, the second year after its occurrence unless there are special circumstances. This deadline should be set taking into account the effort that the Member State concerned can undertake, with a minimum of 0.5% of GDP, based on a balanced assessment of the relevant factors considered in the Commission report under Article 126(3). If this effort seems sufficient to correct the excessive deficit in the year following its identification, the initial deadline should not be set beyond the year following its identification.

Longer deadlines could be set, in particular in the case of excessive deficit procedures based on the debt criterion, when the government balance requested to comply with the debt criterion is significantly higher than a 3% of GDP deficit.

Further steps in the excessive deficit procedure and clarifying the conditions for abeyance

The Council recommendation made in accordance with Article 126(7) of the Treaty shall establish a deadline of no longer than six months for effective action to be taken by the Member State concerned. When warranted by the seriousness of the situation, the deadline to take effective action to comply with a recommendation in accordance with Article 126(7) may be three months.

Following the expiry of the deadline established for taking effective action in a recommendation under Article 126(7) or the four months period following the adoption of a notice under Article 126(9), the Commission shall assess whether the Member State concerned has acted in compliance with the recommendation or notice. This assessment should consider whether the Member State concerned has publicly announced or taken measures that seem sufficient to ensure adequate progress towards the correction of the excessive deficit within the time limits set by the Council.

The assessment should take into account the report on action taken in response to the Council recommendation or notice that, within the deadline provided for, the Member State concerned should submit to the Commission and the Council. The report on action taken in response to the Council recommendation in accordance with Article 126(7) should include the targets for the government expenditure and revenue and for the discretionary measures, on both the expenditure and the revenue side, consistent with the Council recommendation as well as information on the measures taken and the nature of those envisaged to achieve the targets. The report on action taken in response to a notice in accordance with Article 126(9), should include the targets for the government expenditure and revenue and for the discretionary measures, on both the expenditure and the revenue side, as well as information on the actions being taken in response to specific Council recommendations, so as to allow the Council to take, if necessary, a decision to impose sanctions in accordance with Article 126(11) of the Treaty. Any such decision shall be taken no later than four months after the Council decision giving notice to the euro area Member State concerned to take measures in accordance with Article 126 (9) TFEU.

In case it appears that the Member State concerned has not acted in compliance with the recommendation or notice, the following step of the procedure provided by Article 126 of the Treaty, as clarified by Regulation (EC) No 1467/97, shall be activated.

If the Commission considers that the Member State has acted in compliance with the recommendation or notice, it shall inform the Council accordingly, and the procedure shall be held in abeyance. If, thereafter, it appears that action by the Member State concerned is not being implemented or is proving to be inadequate and if the possibility of repeating the same step does not apply, the following step of the procedure provided by Article 126 of the Treaty, as clarified by Regulation (EC) No 1467/97, shall be immediately activated. When considering whether the following step of the procedure should be activated, the Commission and the Council should take into account whether the measures required in the recommendation or notice are fully implemented and whether other budgetary variables under the control of the government, in particular expenditure, are developing in line with what was assumed in the recommendation or notice.

In the specific case of recommendations or notices which have set a deadline for the correction of the excessive deficit more than one

year after its identification, the assessment of the action taken made by the Commission after the expiry of the deadline established in the recommendation under Article 126(7) or the four month period following a notice under Article 126(9) should mainly focus on the measures taken in order to ensure the achievement of the recommended budgetary targets in the year following the identification of the excessive deficit. The Commission should, during the period of abeyance, assess whether the measures already announced or taken are being adequately implemented and whether additional measures are announced and implemented in order to ensure adequate progress toward the correction of the excessive deficit within the time limits set by the Council.

Clarifying the concept of effective action and repetition of steps in the excessive deficit procedure

If effective action has been taken in compliance with a recommendation under Article 126(7) (or notice under Article 126(9)) of the Treaty and unexpected adverse economic events with major unfavourable consequences for government finances occur after the adoption of that recommendation or notice, the Council may decide, on a recommendation from the Commission, to adopt a revised recommendation under Article 126(7) (or notice under Article 126(9)) of the Treaty. The revised recommendation (or notice) may, taking into account the relevant factors mentioned in Article 2 (3) of Regulation 1467/97, notably extend the deadline for the correction of the excessive deficit by one year as a rule.

A Member State should be considered to have taken 'effective action' if it has acted in compliance with the recommendation or notice, regarding both the implementation of the measures required therein and budgetary execution. The assessment should in particular take into account whether the Member State concerned has achieved the annual budgetary targets initially recommended by the Council and the underlying improvement in the cyclically adjusted balance net of one off and other temporary measures. In case the observed budget balance proves to be lower than recommended or if the improvement of the cyclically adjusted balance net of one off and other temporary measures falls significantly short of the adjustment underlying the target, a careful analysis of the reasons for the shortfall would be made. In particular, the analysis should take into account whether expenditure targets have been met and the planned discretionary measures on the revenue side have been implemented.

The occurrence of unexpected adverse economic events with major unfavourable budgetary effects shall be assessed against the economic forecast underlying the Council recommendation or notice.

4) Conditions of abrogation of Council decisions in the context of the EDP

When considering whether an excessive deficit procedure should be abrogated, the Commission and the Council should take a decision on the basis of notified data.

Moreover, the excessive deficit procedure should only be abrogated if the Commission forecasts indicate that:

- the deficit will not exceed the 3% of GDP threshold over the forecast horizon; and
- the debt ratio fulfils the forward-looking element of the debt benchmark.

5) Abrogation of Council decisions in the context of the EDP based on the deficit criterion for Member States having implemented multi-pillar pension reforms

When considering under Article 126 (12) whether some or all of the Council decisions under Article 126(6) to (9) and (11) related to excessive deficit procedures based on the deficit criterion should be abrogated, the Commission and the Council, take into account the net cost of a pension reform introducing a multi-pillar system that includes a mandatory fully- funded pillar only if the general government deficit has declined substantially and continuously and has reached a level that comes close to the reference value.

SECTION II: GUIDELINES ON THE FORMAT AND CONTENT OF STABILITY AND CONVERGENCE PROGRAMMES

The Stability and Growth Pact requires Member States to submit Stability or Convergence Programmes, which are at the basis of the Council's surveillance of budgetary positions and its surveillance and co-ordination of economic policies. The Council, on a recommendation from the Commission, and after consulting the Economic and Financial Committee, will, if necessary, adopt an opinion on the programmes. If it considers that its

objectives and contents should be strengthened, in particular with regard to the adjustment path towards the MTO, the Council will, in its opinion, invite the Member State concerned to adjust its programme.

Member States are expected to take the policy measures they deem necessary to meet the objectives of their Stability or Convergence Programmes, whenever they have information indicating actual or expected significant divergence from those objectives.

The submission and assessment of Stability and Convergence Programmes is an important component of the "European Semester" of economic policy coordination and surveillance. Under the European Semester, the Commission and the Council shall assess Stability and Convergence Programmes before key decisions on the national budgets for the following years are taken, to provide policy advice on fiscal policy intentions. Member States shall align the timing of submissions and assessments of Stability and Convergence Programmes and National Reform Programmes.[10] For reasons of expediency, a copy of the programmes should be submitted to a single electronic email addressed at the Commission.[11]

Under the European Semester the policy surveillance and coordination cycle starts with a horizontal review under which the European Council, based on input from the Commission and the Council, identifies the main economic challenges facing the EU and the euro area and give strategic guidance on policies. Member States are expected to take into account the horizontal guidance by the European Council when preparing their Stability and Convergence Programmes and justify any departure from it. Similarly, the Commission and Council are expected to take due account of the guidance from the European Council when assessing the individual programmes.

In view of the strengthened role of the Stability and Convergence Programmes in the process of multilateral surveillance under the European Semester, it is important that their information content is suitable and allows for comparison across Member States. Whilst acknowledging that the programmes are the responsibility of national authorities and that the possibilities and practices differ across countries, Council Regulation (EC) No 1466/97, as amended by Council Regulation (EC) No 1055/05 and by Regulation (EU) Y of the European Parliament and of the Council, sets out the essential elements of these programmes. In particular, Stability and Convergence Programmes include the necessary information for a meaningful discussion on fiscal policy for the short and the medium term, including a fully-fledged multi-annual macroeconomic scenario, projections for the main government finances variables and the relevant components, and a description and quantification of the envisaged budgetary strategy.

The experience gathered during the first years of implementation of the Pact with the Stability and Convergence Programmes shows that guidelines on the content and format of the programmes not only assist the Member States in drawing up their programmes, but also facilitate their examination by the Commission, the Economic and Financial Committee and the Council, thus providing for a consistent implementation of the Stability and Growth Pact.

The guidelines set out below should be considered as a code of good practice and checklist to be used by Member States in preparing Stability or Convergence Programmes. Member States are expected to follow the guidelines, and to justify any departure from them. Member States under financial programme assistance could submit only the tables as in annex 2.

1) Status of the programme and of the measures

Each programme mentions its status in the context of national procedures, notably whether the programme was presented to the national Parliament and whether there has been parliamentary approval of the programme. The programme also indicates whether the national Parliament had the opportunity to discuss the Council opinion on the previous programme and, if relevant, any recommendation, decision, or warning.

The state of implementation of the measures (enacted versus planned) presented in the programme should be specified.

2) Content of Stability and Convergence Programmes

In order to facilitate comparison across countries, Member States are expected, as far as possible, to follow the model structure for the programmes in Annex 1. The standardisation of the format and content of the programmes along

[10] In the case of the UK, which has a different fiscal year, submission will follow the presentation of the Spring Budget and be as close as possible to its publication.

[11] ec-european- semester@ec. europa. eu

the lines set below will substantially improve the conditions for equality of treatment.

The quantitative information should be presented following a standardised set of tables (Annex 2). Member States should endeavour to supply all the information in these tables. The tables could be complemented by further information wherever deemed useful by Member States.

In addition to the guidelines set out below, the programmes should provide information on the consistency with the broad economic policy guidelines and the National Reforms Programmes of the budgetary objectives and the measures to achieve them, as well as on the measures to enhance the quality of public finances and to achieve long-term sustainability.

Objectives and their implementation

Member States will present in their Stability and Convergence Programmes budgetary targets for the general government balance in relation to the MTO, and the projected path for the general government debt ratio. Convergence programmes shall also present the medium-term monetary policy objectives and their relationship to price and exchange rate stability.

Member States, when preparing the first Stability or Convergence Programme after a new government has taken office, are invited to show continuity with respect to the budgetary targets endorsed by the Council on the basis of the previous Stability/Convergence Programme and - with an outlook for the whole legislature - to provide information on the means and instruments envisaged to reach these targets by setting out its budgetary strategy.

Member States will provide in their Stability or Convergence Programme an update of the fiscal plans for the year of submission of the programme, based on the April notification, including a description and quantification of the policies and measures. The Stability or Convergence Programme will explain revisions of general government balance and expenditure targets set in the programmes submitted in year t-1.

To permit a comprehensive understanding of the path of the government balance and of the budgetary strategy in general, information should be provided on expenditure and revenue ratios and on their main components, as well as on one-off and other temporary measures. Bearing in mind the conditions and criteria to establish the expenditure growth under Article 5(1) of Regulation 1466/97, the programmes should also present the planned growth path of government expenditure, including the corresponding allocation for gross fixed capital formation, the planned growth path of government revenue at unchanged policy and a quantification of the planned discretionary revenue measures.

To permit a comprehensive understanding of the path of the debt ratio, information should be provided, to the extent possible, on components of the stock-flow adjustment, planned privatisation receipts, and other financial operations. In order to assess the extent of possible risks to the budgetary outlook, information should also be provided on implicit liabilities related to ageing and private debt, to the extent that it may represent a contingent implicit liability for the government, and other contingent liabilities, such as

public guarantees, with potentially large impact on the general government accounts.

The budget balances should be broken down by subsector of general government (central government, state government for Member States with federal or quasi-federal institutional arrangements, local government and, social security).

Assumptions and data

Stability and Convergence programmes should be based on realistic and cautious macroeconomic forecasts. The Commission forecasts can provide an important contribution for the coordination of economic and fiscal policies. Member States are free to base their Stability/Convergence Programmes on their own projections. Budgetary planning shall be based on the most likely macro-fiscal scenario or on a more prudent scenario. Particular caution should be used in including the effects of recently implemented structural reforms. If such effects are included in the projections, these should be explicitly quantified together with the underlying assumptions and/or model, including variables and parameters. Significant divergences between the national and the Commission services' forecasts should be explained in some detail. This explanation will serve as a reference when forecast errors are assessed ex post.

The programmes should present the main assumptions about expected economic developments and important economic variables that are relevant to the realisation of their budgetary plans, such as government investment

expenditure, real GDP growth, employment and inflation. The assumptions on real GDP growth should be underpinned by an indication of the expected demand contributions to growth. The possible upside and downside risks to the outlook should be brought out.

Furthermore, the programmes should provide sufficient information about GDP developments to allow an analysis of the cyclical position of the economy and the sources of potential growth. The outlook for sectoral balances and, especially for countries with a high external deficit, the external balance should be analysed.

As regards external macroeconomic developments, euro area Member States and Member States participating in ERM II in particular should use the "common external assumptions" on the main extraEU variables used by the Commission in its spring forecast, which shall be provided in due time by the Commission (on the basis of the final table in Annex

2), or, for comparability reasons, present sensitivity analysis based on the common assumptions for these variables when the differences are significant.

Assumptions about interest rates and exchange rates, if not presented in the programme, should be provided to the Commission services to allow for the technical assessment of the programmes.

In order to facilitate the assessment, the concepts used shall be in line with the standards established at European level, notably in the context of the European system of accounts (ESA). The programmes should ensure the formal and substantial consistency of the required information on budgetary aggregates and economic assumptions with ESA concepts. This information may be complemented by a presentation of specific accounting concepts that are of particular importance to the country concerned.

Measures, structural reforms and long-term sustainability

The programmes should describe the budgetary and other economic policy measures being taken, envisaged or assumed to achieve the objectives of the programme, and, in the case of the main budgetary measures, an assessment of their quantitative effects on the general government balance. Measures having significant 'one-off' effects should be explicitly identified. The further forward the year of the programme, the less detailed the information could be, but could contain quantified examples of measures that would allow reaching the programme targets.

However, in order to allow a meaningful discussion the programmes should provide concrete indications on the budgetary strategy for year t+1, including preliminary projections under unchanged policy and targets for the general government balance, expenditure and revenue and their main components, and a description and quantification of the policies taken, envisaged or assumed to reach the fiscal targets. Should the Council consider that the information provided in the programme is insufficient, it shall, in its opinion, invite the Member State concerned to submit a revised programme, in line with the provisions of Articles 5(2) and 9(2) of regulation 1466/97.

As implied by the Commission services for the purpose of forecasting, the 'no-policy change' assumption involves the extrapolation of revenue and expenditure trends and the inclusion of measures that are known in sufficient detail. In particular, only measures that have been specified and committed to by governments will be taken into account. Each Member State should appropriately define a scenario at unchanged policies and make public the involved assumptions, methodologies and relevant parameters.

Structural reforms should be specifically analysed when they are envisaged to contribute to the achievement of the objectives of the programme. In particular, given the relevance of 'major structural reforms' in defining the adjustment path to the medium-term objective for Member States that have not yet reached it and allowing a temporary deviation from the MTO for Member States that have already reached it (see Section I), the programmes should include comprehensive information on the budgetary and economic effects of such reforms. Programmes should notably include a quantitative cost-benefit analysis of the short-term costs - if any - and of the direct long-term benefits of the reforms from the budgetary point of view. They should also analyse the projected impact of the reforms on economic growth over time while explaining the used methodology.

The programmes should also provide information on measures taken or envisaged to improve the quality of public finances on both the revenue and expenditure side (e.g. tax reform, value-for-money initiatives, measures to improve tax collection efficiency and expenditure control).

The programmes could further include information on existing and envisaged national budgetary rules (expenditure rules, etc.) as well as on other institutional features of the public finances, in particular budgetary procedures and public finance statistical governance.

Finally, the programmes should outline the countries' strategies to ensure the sustainability of public finances, especially in light of the economic and budgetary impact of ageing populations and the fiscal risks stemming from contingent liabilities.

The Working Group on Ageing (AWG) of the Economic Policy Committee (EPC) is responsible for producing common budgetary projections on: public spending on pensions; health-care; long-term care; education; unemployment transfers; and where possible and relevant, age-related revenues, such as pension contributions. These common projections will provide the basis for the assessment by the Commission and the Council of sustainability of the Member States' public finances within the context of the SGP. They should be included in the programmes.

The programmes should include all the necessary additional information, both of qualitative and quantitative nature, so as to enable the Commission and the Council to assess the sustainability of Member States' public finances based on current policies. To this end, information included in programmes should focus on new relevant information that is not fully reflected in the latest common EPC projections. For example, Member States might want to include information on the latest demographic trends and major policy changes in pension and health-care systems. Programmes should clearly distinguish between measures that have been enacted and measures that are envisaged.

Given the uncertainty surrounding long-term projections, the assessment by the Commission and the Council should include stress tests that provide an indication of the risks to public finance sustainability in the event of adverse demographic, financial, economic or budgetary developments.

In addition to the requirements mentioned above, Member States may present different projections, based on national calculations. In such a case, Member States should explain in detail the underlying assumptions of these projections, the used methodology, the policies implemented or planned to meet the assumptions, and the divergences between the national projections and the common projections produced by the AWG.

These national projections and their assumptions, including their plausibility, will enter the basis for the assessment by the Commission and the Council of sustainability of the Member States' public finances within the context of the SGP.

Sensitivity analysis

Given the inevitability of forecast errors, Stability and Convergence Programmes include comprehensive sensitivity analyses and/or develop alternative scenarios, in order to enable the Commission and the Council to consider the complete range of possible fiscal outcomes.

In particular, the programmes shall provide an analysis of how changes in the main economic assumptions would affect the budgetary and debt position and indicate the underlying assumptions about how revenues and expenditures are projected to react to variations in economic variables. This should include the impact of different interest rate assumptions and, for non-participating Member States, of different exchange rate assumptions, on the budgetary and debt position. Countries that do not use the common external assumptions should endeavour to provide a sensitivity analysis also on main extraEU variables when the differences are significant.

In the case of 'major structural reforms' (see section I), the programmes shall also provide an analysis of how changes in the assumptions would affect the effects on the budget and potential growth.

Time horizon

The information about paths for the general government surplus/ deficit ratio, the expenditure and revenue ratios and their components, in particular the planned growth of government expenditure, the planned growth path of government revenue at unchanged policy and the planned discretionary revenue measures, appropriately quantified, as well as for debt ratio and the main economic assumptions should be on an annual basis and should cover, as well as the current and preceding year, at least the three following years (Article 3(3) and Article 7(3)), leaving it open to Member States to cover a longer period if they so wish.

The horizon for the long-term projections on the budgetary implications of ageing should cover the same period as the EPC projections.

Updating of programmes

In order to ensure proper ex ante coordination and surveillance of economic policies, submissions of Stability and Convergence Programmes should take place each year preferably by mid-April, but in any case not later than the end of April.

The whole process should be completed with the adoption of Council Opinions on the programmes as a rule before the end of July each year.

Stability and Convergence Programmes should show how developments have compared with the budgetary targets in the previous programme or update, including the information on how the last year's policy guidance in the Council Opinions on the Stability and Convergence Programmes and country- specific recommendations have been reflected in national budgets. When applicable, they should explain in detail the reasons for the deviations from the budgetary targets (with a special focus on developments in government expenditure). When significant deviations occur, the update should mention whether measures are taken to rectify the situation, and provide information on these measures. The Commission and the Council will assess the implementation of the commitments announced by the Member States in their previous Stability and Convergence programmes and of the policy guidance provided by the Council on the previous programme. The outcome of this assessment will be duly taken into account when addressing new policy guidance to Member States.

(Annexes not included)

§24. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, November 23rd, 2011, pp. 1-7

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 136, in combination with Article 121(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) Member States whose currency is the euro have a particular interest in and a responsibility to conduct economic policies that promote the proper functioning of the economic and monetary union and to avoid policies that jeopardise that functioning.

(2) The Treaty on the Functioning of the European Union (TFEU) allows the adoption of specific measures in the euro area which go beyond the provisions applicable to all Member States, for the purpose of ensuring the proper functioning of the economic and monetary union.

(3) Experience gained and mistakes made during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies.

(4) The improved economic governance framework should rely on several interlinked and coherent policies for sustainable growth and jobs, in particular a Union strategy for growth and jobs, with particular focus on developing and strengthening the internal market, fostering international trade and competitiveness, a European Semester for strengthened

[1] OJ C 150, 20.5.2011, p. 1.
[2] OJ C 218, 23.7.2011, p. 46.
[3] Position of the European Parliament of 28 September 2011 (not yet published in the Official Journal) and decision of the Council of 8 November 2011.

coordination of economic and budgetary policies, an effective framework for preventing and correcting excessive government deficits (the Stability and Growth Pact (SGP)), a robust framework for preventing and correcting macroeconomic imbalances, minimum requirements for national budgetary frameworks, and enhanced financial market regulation and supervision, including macroprudential supervision by the European Systemic Risk Board.

(5) The SGP and the complete economic governance framework should complement and be compatible with the Union strategy for growth and jobs. The interlinks between different strands should not provide for exemptions from the provisions of the SGP.

(6) Achieving and maintaining a dynamic internal market should be considered an element of the proper and smooth functioning of the economic and monetary union.

(7) The Commission should play a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on-site missions, recommendations and warnings. When taking decisions on sanctions, the role of the Council should be limited, and reversed qualified majority voting should be used.

(8) In order to ensure a permanent dialogue with the Member States aiming at achieving the objectives of this Regulation, the Commission should carry out surveillance missions.

(9) A broad evaluation of the economic governance system, in particular of the effectiveness and adequacy of its sanctions, should be undertaken by the Commission at regular intervals. Such evaluations should be complemented by relevant proposals if necessary.

(10) When implementing this Regulation, the Commission should take into account the current economic situation of the Member States concerned.

(11) The strengthening of economic governance should include a closer and a more timely involvement of the European Parliament and the national parliaments.

(12) An economic dialogue with the European Parliament may be established, enabling the Commission to make its analyses public and the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to discuss. Such a public debate could enable discussion of the spill-over effects of national decisions and enable public peer pressure to be brought to bear on the relevant actors. While recognising that the counterparts of the European Parliament in the framework of that dialogue are the relevant institutions of the Union and their representatives, the competent committee of the European Parliament may offer an opportunity to participate in an exchange of views to a Member State which is the subject of a Council decision taken pursuant to Articles 4, 5 and 6 of this Regulation. The Member State's participation in such an exchange of views is voluntary.

(13) Additional sanctions are necessary to make the enforcement of budgetary surveillance in the euro area more effective. Those sanctions should enhance the credibility of the fiscal surveillance framework of the Union.

(14) The rules laid down in this Regulation should ensure fair, timely, graduated and effective mechanisms for compliance with the preventive and the corrective parts of the SGP, in particular Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies[4] and Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure,[5] where compliance with the budgetary discipline is examined on the basis of the government deficit and government debt criteria.

(15) Sanctions under this Regulation and based upon the preventive part of the SGP in respect of Member States whose currency is the euro should provide incentives for adjusting to and maintaining the medium-term budgetary objective.

(16) In order to deter against the misrepresentation, whether intentional or due to serious negligence, of government deficit and debt data, which data is an essential input to economic policy coordination in the Union, fines should be imposed on Member States responsible.

(17) In order to supplement the rules on calculation of the fines for manipulation of statistics as well as the rules on the procedure to be followed by the Commission for the

[4] OJ L 209, 2.8.1997, p. 1.
[5] OJ L 209, 2.8.1997, p. 6.

investigation of such actions, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of detailed criteria for establishing the amount of the fine and for conducting the Commission's investigations. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and the Council.

(18) In respect of the preventive part of the SGP, adjustment and adherence to the medium-term budgetary objective should be ensured through an obligation imposed on a Member State whose currency is the euro that is making insufficient progress with budgetary consolidation to lodge temporarily an interest-bearing deposit. This should be the case when a Member State, including a Member State with a deficit below the 3 % of Gross Domestic Product (GDP) reference value, deviates significantly from the medium-term budgetary objective or the appropriate adjustment path towards that objective and fails to correct the deviation.

(19) The interest-bearing deposit imposed should be released to the Member State concerned together with the interest accrued on it once the Council has been satisfied that the situation giving rise to the obligation to lodge that deposit has come to an end.

(20) In respect of the corrective part of the SGP, sanctions for Member States whose currency is the euro should take the form of an obligation to lodge a non-interest-bearing deposit linked to a Council decision establishing the existence of an excessive deficit if an interest-bearing deposit has already been imposed on the Member State concerned in the preventive part of the SGP or in cases of particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, or the obligation to pay a fine in the event of non-compliance with a Council recommendation to correct an excessive government deficit.

(21) In order to avoid the retroactive application of the sanctions under the preventive part of the SGP provided for in this Regulation, they should apply only in respect of the relevant decisions adopted by the Council under Regulation (EC) No 1466/97 after the entry into force of this Regulation. Similarly, in order to avoid the retroactive application of the sanctions under the corrective part of the SGP provided for in this Regulation, they should apply only in respect of the relevant recommendations and decisions to correct an excessive government deficit adopted by the Council after the entry into force of this Regulation.

(22) The amount of the interest-bearing deposits, of the non-interest-bearing deposits and of the fines provided for in this Regulation should be set in such a way as to ensure a fair graduation of sanctions in the preventive and corrective parts of the SGP and to provide sufficient incentives for the Member States whose currency is the euro to comply with the fiscal framework of the Union. Fines under Article 126(11) TFEU and as specified in Article 12 of Regulation (EC) No 1467/97 are composed of a fixed component that equals 0,2 % of GDP and of a variable component. Thus, graduation and equal treatment between Member States are ensured if the interest-bearing deposit, the non-interest-bearing deposit and the fine specified in this Regulation are equal to 0,2 % of GDP, that being the amount of the fixed component of the fine under Article 126(11) TFEU.

(23) A possibility should be provided for the Council to reduce or to cancel the sanctions imposed on Member States whose currency is the euro on the basis of a Commission recommendation following a reasoned request by the Member State concerned. In the corrective part of the SGP, the Commission should also be able to recommend reducing the amount of a sanction or cancelling it on grounds of exceptional economic circumstances.

(24) The non-interest-bearing deposit should be released upon correction of the excessive deficit, while the interest on such deposits and the fines collected should be assigned to stability mechanisms to provide financial assistance, created by Member States whose currency is the euro in order to safeguard the stability of the euro area as a whole.

(25) The power to adopt individual decisions for the application of the sanctions provided for in this Regulation should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the measures adopted by the Council in accordance with Articles 121 and 126 TFEU and Regulations (EC) No 1466/97 and (EC) No 1467/97.

(26) Since this Regulation contains general rules for the effective enforcement of Regulations (EC) No 1466/97 and (EC) No 1467/97, it should be adopted in accordance with the ordinary legislative procedure referred to in Article 121(6) TFEU.

(27) Since the objective of this Regulation, namely to create a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the SGP in the euro area, cannot be sufficiently achieved at the level of the Member States, the Union may adopt measures in accordance with the principles of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – SUBJECT MATTER, SCOPE AND DEFINITIONS

Article 1 – *Subject matter and scope*

1. This Regulation sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the Stability and Growth Pact in the euro area.

2. This Regulation shall apply to Member States whose currency is the euro.

Article 2 – *Definitions*

For the purposes of this Regulation, the following definitions apply:

(1) 'preventive part of the Stability and Growth Pact' means the multilateral surveillance system as organised by Regulation (EC) No 1466/97;

(2) 'corrective part of the Stability and Growth Pact' means the procedure for the avoidance of Member States' excessive deficit as regulated by Article 126 TFEU and Regulation (EC) No 1467/97;

(3) 'exceptional economic circumstances' means circumstances where an excess of a government deficit over the reference value is considered exceptional within the meaning of the second indent of point (a) of Article 126(2) TFEU and as specified in Regulation (EC) No 1467/97.

CHAPTER II – ECONOMIC DIALOGUE

Article 3 – *Economic dialogue*

In order to enhance the dialogue between the institutions of the Union, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss decisions taken pursuant to Articles 4, 5 and 6 of this Regulation.

The competent committee of the European Parliament may offer the opportunity to the Member State concerned by such decisions to participate in an exchange of views.

CHAPTER III – SANCTIONS IN THE PREVENTIVE PART OF THE STABILITY AND GROWTH PACT

Article 4 – *Interest-bearing deposits*

1. If the Council adopts a decision establishing that a Member State failed to take action in response to the Council recommendation referred to in the second subparagraph of Article 6(2) of Regulation (EC) No 1466/97, the Commission shall, within 20 days of adoption of the Council's decision, recommend that the Council, by a further decision, require the Member State in question to lodge with the Commission an interest-bearing deposit amounting to 0,2 % of its GDP in the preceding year.

2. The decision requiring a lodgement shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.

3. The Council, acting by a qualified majority, may amend the Commission's recommendation and adopt the text so amended as a Council decision.

4. The Commission may, following a reasoned request by the Member State concerned addressed to the Commission within 10 days of adoption of the Council's decision establishing that a Member State failed to take action referred to in paragraph 1, recommend that the Council reduce the amount of the interest-bearing deposit or cancel it.

5. The interest-bearing deposit shall bear an interest rate reflecting the Commission's credit risk and the relevant investment period.

6. If the situation giving rise to the Council's recommendation referred to in the second subparagraph of Article 6(2) of Regulation (EC) No 1466/97 no longer exists, the Council, on the basis of a further recommendation from the Commission, shall decide that the deposit and the interest accrued thereon be returned to the Member State concerned. The Council may, acting by a qualified majority, amend the Commission's further recommendation.

CHAPTER IV – SANCTIONS IN THE CORRECTIVE PART OF THE STABILITY AND GROWTH PACT

Article 5 – *Non-interest-bearing deposits*

1. If the Council, acting under Article 126(6) TFEU, decides that an excessive deficit exists in a Member State which has lodged an interest-bearing deposit with the Commission in accordance with Article 4(1) of this Regulation, or where the Commission has identified particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, the Commission shall, within 20 days of adoption of the Council's decision, recommend that the Council, by a further decision, require the Member State concerned to lodge with the Commission a non-interest-bearing deposit amounting to 0,2 % of its GDP in the preceding year.

2. The decision requiring a lodgement shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.

3. The Council, acting by a qualified majority, may amend the Commission's recommendation and adopt the text so amended as a Council decision.

4. The Commission may, on grounds of exceptional economic circumstances or following a reasoned request by the Member State concerned addressed to the Commission within 10 days of adoption of the Council's decision under Article 126(6) TFEU referred to in paragraph 1, recommend that the Council reduce the amount of the non-interest-bearing deposit or cancel it.

5. The deposit shall be lodged with the Commission. If the Member State has lodged an interest-bearing deposit with the Commission in accordance with Article 4, that interest-bearing deposit shall be converted to a non-interest-bearing deposit.

If the amount of an interest-bearing deposit lodged in accordance with Article 4 and of the interest accrued thereon exceeds the amount of the non-interest-bearing deposit to be lodged under paragraph 1 of this Article, the excess shall be returned to the Member State.

If the amount of the non-interest-bearing deposit exceeds the amount of an interest-bearing deposit lodged in accordance with Article 4 and the interest accrued thereon, the Member State shall make up the shortfall when it lodges the non-interest-bearing deposit.

Article 6 – *Fines*

1. If the Council, acting under Article 126(8) TFEU, decides that a Member State has not taken effective action to correct its excessive deficit, the Commission shall, within 20 days of that decision, recommend that the Council, by a further decision, impose a fine, amounting to 0,2 % of the Member State's GDP in the preceding year.

2. The decision imposing a fine shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.

3. The Council, acting by a qualified majority, may amend the Commission's recommendation and adopt the text so amended as a Council decision.

4. The Commission may, on grounds of exceptional economic circumstances or following a reasoned request by the Member State concerned addressed to the Commission within 10 days of adoption of the Council's decision under Article 126(8) TFEU referred to in paragraph 1, recommend that the Council reduce the amount of the fine or cancel it.

5. If the Member State has lodged a non-interest-bearing deposit with the Commission in accordance with Article 5, the non-interest-bearing deposit shall be converted into the fine.

If the amount of a non-interest-bearing deposit lodged in accordance with Article 5 exceeds the amount of the fine, the excess shall be returned to the Member State.

If the amount of the fine exceeds the amount of a non-interest-bearing deposit lodged in accordance with Article 5, or if no non-interest-bearing deposit has been lodged, the Member State shall make up the shortfall when it pays the fine

Article 7 - *Return of non-interest-bearing deposits*

If the Council, acting under Article 126(12) TFEU, decides to abrogate some or all of its decisions, any non-interest-bearing deposit lodged with the Commission shall be returned to the Member State concerned.

CHAPTER V – SANCTIONS CONCERNING THE MANIPULATION OF STATISTICS

Article 8 – *Sanctions concerning the manipulation of statistics*

1. The Council, acting on a recommendation by the Commission, may decide to impose a fine on a Member State that intentionally or by serious negligence misrepresents deficit and debt data relevant for the application of Articles 121 or 126 TFEU, or for the application of the Protocol on the excessive deficit procedure annexed to the TEU and to the TFEU.

2. The fines referred to in paragraph 1 shall be effective, dissuasive and proportionate to the nature, seriousness and duration of the misrepresentation. The amount of the fine shall not exceed 0,2 % of GDP of the Member State concerned.

3. The Commission may conduct all investigations necessary to establish the existence of the misrepresentations referred to in paragraph 1. It may decide to initiate an investigation when it finds that there are serious indications of the existence of facts liable to constitute such a misrepresentation. The Commission shall investigate the putative misrepresentations taking into account any comments submitted by the Member State concerned. In order to carry out its tasks, the Commission may request the Member State to provide information, and may conduct on-site inspections and accede to the accounts of all government entities at central, state, local and social-security level. If the law of the Member State concerned requires prior judicial authorisation for on-site inspections, the Commission shall make the necessary applications.

Upon completion of its investigation, and before submitting any proposal to the Council, the Commission shall give to the Member State concerned the opportunity of being heard in relation to the matters under investigation. The Commission shall base any proposal to the Council only on facts on which the Member State concerned has had the opportunity to comment.

The Commission shall fully respect the rights of defence of the Member State concerned during the investigations.

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 11 concerning:

(a) detailed criteria establishing the amount of the fine referred to in paragraph 1;

(b) detailed rules concerning the procedures for the investigations referred to in paragraph 3, the associated measures and the reporting on the investigations;

(c) detailed rules of procedure aimed at guaranteeing the rights of the defence, access to the file, legal representation, confidentiality and provisions as to timing and the collection of the fines referred to in paragraph 1.

5. The Court of Justice of the European Union shall have unlimited jurisdiction to review the decisions of the Council imposing fines under paragraph 1. It may annul, reduce or increase the fine so imposed.

CHAPTER VI – ADMINISTRATIVE NATURE OF THE SANCTIONS AND DISTRIBUTION OF THE INTEREST AND FINES

Article 9 – *Administrative nature of the sanctions*

The sanctions imposed pursuant to Articles 4 to 8 shall be of an administrative nature.

Article 10 – *Distribution of the interest and fines*

The interest earned by the Commission on deposits lodged in accordance with Article 5 and the fines collected in accordance with Articles 6 and 8 shall constitute other revenue, as referred to in Article 311 TFEU, and shall be assigned to the European Financial Stability Facility. When the Member States whose currency is the euro create another stability mechanism to provide financial assistance in order to safeguard the stability of the euro area as a whole, the interest and the fines shall be assigned to that mechanism.

CHAPTER VII – GENERAL PROVISIONS

Article 11 – *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 8(4) shall be conferred on the Commission for a period of 3 years from 13 December 2011. The Commission shall draw up a report in respect of the delegation of power not later than 9 months before the end of that 3-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than 3 months before the end of each period.

3. The delegation of power referred to in Article 8(4) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 8(4) shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of 2 months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by 2 months at the initiative of the European Parliament or of the Council.

Article 12 – *Voting in the Council*

1. For the measures referred to in Articles 4, 5, 6 and 8, only members of the Council representing Member States whose currency is the euro shall vote, and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

2. A qualified majority of the members of the Council referred to in paragraph 1 shall be defined in accordance with point (b) of Article 238(3) TFEU.

Article 13 – *Review*

1. By 14 December 2014 and every 5 years thereafter, the Commission shall publish a report on the application of this Regulation.

That report shall evaluate, inter alia:

(a) the effectiveness of this Regulation, including the possibility to enable the Council and the Commission to act in order to address situations which risk jeopardising the proper functioning of the monetary union;

(b) the progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States in accordance with the TFEU.

2. Where appropriate, that report shall be accompanied by a proposal for amendments to this Regulation.

3. The report shall be forwarded to the European Parliament and to the Council.

4. Before the end of 2011 the Commission shall present a report to the European Parliament and to the Council on the possibility of introducing euro-securities.

Article 14 – *Entry into force*

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 16 November 2011.

§25. Commission Delegated Decision of 29 June 2012 on investigations and fines related to the manipulation of statistics as referred to in Regulation (EU) No 1173/2011 of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area, OJ L 306, November 6th, 2012, pp. 21-25

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area,[1] and in particular Article 8(4) thereof,

Whereas:

(1) Regulation (EU) No 1173/2011 sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the Stability and Growth Pact in the euro area. It applies to Member States whose currency is the euro.

(2) The availability of sound fiscal data is essential for budgetary surveillance in the euro area. In order to guarantee sound and independent statistics, Member States should ensure the principle of professional independence of national statistical authorities in conformity with Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics,[2] and as further set out in the European Statistics Code of Practice.

(3) Regulation (EU) No 1173/2011 empowers the Commission to survey the economic and monetary cooperation with a view to detecting and exposing manipulation of general government deficit and debt data relevant for the application of the multilateral surveillance system and the excessive deficit procedure.

(4) For that purpose, the Commission should conduct all necessary investigations to confirm the existence of misrepresentations of actual deficit and debt data, as a result of intent or serious negligence, as referred to in Article 8(1) of Regulation (EU) No 1173/2011.

(5) It is necessary to establish the detailed rules concerning the procedures for investigations, detailed criteria establishing the amount of the fine, detailed rules guaranteeing the rights of the defence, access to the file, legal representation, confidentiality, and provisions as to the timing and collection of fines.

(6) A decision by the Commission to launch investigations should be justified, and the investigations undertaken should be proportionate so as not to go beyond what is necessary to establish the possible existence of manipulation of the relevant deficit and debt data.

(7) When undertaking such investigations, the Commission should be able to conduct on-site inspections and request information from any entity to be classified in the general-government sector, whether at central, State, local or social-security level, in accordance with Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community,[3] hereinafter referred to as 'ESA 95'.

(8) In order to confirm a suspicion following serious indications of misrepresentation of the relevant deficit and debt data, the launch of an investigation should normally be preceded by a methodological visit conducted by the Commission (Eurostat) in accordance with Article 11b of Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community.[4]

(9) In assessing what constitutes a misrepresentation of deficit and debt data within the meaning of Regulation (EU) No 1173/2011, incorrect implementation of ESA 95 accounting rules which is not the result of either intent or serious negligence should not be considered as such. Further excluded from the application of this Decision should be revisions, including major revisions due to changes in methodology for all historical years, that are clearly and adequately explained, insignificant mistakes and cases where a doubt has been expressed by the Member State concerned and clarification has been requested from the Commission (Eurostat) in accordance with Article 10 of Regulation (EC) No 479/2009.

(10) Users of European statistics have a legitimate expectation that they are produced by statistical authorities that conduct their activities professionally and with due diligence. An unintentional act or omission should be considered a case of serious negligence if a person responsible for the production of general government deficit and debt data is in patent breach of his duty of care.

[1] OJ L 306, 23.11.2011, p. 1.
[2] OJ L 87, 31.3.2009, p. 164.
[3] OJ L 310, 30.11.1996, p. 1.
[4] OJ L 145, 10.6.2009, p. 1.

(11) For the purpose of its defence, the Member State concerned should be duly notified of the opening of as well as of the results of the Commission investigations. The results of the investigations should be communicated by means of a Commission report to be transmitted to the European Parliament and to the Council, and to be made public. The Commission (Eurostat) should keep the European Statistical System Committee and the European Statistical Governance Advisory Board appropriately informed.

(12) The rights of defence and the principle of confidentiality should be respected in accordance with the general principles of law and the case-law of the Court of Justice of the European Union. In particular, the Member State concerned should have the right to be heard by the Commission during the investigations, as well as to access the file compiled by the Commission.

(13) Recommendations to the Council to impose a fine should be based exclusively on grounds on which the Member State concerned has been able to comment.

(14) Criteria determining the amount of the fine should be established. These criteria should be used to ensure that the fine proposed is fixed at an appropriate level, making it effective, proportionate and dissuasive, based on a reference amount adapted upwards or downwards where necessary in the light of specific circumstances.

(15) This Decision should be without prejudice to the Commission (Eurostat) exercising its powers under Regulation (EC) No 479/2009.

(16) The content and form of the measures laid down in this Decision do not exceed what is necessary to achieve the objectives established in Regulation (EU) No 1173/2011, in accordance with Article 5 of the Treaty on European Union.

(17) This Decision should apply without prejudice to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents,[5]

HAS ADOPTED THIS DECISION:

CHAPTER I – SUBJECT MATTER AND SCOPE

[5] OJ L 145, 31.5.2001, p. 43.

Article 1 – *Subject matter and scope*

1. This Decision lays down detailed rules concerning the procedures for investigating misrepresentations of general-government deficit and debt data that are the result of intent or serious negligence, detailed rules concerning the right of defence and confidentiality, detailed criteria establishing the amount of the fine and provisions as to the timing and collection of the fines referred to in Article 8(1) of Regulation (EU) No 1173/2011.

2. This Decision shall apply to Member States whose currency is the euro.

CHAPTER II – PROCEDURES FOR INVESTIGATIONS

Article 2 - *Initiation of the investigations*

1. The Commission shall notify the Member State concerned of its decision to initiate an investigation, including information of the serious indications found of the existence of facts liable to constitute a misrepresentation of general government deficit and debt data arising from the manipulation of such data as a result of either intent or serious negligence.

2. During an investigation, the Commission (Eurostat) may request information, interview persons, conduct on-site inspections and accede to the accounts of all government entities at central, State, local and social security level, in accordance with the procedures laid down in Articles 3 to 5. Those means of investigation may be employed by the Commission (Eurostat), either individually or in combination. Where relevant and while fully respecting national rules governing such institutions, the court of auditors or other supreme audit institutions of the Member State concerned may be invited to assist and participate.

3. The Commission may opt not to conduct such an investigation until a methodological visit has been carried out in accordance with a decision taken by the Commission (Eurostat) under Regulation (EC) No 479/2009.

4. The Commission shall inform the European Parliament and the Council of its decision to initiate an investigation.

Article 3 – *Request for information*

1. At the request of the Commission, any government entity, directly or indirectly involved in compiling debt and deficit data of the Member State concerned, or whose accounts are used for this compilation (hereinafter

referred to as 'the entity concerned') shall provide the Commission with all necessary information to perform its task of investigation. The Member State concerned shall be informed about any such request by the Commission to the entity concerned.

2. The Commission shall state the purpose of the request, specifying that the request is made pursuant to this Decision, and shall indicate a deadline for the reply, which shall be no less than four weeks.

Article 4 – *Interviews*

The Commission may interview any person directly or indirectly involved in compiling deficit and debt data, who agrees to be interviewed, for the purpose of collecting information or explanations concerning facts or documents relating to the subject matter of an investigation and to record the answers. The entity concerned shall be informed before any of its representatives or members of staff are interviewed. The person interviewed may request the assistance of a representative of the entity concerned or of a legal counsel.

Article 5 – *Inspections*

1. The Commission officials and other accompanying persons authorised by the Commission to conduct an inspection shall be empowered to:

(a) enter any premises of the entity concerned;

(b) accede all records and accounts of the entity concerned, irrespective of the medium on which they are stored;

(c) take or obtain any form of copy or extract of any records and accounts;

(d) seal any records and accounts to the extent and for the period of time necessary to compile the factual evidence for the investigation while not hampering the essential activities of the entity concerned;

(e) ask any representative or member of staff of the entity concerned for explanations on facts or documents relating to the subject matter and purpose of the inspection, under the conditions laid down in Article 4.

2. The Commission officials and other accompanying persons authorised by the Commission to conduct an inspection shall present a written authorisation specifying the subject matter and purpose of the inspection, stating the date on which the inspection begins.

3. The entity concerned shall fully cooperate with the Commission for the purposes of the inspection.

4. Staff members of statistical authorities of the Member State concerned shall, at the request of the Commission, actively assist the officials and other accompanying persons authorised by the Commission. To this end, they shall enjoy the powers specified in paragraph 1.

5. Where the Commission officials and other accompanying persons authorised by the Commission find that an entity opposes an inspection ordered pursuant to this Article, the Member State concerned shall provide them the necessary assistance according to national rules.

6. If, by national rules, the authorisation from a judicial authority is necessary for the conduct of the inspection, such authorisation shall be applied for by the Commission. In those cases the authorisation from a judicial authority shall be presented along with the written authorisation referred to in paragraph 2.

Article 6 – *Right to be heard*

Before adoption of the report referred to in Article 7, the Commission shall invite the Member State concerned to submit written observations on the preliminary findings.

It shall do so in writing, indicating a deadline for the submission of those observations, which shall be no less than four weeks.

Article 7 – *Reporting*

1. The Commission shall adopt a report presenting its findings and the observations submitted by the Member State concerned in the light of the investigations conducted in accordance with this Chapter and submit it to that Member State.

2. The Commission shall transmit this report to the European Parliament and the Council. This report shall be made public.

3. The Commission (Eurostat) shall inform the European Statistical System Committee and the European Statistical Governance Advisory Board about the outcome of the investigation.

4. Any Commission recommendation to the Council to impose a fine on the Member State concerned shall be based on the report referred to in paragraph 1.

Article 8 – *Duration*

1. The Commission shall adopt the report referred to in Article 7 no later than 10 months after notification of its decision to initiate an investigation according to Article 2. In exceptional cases, where the investigations are obstructed or where the acquisition of the information necessary for the investigations involves excessively long procedures, the Commission may extend the deadline by five months.

2. The inspections shall be completed within six months of the starting date of the inspection. In exceptional cases, where the inspections are obstructed or where the acquisition of the information in connection with the inspections involves excessively long procedures, the Commission may extend the deadline by three months.

CHAPTER III – RIGHT OF DEFENCE AND CONFIDENTIALITY

Article 9 – *Right of defence*

The principle of the right of defence shall apply to any implementation of this Decision.

Article 10 – *Access to the file*

The Member State concerned shall have the right, on request, to access all documents and other factual materials compiled by the Commission which could serve as supporting evidence for the recommendation to the Council to impose the said Member State a fine.

Documents obtained by the Member State concerned through access to the file shall be used solely for the purposes of this Decision.

Article 11 – *Legal representation*

The Member State concerned, any entity concerned, any person working for such an entity or any other natural person concerned shall have the right to legal representation during the investigations.

Article 12 – *Confidentiality and professional secrecy*

The investigations set out in Chapter II shall be conducted subject to the principles of confidentiality and professional secrecy. The Commission officials and other accompanying persons authorised by the Commission shall not disclose information that is acquired in the framework of the investigation which is covered by the obligation of professional secrecy and confidentiality.

Documents or information obtained by the Commission in the course of the investigations shall be used solely for the purposes of this Decision.

CHAPTER IV – CRITERIA FOR ESTABLISHING THE AMOUNT OF THE FINE

Article 13 – *Maximum amount*

The total amount of the fine shall not exceed 0,2 % of the latest official gross domestic product at current market prices of the Member State concerned, as defined in ESA 95, in the preceding year.

Article 14 – *Criteria with regard to the amount of the fine*

1. The Commission shall ensure that the fine to be recommended is effective, proportionate and dissuasive. The fine shall be established on the basis of a reference amount that may be modulated upwards or downwards when taking into account the specific circumstances referred to in paragraph 3.

2. The reference amount shall be equal to 5 % of the larger impact of the misrepresentation on the level of either the general government deficit or debt of the Member State for the relevant years covered by the notification in the context of the excessive deficit procedure.

3. Taking into account the maximum amount established in Article 13, the Commission shall in each case take into consideration, where relevant, the following circumstances:

(a) the seriousness and the wider effects of the misrepresentation; in particular, the impact of the misrepresentation on the functioning of the strengthened economic governance of the Union;

(b) the fact that the misrepresentation has been shown to be the result of serious negligence or, alternatively, the misrepresentation has been shown to be intentional;

(c) the fact that the misrepresentation was the work of one entity acting alone or, alternatively, the misrepresentation was the result of a concerted action by two or more entities;

(d) the repetition, frequency or duration of the misrepresentation by the Member State concerned; in such cases, the reference amount shall be the highest magnitude detected and shall be multiplied by the number of years,

across the four years of the last notification, in which the relevant misrepresentation occurred;

(e) the degree of diligence and cooperation, alternatively the degree of obstruction, shown by the Member State concerned in the detection of the misrepresentation and in the course of the investigations.

Article 15 – *Limitation period for the collection of fines*

1. The right of the Commission to enforce decisions taken by the Council pursuant to Article 8(1) of Regulation (EU) No 1173/2011 shall be exercised within a period of five years.

2. The period shall begin to run on the day on which the Member State concerned is notified of the decision of the Council.

3. The limitation period for the recovery of fines shall be interrupted by any action of the Commission designed to enforce payment of the fine or shall be suspended for so long as enforcement of payment is suspended pursuant to a decision of the Court of Justice of the European Union.

CHAPTER V – FINAL PROVISION

Article 16 – *Entry into force*

This Decision shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

Done at Brussels, 29 June 2012.

§26. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, OJ 306, November 23rd, 2011, pp.41-47

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the third subparagraph of Article 126(14) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament,[1]

Having regard to the opinion of the European Central Bank,[2]

Whereas:

(1) There is a need to build upon the experience gained during the first decade of the economic and monetary union. Recent economic developments have posed new challenges to the conduct of fiscal policy across the Union and have in particular highlighted the need for strengthening national ownership and having uniform requirements as regards the rules and procedures forming the budgetary frameworks of the Member States. In particular, it is necessary to specify what national authorities must do to comply with the provisions of the Protocol (No 12) on the excessive deficit procedure annexed to the Treaty on European Union (TEU) and to the Treaty on the Functioning of the European Union (TFEU), and in particular Article 3 thereof.

(2) Member State governments and government sub-sectors maintain public accounting systems which include elements such as bookkeeping, internal control, financial reporting, and auditing. Those systems should be distinguished from statistical data which relate to the outcomes of government finances based on statistical methodologies, and from forecasts or budgeting actions which relate to future government finances.

(3) Complete and reliable public accounting practices for all sub-sectors of general government are a precondition for the production of high-quality statistics that are comparable across Member States. Internal control should ensure that existing rules are enforced throughout the sub-sectors of general government. Independent audits conducted by public institutions such as courts of auditors or by private auditing bodies should encourage best international practices.

(4) The availability of fiscal data is crucial to the proper functioning of the budgetary

[1] European Parliament opinion of 28 September 2011 (not yet published in the Official Journal).
[2] OJ C 150, 20.5.2011, p. 1.

surveillance framework of the Union. The regular availability of timely and reliable fiscal data is the key to proper and well timed monitoring, which in turn allows prompt action in the event of unexpected budgetary developments. A crucial element in ensuring the quality of fiscal data is transparency, which must entail the regular public availability of such data.

(5) With regard to statistics, Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics[3] established a legislative framework for the production of European statistics with a view to the formulation, application, monitoring and assessment of the policies of the Union. That Regulation also laid down the principles governing the development, production and dissemination of European statistics: professional independence, impartiality, objectivity, reliability, statistical confidentiality and cost-effectiveness, giving precise definitions of each of these principles. Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community,[4] strengthened the Commission's powers to verify statistical data used for the excessive deficit procedure.

(6) The definitions of 'government', 'deficit' and 'investment' are laid down in the Protocol (No 12) on the excessive deficit procedure by reference to the European System of Integrated Economic Accounts (ESA), replaced by the European system of national and regional accounts in the Community, adopted by Council Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community[5] (ESA 95).

(7) The availability and quality of ESA 95 data is crucial to ensure the proper functioning of the Union's fiscal surveillance framework. ESA 95 relies on information provided on an accrual basis. However, these accrual fiscal statistics rely on the previous compilation of cash data, or their equivalent. These can play a relevant role in enhancing timely budgetary monitoring, so as to avoid the late detection of significant budgetary errors. The availability of cash-data time series on budgetary developments can reveal patterns warranting closer surveillance. The cash-based fiscal data (or equivalent figures from public accounting if cash-based data are not available) to be published should at least include an overall balance, total revenue and total expenditure. Where justified, for example where there is a large number of local government bodies, timely publication of data could rely on suitable estimation techniques based on a sample of bodies, with a subsequent revision using complete data.

(8) Biased and unrealistic macroeconomic and budgetary forecasts can considerably hamper the effectiveness of fiscal planning and consequently impair commitment to budgetary discipline, while transparency and discussion of forecasting methodologies can significantly increase the quality of macroeconomic and budgetary forecasts for fiscal planning.

(9) A crucial element in ensuring the use of realistic forecasts for the conduct of budgetary policy is transparency, which should entail the public availability not only of the official macroeconomic and budgetary forecast prepared for fiscal planning, but also of the methodologies, assumptions and relevant parameters on which such forecasts are based.

(10) Sensitivity analysis and corresponding budgetary projections supplementing the most likely macrofiscal scenario allow the analysis of how main fiscal variables would evolve under various growth and interest rates assumptions, and thus greatly reduce the risk of budgetary discipline being jeopardised by forecast errors.

(11) Forecasts by the Commission and information regarding the models on which they are based can provide Member States with a useful benchmark for their most likely macrofiscal scenario, enhancing the validity of the forecasts used for budgetary planning. However, the extent to which Member States can be expected to compare the forecasts used for budgetary planning with the Commission's forecasts varies according to the timing of forecast preparation and the comparability of the forecast methodologies and assumptions. Forecasts from other independent bodies can also provide useful benchmarks.

(12) Significant differences between the chosen macrofiscal scenario and the Commission's forecast should be described and reasons therefor should be given, in particular if the level or growth of variables in external assumptions departs significantly from the values contained in the Commission's forecasts.

(13) Given the interdependence between Member States' budgets and the Union's budget, in order to support Member States in

[3] OJ L 87, 31.3.2009, p. 164.
[4] OJ L 145, 10.6.2009, p. 1.
[5] OJ L 310, 30.11.1996, p. 1.

preparing their budgetary forecasts, the Commission should provide forecasts for the Union's expenditure based on the level of expenditure programmed within the multiannual financial framework.

(14) In order to facilitate the production of the forecasts used for budgetary planning and to clarify differences between the forecasts of the Member States and those of the Commission, each Member State should, on an annual basis, have the opportunity to discuss with the Commission the assumptions underpinning the preparation of macroeconomic and budgetary forecasts.

(15) The quality of official macroeconomic and budgetary forecasts is critically enhanced by regular, unbiased and comprehensive evaluation based on objective criteria. Thorough evaluation includes scrutiny of the economic assumptions, comparison with forecasts prepared by other institutions, and evaluation of past forecast performance.

(16) Considering the documented effectiveness of rules-based budgetary frameworks of the Member States in enhancing national ownership of the Union's fiscal rules promoting budgetary discipline, strong country-specific numerical fiscal rules that are consistent with the budgetary objectives at the level of the Union should be a cornerstone of the strengthened budgetary surveillance framework of the Union. Strong numerical fiscal rules should be equipped with well-specified target definitions together with mechanisms for effective and timely monitoring. Those rules should be based on reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States. In addition, policy experience has shown that for numerical fiscal rules to work effectively, consequences must be attached to non-compliance, where the costs involved may be simply reputational.

(17) By virtue of the Protocol (No 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland annexed to the TEU and to the TFEU, the reference values mentioned in the Protocol (No 12) on the excessive deficit procedure annexed to those Treaties are not directly binding on the United Kingdom. The obligation to have in place numerical fiscal rules that effectively promote compliance with the specific reference values for the excessive deficit, and the related obligation for the multiannual objectives in medium-term budgetary frameworks to be consistent with such rules, should therefore not apply to the United Kingdom.

(18) Member States should avoid pro-cyclical fiscal policies, and fiscal consolidation efforts should be greater in economic good times. Well-specified numerical fiscal rules are conducive to these objectives and should be reflected in the annual budget legislation of the Member States.

(19) National fiscal planning can be consistent with both the preventive and the corrective parts of the Stability and Growth Pact (SGP) only if it adopts a multiannual perspective and pursues the achievement, in particular, of the medium-term budgetary objectives. Medium-term budgetary frameworks are strictly instrumental in ensuring that budgetary frameworks of the Member States are consistent with the legislation of the Union. In the spirit of Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies[6] and Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure,[7] the preventive and corrective parts of the SGP should not be regarded in isolation.

(20) Although the approval of annual budget legislation is the key step in the budget process in which important budgetary decisions are adopted in the Member States, most fiscal measures have budgetary implications that go well beyond the annual budgetary cycle. A single-year perspective therefore provides a poor basis for sound budgetary policies. In order to incorporate the multiannual budgetary perspective of the budgetary surveillance framework of the Union, planning of annual budget legislation should be based on multiannual fiscal planning stemming from the medium-term budgetary framework.

(21) That medium-term budgetary framework should contain, inter alia, projections of each major expenditure and revenue item for the budget year and beyond, based on unchanged policies. Each Member State should be able appropriately to define unchanged policies and those definitions should be made public together with the assumptions involved, the methodologies and other relevant parameters.

(22) This Directive should not prevent a Member State's new government from updating

[6] OJ L 209, 2.8.1997, p. 1.
[7] OJ L 209, 2.8.1997, p. 6.

its medium-term budgetary framework to reflect its new policy priorities. In this case, the new government should highlight the differences from the previous medium-term budgetary framework.

(23) Provisions of the budgetary surveillance framework established by the TFEU and in particular the SGP apply to general government as a whole, which comprises the sub-sectors central government, state government, local government, and social security funds, as defined in Regulation (EC) No 2223/96.

(24) A significant number of Member States have experienced a sizeable fiscal decentralisation with the devolution of budgetary powers to sub-national governments. The role of such sub-national governments in ensuring that the SGP is complied with has thereby increased considerably, and particular attention should be paid to ensuring that all general government sub-sectors are duly covered by the scope of the obligations and procedures laid down in domestic budgetary frameworks, in particular, but not exclusively, in those Member States.

(25) To be effective in promoting budgetary discipline and the sustainability of public finance, budgetary frameworks should comprehensively cover public finances. For this reason, operations of those general government bodies and funds which do not form part of the regular budgets at sub-sector level and that have an immediate or medium-term impact on Member States' budgetary positions should be given particular consideration. Their combined impact on general government balances and debts should be presented in the framework of the annual budgetary processes and in the medium-term budgetary plans.

(26) Similarly, due attention should be paid to the existence of contingent liabilities. More specifically, contingent liabilities encompass possible obligations depending on whether some uncertain future event occurs, or present obligations where payment is not probable or the amount of the probable payment cannot be measured reliably. They comprise for instance relevant information on government guarantees, non-performing loans, and liabilities stemming from the operation of public corporations, including, where appropriate, the likelihood and potential due date of expenditure of contingent liabilities. Market sensitivities should be duly taken into account.

(27) The Commission should regularly monitor the implementation of this Directive. Best practices concerning the provisions of this Directive dealing with the different aspects of national budgetary frameworks should be identified and shared.

(28) Since the objective of this Directive, namely uniform compliance with budgetary discipline as required by the TFEU, cannot be sufficiently achieved by the Member States and can therefore be better achieved at the level of the Union, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) In accordance with point 34 of the Interinstitutional Agreement on better law-making,[8] Member States are encouraged to draw up, for themselves and in the interests of the Union, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAS ADOPTED THIS DIRECTIVE:

CHAPTER I – SUBJECT MATTER AND DEFINITIONS

Article 1

This Directive lays down detailed rules concerning the characteristics of the budgetary frameworks of the Member States. Those rules are necessary to ensure Member States' compliance with obligations under the TFEU with regard to avoiding excessive government deficits.

Article 2

For the purposes of this Directive, the definitions of 'government', 'deficit' and 'investment' set out in Article 2 of the Protocol (No 12) on the excessive deficit procedure annexed to the TEU and to the TFEU shall apply. The definition of sub-sectors of general government set out in point 2.70 of Annex A to Regulation (EC) No 2223/96 shall also apply.

In addition, the following definition shall apply:

'budgetary framework' means the set of arrangements, procedures, rules and institutions that underlie the conduct of budgetary policies of general government, in particular:

[8] OJ C 321, 31.12.2003, p. 1.

(a) systems of budgetary accounting and statistical reporting;

(b) rules and procedures governing the preparation of forecasts for budgetary planning;

(c) country-specific numerical fiscal rules, which contribute to the consistency of Member States' conduct of fiscal policy with their respective obligations under the TFEU, expressed in terms of a summary indicator of budgetary performance, such as the government budget deficit, borrowing, debt, or a major component thereof;

(d) budgetary procedures comprising procedural rules to underpin the budget process at all stages;

(e) medium-term budgetary frameworks as a specific set of national budgetary procedures that extend the horizon for fiscal policy-making beyond the annual budgetary calendar, including the setting of policy priorities and of medium-term budgetary objectives;

(f) arrangements for independent monitoring and analysis, to enhance the transparency of elements of the budget process;

(g) mechanisms and rules that regulate fiscal relationships between public authorities across sub-sectors of general government.

CHAPTER II – ACCOUNTING AND STATISTICS

Article 3

1. As concerns national systems of public accounting, Member States shall have in place public accounting systems comprehensively and consistently covering all sub-sectors of general government and containing the information needed to generate accrual data with a view to preparing data based on the ESA 95 standard. Those public accounting systems shall be subject to internal control and independent audits.

2. Member States shall ensure timely and regular public availability of fiscal data for all sub-sectors of general government as defined by Regulation (EC) No 2223/96. In particular Member States shall publish:

(a) cash-based fiscal data (or the equivalent figure from public accounting if cash-based data are not available) at the following frequencies:

— monthly for central government, state government and social security sub-sectors, before the end of the following month, and

— quarterly, for the local government sub-sector, before the end of the following quarter;

(b) a detailed reconciliation table showing the methodology of transition between cash-based data (or the equivalent figures from public accounting if cash-based data are not available) and data based on the ESA 95 standard.

CHAPTER III – FORECASTS

Article 4

1. Member States shall ensure that fiscal planning is based on realistic macroeconomic and budgetary forecasts using the most up-to-date information. Budgetary planning shall be based on the most likely macrofiscal scenario or on a more prudent scenario. The macroeconomic and budgetary forecasts shall be compared with the most updated forecasts of the Commission and, if appropriate, those of other independent bodies. Significant differences between the chosen macrofiscal scenario and the Commission's forecast shall be described with reasoning, in particular if the level or growth of variables in external assumptions departs significantly from the values contained in the Commission's forecasts.

2. The Commission shall make public the methodologies, assumptions and relevant parameters that underpin its macroeconomic and budgetary forecasts.

3. In order to support Member States in preparing their budgetary forecasts, the Commission shall provide forecasts for the expenditure of the Union based on the level of expenditure programmed within the multiannual financial framework.

4. Within the framework of a sensitivity analysis, the macroeconomic and budgetary forecasts shall examine paths of main fiscal variables under different assumptions as to growth and interest rates. The range of alternative assumptions used in macroeconomic and budgetary forecasts shall be guided by the performance of past forecasts and shall endeavour to take into account relevant risk scenarios.

5. Member States shall specify which institution is responsible for producing macroeconomic and budgetary forecasts and shall make public the official macroeconomic and budgetary forecasts prepared for fiscal planning, including

the methodologies, assumptions and relevant parameters underpinning those forecasts. At least annually, the Member States and the Commission shall engage in a technical dialogue concerning the assumptions underpinning the preparation of macroeconomic and budgetary forecasts.

6. The macroeconomic and budgetary forecasts for fiscal planning shall be subject to regular, unbiased and comprehensive evaluation based on objective criteria, including ex post evaluation. The result of that evaluation shall be made public and taken into account appropriately in future macroeconomic and budgetary forecasts. If the evaluation detects a significant bias affecting macroeconomic forecasts over a period of at least 4 consecutive years, the Member State concerned shall take the necessary action and make it public.

7. Member States' quarterly debt and deficit levels shall be published by the Commission (Eurostat) every 3 months.

CHAPTER IV – NUMERICAL FISCAL RULES

Article 5

Each Member State shall have in place numerical fiscal rules which are specific to it and which effectively promote compliance with its obligations deriving from the TFEU in the area of budgetary policy over a multiannual horizon for the general government as a whole. Such rules shall promote in particular:

(a) compliance with the reference values on deficit and debt set in accordance with the TFEU;

(b) the adoption of a multiannual fiscal planning horizon, including adherence to the Member State's medium-term budgetary objective.

Article 6

1. Without prejudice to the provisions of the TFEU concerning the budgetary surveillance framework of the Union, country-specific numerical fiscal rules shall contain specifications as to the following elements:

(a) the target definition and scope of the rules;

(b) the effective and timely monitoring of compliance with the rules, based on reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States;

(c) the consequences in the event of non-compliance.

2. If numerical fiscal rules contain escape clauses, such clauses shall set out a limited number of specific circumstances consistent with the Member States' obligations deriving from the TFEU in the area of budgetary policy, and stringent procedures in which temporary non-compliance with the rule is permitted.

Article 7

The annual budget legislation of the Member States shall reflect their country-specific numerical fiscal rules in force.

Article 8

Articles 5 to 7 shall not apply to the United Kingdom.

CHAPTER V – MEDIUM-TERM BUDGETARY FRAMEWORKS

Article 9

1. Member States shall establish a credible, effective medium-term budgetary framework providing for the adoption of a fiscal planning horizon of at least 3 years, to ensure that national fiscal planning follows a multiannual fiscal planning perspective.

2. Medium-term budgetary frameworks shall include procedures for establishing the following items:

(a) comprehensive and transparent multiannual budgetary objectives in terms of the general government deficit, debt and any other summary fiscal indicator such as expenditure, ensuring that these are consistent with any numerical fiscal rules as provided for in Chapter IV in force;

(b) projections of each major expenditure and revenue item of the general government with more specifications on the central government and social security level, for the budget year and beyond, based on unchanged policies;

(c) a description of medium-term policies envisaged with an impact on general government finances, broken down by major revenue and expenditure item, showing how the adjustment towards the medium-term budgetary objectives is achieved compared to projections under unchanged policies;

(d) an assessment as to how in the light of their direct long-term impact on general government

finances, the policies envisaged are likely to affect the long-term sustainability of the public finances.

3. Projections adopted within medium-term budgetary frameworks shall be based on realistic macroeconomic and budgetary forecasts in accordance with Chapter III.

Article 10

Annual budget legislation shall be consistent with the provisions of the medium-term budgetary framework. Specifically, revenue and expenditure projections and priorities resulting from the medium-term budgetary framework as set out in Article 9(2) shall constitute the basis for the preparation of the annual budget. Any departure from those provisions shall be duly explained.

Article 11

No provision of this Directive shall prevent a Member State's new government from updating its medium-term budgetary framework to reflect its new policy priorities. In this case, the new government shall indicate the differences from the previous medium-term budgetary framework.

CHAPTER VI – TRANSPARENCY OF GENERAL GOVERNMENT FINANCES AND COMPREHENSIVE SCOPE OF BUDGETARY FRAMEWORKS

Article 12

Member States shall ensure that any measures taken to comply with Chapters II, III and IV are consistent across, and comprehensive in coverage of, all sub-sectors of general government. This shall, in particular, require the consistency of accounting rules and procedures, and the integrity of their underlying data collection and processing systems.

Article 13

1. Member States shall establish appropriate mechanisms of coordination across sub-sectors of general government to provide for comprehensive and consistent coverage of all sub-sectors of general government in fiscal planning, country-specific numerical fiscal rules, and in the preparation of budgetary forecasts and setting-up of multiannual planning as laid down, in particular, in the multiannual budgetary framework.

2. In order to promote fiscal accountability, the budgetary responsibilities of public authorities in the various sub-sectors of general government shall be clearly laid down.

Article 14

1. Within the framework of the annual budgetary processes, Member States shall identify and present all general government bodies and funds which do not form part of the regular budgets at sub-sector level, together with other relevant information. The combined impact on general government balances and debts of those general government bodies and funds shall be presented in the framework of the annual budgetary processes and the medium-term budgetary plans.

2. Member States shall publish detailed information on the impact of tax expenditures on revenues.

3. For all sub-sectors of general government, Member States shall publish relevant information on contingent liabilities with potentially large impacts on public budgets, including government guarantees, non-performing loans, and liabilities stemming from the operation of public corporations, including the extent thereof. Member States shall also publish information on the participation of general government in the capital of private and public corporations in respect of economically significant amounts.

CHAPTER VII – FINAL PROVISIONS

Article 15

1. Member States shall bring into force the provisions necessary to comply with this Directive by 31 December 2013. They shall forthwith communicate to the Commission the text of those provisions. The Council encourages the Member States to draw up, for themselves and in the interests of the Union, their own correlation tables which will, as far as possible, illustrate the correlation between this Directive and the transposition measures, and to make them public.

2. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

3. The Commission shall prepare an interim progress report on the implementation of the main provisions of this Directive on the basis of relevant information from Member States, which shall be submitted to the European

Parliament and to the Council by 14 December 2012.

4. Member States shall communicate to the Commission the text of the main provisions which they adopt in the field covered by this Directive.

Article 16

1. By 14 December 2018 the Commission shall publish a review of the suitability of this Directive.

2. The review shall assess, inter alia, the suitability of:

(a) the statistical requirements for all sub-sectors of government;

(b) the design and effectiveness of numerical fiscal rules in the Member States;

(c) the general level of transparency of public finances in the Member States.

3. By 31 December 2012, the Commission shall assess the suitability of the International Public Sector Accounting Standards for the Member States.

Article 17

This Directive shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

Article 18

This Directive is addressed to the Member States.

Done at Brussels, 8 November 2011.

For the Council

The President

J. VINCENT-ROSTOWSKI

§27. Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area, OJ L 140, May 27th, 2013, pp. 11-23

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 136 in combination with Article 121(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Acting in accordance with the ordinary legislative procedure,[2]

[1] OJ C 141, 17.5.2012, p. 7.

[2] Position of the European Parliament of 12 March 2013 (not yet published in the Official Journal) and decision of the Council of 13 May 2013.

Whereas:

(1) The Treaty on the Functioning of the European Union (TFEU) requires that Member States regard their economic policies as a matter of common concern, that their budgetary policies are guided by the need for sound public finances and that their economic policies do not risk jeopardising the proper functioning of economic and monetary union.

(2) The Stability and Growth Pact (SGP) aims to secure budgetary discipline across the Union and sets out the framework for preventing and correcting excessive government deficits. It is based on the objective of sound government finances as a means of strengthening the conditions for price stability and for strong sustainable growth underpinned by financial stability, thereby supporting the achievement of the Union's objectives for sustainable growth and jobs. The SGP includes

the multilateral surveillance system laid down in Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies[3] and the procedure for the avoidance of excessive government deficit laid down in Article 126 TFEU and further specified in Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.[4] The SGP has been further strengthened by Regulation (EU) No 1175/2011 of the European Parliament and of the Council[5] and Council Regulation (EU) No 1177/2011.[6] Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area[7] added a system of effective, preventive and gradual enforcement mechanisms in the form of the imposition of sanctions on Member States whose currency is the euro.

(3) The strengthening of the SGP has enhanced the guidance provided to Member States concerning prudent fiscal policy-making, and, for the Member States whose currency is the euro, has reinforced and made more automatic the imposition of sanctions for non-compliance with prudent fiscal policy-making, in order to avoid excessive government deficits. Those provisions have created a more comprehensive framework.

(4) In order to ensure closer coordination of economic policies and sustained convergence of the economic performance of Member States, the European Semester, as established in Article 2-a of Regulation (EC) No 1466/97, provides a framework for economic policy coordination. The European Semester includes the formulation, and the surveillance of the implementation, of the broad guidelines of the economic policies of the Member States and of the Union (broad economic policy guidelines) in accordance with Article 121(2) TFEU; the formulation, and the examination of the implementation, of the employment guidelines that must be taken into account by Member States in accordance with Article 148(2) TFEU (employment guidelines); the submission and assessment of Member States' stability or convergence programmes under that Regulation; the submission and assessment of Member States' national reform programmes supporting the Union's strategy for growth and jobs and established in line with the broad economic guidelines, with the employment guidelines and with the general guidance to Member States issued by the Commission (the annual growth survey) and the European Council at the beginning of the annual cycle of surveillance; and surveillance to prevent and correct macroeconomic imbalances under Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances.[8] Where appropriate, opinions issued in the context of an economic partnership programme, as established by this Regulation, should also been taken into account.

(5) To enable the Union to emerge stronger from the crisis, both internally and at an international level, by boosting competitiveness, productivity, growth potential, social cohesion and economic convergence, the European Council, in its conclusions of 17 June 2010, adopted a new Union's strategy for growth and jobs which also contains objectives in the fields of poverty, education, innovation and the environment.

(6) In order to ensure the proper functioning of the economic and monetary union, the TFEU allows the adoption of specific measures in the euro area which go beyond the provisions applicable to all Member States to strengthen the coordination and surveillance of their budgetary discipline. Such reinforced coordination and surveillance should be accompanied by commensurate involvement of the European Parliament and of national parliaments as appropriate. Active use, where appropriate and necessary, should be made of specific measures provided for in Article 136 TFEU.

(7) The application of this Regulation should be in full compliance with Article 152 TFEU and the recommendations issued under this Regulation should respect national practice and institutions for wage formation. This Regulation takes into account Article 28 of the Charter of Fundamental Rights of the European Union, and, accordingly, does not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice.

(8) Article 9 TFEU provides that, in defining and implementing its policies and activities, the Union is to take into account

[3] OJ L 209, 2.8.1997, p. 1.
[4] OJ L 209, 2.8.1997, p. 6.
[5] OJ L 306, 23.11.2011, p. 12.
[6] OJ L 306, 23.11.2011, p. 33.
[7] OJ L 306, 23.11.2011, p. 1.
[8] OJ L 306, 23.11.2011, p. 25.

requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

(9) Gradually strengthened surveillance and coordination, as set out in this Regulation, will further complete the European Semester for economic policy coordination, will complement the existing provisions of the SGP and strengthen the surveillance of budgetary and economic policies in Member States whose currency is the euro. A gradually enhanced monitoring procedure should contribute to better budgetary and economic outcomes, macro-financial soundness and economic convergence, to the benefit of all Member States whose currency is the euro. As part of a gradually strengthened process, closer monitoring is particularly valuable to Member States that are subject to an excessive deficit procedure.

(10) Biased and unrealistic macroeconomic and budgetary forecasts can considerably hamper the effectiveness of budgetary planning and, consequently, impair commitment to budgetary discipline. Unbiased and realistic macroeconomic forecasts can be provided by independent bodies or bodies endowed with functional autonomy vis-à-vis the budgetary authorities of a Member State and which are underpinned by national legal provisions ensuring a high degree of functional autonomy and accountability. Such forecasts should be used throughout the budgetary procedure.

(11) Strong public finances are best ensured at the planning stage and gross errors should be identified as early as possible. Member States should benefit not just from the setting of guiding principles and budgetary targets but also from a synchronised monitoring of their budgetary policies.

(12) Setting up a common budgetary timeline for Member States whose currency is the euro should better synchronise the key steps in the preparation of national budgets, thus contributing to the effectiveness of the SGP and of the European Semester for economic policy coordination. This should lead to stronger synergies by facilitating policy coordination among Member States whose currency is the euro and by ensuring that Council and Commission recommendations are appropriately integrated in the budgetary procedure of the Member States. That procedure should be consistent with the framework for economic policy coordination in the context of the annual cycle of surveillance which includes, in particular, the general guidance to Member States issued by the Commission and the European Council at the beginning of the cycle. Member States' budgetary polices should be consistent with the recommendations issued in the context of the SGP and, where appropriate, with recommendations issued in the context of the annual cycle of surveillance, including the macroeconomic imbalances procedure as established by Regulation (EU) No 1176/2011, and with opinions on economic partnership programmes, as established by this Regulation.

(13) As a first step of that common budgetary timeline, Member States should make public their national medium-term fiscal plan at the same time as their stability programmes preferably by 15 April and no later than by 30 April. Those fiscal plans should include indications on how the reforms and measures set out are expected to contribute to the achievement of the targets and national commitments established within the framework of the Union's strategy for growth and jobs. The national medium-term fiscal plan and the stability programme can be the same document.

(14) One important milestone of that common budgetary timeline should be the publication of the draft central government budget by 15 October. Since compliance with the rules of the SGP is to be ensured at the level of the general government and achievement of the budgetary objectives requires consistent budgeting across all subsectors of the general government, the publication of the draft central government budget should be accompanied by the publication of the main parameters of the draft budgets of all the other subsectors of the general government. Such parameters should include, in particular, the projected budgetary outcomes of the other subsectors, the main assumptions underlying those projections and the reasons for expected changes with respect to the stability programme assumptions.

(15) The common budgetary timeline also provides for the budget to be adopted or fixed upon annually by 31 December together with the updated main budgetary parameters for the other subsectors of the general government. Where, for objective reasons beyond the control of the government, the budget is not adopted by 31 December, reversionary budget procedures should be put in place to ensure that the government remains able to discharge its essential duties. Such arrangements could include the implementation of the government's draft budget, of the preceding year's approved budget, or of specific parliament-approved measures.

(16) With a view to better coordinating the planning of their national debt issuance, the Member States should report ex ante on their public debt issuance plans to the Eurogroup and to the Commission.

(17) Compliance with effective rules-based fiscal frameworks can be important in supporting sound and sustainable fiscal policies. Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States[9] established that monitoring of compliance with country-specific numerical fiscal rules should be supported at national level by independent bodies or bodies endowed with functional autonomy. It is important to note that given the diversity of possible and existing arrangements, while not the preferred option, it should be possible for more than one independent body to be in charge of monitoring compliance with those rules as long as there is a clear allocation of responsibility and as long as there is no overlap of competency over specific aspects of the monitoring. Excessive institutional fragmentation of monitoring tasks should be avoided. In order for monitoring bodies to fulfil their mandate effectively, national legal provisions ensuring a high degree of functional autonomy and accountability should underpin such bodies. The design of those monitoring bodies should take into account the existing institutional setting and the administrative structure of the Member State concerned. In particular, it should be possible to endow a suitable entity of an existing institution with functional autonomy provided that such an entity is designated to carry out specific monitoring tasks, has a distinct statutory regime and complies with the other principles referred to in this recital.

(18) This Regulation does not impose on Member States additional requirements or obligations with regard to country-specific numerical fiscal rules. Strong country-specific numerical fiscal rules consistent with the budgetary objectives at the level of the Union and monitored by independent bodies are a cornerstone of the strengthened budgetary surveillance framework of the Union. The rules with which those bodies should comply, and their specific tasks, are set out in this Regulation.

(19) Member States whose currency is the euro are particularly subject to spill-over effects from each other's budgetary policies. Member States whose currency is the euro should consult the Commission and each other before adopting any major fiscal policy reform plans with potential spill-over effects, so as to allow an assessment of the possible impact for the euro area as a whole. They should also consider their budgetary plans to be of common concern and submit them to the Commission for monitoring purposes in advance of their becoming binding. The Commission, in cooperation with the Member States, should propose guidelines in the form of a harmonised framework for the specification of the content of draft budgetary plans.

(20) In the exceptional cases where, after consulting the Member State concerned, the Commission identifies in the draft budgetary plan particularly serious non-compliance with the budgetary policy obligations laid down in the SGP, the Commission, in its opinion on the draft budgetary plan, should request a revised draft budgetary plan, in accordance with this Regulation. This will be the case, in particular, where the implementation of the draft budgetary plan would put at risk the financial stability of the Member State concerned or risk jeopardising the proper functioning of the economic and monetary union, or where the implementation of the draft budgetary plan would entail an obvious significant violation of the recommendations adopted by the Council under the SGP.

(21) The Commission's opinion on the draft budgetary plan should be adopted as soon as possible and in any event by the end of November, taking into account, to the extent possible, the specific national fiscal schedule and parliamentary procedures, in order to ensure that Union's policy guidance in the budgetary area can be appropriately integrated in the national budgetary preparations. In particular, the opinion should include an assessment of whether the budgetary plans appropriately address the recommendations issued in the context of the European Semester in the budgetary area. At the request of the parliament of the Member State concerned or of the European Parliament, the Commission should be prepared to present its opinion to the parliament making the request, after it has been made public. Member States are invited to take into account, in the process of adopting their budget law, the Commission opinion on their draft budgetary plan.

(22) The extent to which that opinion has been taken into account in a Member State's budget law should be part of the assessment, if and when the conditions are met, leading to a decision on the existence of an excessive deficit

[9] OJ L 306, 23.11.2011, p. 41.

in the Member State concerned. In such a case, no follow-up to the early guidance from the Commission should be considered as an aggravating factor.

(23) Also, based on an overall assessment of the draft budgetary plans by the Commission, the Eurogroup should discuss the budgetary situation and prospects for the euro area as a whole.

(24) Member States whose currency is the euro and which are subject to an excessive deficit procedure should be monitored more closely, in order to secure a full, sustainable and timely correction of the excessive deficit. Closer monitoring by means of additional reporting requirements should ensure prevention and early correction of any deviations from the Council recommendations to correct the excessive deficit. Such monitoring should complement the provisions set out in Regulation (EC) No 1467/97. Those additional reporting requirements should be proportionate to the stage of the procedure to which the Member State is subject, under Article 126 TFEU. As a first step, the Member State concerned should carry out a comprehensive assessment of in-year budgetary execution for the general government and its subsectors, taking into account in particular financial risks associated to contingent liabilities with potentially large impacts on public budgets.

(25) Additional reporting requirements for Member States whose currency is the euro and which are subject to an excessive deficit procedure should enable a better exchange of information between the Member States concerned and the Commission, and, as a consequence, the identification of risks in the compliance of a Member State with the deadline which has been set by the Council to correct its excessive deficit. In the event of such risks being identified, the Commission should issue a recommendation to the Member State concerned setting out appropriate measures to be taken within a given timeframe. Upon request, the Commission should present its recommendation to the parliament of the Member State concerned. Compliance with the recommendation should lead to a prompt correction of any developments putting at risk the correction of the excessive deficit within the established deadline.

(26) Assessment of compliance with the Commission recommendation should be part of the continuous assessment made by the Commission of effective action to correct an excessive deficit. When deciding whether effective action to correct the excessive deficit has been taken, the Council should also base its decision on whether or not the Member State complied with the Commission recommendation, while giving due consideration to Article 3(5) and Article 5(2) of Regulation (EC) No 1467/97.

(27) Indeed, Regulation (EC) No 1467/97, which sets out in detail the excessive deficit procedure based on Article 126 TFEU, embeds elements of flexibility which allow unexpected adverse economic events to be taken into account. Article 3(5) and Article 5(2) of that Regulation provide that if effective action has been taken in compliance with, respectively, a recommendation under Article 126(7) TFEU or a decision to give notice under Article 126(9) TFEU, and unexpected adverse economic events with major unfavourable consequences for government finances occur after the adoption of that recommendation or decision to give notice, the Council may decide, on a recommendation from the Commission, to adopt a revised recommendation under Article 126(7) TFEU or a revised decision to give notice under Article 126(9) TFEU. The revised recommendation or revised decision to give notice, taking into account the relevant factors referred to in Article 2(3) of Regulation (EC) No 1467/97 may, in particular, extend the deadline for the correction of the excessive deficit by one year as a rule.

The Council should assess the existence of unexpected adverse economic events with major unfavourable consequences for government finances against the economic forecasts in its initial recommendation or decision to give notice. In the case of a severe economic downturn in the euro area or in the Union as a whole, the Council may also decide, on a recommendation from the Commission, to adopt a revised recommendation under Article 126(7) TFEU or a revised decision to give notice under Article 126(9) TFEU, provided that that does not endanger fiscal sustainability in the medium term. In addition, Article 2(1a) of Regulation (EC) No 1467/97 provides that, in implementing the debt ratio adjustment benchmark, account shall be taken of the influence of the cycle on the pace of debt reduction. Thus, a Member State would not be considered as having breached the debt criterion laid down in Article 126(2)(b) TFEU if that is only because of negative cyclical conditions.

(28) Also, since budgetary measures might be insufficient to ensure a lasting correction of the excessive deficit, Member States whose currency is the euro and are subject to an

excessive deficit procedure should present an economic partnership programme detailing the policy measures and structural reforms needed to ensure an effective and lasting correction of the excessive deficit, building on the latest update of their national reform programme and their stability programme.

(29) Furthermore, strengthening economic governance has involved a closer dialogue with the European Parliament. While recognising that the counterparts of the European Parliament in the framework of the dialogue are the relevant institutions of the Union and their representatives, the competent committee of the European Parliament may offer an opportunity to participate in an exchange of views to a Member State which is the subject of a Commission recommendation or of a Council opinion in accordance with this Regulation. The Member State's participation in such an exchange of views is voluntary.

(30) In order to specify the extent of the reporting obligations for Member States subject to an excessive deficit procedure, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of the content and scope of such reporting. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

(31) The power to adopt opinions on economic partnership programmes, as established by this Regulation should be conferred on the Council. Those opinions are complementary to the excessive deficit procedure laid down under Article 126 TFEU in accordance with which the Council is to decide on the existence of an excessive deficit and on the measures required to put an end to it.

(32) Recalling the importance of sound public finances, structural reform and targeted investment for sustainable growth, the Member States' Heads of State or Government signed a Compact for Growth and Jobs on 29 June 2012, demonstrating their determination to stimulate job-creating growth in parallel to their commitment to sound public finances. The Compact includes, in particular, measures to boost the financing of the economy. EUR 120 000 million (equivalent to around 1 % of the Union's Gross National Income) are being mobilised for fast-acting growth measures. As recommended in the annual growth survey in 2012 and 2013, the Member States should strive to maintain an adequate pace of fiscal consolidation while preserving investment aiming to achieve the Europe 2020 goals for growth and jobs.

(33) The Commission is monitoring the impact of tight budget constraints on growth enhancing public expenditure and on public investment. The Union's fiscal framework offers scope to balance the acknowledgement of productive public investment needs with fiscal discipline objectives: while fully respecting the SGP, the possibilities offered by the Union's existing fiscal framework to balance productive public investment needs with fiscal discipline objectives can be exploited in the preventive arm of the SGP. The Commission has announced its intention to report on the scope for possible action within the boundaries of the existing Union fiscal framework.

(34) The European Parliament's resolution of 20 November 2012 with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the European Central Bank and the Eurogroup 'Towards a Genuine Economic and Monetary Union' and the Commission's Communication of 28 November 2012 entitled 'A blueprint for a deep and genuine EMU' outline, respectively, the views of the European Parliament and of the Commission on the steps needed to achieve a deeper and better integrated economic and monetary union. Following the report 'Towards a Genuine Economic and Monetary Union', the European Council, in its conclusions in December 2012, set out its views on a number of issues with a view to the further strengthening of EMU,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – GENERAL PROVISIONS

Article 1 – *Subject matter and scope*

1. This Regulation sets out provisions for enhanced monitoring of budgetary policies in the euro area and for ensuring that national budgets are consistent with the economic policy guidance issued in the context of the SGP and the European Semester for economic policy coordination, by:

(a) complementing the European Semester, as established in Article 2-a of Regulation (EC) No 1466/97, with a common budgetary timeline;

(b) complementing the procedure for the prevention and correction of excessive macroeconomic imbalances, as established by Regulation (EU) No 1176/2011;

(c) complementing the multilateral surveillance system of budgetary policies, as established by Regulation (EC) No 1466/97, with additional monitoring requirements in order to ensure that Union policy recommendations in the budgetary area are appropriately integrated in the national budgetary preparations;

(d) complementing the procedure for correcting a Member State's excessive deficit, as established by Article 126 TFEU and by Regulation (EC) No 1467/97, with closer monitoring of the budgetary policies of Member States subject to an excessive deficit procedure in order to secure a timely and lasting correction of an excessive deficit;

(e) guaranteeing the consistency between budgetary policies and measures and reforms taken in the context of the procedure for prevention and correction of excessive macroeconomic imbalances as established by Regulation (EU) No 1176/2011 and, where appropriate, in the context of an economic partnership programme as referred to in Article 9.

2. The application of this Regulation shall be in full compliance with Article 152 TFEU and the recommendations issued under this Regulation shall respect national practice and institutions for wage formation. In accordance with Article 28 of the Charter of Fundamental Rights of the European Union, this Regulation shall not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practice.

3. This Regulation shall apply to Member States whose currency is the euro.

Article 2 – *Definitions*

1. For the purposes of this Regulation, the following definitions shall apply:

(a) 'independent bodies' means bodies that are structurally independent or bodies endowed with functional autonomy vis-à-vis the budgetary authorities of the Member State, and which are underpinned by national legal provisions ensuring a high degree of functional autonomy and accountability, including:

(i) a statutory regime grounded in national laws, regulations or binding administrative provisions;

(ii) not taking instructions from the budgetary authorities of the Member State concerned or from any other public or private body;

(iii) the capacity to communicate publicly in a timely manner;

(iv) procedures for nominating members on the basis of their experience and competence;

(v) adequate resources and appropriate access to information to carry out their mandate;

(b) 'independent macroeconomic forecasts' means macroeconomic forecasts produced or endorsed by independent bodies;

(c) 'medium-term budgetary framework' means medium-term budgetary framework as described in point (e) of Article 2 of Directive 2011/85/EU;

(d) 'stability programme' means stability programme as described in Article 3 of Regulation (EC) No 1466/97.

In order to ensure consistency across the independent macroeconomic forecasts referred to in point (b) of the first subparagraph, the Member States and the Commission shall, at least annually, engage in a technical dialogue concerning the assumptions underpinning the preparation of macroeconomic and budgetary forecasts in accordance with Article 4(5) of Directive 2011/85/EU.

2. The definitions of 'general government sector' and of 'subsectors of the general government sector', set out in point 2.70 of Annex A to Regulation (EC) No 2223/96 of 25 June 1996 on the European system of national and regional accounts in the Community[10] shall also apply to this Regulation.

3. The application of this Regulation is without prejudice to Article 9 TFEU.

CHAPTER II - ECONOMIC POLICY COORDINATION

Article 3 – *Consistency with the framework for economic policy coordination*

The Member States' budgetary procedure shall be consistent with:

[10] OJ L 310, 30.11.1996, p. 1.

(1) the framework for economic policy coordination in the context of the annual cycle of surveillance, which includes, in particular, the general guidance to Member States issued by the Commission and the European Council at the beginning of the cycle;

(2) the recommendations issued in the context of the SGP;

(3) where appropriate, recommendations issued in the context of the annual cycle of surveillance, including the macroeconomic imbalances procedure as established by Regulation (EU) No 1176/2011; and

(4) where appropriate, opinions on economic partnership programmes, as referred to in Article 9.

CHAPTER III – COMMON BUDGETARY PROVISIONS

Article 4 – *Common budgetary timeline*

1. Member States shall, in the context of the European Semester, make public, preferably by 15 April but no later than 30 April each year, their national medium-term fiscal plans in accordance with their medium-term budgetary framework. Such plans shall include at least all the information to be provided in their stability programmes and shall be presented together with their national reform programmes and the stability programmes. Such plans shall be consistent with the framework for economic policy coordination in the context of the annual cycle of surveillance, which includes, in particular, the general guidance to Member States issued by the Commission and the European Council at the beginning of the cycle. They shall also be consistent with the recommendations issued in the context of the SGP and, where appropriate, with recommendations issued in the context of the annual cycle of surveillance, including the macroeconomic imbalances procedure as established by Regulation (EU) No 1176/2011, and with opinions on economic partnership programmes referred to in Article 9.

National medium-term fiscal plans and national reform programmes shall include indications on how the reforms and measures set out are expected to contribute to the achievement of the targets and national commitments established within the framework of the Union's strategy for growth and jobs. Furthermore, national medium-term fiscal plans or national reform programmes shall include indications on the expected economic returns on non-defence public investment projects that have a significant budgetary impact. National medium-term fiscal plans and stability programmes may be the same document.

2. The draft budget for the forthcoming year for the central government and the main parameters of the draft budgets for all the other subsectors of the general government shall be made public annually not later than 15 October.

3. The budget for the central government shall be adopted or fixed upon and made public annually not later than 31 December together with the updated main budgetary parameters for the other sub-sectors of the general government. Member States shall have in place reversionary budget procedures to be applied if, for objective reasons beyond the control of the government, the budget is not adopted or fixed upon and made public by 31 December.

4. National medium-term fiscal plans and draft budgets referred to in paragraphs 1 and 2 shall be based on independent macroeconomic forecasts, and shall indicate whether the budgetary forecasts have been produced or endorsed by an independent body. Those forecasts shall be made public together with the national medium-term fiscal plans and the draft budgets that they underpin.

Article 5 – *Independent bodies monitoring compliance with fiscal rules*

1. Member States shall have in place independent bodies for monitoring compliance with:

(a) numerical fiscal rules incorporating in the national budgetary processes their medium-term budgetary objective as established in Article 2a of Regulation (EC) No 1466/97;

(b) numerical fiscal rules as referred to in Article 5 of Directive 2011/85/EU.

2. Those bodies shall, where appropriate, provide public assessments with respect to national fiscal rules, inter alia relating to:

(a) the occurrence of circumstances leading to the activation of the correction mechanism for cases of significant observed deviation from the medium-term objective or the adjustment path towards it in accordance with Article 6(2) of Regulation (EC) No 1466/97;

(b) whether the budgetary correction is proceeding in accordance with national rules and plans;

(c) any occurrence or cessation of circumstances referred to in the tenth subparagraph of Article 5(1) of Regulation (EC) No 1466/97 which may allow a temporary deviation from the medium-term budgetary objective or the adjustment path towards it, provided that such a deviation does not endanger fiscal sustainability in the medium term.

CHAPTER IV – MONITORING AND ASSESSMENT OF MEMBER STATES DRAFT BUDGETARY PLANS

Article 6 – *Monitoring requirements*

1. Member States shall submit annually to the Commission and to the Eurogroup a draft budgetary plan for the forthcoming year by 15 October. That draft budgetary plan shall be consistent with the recommendations issued in the context of the SGP and, where applicable, with recommendations issued in the context of the annual cycle of surveillance, including the macroeconomic imbalances procedure as established by Regulation (EU) No 1176/2011, and with opinions on the economic partnership programmes referred to in Article 9.

2. As soon as the draft budgetary plans referred to in paragraph 1 have been submitted to the Commission, they shall be made public.

3. The draft budgetary plan shall contain the following information for the forthcoming year:

(a) the targeted budget balance for the general government as a percentage of Gross Domestic Product (GDP), broken down by subsector of general government;

(b) the projections at unchanged policies for expenditure and revenue as a percentage of GDP for the general government and their main components, including gross fixed capital formation;

(c) the targeted expenditure and revenue as a percentage of GDP for the general government and their main components, taking into account the conditions and criteria to establish the growth path of government expenditure net of discretionary revenue measures under Article 5(1) of Regulation (EC) No 1466/97;

(d) relevant information on the general government expenditure by function, including on education, healthcare and employment, and, where possible, indications on the expected distributional impact of the main expenditure and revenue measures;

(e) a description and quantification of the expenditure and revenue measures to be included in the draft budget for the year to come at the level of each subsector in order to bridge the gap between the targets referred to in point (c) and the projections at unchanged policies provided in accordance with point (b);

(f) the main assumptions of the independent macroeconomic forecasts and important economic developments which are relevant to the achievement of the budgetary targets;

(g) an annex containing the methodology, economic models and assumptions, and any other relevant parameters underpinning the budgetary forecasts and the estimated impact of aggregated budgetary measures on economic growth;

(h) indications on how reforms and measures in the draft budgetary plan, including in particular public investment, address the current recommendations to the Member State concerned in accordance with Articles 121 and 148 TFEU and are instrumental to the achievement of the targets set by the Union's strategy for growth and jobs.

The description referred to in point (e) of the first subparagraph may be less detailed for measures with a budgetary impact estimated to be lower than 0,1 % of GDP. Particular and explicit attention shall be paid to major fiscal policy reform plans with potential spill-over effects for other Member States whose currency is the euro.

4. Where the budgetary targets reported in the draft budgetary plan in accordance with paragraph 3 or the projections at unchanged policies differ from those in the most recent stability programme, the differences shall be duly explained.

5. The specification of the content of the draft budgetary plan shall be set out in a harmonised framework established by the Commission in cooperation with the Member States.

Article 7 – *Assessment of the draft budgetary plan*

1. The Commission shall adopt an opinion on the draft budgetary plan as soon as possible and in any event by 30 November.

2. Notwithstanding paragraph 1, where, in exceptional cases, after consulting the Member State concerned within one week of submission of the draft budgetary plan, the Commission identifies particularly serious non-compliance

with the budgetary policy obligations laid down in the SGP, the Commission shall adopt its opinion within two weeks of submission of the draft budgetary plan. In its opinion, the Commission shall request that a revised draft budgetary plan be submitted as soon as possible and in any event within three weeks of the date of its opinion. The Commission's request shall be reasoned and shall be made public.

Article 6(2), (3) and (4) shall apply to revised draft budgetary plans submitted pursuant to the first subparagraph of this paragraph.

The Commission shall adopt a new opinion on the revised draft budgetary plan as soon as possible and in any event within three weeks of submission of the revised draft budgetary plan.

3. The Commission's opinion shall be made public and shall be presented to the Eurogroup. Thereafter, at the request of the parliament of the Member State concerned or of the European Parliament, the Commission shall present its opinion to the parliament making the request.

4. The Commission shall make an overall assessment of the budgetary situation and prospects in the euro area as a whole, on the basis of the national budgetary prospects and their interaction across the area, relying on the most recent economic forecasts of the Commission services.

The overall assessment shall include sensitivity analyses that provide an indication of the risks to public finance sustainability in the event of adverse economic, financial or budgetary developments. It shall also, as appropriate, outline measures to reinforce the coordination of budgetary and macroeconomic policy at the euro area level.

The overall assessment shall be made public and shall be taken into account in the annual general guidance to Member States issued by the Commission.

The methodology (including models) and assumptions of the most recent economic forecasts of the Commission services for each Member State, including estimates of the impact of aggregated budgetary measures on economic growth, shall be annexed to the overall assessment.

5. The Eurogroup shall discuss opinions of the Commission on the draft budgetary plans and the budgetary situation and prospects in the euro area as a whole on the basis of the overall assessment made by the Commission in accordance with paragraph 4. The results of those discussions of the Eurogroup shall be made public where appropriate.

Article 8 – *Reporting on debt issuance*

1. Member States shall report to the Commission and the Eurogroup, ex ante and in a timely manner, on their national debt issuance plans.

2. The harmonised form and content of the report referred to in paragraph 1 shall be laid down by the Commission, in cooperation with the Member States.

CHAPTER V – ENSURING THE CORRECTION OF EXCESSIVE DEFICIT

Article 9 – *Economic partnership programmes*

1. If the Council, acting under Article 126(6) TFEU, decides that an excessive deficit exists in a Member State, the Member State concerned shall present to the Commission and to the Council an economic partnership programme describing the policy measures and structural reforms that are needed to ensure an effective and lasting correction of the excessive deficit, as a development of its national reform programme and its stability programme, and fully taking into account the Council recommendations on the implementation of the integrated guidelines for the economic and employment policies of the Member State concerned.

2. The economic partnership programme shall identify and select a number of specific priorities aiming to enhance competitiveness and long-term sustainable growth and addressing structural weaknesses in the Member State concerned. Those priorities shall be consistent with the Union’s strategy for growth and jobs. Where appropriate, potential financial resources shall be identified, including credit lines of the European Investment Bank and other relevant financial instruments, as appropriate.

3. The economic partnership programme shall be presented at the same time as the report provided for in Article 3(4a) of Regulation (EC) No 1467/97.

4. The Council, acting on a proposal from the Commission, shall adopt an opinion on the economic partnership programme.

5. A corrective action plan as referred to in Article 8(1) of Regulation (EU) No 1176/2011 may be amended in accordance with Article 9(4) of that Regulation to replace the economic

partnership programme provided for in this Article. Where such a corrective action plan is submitted after the adoption of an economic partnership programme, the measures set out in the economic partnership programme may, as appropriate, be included in the corrective action plan.

6. The implementation of the programme, and the annual budgetary plans consistent with it, shall be monitored by the Council and by the Commission.

Article 10 – *Reporting requirements for Member States in excessive deficit procedure*

1. Where the Council decides in accordance with Article 126(6) TFEU that an excessive deficit exists in a Member State, the Member State concerned shall, on a request from the Commission, be subject to reporting requirements in accordance with paragraphs 2 to 5 of this Article, until the abrogation of its excessive deficit procedure.

2. The Member State shall carry out a comprehensive assessment of in-year budgetary execution for the general government and its subsectors. The financial risks associated with contingent liabilities with potentially large impacts on public budgets, as referred to in Article 14(3) of Directive 2011/85/EU shall also be covered by the assessment to the extent that they may contribute to the existence of an excessive deficit. The result of that assessment shall be included in the report submitted in accordance with Article 3(4a) or Article 5(1a) of Regulation (EC) No 1467/97 on action taken to correct the excessive deficit.

3. The Member State shall report regularly to the Commission and to the Economic and Financial Committee, for the general government and its subsectors, the in-year budgetary execution, the budgetary impact of discretionary measures taken on both the expenditure and the revenue side, targets for the government expenditure and revenues, and information on the measures adopted and the nature of those envisaged to achieve the targets. The report shall be made public.

The Commission shall be empowered to adopt delegated acts in accordance with Article 14 specifying the content of the regular reporting referred to in this paragraph.

4. If the Member State concerned is the subject of a Council recommendation under Article 126(7) TFEU, the report referred to in paragraph 3 of this Article shall be submitted for the first time six months after the report provided for in Article 3(4a) of Regulation (EC) No 1467/97, and thereafter on a six-monthly basis.

5. If the Member State concerned is the subject of a Council decision to give notice under Article 126(9) TFEU, the report in accordance with paragraph 3 of this Article shall also contain information on the actions being taken in response to the specific Council notice. It shall be submitted for the first time three months after the report provided for in Article 5(1a) of Regulation (EC) No 1467/97, and thereafter on a quarterly basis.

6. Upon request and within the deadline set by the Commission, a Member State subject to an excessive deficit procedure shall:

(a) carry out and report on a comprehensive independent audit of the public accounts of all subsectors of the general government conducted preferably in coordination with national supreme audit institutions, aiming to assess the reliability, completeness and accuracy of those public accounts for the purposes of the excessive deficit procedure;

(b) provide available additional information for the purposes of monitoring progress towards the correction of the excessive deficit.

The Commission (Eurostat) shall assess the quality of statistical data reported by the Member State concerned under point (a) in accordance with Council Regulation (EC) No 479/2009 of 25 May 2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community.[11]

Article 11 – *Member States at risk of non-compliance with their obligation under their excessive deficit procedure*

1. When assessing whether compliance with the deadline to correct the excessive deficit, as established by a Council recommendation under Article 126(7) TFEU or a Council decision to give notice under Article 126(9) TFEU, is at risk, the Commission shall base its assessment, inter alia, on the reports submitted by the Member States in accordance with Article 10(3) of this Regulation.

2. In the case of a risk of non-compliance with the deadline to correct the excessive deficit, the

[11] OJ L 145, 10.6.2009, p. 1.

Commission shall address a recommendation to the Member State concerned regarding full implementation of the measures provided for in the recommendation or decision to give notice referred to in paragraph 1, adoption of other measures, or both, within a timeframe consistent with the deadline for the correction of its excessive deficit. The recommendation by the Commission shall be made public and shall be presented to the Economic and Financial Committee. At the request of the parliament of the Member State concerned, the Commission shall present the recommendation to that parliament.

3. Within the timeframe set by the Commission recommendation referred to in paragraph 2, the Member State concerned shall report to the Commission on measures adopted in response to that recommendation together with the reports provided for in Article 10(3). The report shall include the budgetary impact of all discretionary measures taken, targets for the government expenditure and revenues, information on the measures adopted and the nature of those envisaged to achieve the targets, and information on the other actions being taken in response to the Commission recommendation. The report shall be made public and shall be presented to the Economic and Financial Committee.

4. On the basis of the report referred to in paragraph 3, the Commission shall assess whether the Member State has complied with the recommendation referred to in paragraph 2.

Article 12 – *Impact on the excessive deficit procedure*

1. The extent to which the Member State concerned has taken into account the Commission's opinion referred to in Article 7(1) shall be taken into account by:

(a) the Commission when conducting a report under Article 126(3) TFEU and when recommending the imposition of a non-interest bearing deposit in accordance with Article 5 of Regulation (EU) No 1173/2011;

(b) the Council when deciding whether an excessive deficit exists in accordance with Article 126(6) TFEU.

2. The monitoring established by Articles 10 and 11 of this Regulation shall be an integral part of the regular monitoring, as provided for in Article 10(1) of Regulation (EC) No 1467/97, of the implementation of action taken by the Member State concerned in response to Council recommendations under Article 126(7) TFEU or Council decisions to give notice under Article 126(9) TFEU to correct the excessive deficit.

3. When considering whether effective action has been taken in response to recommendations under Article 126(7) TFEU or to decisions to give notice under Article 126(9) TFEU, the Commission shall take into account the assessment referred to in Article 11(4) in this Regulation and shall recommend, as appropriate, that the Council take decisions under Article 126(8) or Article 126(11) TFEU, giving due consideration to Article 3(5) and Article 5(2) of Regulation (EC) No 1467/97.

Article 13 – *Consistency with Regulation (EU) No 472/2013*[12]

Member States subject to a macroeconomic adjustment programme shall not be subject to Articles 6 to 12 of this Regulation.

CHAPTER VI – FINAL PROVISIONS

Article 14 – *Exercise of the delegation*

1. The power to adopt delegated acts is conferred on the Commission subject to the conditions laid down in this Article.

2. The power to adopt delegated acts referred to in Article 10(3) shall be conferred on the Commission for a period of three years from 30 May 2013. The Commission shall draw up a report in respect of the delegation of power not later than nine months before the end of the three-year period. The delegation of power shall be tacitly extended for periods of an identical duration, unless the European Parliament or the Council opposes such extension not later than three months before the end of each period.

3. The delegation of power referred to in Article 10(3) may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a later date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

[12] 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.

5. A delegated act adopted pursuant to Article 10(3) shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council.

Article 15 – *Economic Dialogue*

1. In order to enhance the dialogue between the Union institutions, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite, where appropriate, the President of the Council, the Commission, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss:

(a) the specification of the content of the draft budgetary plan as set out in a harmonised framework established in accordance with Article 6(5);

(b) the results of the discussion of the Eurogroup on the Commission opinions adopted in accordance with Article 7(1), to the extent that they have been made public;

(c) the overall assessment of the budgetary situation and prospects in the euro area as a whole made by the Commission in accordance with Article 7(4);

(d) Council acts referred to in Article 9(4) and in Article 12(3).

2. The competent committee of the European Parliament may offer the opportunity to the Member State that is the subject of a Commission recommendation under Article 11(2) or Council acts as referred to in paragraph 1(d) to participate in an exchange of views.

3. The European Parliament shall be duly involved in the European Semester in order to increase the transparency and ownership of, and the accountability for the decisions taken, in particular by means of the economic dialogue carried out pursuant to this Article.

Article 16 – *Review and reports on the application of this Regulation*

1. By 14 December 2014, and every five years thereafter, the Commission shall submit to the European Parliament and to the Council a report on the application of this Regulation, accompanied, where appropriate, by a proposal to amend this Regulation. The Commission shall make that report public.

The reports referred to in the first subparagraph shall evaluate, inter alia:

(a) the effectiveness of this Regulation;

(b) progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States in accordance with the TFEU;

(c) the contribution of this Regulation to the achievement of the Union's strategy for growth and jobs.

2. By 31 July 2013, the Commission shall report on the possibilities offered by the Union's existing fiscal framework to balance productive public investment needs with fiscal discipline objectives in the preventive arm of the SGP, while complying with it fully.

Article 17 – *Transitional provisions*

1. Member States already subject to an excessive deficit procedure at the time of the entry into force of this Regulation shall comply with the regular reporting in accordance with Article 10(3), (4) and (5) by 31 October 2013.

2. Article 9(1) and Article 10(2) shall apply to Member States that are already subject to an excessive deficit procedure at the time of the entry into force of this Regulation only when a Council recommendation in accordance with Article 126(7) TFEU, or a Council decision to give notice in accordance with Article 126(9) TFEU, is taken after 30 May 2013.

In such cases, the economic partnership programme shall be presented simultaneously with the report submitted in accordance with Article 3(4a) or Article 5(1a) of Regulation (EC) No 1467/97.

3. Member States shall comply with Article 5 by 31 October 2013.

Article 18 – *Entry into force*

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 21 May 2013.

§28. 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, OJ L 140, May 27th, 2013, pp. 1-10

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 136 in combination with Article 121(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Acting in accordance with the ordinary legislative procedure,[2]

Whereas:

(1) The unprecedented global crisis that has hit the world since 2007 has seriously damaged economic growth and financial stability and has given rise to a strong deterioration in the government deficit and debt position of the Member States, leading a number of them to seek financial assistance within and outside the framework of the Union.

(2) Article 9 of the Treaty on the Functioning of the European Union (TFEU) provides that, in defining and implementing its policies and activities, the Union is to take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

(3) Full consistency between the Union multilateral surveillance framework established by the TFEU and the possible policy conditions attached to financial assistance should be enshrined in Union law. The economic and financial integration of all Member States, in particular those whose currency is the euro, calls for enhanced surveillance to prevent contagion from a Member State experiencing or threatened with serious difficulties with respect to its financial stability to the rest of the euro area and, more broadly, to the Union as a whole.

(4) The intensity of economic and budgetary surveillance should be commensurate with, and proportionate to, the severity of the financial difficulties encountered and should take due account of the nature of the financial assistance received, which may range from mere precautionary support based on eligibility conditions to a full macroeconomic adjustment programme involving strict policy conditionality. Any macroeconomic adjustment programme should take into account the national reform programme of the Member State concerned in the context of the Union's strategy for growth and jobs.

(5) A Member State whose currency is the euro should be subject to enhanced surveillance under this Regulation when it is experiencing or is threatened with serious financial difficulties, with a view to ensuring its swift return to a normal situation and to protecting the other euro area Member States against potential adverse spill-over effects. Such enhanced surveillance should be proportionate to the seriousness of the problems and should be adjusted accordingly. It should include wider access to the information needed for a close monitoring of the economic, fiscal and financial situation and a regular reporting to the competent committee of the European Parliament and to the Economic and Financial Committee (EFC) or to any subcommittee the latter may designate for that purpose. The same arrangements for surveillance should apply to Member States requesting precautionary assistance from one or several other Member States or third countries, the European Financial Stabilisation Mechanism

[1] OJ C 141, 17.5.2012, p. 7.
[2] Position of the European Parliament of 12 March 2013 (not yet published in the Official Journal) and decision of the Council of 13 May 2013.

(EFSM), the European Stability Mechanism (ESM), the European Financial Stability Facility (EFSF), or another relevant international financial institution such as the International Monetary Fund (IMF).

(6) A Member State subject to enhanced surveillance should also adopt measures aimed at addressing the sources or potential sources of its difficulties. To that end, all recommendations addressed to it in the course of an excessive deficit procedure or of an excessive macroeconomic imbalance procedure should be taken into account.

(7) Economic and budgetary surveillance should be strongly reinforced for Member States subject to a macroeconomic adjustment programme. Because of the comprehensive nature of the latter, the other processes of economic and budgetary surveillance should be suspended or, where appropriate, streamlined for the duration of the macroeconomic adjustment programme, with a view to ensuring consistency of economic policy surveillance and to avoiding duplication of reporting obligations. However, when preparing the macroeconomic adjustment programme, all recommendations addressed to the Member State in the course of an excessive deficit procedure or an excessive macroeconomic imbalance procedure should be taken into account.

(8) The challenge posed by tax fraud and evasion has increased considerably. Globalisation of the economy, technological developments, the internationalisation of fraud and the resulting interdependence of Member States reveal the limits of strictly national approaches and reinforce the need for joint action.

(9) The problems presented by tax fraud and evasion in Member States subject to a macroeconomic adjustment programme should be tackled by improving revenue collection in those Member States and enhancing cooperation between the revenue administrations in the Union and in third countries.

(10) Rules should be laid down to enhance the dialogue between the Union institutions, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability. The parliament of a Member State subject to a macroeconomic adjustment programme or to enhanced surveillance should be kept informed in accordance with national rules and practice.

(11) Member States should involve the social partners and civil society organisations in the preparation, implementation, monitoring and evaluation of financial assistance programmes, in accordance with national rules and practice.

(12) Before a Council decision relating to a macroeconomic adjustment programme under this Regulation is adopted, the relevant bodies of the ESM and of the EFSF should have the opportunity to hold a discussion on the outcome of negotiations between the Commission – acting on behalf of the ESM or the EFSF, in liaison with the European Central Bank (ECB) and, where appropriate, the IMF – and the beneficiary Member State on the possible policy conditions attached to that Member State's financial assistance. Memoranda of understanding setting down the detailed conditions for granting financial assistance are to be adopted under the Treaty establishing the European Stability Mechanism and the EFSF Framework Agreement.

(13) Unless otherwise provided, references to financial assistance in this Regulation should also cover financial support granted on a precautionary basis and loans for the recapitalisation of financial institutions.

(14) The decision of the Commission to subject a Member State to enhanced surveillance under this Regulation should be taken in close cooperation with the EFC, the European Supervisory Authority (European Banking Authority) established by Regulation (EU) No 1093/2010 of the European Parliament and of the Council,[3] the European Supervisory Authority (European Insurance and Pensions Authority) established by Regulation (EU) No 1094/2010 of the European Parliament and of the Council,[4] the European Supervisory Authority (European Securities and Markets Authority) established by Regulation (EU) No 1095/2010 of the European Parliament and of the Council[5] (collectively referred to as the 'ESAs') and the European Systemic Risk Board (ESRB) established by Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board.[6] The Commission should also cooperate with the EFC when deciding on whether to prolong enhanced surveillance.

[3] OJ L 331, 15.12.2010, p. 12.
[4] OJ L 331, 15.12.2010, p. 48.
[5] OJ L 331, 15.12.2010, p. 84.
[6] OJ L 331, 15.12.2010, p. 1.

(15) Following a reasoned request by the Member State concerned or, where appropriate, on grounds of exceptional economic circumstances, the Commission is able to recommend reducing or cancelling any existing interest-bearing deposit, non-interest-bearing deposit or fine imposed by the Council in the framework of the preventive or corrective part of the Stability and Growth Pact for a Member State subject to a macroeconomic adjustment programme.

(16) Access to information on the preparatory work undertaken before the adoption of a recommendation under this Regulation should be subject to Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.[7]

(17) Where a decision is taken under this Regulation that a Member State does not comply with the requirements contained in its macroeconomic adjustment programme, and events and analyses clearly show that a mechanism is needed to ensure respect for the obligations towards its creditors and the stabilisation of its economic and financial situation, the Commission is invited to make proposals for such mechanism.

(18) The power to adopt recommendations on the adoption of precautionary corrective measures and on the preparation of a macroeconomic adjustment programme; the power to approve macroeconomic adjustment programmes; the power to adopt decisions on the main policy requirements which the ESM or the EFSF plan to include in the conditionality for financial assistance granted on a precautionary basis, loans for the recapitalisation of financial institutions or any new financial instrument agreed within the framework of the ESM; and the power to recommend the adoption of corrective measures to Member States under post-programme surveillance, should be conferred on the Council. Those powers are of particular relevance to the policy of economic coordination of Member States, which, pursuant to Article 121 TFEU, is to take place within the Council,

HAVE ADOPTED THIS REGULATION:

Article 1 – *Subject matter and scope*

1. This Regulation lays down provisions for strengthening the economic and budgetary surveillance of Member States whose currency is the euro, where those Member States:

(a) experience or are threatened with serious difficulties with respect to their financial stability or to the sustainability of their public finances, leading to potential adverse spill-over effects on other Member States in the euro area; or

(b) request or receive financial assistance from one or several other Member States or third countries, the European Financial Stabilisation Mechanism (EFSM), the European Stability Mechanism (ESM), the European Financial Stability Facility (EFSF), or another relevant international financial institution such as the International Monetary Fund (IMF).

2. This Regulation also lays down provisions for enhanced economic policy coordination.

3. This Regulation shall apply to Member States whose currency is the euro.

4. In applying this Regulation, the Council, the Commission and the Member States shall fully observe Article 152 TFEU. In applying this Regulation and the recommendations adopted hereunder, the Council, the Commission and the Member States shall take into account national rules and practice and Article 28 of the Charter of Fundamental Rights of the European Union. Accordingly, the application of this Regulation and of those recommendations does not affect the right to negotiate, conclude and enforce collective agreements or to take collective action in accordance with national law.

Article 2 – *Member States subject to enhanced surveillance*

1. The Commission may decide to subject to enhanced surveillance a Member State experiencing or threatened with serious difficulties with respect to its financial stability which are likely to have adverse spill-over effects on other Member States in the euro area.

When assessing whether a Member State is threatened with serious difficulties with respect to its financial stability, the Commission shall use, among other parameters, the alert mechanism established under Article 3(1) of Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances[8] or, where

[7] OJ L 145, 31.5.2001, p. 43.

[8] OJ L 306, 23.11.2011, p. 25.

available, the latest in-depth review. The Commission shall also conduct a comprehensive assessment, taking into account, in particular, the borrowing conditions of that Member State, the repayment profile of its debt obligations, the robustness of its budgetary framework, the long-term sustainability of its public finances, the importance of its debt burden and the risk of contagion from severe tensions in its financial sector on its budgetary situation or on the financial sector of other Member States.

The Member State concerned shall be given the opportunity to express its views before the Commission adopts its decision to subject that Member State to enhanced surveillance. Every six months, the Commission shall decide whether to prolong the enhanced surveillance on that Member State.

2. Where the Commission decides to subject a Member State to enhanced surveillance under paragraph 1, it shall duly inform the Member State concerned of all the results of the assessment and shall notify the European Central Bank (ECB), in its supervisory capacity, the relevant ESAs and the ESRB accordingly.

3. Where a Member State is in receipt of financial assistance on a precautionary basis from one or several other Member States or third countries, the EFSM, the ESM, the EFSF, or another relevant international financial institution such as the IMF, the Commission shall subject that Member State to enhanced surveillance.

The Commission shall make public its decisions taken in accordance with paragraph 1 and with this paragraph.

4. Paragraph 3 shall not apply to a Member State receiving financial assistance on a precautionary basis in the form of a credit line, which is not conditional on that Member State adopting new policy measures, provided that the credit line is not drawn.

5. The Commission shall publish, for information purposes, a list of the instruments providing precautionary financial assistance, as referred to in paragraph 3 and shall keep it updated to take into account possible changes in the financial support policy of the ESM, the EFSF or of another relevant international financial institution.

Article 3 – *Enhanced surveillance*

1. A Member State subject to enhanced surveillance shall, after consulting, and in cooperation with, the Commission, acting in liaison with the ECB, the ESAs, the ESRB and, where appropriate, the IMF, adopt measures aimed at addressing the sources or potential sources of difficulties. In so doing, the Member State shall take into account any recommendations addressed to it under Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of budgetary positions and the surveillance and coordination of economic policies,[9] Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure,[10] or Regulation (EU) No 1176/2011 concerning its national reform programme and its stability programme.

The Commission shall inform the competent committee of the European Parliament, the EFC, the Eurogroup Working Group, and the parliament of the Member State concerned, where relevant and in accordance with national practice, of the measures referred to in the first subparagraph.

2. The closer monitoring of the fiscal situation laid down in Article 10(2), (3) and (6) of Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area shall apply to a Member State subject to enhanced surveillance, irrespective of the existence of an excessive deficit in that Member State. The report drawn up in accordance with Article 10(3) of that Regulation shall be submitted on a quarterly basis.

3. On a request from the Commission, a Member State subject to enhanced surveillance pursuant to Article 2(1) shall:

(a) communicate to the ECB in its supervisory capacity, and, where appropriate, to the relevant ESAs, in accordance with Article 35 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, at the requested frequency, disaggregated information on developments in its financial system, including an analysis of the results of any stress test exercises or sensitivity analyses carried out under point (b) of this paragraph;

(b) carry out, under the supervision of the ECB in its supervisory capacity, or, where appropriate, under the supervision of the

[9] OJ L 209, 2.8.1997, p. 1.
[10] OJ L 209, 2.8.1997, p. 6.

relevant ESAs, stress test exercises or sensitivity analyses, as necessary, to assess the resilience of the financial sector to various macroeconomic and financial shocks, as specified by the Commission and the ECB, in liaison with the relevant ESAs and with the ESRB;

(c) be required to submit to regular assessments of its supervisory capacities over the financial sector in the framework of a specific peer review carried out by the ECB, in its supervisory capacity, or, where appropriate, by the relevant ESAs;

(d) communicate to the Commission any information needed for the monitoring of macroeconomic imbalances in accordance with Regulation (EU) No 1176/2011.

On the basis of the analysis of the results of the stress test exercises and sensitivity analyses referred to in point (a) of the first subparagraph, and taking into account the conclusions of the assessment of the relevant indicators of the scoreboard for macroeconomic imbalances established in Regulation (EU) No 1176/2011, the ECB, in its supervisory capacity, and the relevant ESAs shall prepare, in liaison with the ESRB, an assessment of the potential vulnerabilities of the financial system and shall submit that assessment to the Commission, at the frequency indicated by the latter, and to the ECB.

4. On a request from the Commission, a Member State subject to enhanced surveillance pursuant to Article 2(3) shall:

(a) communicate to the Commission, the ECB and, where appropriate, the relevant ESAs, in accordance with Article 35 of Regulations (EU) No 1093/2010, (EU) No 1094/2010 and (EU) No 1095/2010, at the requested frequency, disaggregated information on developments in its financial system, including an analysis of the results of any stress test exercises or sensitivity analyses carried out under point (b);

(b) carry out, under the supervision of the ECB, in its supervisory capacity, or, where appropriate, under the supervision of the relevant ESAs, stress test exercises or sensitivity analyses, as necessary, to assess the resilience of the financial sector to various macroeconomic and financial shocks, as specified by the Commission and the ECB, in liaison with the relevant ESAs and with the ESRB, and share the detailed results with them;

(c) be required to submit to regular assessments of its supervisory capacities over the financial sector in the framework of a specific peer review carried out by the ECB, in its supervisory capacity, or, where appropriate, by the relevant ESAs;

(d) communicate to the Commission any information needed for the monitoring of macroeconomic imbalances in accordance with Regulation (EU) No 1176/2011.

The Commission, the ECB and the relevant ESAs shall treat any disaggregated information communicated to them as confidential.

5. The Commission, in liaison with the ECB and with the relevant ESAs and, where appropriate, with the IMF, shall conduct regular review missions in the Member State subject to enhanced surveillance to verify the progress made by that Member State in the implementation of the measures referred to in paragraphs 1, 2, 3 and 4.

Every quarter, the Commission shall communicate its assessment to the competent committee of the European Parliament and to the EFC. In that assessment, it shall examine, in particular, whether further measures are needed.

The review missions referred to in the first subparagraph shall replace the on-site monitoring provided for in Article 10a(2) of Regulation (EC) No 1467/97.

6. When preparing the assessment referred to in paragraph 5, the Commission shall take into account the results of any in-depth review under Regulation (EU) No 1176/2011, including the evaluation of spill-over effects of national economic policies on the Member State subject to enhanced surveillance, in accordance with Article 5(2) of that Regulation.

7. Where the Commission concludes that, on the basis of the review missions provided for in paragraph 5, further measures are needed and the financial and economic situation of the Member State concerned has significant adverse effects on the financial stability of the euro area or of its Member States, the Council, acting by a qualified majority on a proposal from the Commission, may recommend to the Member State concerned to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme.

The Council may decide to make its recommendation public.

8. Where a recommendation referred to in paragraph 7 is made public:

(a) the competent committee of the European Parliament may offer the opportunity to the Member State concerned and to the Commission to participate in an exchange of views;

(b) representatives of the Commission may be invited by the parliament of the Member State concerned to participate in an exchange of views;

(c) the Council shall inform the relevant committee of the European Parliament in due time about the content of the recommendation.

9. During the course of the enhanced surveillance process, the competent committee of the European Parliament and the parliament of the Member State concerned may invite representatives of the Commission, the ECB and the IMF to participate in an economic dialogue.

Article 4 – *Reporting in the event of financial support for the recapitalisation of financial institutions*

Member States subject to enhanced surveillance or to a macroeconomic adjustment programme receiving financial support for the recapitalisation of their financial institutions shall report twice a year to the EFC on the conditions imposed on those financial institutions, including the conditions relating to executive remuneration. Those Member States shall also report on the credit conditions offered by the financial sector to the real economy.

Article 5 – *Information on envisaged financial assistance requests*

A Member State intending to request financial assistance from one or several other Member States or third countries, the ESM, the EFSF, or another relevant international financial institution, such as the IMF, shall immediately inform the President of the Eurogroup Working Group, the member of the Commission responsible for Economic and Monetary Affairs and the President of the ECB of its intention.

After receiving an assessment from the Commission, the Eurogroup Working Group shall hold a discussion about the intended request with a view to examining, inter alia, the possibilities available under existing Union or euro area financial instruments before the Member State concerned addresses potential lenders.

A Member State intending to request financial assistance from the EFSM shall immediately inform the President of the EFC, the member of the Commission responsible for economic and monetary affairs and the President of the ECB of its intention.

Article 6 – *Evaluation of the sustainability of the government debt*

Where a Member State requests financial assistance from the EFSM, the ESM, or the EFSF, the Commission shall assess, in liaison with the ECB and, where possible, with the IMF, the sustainability of that Member State's government debt and its actual or potential financing needs. The Commission shall submit that assessment to the Eurogroup Working Group where the financial assistance is to be granted under the ESM or the EFSF, and to the EFC where the financial assistance is to be granted under the EFSM.

The assessment of the sustainability of the government debt shall be based on the most likely macroeconomic scenario or a more prudent scenario and budgetary forecasts using the most up-to-date information and taking proper account of the outcome of the reporting referred to in point (a) of Article 3(3) as well as any supervisory task exercised in accordance with point (b) of Article 3(3). The Commission shall also assess the impact of macroeconomic and financial shocks and adverse developments on the sustainability of government debt.

The Commission shall make public the macroeconomic scenario, including the growth scenario, the relevant parameters underpinning the assessment of the sustainability of the government debt of the Member State concerned, and the estimated impact of the aggregate budgetary measures on economic growth.

Article 7 – *Macroeconomic adjustment programme*

1. Where a Member State requests financial assistance from one or several other Member States or third countries, the EFSM, the ESM, the EFSF or the IMF, it shall prepare, in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment programme which shall build on and substitute any economic partnership programme under Regulation (EU) No 473/2013 and which shall include annual budgetary targets.

The draft macroeconomic adjustment programme shall address the specific risks emanating from that Member State for the financial stability in the euro area and shall aim

at rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets.

The draft macroeconomic adjustment programme shall be based on the assessment of the sustainability of the government debt referred to in Article 6, which shall be updated to incorporate the impact of the draft corrective measures negotiated with the Member State concerned, and shall take due account of any recommendation addressed to that Member State under Articles 121, 126, 136 or 148 TFEU and of its actions to comply with any such recommendation, while aiming at broadening, strengthening and deepening the required policy measures.

The draft macroeconomic adjustment programme shall take into account the practice and institutions for wage formation and the national reform programme of the Member State concerned in the context of the Union's strategy for growth and jobs.

The draft macroeconomic adjustment programme shall fully observe Article 152 TFEU and Article 28 of the Charter of Fundamental Rights of the European Union. The Commission shall orally inform the Chair and Vice-Chairs of the competent committee of the European Parliament of the progress made in the preparation of the draft macroeconomic adjustment programme. That information shall be treated as confidential.

2. The Council, acting by a qualified majority on a proposal from the Commission, shall approve the macroeconomic adjustment programme prepared by the Member State requesting financial assistance in accordance with paragraph 1.

The Commission shall ensure that the memorandum of understanding signed by the Commission on behalf of the ESM or of the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council.

3. The Commission shall ensure consistency in the process of economic and budgetary surveillance with respect to a Member State under a macroeconomic adjustment programme to avoid duplication of reporting obligations.

4. The Commission, in liaison with the ECB and, where appropriate, with the IMF, shall monitor the progress made by a Member State in the implementation of its macroeconomic adjustment programme.

Every three months, the Commission shall inform the EFC of such progress. The Member State concerned shall fully cooperate with the Commission and with the ECB. It shall, in particular, provide the Commission and the ECB with all the information that they consider to be necessary for the monitoring of the implementation of the macroeconomic adjustment programme in accordance with Article 3(4).

The Commission shall inform the Chair and Vice-Chairs of the competent committee of the European Parliament orally of the conclusions drawn from the monitoring of the macroeconomic adjustment programme. That information shall be treated as confidential.

5. The Commission, in liaison with the ECB and, where appropriate, with the IMF, shall examine with the Member State concerned the changes and updates that may be needed to its macroeconomic adjustment programme in order to take proper account, inter alia, of any significant gap between macroeconomic forecasts and realised figures, including possible consequences resulting from the macroeconomic adjustment programme, adverse spill-over effects and macroeconomic and financial shocks. The Council, acting by a qualified majority on a proposal from the Commission, shall decide on any change to be made to that programme.

6. The Member State concerned shall consider, in close cooperation with the Commission, whether to take all necessary measures to invite private investors to maintain their overall exposure on a voluntary basis.

7. Where the monitoring referred to in paragraph 4 highlights significant deviations from a Member State's macroeconomic adjustment programme, the Council, acting by a qualified majority on a proposal from the Commission, may decide that the Member State concerned does not comply with the policy requirements contained in its programme. The Commission, in its proposal, shall assess explicitly whether such significant deviations are due to reasons that are not within the control of the Member State concerned.

The budgetary consolidation efforts set out in the macroeconomic adjustment programme shall take into account the need to ensure sufficient means for fundamental policies, such as education and health care.

Where a decision is taken under this paragraph, the Member State concerned shall, in close cooperation with the Commission and in liaison with the ECB and, where appropriate, with the IMF, take measures aimed at stabilising markets and preserving the good functioning of its financial sector.

8. A Member State subject to a macroeconomic adjustment programme experiencing insufficient administrative capacity or significant problems in the implementation of the programme shall seek technical assistance from the Commission, which may constitute, for that purpose, groups of experts composed of members from other Member States and other Union institutions or from relevant international institutions. The objectives and the means of the technical assistance shall be explicitly outlined in the updated versions of the macroeconomic adjustment programme and focus on the area where major needs are identified. Technical assistance may include the establishment of a resident representative and supporting staff to advise authorities on the implementation of the programme.

The macroeconomic adjustment programme, including its objectives and the expected distribution of the adjustment effort, shall be made public.

The conclusions of the assessment of the sustainability of the government debt shall be annexed to the macroeconomic adjustment programme.

9. A Member State subject to a macroeconomic adjustment programme shall carry out a comprehensive audit of its public finances in order, inter alia, to assess the reasons that led to the building up of excessive levels of debt as well as to track any possible irregularity.

10. The competent committee of the European Parliament may offer the opportunity to the Member State concerned and to the Commission to participate in an exchange of views on the progress made in the implementation of the macroeconomic adjustment programme.

11. Representatives of the Commission may be invited by the parliament of the Member State concerned to participate in an exchange of views on the progress made in the implementation of its macroeconomic adjustment programme.

12. This Article shall not apply to instruments providing financial assistance on a precautionary basis, to loans made for the recapitalisation of financial institutions, or to any new ESM financial instrument for which the ESM rules do not provide for a macroeconomic adjustment programme.

For information purposes, the Commission shall establish a list of the financial assistance instruments referred to in the first subparagraph and shall keep it updated to take into account possible changes in the financial support policy of the ESM.

Concerning those instruments, the Council, acting on a recommendation from the Commission, shall, by a decision addressed to the Member State concerned, approve the main policy requirements which the ESM or the EFSF plans to include in the conditionality for its financial support, to the extent that the content of those measures falls within the competence of the Union as laid down by the Treaties.

The Commission shall ensure that the memorandum of understanding signed by the Commission on behalf of the ESM or the EFSF is fully consistent with such a Council decision.

Article 8 – *Involvement of social partners and civil society*

A Member State shall seek the views of social partners as well as relevant civil society organisations when preparing its draft macroeconomic adjustment programmes, with a view to contributing to building consensus over its content.

Article 9 – *Measures to safeguard tax revenue*

A Member State shall, where necessary, take measures in close cooperation with the Commission and in liaison with the ECB and, where appropriate, with the IMF, aiming to reinforce the efficiency and effectiveness of revenue collection capacity and the fight against tax fraud and evasion, with a view to increasing its fiscal revenue.

Article 10 – *Consistency with the Stability and Growth Pact*

1. Where a Member State is subject to a macroeconomic adjustment programme, and the changes thereto, under Article 7 of this Regulation, it shall be exempt from submitting a stability programme, under Article 3 of Regulation (EC) No 1466/97, and shall integrate

the content of such a stability programme into its macroeconomic adjustment programme.

2. Where a Member State subject to a macroeconomic adjustment programme is also the subject of a recommendation under Article 126(7) TFEU or of a decision to give notice under Article 126(9) TFEU for the correction of an excessive deficit:

(a) it shall be exempt from submitting, as appropriate, the reports under Article 3(4a) and Article 5(1a) of Regulation (EC) No 1467/97;

(b) the annual budgetary targets in each macroeconomic adjustment programme shall be integrated into the recommendation or decision to give notice, respectively under Article 3(4) and Article 5(1) of Regulation (EC) No 1467/97, and, where the Member State concerned is subject to a decision to give notice under Article 126(9) TFEU, the measures conducive to those targets in the macroeconomic adjustment programme shall be integrated into the decision to give notice in accordance with Article 5(1) of Regulation (EC) No 1467/97;

(c) with regard to the monitoring provided for by Article 7(4) of this Regulation, it shall be exempt from monitoring under Article 10(1) and Article 10a of Regulation (EC) No 1467/97 and monitoring underlying any decision under Article 4(2) and Article 6(2) of that Regulation.

Article 11 – *Consistency with Regulation (EU) No 1176/2011*

Where a Member State is subject to a macroeconomic adjustment programme, Regulation (EU) No 1176/2011 shall not apply to that Member State for the duration of that programme, save that the indicators in the scoreboard established in Regulation (EU) No 1176/2011 shall be integrated into the monitoring of that programme.

Article 12 – *Consistency with the European Semester for economic policy coordination*

Where a Member State is subject to a macroeconomic adjustment programme, it shall be exempt from the monitoring and assessment of the European Semester for economic policy coordination under Article 2-a of Regulation (EC) No 1466/97 for the duration of that programme.

Article 13 – *Consistency with Regulation (EU) No 473/2013*

Where a Member State is subject to a macroeconomic adjustment programme, Regulation (EU) No 473/2013 shall not apply to that Member State for the duration of that programme, with the exception of Articles 1 to 5 and 13 to 18 of that Regulation.

Article 14 – *Post-programme surveillance*

1. A Member State shall be under post-programme surveillance as long as a minimum of 75 % of the financial assistance received from one or several other Member States, the EFSM, the ESM or the EFSF has not been repaid. The Council, on a proposal from the Commission, may extend the duration of the post-programme surveillance in the event of a persistent risk to the financial stability or fiscal sustainability of the Member State concerned. The proposal from the Commission shall be deemed to be adopted by the Council unless the Council decides, by a qualified majority, to reject it within 10 days of the Commission's adoption thereof.

2. On a request from the Commission, a Member State under post-programme surveillance shall comply with the requirements under Article 3(3) of this Regulation and shall provide the information referred to in Article 10(3) of Regulation (EU) No 473/2013.

3. The Commission shall conduct, in liaison with the ECB, regular review missions in the Member State under post-programme surveillance to assess its economic, fiscal and financial situation. Every six months, it shall communicate its assessment to the competent committee of the European Parliament, to the EFC and to the parliament of the Member State concerned and shall assess, in particular, whether corrective measures are needed.

The competent committee of the European Parliament may offer the opportunity to the Member State concerned to participate in an exchange of views on the progress made under post-programme surveillance.

4. The Council, acting on a proposal from the Commission, may recommend to a Member State under post-programme surveillance to adopt corrective measures. The proposal from the Commission shall be deemed to be adopted by the Council unless the Council decides, by a qualified majority, to reject it within 10 days of the Commission's adoption thereof.

5. The parliament of the Member State concerned may invite representatives of the

Commission to participate in an exchange of views on the post-programme surveillance.

Article 15 – *Voting within the Council*

For the measures referred to in this Regulation, only members of the Council representing Member States whose currency is the euro shall vote and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

A qualified majority of the members of the Council referred to in the first paragraph shall be calculated in accordance with Article 238(3)(a) TFEU.

Article 16 – *Application to Member States in receipt of financial assistance*

Member States in receipt of financial assistance on 30 May 2013 shall be subject to this Regulation as from that date.

Article 17 – *Transitional provisions*

Notwithstanding Article 14, Members States that are under post-programme surveillance on 30 May 2013 shall be subject to the post-programme surveillance rules, conditions and procedures applicable to the financial assistance from which they benefit.

Article 18 – *Informing the European Parliament*

The European Parliament may invite representatives of the Council and of the Commission to enter into a dialogue on the application of this Regulation.

Article 19 – *Reports*

By 1 January 2014, and every five years thereafter, the Commission shall submit to the European Parliament and to the Council a report on the application of this Regulation, accompanied, where appropriate, by a proposal to amend this Regulation. The Commission shall make that report public.

The reports referred to in the first subparagraph shall evaluate, inter alia:

(a) the effectiveness of this Regulation;

(b) progress in ensuring closer coordination of economic policies and sustained convergence of economic performance of the Member States in accordance with the TFEU;

(c) the contribution of this Regulation to the achievement of the Union's strategy for growth and jobs.

Article 20 – *Entry into force*

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 21 May 2013.

§29. Specifications on the Implementation of the Two Pack, 1 July 2013, available at http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/coc/130701_-_two_pack_coc_final_endorsed.pdf

Introduction

The new legislation on economic governance, the so-called Two Pack, has entered into force on 30 May 2013.

The Two Pack consists of two Regulations: 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 (hereinafter, Regulation 1) and, Regulation (EU) No 472/2013 of the European Parliament and of the Council 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 (hereinafter, Regulation 2).

These two new Regulations contribute to strengthening the surveillance mechanisms applicable to all Member States in the Euro Area (EA), while at the same time establish a comprehensive and better aligned surveillance regime for those Member States in the EA threatened with or experiencing serious

difficulties with respect to their financial stability, those in receipt of financial assistance, and those that are in the process of exiting such assistance.

The Two Pack builds on and complements the Stability and Growth Pact (SGP), the European framework for fiscal surveillance.

Regulation 1 applies to all Member States in the EA, with special provisions made for those which are subject to an excessive deficit procedure (EDP). According to this Regulation, all EA Member States will follow a common budgetary timeline and common budgetary rules; in particular, the soundness of national budgetary processes will be enhanced with the obligation to be based on independent macroeconomic forecasts and to set up independent bodies to monitor compliance with national fiscal rules, including the functioning of the automatic correction mechanism called for by the Treaty on Stability, Coordination and Governance in the Economic and Monetary union (TSCG). As part of this common timeline, a new coordinated surveillance exercise will take place annually in the Autumn. This Regulation also fosters a better coordination of national debt issuance plans, establishing a reporting obligation that concerns all EA Member States. For EA Member States in EDP, Regulation 1 introduces additional reporting requirements that will complement those already envisaged in the SGP, allowing for an enhanced monitoring. In this sense, EA Member States in EDP should submit an economic partnership programme describing the structural reforms needed to ensure an effective and lasting correction of the excessive deficit.

Regulation 2 strengthens the monitoring and surveillance procedures for EA Member States experiencing or threatened with serious difficulties with respect to their financial stability, including those EA Member States in receipt of financial assistance and those in the process of exiting such assistance. The strength of the monitoring and the surveillance will depend on the severity of a Member State's particular situation. Surveillance of budgetary policy will build on but go further than the requirements for Member States under an EDP.

These Guidelines consist of four sections and two annexes and concern Member States whose currency is the euro. The first section elaborates on the fiscal surveillance aspects of the implementation of Regulation 1 and Regulation 2. The subsequent sections consist of guidelines on the content and format of draft budgetary plans, debt issuance reports and economic partnership programmes respectively. Annex I presents standardized tables to be contained in draft budgetary plans, for data required in accordance with Article 6 of Regulation 1. Finally, Annex II details some considerations for the national arrangements framing the involvement of independent bodies in the production or endorsement of macroeconomic forecasts pursuant to Regulation 1.

SECTION I: SPECIFICATIONS ON THE IMPLEMENTATION OF THE TWO PACK

The new fiscal surveillance features stemming from the Two Pack for EA Member States are five-fold:

The new common budgetary provisions of Regulation 1 include a common budgetary timeline according to which, by 15 October every Autumn, all Member States in the EA will make public their draft budgets for the forthcoming year for the central government and the main parameters of the draft budgets for all the other sub-sectors of the general government. By that same date, 15 October, all Member States in the EA will submit the draft budgetary plans (DBPs) for the forthcoming year, along with the independent macroeconomic forecast on which they are based. For each EA Member State, the Commission will issue an opinion on the DBP before the final adoption of the budget; in case of particularly serious non-compliance of a plan with the obligations under the SGP, a revised draft plan will be requested. Based on all DBPs, the Commission will also provide a comprehensive overview of the budgetary outlook of the EA as a whole, to be discussed by the Eurogroup. In addition, this new common budgetary timeline also provides for the budget to be adopted or fixed upon by 31 December each year and for reversionary budget procedures to be put in place to ensure that the government remains able to discharge its essential duties in all circumstances.

According to the new common budgetary provisions, EA Member States will have in place independent bodies for monitoring compliance with budgetary rules at the national level, including those incorporating the MTO into national law and assessing the functioning of the national automatic correction mechanism. The independent bodies will also play a role in either the production or endorsement of the independent macroeconomic forecasts upon which the budgetary process should be based.

All EA Member States are required to ex-ante and timely report on their national debt issuance plans.

More stringent reporting requirements are introduced by Regulation 1 for all EA Member States under EDPs. Firstly, a graduated monitoring system for EA Member States in EDP is established, in order to ensure a timely correction of excessive deficit. This should allow an early detection of risks that a Member State does not correct its excessive deficit by the deadline set by the Council, so that appropriate action is taken. Secondly, once this Regulation enters into force, any new EDP (or new step in current EDPs) would imply the submission of an economic partnership programme (EPP), i.e. a roadmap for structural reforms instrumental to ensure an effective and lasting correction of the excessive deficit.

The fiscal dimension of the enhanced monitoring and surveillance established in Regulation 2 builds on but goes further than the requirements for Member States under an EDP. The intensity of the fiscal surveillance is proportionate to the severity of the financial difficulties encountered and to the nature of the financial assistance received.

Accordingly, the fiscal monitoring of Member States subject to enhanced surveillance differs from that applicable to Member States subject to a macroeconomic adjustment programme or to post-programme surveillance.

This section details the implications of these new provisions in the following subsections: those concerning all EA Member States (subsection A), new provisions concerning EA Member States in EDP (subsection B) and new provisions concerning EA Member States in financial difficulties (subsection C).

A. NEW PROVISIONS CONCERNING ALL EURO AREA MEMBER STATES.

The new requirements introduced by Regulation 1 concerning all EA Member States include the annual adoption of national medium-term fiscal plans and submission of DBPs, the setting-up of independent fiscal bodies, the use of independent macroeconomic forecasts and reporting on debt issuance plans. However, Member States subject to a macroeconomic adjustment programme are required neither to submit DBPs nor to report on national debt issuance plans.

The following subdivisions provide some specifications for each of these new obligations.

A.1 National medium-term fiscal plans (Article 4 of Regulation 1)

As a first step of the new common budgetary timeline, Member States will make public their national medium-term fiscal plan at the same time as their Stability Programme (SP) and national reform programmes preferably by 15 April and no later than 30 April. The national medium-term fiscal plan and the stability programme can be the same document.

National medium-term fiscal plans are targeted at the national audience and aim at enhancing national ownership of the fiscal strategy. Given their national dimension, there is no specific guideline on the format and content of such plans, however, they should comply with the minimum requirements set-up by Directive 2011/85/EU.

According to Regulation 1, they should be published at the same time as SPs, contain at least the information required for the SPs, be based on independent macroeconomic forecasts and include information on how the reforms and measures set out are expected to contribute to the targets and national commitments established within the framework of the Union's Strategy for growth and jobs. They should also indicate whether the budgetary forecasts have been produced or endorsed by an independent body. Their content should be consistent with the framework for economic policy coordination in the context of the annual cycle surveillance, as established in Article 4 of Regulation 1. Additionally, indications on the expected economic returns on non-defence public investment projects that have a significant budgetary impact should be included either in these national medium-term fiscal plans or in the National Reform Programmes.

A.2 Assessment of DBPs.

All EA Member States will make public their draft budget for the forthcoming year no later than 15 October every year. By that same date, they must submit their DBP to the Commission and the Eurogroup. Whereas the draft budget is a national act that, according to national procedures typically involving the national parliament, proposes the nature, amount and allocation of the resources of the State, the DBP is a synthetic document presenting the main aspects of the budgetary situation of the general government and its sub-sectors for the year to come.

According to Article 6 of Regulation 1, the DBP will be consistent with the recommendations

issued in the context of the SGP and the annual cycle of surveillance, including the macroeconomic imbalances procedure as established by Regulation (EU) No 1176/2011.

As described in Article 6(3) of Regulation 1, DBPs will provide detailed information on budgetary policy measures for the year to come. Guidelines on DBPs' content and format are contained in section II.

The DBPs will be assessed by the Commission, taking into account to the extent possible the specific national fiscal schedule and parliamentary procedures. Two assessments will be provided: an opinion on each Member State's DBP and an overall assessment of the budgetary situation and prospects of the EA as a whole. This latter exercise mirrors the horizontal assessment of Stability and Convergence Programmes taking place in Spring, but, instead of looking at medium-term fiscal plans, it will be focusing only on the year to come. Its main purpose will be to focus on the adequacy of draft measures contained in the DBP to comply with SGP requirements and existing country-specific recommendations. It will also include additional elements such as sensitivity analyses that provide indications of the risks to public finance sustainability in the event of adverse economic, financial or budgetary developments. Thus, the Autumn exercise provides an important milestone to assess whether the orientations contained in the SPs and assessed by the European Commission and the Council during the European Semester have been translated into concrete plans.

Commission opinions on national DBPs concern all EA Member States, either indicating a positive assessment of the plan or pointing out underlying risks which could stem from its implementation, with the possibility to request a revised plan in case of particularly serious non-compliance with the SGP. Particularly serious non-compliance could be found in the following situations. These examples are non-exhaustive:

If an obvious breach of the criteria laid down in Article 126(2) of the TFEU would follow from the implementation of the DBP;

For Member States in the preventive arm of the SGP, if the fiscal effort envisaged in the DBP falls clearly short of the fiscal effort recommended by the Council in accordance existing Council recommendation issued in accordance with Article 121(4) of the TFEU;

For Member States in the corrective arm of the SGP, if the fiscal effort envisaged in the DBP, i.e. the forecast change in the structural balance, falls clearly short of the recommended fiscal effort by the Council in accordance with Article 126(7) or 126(9) TFEU;

Where the implementation of the initial budgetary plan would put at risk the financial stability of the Member State concerned or risk jeopardizing the proper functioning of the economic and monetary union.

The opinions are to be adopted by the Commission, made public and be presented to the Eurogroup. The Commission may also present its opinion to the Parliament of the Member State concerned and/or to the European Parliament at their request.

The timeline for the Commission's assessment and corresponding actions to be taken are presented in Table I:

Table I - Process for the Autumn assessment of DBPs (Article 7)

Table I – Process for the Autumn assessment of DBPs (Article 7)

	By when?	Who?	What?
	15 October	Each Member State	Submits its DBP
Individual assessment of DBPS	***Normal process***		
	End-November at the latest	Commission	Adopts an Opinion on each DBP
	If Commission detects particularly serious non-compliance with SGP obligations in a DBP		
	1 week of submission [Indicative: 23 October]	Commission	Consults the Member State concerned
	2 weeks of submission [Indicative: 30 October]	Commission	Adopts an Opinion requesting a revised DBP to be submitted within 3 weeks
	3 weeks of the date of Commission's Opinion at the latest [Indicative: 21 November at the latest]	Member State concerned	Submits a revised DBP
	3 weeks of submission of revised DBP at the latest [Indicative: 12 December at the latest]	Commission	Adopts a new Opinion on revised DBP
	No fixed deadline (in principle end-November)	Commission	Overall assessment of the budgetary situation and prospects in the EA as a whole, on the basis of national DBPs and their interaction.

A.3 The setting-up of independent bodies (Article 2(1)(a) and Article 5 of Regulation 1).

Regulation 1 mandates the setting-up of independent bodies, spelling out principles to ensure the independence of these bodies. As established in Article 2(1)(a), ' "independent bodies" means bodies that are structurally independent or bodies endowed with functional autonomy vis-à-vis the budgetary authorities of the Member State, and which are underpinned by national legal provisions ensuring a high degree of functional autonomy and accountability, including:

(i) a statutory regime grounded in national laws, regulations or binding administrative provisions;

(ii) not taking instructions from the budgetary authorities of the Member State concerned or from any other public or private body;

(iii) the capacity to communicate publicly in a timely manner;

(iv) procedures for nominating members on the basis of their experience and competence;

(v) adequate resources and appropriate access to information to carry out their given mandate;'

According to Regulation 1, these independent bodies have two major roles to play, which can be fulfilled by a single independent body or different ones. Firstly, they should produce or endorse the macroeconomic forecasts underpinning the budgetary process. Secondly, they should monitor Member States' compliance with national fiscal rules, including those rules incorporating in the national budgetary processes their medium-term budgetary objective (MTO) and the related activation of the correction mechanism linked to significant deviations from the MTO or the adjustment path towards it. In this sense, Regulation 1 echoes Article 6(1) of the Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States and Principle (7) of the Communication from the Commission on the common principles on national fiscal correction mechanisms.[1]

Box: The role of independent fiscal institutions

With the strengthening of the legal framework regarding fiscal governance in the EU, independent fiscal institutions have gradually become a prominent feature of national fiscal frameworks. This development is supported in a coherent way by several provisions in the "Six Pack", the inter-governmental TSCG and more recently the "Two Pack".

First, the Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States established that effective and timely monitoring of compliance with the national numerical fiscal rules should be based on reliable and independent analysis carried out by independent bodies or bodies endowed with functional autonomy vis-à-vis the fiscal authorities of the Member States (Article 6(1)(b)). This requirement applies to all Member States except the United Kingdom.

Second, the Member States that are bound by the provisions in Title III of the TSCG have agreed upon involving national independent bodies in monitoring compliance with the structural budget balance rule enshrining the medium-term budgetary objective (MTO) at national level (Article 3(2)), including as regards the associated correction mechanism. Further specifications on this role stemming from the TSCG provisions are laid down in the Commission Communication COM(2012)342 on common principles on the national fiscal correction mechanism, namely as regards: i) the carrying out of assessments related to activating the correction mechanism, monitoring whether the correction is proceeding in accordance with national rules and plans as well as to triggering, extending or exiting escape clauses; ii) the obligation of Member States to comply or alternatively explain publicly why they are not following the assessments of the independent bodies; iii) features ensuring a high degree of functional autonomy (Principle 7).

Third, Regulation 1 of the "Two-Pack" further reinforces the role of independent fiscal institutions in the EA Member States by firmly anchoring in the EU law the definition, independence-related features and tasks of such bodies, in correlation with the relevant provisions of the Council Directive 2011/85/EU and the TSCG. In particular, Article 5 of Regulation 1 lays down the following key functions: i) monitoring compliance with numerical fiscal rules incorporating in the national budgetary processes the MTO and numerical fiscal rules as referred to in the Council Directive 2011/85/EU; ii) providing public assessments with respect to national fiscal rules, inter alia relating to activation of the correction mechanism for cases of significant observed deviation from the MTO or the adjustment path towards it, monitoring whether the correction is proceeding in accordance with national rules and plans as well as the occurrence and cessation of circumstances allowing a temporary deviation from the MTO or the adjustment path towards it.

A.4 Production or endorsement of independent macroeconomic forecasts (Article 2(1)(b) and Article 6(3)(f) of Regulation 1).

[1] COM(2012)342: Communication on common principles for national fiscal correction mechanisms. Following-up on Articles 3(1)(e) and 3(2) of the Treaty on Stability, Coordination and Governance in the EMU (TSCG), this Communication establishes that independent bodies acting as monitoring institutions should support the credibility and transparency of the correction mechanism.

According to Regulation 1, DBPs, national medium-term fiscal plans and draft budgets should be based on independent macroeconomic forecasts, which are those produced or endorsed by independent bodies in the sense of Article 2(1)(a). Member States are required to communicate whether those independent macroeconomic forecasts are either produced or endorsed by the independent body.

According to Article 4(4) of Regulation 1, Member States may decide to involve the independent body in the preparation of the budgetary forecasts (either by production or endorsement), or on the contrary, assign the development of these budgetary forecasts to another institution with no further involvement of the independent body. In this sense, Member States are therefore required to report in their national medium-term fiscal plans whether the independent body was involved in the preparation of budgetary forecasts (through their production or their endorsement) or not. These budgetary forecasts will be made public together with the national medium-term fiscal plans and the draft budgets that they underpin.

Member States will define and adopt transparent procedures for the independent production/endorsement of the macroeconomic forecasts underpinning the budgetary process, therefore setting out specific criteria and procedural safeguards in accordance with the provisions of Chapter III of Council Directive 2011/85/EU[2]. The following paragraphs outline key milestones that Member States should consider when deciding on the precise internal procedures.

In the case of macroeconomic forecasts produced by the independent body, the latter should have in place a dedicated procedure for this purpose, in accordance with Directive 2011/85/EU, which should be consistent with the stages of the national budgetary process and related timetable. The Ministry of Finance should provide support to facilitate the production of the macroeconomic forecasts by the independent body, such as access rights to relevant budgetary information, including budgetary execution data. Additionally, the national legislation or the internal procedures of the Ministry of Finance should define rules governing the handling of forecasts received from the independent body.

Analogously, for the macroeconomic forecasts produced by public sector entities and submitted for endorsement to the independent body, Member States should lay down implementing aspects of the endorsement process (including deadlines for action and the consequences arising from the forecast-related decisions of the independent body), without prejudice to the independent assessment of the endorsing body. The independent body should make clear whether it endorses or not the forecasts and provide the underlying justifications. It is understood that, while the endorsement would enable the use of the respective forecasts for fiscal planning purposes, a negative decision would typically trigger a review of the forecasts in the light of comments issued by the independent body. A revised forecast may be produced and submitted for assessment to the independent body, which would have to issue a new decision.

Irrespective of the choice of having forecasts produced or endorsed independently, Member States should have in place specific mechanisms to cope with situations in which there are different views between the independent body and the Ministry of Finance on the main variables of the forecast. These could, for example, take the form of arrangements to reach an agreement.

In order to support the setting up or strengthening of effective national arrangements framing the involvement of independent bodies in the production or endorsement of macroeconomic forecasts, some optional considerations and suggestions are provided in Annex II.

A.5 Reporting on debt issuance plans (Article 8 of Regulation 1).

EA Member States are required to ex-ante report on their national debt issuance plans to the Commission and the Eurogroup. According to Article 8 of Regulation 1, the harmonised form and content of these report requirements should be laid down by the Commission in cooperation with the Member States.

Against this background, Section III sets out some Guidelines on the implementation of this provision.

[2] Hard-wiring the essential features of these procedures in legislation would be the preferred choice to ensure process clarity, stability and transparency, as well as effective compliance; however, given the markedly technical characteristics of the forecasting process, additional elements may be specified through other means (e.g. administrative procedure, budgetary circular/order).

B. NEW PROVISIONS CONCERNING EURO AREA MEMBER STATES IN EDP.

The reporting requirements set out below concern all EA Member States in EDP, with the exception of those subject to a macroeconomic adjustment programme in accordance with Article 7 of Regulation 2.

B. 1 Additional reporting by EDP Member States.

Article 10 of Regulation 1 allows the Commission to request the activation of additional reporting requirements in the form of a letter, when recommending to the Council to place a Member State in EDP.

These more stringent reporting requirements by the Member State come on top of the reporting on action taken already foreseen by Regulation 1467/97, as explained in Table II:

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Table II - EDP reporting obligations added by the Two Pack for EA Member States.

Table II – EDP reporting obligations added by the Two Pack for EA Member States.

SGP reporting required by Regulation 1467/97 (as reformed by the Six-Pack)	ADDITIONAL reporting required by *Regulation 1upon request by the Commis*
Within deadline set in 126(7) TFEU recommendation (max. 6 months), report on action taken to correct the excessive defi	
(Article 3(4)(a)) Targets for government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side consistent with the Council's recommendation, as well as information on the measures taken and the nature of those envisaged to achieve the targets.	*(Article 10(2))* Comprehensive assessment of in-year budgetary execution for the g government and its sub-sectors. The financial risks associated with contingent lia with potentially large impacts on public budgets, as referred to in Article 14(3) of Di 2011/85/EU should also be covered by the assessment to the extent that they may con to the existence of an excessive deficit.
	6 months later and every 6 months until abrogation/stepping up
	(Article10(3)) For the general government and its sub-sectors, in-year budgetary exe budgetary impact of discretionary measures taken on both the expenditure and the re side, targets for the government expenditure and revenues, and information on the me adopted and the nature of those envisaged to achieve the targets. The specific con these reporting requirements will be detailed in a delegated act.
	If subject to an Article 11(2) Commission recommendation for adoption of further me because compliance with correction by the deadline is at risk: (Article 11(3)) Reg measures adopted in response to this recommendation, including the budgetary impac discretionary measures taken, targets for the government expenditure and rev information on the measures adopted and the nature of those envisaged to achie targets, and information on the other actions being taken in response to the Comm recommendation
Following 126(9) TFEU decision to give notice, report on action taken in response thereto	
(Article 5(1)(a)) Same as under Article 3.4a plus information on the actions being taken in response to specific Council recommendations in the decision to give notice.	
	3 months later and every 3 months until abrogation
	(Article 10(5)) Same content as biannual report following 126(7) TFEU recommen plus information on the actions being taken in response to the Council decision t notice.
	Within the deadline set by the Commission
(Article 10(a)) If Member State subject to 126(8) or 126(11) decisions, all necessary information to prepare and conduct on-site monitoring missions.	*(Article 10(6)(a))* Comprehensive independent audit of the public accounts of all sub of the general government conducted preferably in coordination with national suprem institutions, aiming to assess the reliability, completeness and accuracy of those accounts for the purposes of the excessive deficit procedure.
	(Article 10(6)(b)) Any available additional information for the purposes of monitori progress towards the correction of the excessive deficit.

B. 2 New recommendation by the Commission in case of risks of non-compliance with the deadline to correct the excessive deficit.

An important dimension of the EDP is the regular monitoring and assessment by the Commission of the Member State's compliance with EDP recommendations on the basis of the Member State's reporting on action taken, Commission forecasts and the Member States' plans, as described for example in the SP or the DBP.

When assessments are positive, the procedure is held in abeyance; when negative, the Commission recommends that the Council decides on non-effective action and the EDP is stepped-up. So far, for cases in-between, when risks to the correction were detected, warnings have been sent to the authorities to encourage them to take additional measures in order to prevent their procedure from being stepped-up at a later stage.

As a new provision included in Article 11(2) of Regulation 1, in the case of a risk of non-compliance with the deadline to correct the excessive deficit, the Commission may address an autonomous recommendation to the Member State regarding full implementation of the measures provided for in the recommendation under Article 126(7) TFEU or the decision to give notice under Article 126(9) TFEU, adoption of other measures, or both, within a timeframe consistent with the deadline for the correction of its excessive deficit. This additional recommendation would also define a timeframe for the Member State to publicly report on action taken.

B. 3 Implications of the new provisions for Commission actions under Article 126.

Some of the new provisions introduced by Regulation 1 will be taken into account by the Commission in the context of the EDP, as they will enrich its assessment. In particular, as established in Article 12 of this Regulation:

- Compliance with the Commission's opinion on the DBP will be taken into consideration in the stages leading to the opening of an EDP:

o when drafting a report under Article 126(3);

o when recommending a Council decision under Article 126(6) and the imposition of a non-interest bearing deposit after the opening of an EDP.

- Compliance with any autonomous Commission recommendation, issued in accordance to Article 11(2) of Regulation 1, will be taken into account when monitoring and considering whether effective action has been taken in response to Article 126(7) TFEU recommendation or Article 126(9) TFEU decision to give notice. In particular, (non-) compliance with such autonomous Commission

recommendation will be considered as a mitigating (aggravating) factor in the eventual careful analysis of the reasons for the shortfall with respect to the recommended target.

B.4 Economic partnership programmes (Article 9 of Regulation 1).

Excessive public deficit may be partially rooted on structural weaknesses. Therefore, budgetary measures might be insufficient to ensure a lasting correction of the excessive deficit. In this sense, Regulation 1 provides for economic partnership programmes (EPPs) to be submitted by Member States in which an EDP is opened. Specifically, any new EDP (or, according to Article 17(2), any new step in EDPs already opened at the time the Two Pack enters into force) will trigger the submission of an EPP, defined as a roadmap for the structural reforms instrumental to an effective and lasting correction of the excessive deficit.

EPPs should build on the overall national strategy as described in the National Reform Programme. They should identify specific priorities enhancing competitiveness and long-term sustainable growth and addressing structural weaknesses, and detail the main fiscal structural reforms in particular those referring to taxation, pension and health systems and budgetary frameworks that will be instrumental to correct the excessive deficit in a lasting manner. Where appropriate, the EPPs should identify the potential financial needs and resources.

The EPP should be developed by the concerned Member State in view of its specific situation. Given the range of possible situations and the importance of national ownership of such programmes, this Code of Conduct does not provide specific instructions for the content and timeline of such programmes. To ensure cross-country consistency of EPPs, a model structure is included in Section IV.

Taking into account that structural weaknesses to be identified in EPPs may already be contained in the concerned Member State's Country Specific Recommendations (CSRs) and, as such, may already be subject to surveillance in the context of the European Semester, the EPP should be considered as a focused update of the SP and the National Reform Programme (NRP), taking into account CSRs.

In order to streamline procedures, Regulation 1 envisages some EPPs' specificities when a Member State enters into an Excessive Imbalances Procedure (EIP) or is already in one. In these cases: (i) the EPP would be subsumed as appropriate in and replaced by the corresponding Corrective Action Plan - if the Member State enters into an EIP after drafting the corresponding EPP, or (ii) when an EIP already exists at the time the EPP should be submitted, the Corrective Action Plan will stand for it or may be adapted where relevant and thus, there is no longer an obligation to submit it[3].

Submission and endorsement process.

According to Regulation 1, it is the Council decision on the existence of an excessive deficit that triggers the submission of an EPP. Thus, EPPs are envisaged as a 'one-off[1] document to be submitted when the EDP is opened, detailing the policy priorities and the fiscal structural strategy designed to accompany the correction of the excessive deficit situation.

Regulation 1 states that Member States should submit their programme to the Commission and the Council along with the report on action taken they provide in the context of the EDP, in response to Article 126(7) TFEU Council recommendation.[4] As established in Regulation 1, the Council, acting on a proposal from the Commission, will adopt an opinion on the EPP.

Monitoring

In order to streamline procedures, the monitoring of EPPs' implementation will be based on Member States reporting in NRP and/or SP, as appropriate, within the context of the European Semester. Reforms set out in the EPP would therefore be expected to be further

[3] The opening of an EDP qualifies as a "relevant major change in economic circumstances" in the sense of Article 9(4) of Regulation EU No 1176/2011, which in turn allows for a revision of the Corrective Action Plan, according to the same Regulation.

[4] Or, as a transitional provision, for Member States already in EDP when the Two Pack enters into force, and where any further step is being taken in the context of the EDP, the EPP should be submitted together with the report on action taken in response to the Council decision to give notice under Article 126(9) TFEU.

taken up in the following updates of the NRP and SP.

In case the concerned Member State is subject to an EIP, the provisions set out in Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances will apply instead. Similarly, Member States subject to a macroeconomic adjustment programme will not submit an EPP in case they enter in EDP or are already in one, as the macroeconomic adjustment programme should substitute it.

C. BUDGETARY SURVEILLANCE CONCERNING EURO AREA MEMBER STATES IN FINANCIAL DIFFICULTIES.

As stated above, Regulation 2 strengthens the monitoring and surveillance procedures for Member States experiencing or threatened with serious difficulties with respect to their financial stability, Member States in receipt of financial assistance, and Member States in the process of exiting such assistance. As this strengthened surveillance encompasses also a fiscal dimension, - which builds on the requirements under an EDP but goes beyond them-, this Regulation also introduces new provisions to be duly considered.

The fiscal side of this strengthened surveillance is modulated according to the severity of the financial difficulties faced by the Member State and to the nature of the financial assistance received. In particular, Regulation 2 envisages three different possible scenarios.

C.1. Member States subject to enhanced surveillance.

Member States subject to enhanced surveillance must, regardless of the existence of an excessive deficit, comply with the additional reporting requirements established in Article 10 (2), (3) and (6) of Regulation 1, as detailed above.

In particular, a Member State under enhanced surveillance will:

- Carry out a comprehensive assessment of in-year budgetary execution for the general government and its sub-sectors, as stated in Article 10(2) of Regulation 1

- Report regularly on the in-year budgetary execution, the budgetary impact of discretionary measures on the expenditure and revenue sides, targets for the government expenditure and revenues and the measures adopted and envisaged to achieve the targets, according to Article 10(3) of Regulation 1;

- Carry out, on a request from the Commission, a comprehensive independent audit of the public accounts, as stated in Article 10(6) of Regulation 1.

C.2. Member States subject to a macroeconomic adjustment programme.

Where a Member State requests financial assistance, it is required to prepare together with the Commission, in liaison with the ECB, a draft macroeconomic adjustment programme, unless this assistance is on a precautionary basis, is granted for the recapitalisation of financial institutions or is not accompanied with a macroeconomic adjustment programme under the ESM rules. The Council approves the macroeconomic adjustment programme, on a proposal from the Commission.

Once a Member State is subject to a macroeconomic adjustment programme, and irrespective of the existence of an excessive deficit:

- It will carry out a comprehensive audit of public finances to assess the reasons that led to the building up of excessive debt levels. The scope of this audit will generally be analytical, but it can be extended to include accounting or statistical fields on a case-by-case basis, when this extension is necessary for having an accurate understanding of the Member State's fiscal situation. Additionally, in the cases where financial assistance is requested to the EFSM, the EFSF or the ESM, the Commission, in liaison with the ECB, has to assess the sustainability of government debt and the actual or potential needs of the Member State seeking the financial assistance. This sustainability assessment should be updated to incorporate the impact of the draft corrective measures negotiated with the Member State concerned.

- It will comply with the annual budgetary targets included in the macroeconomic adjustment programme, based on the assessment of the sustainability of the government debt.

- In case there is an EPP for the Member State concerned, the programme will build on and substitute it.

- The implementation of Regulation 1 is suspended for the Member State subject to a macroeconomic adjustment programme, for the duration of the programme, with the exception of Articles 1 to 5 and 13 to 18.

Programme Member States have their budgetary surveillance framework considerably simplified so as to avoid overlaps and duplications of reporting obligations. In this sense:

- Programme Member States are exempted from submitting a SP (but should submit the SP tables) and are required to integrate the content of such SP into its macroeconomic adjustment programme.

- If the Member State is the subject of a recommendation under Article 126(7) TFEU:

o it is exempted from submitting, as appropriate, the reports on actions taken in response to the 126(7) TFEU recommendation;

o annual budgetary targets set in the macroeconomic adjustment programme will be integrated into the above-mentioned recommendation;

o monitoring of the progress made in the implementation of the macroeconomic adjustment programme replaces monitoring of implementation of action taken by the Member State in response to the recommendation of Article 126(7) TFEU.

- If the Member State is under an Article 126(9) TFEU decision to give notice:

o it is exempted from submitting, as appropriate, the reports on actions taken in response to the 126(9) TFEU decision to give notice;

o annual budgetary targets set in the macroeconomic adjustment programme, as well as the measures conducive to those targets will be integrated into the abovementioned decision to give notice;

o monitoring of the progress made in the implementation of the macroeconomic adjustment programme replaces monitoring of implementation of action taken by the Member State in response to the decision to give notice of Article 126(9) TFEU.

C.3. Member States under post-programme surveillance.

According to Regulation 2 a Member State will be under post-programme surveillance until it has repaid at least 75% of the financial assistance received. From the fiscal monitoring perspective, the post-programme surveillance implies that, on a request from the Commission, the Member State must provide the information mentioned in Article 10(3) of Regulation 1, as summarized above.

SECTION II. GUIDELINES ON THE FORM AND CONTENT OF DRAFT BUDGETARY PLANS.

Regulation 1 foresees the annual submission of a DBP by each Member State in the EA to the Commission and the Eurogroup no later than 15 October. The requirements for the DBP are described in Article 6 of this Regulation.

According to Article 6(5), the specification of the content of the DBP is set out in a harmonised framework established by the Commission in cooperation with the Member States. The purpose of this section is to provide such harmonised framework.

The guidelines set out below should be considered as a code of good practice and checklist to be used by Member States in preparing DBP. Member States are expected to follow the guidelines, and to justify any departure from them.

The DBP should essentially present an update of some of the standardized set of tables from the Stability Programmes, complemented by detailed information on the measures presented in the DBP.

In line with existing guidelines provided for Stability and Convergence Programmes, the concepts used should be consistent with the standards established at European level, notably in the context of the European system of accounts (ESA).

The DBP should allow the identification of sources of possible discrepancies from the budgetary strategy in the most recent Stability Programme. For this reason, besides the required data for the forthcoming year, i.e. the year for which the budget is being drafted (year t+1 in the standardized tables in Annex I), the corresponding estimates for the current year (t in the standardized tables in Annex I) should also be included, together with the outcomes of the previous year (t-1 in the standardized tables in Annex I), consistent with data reported under the excessive deficit procedure.

A. Independent macroeconomic forecasts and assumptions. Estimated impact of aggregated budgetary measures on economic growth.

DBPs should be based on independent macroeconomic forecasts. Accordingly, Tables 1a, 1b, 1c, 1d of the DBP, included in Annex I, present the main expected economic

developments and important economic variables used in the preparation of the DBP.

In particular, Table 1a contains data on real GDP rate of change observed in year t-1, and real GDP rate of change forecasted for years t and t+1. The estimated impact on economic growth of the aggregated budgetary measures envisaged in the DBP should be included in these forecasted growth rates for years t and t+1. Therefore, following Article 6(3)(g) of Regulation 1, this estimated impact on economic growth is recommended to be specified in Table 1a or otherwise detailed in the methodological annex.

The basic assumptions upon which macroeconomic forecasts are based should be presented in table 0.i) of Annex I. Further main assumptions typically relevant for the production of

macroeconomic forecasts are presented in table 0.ii). Member States may find useful to check the latter when trying to summarise the assumptions upon which the independent macroeconomic forecasts are based.

Member States should also make explicit whether the independent macroeconomic and budgetary forecasts have been produced or endorsed by the independent body.

B. Budgetary targets

The budgetary targets for the general government balance, broken-down by sub-sector of the general government (central government, state or regional government for Member States with federal or largely decentralized institutional arrangements, local government and social security) should be presented in the corresponding tables also included in Annex I. As stated in Article 7(2) of Regulation 1, the Commission should assess whether the DBP complies with the budgetary policy obligations laid down in the SGP. In order to make this assessment possible, structural budgetary targets and one-off and other temporary measures are also among the required information in this section. Compliance with the debt benchmark is assessed against debt developments data, which should be consistent with the previously detailed budgetary targets and macroeconomic forecasts. This information, which is required in the tables 2.a, 2.b and 2.c of Annex I, could be complemented with data on contingent liabilities that could affect the medium-term government debt position.

To allow for a comprehensive understanding of the government balance and of the budgetary strategy in general, information should be provided on expenditure and revenue targets and on their main components. This information is contained in table 4a of Annex I. Bearing in mind the conditions and criteria to establish the expenditure growth to be assessed in accordance with Article 5(1) of Regulation 1466/97, which defines an expenditure benchmark, the DBP also presents the planned growth of government expenditure which receives a special treatment in the computation of the expenditure benchmark.

A breakdown of the general government expenditure by function is contained in the corresponding tables in Annex I. Where possible, Member States are encouraged to provide this information broken down into the categories detailed in the Classification of the Functions of Government (COFOG). In any case, according to Article 6(3)(d)) of Regulation 1, relevant information on the general government expenditure on education, healthcare and employment should be provided, either in the proposed table or otherwise detailed in the DBP.

C. Public expenditure and revenue under the no-policy-change scenario and Discretionary Budgetary Measures

Each Member State should appropriately define a scenario for expenditure and revenue at unchanged policies for the forthcoming year (i.e. pre-budget, excluding the new measures that have been proposed in the context of the budgetary process) and make public the underlying assumptions, methodologies and relevant parameters. The 'no-policy change' assumption involves the extrapolation of revenue and expenditure trends before adding the impact of discretionary

budgetary measures decided in the context of the budgetary process for the forthcoming year. The results of projections for the expenditure and the revenue sides on the basis of the unchanged policy assumption are presented in table 3 of Annex I, while the set of tables 5.a, 5.b and 5.c describe and summarize the discretionary measures in the process of being adopted by the different sub-sectors to reach the budgetary targets.

These three tables should contain an exhaustive technical description of the measures being taken by the different sub-sectors, together with information concerning the motivation, the design and the implementation of the measure.

The target of the budgetary measure should also be detailed, in ESA terms, specifying whether it is a discretionary expenditure or revenue measure. Furthermore, the precise component of the expenditure or revenue side targeted by the discretionary measure should also be specified. This will make the comparison between the targets and the no-policy-change outcomes feasible. In other words:

- On the revenue side, it should be stated whether it is a measure targeting:

o Taxes on production and imports (ESA code: D.2)

o Current taxes on income, wealth, etc. (ESA code: D.5)

o Capital taxes (ESA code: D.91)

o Social contributions (ESA code: D.61)

o Property income (ESA code; D.4)

o Other (ESA code: P.11+P.12+P.131+D.39+D.7+D.9 {other than D.91})

- On the expenditure side, it should be stated whether it is a measure targeting:

o Compensation of employees (ESA code: D.1)
o Intermediate consumption (ESA code: P.2)

o Social payments (social benefits and social transfers in kind supplied to households via market producers ESA code: D.62, D.6311, D.63121, D.63131), of which, where applicable, unemployment benefits including cash benefits (D.621 and D.624) and in kind benefits (D.6311, D.63121, D.63131) related to unemployment benefits should be also specified.

o Interest expenditure (ESA code: D.41) o Subsidies (ESA code: D.3)

o Gross fixed capital formation (ESA code: P.51)

o Capital transfers (ESA code: D.9)

o Other (ESA code: D.29+D.4 {other than D.41} +D.5+D.7+P.52+P.53+K.2+D.8)

The time profile of the measures should be specified in order to distinguish measures with a transitory budgetary effect that does not lead to a sustained change in the intertemporal budgetary position (i.e. in the permanent level of revenues or expenditure) from those having a permanent budgetary effect that leads to a sustained change in the intertemporal budgetary position (i.e. in the permanent level of revenues or expenditure). According to Regulation 1 measures with an estimated budgetary impact above 0.1% of GDP should be described in detail, whereas those with a budgetary impact below this threshold need to be identified and their aggregated budgetary impact indicated. To the extent possible, smaller measures affecting the same revenue / expenditure category could be meaningfully grouped together. However, in the context of the Economic and Financial Committee (Alternates composition) Member States have agreed to further improve the quality of discretionary tax measures (DTM) reporting, committing themselves to describe in detail all DTM with a minimum budgetary impact of 0.05% of GDP. Thus, in the context of the DBPs and to improve consistency across reporting requirements, Member States are also encouraged to provide detailed information on all discretionary budgetary measures with an estimated budgetary impact above 0.05% of GDP.

DBPs should also contain information on the estimated budgetary impact of discretionary measures at the level of each sub-sector, included in tables 5.a, 5.b and 5.c of Annex I. The budgetary impact of all measures is to be recorded in terms of the incremental impact -as opposed to recording the budgetary impact in terms of levels- compared to the previous year baseline projection. This implies that simple permanent measures should be recorded as having an effect of +/- X in the year(s) they are introduced and zero otherwise, i.e. the overall impact on the level of revenues or expenditures must not cancel out. If the impact of a measure varies over time, only the incremental impact should be recorded in the table[5]. By their nature, one-off measures should be always recorded as having an effect of +/-X in the year of the first budgetary impact and -/+ X in the following year, i.e. the overall impact on the level of revenues or expenditures in two consecutive years must be zero[6].

[5] For instance: a measure which takes effect in July of year t may have a total impact of 100 in the first year and 200 in the years after. In the reporting tables, this should be recorded as +100 in year t and again +100 (the increment) in year t+1. The total impact of a measure in a given year can be derived as the cumulative impact of the increments since its introduction.

[6] One-off measures covering more than one year (e.g. a tax amnesty generating income in two consecutive years) should be recorded as two separate measures, one as a measure having its

Depending on each specific measure, Member States should adapt the dimension of these three tables accordingly, so they contain as many columns as needed to reflect the complete budgetary impact over time. Underlying assumptions used to estimate the budgetary impact of each measure (e.g. elasticities or evolution of the tax base) should also be described in the DBP. Finally, DBPs should also specify the accounting principle on which the data are being reported: by default, they should be reported on accrual basis, but, if impossible, it should be indicated explicitly that the value reported is based on cash reporting.

D. Union's Strategy for growth and jobs targets and Country Specific Recommendations.

Details on how the measures adopted address the CSRs or the national targets in accordance with the Union's strategy for growth and jobs are included in tables 6.a and 6.b of Annex I.

E. Indications on the expected distributional impact of the main expenditure and Revenue Measures

Information on the expected distributional impact of the main expenditure and revenue measures should also be specified in DBPs, according to Article 6(3)(d) of Regulation 1.

Whereas the majority of Member States already include in their budgets qualitative considerations on the distributional impact of fiscal measures, quantitative estimations are much less common. Certainly, quantifying the distributional impact of budgetary measures is a challenging task. For this reason no standardized table on this aspect of DBPs is included in Annex I; on the contrary, Member States should provide, to the extent possible, qualitative information and quantitative estimations on the distributional effects of budgetary measures, presented as best fits each Member State's specific measures and available analytical frameworks.

F. Comparison between DBP and the most recent Stability Programme.

Table 7 of Annex I compares the budgetary targets and projections at unchanged policies in the DBP with those of the latest SP. Possible differences in past and planned data with respect to those in the SP should be duly explained.

first impact in t and one having its first impact in t+1.

23.

G. Methodological Annex.

Finally, table 8 in Annex I contains the methodological aspects that should be included in the DBP. These should include details on the different estimation techniques applied along the budgetary process, together with its relevant features and the assumptions used. In case the estimated impact of aggregated budgetary measures on economic growth has not been reported in Table 1.a, it should be specified in this Annex.

SECTION III. GUIDELINES ON THE FORM AND CONTENT OF DEBT ISSUANCE REPORTS.

Following Article 8(2) of Regulation 1, this section provides a harmonised form and content for EA Member States to report on their national debt issuance plans.

In order to place the national debt issuance plans in a fiscal surveillance framework they should be accompanied by general information on the overall financing needs of the central budget. Therefore, two reports are to be submitted: an annual and a quarterly report.

Given the need for flexibility in changing market conditions, the forward-looking information in these reports is understood to be indicative and subject to market conditions. The reports should in principle not be disseminated to the public, given the potential sensitivity of this information.

1. The annual report should contain:

- general information on the overall financing needs of the central budget, such as (i) redemptions of securities with an original maturity of one year or more; (ii) stock of securities with an original maturity of less than one year; (iii) net cash financing; (iv) cash deficit and (v) net acquisition of financial assets, excluding net cash financing,

- the issuance plans for the next year including the break-down into short-term and medium- to long-term securities following the template provided below.

Table III - Template to be contained in annual debt issuance reports[7].

[7] Provision of data on variables in bold characters is a requirement. Provision of data

Total funding requirement (EUR million)								Financing plan (EUR million)			
Redemptions of securities with an original maturity of one year or more (1)	Stock of T-bills and Commercial Papers at the end of the previous year (2)	Net cash financing (3)	Total refinancing needs (4 = 1+2 +3)	Cash deficit/ surplus (5)	Net acquisition of financial assets, excl. net cash financing (6)	Other (7)	Total (8 = 4+5 +6+7)	Change in the stock of short-term (T-bills + CPs) (9)	Medium to long-term (10)	Other (11)	Total (12 = 2+9+ 10+11)

The report should be submitted to the European Commission at least one week before the end of the calendar year.

2. The quarterly report should present the issuance plans, per quarter (non-cumulative) including the breakdown into short-term and medium- to long-term securities. Issuance plans for the quarter(s) to come should be accompanied by a report on actual issuance in the preceding quarter as well as the estimate of issuance for the current quarter following the template provided below. While, in principle and under more normal market conditions, foreseen issuance plans should be reported for several quarters ahead, under the current market conditions such issuance forecasts might be difficult to make or be of limited informational value. Therefore, it is suggested that only the immediate quarter ahead would be subject to such reporting.

Table IV - Template to be contained in quarterly debt issuance reports[8] [9]

Financing plan (EUR million)				
	Short-term (T-bills + CPs)* (1)	Medium to long-term (2)	Other (3)	Total (4=1+2+3)
q-1 (preceding quarter, actual data)	*actual data*	*actual data*	*actual data*	*actual data*
q (current quarter, estimate)	*estimate*	*estimate*	*estimate*	*estimate*
q+1 (next quarter, plan)	*plan*	*plan*	*plan*	*plan*

** Please report here the actual issuance, i.e. including multiple counting of 1-month bill rollover*

The report should be submitted to the European Commission at least one week before the beginning of the next quarter.

The quarterly periodicity of issuance plans reporting is considered to strike the right balance between, on the one hand, increasing the transparency and predictability of funding plans, and, on the other hand, leaving enough flexibility for issuance policies and procedures.

All the amounts should be expressed in million Euros.

Where data are available, Member States are encouraged to provide comparable templates with similar information concerning national agencies and regional or local governments.

SECTION IV. GUIDELINES ON THE FORM AND CONTENT OF EPPs.

Regulation 1 mandates that EA Member States entering in EDP should draft and submit an EPP. EPPs should be based on the following model structure:

1. Introduction [1/2 page]

This section should contain overall information on:

The main macroeconomic context.

The overall strategy at national level, including the relation between the measures presented in the EPP and the country-specific recommendations (CSRs).

Potential financial resources, including credit lines of the European Investment Bank and other relevant financial instruments.

2. Policy measures and structural reforms to accompany the correction of the excessive deficit.

EPPs should contain the following reporting table, specifically covering the description of the fiscal structural reforms instrumental to an effective and lasting correction of the excessive deficit.

Tables to be contained in the EPPs[10]

Description of the structural reform measures in the fiscal area and information on their qualitative impact

on other variables is optional but highly desirable.

[8] Provision of data on variables in bold characters is a requirement. Provision of data on other variables is optional but highly desirable.

[9] The reporting horizon will be revisited in dependence of a stabilisation of conditions on European sovereign debt markets

[10] Provision of data on variables in bold characters is a requirement. Provision of data on other variables is optional but highly desirable.

Main objectives and relevant CSRs	Information on planned and already enacted measures			
	List of measures	Description of the measure	Timetable on upcoming steps	Specific challenges/ risks in implementing the measures

Quantitative assessment of the measures

List of measures	Methodological elements		Quantitative elements			
	Relevant features of the model used/ estimation technique	Main macroeconomic/ simulation assumptions	Main outcome of macroeconomic simulati			
			Variables	Yearly and cumulated effect on main macroeconomic v		
				Year t	Year t+1	Year t
			GDP			
			Contribution of production factors to potential GDP (labour capital, TFP)			
			Budgetary impact			

Two sub-sets can be distinguished in the reporting template:

- The first table, which should always be included in EPPs, contains the description of the structural reform measures in the fiscal area and information on their qualitative impact. In particular, it should include:

o A description about the measures' main objectives in terms of fiscal structural policy, and how the measure is relevant to address the excessive deficit situation. An indication on which CSR (if any) each fiscal structural measure relates to.

o A description synthesising key elements of the measure as well as its coverage.

o A timetable on the implementation steps expected in the future. Each date should be accompanied by an explanation of what is concretely planned by that date.

o The main challenges or risks pertaining to the implementation of the measures.

o A brief qualitative description of the foreseen impacts of the measure and their expected timing, including its budgetary implications, both on the revenue and expenditure side and whenever possible the indirect budgetary impact via the macro-economic effects

- The second table is optional and covers useful information that Member States are encouraged to provide where relevant. This includes:

o Information on the estimated macroeconomic and budgetary impact of the respective fiscal structural measure, expressed as the yearly and/or cumulated effect on the GDP and potential GDP, as well as the policy simulation horizon. The macroeconomic impact of fiscal structural reforms needs to take the form of a number expressing the difference (in percentage points) with respect to the reference scenario, i.e. the scenario that does not include the fiscal structural measures. The budgetary impact should take an analogous form, expressing the change in the general government balance as a percentage of GDP.

o Relevant information on the analytical and methodological approach used in the empirical exercise, such as the type of the model or estimation technique applied (e.g. econometric estimations or simulation based assessments with DSGE/dynamic CGE/static CGE models, etc.) and the sources and frequency of the macroeconomic data used;

o The main macroeconomic and simulation assumptions underlying the estimation;

In this second part of the table, year t refers to the current year, that when the EPP is being drafted and submitted.

§30. Decision of the European Central Bank of 20 February 2014 on the prohibition of monetary financing and the remuneration of government deposits by national central banks, OJ L 159, May 28th 2014, pp.54-55

Having regard to the Treaty on the Functioning of the European Union, and in particular of the second indent of Article 132(1) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the second indent of Article 34.1 thereof,

Whereas:

(1) Pursuant to Article 271(d) of the Treaty on the Functioning of the European Union, and

Article 35.6 of the Statute of the European System of Central Banks and the European Central Bank, in conjunction with the ninth recital of Council Regulation (EC) No 3603/93[1], the Governing Council is mandated to assess compliance by national central banks (NCBs) with their obligations under the Treaties. To that effect the Governing Council monitors compliance of NCBs with the prohibition on monetary financing as laid down in Article 123 of the Treaty on the Functioning of the European Union. This Decision aims to clarify the criteria that the European Central Bank (ECB) will apply regarding the remuneration of deposits held by governments and public authorities with their central bank in relation to the Treaty prohibition of monetary financing, for the purposes of the abovementioned Governing Council's monitoring role.

(2) To monitor compliance with the monetary financing prohibition laid down in Article 123 of the Treaty on the Functioning of the European Union, the ECB will take into account the remuneration of government deposits, which should not be higher than a remuneration based on the relevant money market rates. This Decision specifies the market rates that will operate as ceilings for the remuneration of government deposits and that will be taken into account in monitoring compliance with the Treaty from 1 December 2014,

HAS ADOPTED THIS DECISION:

Article 1 Definitions

For the purposes of this Decision:

(a) 'government' means all public entities mentioned in Article 123 of the Treaty, as interpreted in the light of Regulation (EC) No 3603/93, except for publicly-owned credit institutions which, in the context of the supply of reserves by NCBs, are given the same treatment by NCBs and the ECB as private credit institutions;

(b) 'government deposits' means overnight and fixed-term deposits accepted by NCBs from any government;

(c) 'unsecured overnight market rate' means: (i) with regard to overnight deposits in euro, the euro overnight index average rate (EONIA); and (ii) with regard to overnight deposits in a different currency, a comparable rate;

d) 'secured market rate' means: (i) with regard to fixed term deposits in euro, the euro repo market offered rate (EUREPO) with comparable maturity if available; and (ii) with regard to fixed term deposits in a different currency, a comparable rate.

Article 2 Remuneration of government deposits and compliance with the prohibition on monetary financing

1. For the purposes of monitoring compliance with the prohibition on monetary financing, the following ceilings on the remuneration of government deposits with NCBs shall apply:

(a) for overnight deposits, the unsecured overnight market rate;

(b) for fixed-term deposits, the secured market rate or, if unavailable, the unsecured overnight market rate.

2. Compliance with the ceilings referred to in paragraph 1 shall be assessed in the light of all relevant facts specific to each individual case.

Article 3 Entry into force

1. The provisions of this Decision shall be applied by the ECB from 1 December 2014.

2. This Decision shall enter into force on 22 February 2014.

Done at Frankfurt am Main, 20 February 2014.

[1] Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

§31. Guideline of the European Central Bank of 20 February 2014 on domestic asset and liability management operations by the national central banks, OJ L 159, May 28th 2014, pp. 56-65

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Articles 12.1 and 14.3 thereof,

Whereas:

(1) The achievement of the single monetary policy requires that the European Central Bank (ECB) specifies the general principles to be followed by the national central banks of Member States whose currency is the euro (hereinafter the 'NCBs') when carrying out domestic operations in assets and liabilities on their own initiative; such operations should not interfere with the single monetary policy.

(2) Repurchase agreements entered into by NCBs with non-Eurosystem national central banks may have an impact on euro liquidity and hence on the single monetary policy once they are activated. Therefore, to better safeguard the integrity of the single monetary policy, the Governing Council decided on 22 October 2009 that its prior approval should be required for certain liquidity arrangements entered into by NCBs with non-Eurosystem national central banks.

(3) Limitations on the remuneration of government deposits held with NCBs as fiscal agents pursuant to Article 21.2 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB') must be specified to preserve the integrity of the single monetary policy, and in order to provide incentives for government deposits to be placed in the market, so as to facilitate the Eurosystem's liquidity management and monetary policy implementation. In addition, the introduction of a ceiling on the remuneration of government deposits based on money market rates facilitates the monitoring of the NCBs' compliance with the prohibition on monetary financing carried out by the ECB in accordance with Article 271(d) of the Treaty.

(4) In view of the exceptional and temporary nature of the government deposits related to European Union/International Monetary Fund and other comparable financial support programmes, the applicable procedures should not restrict the ability of a national government to maintain deposits with its NCB, not least because the holding of such deposits may be part of the conditions of the relevant programme. The exclusion of such deposits from the threshold amount does not interfere with the single monetary policy to the same extent as the holding of government deposits in other Member States whose currency is the euro,

HAS ADOPTED THIS GUIDELINE:

Article 1 Scope of application

1. This Guideline shall apply to all NCB operations involving euro amounts, including operations conducted by NCBs either as principal on their own behalf or as agent on behalf of third parties or as both principal and agent at the same time. The following operations are not subject to this Guideline:

(a) standing facilities and operations executed by NCBs on the ECB's initiative, in particular, operations carried out in accordance with Guideline ECB/2011/14[1];

(b) transactions in precious metals and foreign exchange operations against the euro, which are covered by Guideline ECB/2003/12[2];

(c) operations of NCBs related to emergency liquidity assistance.

2. Articles 7 and 8 shall not apply to operations that NCBs carry out:

(a) while acting as fiscal agents pursuant to Article 21.2 of the Statute of the ESCB;

[1] Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem (OJ L 331, 14.12.2011, p. 1).

[2] Guideline ECB/2003/12 of 23 October 2003 for participating Member States' transactions with their foreign exchange working balances pursuant to Article 31.3 of the Statute of the European System of Central Banks and of the European Central Bank (OJ L 283, 31.10.2003, p. 81).

(b) for their administrative purposes or for their staff pursuant to Article 24 of the Statute of the ESCB;

(c) while managing a pension fund for their staff;

(d) while operating a deposit scheme for their staff or other customers;

(e) while transferring their profit to the government.

Operations conducted by an NCB's staff pension fund that is managed by an autonomous institution shall be exempt from Articles 6 and 9. In addition, the ex-post reporting requirements of Articles 6 and 9 shall not apply to operations carried out by NCBs for their administrative purposes or deposit transactions related to current accounts that staff and other customers hold at NCBs.

3. Except for the ex-post reporting requirements in Article 6(1), this Guideline shall not apply to operations within the framework of Eurosystem reserve management services.

4. Without prejudice to paragraph 1 above, Articles 5 and 11 shall apply to government deposits denominated in euro or in a foreign currency.

Article 2 Definitions

For the purposes of this Guideline:

(a) 'repurchase agreement' means an agreement by which an NCB and a non-euro area national central bank agree to enter into one or more specific repurchase transactions. In a repurchase transaction, one party agrees to purchase from (or sell to) the other party securities denominated in euro against payment of an agreed price in euro on the trade date, with a simultaneous agreement to sell to (or purchase from) the other party equivalent securities against payment of another agreed price in euro at the maturity date;

(b) 'government' means all public entities of a Member State or any public entities of the Union mentioned in Article 123 of the Treaty, as interpreted in the light of Council Regulation (EC) No 3603/93[3] ([3]), except for publicly owned credit institutions which, in the context of the supply of reserves by NCBs, are given the same treatment by NCBs and the ECB as private credit institutions;

(c) 'government deposits' means overnight and fixed term deposits accepted by NCBs from any government, including deposits held in foreign currencies;

(d) 'unsecured overnight market rate' means: (a) with regard to overnight deposits in domestic currency, the euro overnight index average rate (EONIA); (b) with regard to overnight deposits in a foreign currency, a comparable rate;

(e) 'secured market rate' means: (a) with regard to fixed term deposits in domestic currency, the euro repo market offered rate (EUREPO) with comparable maturity if available; and (b) with regard to fixed term deposits in foreign currency, a comparable rate;

(f) 'gross domestic product' means the value of an economy's total output of goods and services, less intermediate consumption, plus net taxes on products and imports, in a specified period;

(g) 'deposit facility rate' means the pre-specified interest rate that is applied to counterparties who use the Eurosystem deposit facility to make overnight deposits with an NCB.

Article 3 Organisational issues

1. NCBs shall make, and the Executive Board shall monitor, the appropriate arrangements to enable counterparties to distinguish between operations carried out by NCBs under this Guideline and European System of Central Bank operations carried out by NCBs in accordance with the instruments and procedures specified in Guideline ECB/2011/14.

2. NCBs shall make the appropriate arrangements to ensure that confidential monetary policy information is not used by NCBs in carrying out operations covered by this Guideline.

3. NCBs shall inform the ECB of the arrangements established in accordance with paragraphs 1 and 2.

Article 4 Prior approval of repurchase agreements with non-Eurosystem national central banks

1. Before NCBs enter into repurchase agreements with non-Eurosystem national central banks, they shall submit these

[3] Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Article 104 and 104b(1) of the Treaty (OJ L 332, 31.12.1993, p. 1).

agreements to the ECB for the Governing Council's prior approval.

2. NCBs shall submit their requests for prior approval to the ECB as far in advance as possible before the envisaged date for entering into the repurchase agreements. Each request shall contain as a minimum the following information:

(a) identity of the counterparty to the repurchase agreement;

(b) purpose of the repurchase agreement;

(c) to the extent already available, amount and dates of the specific repurchase transactions; the envisaged aggregated amount of such transactions;

(d) maturity of the repurchase agreement and, to the extent already available, maturity of the specific repurchase transactions to be entered into;

(e) any other information considered relevant by the NCB submitting the request.

3. The Governing Council shall respond to each request as soon as possible and in any case no later than 40 business days following receipt of the request.

4. When receiving a request for prior approval, the Governing Council shall have regard to:

(a) the primary objective of ensuring the integrity of monetary policy;

(b) the preservation of the effectiveness of euro liquidity management by the Eurosystem;

(c) a coordinated Eurosystem approach with respect to the conduct of repurchase transactions with non-Eurosystem national central banks;

(d) a level-playing field for all credit institutions located in a Member State whose currency is the euro.

5. If the Governing Council considers that a repurchase agreement would not be in line with the objectives specified in paragraph 4, it may either require that the repurchase agreement submitted for its approval is:

(a) entered into at a later date than that originally planned; or

(b) subject to specific amendments and resubmitted for approval before it can be entered into by the relevant NCB.

6. The Governing Council shall endeavour to accommodate the NCBs' requests for prior approval taking into account the principles of proportionality and non-discrimination.

Article 5 Limitations on remuneration of government deposits

1. Remuneration of government deposits shall be subject to the following ceilings:

(a) for overnight deposits, the unsecured overnight market rate;

(b) for fixed term deposits, the secured market rate or, if not available, the unsecured overnight market rate.

2. On any calendar day, the total amount of overnight and fixed term deposits of all governments with an NCB exceeding the higher of either: (a) EUR 200 million; or (b) 0,04 % of the gross domestic product of the Member State in which the NCB is domiciled, shall be remunerated with an interest rate of zero per cent.

3. The government deposits related to European Union/International Monetary Fund and other comparable financial support programmes that are held in accounts with NCBs shall be subject to paragraph 1, but they shall not count towards the threshold amount mentioned in paragraph 2.

Article 6 Reporting

1. NCBs shall report ex ante to the ECB the total net liquidity effect of their domestic asset and liability management operations within the context of the Eurosystem's general liquidity management framework. An NCB shall include the transfer of its profit to the government in its forecast of autonomous liquidity factors at least one week in advance of the transfer taking place. Furthermore, an NCB shall ensure through appropriate measures that investment operations and deposit schemes do not result in liquidity effects that cannot be accurately forecast.

2. Once a month, NCBs shall report ex post to the ECB, using the ex post reporting format in Annex II to this Guideline, the details of the operations they carried out during the previous month. With respect to the monthly ex post report, a general threshold of EUR 500 million shall apply to the monthly turnover in each individual category listed in Annex II, with

transactions counting towards the threshold as follows:

(a) the gross sum of purchases, sales and redemptions for each of the following categories:

(i) investment operations;

(ii) pension fund management;

(iii) agent activities;

(b) the gross sum of securities lending and borrowing for the following categories:

(i) securities loans; and

(ii) repurchase transactions.

(c) the gross sum of credit granting and deposit taking for the category credit and deposit schemes;

(d) the amount for each of the following categories:

(i) obligations towards third parties; and

(ii) transfer and subsidies.

If the gross sum of the transactions in a category is below the respective threshold, NCBs shall fill in a zero in the reporting format as for cases where no transactions have taken place. NCBs may choose to continue to report all their transactions to the ECB even if the threshold for one or more categories is not reached (full reporting).

For transactions in euro carried out within the Eurosystem reserve management services framework, NCBs shall, in addition, comply with any other applicable reporting requirements.

3. In the event that reporting requirements reveal that the asset or liability management operations of a particular NCB contradict single monetary policy requirements, the ECB may give specific instructions with regard to the asset and liability management behaviour of the NCB in question.

Article 7 Thresholds

1. Operations may not be conducted above the threshold in Annex I to this Guideline without the ECB's prior approval. Such threshold also applies to repurchase transactions, without prejudice to the prior approval procedure for repurchase agreements in Article 4.

2. In addition to the threshold for daily aggregate operations in Annex I to this Guideline, the ECB may specify and apply additional thresholds for NCBs' cumulative purchases or sales of assets and liabilities during any particular period of time.

3. The Governing Council may change the threshold in Annex I to this Guideline at any time.

Article 8 Procedure for requesting and granting prior approval

1. NCBs shall forward their requests for prior approval as far in advance as possible. Where the operation has to be settled on the same day or the next working day, the ECB shall receive such requests at the latest by 9 a.m.[4] on the envisaged trade date. For other operations, the ECB shall receive the corresponding request at the latest by 11 a.m. on the envisaged trade date.

2. The NCB's request shall be made in accordance with Annex III to this Guideline. Where a transaction, for which prior approval has been sought and granted, does not take place in accordance with the prior approval, NCBs shall notify the ECB immediately.

3. Under exceptional circumstances, NCBs carrying out security lending operations against collateral may, where the market participants are not able to provide specific securities, also forward their requests for late same-day prior approval in the late afternoon.

4. The ECB shall respond to an NCB's request for prior approval as soon as possible, and to a request for late same- day prior approval immediately. For operations to be settled on the trade date or on the next working day, the ECB shall respond by 10.15 a.m. on the envisaged trade date. For other operations, the ECB shall respond by 1 p.m. on the envisaged trade date. If an NCB does not receive a reply by this deadline, after verifying that the ECB received its request and that no reply has been sent, assume from 1.15 p.m. that approval has been granted.

5. The ECB shall consider all requests with a view to ensuring consistency with the single monetary policy of the Eurosystem, having regard to both the effect of individual NCBs'

[4] All references are to Central European Time, which takes account of the change to Central European Summer Time.

operations and the aggregate effect of such operations in the Member States whose currency is the euro. Without prejudice to this, the ECB shall try to accommodate the NCBs' requests.

Article 9 Monitoring

1. Once a year the Executive Board shall submit a report to the Governing Council on the implementation and application of this Guideline. This report shall provide information on:

(a) the application of the prior approval procedure;

(b) NCBs' domestic asset and liability management practices;

(c) compliance with this Guideline.

2. In case of doubt regarding compliance with Article 5(1) to (3), the ECB may request information from NCBs.

Article 10 Confidentiality

All the information and data exchanged in the context of the above procedures, including the monitoring report mentioned in Article 9, shall be treated confidentially.

Article 11

Transitional provision

Fixed-term government deposits held with the NCBs shall be subject to Article 5(1), but they shall only count towards the threshold amount mentioned in Article 5(2) from 1 December 2015.

Article 12 Taking effect and implementation

1. This Guideline shall take effect two days following its adoption.

2. The NCBs shall take the necessary measures to comply with this Guideline by 1 December 2014. They shall notify the ECB of the texts and means relating to those measures by 31 October 2014 at the latest.

Article 13 Addressees

This Guideline is addressed to the NCBs.

Done at Frankfurt am Main on 20 February 2014.

(Annexes not included)

II.5 COORDINATION OF MACRO-ECONOMIC POLICIES

§32. Council Recommendation of 13 July 2010 on Broad Economic Policy Guidelines of Member States, OJ L 191, July 23th 2010, pp. 28-34

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 121(2) thereof,

Having regard to the recommendation from the European Commission,

Having regard to the conclusions of the European Council,

Whereas:

(1) The Treaty provides that Member States are to regard their economic policies as a matter of common concern and to coordinate them within the Council. In accordance with Treaty provisions, the European Union has developed and implemented policy coordination instruments for fiscal policy (the Stability and Growth Pact) and macro-structural policies.

(2) The Treaty provides that employment guidelines and broad economic policy guidelines are to be adopted by the Council to guide Member States' policies.

(3) The Lisbon Strategy, launched in 2000, was based on an acknowledgement of the European

Union's need to increase employment, productivity and competitiveness, while enhancing social cohesion, in the face of global competition, technological change, environmental challenges and an ageing population. The Lisbon Strategy was re-launched in 2005, after a mid-term review which led to greater focus on growth, more and better jobs.

(4) The Lisbon strategy for growth and jobs helped forge consensus around the broad direction of the Union's economic and employment policies. Under the strategy, both broad economic policy guidelines and employment guidelines were adopted by the Council in 2005 [1] and revised in 2008[2]. The 24 guidelines laid the foundations for the national reform programmes, outlining the key macroeconomic, microeconomic and labour-market reform priorities for the Union as a whole. However, experience shows that the guidelines did not set clear enough priorities and that links between them could have been stronger. This limited their impact on national policy-making.

(5) The financial and economic crisis that started in 2008 resulted in a significant loss in jobs and potential output and has led to a dramatic deterioration in public finances. The European Economic Recovery Plan[3] has nevertheless helped Member States to deal with the crisis, partly through a coordinated fiscal stimulus, with the euro providing an anchor for macroeconomic stability. The crisis therefore showed that economic policy coordination at the level of the Union can deliver significant results if it is strengthened and rendered effective. The crisis also underscored the close interdependence of the Member States' economies and labour markets.

(6) The Commission proposed setting up a new strategy for the next decade, the Europe 2020 Strategy ([4])[4], to enable the Union to emerge stronger from the crisis, and to turn its economy towards smart, sustainable and inclusive growth. Five headline targets, listed under the relevant guidelines, constitute shared objectives guiding the action of the Member States, taking account of their relative starting positions and national circumstances, and of the Union. Member States should make every effort to meet the national targets and to remove the bottlenecks that constrain growth.

(7) As part of comprehensive 'exit strategies' for the economic crisis, Member States should carry out ambitious reform programmes to ensure macroeconomic stability and the sustainability of public finance, improve competitiveness, and reduce macroeconomic imbalances and enhance labour market performance. Temporary measures introduced in response to the crisis should be withdrawn in a coordinated manner as appropriate when the recovery is secure. The withdrawal of the fiscal stimulus should be implemented and coordinated within the framework of the Stability and Growth Pact.

(8) Within the Europe 2020 strategy, Member States and the Union should implement reforms aimed at 'smart growth', i.e. growth driven by knowledge and innovation. Reforms should aim at improving the quality of education, ensuring access for all, strengthening research and business performance, and further improving the regulatory framework in order to promote innovation and knowledge transfer throughout the Union. They should encourage entrepreneurship and help to turn creative ideas into innovative products, services and processes that can create growth, quality jobs, territorial, economic and social cohesion, and address more efficiently European and global societal challenges. Making the most of information and communication technologies is essential in this context.

protection and active inclusion to reduce poverty, while at the same time adhering to agreed fiscal consolidation, should therefore be at the heart of Member States' reform programmes.

(9) The policies of the Union and of Member States, including through their reform programmes, should aim at 'sustainable growth'. Sustainable growth means decoupling economic growth from the use of resources, building an energy and resource-efficient, sustainable and competitive economy, a fair distribution of the cost and benefits and exploiting Europe's leadership in the race to develop new processes and technologies, including green technologies. Member States and the Union should implement the necessary reforms to reduce greenhouse gases emissions and use resources efficiently, which will also assist in preventing environmental degradation and biodiversity loss. They should also improve the business environment, stimulate creation of green jobs and help enterprises modernising their industrial base.

[1] COM(2005) 141.
[2] COM(2007) 803.
[3] COM(2009) 615, 19.11.2009.
[4] COM(2010) 2020, 3.3.2010.

(10) The policies of the Union, and Member States' reform programmes should finally also aim at 'inclusive growth'. Inclusive growth means building a cohesive society in which people are empowered to anticipate and manage change, thus to actively participate in society and the economy. Member States' reforms should therefore ensure access and opportunities for all throughout the lifecycle, thus reducing poverty and social exclusion, through removing barriers to labour market participation especially for women, older workers, young people, the disabled and legal migrants.

(11) As an essential element, Member States and the Union should continue and expand their efforts to further improve their regulatory framework, especially for European enterprises. By strengthening their smart regulation instruments, Member States and the Union should guarantee that legislation is well-designed, proportionate, regularly reviewed and does not cause unnecessary burdens. Achievement of the administrative burdens reduction targets remains a priority.

(12) The Union's and the Member States' structural reforms can effectively contribute to growth and jobs if they enhance the Union's competitiveness in the global economy, open up new opportunities for Europe's exporters and provide competitive access to vital imports. Reforms should therefore take into account their external competitiveness implications to foster European growth and participation in open and fair markets worldwide.

(13) The Europe 2020 strategy has to be underpinned by an integrated set of European and national policies, which Member States and the Union should implement fully and at a similar pace, in order to achieve the positive spill-over effects of coordinated structural reforms, and more consistent contribution from European policies to the Strategy's objectives, taking into account national starting positions.

(14) While these guidelines are addressed to Member States and the European Union, the Europe 2020 strategy should be implemented in partnership with all national, regional and local authorities, closely associating parliaments, as well as social partners and representatives of civil society, who shall contribute to the elaboration of national reform programmes, to their implementation and to the overall communication on the strategy.

They should take into account the gender perspective in all these policies. They should also make sure that the benefits of economic growth reach all citizens and all regions. Ensuring effective functioning of the labour markets through investing in successful transitions, appropriate skills development, rising job quality and fighting segmentation, structural unemployment and inactivity while ensuring adequate and sustainable social

(15) The Europe 2020 strategy is underpinned by a smaller set of guidelines, replacing the previous set of 24 and addressing employment and broad economic policy issues in a coherent manner. The guidelines for the economic policies of the Member States and of the Union, annexed to this Recommendation, are intrinsically linked with the relevant guidelines for employment policies. Together, they form the 'Europe 2020 integrated guidelines'.

(16) These new integrated guidelines are in line with the conclusions of the European Council. They give precise guidance to the Member States on defining their national reform programmes and implementing reforms, reflecting interdependence and are in line with the Stability and Growth Pact. The guidelines will form the basis for any country-specific recommendations that the Council may address to the Member States, or, in the case of the broad guidelines on economic policies, for policy warnings that the Commission may issue in cases of insufficient follow-up to the respective country-specific recommendations.

(17) These guidelines should remain stable until 2014 to ensure a focus on implementation,

HAS ADOPTED THIS RECOMMENDATION:

(1) Member States and, where relevant, the European Union should take into account in their economic policies the guidelines set out in the Annex.

(2) Member States should design national reform programmes consistent with the objectives set out in the 'Europe 2020 integrated guidelines'.

Done at Brussels, 13 July 2010.

ANNEX: Broad guidelines for the economic policies of the Member States and of the Union

Guideline 1: Ensuring the quality and the sustainability of public finances

Member States should vigorously implement budgetary consolidation strategies under the Stability and Growth Pact (SGP) and, in

particular, recommendations addressed to Member States under the excessive deficit procedure, and/or in memoranda of understanding, in the case of balance-of-payments support. In particular, Member States should achieve consolidation in line with the Council's recommendations and meet their medium-term objectives in line with the SGP. Without prejudice to the legal framework of the SGP, this implies for most Member States achieving a consolidation well beyond the benchmark of 0,5 % of gross domestic product (GDP) per year in structural terms until debt ratios are on a solid declining path. Fiscal consolidation should start in 2011 at the latest, earlier in some Member States where economic circumstances make this appropriate, provided that the Commission's forecasts continue to indicate that the recovery is strengthening and becoming self-sustaining.

In designing and implementing budgetary consolidation, strategies should focus on expenditure restraint and prioritise growth-enhancing expenditure items within areas such as education, skills and employability, research and development (R & D) and innovation and investment in networks with positive impacts on productivity, where appropriate for example high-speed Internet, energy and transport interconnections and infrastructure. Where taxes may have to rise, this should, where possible, be done in conjunction with measures to make tax systems more employment, environment and growth-friendly, for example by shifting the tax burden towards environmentally harmful activities. Tax and benefits systems should provide better incentives to make work pay.

Furthermore, Member States should strengthen national budgetary frameworks, enhance the quality of public expenditure and improve the sustainability of public finances, pursuing in particular determined debt reduction, reform of age-related public expenditure, such as pensions and health spending, and policies contributing to raising employment and effective retirement ages to ensure that age-related public expenditure and social well-fare systems are financially sustainable.

Budget efficiency and quality of public finances are also important at the level of the Union.

Guideline 2: Addressing macroeconomic imbalances

Member States should avoid unsustainable macroeconomic imbalances, arising notably from developments in current accounts, asset markets and the balance sheets of the household and corporate sectors. Member States with large current account imbalances rooted in a persistent lack of competitiveness or due to other reasons should address the underlying causes by acting, for example, on fiscal policy, on wage developments, on structural reforms relating to product and financial services markets (including the flow of productivity enhancing capital), on labour markets, in line with the employment guidelines, or on any other relevant policy area. In this context, Member States should encourage the right framework conditions for wage bargaining systems and labour cost developments consistent with price stability, productivity trends over the medium-term and the need to reduce macroeconomic imbalances. Where appropriate, adequate wage setting in the public sector should be regarded as an important signal to ensure wage moderation in the private sector in line with the need to improve competitiveness. Wage setting frameworks, including minimum wages, should allow for wage formation processes that take into account differences in skills and local labour market conditions and respond to large divergences in economic performance across regions, sectors and companies within a country. The social partners have an important role to play in this context. Member States with large current account surpluses should pursue measures aimed at implementing structural reforms conducive to strengthening potential growth and thereby also underpinning domestic demand. Addressing macroeconomic imbalances, including among Member States, would also help in achieving economic cohesion.

Guideline 3: Reducing imbalances within the euro area

Member States whose currency is the euro should regard large and persistent divergences in current account positions and other macroeconomic imbalances as a matter of common concern and take urgent action to reduce the imbalances where necessary. Action is required in all euro area Member States, but the nature, importance and urgency of the policy challenges differ significantly depending on the countries considered. Given the vulnerabilities and the magnitude of the adjustment required, the need for policy action is particularly pressing in Member States showing persistently large current account deficits and large competitiveness losses. They should achieve a significant permanent reduction of the current account deficit. These euro area Member States should also aim to reduce unit labour costs taking into account productivity developments at regional, sector and company level, and

enhance competition in product markets. Euro area Member States with large current account surpluses should pursue measures aimed at implementing structural reforms conducive to strengthening potential growth and thereby also underpinning domestic demand. Similarly, the euro area Member States should act on any other macroeconomic imbalances such as excessive private debt accumulation and inflation divergence. Institutional barriers to flexible adjustments of prices and wages to market conditions should be removed. Macroeconomic imbalances should be closely monitored within the Eurogroup, which should propose remedial actions when needed.

Guideline 4: Optimising support for R & D and innovation, strengthening the knowledge triangle and unleashing the potential of the digital economy

Member States should review national (and regional) R & D and innovation systems, ensuring effective and adequate framework conditions for public investment within the budgetary consolidation strategies under the Stability and Growth Pact (guideline 1), and orienting them towards higher growth while addressing, where appropriate, major societal challenges (including energy, resource efficiency, climate change, biodiversity, social and territorial cohesion, ageing, health, and security) cost-effectively. In particular, public investment should serve to leverage private R & D financing. The reforms should foster excellence and smart specialisation, promote scientific integrity, reinforce cooperation between universities, research institutes, public, private and third sector players, both domestically and internationally and ensure the development of infrastructures and networks that enable knowledge diffusion. The governance of research institutions should be improved to make national research systems more cost-effective and productive. To this end, university-based research should be modernised, world-class infrastructures developed and made accessible, attractive careers and the mobility of researchers and students promoted. Funding and procurement schemes should be adapted and simplified, helping where appropriate to facilitate cross-border cooperation, knowledge transfer and merit-based competition, building on synergies and achieving grater value.

Member States' R & D and innovation policies should directly address national opportunities and challenges and should take into account the context of the Union in order to enhance opportunities for pooling public and private resources in areas where the Union adds value, exploiting synergies with Union funds, thus achieving sufficient scale and avoiding fragmentation. Member States and the Union should integrate innovation in all relevant policies and promote innovation in a broad sense (including non-technological innovation). With a view to promoting private investment in research and innovation, Member States and the Union should improve framework conditions — notably with regard to the business environment, competitive and open markets, and the high economic potential of the cultural and creative industries — combine, as appropriate, cost-effective fiscal incentives, depending on each Member State's fiscal room for manoeuvre, and other financial instruments with measures to facilitate access to private finance (including risk-capital) and simplify access for SMEs, boost demand, in particular in eco-innovation, (where appropriate through green public procurement and interoperable standards), promote innovation-friendly markets and regulations, and provide efficient, affordable and effective protection and management of intellectual property. All three sides of the triangle (education-research-innovation) should mutually support and feed into each other. In line with guidelines 8 and 9, Member States should equip people with a broad range of skills needed for innovation in all its forms, including eco-innovation, and should seek to ensure a sufficient supply of science, mathematics and technology graduates.

Member States and the Union should put in place appropriate framework conditions for the rapid development of a digital single market offering widely accessible online contents and services. Member States should promote the roll-out and take up of high-speed Internet as an essential means for acceding to knowledge and participating in its creation. Public funding should be cost-efficient and targeted to address market failures. Policies should respect the principle of technological neutrality. Member States should seek to reduce the costs of network roll-out, in particular by enhancing the coordination of public works. Member States and the Union should promote the deployment and use of modern accessible online services, including by further developing e-government, e-signature, e-identity and e-payment; support active participation in the digital society, in particular by promoting access to cultural content and services including through media and digital literacy; and promote a climate of security and trust.

The European Union headline target, on the basis of which Member States will set their national targets, is to improve the conditions for

research and development, in particular with the aim of bringing combined public and private investment levels in this sector to 3 % of GDP by 2020. The Commission will elaborate an indicator reflecting R & D and innovation intensity.

Guideline 5: Improving resource efficiency and reducing greenhouse gases

Member States and the Union should put measures in place to promote the decoupling of economic growth from resource use, turning environmental challenges into growth opportunities and making more efficient use of their natural resources, which also assists in preventing environmental degradation and ensuring biodiversity. They should implement the necessary structural reforms to be successful under increasing global carbon and resource constraints in creating new business and employment opportunities. The Union and Member States should make further efforts to speed up the creation of an integrated and fully functioning internal energy market to enable gas and electricity flows without bottlenecks. In order to reduce emissions and improve energy efficiency, Member States should make extensive use of market-based instruments, supporting the principle of internalisation of external costs, including taxation, and other effective support instruments in order to reduce emissions and better adapt to climate change, support sustainable growth and jobs and resource efficiency in a cost-effective manner, incentivise the use of renewable energy and low-carbon climate-resilient technologies, a shift to more environmentally-friendly and interconnected modes of transport and promote energy savings and eco-innovation. Member States should phase out environmentally harmful subsidies and ensure fair distribution of their costs and benefits.

Member States and the Union should use regulatory, non-regulatory and fiscal instruments, for example Union-wide energy performance standards for products and buildings, labelling, and 'green procurement', to incentivise cost-effective transition of production and consumption patterns, promote recycling, make the transition to energy- and resource- efficiency and a safe and sustainable low-carbon economy, and ensure progress towards more sustainable transport and safe and clean energy production while maximising European synergies in this respect and take into account the contribution of sustainable agriculture. Member States should decisively work towards smart, upgraded and fully inter-connected transport and energy infrastructures, use Information and Communication Technologies, in line with guideline 4, to secure productivity gains, ensure coordinated implementation of infrastructure projects and support the development of open, competitive and integrated network markets.

The European Union headline target, on the basis of which Member States will set their national targets, is to reduce by 2020 greenhouse gas emissions by 20 % compared to 1990 levels; to increase the share of renewable energy sources in our final energy consumption to 20 %; and moving towards a 20 % increase in energy efficiency; the Union is committed to take a decision to move to a 30 % reduction by 2020 compared to 1990 levels as its conditional offer with a view to a global and comprehensive agreement for the period beyond 2012, provided that other developed countries commit themselves to comparable emission reductions and developing countries contribute adequately according to their responsibilities and respective capabilities.

Guideline 6: improving the business and consumer environment, and modernising and developing the industrial base in order to ensure the full functioning of the internal market

Member States should ensure that markets work for citizens, consumers and businesses. While ensuring the protection of consumers, Member States and the Union should put in place predictable framework conditions and ensure well- functioning, open and competitive goods and services markets. In particular, these actions should aim for the deepening the single market and regulation system, notably in the financial sector, as well as the promotion of a level playing field in financial markets at global level, the effective implementation and enforcement of single market and competition rules, and developing the necessary physical infrastructure, also with a view to reducing regional disparities.

The external dimension of the internal market should be further developed with the aim of enhanced trade and investment. In the context of the single market due attention must be paid to respecting the adequate provision of services of general interest. Member States should continue to improve the business environment by modernising public administrations, improving corporate governance, removing remaining barriers to the internal market, eliminating unnecessary administrative burdens and avoid unnecessary new burdens by applying smart regulation instruments, including by developing

further interoperable e-government services, removing tax obstacles, supporting small and medium-sized enterprises (SMEs), improving their access to the Single Market in line with the 'Small Business Act for Europe' and the 'Think Small First' principle, ensuring stable and integrated financial services markets, facilitating access to finance, improving conditions for promoting access to and protecting intellectual property rights, supporting internationalisation of SMEs and promoting entrepreneurship, including female entrepreneurship. Public procurement should encourage innovation, particularly for SMEs, and support the transition toward a resource- and energy-efficient economy (in line with guideline 5), while respecting the principles of market-openness, transparency and effective competition.

Member States should support a modern, innovative, diversified, competitive, low-carbon, resource- and energy-efficient industrial base, partly by facilitating any necessary restructuring in a cost-effective manner and in full compliance with the Union's competition rules and other relevant rules. The Union's funds should be reprioritised by Member States in this context. Member States should work closely with industry and stakeholders to contribute to the Union's leadership and competitiveness in global sustainable and inclusive development, particularly by encouraging corporate social responsibility, identifying bottlenecks and enabling change.

§33. Council Decision of 21 October 2010 on Guidelines for the Employment Policies of Member States, OJ L 308, November 24th, 2010, pp. 46-51

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 148(2) thereof,

Having regard to the proposal from the European Commission,

Having regard to the opinion of the European Parliament[1],

Having regard to the opinion of the European Economic and Social Committee[2],

Having regard to the opinion of the Committee of the Regions[3],

Having regard to the opinion of the Employment Committee[4],

Whereas:

(1) The Treaty on the Functioning of the European Union (TFEU) stipulates in Article 145 that Member States and the Union shall work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce as well as labour markets that are responsive to economic change and with a view to achieving the objectives defined in Article 3 of the Treaty on European Union (TEU). Member States, having regard to national practices related to the responsibilities of management and labour, shall regard promoting employment as a matter of common concern and shall coordinate their action in this respect within the Council, in accordance with the provisions of Article 148 of the TFEU.

(2) The TEU stipulates in Article 3(3) that the Union shall aim at full employment and shall combat social exclusion and discrimination, and shall promote social justice and protection and provides for the Union's initiatives to ensure coordination of Member States' social policies. Article 8 of the TFEU stipulates that in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women. Article 9 thereof provides that in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education and training.

(3) The TFEU provides that employment guidelines and broad economic policy

[1] Opinion of 8 September 2010 (not yet published in the Official Journal).
[2] Opinion of 27 May 2010 (not yet published in the Official Journal).
[3] Opinion of 10 June 2010 (not yet published in the Official Journal).
[4] Opinion of 20 May 2010 (not yet published in the Official Journal).

guidelines are to be adopted by the Council to guide Member States' policies.

(4) The Lisbon Strategy, launched in 2000, was based on an acknowledgement of the EU's need to increase its employment, productivity and competitiveness, while enhancing social cohesion, in the face of global competition, technological change, environmental challenges and an ageing population. The Lisbon Strategy was relaunched in 2005, after a mid-term review which led to greater focus on growth and more and better jobs.

(5) The Lisbon strategy for growth and jobs helped forge consensus around the broad direction of the EU's economic and employment policies. Under the strategy, both broad economic policy guidelines and employment guidelines were adopted by the Council Decision 2005/600/EC[5] ([5]) and revised in Council Decision 2008/618/EC[6] ([6]). The 24 guidelines laid the foundations for the National Reform Programmes, outlining the key macroeconomic, microeconomic and labour market reform priorities for the Union as a whole. However, experience shows that the guidelines did not set clear enough priorities and that links between them could have been stronger. This limited their impact on national policymaking.

(6) The financial and economic crisis that started in 2008 resulted in a significant loss in jobs and potential output and has led to a dramatic deterioration in public finances. The European Economic Recovery Plan has nevertheless helped Member States to deal with the crisis, partly through a coordinated fiscal stimulus, with the euro providing an anchor for macroeconomic stability. The crisis therefore showed that when the coordination of Union policies is strengthened and rendered effective, it can deliver significant results. The crisis also underscored the close interdependence of the Member States' economic and employment performance.

(7) The Commission proposed to set up a new strategy for the next decade, known as 'the Europe 2020 Strategy', to enable the Union to emerge stronger from the crisis, and to turn its economy towards smart, sustainable and inclusive growth, accompanied by high level employment, productivity and social cohesion. Five headline targets, listed under the relevant guidelines, constitute shared objectives which guide the action of the Member States, taking into account their relative starting positions and national circumstances, and which also guide the action of the Union. The Member States should, furthermore, make every effort to meet the national targets and to remove the bottlenecks that constrain growth.

(8) As part of comprehensive 'exit strategies' for the economic crisis, Member States should carry out ambitious reforms to ensure macroeconomic stability, the promotion of more and better jobs and the sustainability of public finance, improve competitiveness and productivity, reduce macroeconomic imbalances and enhance labour market performance. The withdrawal of the fiscal stimulus should be implemented and coordinated within the framework of the Stability and Growth Pact.

(9) Within the Europe 2020 strategy, Member States and the Union should implement reforms aimed at 'smart growth', i.e. growth driven by knowledge and innovation. Reforms should aim at improving the quality of education and ensuring access for all, as well as strengthening research, business performance and further improving the regulatory framework in order to promote innovation and knowledge transfer throughout the Union. Reforms should encourage entrepreneurship, the development of small and medium-sized enterprises (SMEs) and help to turn creative ideas into innovative products, services and processes that can create growth, quality and sustainable jobs, territorial, economic and social cohesion, and address more efficiently European and global societal challenges. Making the most of information and communication technologies is essential in this context.

(10) The policies of the Union and of Member States, including their reform programmes, should aim at 'sustainable growth'. Sustainable growth means building an energy and resource-efficient, sustainable and competitive economy, a fair distribution of the cost and benefits and exploiting Europe's leadership in the race to develop new processes and technologies, including green technologies. Member States and the Union should implement the necessary reforms to reduce greenhouse gas emissions and use resources efficiently, which will also help to prevent environmental degradation and biodiversity loss. They should also improve the business environment, stimulate the creation of green jobs and help enterprises to modernise their industrial base.

(11) The policies of the Union and Member States' reform programmes should also aim at 'inclusive growth'. Inclusive growth means

[5] OJ L 205, 6.8.2005, p. 21.
[6] OJ L 198, 26.7.2008, p. 47.

building a cohesive society in which people are empowered to anticipate and manage change and consequently to actively participate in society and the economy. Member States' reforms should therefore ensure access and opportunities for all throughout their lifecycle, thus reducing poverty and social exclusion through removing barriers to labour market participation, especially for women, older workers, young people, people with disabilities and legal migrants. They should also make sure that the benefits of economic growth reach all citizens and all regions and foster employment-enhancing growth, based on decent work. Ensuring the effective functioning of the labour markets through investing in successful transitions, education and training systems, appropriate skills development, raising job quality, and fighting segmentation, structural unemployment, youth unemployment, and inactivity while ensuring adequate, sustainable social protection and active inclusion to prevent and reduce poverty, with particular attention to combating in-work poverty and reducing poverty amongst the groups most at risk from social exclusion, including children and young people, while at the same time adhering to agreed fiscal consolidation, should therefore be at the heart of Member States' reform programmes.

(12) Increased labour market participation by women is a precondition for boosting growth and for tackling the demographic challenges. A visible gender equality perspective, integrated into all relevant policy areas, is therefore crucial for the implementation of all aspects of the guidelines in the Member States. Conditions should be created to support the supply of adequate, affordable, high-quality childcare services for pre-school age children. The principle of equal pay for male and female workers for equal work or work of equal value should be applied.

(13) The Union's and Member States' structural reforms can effectively contribute to growth and jobs if they enhance the Union's competitiveness in the global economy, open up new opportunities for Europe's exporters and provide competitive access to vital imports. Reforms should therefore take into account their external competitiveness implications to foster European growth and participation in open and fair markets worldwide.

(14) The Europe 2020 strategy has to be underpinned by an integrated set of European and national policies, which Member States and the Union should implement fully and in a timely manner, in order to achieve the positive spillover effects of coordinated structural reforms and a more consistent contribution from European policies to the strategy's objectives. The guidelines are a framework for Member States in devising, implementing and monitoring national policies in the context of the overall EU strategy. The Europe 2020 headline targets listed under the relevant guidelines should guide the Member States in defining their own national targets and any sub-targets, taking account of their relative starting positions and national circumstances, and according to their national decisionmaking procedures. Where they do so, Member States may wish to draw on the indicators developed by the Employment Committee or the Social Protection Committee, as appropriate. The headline employment target draws attention to reducing unemployment of vulnerable groups, including young people.

(15) Cohesion policy and its structural funds are amongst a number of important delivery mechanisms to achieve the priorities of smart, sustainable and inclusive growth in Member States and regions. In its conclusions of 17 June 2010, the European Council stressed the importance of promoting economic, social and territorial cohesion in order to contribute to the success of the new Europe 2020 strategy.

(16) When designing and implementing their National Reform Programmes taking account of these guidelines, Member States should ensure effective governance of employment policy. While these guidelines are addressed to Member States, the Europe 2020 strategy should, as appropriate, be implemented, monitored and evaluated in partnership with all national, regional and local authorities, closely associating parliaments, as well as social partners and representatives of civil society, who shall contribute to the elaboration of National Reform Programmes, to their implementation and to the overall communication on the strategy.

(17) The Europe 2020 strategy is underpinned by a smaller set of guidelines, replacing the previous set of 24 and addressing employment and broad economic policy issues in a coherent manner. The guidelines for the employment policies of the Member States, annexed to this Decision, are intrinsically linked with the guidelines for the economic policies of the Member States and of the Union, annexed to Council Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union ([1]). Together, they form the 'Europe 2020 integrated guidelines'.

(18) These new integrated guidelines are in line with the conclusions of the European Council. They give precise guidance to the Member States on defining their National Reform Programmes and implementing reforms, reflecting interdependence and in line with the Stability and Growth Pact. The employment guidelines should form the basis for any country-specific recommendations that the Council may address to the Member States pursuant to Article 148(4) of the TFEU, in parallel with the country-specific recommendations addressed to the Member States pursuant to Article 121(4) of that Treaty, in order to form a coherent package of recommendations. The employment guidelines should also form the basis for the establishment of the Joint Employment Report sent annually by the Council and the Commission to the European Council.

(19) The Employment Committee and the Social Protection Committee should monitor progress in relation to the employment and social aspects of the employment guidelines, in line with their respective Treaty-based mandates. This should in particular build on the activities of the open method of coordination in the fields of employment and of social protection and social inclusion. In addition the Employment Committee should maintain close contact with other relevant Council preparatory instances, including in the field of education.

(20) Even though they must be drawn up each year, these guidelines should remain stable until 2014 to ensure a focus on implementation,

HAS ADOPTED THIS DECISION:

Article 1

The guidelines for Member States' employment policies, as set out in the Annex, are hereby adopted.

Article 2

The guidelines shall be taken into account in the employment policies of the Member States, which shall be reported upon in National Reform Programmes.

Article 3

This Decision is addressed to the Member States.

Done at Luxembourg, 21 October 2010.

ANNEX: GUIDELINES FOR THE EMPLOYMENT POLICIES OF THE MEMBER STATES

Guideline 7: Increasing labour market participation of women and men, reducing structural unemployment and promoting job quality

Activation is key to increasing labour market participation. Member States should integrate the flexicurity principles endorsed by the European Council into their labour market policies and apply them, making appropriate use of European Social Fund and other EU funds support, with a view to increasing labour market participation and combating segmentation, inactivity and gender inequality, whilst reducing structural unemployment. Measures to enhance flexibility and security should be both balanced and mutually reinforcing. Member States should therefore introduce a combination of flexible and reliable contractual arrangements, active labour market policies, effective lifelong learning, policies to promote labour mobility, and adequate social security systems to secure labour market transitions accompanied by clear rights and responsibilities for the unemployed to actively seek work. Together with the social partners, adequate attention should also be paid to internal flexicurity at the work place.

Member States should step up social dialogue and tackle labour market segmentation with measures addressing precarious employment, underemployment and undeclared work. Professional mobility should be rewarded. The quality of jobs and employment conditions should be addressed. Member States should combat in-work poverty and promote occupational health and safety. Adequate social security should also be ensured for those on fixed-term contracts and the selfemployed. Employment services play an important role in activation and matching and they should therefore be strengthened with personalised services and active and preventive labour market measures at an early stage. Such services and measures should be open to all, including young people, those threatened by unemployment, and those furthest away from the labour market.

Policies to make work pay remain important. In order to increase competitiveness and raise participation levels, particularly for the low-skilled, and in line with economic policy guideline 2, Member States should encourage the right framework conditions for wage bargaining and labour cost development consistent with price stability and productivity

trends. Member States should review tax and benefit systems, and public services capacity to provide the support needed, in order to increase labour force participation and stimulate labour demand. They should promote active ageing, gender equality including equal pay, and the integration in the labour market of young people, people with disabilities, legal migrants and other vulnerable groups. Work-life balance policies with the provision of affordable care and innovation in the manner in which work is organised should be geared to raising employment rates, particularly among young people, older workers and women. Member States should also remove barriers to labour market entry for newcomers, promote self-employment, entrepreneurship and job creation in all areas including green employment and care and promote social innovation.

The EU headline target, on the basis of which Member States will set their national targets, taking into account their relative starting positions and national circumstances, is to aim to raise the employment rate for women and men aged 20-64 to 75 % by 2020, including through the greater participation of young people, older workers and low-skilled workers and the better integration of legal migrants.

Guideline 8: Developing a skilled workforce responding to labour market needs and promoting lifelong learning

Member States should promote productivity and employability through an adequate supply of knowledge and skills to match current and future demand in the labour market. Quality initial education and attractive vocational training must be complemented with effective incentives for lifelong learning for those who are in and those who are not in employment, thus ensuring every adult the chance to retrain or to move one step up in their qualification and overcome gender stereotypes, as well as by opportunities for second-chance learning and by targeted migration and integration policies. Member States should develop systems for recognising acquired competencies, and should remove barriers to occupational and geographical mobility of workers, promote the acquisition of transversal competences to support creativity, innovation and entrepreneurship. In particular, efforts should focus on supporting those with low and obsolete skills, increasing the employability of older workers, enhancing training, skills and experience of highly skilled workers, including researchers and women in scientific, mathematical and technological fields.

In cooperation with social partners and firms, Member States should improve access to training, strengthen education and career guidance. These improvements should be combined with the provision of systematic information on new job openings and opportunities, the promotion of entrepreneurship and enhanced anticipation of skill needs. Investment in human resource development, up-skilling and participation in lifelong learning schemes should be promoted through joint financial contributions from governments, individuals and employers. To support young people and in particular those not in employment, education or training, Member States, in cooperation with the social partners, should enact schemes to help those people find initial employment, job experience, or further education and training opportunities, including apprenticeships, and should intervene rapidly when young people become unemployed.

Regular monitoring of the performance of up-skilling and anticipation policies should help identify areas for improvement and increase the responsiveness of education and training systems to current and emerging labour market needs, such as the low-carbon and resource-efficient economy. The ESF and other EU funds should be mobilised, where appropriate, by Member States to support these objectives. Policies stimulating labour demand could complement investments in human capital.

Guideline 9: Improving the quality and performance of education and training systems at all levels and increasing participation in tertiary or equivalent education

In order to ensure access to quality education and training for all and to improve educational outcomes, Member States should invest efficiently in education and training systems notably to raise the skill level of the EU's workforce, allowing it to meet the rapidly changing needs of modern labour markets and society at large. In line with the lifelong learning principles, action should cover all sectors (from early childhood education and schools through to higher education, vocational education and training, as well as adult learning) taking into account also learning in informal and non-formal contexts. Reforms should aim to ensure the acquisition of the key competencies that every individual needs for success in a knowledge-based economy, notably in terms of employability in line with the priorities mentioned in guideline 4. International mobility for learners and teachers should be encouraged. Steps should also be taken to ensure that

learning mobility for young people and teachers becomes the norm. Member States should improve the openness and relevance of education and training systems, particularly by implementing national qualification frameworks enabling flexible learning pathways, and by developing partnerships between the worlds of education/training and work. The teaching profession should be made more attractive and attention should be paid to the initial education and the continuous professional development of teachers. Higher education should become more open to non-traditional learners and participation in tertiary or equivalent education should be increased. With a view to reducing the number of young people not in employment, education, or training, Member States should take all necessary steps to prevent early school leaving.

The EU headline target, on the basis of which Member States will set their national targets, taking into account their relative starting positions and national circumstances, will aim to reduce drop out rates to less than 10 %, and increase the share of 30-34 year-olds having completed tertiary or equivalent education to at least 40 %[7].

Guideline 10: Promoting social inclusion and combating poverty

The extension of employment opportunities is an essential aspect of Member States' integrated strategies to prevent and reduce poverty and to promote full participation in society and economy. Appropriate use of the European Social Fund and other EU funds should be made to that end. Efforts should concentrate on ensuring equal opportunities, including through access for all to high quality, affordable, and sustainable services, in particular in the social field. Public services (including online services, in line with guideline 4) play an important role in this respect. Member States should put in place effective anti-discrimination measures. Empowering people and promoting labour market participation for those furthest away from the labour market while preventing in-work poverty will help fight social exclusion. This would require enhancing social protection systems, lifelong learning and comprehensive active inclusion policies to create opportunities at different stages of people's lives and shield them from the risk of exclusion, with special attention to women. Social protection systems, including pensions and access to healthcare, should be modernised and fully deployed to ensure adequate income support and services — thus providing social cohesion — whilst remaining financially sustainable and encouraging participation in society and in the labour market.

Benefit systems should focus on ensuring income security during transitions and reducing poverty, in particular among groups most at risk from social exclusion, such as one-parent families, minorities including the Roma, people with disabilities, children and young people, elderly women and men, legal migrants and the homeless. Member States should also actively promote the social economy and social innovation in support of the most vulnerable. All measures should also aim at promoting gender equality.

The EU headline target, on the basis of which Member States will set their national targets, taking into account their relative starting conditions and national circumstances, will aim at promoting social inclusion, in particular through the reduction of poverty by aiming to lift at least 20 million people out of the risk of poverty and exclusion[8].

[7] The European Council emphasises the competence of Member States to define and implement quantitative targets in the field of education.

[8] The population is defined as the number of persons who are at risk of poverty and exclusion according to three indicators (at risk of poverty; material deprivation; jobless household), leaving Member States free to set their national targets on the basis of the most appropriate indicators, taking into account their national circumstances and priorities.

§34. Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L306, November 16th, 2011, pp.25-32

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 121(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) The coordination of the economic policies of the Member States within the Union should be developed in the context of the broad economic policy guidelines and the employment guidelines, as provided for by the Treaty on the Functioning of the European Union (TFEU), and should entail compliance with the guiding principles of stable prices, sound and sustainable public finances and monetary conditions and a sustainable balance of payments.

(2) There is a need to draw lessons from the first decade of functioning of the economic and monetary union and, in particular, for improved economic governance in the Union built on stronger national ownership.

(3) Achieving and maintaining a dynamic internal market should be considered an element of the proper and smooth functioning of the economic and monetary union.

(4) The improved economic governance framework should rely on several interlinked and coherent policies for sustainable growth and jobs, in particular a Union strategy for growth and jobs, with particular focus on developing and strengthening the internal market, fostering international trade and competitiveness, a European Semester for strengthened coordination of economic and budgetary policies (European Semester), an effective framework for preventing and correcting excessive government deficits (the Stability and Growth Pact (SGP)), a robust framework for preventing and correcting macroeconomic imbalances, minimum requirements for national budgetary frameworks, and enhanced financial market regulation and supervision, including macroprudential supervision by the European Systemic Risk Board (ESRB).

(5) The strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments. While recognising that the counterparts of the European Parliament in the framework of the dialogue are the relevant institutions of the Union and their representatives, the competent committee of the European Parliament may offer an opportunity to participate in an exchange of views to a Member State which is the subject of a Council recommendation or decision in accordance with Article 7(2), Article 8(2) or Article 10(4) of this Regulation. The Member State's participation in such an exchange of views is voluntary.

(6) The Commission should have a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on-site missions, recommendations and warnings.

(7) In particular, surveillance of the economic policies of the Member States should be broadened beyond budgetary surveillance to include a more detailed and formal framework to prevent excessive macroeconomic imbalances and to help the Member States affected to establish corrective plans before divergences become entrenched. Such broadening of the surveillance of economic

[1] OJ C 150, 20.5.2011, p. 1.
[2] OJ C 218, 23.7.2011, p. 53.
[3] Position of the European Parliament of 28 September 2011 (not yet published in the Official Journal) and decision of the Council of 8 November 2011.

policies should take place in parallel with a deepening of fiscal surveillance.

(8) To help correct such excessive macroeconomic imbalances, it is necessary to lay down a detailed procedure in legislation.

(9) It is appropriate to supplement the multilateral surveillance procedure referred to in paragraphs 3 and 4 of Article 121 TFEU with specific rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union. It is essential that the procedure should be aligned with the annual multilateral surveillance cycle.

(10) That procedure should establish an alert mechanism for the early detection of emerging macroeconomic imbalances. It should be based on the use of an indicative and transparent 'scoreboard' comprising indicative thresholds, combined with economic judgement. This judgement should take into account, inter alia, nominal and real convergence inside and outside the euro area.

(11) In order to function efficiently as an element of the alert mechanism, the scoreboard should consist of a limited set of economic, financial and structural indicators relevant to the detection of macroeconomic imbalances, with corresponding indicative thresholds. The indicators and thresholds should be adjusted when necessary, in order to adapt to the changing nature of macroeconomic imbalances due, inter alia, to evolving threats to macroeconomic stability, and in order to take into account the enhanced availability of relevant statistics. The indicators should not be understood as goals for economic policy in themselves but as tools to take account of the evolving nature of the macroeconomic imbalances within the Union.

(12) The Commission should closely cooperate with the European Parliament and the Council when drawing up the scoreboard and the set of macroeconomic and macrofinancial indicators for Member States. The Commission should present suggestions for comments to the competent committees of the European Parliament and of the Council on plans to establish and adjust the indicators and thresholds. The Commission should inform the European Parliament and the Council of any changes to the indicators and thresholds and explain its reasons for suggesting such changes.

(13) In developing the scoreboard, due consideration should also be given to catering for heterogeneous economic circumstances, including catching-up effects.

(14) The crossing of one or more indicative thresholds need not necessarily imply that macroeconomic imbalances are emerging, as economic policy-making should take into account interlinks between macroeconomic variables. Conclusions should not be drawn from an automatic reading of the scoreboard: economic judgement should ensure that all pieces of information, whether from the scoreboard or not, are put in perspective and become part of a comprehensive analysis.

(15) Based on the multilateral surveillance procedure and the alert mechanism, or in the event of unexpected, significant economic developments that require urgent analysis for the purpose of this Regulation, the Commission should identify the Member States to be subject to an in-depth review. The in-depth review should be undertaken without the presumption that an imbalance exists and should encompass a thorough analysis of sources of imbalances in the Member State under review, taking due account of country-specific economic conditions and circumstances and of a wider set of analytical tools, indicators and qualitative information of country-specific nature. When the Commission is undertaking the in-depth review, the Member State should cooperate to ensure that the information available to the Commission is as complete and correct as possible. Furthermore, the Commission should give due consideration to any other information which, in the opinion of the Member State concerned is relevant, and which the Member State has put forward to the Council and to the Commission.

(16) The in-depth review should be discussed within the Council, and within the Eurogroup for the Member States whose currency is the euro. The in-depth review should take into account, where appropriate, Council recommendations or invitations addressed to Member States under review adopted in accordance with Articles 121, 126 and 148 TFEU and under Articles 6, 7, 8 and 10 of this Regulation, and the policy intentions of the Member State under review, as reflected in its national reform programmes, as well as international best practices as regards indicators and methodologies. When the Commission decides to undertake an in-depth review in the event of significant and unexpected economic developments that require urgent analysis, it should inform the Member States concerned.

(17) When assessing macroeconomic imbalances, account should be taken of their severity and their potential negative economic and financial spill-over effects which aggravate the vulnerability of the Union economy and are a threat to the smooth functioning of the economic and monetary union. Actions to address macroeconomic imbalances and divergences in competitiveness are required in all Member States, particularly in the euro area. However, the nature, importance and urgency of the policy challenges may differ significantly depending on the Member States concerned. Given vulnerabilities and the magnitude of the adjustment required, the need for policy action is particularly pressing in Member States showing persistently large current-account deficits and competitiveness losses. Furthermore, in Member States that accumulate large current-account surpluses, policies should aim to identify and implement measures that help strengthen their domestic demand and growth potential.

(18) The economic adjustment capacity and the track record of the Member State concerned as regards compliance with earlier recommendations issued under this Regulation and other recommendations issued under Article 121 TFEU as part of multilateral surveillance, in particular the broad guidelines for the economic policies of the Member States and of the Union, should also be considered.

(19) A procedure to monitor and correct adverse macroeconomic imbalances, with preventive and corrective elements, will require enhanced surveillance tools based on those used in the multilateral surveillance procedure. This could include enhanced surveillance missions to Member States by the Commission, in liaison with the European Central Bank (ECB) for Member States whose currency is the euro or Member States participating in the Agreement of 16 March 2006 between the European Central Bank and the national central banks of the Member States outside the euro area laying down the operating procedures for an exchange rate mechanism in stage three of Economic and Monetary Union[4] (ERM II), and additional reporting by Member States in case of severe imbalances, including imbalances that jeopardise the proper functioning of the economic and monetary union. Social partners and other national stakeholders should, where appropriate, be involved in the dialogue.

(20) If macroeconomic imbalances are identified, recommendations, where appropriate involving the relevant committees, should be addressed to the Member State concerned to provide guidance on appropriate policy responses. The policy response of the Member State concerned should be timely and should use all available policy instruments under the control of public authorities. Where appropriate, relevant national stakeholders, including social partners, should also be involved in accordance with the TFEU and national legal and political arrangements. The policy response should be tailored to the specific environment and circumstances of the Member State concerned and should cover the main economic policy areas, potentially including fiscal and wage policies, labour markets, product and services markets and financial sector regulation. The commitments under ERM II should be taken into account.

(21) The warnings and recommendations by the ESRB to Member States or to the Union address risks of a macrofinancial nature. These should also warrant appropriate follow-up action by the Commission in the context of the surveillance of macroeconomic imbalances, where appropriate. The independence and confidentiality of the ESRB should be strictly observed.

(22) If severe macroeconomic imbalances are identified, including imbalances that jeopardise the proper functioning of the economic and monetary union, an excessive imbalance procedure should be initiated that may include issuing recommendations to the Member State, enhanced surveillance and monitoring requirements and, in respect of Member States whose currency is the euro, the possibility of enforcement in accordance with Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area in the event of sustained failure to take corrective action.

(23) A Member State subject to the excessive imbalance procedure should establish a corrective action plan setting out details of its policies designed to implement the Council's recommendations. The corrective action plan should include a timetable for implementing the measures envisaged. It should be endorsed by a recommendation of the Council. That recommendation should be transmitted to the European Parliament.

(24) The power to adopt individual decisions establishing non-compliance with the recommendations adopted by the Council within

[4] OJ C 73, 25.3.2006, p. 21.

the framework of the corrective action plan should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council, as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the recommendations adopted by the Council on the basis of Article 121(4) TFEU in the context of the corrective action plan.

(25) In applying this Regulation, the Council and the Commission should fully respect the role of national parliaments and social partners, as well as differences in national systems, such as the systems for wage formation.

(26) If the Council considers that a Member State is no longer affected by an excessive macroeconomic imbalance, the excessive imbalance procedure should be closed following the Council's abrogation, on a recommendation from the Commission, of its relevant recommendations. That abrogation should be based on a comprehensive analysis by the Commission showing that the Member State has acted in line with the relevant Council recommendations and that the underlying causes and associated risks identified in the Council recommendation opening the excessive imbalance procedure no longer exist, taking account, inter alia, of macroeconomic developments, prospects and spill-over effects. The closure of the excessive imbalance procedure should be made public.

(27) Since the objective of this Regulation, namely the establishment of an effective framework for the detection of macroeconomic imbalances and the prevention and correction of excessive macroeconomic imbalances, cannot be sufficiently achieved by the Member States because of the deep trade and financial interlinks between Member States and the spill-over effects of national economic policies on the Union and the euro area as a whole, and can therefore be better achieved at the level of the Union, the Union may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective,

HAVE ADOPTED THIS REGULATION:

CHAPTER I – SUBJECT MATTER AND DEFINITIONS

Article 1 – *Subject matter*

1. This Regulation sets out detailed rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union.

2. This Regulation shall be applied in the context of the European Semester as set out in Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies.

3. The application of this Regulation shall fully observe Article 152 TFEU, and the recommendations issued under this Regulation shall respect national practices and institutions for wage formation. This Regulation takes into account Article 28 of the Charter of Fundamental Rights of the European Union, and accordingly does not affect the right to negotiate, conclude or enforce collective agreements or to take collective action in accordance with national law and practices.

Article 2 – *Definitions*

For the purposes of this Regulation:

(1) ‘imbalances’ means any trend giving rise to macroeconomic developments which are adversely affecting, or have the potential adversely to affect, the proper functioning of the economy of a Member State or of the economic and monetary union, or of the Union as a whole;

(2) ‘excessive imbalances’ means severe imbalances, including imbalances that jeopardise or risks jeopardising the proper functioning of the economic and monetary union.

CHAPTER II – DETECTION OF IMBALANCES

Article 3 – *Alert mechanism*

1. An alert mechanism shall be established to facilitate the early identification and the monitoring of imbalances. The Commission shall prepare an annual report containing a qualitative economic and financial assessment based on a scoreboard with a set of indicators the values of which are compared to their indicative thresholds, as provided for in Article 4. The annual report, including the values of the indicators of the scoreboard, shall be made public.

2. The Commission's annual report shall contain an economic and financial assessment putting the movement of the indicators into perspective, drawing, if necessary, on other relevant economic and financial indicators when assessing the evolution of imbalances. Conclusions shall not be drawn from a mechanical reading of the scoreboard indicators. The assessment shall take into account the evolution of imbalances in the Union and in the euro area. The report shall also indicate whether the crossing of thresholds in one or more Member States signifies the possible emergence of imbalances. The assessment of Member States showing large current-account deficits may differ from that of Member States that accumulate large current-account surpluses.

3. The annual report shall identify Member States that the Commission considers may be affected by, or may be at risk of being affected by, imbalances.

4. The Commission shall transmit the annual report to the European Parliament, the Council and the European Economic and Social Committee in a timely manner.

5. As part of the multilateral surveillance in accordance with Article 121(3) TFEU, the Council shall discuss and carry out an overall assessment of the Commission's annual report. The Eurogroup shall discuss the report as far as it relates to Member States whose currency is the euro.

Article 4 – *Scoreboard*

1. The scoreboard comprising the set of indicators, shall be used as a tool to facilitate early identification and monitoring of imbalances.

2. The scoreboard shall comprise a small number of relevant, practical, simple, measurable and available macroeconomic and macrofinancial indicators for Member States. It shall allow for the early identification of macroeconomic imbalances that emerge in the short-term and imbalances that arise due to structural and long-term trends.

3. The scoreboard shall, inter alia, encompass indicators which are useful in the early identification of:

(a) internal imbalances, including those that can arise from public and private indebtedness; financial and asset market developments, including housing; the evolution of private sector credit flow; and the evolution of unemployment;

(b) external imbalances, including those that can arise from the evolution of current account and net investment positions of Member States; real effective exchange rates; export market shares; changes in price and cost developments; and non-price competitiveness, taking into account the different components of productivity.

4. In undertaking its economic reading of the scoreboard in the alert mechanism, the Commission shall pay close attention to developments in the real economy, including economic growth, employment and unemployment performance, nominal and real convergence inside and outside the euro area, productivity developments and its relevant drivers such as research and development and foreign and domestic investment, as well as sectoral developments including energy, which affect GDP and current account performance.

The scoreboard shall also include indicative thresholds for the indicators, to serve as alert levels. The choice of indicators and thresholds shall be conducive towards promoting competitiveness in the Union.

The scoreboard of indicators shall have upper and lower alert thresholds unless inappropriate, which shall be differentiated for euro and non-euro area Member States if justified by specific features of the monetary union and relevant economic circumstances. In developing the scoreboard, due consideration shall be given to catering for heterogeneous economic circumstances, including catching-up effects.

5. The work of the ESRB shall be taken into due consideration in the drafting of indicators relevant to financial market stability. The Commission shall invite the ESRB to provide its views regarding draft indicators, relevant to financial market stability.

6. The Commission shall make the set of indicators and the thresholds in the scoreboard public.

7. The Commission shall assess on a regular basis the appropriateness of the scoreboard, including the composition of indicators, the thresholds set and the methodology used, and it shall adjust or modify them where necessary. The Commission shall make changes in the underlying methodology and composition of the scoreboard and the associated thresholds public.

8. The Commission shall update the values for the indicators on the scoreboard at least on an annual basis.

Article 5 – *In-depth review*

1. Taking due account of the discussions within the Council and the Eurogroup referred to in Article 3(5), or in the event of unexpected, significant economic developments that require urgent analysis for the purpose of this Regulation, the Commission shall undertake an in-depth review for each Member State that it considers may be affected by, or may be at risk of being affected by, imbalances.

The in-depth review shall build on a detailed analysis of country-specific circumstances, including the different starting positions across Member States; it shall examine a broad range of economic variables and involve the use of analytical tools and qualitative information of country-specific nature. It shall acknowledge the national specificities regarding industrial relations and social dialogue.

The Commission shall also give due consideration to any other information which the Member State concerned considers to be relevant and has communicated to the Commission.

The Commission shall undertake its in-depth review in conjunction with surveillance missions to the Member State concerned in accordance with Article 13.

2. The Commission's in-depth review shall include an evaluation of whether the Member State in question is affected by imbalances, and of whether these imbalances constitute excessive imbalances. It shall examine the origin of the detected imbalances against the background of prevailing economic circumstances, including the deep trade and financial interlinks between Member States and the spill-over effects of national economic policies. The in-depth review shall analyse relevant developments related to the Union strategy for growth and jobs. It shall also consider the relevance of economic developments in the Union and the euro area as a whole. It shall, in particular, take into account:

(a) where appropriate, Council recommendations or invitations addressed to Member States under review adopted in accordance with Articles 121, 126 and 148 TFEU and under Articles 6, 7, 8 and 10 of this Regulation;

(b) the policy intentions of the Member State under review, as reflected in its national reform programmes and, where appropriate, in its stability or convergence programme;

(c) any warnings or recommendations from the ESRB on systemic risks addressed to, or being relevant to, the Member State under review. The confidentiality regime of the ESRB shall be observed.

3. The Commission shall inform the European Parliament and the Council of the results of the in-depth review and shall make them public.

Article 6 – *Preventive action*

1. If, on the basis of the in-depth review referred to in Article 5, the Commission considers that a Member State is experiencing imbalances, it shall inform the European Parliament, the Council and the Eurogroup accordingly. The Council, on a recommendation from the Commission, may address the necessary recommendations to the Member State concerned, in accordance with the procedure set out in Article 121(2) TFEU.

2. The Council shall inform the European Parliament of the recommendation and shall make it public.

3. The recommendations of the Council and of the Commission shall fully observe Article 152 TFEU and shall take into account Article 28 of the Charter of Fundamental Rights of the European Union.

4. The Council shall review its recommendation annually in the context of the European Semester and may, if appropriate, adjust it in accordance with paragraph 1.

CHAPTER III – EXCESSIVE IMBALANCE PROCEDURE

Article 7 – *Opening of the excessive imbalance procedure*

1. If, on the basis of the in-depth review referred to in Article 5, the Commission considers that the Member State concerned is affected by excessive imbalances, it shall inform the European Parliament, the Council and the Eurogroup accordingly.

The Commission shall also inform the relevant European Supervisory Authorities and the ESRB. The ESRB is invited to take the steps that it deems necessary.

2. The Council, on a recommendation from the Commission, may, in accordance with Article 121(4) TFEU, adopt a recommendation establishing the existence of an excessive imbalance and recommending that the Member State concerned take corrective action.

The Council's recommendation shall set out the nature and implications of the imbalances and shall specify a set of policy recommendations to be followed and a deadline within which the Member State concerned is to submit a corrective action plan. The Council may, as provided for in Article 121(4) TFEU, make its recommendation public.

Article 8 – *Corrective action plan*

1. Any Member State for which an excessive imbalance procedure is opened shall submit a corrective action plan to the Council and the Commission based on, and within a deadline to be defined in, the Council's recommendation referred to in Article 7(2). The corrective action plan shall set out the specific policy actions the Member State concerned has implemented or intends to implement and shall include a timetable for those actions. The corrective action plan shall take into account the economic and social impact of the policy actions and shall be consistent with the broad economic policy guidelines and the employment guidelines.

2. The Council, on the basis of a Commission report, shall assess the corrective action plan within 2 months of submission of that plan. If, upon a Commission recommendation, the Council considers the corrective action plan sufficient, it shall endorse the plan by way of a recommendation listing the specific actions required and the deadlines for taking them, and shall establish a timetable for surveillance, paying due attention to the transmission channels and recognising that there may be long lags between the adoption of the corrective action and the actual resolution of imbalances.

3. If, upon a Commission recommendation, the Council considers the actions or the timetable envisaged in the corrective action plan insufficient, it shall adopt a recommendation addressed to the Member State to submit, within 2 months as a rule, a new corrective action plan. The Council shall examine the new corrective action plan in accordance with the procedure laid down in this Article.

4. The corrective action plan, the Commission report and the Council recommendation referred to in paragraphs 2 and 3 shall be made public.

Article 9 – *Monitoring of corrective action*

1. The Commission shall monitor implementation of the Council's recommendation adopted under Article 8(2). For that purpose, the Member State shall present to the Council and the Commission at regular intervals progress reports, the frequency of which shall be established by the Council in the recommendation referred to in Article 8(2).

2. The Council shall make Member States' progress reports public.

3. The Commission may carry out enhanced surveillance missions to the Member State concerned, in order to monitor the implementation of the corrective action plan, in liaison with the ECB when those missions concern Member States whose currency is the euro or Member States participating in ERM II. The Commission shall, where appropriate, involve social partners and other national stakeholders in a dialogue during those missions.

4. In the event of relevant major changes in economic circumstances, the Council, on a recommendation from the Commission, may amend the recommendations adopted under Article 8(2) in accordance with the procedure laid down in that Article. Where appropriate, the Council shall invite the Member State concerned to submit a revised corrective action plan, and shall assess that revised corrective action plan in accordance with the procedure laid down in Article 8.

Article 10 – *Assessment of corrective action*

1. On the basis of a Commission report, the Council shall assess whether the Member State concerned has taken the recommended corrective action in accordance with the Council's recommendation issued under Article 8(2).

2. The Commission shall make its report public.

3. The Council shall make its assessment by the deadline set by the Council in its recommendations adopted in accordance with Article 8(2).

4. Where it considers that the Member State has not taken the recommended corrective action, the Council, on a recommendation from the Commission, shall adopt a decision establishing non-compliance, together with a recommendation setting new deadlines for taking corrective action. In this case, the

Council shall inform the European Council, and shall make public the conclusions of the surveillance missions referred to in Article 9(3).

The Commission's recommendation on establishing non-compliance shall be deemed to have been adopted by the Council, unless it decides, by qualified majority, to reject the recommendation within 10 days of its adoption by the Commission. The Member State concerned may request that a meeting of the Council be convened within that period to take a vote on the decision.

5. Where the Council, on the basis of the Commission's report referred to in paragraph 1, considers that the Member State has taken the corrective action recommended in accordance with Article 8(2), the excessive imbalance procedure shall be considered to be on track and shall be held in abeyance. Nevertheless, monitoring shall continue in accordance with the timetable set out in the recommendation under Article 8(2). The Council shall make public its reasons for holding the procedure in a position of abeyance and recognising the corrective policy actions taken by the Member State concerned.

Article 11 – *Closing of the excessive imbalance procedure*

The Council, on a recommendation from the Commission, shall abrogate recommendations issued under Articles 7, 8 or 10 as soon as it considers that the Member State concerned is no longer affected by excessive imbalances as outlined in the recommendation referred to in Article 7(2). The Council shall make a public statement reflecting that fact.

Article 12 – *Voting within the Council*

For the measures referred to in Articles 7 to 11, the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

CHAPTER IV – FINAL PROVISIONS

Article 13 – *Surveillance missions*

1. The Commission shall ensure a permanent dialogue with the authorities of the Member States in accordance with the objectives of this Regulation. To that end, the Commission shall, in particular, carry out missions for the purpose of assessing the economic situation in the Member State and the identification of any risks or difficulties in complying with the objectives of this Regulation.

2. The Commission may undertake enhanced surveillance missions for Member States which are the subject of a recommendation as to the existence of an excessive imbalance position under Article 7(2) for the purposes of on-site monitoring.

3. Where the Member State concerned is a Member State whose currency is the euro or is participating in ERM II, the Commission may, if appropriate, invite representatives of the European Central Bank to participate in surveillance missions.

4. The Commission shall report to the Council on the outcome of the missions referred to in paragraph 2 and may, if appropriate, decide to make its findings public.

5. When organising the missions referred to in paragraph 2, the Commission shall transmit its provisional findings to the Member State concerned for comments.

Article 14 – *Economic Dialogue*

1. In order to enhance the dialogue between the institutions of the Union, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss:

(a) information provided by the Council on the broad guidelines of economic policy pursuant to Article 121(2) TFEU;

(b) general guidance to Member States issued by the Commission at the beginning of the annual cycle of surveillance;

(c) the conclusions of the European Council concerning orientations for economic policies in the context of the European Semester;

(d) the results of multilateral surveillance carried out under this Regulation;

(e) the conclusions of the European Council concerning the orientations for, and results of, multilateral surveillance;

(f) a review of the conduct of the multilateral surveillance at the end of the European Semester;

(g) the recommendations taken pursuant to Article 7(2), Article 8(2) and Article 10(4) of this Regulation.

2. The competent committee of the European Parliament may offer the opportunity to participate in an exchange of views to the Member State which is the subject of a Council recommendation or decision under Article 7(2), Article 8(2) or Article 10(4).

3. The Council and the Commission shall regularly inform the European Parliament of the results of the application of this Regulation.

Article 15 – *Annual Reporting*

The Commission shall report annually on the application of this Regulation, including the updating of the scoreboard as set out in Article 4 and shall present its findings to the European Parliament and to the Council in the context of the European Semester.

Article 16 – *Review*

1. By 14 December 2014 and every 5 years thereafter, the Commission shall review and report on the application of this Regulation.

Those reports shall evaluate, inter alia:

(a) the effectiveness of this Regulation;

(b) the progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States in accordance with the TFEU.

Where appropriate, those reports shall be accompanied by a proposal for amendments to this Regulation.

2. The Commission shall send the reports referred to in paragraph 1 to the European Parliament and to the Council.

Article 17 – *Entry into force*

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Strasbourg, 16 November 2011.

§35. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306, November 16th, 2011, pp.8-11

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 136, in combination with Article 121(6) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank,[1]

Having regard to the opinion of the European Economic and Social Committee,[2]

Acting in accordance with the ordinary legislative procedure,[3]

Whereas:

(1) The improved economic governance framework should rely on several interlinked and coherent policies for sustainable growth and jobs, in particular a Union strategy for growth and jobs, with particular focus upon developing and strengthening the internal market, fostering international trade and competitiveness, a European Semester for strengthened coordination of economic and budgetary policies, an effective framework for preventing and correcting excessive government deficits

[1] OJ C 150, 20.5.2011, p. 1.

[2] OJ C 218, 23.7.2011, p. 53.

[3] Position of the European Parliament of 28 September 2011 (not yet published in the Official Journal) and decision of the Council of 8 November 2011.

(the Stability and Growth Pact (SGP)), a robust framework for preventing and correcting macroeconomic imbalances, minimum requirements for national budgetary frameworks, and enhanced financial market regulation and supervision, including macroprudential supervision by the European Systemic Risk Board.

(2) Reliable statistical data is the basis for the surveillance of macroeconomic imbalances. In order to guarantee sound and independent statistics, Member States should ensure the professional independence of national statistical authorities, consistent with the European statistics code of practice as laid down in Regulation (EC) No 223/2009 of the European Parliament and of the Council of 11 March 2009 on European statistics.[4] In addition, the availability of sound fiscal data is also relevant for the surveillance of macroeconomic imbalances. This requirement should be guaranteed by the rules provided in this regard by Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, in particular its Article 8.

(3) The coordination of the economic policies of the Member States within the Union should be developed in the context of the broad economic policy guidelines and the employment guidelines, as provided for by the Treaty on the Functioning of the European Union (TFEU), and should entail compliance with the guiding principles of stable prices, sound and sustainable public finances and monetary conditions and a sustainable balance of payments.

(4) Experience gained and mistakes made during the first decade of the economic and monetary union show a need for improved economic governance in the Union, which should be built on stronger national ownership of commonly agreed rules and policies and on a more robust framework at the level of the Union for the surveillance of national economic policies.

(5) Achieving and maintaining a dynamic internal market should be considered an element of the proper and smooth functioning of the economic and monetary union.

(6) In particular, surveillance of the economic policies of the Member States should be broadened beyond budgetary surveillance to include a more detailed and formal framework to prevent excessive macroeconomic imbalances and to help the Member States affected to establish corrective plans before divergences become entrenched and before economic and financial developments take a durable turn in an excessively unfavourable direction. Such broadening of the surveillance of economic policies should take place in parallel with a deepening of fiscal surveillance.

(7) To help correct such excessive macroeconomic imbalances, it is necessary to lay down a detailed procedure in legislation.

(8) It is appropriate to supplement the multilateral surveillance procedure referred to in paragraphs 3 and 4 of Article 121 TFEU with specific rules for the detection of macroeconomic imbalances as well as the prevention and correction of excessive macroeconomic imbalances within the Union. It is essential that the procedure be embedded in the annual multilateral surveillance cycle.

(9) Strengthening economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments. While recognising that the counterparts of the European Parliament in the framework of the dialogue are the relevant institutions of the Union and their representatives, the competent committee of the European Parliament may offer an opportunity to participate in an exchange of views to a Member State which is the subject of a Council decision imposing an interest-bearing deposit or an annual fine in accordance with this Regulation. The Member State's participation in such an exchange of views is voluntary.

(10) The Commission should have a stronger role in the enhanced surveillance procedure as regards assessments that are specific to each Member State, monitoring, on-site missions, recommendations and warnings.

(11) Enforcement of Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances should be strengthened by establishing interest-bearing deposits in case of non-compliance with the recommendation to take corrective action. Such deposits should be converted into an annual fine in the case of continued non-compliance with the recommendation to address excessive macroeconomic imbalances within the same imbalances procedure. Those enforcement

[4] OJ L 87, 31.3.2009, p. 164.

measures should be applicable to Member States whose currency is the euro.

(12) In the case of failure to comply with Council recommendations, the interest-bearing deposit or the fine should be imposed until the Council establishes that the Member State has taken corrective action to comply with its recommendations.

(13) Moreover, repeated failure of the Member State to draw up a corrective action plan to address the Council recommendation should also be subject to an annual fine as a rule, until the Council establishes that the Member State has provided a corrective action plan that sufficiently addresses its recommendation.

(14) To ensure equal treatment between Member States, the interest-bearing deposit and the fine should be identical for all Member States whose currency is the euro and equal to 0,1 % of the gross domestic product (GDP) of the Member State concerned in the preceding year.

(15) The Commission should be able to recommend reducing the amount of a sanction or cancelling it on grounds of exceptional economic circumstances.

(16) The procedure for applying sanctions to those Member States which fail to take effective measures to correct excessive macroeconomic imbalances should be construed in such a way that the application of the sanctions to those Member States would be the rule and not the exception.

(17) Fines referred to in this Regulation should constitute other revenue, as referred to in Article 311 TFEU, and should be assigned to stability mechanisms to provide financial assistance, created by Member States whose currency is the euro in order to safeguard the stability of the euro area as a whole.

(18) The power to adopt individual decisions for the application of the sanctions provided for in this Regulation should be conferred on the Council. As part of the coordination of the economic policies of the Member States conducted within the Council as provided for in Article 121(1) TFEU, those individual decisions are an integral follow-up to the measures adopted by the Council in accordance with Article 121 TFEU and Regulation (EU) No 1176/2011.

(19) Since this Regulation contains general rules for the effective enforcement of Regulation (EU) No 1176/2011, it should be adopted in accordance with the ordinary legislative procedure referred to in Article 121(6) TFEU.

(20) Since the objective of this Regulation, namely the effective enforcement of the correction of excessive macroeconomic imbalances in the euro area, cannot be sufficiently achieved by the Member States because of the deep trade and financial interlinks between Member States and the spill-over effects of national economic policies on the Union and the euro area as a whole, and can therefore be better achieved at the level of the Union, the Union may adopt measures in accordance with the principle of subsidiarity, as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to achieve that objective,

HAVE ADOPTED THIS REGULATION:

Article 1 – *Subject matter and scope*

1. This Regulation lays down a system of sanctions for the effective correction of excessive macroeconomic imbalances in the euro area.

2. This Regulation shall apply to Member States whose currency is the euro.

Article 2 – *Definitions*

For the purposes of this Regulation, the definitions set out in Article 2 of Regulation (EU) No 1176/2011 shall apply.

In addition, the following definition shall apply:

'exceptional economic circumstances' means circumstances where an excess of a government deficit over the reference value is considered exceptional within the meaning of the second indent of point (a) of Article 126(2) TFEU and as specified in Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure.[5]

Article 3 – *Sanctions*

1. An interest-bearing deposit shall be imposed by a Council decision, acting on a recommendation from the Commission, if a

[5] OJ L 209, 2.8.1997, p. 6.

Council decision establishing non-compliance is adopted in accordance with Article 10(4) of Regulation (EU) No 1176/2011, where the Council concludes that the Member State concerned has not taken the corrective action recommended by the Council.

2. An annual fine shall be imposed by a Council decision, acting on a recommendation by the Commission, where:

(a) two successive Council recommendations in the same imbalance procedure are adopted in accordance with Article 8(3) of Regulation (EU) No 1176/2011 and the Council considers that the Member State has submitted an insufficient corrective action plan; or

(b) two successive Council decisions in the same imbalance procedure are adopted establishing non-compliance in accordance with Article 10(4) of Regulation (EU) No 1176/2011. In this case, the annual fine shall be imposed by means of converting the interest-bearing deposit into an annual fine.

3. The decisions referred to in paragraphs 1 and 2 shall be deemed adopted by the Council unless it decides, by qualified majority, to reject the recommendation within 10 days of its adoption by the Commission. The Council may decide, by qualified majority, to amend the recommendation.

4. The Commission's recommendation for a Council decision shall be issued within 20 days of the conditions referred to in paragraphs 1 and 2 being met.

5. The interest-bearing deposit or the annual fine recommended by the Commission shall be 0,1 % of the GDP in the preceding year of the Member State concerned.

6. By derogation from paragraph 5, the Commission may, on grounds of exceptional economic circumstances or following a reasoned request by the Member State concerned addressed to the Commission within 10 days of the conditions referred to in paragraphs 1 and 2 being met, propose to reduce or cancel the interest-bearing deposit or the annual fine.

7. If a Member State has constituted an interest-bearing deposit or has paid an annual fine for a given calendar year and the Council thereafter concludes, in accordance with Article 10(1) of Regulation (EU) No 1176/2011 that the Member State has taken the recommended corrective action in the course of that year, the deposit paid for that year together with the accrued interest or the fine paid for that year shall be returned to the Member State pro rata temporis.

Article 4 – *Allocation of the fines*

Fines referred to in Article 3 of this Regulation shall constitute other revenue, as referred to in Article 311 TFEU, and shall be assigned to the European Financial Stability Facility. When the Member States whose currency is the euro create another stability mechanism to provide financial assistance in order to safeguard the stability of the euro area as a whole, those fines shall be assigned to that mechanism.

Article 5 – *Voting in the Council*

1. For the measures referred to in Article 3, only members of the Council representing Member States whose currency is the euro shall vote, and the Council shall act without taking into account the vote of the member of the Council representing the Member State concerned.

2. A qualified majority of the members of the Council referred to in paragraph 1 shall be defined in accordance with point (b) of Article 238(3) TFEU.

Article 6 – *Economic dialogue*

In order to enhance the dialogue between the Union institutions, in particular the European Parliament, the Council and the Commission, and to ensure greater transparency and accountability, the competent committee of the European Parliament may invite the President of the Council, the Commission and, where appropriate, the President of the European Council or the President of the Eurogroup to appear before the committee to discuss decisions taken pursuant to Article 3.

The competent committee of the European Parliament may offer the opportunity to the Member State concerned by such decisions to participate in an exchange of views.

Article 7 – *Review*

1. By 14 December 2014 and every 5 years thereafter, the Commission shall publish a report on the application of this Regulation.

That report shall evaluate, inter alia:

(a) the effectiveness of this Regulation;

(b) the progress in ensuring closer coordination of economic policies and sustained convergence of economic performances of the Member States in accordance with the TFEU.

2. Where appropriate, that report shall be accompanied by a proposal for amendments to this Regulation.

3. The Commission shall send the report and any accompanying proposals to the European Parliament and to the Council.

Article 8 – *Entry into force*

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Strasbourg, 16 November 2011.

II.6 MONETARY POLICY

§36. Regulation (EC) No 1053/2008 of the European Central Bank of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/11), OJ L 282, October 25th, 2008, pp. 17-18.

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty establishing the European Community and in particular to the first indent of Article 105(2) and to Article 110 thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank and in particular to the first indent of Article 34.1, in conjunction with the first indent of Article 3.1 and Article 18.2 thereof,

Whereas:

(1) To enhance on a temporary basis the provision of liquidity to counterparties for Eurosystem monetary policy operations, the criteria determining the eligibility of collateral that counterparties for Eurosystem monetary policy operations provide to the Eurosystem to obtain liquidity should be widened. The criteria determining the eligibility of collateral are laid down in Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem.[1]

(2) The Governing Council of the European Central Bank (ECB) decided on 15 October 2008 to widen temporarily the rules relating to the eligibility of collateral for the operations of the Eurosystem. The Governing Council furthermore decided that the date of entry into force of its decision as well as any further measures regarding such widened eligibility criteria would be communicated as soon as possible.

(3) In order to implement the above mentioned decision in a manner which allows its immediate application, recourse has to be made to a regulation, which does not require further executing measures by the national central banks of the Member States that have adopted the euro (hereinafter the NCBs). This Regulation is to be in force for a limited period of time and will be replaced by an ECB Guideline,

HAS ADOPTED THIS REGULATION:

Article 1 – *Widening of certain eligibility criteria for collateral*

1. The eligibility criteria for collateral laid down in Annex I to Guideline ECB/2000/7 (hereinafter the General Documentation) shall be widened in accordance with Articles 2 to 7.

2. In the event of any discrepancy between this Regulation and the General Documentation, as implemented at national level by the NCBs, the former shall prevail. The NCBs shall continue to apply all provisions of the General Documentation unaltered unless otherwise provided for in this Regulation.

[1] OJ L 310, 11.12.2000, p. 1.

Article 2 – *Admission of collateral denominated in US dollars, pounds sterling or Japanese yen as eligible collateral*

1. Marketable debt instruments as described in Section 6.2.1 of the General Documentation, if denominated in US dollars, pounds sterling or Japanese yen, shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations, provided that: (i) they are issued and held/settled in the euro area; and (ii) the issuer is established in the European Economic Area.

2. An additional haircut of 8 % shall be imposed by the Eurosystem on all such marketable debt instruments.

Article 3 – *Admission of syndicated loans governed by the laws of England and Wales as eligible collateral*

1. Syndicated loans as described in Section 6.2.2 of the General Documentation governed by the laws of England and Wales shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations.

2. Furthermore, the requirement laid down in Section 6.2.2 of the General Documentation, according to which the total number of governing laws that are applicable to: (i) the counterparty; (ii) the creditor; (iii) the debtor; (iv) the guarantor (if relevant); (v) the credit claim agreement; and (vi) the mobilisation agreement may not exceed two, shall be amended in the case of such syndicated loans so that the total number of governing laws may not exceed three.

Article 4 – *Admission of debt instruments issued by credit institutions, which are traded on certain non-regulated markets as eligible collateral*

1. Debt instruments issued by credit institutions, which are traded on certain non-regulated markets, as specified by the ECB shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations.

2. An additional haircut of 5 % shall be imposed by the Eurosystem on all such debt instruments.

Article 5 – *Admission of collateral with a "BBB-" credit assessment and above as eligible collateral*

1. The Eurosystem's minimum requirement for the assessment of the credit standard of assets eligible as collateral for the purposes of Eurosystem monetary policy operations shall be a "BBB-" equivalent credit assessment. This change to the credit assessment requirement shall apply to both marketable and non-marketable assets, with the exception of asset-backed securities as described in Section 6.3 of the General Documentation, for which the requirement for high credit standards shall remain unchanged.

2. An additional haircut of 5 % shall be imposed by the Eurosystem on all eligible assets with a credit assessment below "A-".

Article 6 – *Admission of subordinated assets with adequate guarantees as eligible collateral*

1. The requirement of non-subordination relating to the eligibility of marketable assets as collateral for the purposes of Eurosystem monetary policy operations as described in Section 6.2.1 of the General Documentation shall not apply when a financially sound guarantor provides an unconditional and irrevocable guarantee payable on first demand on these assets, as further defined in Section 6.3.2 of the General Documentation.

2. An additional haircut of 10 % shall be imposed by the Eurosystem on all such assets, with a further 5 % valuation markdown in the event of a theoretical valuation.

Article 7 – *Admission of fixed-term deposits as eligible collateral*

Fixed-term deposits as described in Section 3.5 of the General Documentation from eligible counterparties shall be eligible as collateral for all refinancing operations of the Eurosystem.

Article 8 – *Further implementation measures*

The Governing Council has delegated the competence to take any further decisions which are necessary to implement its decision of 15 October 2008 to the Executive Board.

Article 9 – *Final provisions*

1. This Regulation shall enter into force on 25 October 2008. Articles 2 and 3 shall apply as from 14 November 2008.

2. This Regulation shall apply until 30 November 2008.

3. This Regulation shall be published without delay on the ECB's website.

§37. 2008/874/EC: Decision of the European Central Bank of 14 November 2008 on the implementation of Regulation ECB/2008/11 of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/15), OJ L 309, November 14th, 2008, pp.8-12

THE EXECUTIVE BOARD OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty establishing the European Community and in particular to the first indent of Article 105(2) and to Article 110,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank and in particular to the second indent of Article 34.1, in conjunction with the first indent of Article 3.1 and Article 18.2,

Having regard to Article 8 of Regulation ECB/2008/11 of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral,

Whereas:

(1) On 15 October 2008, the Governing Council of the European Central Bank (ECB) decided to temporarily admit credit claims arising under syndicated loans governed by the laws of England and Wales as eligible collateral for the purposes of Eurosystem monetary policy operations. On 23 October 2008, the Governing Council gave effect to its decision by adopting Regulation ECB/2008/11.[1]

(2) Under Article 3(2) of Regulation ECB/2008/11, for syndicated loans governed by the laws of England and Wales, the total number of governing laws applying to the mobilisation of such loans may not exceed three. The legal complexities inherent in the mobilisation of syndicated loans, when up to three different governing laws can apply, require the conduct of legal and risk assessments by the national central banks of the Member States that have adopted the euro (hereinafter "the NCBs"), when providing liquidity against such collateral.

(3) The legal complexity involved in the mobilisation of the above loans requires the adoption of implementation criteria relating to the acceptance, as eligible collateral, of syndicated loans governed by the laws of England and Wales,

HAS DECIDED AS FOLLOWS:

Article 1 – *Definitions*

For the purposes of this Decision:

- "General Documentation" means Annex I to Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem,[2]

- "syndicated loans" means credit claims represented by shares of syndicate member institutions in syndicated loans, as described in Chapter 6.2.2 of the General Documentation and governed by the laws of England and Wales.

Article 2 – *Mobilisation techniques for syndicated loans*

1. An NCB shall mobilise syndicated loans directly from its relevant counterparty in accordance with its respective domestic procedures for credit claims. The mobilisation agreement shall be governed by the law of a Member State belonging to the euro area.

2. Chapter 6.6 of the General Documentation shall not apply to the mobilisation of syndicated loans.

Article 3 – *Transferability of loans*

Only fully transferable syndicated loans shall be eligible. For the purposes of the fourth indent of Appendix 7 of Annex I to the General Documentation, syndicated loans shall not be considered to be fully transferable and capable of being mobilised without restriction as collateral for Eurosystem credit operations unless the loan agreement unconditionally permits:

(i) the lender to charge, assign or otherwise create a security interest in or over its rights to secure obligations of that lender to an NCB; and

(ii) the relevant NCB to enforce its security interest over such loan by way of collecting payments under the loan directly or indirectly from the underlying debtor and by way of assigning or transferring the loan to a bank or financial institution or to a trust fund or other

[1] OJ L 282, 25.10.2008, p. 17.

[2] OJ L 310, 11.12.2000, p. 1.

entity which is regularly engaged in or established for the purpose of making, purchasing or investing in loans, securities or other financial assets.

Article 4 – *Notification to the debtor*

1. The counterparty shall be required to notify the debtor under a syndicated loan agreement of the mobilisation of such syndicated loan as collateral before or immediately following mobilisation of such loan. Such notification shall be given in accordance with the applicable procedures as specified in the syndicated loan agreement.

2. Paragraph 1 is without prejudice to the right of the relevant NCB to notify the debtor.

Article 5 – *Registration certificate*

Counterparties shall provide the relevant NCB with a copy of the confirmation received from the Registrar of Companies of England and Wales that mobilisation of the syndicated loan has been registered at Companies House.

Article 6 – *Submission by the counterparty of a diligence letter from external legal counsel*

Before mobilisation of syndicated loans, counterparties shall deliver to the relevant NCB a diligence letter from external legal counsel addressing, in a manner and form satisfactory to the Eurosystem, certain diligence issues, as these may be elaborated on from time to time by the ECB and published on its website.

Article 7 – *Special purpose vehicles as debtors*

1. A special purpose vehicle (SPV) shall be an eligible debtor under a syndicated loan only if (i) the SPV is the beneficiary of a guarantee that is issued by a non-financial corporation eligible as a guarantor within the meaning of Chapter 6.2.2 of the General Documentation; (ii) the guarantee complies with the requirements set out in Chapter 6.3.3 of the General Documentation; and (iii) the relevant NCB is legally entitled to enforce the guarantee following the mobilisation of the syndicated loan.

2. Credit claims arising under syndicated loans with SPVs as debtors shall be eligible collateral for Eurosystem credit operations only if the SPV and the guarantor are established in the euro area.

3. The requirement to provide legal confirmation, as provided for in Chapter 6.3.3 of the General Documentation, shall also apply where the debtor is an SPV benefiting from a guarantee in accordance with paragraph 1.

Article 8 – *Currency of denomination*

For the purposes of Chapter 6.2.2 of the General Documentation, syndicated loans shall be considered to be denominated in euro only insofar as the relevant loan agreement does not allow the debtor or the debtor's agent, on its behalf, to vary the currency in which the syndicated loan is denominated or payable at any time before the maturity of the relevant Eurosystem credit operation.

Article 9 – *No set-off or counterclaim*

Syndicated loans shall only constitute eligible collateral for Eurosystem credit operations if the relevant syndicated loan agreement includes an express provision pursuant to which all payments to be made by the debtor are made free and clear of any deduction for set-off or counterclaim.

Article 10 – *Restrictions on realisation of collateral*

1. Syndicated loans containing contractual provisions requiring a majority of lenders to adopt syndicate decisions vis-à-vis the debtor shall be eligible collateral for Eurosystem credit operations.

2. Syndicated loan agreements containing contractual provisions authorising certain terms of the relevant syndicated loan agreement to be amended or waived with the consent of a majority of lenders shall be eligible collateral for Eurosystem credit operations; provided, however, that the loan agreement for such loans does not provide that majority decisions may be taken with respect to: (i) an extension to the date of payment of any amount due under the agreement; or (ii) a reduction in margin or in the amount of any payment of principal or interest; or (iii) a change to the principle that each lender's obligations under the agreement are several.

3. Syndicated loans involving a facility agent for the collection and distribution of payments shall be eligible collateral for Eurosystem credit operations only where the facility agent is a credit institution with a minimum long-term rating of "A-" by Fitch or Standard & Poor's, "A3" by Moody's or of "AL" by DBRS.

Article 11 – *Replacement of lender clauses*

A syndicated loan containing contractual provisions permitting the debtor to replace the

lender in exchange for an outstanding loan shall only be eligible collateral for Eurosystem credit operations where, prior to mobilisation, the counterparty provides the relevant NCB with an enforceable security interest in or over the counterparty's right to receive cash in respect of such exchange.

Article 12 – *Disclosure of confidential information*

A syndicated loan shall only constitute eligible collateral for Eurosystem credit operations if the syndicated loan agreement permits the lender to disclose confidential information to a Eurosystem central bank in connection with any charge, assignment or security interest created by the lender in or over its rights under the agreement to secure obligations of that lender to a Eurosystem central bank.

Article 13 – *Taxation and Indemnity*

1. A syndicated loan shall only be eligible collateral for Eurosystem credit operations if the counterparty fulfils the conditions set out in this Article.

2. The counterparty shall provide confirmation from UK tax counsel to the effect that either: (a) the debtor will not be required to retain UK withholding tax as a result of any transfer, under either English or any other law, of the beneficial ownership of the loan asset to the NCB; or (b) the debtor will be required to retain UK withholding tax as a result of such transfer of beneficial ownership to the NCB, but that the NCB should be eligible to benefit from the tax treaty between the UK and the jurisdiction of the NCB, such that once a direction has been issued by Her Majesty's Revenue & Customs (HMRC) under the relevant treaty, the debtor will be entitled to make interest payments to the NCB without withholding UK tax and the NCB will be entitled to recover tax previously withheld; or (c) the debtor will be required to retain UK withholding tax as a result of such transfer of beneficial ownership to the NCB and the NCB will not be eligible to benefit from the tax treaty between the UK and the NCB's jurisdiction or any other exemption.

3. Where UK tax counsel confirms that the transfer of beneficial ownership of the loan asset to the NCB falls under either category (b) or (c) in paragraph 2 above, the counterparty will be required to agree to indemnify the NCB for any UK withholding tax that is withheld by the debtor (and not grossed up pursuant to the syndicated loan agreement), and for all adverse cash-flow consequences of any UK withholding tax that is first retained from, and then refunded to, the NCB.

4. The counterparty shall assume any and all responsibility for notifying the debtor of any transfer of the beneficial ownership of the loan asset to the NCB that results in the debtor being required to withhold UK tax (or to withhold UK tax at a different rate).

5. The counterparty shall bear the full cost of any UK stamp duty (as well as any penalty and interest thereon) that is payable as a result of any transfer, under either English or any other law, of the beneficial ownership of the loan asset, and that the NCB reasonably considers has to be paid in order for the NCB to be able to adduce the loan asset as evidence in an English court or use the loan asset for some other purpose in the UK. The counterparty shall also bear the full cost of any UK stamp duty reserve tax payable as a result of any such transfer, if applicable.

6. The counterparty shall provide confirmation from appropriate tax counsel in such jurisdictions that the counterparty considers applicable, to the effect that the debtor will not be required to retain non-UK withholding tax as a result of any transfer, under either English or any other law, of the beneficial ownership of the loan asset to the NCB, and that any such transfer will not trigger liability to any non-UK stamp or transfer duty.

7. The counterparty shall fully indemnify the relevant NCB in respect of any fees due to the facility or paying agent, or any other fees or costs related to the administration of the loan.

Article 14 – *Final provisions*

1. This Decision shall enter into force on 17 November 2008.

2. This Decision shall apply until 30 November 2008.

Done at Frankfurt am Main, 14 November 2008.

The President of the ECB

Jean-Claude Trichet

§38. Guideline of the European Central Bank of 21 November 2008 on temporary changes to the rules relating to eligibility of collateral (ECB/2008/18),
OJ L 314, November 25 th , 2008, pp. 0014 – 0015 (Consolidated version)

Original version (OJ L 314, 25.11.2008, p.14); amended by Guideline of the European Central Bank of 10 December 2009 amending Guideline ECB/2008/18 on temporary changes to the rules relating to eligibility of collateral (ECB/2009/24), (OJ L 330, 16.12.2009, p.95) [the text amended then is underlined]

ORIGINAL PREAMBLE

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty establishing the European Community and in particular to the first indent of Article 105(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank and in particular Article 12.1 and Article 14.3, in conjunction with the first indent of Article 3.1 and Article 18.2 and the first paragraph of Article 20 thereof,

Whereas:

(1) To enhance on a temporary basis the provision of liquidity to counterparties for Eurosystem monetary policy operations, the criteria determining the eligibility of collateral that counterparties for Eurosystem monetary policy operations provide to the Eurosystem to obtain liquidity should be widened. The criteria determining the eligibility of collateral are laid down in Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem.[1]

(2) The Governing Council of the European Central Bank (ECB) decided on 15 October 2008 to widen temporarily the rules relating to the eligibility of collateral for the operations of the Eurosystem. The Governing Council furthermore decided that the date of entry into force of its decision as well as any further measures regarding such widened eligibility criteria would be communicated as soon as possible,

HAS ADOPTED THIS GUIDELINE:

PREAMBLE 2009

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union and in particular to the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank and in particular Article 12.1 and Article 14.3, in conjunction with the first indent of Article 3.1, Article 18.2 and the first paragraph of Article 20 thereof,

Whereas:

(1) The Governing Council of the European Central Bank (ECB) has decided to prolong the widening of certain eligibility criteria for collateral laid down in Guideline ECB/2008/18 of 21 November 2008 on temporary changes to the rules relating to eligibility of collateral.[2]

(2) It is therefore necessary to amend Guideline ECB/2008/18 accordingly,

HAS ADOPTED THIS GUIDELINE:

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Article 1 – *Widening of certain eligibility criteria for collateral*

1. The eligibility criteria for collateral laid down in Annex I to Guideline ECB/2000/7 (hereinafter the "General Documentation") shall be widened in accordance with Articles 2 to 7.

2. In the event of any discrepancy between this Guideline and the General Documentation, as implemented at national level by the NCBs, the former shall prevail. The NCBs shall continue to apply all provisions of the General Documentation unaltered unless otherwise provided for in this Guideline.

[1] OJ L 310, 11.12.2000, p. 1.

[2] OJ L 314, 25.11.2008, p. 14.

Article 2 – *Admission of collateral denominated in US dollars, pounds sterling or Japanese yen as eligible collateral*

1. Marketable debt instruments as described in Chapter 6.2.1 of the General Documentation, if denominated in US dollars, pounds sterling or Japanese yen, shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations, provided that: (i) they are issued and held/settled in the euro area; and (ii) the issuer is established in the European Economic Area.

2. An additional haircut of 8 % shall be imposed by the Eurosystem on all such marketable debt instruments.

Article 3 – *Admission of syndicated loans as eligible collateral*

1. Syndicated loans shall only constitute eligible collateral for the purposes of Eurosystem monetary policy operations provided that they comply with Chapters 6.2.2 and 6.3.3 and Appendix 7 of the General Documentation.

2. Without prejudice to paragraph 1, syndicated loans governed by the laws of England and Wales which have been accepted by 30 November 2008 in accordance with the requirements laid down in Decision ECB/2008/15 of 14 November 2008 on the implementation of Regulation ECB/2008/11 of 23 October 2008 on temporary changes to the rules relating to eligibility of collateral[3] for the purposes of Eurosystem monetary policy operations shall remain eligible collateral for the duration of the Eurosystem monetary policy operation for which they have been accepted as eligible collateral.

Article 4 – *Admission of debt instruments issued by credit institutions, which are traded on certain non-regulated markets as eligible collateral*

1. Debt instruments issued by credit institutions, which are traded on certain non-regulated markets as specified by the ECB, shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations.

2. An additional haircut of 5 % shall be imposed by the Eurosystem on all such debt instruments.

Article 5 – *Admission of collateral with a "BBB-" credit assessment and above as eligible collateral*

1. The Eurosystem's minimum requirement for the assessment of the credit standard of assets eligible as collateral for the purposes of Eurosystem monetary policy operations shall be a "BBB-" equivalent credit assessment. This change to the credit assessment requirement shall apply to both marketable and non-marketable assets, with the exception of asset-backed securities as described in Chapter 6.3 of the General Documentation, for which the requirement for high credit standards shall remain unchanged.

2. An additional haircut of 5 % shall be imposed by the Eurosystem on all eligible assets with a credit assessment below "A-".

Article 6 – *Admission of subordinated assets with adequate guarantees as eligible collateral*

1. The requirement of non-subordination relating to the eligibility of marketable assets as collateral for the purposes of Eurosystem monetary policy operations as described in Chapter 6.2.1 of the General Documentation shall not apply when a financially sound guarantor provides an unconditional and irrevocable guarantee payable on first demand on these assets, as further defined in Chapter 6.3.2 of the General Documentation.

2. An additional haircut of 10 % shall be imposed by the Eurosystem on all such assets, with a further 5 % valuation markdown in the event of a theoretical valuation.

Article 7 – *Admission of fixed-term deposits as eligible collateral*

Fixed-term deposits as described in Chapter 3.5 of the General Documentation from eligible counterparties shall be eligible as collateral for all refinancing operations of the Eurosystem.

Article 8 – *Further implementation measures*

The Governing Council has delegated the competence to take any further decisions which are necessary to implement its decision of 15 October 2008 to the Executive Board.

Article 9 – *Verification*

The NCBs shall forward to the ECB by 25 November 2008 at the latest details of the texts and means by which they intend to comply with this Guideline.

Article 10 – *Final provisions*

1. This Guideline shall enter into force on 25 November 2008.

[3] OJ L 309, 20.11.2008, p. 8.

2. This Guideline shall apply from 1 December 2008 until 31 December 2010 or until the maturity date of the last 12-month refinancing operation launched by 31 December 2010, whichever is the latest.

Article 11 – *Addressees*

This Guideline is addressed to the NCBs of participating Member States.

Done at Frankfurt am Main, 21 November 2008.

For the Governing Council of the ECB

The President of the ECB

Jean-Claude Trichet

§40. Decision of the European Central Bank of 2 July 2009 on the implementation of the covered bond purchase programme (ECB/2009/16), OJ L 175, July 4th, 2009, pp. 18-19

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty establishing the European Community and, in particular to the first indent of Article 105(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the "Statute of the ESCB") and, in particular to the second subparagraph of Article 12.1 in conjunction with the first indent of Article 3.1, and Article 18.1 thereof,

Whereas:

(1) In accordance with Article 18.1 of the Statute of the ESCB, national central banks of Member States that have adopted the euro (hereinafter the "NCBs") and the European Central Bank (ECB) (hereinafter jointly the "Eurosystem central banks") may operate in the financial markets by, among other things, buying and selling outright marketable instruments.

(2) On 7 May 2009 and subsequently on 4 June 2009 the Governing Council decided that in view of the current exceptional circumstances prevailing in the market a programme (hereinafter the "covered bo nd purchase programme" or the "programme") should be initiated under which the NCBs and exceptionally the ECB in direct contact with counterparties may according to their allocated share purchase outright eligible covered bonds. The Eurosystem central banks intend to implement the covered bond purchase programme gradually, taking into account market conditions and the Eurosystem's monetary policy needs. The objectives of these purchases are to contribute to: (a) promoting the ongoing decline in money market term rates; (b) easing funding conditions for credit institutions and enterprises; (c) encouraging credit institutions to maintain and expand their lending to clients; and (d) improving market liquidity in important segments of the private debt securities market.

(3) As part of the single monetary policy, the outright purchase of eligible covered bonds by Eurosystem central banks under the programme should be implemented in a uniform manner, in accordance with the terms of this Decision,

HAS DECIDED AS FOLLOWS:

Article 1 – *Establishment and scope of the outright purchase of covered bonds*

The Eurosystem has established the programme under which the Eurosystem central banks shall purchase eligible covered bonds with a targeted nominal amount of EUR 60 billion. Under the programme, a Eurosystem central bank may decide to purchase eligible covered bonds from eligible counterparties in the primary and secondary markets according to the eligibility criteria contained in this Decision. Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem[1] shall not apply to the outright purchase of covered bonds by a Eurosystem central bank under the programme.

Article 2 – *Eligibility criteria for covered bonds*

Covered bonds that are: (a) eligible for monetary policy operations as defined in Guideline ECB/2000/7; (b) denominated in

[1] OJ L 310, 11.12.2000, p. 1.

euro; (c) issued by credit institutions incorporated in the euro area or by other entities incorporated in the euro area complying with conditions set forth in paragraph 4 below; and (d) held and settled in the euro area, shall be eligible for outright purchase under the programme, provided that they satisfy the following additional requirements:

1. They shall be either (i) covered bonds issued in accordance with the criteria set out in Article 22(4) of the UCITS Directive[2] (hereinafter the "UCITS-compliant covered bonds"), or (ii) structured covered bonds that a Eurosystem central bank at its sole discretion considers as offering safeguards similar to UCITS-compliant covered bonds.

2. Each covered bond issue shall, as a rule, have a minimum issue size of EUR 500 million. In special cases, a Eurosystem central bank may decide to purchase outright covered bonds with an issue size of below EUR 500 million, provided that the issue size is not below EUR 100 million, when this Eurosystem central bank decides at its sole discretion that specific market circumstances or risk management considerations require such purchase.

3. The covered bond issue shall, as a rule, have a minimum rating of "AA" or equivalent, awarded by at least one of the major rating agencies.

4. If the issuer of the covered bond is an entity (other than a credit institution) incorporated in the euro area, the conditions shall be that (i) such an entity only issues covered bonds, and (ii) the covered bonds are guaranteed in a manner satisfactory to the relevant Eurosystem central bank by a credit institution incorporated in the euro area, or, alternatively, have safeguards of a similar nature that satisfy the requirements of the relevant Eurosystem central bank.

5. The covered bonds shall be issued pursuant to legislation governing covered bonds that is in force in a euro area Member State. In the case of structured covered bonds, the law governing the documentation of the covered bonds shall be the law of a euro area Member State.

Article 3 – *Eligible counterparties*

The following shall be eligible counterparties for the covered bond purchase programme: (a) domestic counterparties participating in Eurosystem monetary policy operations as defined in section 2.1 of Annex I to Guideline ECB/2000/7; and (b) any other counterparties established in the euro area (either through incorporation or through a branch) that are used by a Eurosystem central bank for the investment of its euro denominated investment portfolios.

Article 4 – *Final provisions*

1. This Decision shall enter into force on the day following its publication on the ECB's website.

2. This Decision shall apply until 30 June 2010.

Done at Luxembourg, 2 July 2009.

The President of the ECB

Jean-Claude Trichet

[2] Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 375, 31.12.1985, p. 3).

§41. Decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government (ECB/2010/3), OJ L 117, May 11th, 2010, pp. 102-3

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the "Statute of the ESCB"), and in particular Article 12.1 and the second indent of Article 34.1, in conjunction with the first indent of Article 3.1 and Article 18.2 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the ESCB, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The criteria determining the eligibility of collateral for the purposes of Eurosystem monetary policy operations are laid down in Annex I to Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem[1] (hereinafter referred to as the "General Documentation").

(2) Pursuant to Section 1.6 of the General Documentation, the Governing Council of the ECB may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations. Pursuant to Section 6.3.1 of the General Documentation, the Eurosystem reserves the right to determine whether an issue, issuer, debtor or guarantor fulfils its requirements for high credit standards on the basis of any information it may consider relevant.

(3) There are exceptional circumstances prevailing in the financial market, arising from the fiscal position of the Greek Government and discussions for an adjustment plan supported by the euro area Member States and the International Monetary Fund, and there is a disruption of the normal assessment by the market of securities issued by the Greek Government, with negative effects on the stability of the financial system. This exceptional situation requires a swift and temporary adaptation of the Eurosystem monetary policy framework.

(4) The Governing Council has assessed the fact that the Greek Government has approved an economic and financial adjustment programme which it has negotiated with the European Commission, the ECB and the International Monetary Fund, as well as the strong commitment of the Greek Government to fully implement such programme. The Governing Council has also assessed, from a Eurosystem credit risk management perspective, the effects of such a programme on the securities issued by the Greek Government. The Governing Council considers the programme to be appropriate, so that, from a credit risk management perspective, the marketable debt instruments issued by the Greek Government or guaranteed by the Greek Government retain a quality standard sufficient for their continued eligibility as collateral for Eurosystem monetary policy operations, irrespective of any external credit assessment. These positive assessments are the bases for this exceptional and temporary suspension, put in place with a view to contributing to the soundness of financial institutions, thereby strengthening the stability of the financial system as a whole and protecting the customers of those institutions. However, the ECB should closely monitor the continued strong commitment by the Greek Government to fully implement the economic and financial adjustment programme underlying these measures.

(5) This exceptional measure was decided and publicly announced by the Governing Council on 3 May 2010. It will apply temporarily, until the Governing Council considers that the stability of the financial system allows the normal application of the Eurosystem framework for monetary policy operations,

HAS ADOPTED THIS DECISION:

Article 1 – *Suspension of certain provisions of the General Documentation*

[1] OJ L 310, 11.12.2000, p. 1.

1. The Eurosystem's minimum requirements for credit quality thresholds, as specified in the Eurosystem credit assessment framework rules for marketable assets in Section 6.3.2 of the General Documentation, shall be suspended in accordance with Articles 2 and 3.

2. In the event of any discrepancy between this Decision and the General Documentation, the former shall prevail.

Article 2 – *Continued eligibility as collateral of marketable debt instruments issued by the Greek Government*

The Eurosystem's credit quality threshold shall not apply to marketable debt instruments issued by the Greek Government. Such assets shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations, irrespective of their external credit rating.

Article 3 – *Continued eligibility as collateral of marketable debt instruments guaranteed by the Greek Government*

The Eurosystem's credit quality threshold shall not apply to marketable debt instruments issued by entities established in Greece and fully guaranteed by the Greek Government. A guarantee provided by the Greek Government shall continue to be subject to the requirements contained in Section 6.3.2 of the General Documentation. Such assets shall constitute eligible collateral for the purposes of Eurosystem monetary policy operations, irrespective of their external credit rating.

Article 4 – *Entry into force*

This Decision shall enter into force on 6 May 2010.

Done at Lisbon, 6 May 2010.

The President of the ECB

Jean-Claude Trichet

§42. Decision of the European Central Bank of 27 February 2012 repealing Decision ECB/2010/3 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government, OJ L 59, March 1st, 2012, p. 36

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the "Statute of the ESCB"), and in particular Article 12.1 and the second indent of Article 34.1, in conjunction with the first indent of Article 3.1 and Article 18.2 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the ESCB, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The criteria determining the eligibility of collateral for the purposes of Eurosystem monetary policy operations are laid down in Annex I to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem[1] (hereinafter referred to as the "General Documentation").

(2) Pursuant to Section 1.6 of the General Documentation, the Governing Council of the ECB may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations. Pursuant to Section 6.3.1 of the General Documentation, the Eurosystem reserves the right to determine whether an issue, issuer, debtor or guarantor fulfils its requirements for high credit standards on the basis of any information it may consider relevant.

(3) Decision ECB/2010/3 of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or

[1] OJ L 331, 14.12.2011, p. 1.

guaranteed by the Greek Government[2] temporarily suspended, as an exceptional measure, the Eurosystem's minimum requirements for credit quality thresholds applicable to marketable debt instruments issued by the Greek Government or issued by entities established in Greece and fully guaranteed by the Greek Government.

(4) The Hellenic Republic has decided to launch a debt exchange offer in the context of private sector involvement to holders of marketable debt instruments issued by the Greek Government.

(5) The adequacy as collateral for Eurosystem operations of the marketable debt instruments issued by the Greek Government, or issued by entities established in Greece and fully guaranteed by the Greek Government, has been further negatively affected by such decision of the Hellenic Republic.

(6) Decision ECB/2010/3 should be repealed,

HAS ADOPTED THIS DECISION:

Article 1 – *Repeal of Decision ECB/2010/3*

Decision ECB/2010/3 is repealed.

Article 2 – *Entry into force*

This Decision shall enter into force on 28 February 2012.

Done at Frankfurt am Main, 27 February 2012.

The President of the ECB

Mario Draghi

[2] OJ L 117, 11.5.2010, p. 102.

§43. ECB decides on measures to address severe tensions in financial markets, Press Report, 10 May 2010, http://www.ecb.europa.eu/press/pr/date/2010/html/pr100510.en.html

The Governing Council of the European Central Bank (ECB) decided on several measures to address the severe tensions in certain market segments which are hampering the monetary policy transmission mechanism and thereby the effective conduct of monetary policy oriented towards price stability in the medium term. The measures will not affect the stance of monetary policy.

In view of the current exceptional circumstances prevailing in the market, the Governing Council decided:

- To conduct interventions in the euro area public and private debt securities markets (Securities Markets Programme) to ensure depth and liquidity in those market segments which are dysfunctional. The objective of this programme is to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism. The scope of the interventions will be determined by the Governing Council. In making this decision we have taken note of the statement of the euro area governments that they *"will take all measures needed to meet [their] fiscal targets this year and the years ahead in line with excessive deficit procedures"* and of the precise additional commitments taken by some euro area governments to accelerate fiscal consolidation and ensure the sustainability of their public finances. In order to sterilise the impact of the above interventions, specific operations will be conducted to re-absorb the liquidity injected through the Securities Markets Programme. This will ensure that the monetary policy stance will not be affected.
- To adopt a fixed-rate tender procedure with full allotment in the regular 3-month longer-term refinancing operations (LTROs) to be allotted on 26 May and on 30 June 2010.
- To conduct a 6-month LTRO with full allotment on 12 May 2010, at a rate which will be fixed at the average minimum bid rate of the main refinancing operations (MROs) over the life of this operation.
- To reactivate, in coordination with other central banks, the temporary liquidity swap lines with the Federal Reserve, and resume US dollar liquidity-providing operations at terms of 7 and 84 days. These operations will take the form of repurchase operations against ECB-eligible collateral and will be carried out as fixed rate tenders with full allotment. The first operation will be carried out on 11 May 2010.

§44. Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme, OJ L 124, May 20th, 2010, pp.8-9

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular to the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the "Statute of the ESCB"), and in particular the second subparagraph of Article 12.1, Article 3.1 and Article 18.1 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the ESCB, national central banks of Member States whose currency is the euro (hereinafter the "euro area NCBs") and the European Central Bank (ECB) (hereinafter collectively referred to as the "Eurosystem central banks") may operate in the financial markets by, among other things, buying and selling outright marketable instruments.

(2) On 9 May 2010 the Governing Council decided and publicly announced that, in view of the current exceptional circumstances in financial markets, characterised by severe tensions in certain market segments which are hampering the monetary policy transmission mechanism and thereby the effective conduct of monetary policy oriented towards price stability in the medium term, a temporary securities markets programme (hereinafter the "programme") should be initiated. Under the programme, the euro area NCBs, according to their percentage shares in the key for subscription of the ECB's capital, and the ECB, in direct contact with counterparties, may conduct outright interventions in the euro area public and private debt securities markets.

(3) The programme forms part of the Eurosystem's single monetary policy and will apply temporarily. The programme's objective is to address the malfunctioning of securities markets and restore an appropriate monetary policy transmission mechanism.

(4) The Governing Council will decide on the scope of the interventions. The Governing Council has taken note of the statement of the euro area Member State governments that they "will take all measures needed to meet their fiscal targets this year and the years ahead in line with excessive deficit procedures" and the precise additional commitments taken by some euro area Member State governments to accelerate fiscal consolidation and ensure the sustainability of their public finances.

(5) As part of the Eurosystem's single monetary policy, the outright purchase of eligible marketable debt instruments by Eurosystem central banks under the programme should be implemented in accordance with the terms of this Decision,

HAS ADOPTED THIS DECISION:

Article 1 – *Establishment of the securities markets programme*

Under the terms of this Decision, Eurosystem central banks may purchase the following: (a) on the secondary market, eligible marketable debt instruments issued by the central governments or public entities of the Member States whose currency is the euro; and (b) on the primary and secondary markets, eligible marketable debt instruments issued by private entities incorporated in the euro area.

Article 2 – *Eligibility criteria for debt instruments*

Marketable debt instruments shall be eligible for outright purchase under the programme if they are all of the following: (a) denominated in euro; and (b) either: (i) issued by central governments or public entities of the Member States whose currency is the euro; or (ii) issued by other entities incorporated in the euro area and meeting the asset eligibility criteria specified in Chapter 6 of Annex I to Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem.[1]

Article 3 – *Eligible counterparties*

The following shall be eligible counterparties for the programme: (a) counterparties eligible for Eurosystem monetary policy operations as defined in Section 2.1 of Annex I to Guideline ECB/2000/7; and (b) any other counterparties that are used by a Eurosystem central bank for the investment of its euro-denominated investment portfolios.

Article 4 – *Final provision*

This Decision shall enter into force on the day following its publication on the ECB's website.

Done at Frankfurt am Main, 14 May 2010.

The President of the ECB

Jean-Claude Trichet

[1] OJ L 310, 11.12.2000, p. 1.

§45. Decision of the European Central Bank of 3 November 2011 on the implementation of the second covered bond purchase programme OJ L 297, November 16th, 2011, pp. 70-71

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union and, in particular to the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank and, in particular to the second subparagraph of Article 12.1 in conjunction with the first indent of Article 3.1, and Article 18.1 thereof,

Whereas:

(1) In accordance with Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the "Statute of the ESCB"), the European Central Bank (ECB), together with national central banks of Member States whose currency is the euro (hereinafter the "NCBs") may operate in the financial markets by, among other things, buying and selling marketable instruments outright.

(2) On 7 May 2009 and subsequently on 4 June and 18 June 2009 the Governing Council decided, in view of the exceptional circumstances prevailing in the market at that time, to initiate a covered bond purchase programme (hereinafter the "programme"), with an overall targeted nominal amount of EUR 60 billion in accordance with Decision ECB/2009/16 of 2 July 2009 on the implementation of the covered bond purchase programme.[1] Under the programme, the NCBs and, exceptionally, the ECB in direct contact with counterparties could according to their allocated share decide to purchase eligible covered bonds outright from eligible counterparties in the primary and secondary markets. Taking into account the Eurosystem's monetary policy needs and the objectives of the covered bond purchases, the programme was designed as a temporary measure for a 12-month period and expired on 30 June 2010.

(3) The Governing Council has decided that a second covered bond purchase programme (hereinafter the "second programme") should be initiated. The Eurosystem central banks intend to implement the second programme gradually, taking into account market conditions and the Eurosystem's monetary policy needs. The objectives of the second programme are to contribute to: (a) easing funding conditions for credit institutions and enterprises; and (b) encouraging credit institutions to maintain and expand lending to their clients.

(4) As part of the single monetary policy, the outright purchase of eligible covered bonds by Eurosystem central banks under the second programme should be implemented in a uniform manner, in accordance with this Decision,

HAS ADOPTED THIS DECISION:

Article 1 – *Establishment and scope of the outright purchase of covered bonds*

The Eurosystem has established the second programme under which the Eurosystem central banks shall purchase eligible covered bonds with a targeted nominal amount of EUR 40 billion. Under the second programme, eligible covered bonds may be purchased by the Eurosystem central banks from eligible counterparties in the primary and secondary markets according to the eligibility criteria contained in this Decision. Guideline ECB/2000/7 of 31 August 2000 on monetary policy instruments and procedures of the Eurosystem[2] shall not apply to the outright purchase of covered bonds by a Eurosystem central bank under the second programme.

Article 2 – *Eligibility criteria for covered bonds*

Covered bonds that are: (a) eligible for monetary policy operations as defined in Guideline ECB/2000/7; (b) denominated in euro; and (c) held and settled in the euro area, shall be eligible for outright purchase under the second programme, provided that they satisfy the following additional requirements:

[1] OJ L 175, 4.7.2009, p. 18.

[2] OJ L 310, 11.12.2000, p. 1.

1. They shall be either: (a) covered bonds issued in accordance with the criteria set out in Article 52(4) of Directive 2009/65/EC[3] (hereinafter the "UCITS-compliant covered bonds"); or (b) structured covered bonds offering safeguards similar to UCITS-compliant covered bonds as defined in Section 6.2.3 of Annex I to Guideline ECB/2000/7.

2. Each covered bond issue shall have a minimum issue size of EUR 300 million.

3. The covered bond issue shall have a minimum rating of "BBB-" or equivalent, awarded by at least one of the major rating agencies.

4. The covered bonds shall be issued pursuant to legislation governing covered bonds that is in force in a euro area Member State. In the case of structured covered bonds, the law governing the documentation of the covered bonds shall be the law of a euro area Member State.

5. The covered bond issue shall have a maximum remaining maturity of 10,5 years at the time of the purchase of the security.

Article 3 – *Eligible counterparties*

The following shall be eligible counterparties for the second programme: (a) domestic counterparties participating in Eurosystem monetary policy operations as defined in Section 2.1 of Annex I to Guideline ECB/2000/7; and (b) any other counterparties that are used by Eurosystem central banks for the investment of their euro-denominated investment portfolios.

Article 4 – *Final provisions*

(1) This Decision shall enter into force on the day following its publication on the ECB's website.

(2) This Decision shall apply until 31 October 2012.

Done at Frankfurt am Main, 3 November 2011.

The President of the ECB

Mario Draghi

[3] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302, 17.11.2009, p. 32).

§46. Decision of the European Central Bank (2012/153/EU) of 5th March 2012 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer, (ECB/2012/3), OJ L 077, March 16th, 2012, p. 19

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the first indent of Article 3.1, Article 12.1, Article 18 and the second indent of Article 34.1,

Having regard to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem,[1] and in particular Sections 1.6, 6.3.1 and 6.3.2 of Annex I thereof,

Whereas:

(1) Given the exceptional circumstances prevailing in financial markets and the disruption in the normal assessment by the market of securities issued or guaranteed by the Hellenic Republic, the Governing Council adopted Decision ECB/2010/3 of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government.[2] This Decision temporarily suspended the Eurosystem's minimum requirements for credit quality thresholds, as specified in the Eurosystem credit assessment framework rules for certain marketable assets in Section 6.3.2 of Annex I to Guideline ECB/2011/14. Decision ECB/2012/2[3] repealed Decision ECB/2010/3 because of the negative impact on the credit ratings assigned to such debt instruments of the launch of the debt exchange offer in the context of private sector involvement to holders of marketable debt instruments issued or guaranteed by the Greek Government.

(2) On 21 July 2011, the Heads of State or Government of the euro area and Union institutions announced measures to stabilise Greek public finances, which included their commitment to provide collateral enhancement to underpin the quality of marketable debt instruments issued or guaranteed by the Hellenic Republic. The Governing Council has decided that such collateral enhancement is to be provided by the Hellenic Republic for the benefit of the national central banks (NCBs).

(3) The Governing Council has decided that the Eurosystem's credit quality threshold should be suspended in respect of marketable debt instruments issued or fully guaranteed by the Hellenic Republic that are covered by the collateral enhancement,

HAS ADOPTED THIS DECISION:

Article 1 – *Eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer*

1. The use, as collateral for Eurosystem credit operations, of marketable debt instruments issued or fully guaranteed by the Hellenic Republic that do not fulfil the Eurosystem's minimum requirements for credit quality thresholds, as specified in the Eurosystem credit assessment framework rules for certain marketable assets in Section 6.3.2 of Annex I to Guideline ECB/2011/14 while fulfilling the other eligibility requirements specified in Annex I to Guideline ECB/2011/14, shall be conditional on the provision by the Hellenic Republic to NCBs of a collateral enhancement in form of a buy-back scheme.

2. The marketable debt instruments referred to in paragraph 1 shall remain eligible for the duration of the collateral enhancement.

Article 2 – *Entry into force*

This Decision shall enter into force on 8 March 2012.

[1] OJ L 331, 14.12.2011, p. 1.
[2] OJ L 117, 11.5.2010, p. 102.
[3] OJ L 59, 1.3.2012, p. 36.

§47. Decision of the European Central Bank of 18 July 2012 repealing Decision ECB/2012/3 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer, OJ L 199 , July 26 th , 2012 pp.0026-0026

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the first indent of Article 3.1, Article 12.1, Article 18 and the second indent of Article 34.1,

Having regard to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem,[1] and in particular Section 1.6 and Sections 6.3.1 and 6.3.2 of Annex I thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The criteria determining the eligibility of collateral for the purposes of Eurosystem monetary policy operations are laid down in Annex I to the Guideline ECB/2011/14.

(2) Pursuant to Section 1.6 of Annex I to Guideline ECB/2011/14, the Governing Council may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations. Pursuant to Section 6.3.1 of Annex I to Guideline ECB/2011/14, the Eurosystem reserves the right to determine whether an issue, issuer, debtor or guarantor fulfils its requirements for high credit standards on the basis of any information it may consider relevant.

(3) In the context of the debt exchange offer launched by the Hellenic Republic to the holders of marketable debt instruments issued or guaranteed by the Greek Government, on 24 February 2012 a collateral enhancement in the form of a buy-back scheme to underpin the quality of marketable debt instruments issued or guaranteed by the Hellenic Republic was provided for the benefit of the national central banks.

(4) As an exceptional measure, Decision ECB/2012/3 of 5 March 2012 on the eligibility of marketable debt instruments issued or fully guaranteed by the Hellenic Republic in the context of the Hellenic Republic's debt exchange offer[2] temporarily suspended the Eurosystem's minimum requirements for credit quality thresholds applicable to marketable debt instruments issued or fully guaranteed by the Hellenic Republic, declaring them eligible for the duration of the collateral enhancement.

(5) Upon termination of the collateral enhancement, given that the adequacy as collateral of marketable debt instruments issued or fully guaranteed by the Hellenic Republic is currently not ensured, the Governing Council has decided that the Eurosystem's credit quality threshold specified in Section 6.3.2 of Annex I to Guideline ECB/2011/14 should apply in respect of such instruments.

(6) Decision ECB/2012/3 should therefore be repealed,

HAS ADOPTED THIS DECISION:

Article 1 – *Repeal of Decision ECB/2012/3*

Decision ECB/2012/3 is repealed.

Article 2 – *Entry into force*

This Decision shall enter into force on 25 July 2012.

[1] OJ L 331, 14.12.2011, p. 1.

[2] OJ L 77, 16.3.2012, p. 19.

§48. Introductory statement to the press conference (with Q&A), Mario Draghi, President of the ECB, Vítor Constâncio, Vice-President of the ECB, Frankfurt am Main, 6 September 2012, http://www.ecb.europa.eu/press/pressconf/2012/html/is121206.en.html

Ladies and gentlemen, the Vice-President and I are very pleased to welcome you to our press conference. We will now report on the outcome of today's meeting of the Governing Council, which was also attended by the President of the Eurogroup, Prime Minister Juncker, and by the Commission Vice-President, Mr Rehn.

Based on our regular economic and monetary analyses, we decided to keep the key ECB interest rates unchanged. Owing to high energy prices and increases in indirect taxes in some euro area countries, inflation rates are expected to remain above 2% throughout 2012, to fall below that level again in the course of next year and to remain in line with price stability over the policy-relevant horizon. Consistent with this picture, the underlying pace of monetary expansion remains subdued. Inflation expectations for the euro area economy continue to be firmly anchored in line with our aim of maintaining inflation rates below, but close to, 2% over the medium term. Economic growth in the euro area is expected to remain weak, with the ongoing tensions in financial markets and heightened uncertainty weighing on confidence and sentiment. A renewed intensification of financial market tensions would have the potential to affect the balance of risks for both growth and inflation.

It is against this background that the Governing Council today decided on the modalities for undertaking Outright Monetary Transactions (OMTs) in secondary markets for sovereign bonds in the euro area. As we said a month ago, we need to be in the position to safeguard the monetary policy transmission mechanism in all countries of the euro area. We aim to preserve the singleness of our monetary policy and to ensure the proper transmission of our policy stance to the real economy throughout the area. OMTs will enable us to address severe distortions in government bond markets which originate from, in particular, unfounded fears on the part of investors of the reversibility of the euro. Hence, under appropriate conditions, we will have a fully effective backstop to avoid destructive scenarios with potentially severe challenges for price stability in the euro area. Let me repeat what I said last month: we act strictly within our mandate to maintain price stability over the medium term; we act independently in determining monetary policy; and the euro is irreversible.

In order to restore confidence, policy-makers in the euro area need to push ahead with great determination with fiscal consolidation, structural reforms to enhance competitiveness and European institution-building. At the same time, governments must stand ready to activate the EFSF/ESM in the bond market when exceptional financial market circumstances and risks to financial stability exist – with strict and effective conditionality in line with the established guidelines. The adherence of governments to their commitments and the fulfilment by the EFSF/ESM of their role are necessary conditions for our outright transactions to be conducted and to be effective. Details of the Outright Monetary Transactions are described in a separate press release.

Furthermore, the Governing Council took decisions with a view to ensuring the availability of adequate collateral in Eurosystem refinancing operations. The details of these measures are also elaborated in a separate press release.

Let me now explain our assessment in greater detail, starting with the economic analysis. Recently published statistics indicate that euro area real GDP contracted by 0.2%, quarter on quarter, in the second quarter of 2012, following zero growth in the previous quarter. Economic indicators point to continued weak economic activity in the remainder of 2012, in an environment of heightened uncertainty. Looking beyond the short term, we expect the euro area economy to recover only very gradually. The growth momentum is expected to remain dampened by the necessary process of balance sheet adjustment in the financial and non-financial sectors, the existence of high unemployment and an uneven global recovery.

The September 2012 ECB staff macroeconomic projections for the euro area foresee annual real GDP growth in a range between -0.6% and -0.2% for 2012 and between -0.4% and 1.4% for 2013. Compared with the June 2012 Eurosystem staff macroeconomic projections, the ranges for 2012 and 2013 have been revised downwards.

The risks surrounding the economic outlook for the euro area are assessed to be on the downside. They relate, in particular, to the tensions in several euro area financial markets and their potential spillover to the euro area real economy. These risks should be contained by effective action by all euro area policy-makers.

Euro area annual HICP inflation was 2.6% in August 2012, according to Eurostat's flash estimate, compared with 2.4% in the previous month. This increase is mainly due to renewed increases in euro-denominated energy prices. On the basis of current futures prices for oil, inflation rates could turn out somewhat higher than expected a few months ago, but they should decline to below 2% again in the course of next year. Over the policy-relevant horizon, in an environment of modest growth in the euro area and well-anchored long-term inflation expectations, underlying price pressures should remain moderate.

The September 2012 ECB staff macroeconomic projections for the euro area foresee annual HICP inflation in a range between 2.4% and 2.6% for 2012 and between 1.3% and 2.5% for 2013. These projection ranges are somewhat higher than those contained in the June 2012 Eurosystem staff macroeconomic projections.

Risks to the outlook for price developments continue to be broadly balanced over the medium term. Upside risks pertain to further increases in indirect taxes owing to the need for fiscal consolidation. The main downside risks relate to the impact of weaker than expected growth in the euro area, particularly resulting from a further intensification of financial market tensions, and its effects on the domestic components of inflation. If not contained by effective action by all euro area policy-makers, such intensification has the potential to affect the balance of risks on the downside.

Turning to the monetary analysis, the underlying pace of monetary expansion remained subdued. The annual growth rate of M3 increased to 3.8% in July 2012, up from 3.2% in June. The rise in M3 growth was mainly attributable to a higher preference for liquidity, as reflected in the further increase in the annual growth rate of the narrow monetary aggregate M1 to 4.5% in July, from 3.5% in June.

The annual growth rate of loans to the private sector (adjusted for loan sales and securitisation) remained weak at 0.5% in July (after 0.3% in June). Annual growth in MFI loans to both non-financial corporations and households remained subdued, at -0.2% and 1.1% respectively (both adjusted for loan sales and securitisation). To a large extent, subdued loan growth reflects a weak outlook for GDP, heightened risk aversion and the ongoing adjustment in the balance sheets of households and enterprises, all of which weigh on credit demand. Furthermore, in a number of euro area countries, the segmentation of financial markets and capital constraints for banks continue to weigh on credit supply.

Looking ahead, it is essential for banks to continue to strengthen their resilience where this is needed. The soundness of banks' balance sheets will be a key factor in facilitating both an appropriate provision of credit to the economy and the normalisation of all funding channels.

To sum up, the economic analysis indicates that price developments should remain in line with price stability over the medium term. A cross-check with the signals from the monetary analysis confirms this picture.

Although good progress is being made, the need for structural and fiscal adjustment remains significant in many European countries. On the structural side, further swift and decisive product and labour market reforms are required across the euro area to improve competitiveness, increase adjustment capacities and achieve higher sustainable growth rates. These structural reforms will also complement and support fiscal consolidation and debt sustainability. On the fiscal front, it is crucial that governments undertake all measures necessary to achieve their targets for the current and coming years. In this respect, the expected rapid implementation of the fiscal compact should be a main element to help strengthen confidence in the soundness of public finances. Finally, pushing ahead with European institution-building with great determination is essential.

We are now at your disposal for questions.

* * *

Question: My question regards the vote today. Was it unanimous and, if not, what does it mean? Thank you.

Draghi: Well, it was not unanimous. There was one dissenting view. We do not disclose the details of our work. It is up to you to guess.

Question: Mr Draghi, you repeated that the euro is irreversible. What gives you the democratic legitimation, the authority to say that? Because I have looked it up in the Treaty. It does not say anywhere that it is the role of the ECB to decide what kind of currency the European countries have. Thank you.

Draghi: What I said exactly is that – and I repeat what I said in London the first time – we will do whatever it takes within our mandate – within our mandate – to have a single monetary policy in the euro area, to maintain price stability in the euro area and to preserve the euro. And we say that the euro is irreversible. So unfounded fears of reversibility are just what they are: unfounded fears. And we think this falls squarely within our mandate.

Question: The FAZ warned the other day about what they have called – pardon me – the "liraisation" of the euro, moving away from a Deutschmark culture to a lira culture. The FDP wants to protest the decisions you have taken today, because they say they are in breach of Article 123 of the EU Treaty of financing governments. Can you explain to us why they are wrong?

Draghi: As far as the "liraisation" or whatever goes, I think that the voting today speaks for itself. It shows that it is not only the decision of former lira members or others, it is basically the almost unanimous decision of the Governing Council. So, first of all, I would not identify with this caricature of it being a southern cabal or an Italian thing. No, it is not. It is the Governing Council that, in its almost unanimous decision, has taken this measure. Second, no, we are sure that we are acting within our mandate, that we are not violating Article 123. It is pretty explicit: it says for purchases on the primary market, this is a violation, not for purchases on the secondary market as I have stated this programme will work. And incidentally, outright purchases of bonds are identified, in Article 18 of the Statute of the ECB, as one of the various possible tools that our monetary policy has and can use. So we are not creating anything new here.

Question: Mr Draghi, how can you be sure the fact that the monetary impulse of the ECB seems not to be reaching a big part of the euro area is really a problem of "monetary transmission" and not maybe a problem of "liquidity trap"?

Draghi: We have substantial, significant and important evidence that the European monetary area is now fragmented. We see this from a variety of indicators: not only the level of yields, the yield spreads, but also volatility, and especially liquidity conditions in many parts of the euro area. So, the actions we decided on today are geared to repairing monetary policy transmission channels in a way that our standard monetary policy can address its primary objective, i.e. maintaining price stability. In other words, these decisions are necessary to restore our capacity to pursue the objective of price stability in the euro area and to restore the singleness of monetary policy in the euro area.

Question: Mr Draghi, on the maturity of the assets that you would intend to purchase under the OMTs you said between one and three years. Could you explain: does this involve bonds that have a residual maturity of that amount of time, i.e. a ten-year bond that has two or three years left to run as well as ones whose face maturity is that time? And my second question is about the conditionally aspect: you mentioned that the OMTs would be suspended if countries did not fulfil the necessary conditions set out in the MoU. Given that these purchases are explicitly for monetary policy purposes, does this mean that you will suspend the ECB's independence if the countries do not fulfil the conditions? I don't quite understand this contradiction; maybe you could elaborate on that for me?

Draghi: On the first question, the "three years" is to be understood in the way you mentioned. And it is three years because it seemed to us the maximum most effective maturity to target: it is close to our short-term policy rates; it affects also the medium-term yield curve; it is close to the rates that are being used to lend to the private sector; it is, in a certain sense, similar to the maturity we used for the LTROs; and also, in a very indirect way, it decreases concerns about our seniority over the bond holdings. So, there are many good reasons for choosing the "three years".

On "conditionality", the assessment of the Governing Council is that we are in a situation now where you have large parts of the euro area in what we call a "bad equilibrium", namely an equilibrium where you may have self-fulfilling expectations that feed upon themselves and generate very adverse scenarios. So, there is a case for intervening, in a sense, to "break" these expectations, which, by the way, do not concern only the specific countries, but the euro area as a whole. And this would justify the intervention of the central bank. But then, we should not

forget why countries have found themselves in a bad equilibrium to start with. And this is because of policy mistakes. That is why we need both legs to fix this situation and move from a bad equilibrium to a good equilibrium. If the central bank were to intervene without any actions on the part of governments, without any conditionality, the intervention would not be effective and the Bank would lose its independence. At the same time, we see that we are in a bad equilibrium and, therefore, policy action, though convincing, does not seem to produce – at least not in the relatively medium term – the results for which it is geared. So that is why we need both legs for this action.

Question: I also have a question on the conditionality. In your statement, you say that "the involvement of the IMF shall be sought". Does that mean that the involvement of the IMF is a firm condition or is it just the preferred scenario? My second question is: am I right in understanding that you will retain your senior status for bonds bought under the Securities Markets Programme (SMP) and for all other bonds held by the Eurosystem? And finally, did you discuss a change in interest rates at your meeting today?

Draghi: The involvement of the IMF is sought for the design of the policy conditionality, but we cannot dictate what it should do. It is an independent institution, but if the Board of the IMF, its management and its Managing Director want to participate in the programme, they would be more than welcome. This is definitely the preferred scenario. However, because I can read the question on your mind – is this a condition sine qua non? – it is important to explain how the ECB is retaining its independence in all this. We have provided governments with a broad framework for conditionality, but it is very much up to the governments themselves, the European Union, the European Commission and the IMF to decide on the precise nature of this conditionality. It is important that the Governing Council retains full discretion and full independence when deciding on issues relating to monetary policy. What we have put in place today is an effective backstop to remove tail risks from the euro area, and the ECB will retain its independence throughout. With regard to seniority, the statement on outright monetary purchases does not apply to the SMP holdings.

Finally, yes, we discussed interest rates today, but it was decided that it was not the right time to make a change. The reason for this is, in a sense, given in the introductory statement. When we last decided to reduce rates, we had anticipated this weakening in the business cycle.

Question: Mr Draghi, will the purchases be unlimited in amount and time? And my second question is: Spain is facing a huge refinancing hump at the end of October. Will the ECB's new programme be up and running in time for this?

Draghi: Well, on the first question, there are no ex-ante limits on the amount of Outright Monetary Transactions. And the size – as I think it said in the first press release or the introductory statement – is going to be adequate to meet our objectives. As regards Spain, we have designed a parcours, a path, and it is now in the hands of the government and the Eurogroup – in the hands of the government of Spain and the governments of the euro area.

Question: Mr Draghi, do you foresee the ECB possibly buying Spanish bank debt in the near future, and maybe even corporate debt?

Draghi: Frankly, we have just taken a very important decision with a view to tackling the crisis. As I have said, this is a fully effective backstop removing tail risk for Europe, and I would not want to speculate on other measures for the time being at least.

Question: I have two questions, Mr Draghi. First of all, was there any discussion in today's meeting regarding any other liquidity programmes, like an LTRO? And my second question is: All global markets were waiting for this today. Even the Turkish central bank was waiting for it. Does this put pressure on you when deciding things?

Draghi: No, there was no discussion on LTROs. And we are obviously all under pressure. It is not just me; the whole of the Governing Council has taken very important decisions today – also for the ECB as an institution – so we are fully aware of that.

Question: Mr Draghi, I think I am right in saying that in the statement, you are explicitly not providing any kind of level at which you think a bond yield of a country that applies for this is excessive. In fact, the language seems to basically say "you will know when it is there and then you will do it and you will tell us about it afterwards" – is that broadly it? Is there any more detail you can give us in terms of the work that the experts were doing over the last few weeks to try and figure out how you decide when a bond is suffering from convertibility risk?

And the second question is, since this is all designed to protect the transmission mechanism or repair it, would you say that the transmission mechanism is also broken in a sense in Germany, where perhaps the bonds are suffering from a sort of convertibility premium, and will you be doing anything to fix that?

Draghi: The answer to your last question is, if bond markets are distorted in the euro area, they are distorted in all directions. And this is one of the causes of the impairment of monetary policy transmission. And that is really the objective of this programme: it is to repair monetary policy transmission and to recreate the singleness of monetary policy for the euro area. Now, on the specific question you had whether we had in mind a specific yield target – the answer is no. No, just because the repair of monetary policy transmission is a complex concept, so we will be looking at a variety of issues. The level of yield ceilings is one, but there are also spreads – CDS spreads, bid-ask spreads – and more generally the conditions of liquidity, so we have a variety of indicators. Volatility is also very important, in terms of the indicators that we plan to take into consideration in planning our interventions.

Question: Under the new OMTs, will the purchases continue to be conducted by the national central banks according to the capital key, and will they take the risks associated with these purchases according to the capital share that they have of the ECB?

And my second question is, this is kind of the third attempt at making a bond purchase programme work: you did it in May 2010, you did it again in August 2011, and they did not seem to work. What makes you think and why should people be convinced that this third attempt will work?

Draghi: Well, the answer to the first question is yes. And the second is actually very, very important. We certainly discussed that. I would, by the way, disagree that the other two programmes have not worked in such a kind of decisive way, but let me talk about the present programme. The present programme is very, very different from any other programme we had in the past. First of all, we have this conditionality element. That is, I would say, the most important difference, because it really puts together our intervention with an ownership of the economic programme that a certain country has, by the country's government, but also by the other governments that have to vote in favour of the EFSF interventions. That is one of the differences, and I think it is probably the most important. The second one is that there is going to be much greater transparency: as I said before, we will publish the OMT holdings, the duration, the issuer, the market value. So there is going to be much more transparency. The third is that the duration is different. And the fourth is the explicit statement that we will accept pari passu treatment with the other creditors. So, there are very many differences with the previous ones, which lead us to think that it will actually work.

Question: Two questions, please. Some analysts thought that you would remain vague today, not giving details, because there are some important issues coming up in the next few months. The first is the expected decision of the Constitutional Court in Karlsruhe regarding the claim against the ESM. To what extent has this topic or issue influenced the decision taken today? And my second question is: Unlimited bond purchases are something very new. The SMP is in the past. Now, we have unlimited purchases. What is the rationale for this? Is it to say: "Look guys, we have spent more than €200 billion buying these bonds and still monetary policy measures are not being transmitted."? Is it to ensure better transmission of monetary policy that you have decided this, which is a big step?

Draghi: On the first question, we really have taken these decisions with total independence, and we will be processing the requests when they come in. There was no discussion at all regarding decisions taken by other institutions, which they will obviously take with complete independence.

On the second point – yes, we think that having it, ex ante, unlimited in size is adequate to reach our objectives.

Question : I have a question relating to Ireland. Are you in any way concerned about the tensions and infighting in the Irish coalition over the forthcoming budget? And secondly, what remains to be done in order for Ireland to secure a debt relief deal?

Draghi: I think you are asking me too much. I think the Irish government has so far been a model of compliance with the macroeconomic adjustment programme. And I am confident that whatever the tensions, this will continue to be the case. On the second question, I have no real news to give you.

Question: When I listened to your words, I thought that there was quite a lot of Weidmann in it. I was quite surprised. But outside, there is

a lot of pressure on you to put less Weidmann in your statements in the future. I fear that that will happen. What do you think?

Draghi: I am what I am, really. I think one thing that is required for this job, for me and my colleagues in the Governing Council, is that you have to think with your head, and external pressures do not really have a role to play in your decision-making.

Question: Especially, Mr Weidman – I mean, Mr Draghi – all the conditionality. You have talked constantly about conditionality. Every second word was "conditionality". I am a German. I really think your approach is great, but you know the markets. You know all these markets are putting pressure on you and your colleagues. In four weeks we will be sitting here again at another press conference. I hope that this conditionality will stay and you will not give ground regarding this issue of conditionality.

Draghi: Certainly, certainly. And as I have said before, you know, all of us are convinced, all of the Governing Council is convinced, that really you need two legs to make it work. We are all convinced that having just one leg does not work. As you have said, Brian, we have had previous experience of this, and that was basically one leg and did not work. We need both to make it work. And I think that is a general conviction. Again, I think there is unfortunately a misconception – especially, I would say, in this country – about how the Governing Council works, and this is not accurate.

Question: The SMP was of a temporary nature. Are the new OMTs here to stay forever, or is there a limit on them? Secondly, there were some voices in the markets yesterday saying that there was a "North-South" discussion within the ECB, in that one person would like to have very strict conditions and another would like to have lenient conditions. Could you please explain if this is true or not.

Draghi: First, in terms of the size, I said there is no ex ante quantitative limit to these interventions because we want this to be perceived as a fully effective backstop that removes tail risk from the euro area. But, at the same time, if we achieve our objectives, why should we continue making these interventions? If governments or countries do not comply, why should we continue doing so? These are the two conditions for exiting. This is pretty clear now. As I said, we always go back to the reasoning that we have to have two components for this backstop to work. On the "North-South" question, I think that was an unfair characterisation. There were discussions about conditionality, but they were not dramatic. People had different views but, in the end, we converged. As I said, an overwhelming majority of the Governing Council were in favour of the concept that I have just described to you.

Question: I wonder if the fact that you have systematically had one person opposing most of the decisions you have taken lately is a source of discomfort. Do you think it is appropriate that the same opposition is then expressed publicly, sometimes almost simultaneously or immediately after the decisions are announced by this party?

Draghi: I think that, in my job as president, I have been blessed by almost having unanimity on the very important and fundamental decisions that we have taken in the last few months. There is nothing I would wish more than to have total unanimity, of course. So I am looking forward to having that.

Question: Mr Draghi, would you agree with the statement that the ECB can only buy time with its OMT actions, in order that politicians resolve the crisis? And are you confident that political leaders in the euro area will use this time effectively? Secondly, polls show a lack of trust on the part of the German public in you as President of the ECB. How will you regain this confidence?

Draghi: Regarding the first point, as I have said several times today, governments have to undertake the policy reforms. We are convinced that no intervention by this or any central bank is actually effective without concurrent policy action by governments. And frankly, if we look elsewhere in the world, we see exactly that. We see that if there is no concurrent action by governments, the effects of these kinds of intervention are not very strong.

As to your second question, well, the proof is in the pudding, and if the action of the European Central Bank under my presidency continues to maintain price stability, as it has done so far, and as my predecessor did during his eight-year term, I think trust will be regained. I have only had one year so far, so of course it is too early.

Question: Mr Draghi, I want to ask if the inclusion of the precautionary programme was decided on with countries like Spain or Italy, who have refused the idea of undergoing a full macroeconomic adjustment programme, in mind?

Draghi: No, no, the answer is no. It was basically the common view that in addition to the precautionary programme you also have the possibility of a full macroeconomic adjustment programme, and I would consider that the two forms have broad conditionality and require involvement of all the other euro area governments.

Question: Yes, but Mr Draghi, does this not mean a soft bailout fear?

Draghi: Oh no, not at all, you should look at the conditionality of the ECCL [Enhanced Conditions Credit Line]. It is a full macroeconomic conditionality and it would also see the involvement of the IMF.

Question: Mr Draghi, I just wondered if I could ask you about what you see as the long-term implications for European Monetary Union (EMU) as a result of the steps that you have taken today? You wrote a week or so ago about the future structure of EMU – with these steps, are you in effect pushing governments in the direction that, in order to get relief from the ECB, they really have to push towards a more integrated European Union?

Draghi: I think that would be a very ambitious objective. We are trying to do something which we believe is very important for the euro area and for price stability, which is to repair monetary policy transmission channels in the euro area. That is our job and we are trying to do it to the best of our ability. Whether this will have implications for the broader political destinies of the euro area is very much in the hands of our leaders and much less in the hands of central bankers.

Question: I am wondering if you could comment when the OMT programme will be launched? For example, in Portugal and Ireland, are you ready to start buying under the OMT programme today and do you anticipate that you will be in a position to buy bonds in Spain before the end of the month so that we can avoid a Moody's downgrade?

Draghi: The answer is the same as before. It is in the hands of governments. As far as Portugal and Ireland are concerned, the press statement says that Outright Monetary Transactions "may be also considered for Member States currently under macroeconomic adjustment programme when they will be regaining bond market access".

Question: Since you were talking about a pretty downbeat economic outlook, do you think the OMT will have an immediate impact on credit growth and the real economy in terms of the borrowing rates that businesses are paying in the periphery and the contraction in lending growth that we have seen there. On a related note, in view of that situation, was there any talk of not sterilising purchases, given that that would have an impact on credit?

Draghi: The answer to your second question is no. In answer to your first question, the objective of the OMT programme is to repair monetary policy transmission channels, which today are hampered, and to recreate a single currency area, which today is fragmented. We should therefore see some improvement on the credit front. However, we should not forget that credit flows are sluggish for several reasons, one of which is low demand.

Question: The ECB already has a lot of sovereign bonds on its balance sheet, by some estimates amounting to some 33% of euro area GDP. Once you start throwing in the OMT bonds, are you concerned that the market will start questioning the integrity of the balance sheet of the ECB?

Second, would you say that the high yields on government bonds, in particular in Spain and Italy, are based on unfounded fears? It is almost like a self-fulfilling prophecy. But you have to admit that economic data suggest that some of these high yields could in fact reflect reality.

Draghi: First of all, the figure you quoted about our SMP holdings is way off mark. We are talking about around 3% of total euro area GDP, not 33%.

On the yields, you are absolutely right. As I said at the start, the programme needs two legs. We should not forget how these countries found themselves in a bad equilibrium to begin with, namely because of incorrect policies and policy mistakes. So to this extent, the yields that are currently in the market reflect this fact. They do not reflect only unfounded fears of possible reversibility, they also reflect the quality of the outstanding credit of these countries.

Question: Will all national central banks participate in the purchases in the OMT programme? My second question is, if the OMT programme is operational, could it create an incentive for countries to issue short-term debt instead of long-term debt, and what are the countermeasures to address that?

Draghi: On the second question – the first question I have already answered – certainly,

there could be such an incentive. We will monitor the situation very carefully, but, at the same time, one assumes that countries would like to keep a structure of debt issuance which is balanced across all maturities. So there is a danger, there is a risk, but it is not at all clear that debt issuers will actually move in this direction because it has a cost, namely of unbalancing a maturity structure which was probably balanced to begin with and has taken many years to achieve.

§49. Press Release of the European Central Bank, September 6 September 2012 - Technical features of Outright Monetary Transactions, available at http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html

As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No ex ante quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue

to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.

§50. Press Release of the European Central Bank, 6 September 2012 – Measures to preserve collateral availability, available at http://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_2.en.html

On 6 September 2012 the Governing Council of the European Central Bank (ECB) decided on additional measures to preserve collateral availability for counterparties in order to maintain their access to the Eurosystem's liquidity-providing operations.

Change in eligibility for central government assets

The Governing Council of the ECB has decided to suspend the application of the minimum credit rating threshold in the collateral eligibility requirements for the purposes of the Eurosystem's credit operations in the case of marketable debt instruments issued or guaranteed by the central government, and credit claims granted to or guaranteed by the central government, of countries that are eligible for Outright Monetary Transactions or are under an EU-IMF programme and comply with the attached conditionality as assessed by the Governing Council.

The suspension applies to all outstanding and new assets of the type described above.

The decision on the collateral eligibility of bonds issued or guaranteed by the Greek government taken by the Governing Council on 18 July 2012 is still applicable (Decision ECB/2012/14).

Expansion of the list of assets eligible to be used as collateral

The Governing Council of the ECB has also decided that marketable debt instruments denominated in currencies other than the euro, namely the US dollar, the pound sterling and the Japanese yen, and issued and held in the euro area, are eligible to be used as collateral in Eurosystem credit operations until further notice. This measure reintroduces a similar decision that was applicable between October 2008 and December 2010, with appropriate valuation markdowns.

These measures will come into force with the relevant legal acts.

§51. Decision of the European Central Bank of 20 March 2013 on the rules concerning the use as collateral for Eurosystem monetary policy operations of own-use uncovered government-guaranteed bank bonds (ECB/2013/6), OJ L 95, April 5th, 2013, p. 22

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the first indent of Article 3.1 and Articles 12.1, 14.3 and Article 18.2 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro (hereinafter the "NCBs") may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The standard conditions under which the ECB and the NCBs stand ready to enter into credit operations, including the criteria determining the eligibility of collateral for the purposes of Eurosystem credit operations, are laid down in Annex I to Guideline ECB/2011/14 of 20 September 2011

on monetary policy instruments and procedures of the Eurosystem.[1]

(2) Pursuant to Section 1.6 of Annex I to Guideline ECB/2011/14, the Governing Council may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations.

(3) The direct use of own-use uncovered government-guaranteed bank bonds and the indirect use of such bonds where they are included in the pool of covered bonds issued by the same counterparty that issued the uncovered bank bonds or by entities closely linked to that counterparty should be completely excluded as collateral for Eurosystem monetary policy operations from 1 March 2015. In exceptional circumstances, counterparties participating in Eurosystem monetary policy operations could be granted by the Governing Council temporary derogations from this prohibition.

(4) The terms of this exclusion should be laid down in an ECB Decision,

HAS ADOPTED THIS DECISION:

Article 1 – *Changes in the rules concerning the use as collateral of own-use uncovered government-guaranteed bank bonds*

1. From 1 March 2015, uncovered bank bonds issued by the counterparty using them or by entities closely linked to the counterparty and fully guaranteed by one or several European Economic Area (EEA) public sector entities which have the right to levy taxes may no longer be used as collateral for Eurosystem monetary policy operations by such counterparty either: (a) directly; or (b) indirectly where they are included in the pool of covered bonds issued by the same counterparty that issued the uncovered bank bonds or by entities closely linked to that counterparty.

2. In exceptional cases, the Governing Council may decide on temporary derogations from the prohibition laid down in paragraph 1 for a maximum of three years. A request for a derogation shall be accompanied by a funding plan that indicates how the own use of uncovered government-guaranteed bank bonds by the requesting counterparty will be phased out by no later than three years following the granting of the derogation.

3. In the event of any discrepancy between this Decision, Guideline ECB/2011/14 and Guideline ECB/2013/4 of 20 March 2013 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral, in each case as implemented at national level by the NCBs, this Decision shall prevail.

Article 2 – *Entry into force*

This Decision shall enter into force on 22 March 2013.

[1] OJ L 331, 14.12.2011, p. 1.

§52. Decision of the European Central Bank of 2 May 2013 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus, OJ L 133, May 17th, 2013, pp. 26-28

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the first indent of Article 3.1, Article 12.1, Article 18 and the second indent of Article 34.1,

Having regard to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem,[1] and in particular Section 1.6 and Sections 6.3.1, 6.3.2 and 6.4.2 of Annex I thereof,

Having regard to Guideline ECB/2013/4 of 20 March 2013 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral,[2] and in particular Article 1(3) and Articles 5 and 7 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro (NCBs) may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The standard criteria determining the eligibility of collateral for the purposes of Eurosystem monetary policy operations are laid down in Annex I to Guideline ECB/2011/14.

(2) Pursuant to Section 1.6 of Annex I to Guideline ECB/2011/14, the Governing Council may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations. Pursuant to Section 6.3.1 of Annex I to Guideline ECB/2011/14, the Eurosystem reserves the right to determine whether an issue, issuer, debtor or guarantor fulfils its requirements for high standards on the basis of any information it may consider relevant.

(3) Marketable debt instruments issued or fully guaranteed by the Republic of Cyprus currently do not meet the Eurosystem's minimum requirements for credit quality thresholds applicable to marketable debt instruments, as established in Annex I to Guideline ECB/2011/14.

(4) The Governing Council has taken into consideration the Memorandum of Understanding concluded between the Republic of Cyprus and the European Commission and endorsed by the Member States, reflecting the economic and financial adjustment programme for Cyprus.

(5) The Governing Council considers this programme to be appropriate, so that the marketable debt instruments issued or fully guaranteed by the Republic of Cyprus have a quality standard sufficient to warrant their eligibility as collateral for Eurosystem monetary policy operations, irrespective of any external credit assessment.

(6) The Governing Council has therefore decided that the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus must be restored for the Eurosystem's monetary policy operations, subject to applying specific haircuts to such instruments different from those provided for in Section 6.4.2 of Annex I to Guideline ECB/2011/14.

(7) Under Article 7 of Guideline ECB/2013/4, the Eurosystem's credit quality threshold shall not apply to marketable debt instruments issued or fully guaranteed by the central governments of euro area Member States under a European Union/International Monetary Fund programme, unless the Governing Council decides that the respective Member State does not comply with the conditionality of the financial support and/or the macroeconomic programme. However, under Article 1(3) of the same Guideline, for the purposes of its Article 5(1) and Article 7, only Ireland, the Hellenic Republic and the

[1] OJ L 331, 14.12.2011, p. 1.
[2] OJ L 95, 5.4.2013, p. 23.

Portuguese Republic are considered euro area Member States compliant with a European Union/International Monetary Fund programme. Therefore an additional Governing Council decision is required to waive the Eurosystem's credit quality threshold for marketable debt instruments issued or fully guaranteed by the Republic of Cyprus.

(8) This exceptional measure will apply temporarily until the Governing Council considers that the normal application of the Eurosystem's eligibility criteria and risk control framework for monetary policy operations can be reintroduced,

HAS ADOPTED THIS DECISION:

Article 1 – *Suspension of certain provisions of Guideline ECB/2011/14 and eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus*

1. The Eurosystem's minimum requirements for credit quality, as specified in the Eurosystem credit assessment framework rules for certain marketable assets in Section 6.3.2 of Annex I to Guideline ECB/2011/14, shall be suspended for marketable debt instruments issued or fully guaranteed by the Republic of Cyprus. Hence, for the purposes of Article 5(1) and Article 7 of Guideline ECB/2013/4, the Republic of Cyprus shall be considered a euro area Member State compliant with a European Union/International Monetary Fund programme.

2. Marketable debt instruments issued or fully guaranteed by the Republic of Cyprus shall be subject to the specific haircuts set out in the Annex to this Decision.

3. In the event of any discrepancy between this Decision, Guideline ECB/2011/14 and Guideline ECB/2013/4, in each case as implemented at national level by the NCBs, this Decision shall prevail.

Article 2 – *Entry into force*

This Decision shall enter into force on 9 May 2013.

ANNEX

Haircut schedule applying to marketable debt instruments issued or fully guaranteed by the Republic of Cyprus

	Maturity bucket	**Haircuts for fixed coupons and floaters**	**Haircuts for zero coupon**
Government bonds	**0-1**	14,5	14,5
	1-3	27,5	29,5
	3-5	37,5	40,0
	5-7	41,0	45,0
	7-10	47,5	52,5
	> 10	57,0	71,0
	Maturity bucket	**Haircuts for fixed coupons and floaters**	**Haircuts for zero coupon**
Government guaranteed bank bonds and government-guaranteed non-financial corporate bonds	**0-1**	23,0	23,0
	1-3	37,0	39,0
	3-5	47,5	50,5
	5-7	51,5	55,5
	7-10	58,0	63,0
	> 10	68,0	81,5

§53. Decision of the European Central Bank of 2 May 2013 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus, OJ L 133, May 17 th , 2013, pp. 0026-0028.

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular Article 12.1 and the second indent of Article 34.1, in conjunction with the first indent of Article 3.1 and Article 18.2 thereof,

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank (hereinafter the 'Statute of the ESCB'), the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The criteria determining the eligibility of collateral for the purposes of Eurosystem monetary policy operations are laid down in Annex I to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Euro- system[1] (hereinafter referred to as the 'General Documentation').

(2) Pursuant to Section 1.6 of the General Documentation, the Governing Council of the ECB may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations. Pursuant to Section 6.3.1 of the General Documentation, the Eurosystem reserves the right to determine whether an issue, issuer, debtor or guarantor fulfils its requirements for high credit standards on the basis of any information it may consider relevant.

(3) Decision ECB/2013/13 of 2 May 2013 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus[2] temporarily suspended, as an exceptional measure, the Eurosystem's minimum requirements for credit quality thresholds applicable to marketable debt instruments issued or fully guaranteed by the Republic of Cyprus.

(4) The Republic of Cyprus has decided to launch a debt management exercise involving marketable debt instruments that it has issued.

(5) The adequacy as collateral for Eurosystem operations of the marketable debt instruments issued or fully guar- anteed by the Republic of Cyprus has been further negatively affected by the decision to launch a debt management exercise.

(6) Decision ECB/2013/13 should be repealed,

HAS ADOPTED THIS DECISION:

Article 1

Repeal of Decision ECB/2013/13

Decision ECB/2013/13 is repealed.

Article 2 Entry into force

This Decision shall enter into force on 28 June 2013.

[1] OJ L 331, 14.12.2011, p. 1.
[2] OJ L 133, 17.5.2013, p. 26.

§54. Decision of the European Central Bank (2013/645/EU) of 26 September 2013 on additional measures relating to Eurosystem refinancing operations and eligibility of collateral, (ECB/2013/35), OJ L 301, November 12th , 2013 p. 6

Original version (OJ L 301, 12.11.2013, p.6); amended by Decision of the European Central Bank of 12 March 2014 amending Decision ECB/2013/35 on additional measures relating to Eurosystem refinancing operations and eligibility of colateral (ECB/2014/11) (OJ L 166, 5.6.2014, p. 31) [the text amended then is underlined].

ORIGINAL PREAMBLE

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European Central Bank, and in particular the first indent of Article 3.1, Article 12.1, Article 14.3 and Article 18.2 thereof,

Having regard to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem[1] and Decision ECB/2013/6 of 20 March 2013 on the rules concerning the use as collateral for Eurosystem monetary policy operations of own-use uncovered government-guaranteed bank bonds,[2]

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro (hereinafter the "NCBs") may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The standard conditions under which the ECB and the NCBs stand ready to enter into credit operations, including the criteria determining the eligibility of collateral for the purposes of Eurosystem credit operations, are laid down in Annex I to Guideline ECB/2011/14 and Decision ECB/2013/6.

(2) Guideline ECB/2013/4 of 20 March 2013 on additional temporary measures relating to Eurosystem refinancing operations and eligibility of collateral and amending Guideline ECB/2007/9[3] and Decision ECB/2013/22 of 5 July 2013 on temporary measures relating to the eligibility of marketable debt instruments issued or fully guaranteed by the Republic of Cyprus,[4] established additional temporary measures relating to the eligibility of collateral for the Eurosystem credit operations.

(3) Pursuant to Section 1.6 of Annex I to Guideline ECB/2011/14, the Governing Council may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations.

(4) On 17 July 2013, the Governing Council decided to further strengthen its risk control framework, by adjusting the eligibility criteria and haircuts applied to collateral accepted in Eurosystem monetary policy operations and adopting certain additional measures to improve the overall consistency of the framework and its practical implementation.

(5) The decisions mentioned in Recital 4 should be laid down in an ECB Decision,

HAS ADOPTED THIS DECISION:

PREAMBLE 2014

THE GOVERNING COUNCIL OF THE EUROPEAN CENTRAL BANK,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first indent of Article 127(2) thereof,

Having regard to the Statute of the European System of Central Banks and of the European

[1] OJ L 331, 14.12.2011, p. 1.
[2] OJ L 95, 5.4.2013, p. 22.
[3] OJ L 95, 5.4.2013, p. 23.
[4] OJ L 195, 18.7.2013, p. 27.

Central Bank, and in particular the first indent of Article 3.1, Article 12.1, Article 14.3 and Article 18.2 thereof,

Having regard to Guideline ECB/2011/14 of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem[5] and Decision ECB/2013/6 of 20 March 2013 on the rules concerning the use as collateral for Eurosystem monetary policy operations of own-use uncovered governmentguaranteed bank bonds,[6]

Whereas:

(1) Pursuant to Article 18.1 of the Statute of the European System of Central Banks and of the European Central Bank, the European Central Bank (ECB) and the national central banks of Member States whose currency is the euro (hereinafter the 'NCBs') may conduct credit operations with credit institutions and other market participants, with lending being based on adequate collateral. The standard conditions under which the ECB and the NCBs stand ready to enter into credit operations, including the criteria determining the eligibility of collateral for the purposes of Eurosystem credit operations, are laid down in Annex I to Guideline ECB/2011/14, as well as Decision ECB/2013/6 and Decision ECB/2013/35.[7]

(2) Pursuant to Section 1.6 of Annex I to Guideline ECB/2011/14, the Governing Council may, at any time, change the instruments, conditions, criteria and procedures for the execution of Eurosystem monetary policy operations.

(3) On 17 July 2013, the Governing Council decided to further strengthen its risk control framework by adjusting the eligibility criteria and haircuts applied to collateral accepted in Eurosystem monetary policy operations and adopting certain additional measures to improve the overall consistency of the framework and its practical implementation. These measures were laid down in Decision ECB/2013/35.

(4) In relation to the rating requirements for asset-backed securities, it is necessary to introduce further refinements to Decision ECB/2013/35, which should therefore be amended accordingly,

HAS ADOPTED THIS DECISION:

[5] OJ L 331, 14.12.2011, p. 1.
[6] OJ L 95, 5.4.2013, p. 22.
[7] Decision ECB/2013/35 of 26 September 2013 on additional measures relating to Eurosystem refinancing operations and eligibility of collateral (OJ L 301, 12.11.2013, p. 6).

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Article 1 – *Changes and additions to certain provisions of Guideline ECB/2011/14*

1. The rules for the conduct of Eurosystem monetary policy operations and the eligibility criteria for collateral laid down in this Decision shall apply in conjunction with other Eurosystem legal acts related to the monetary policy instruments and procedures of the Eurosystem and, in particular, Guideline ECB/2011/14.

2. In the event of any discrepancy between this Decision and Guideline ECB/2011/14 and/or any measures implementing them at national level, this Decision shall prevail. The NCBs shall continue to apply all provisions of Guideline ECB/2011/14 unaltered unless otherwise provided for in this Decision.

Article 2 – *Information requests*

1. As part of the monetary policy framework referred to in Chapter 1 of Annex I to Guideline ECB/2011/14, the Eurosystem reserves the right to request and obtain any relevant information needed to carry out its tasks and achieve its objectives in relation to monetary policy operations.

2. This right is without prejudice to any other existing specific rights of the Eurosystem to request information related to monetary policy operations.

Article 3 – *Common eligibility criteria for marketable assets*

1. The following paragraphs shall be read in conjunction with the Eurosystem common eligibility requirements for marketable assets mentioned in Section 6.2.1.1(1) of Annex I to Guideline ECB/2011/14 and the risk control measures for marketable assets mentioned in Section 6.4.2 of Annex I to Guideline ECB/2011/14.

2. Each eligible debt instrument shall have:

(a) (i) a fixed, unconditional principal amount;[8] or

(ii) an unconditional principal amount that is linked on a flat basis to only one euro area inflation index at a single point in time, containing no other complex structures;[9] and

[8] Bonds with warrants or other similar rights attached are not eligible.
[9] Debt instruments with a principal amount linked to only

(b) (i) fixed, zero or multi-step coupons with a predefined coupon schedule and predefined coupon values that cannot result in a negative cash flow; or

(ii) a floating coupon that cannot result in a negative cash flow and has the following structure: coupon rate = (reference rate * l) ± x, with f ≤ coupon rate ≤ c, where:

1. reference rate is only one of the following at a single point in time:

(a) a euro money market rate (e.g. EURIBOR, LIBOR) or similar indices;

(b) a constant maturity swap rate (e.g. CMS, EIISDA, EUSA);

(c) the yield of one or an index of several euro area government bonds that have a maturity of one year or less; or

(d) a euro area inflation index provided by Eurostat or a national statistical authority of a Member State (e.g. HICP);

and it must be the same reference rate as under (a)(ii) above in case the repayment of the principal is linked to a reference rate; and

2. f (floor), c (ceiling), l (leveraging/deleveraging factor) and x (margin) are, if present, numbers that are fixed and predefined at issuance, which may change over time, where f, c, and x are greater than or equal to zero and l is greater than zero throughout the entire lifetime of the asset. For floating coupons with an inflation index reference rate, l shall be equal to one.

3. All structures not included in paragraph 2 are ineligible. Hence, the list of excluded coupon structures of the second subparagraph of Section 6.2.1.1(1) of Annex I to Guideline ECB/2011/14 shall be deemed inapplicable. Assets that were on the list of eligible assets on the date of entry into force of this Decision and that become ineligible because of paragraph 2 will remain eligible for 12 months from the date of entry into force of this Decision.

4. The eligibility assessment of an asset as regards its coupon structure, in the event that the coupon is of a multi-step type — either fixed or floating — shall be based on the entire lifetime of the asset with both a forward and backward-looking perspective.

5. Eligible coupons shall have no issuer optionalities, i.e. they shall not allow changes in the coupon structure during the entire lifetime of the asset, based on a forward and backward-looking perspective, that are contingent on an issuer's decision.

6. The second paragraph of Section 6.7 of Annex I to Guideline ECB/2011/14 shall cease to apply.

Article 4 – *Additional eligibility criterion for commercial-mortgage backed securities*

Without prejudice to the eligibility criteria of Section 6.2.1.1.2 of Annex I to Guideline ECB/2011/14, the cash-flow generating assets backing commercial-mortgage backed securities shall not contain loans which are at any time, structured, syndicated or leveraged. For the purposes of this Article, the terms "structured loan", "syndicated loan" and "leveraged loan" shall have the meanings given to them in points 4 to 6 of Article 3(6) of Guideline ECB/2013/4.

Article 5 – *Specific eligibility criteria for covered bonds*

1. The following paragraphs shall be read in conjunction with the additional eligibility criteria for covered bonds specified in Section 6.2.1.1.3 of Annex I to Guideline ECB/2011/14.

2. For the purposes of Section 6.2.1.1.3(b) of Annex I to Guideline ECB/2011/14, an entity is considered to be part of a consolidated group or affiliated to the same central body if there are close links between the entities involved as described in Section 6.2.3.2. The common group membership or affiliation is to be determined at the time the senior units of the asset-backed security are transferred into the cover pool of the covered bond, in line with Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions.[10]

3. Covered bonds which were on the list of eligible assets on 30 March 2013 shall benefit from a grandfathering period until 28 November 2014. Tap issues of such covered bonds may also benefit from the grandfathering period provided that, from 31 March 2013, asset-backed securities that do not comply with the requirements specified in Section 6.2.1.1.3(a) to

one euro area inflation index at a single point in time are also permissible given that the coupon structure is as defined in Article 3(2)(b)(ii)(1)(d) and is linked to the same inflation index.

[10] OJ L 177, 30.6.2006, p. 1.

(c) of Annex I to Guideline ECB/2011/14 are not added to the cover pool.

4. Paragraphs 1 to 3 above shall be understood without prejudice to the rules of Decision ECB/2013/6 concerning the use as collateral for Eurosystem monetary policy operations of own-use uncovered government-guaranteed bank bonds.

Article 6 – *Additional high credit standards for marketable assets*

1. The ECAI credit assessment of marketable assets other than asset-backed securities, mentioned in Section 6.3.2(a) ECAI credit assessment, of Annex I to Guideline ECB/2011/14, shall be subject to the following criteria:

(i) At least one credit assessment from an accepted ECAI[11] for either the issue or, in the absence of an issue rating from the same ECAI, the programme/issuance series under which the asset is issued, must comply with the Eurosystem's credit quality threshold.[12] The ECB publishes the credit quality threshold for all accepted ECAIs, as established under Section 6.3.1 of Annex I to Guideline ECB/2011/14.[13] If multiple ECAI credit assessments are available for the same issue or, if applicable, for programme/issuance series, then the first-best rule (i.e. the best available ECAI credit assessment for the issue or, if applicable, for the programme/issuance series) is applied. If the first-best credit assessment for the issue or, if applicable, for the programme/issuance series does not comply with the Eurosystem's credit quality threshold, the asset is not eligible, even if a guarantee acceptable under Section 6.3.2(c) of Annex I to Guideline ECB/2011/14 exists. In the absence of an ECAI credit assessment for the issue or, if applicable, the programme/issuance series, the best available ECAI credit assessment for the issuer or the guarantor (if the guarantee is acceptable under Section 6.3.2(c) of Annex I to Guideline ECB/2011/14) must comply with the Eurosystem's credit quality threshold for the asset to be eligible.

(ii) For ECAI issue and programme/issuance series ratings, no distinction by original maturity of the asset is made for the purposes of establishing high credit standards for marketable assets. Any ECAI rating assigned to the issue or programme/issuance series that meets the Eurosystem credit quality threshold is acceptable. As regards the ECAI issuer/guarantor rating, the acceptable ECAI credit assessment depends on the original maturity of the asset. A distinction is made between short-term assets (meaning those assets with an original maturity of up to 390 days) and long-term assets (meaning those assets with an original maturity of more than 390 days). For short-term assets, ECAI short-term and long-term issuer ratings and long-term guarantor ratings are acceptable, on a first-best rule basis. For long-term assets, only ECAI long-term issuer or long-term guarantor ratings are acceptable.

2. The credit quality threshold applicable to asset-backed securities, as laid down in Section 6.3 of Annex I to Guideline ECB/2011/14, shall correspond to Credit Quality Step (CQS) 2 of the Eurosystem's harmonised rating scale ('single A').[14] All asset-backed securities shall have at least two credit assessments at a 'single A' level from any accepted ECAI for the issue.

3. *(repealed)*

4. In the absence of an ECAI credit assessment for the issue (or, if applicable, the programme/issuance series) rating, the high credit standards for marketable assets, other than asset-backed securities, can be established on the basis of guarantees provided by financially sound guarantors as referred to in Section 6.3.2(c) of Annex I to Guideline ECB/2011/14. The financial soundness of the guarantor is assessed on the basis of long-term ECAI guarantor ratings meeting the Eurosystem's credit quality threshold. The guarantee shall meet the requirements set out in points (i) to (iv) of Section 6.3.2(c) of Annex I to Guideline ECB/2011/14.

Article 7 – *Determination of haircuts*

The credit assessment used for the purpose of determining eligibility in accordance with Sections 6.3.2 and 6.3.3 of Annex I to Guideline ECB/2011/14 shall apply in determining the applicable haircut pursuant to Section 6.4.1 of Annex I to Guideline ECB/2011/14.

Article 8 – *Haircut categories and haircuts for marketable and non-marketable assets*

[11] The accepted ECAIs, ICASs and third-party RTs and their providers are listed on the ECB's website at www.ecb.europa.eu

[12] An ECAI assessment for a programme/issuance series is only relevant if it applies to the particular asset and no different issue rating from the same ECAI exists.

[13] This information is published on the ECB's website at www.ecb.europa.eu

[14] A 'single A' rating is a rating of at least 'A3' from Moody's, 'A-' from Fitch or Standard & Poor's, or 'AL' from DBRS.

1. The liquidity categories for marketable assets, as specified in the Eurosystem risk control measures for marketable assets in Table 6 of Section 6.4.2 of Annex I to Guideline ECB/2011/14, shall be referred to as haircut categories throughout that Section, without changes in the assignment of eligible assets to the respective categories.

2. The levels of valuation haircuts applied to marketable assets, as specified in the Eurosystem risk control measures in Table 7 of Section 6.4.2 of Annex I to Guideline ECB/2011/14, shall be substituted by the haircuts set out in Annex I to this Decision.

3. The haircut applied to asset-backed securities included in haircut category V, specified in Section 6.4.2(d) of Annex I to Guideline ECB/2011/14, shall be 10 % regardless of maturity or coupon structures.

4. Own-use covered bonds are subject to an additional valuation haircut. This add-on haircut is directly applied to the value of the entire issuance of the individual debt instrument in the form of a valuation markdown of (a) 8 % for own-use covered bonds in CQS 1&2, and (b) 12 % for own-use covered bonds in CQS3. For these purposes, "own-use covered bonds" means covered bank bonds issued by either a counterparty or entities closely linked to it, and used in a percentage greater than 75 % of the outstanding notional amount by that counterparty and/or its closely linked entities.

5. The levels of valuation haircuts applied to non-marketable assets, as specified in the Eurosystem risk control measures in Table 9 of Section 6.4.3 of Annex I to Guideline ECB/2011/14, shall be substituted by the haircuts set out in Annex II to this Decision.

6. The valuation haircut for non-marketable retail mortgage-backed debt instruments, specified in Section 6.4.3.2 of Annex I to Guideline ECB/2011/14, shall be 39,5 % of their outstanding notional amount.

Article 9 – *Remedies in an event of default and on grounds of prudence*

1. The remedies that the relevant contractual or regulatory arrangements applied by the NCB must ensure, as referred to in Section I.7 of Annex II to Guideline ECB/2011/14, shall be subject to the terms specified in the following paragraphs.

2. Following the occurrence of an event of default or on grounds of prudence, the NCB is entitled to exercise the following remedies:

(a) suspend, limit or exclude the Counterparty from access to open market operations;

(b) suspend, limit or exclude the Counterparty from access to the Eurosystem's standing facilities;

(c) terminate all outstanding agreements and transactions;

(d) demand accelerated performance of claims that have not yet matured or are contingent;

(e) use deposits of the Counterparty placed with the NCB to set off claims against the Counterparty;

(f) suspend the performance of obligations in respect of the Counterparty until the claim against the Counterparty has been satisfied.

3. In addition, following the occurrence of an event of default, the NCB may be entitled to exercise the following remedies:

(a) claim default interest;

(b) claim an indemnity for any losses sustained as a consequence of a default by the Counterparty.

4. In addition, on grounds of prudence, the NCB may be entitled to reject, limit the use of or apply supplementary haircuts to assets submitted as collateral in Eurosystem credit operations by the relevant Counterparty.

5. The NCB shall at all times be in a position legally to realise all assets provided as collateral without undue delay and in such a way as to entitle the NCB to realise value for the credit provided, if the Counterparty does not settle its negative balance promptly.

6. In order to ensure uniform implementation of the measures imposed, the ECB's Governing Council may decide on the remedies, including suspension, limitation or exclusion from access to open market operations or the Eurosystem's standing facilities.

Article 10 – *Clarification of the definition of EEA countries*

1. For the purposes of the Eurosystem collateral framework, EEA countries shall be understood to include all EU Member States, regardless of whether or not they have formally acceded to

the EEA, together with Iceland, Liechtenstein and Norway.

2. The definition of EEA countries contained in Appendix 2 to Annex I to Guideline ECB/2011/14 (Glossary) shall be deemed to be amended accordingly.

Article 11 – *Adjustments to the implementation of loan-level requirements for asset-backed securities*

1. Without prejudice to Section 6.2.1.1.2 of Annex I to Guideline ECB/2011/14 and Appendix 8 thereto, the Eurosystem may accept as eligible collateral asset-backed securities with a score lower than A1 after completion of the relevant transitional period, on a case-by-case basis and subject to the provision of adequate explanations for the failure to achieve the mandatory score. For each adequate explanation the Governing Council shall specify a maximum tolerance level and a tolerance horizon. The tolerance horizon shall indicate that the data quality for the asset-backed securities must improve within the specified time period.

2. The full list of adequate explanations, their tolerance levels and tolerance horizons is available on the ECB's website and contains, inter alia, descriptions of legacy assets and legacy IT systems.

Article 12 – *Entry into force and application*

1. This Decision shall enter into force on 1 October 2013.

2. As an exception, Article 8(4) shall apply from 1 November 2013.

ANNEX I

LEVELS OF VALUATION HAIRCUTS APPLIED TO ELIGIBLE MARKETABLE ASSETS

		Haircut categories								
Credit quality	**Residual maturity (years)**	**Category I**		**Category II***		**Category III***		**Category IV***		**Category V***
		Fixed coupon	**Zero coupon**	**Fixed coupon**	**Zero coupon**	**Fixed coupon**	**Zero coupon**	**Fixed coupon**	**Zero coupon**	
Steps 1 and 2 (AAA to A-)**	**0-1**	0,5	0,5	1,0	1,0	1,0	1,0	6,5	6,5	10,0
	1-3	1,0	2,0	1,5	2,5	2,0	3,0	8,5	9,0	
	3-5	1,5	2,5	2,5	3,5	3,0	4,5	11,0	11,5	
	5-7	2,0	3,0	3,5	4,5	4,5	6,0	12,5	13,5	
	7-10	3,0	4,0	4,5	6,5	6,0	8,0	14,0	15,5	
	> 10	5,0	7,0	8,0	10,5	9,0	13,0	17,0	22,5	

Credit quality	Residual maturity (years)	Haircut categories								
		Category I		Category II*		Category III*		Category IV*		Category V*
		Fixed coupon	Zero coupon	Fixed coupon	Zero coupon	Fixed coupon	Zero coupon	Fixed coupon	Zero coupon	
Step 3 (BBB+ to BBB-)**	**0-1**	6,0	6,0	7,0	7,0	8,0	8,0	13,0	13,0	Not eligible
	1-3	7,0	8,0	10,0	14,5	15,0	16,5	24,5	26,5	
	3-5	9,0	10,0	15,5	20,5	22,5	25,0	32,5	36,5	
	5-7	10,0	11,5	16,0	22,0	26,0	30,0	36,0	40,0	
	7-10	11,5	13,0	18,5	27,5	27,0	32,5	37,0	42,5	
	> 10	13,0	16,0	22,5	33,0	27,5	35,0	37,5	44,0	

[*] Individual asset-backed securities, covered bank bonds (jumbo covered bank bonds, traditional covered bank bonds and other covered bank bonds) and uncovered bank bonds that are theoretically valued in accordance with Section 6.5 of Annex I to Guideline ECB/2011/14 are subject to an additional valuation haircut. This haircut is directly applied at the level of the theoretical valuation of the individual debt instrument in the form of a valuation markdown of 5 %. Furthermore, an additional valuation markdown is applied to own-use covered bonds. This valuation markdown is 8 % for own-use covered bonds in CQS1&2 and 12 % for own-use covered bonds in CQS3.

[**] Ratings are as specified in the Eurosystem's harmonised rating scale, published on the ECB's website at www.ecb.europa.eu

ANNEX II

LEVELS OF VALUATION HAIRCUTS APPLIED TO CREDIT CLAIMS WITH FIXED INTEREST PAYMENTS

Credit quality	Residual maturity (years)	Valuation methodology	
		Fixed interest payment and a valuation based on a theoretical price assigned by the NCB	Fixed interest payment and a valuation according to the outstanding amount assigned by the NCB
Steps 1 and 2 (AAA to A-)**	**0-1**	10,0	12,0
	1-3	12,0	16,0
	3-5	14,0	21,0
	5-7	17,0	27,0
	7-10	22,0	35,0
	> 10	30,0	45,0
		Valuation methodology	
Credit quality	**Residual maturity (years)**	**Fixed interest payment and a valuation based on a theoretical price assigned by the NCB**	**Fixed interest payment and a valuation according to the outstanding amount assigned by the NCB**

Step 3 (BBB+ to BBB-)**	**0-1**	17,0	19,0
	1-3	29,0	34,0
	3-5	37,0	46,0
	5-7	39,0	52,0
	7-10	40,0	58,0
	> 10	42,0	65,0

§55. Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:JOL_2014_198_R_0004

Having regard to Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions,[1] and in particular Article 7 thereof,

Whereas:

(1) Member States whose currency is not the euro may wish to participate in the Single Supervisory Mechanism (SSM). For this purpose, they may request the European Central Bank (ECB) to enter into a close cooperation in relation to the tasks referred to in Articles 4 and 5 of Regulation (EU) No 1024/2013 with regard to all credit institutions established in that Member State.

(2) The close cooperation will be established by a decision of the ECB, provided that the conditions laid down in Article 7 of Regulation (EU) No 1024/2013 are met.

(3) It is necessary to specify the procedural aspects relating to (a) requests by Member States whose currency is not the euro (hereinafter 'non-euro area Member States') to enter into a close cooperation, (b) the assessment of these requests by the ECB and (c) the ECB decision establishing close cooperation with the specific Member State.

(4) Regulation (EU) No 1024/2013 also sets out the cases in which a close cooperation may be suspended or terminated by the ECB. It is necessary to specify the procedural aspects relating to potential suspension and termination of a close cooperation.

HAS ADOPTED THIS DECISION:

Title 1 - *Procedure for the establishment of a close cooperation*

Article 1: Definitions

For the purposes of this Decision:

1. 'less significant supervised entity' means a supervised entity (a) established in a non-euro area Member State which is a participating Member State in accordance with Article 2(1) of Regulation (EU) No 1024/2013, and (b) which does not have the status of a significant supervised entity pursuant to a decision of the ECB based on Article 6(4) or Article 6(5)(b) of Regulation (EU) No 1024/2013;

2. 'national competent authority' means any national competent authority as defined in Article 2(2) of Regulation (EU) No 1024/2013;

3. 'national designated authority' means a national designated authority as defined in Article 2(7) of Regulation (EU) No 1024/2013;

4. 'non-participating Member State' means any Member State which is not a participating Member State as defined in Article 2(1) of Regulation (EU) No 1024/2013;

5. 'requesting Member State' means a non-participating Member State that has notified the ECB in accordance with Article 2 of this Decision of its request to enter into a close cooperation pursuant to Article 7 of Regulation (EU) No 1024/2013;

6. 'significant supervised entity' means a supervised entity (a) established in a non-euro area Member State which is a participating Member State, and (b) which has the status of a significant supervised entity pursuant to a decision of the ECB based on Article 6(4) or

[1] OJ L 287, 29.10.2013, p. 63.

Article 6(5)(b) of Regulation (EU) No 1024/2013;

7. 'supervised entity' means a credit institution, financial holding company, or mixed-financial holding company as defined in Regulation (EU) No 1024/2013 and established in the requesting Member State, as well as a branch established in a requesting Member State by a credit institution which is established in a non-participating Member State.

Article 2: Request to enter into a close cooperation

1. A non-participating Member State wishing to participate in the SSM shall request the ECB to enter into a close cooperation, using the template provided in Annex I.

2. Such request shall be made at least five months before the date on which the non-participating Member State intends to participate in the SSM.

Article 3: Content of the request to enter into a close cooperation

1. The request to enter into a close cooperation shall include all of the following:

(a) an undertaking of the requesting Member State to ensure that its national competent authority and its national designated authority will adhere to any instructions, guidelines or requests issued by the ECB from the date of the establishment of the close cooperation;

(b) an undertaking of the requesting Member State to provide all information on the supervised entities established in such Member State that the ECB may require for the purpose of carrying out a comprehensive assessment of those supervised entities. The requesting Member State shall ensure that the information necessary to assess the significance and to carry out a comprehensive assessment pursuant to Article 7(2)(b) of Regulation (EU) No 1024/2013 of the credit institutions established in such Member State can be provided to the ECB as soon as the request to enter into a close cooperation is notified to the ECB;

(c) a commitment that all confidential data requested by the ECB for the finalisation of its preparatory activities will be provided to the ECB.

2. The request to enter into a close cooperation shall be accompanied by all of the following:

(a) an undertaking of the requesting Member State that it will adopt the relevant national legislation to ensure that legal acts adopted by the ECB pursuant to Regulation (EU) No 1024/2013 are binding and enforceable in the requesting Member State and that its national competent authority and its national designated authority are obliged to adopt any measure requested by the ECB in relation to the supervised entities, in accordance with Article 7(4) of Regulation (EU) No 1024/2013;

(b) a copy of the draft relevant national legislation as well as an English translation thereof, and a request for an ECB opinion on such draft legislation;

(c) an undertaking to notify to the ECB immediately after the date upon which the relevant national legislation has entered into force and an undertaking to provide a confirmation pursuant to Article 7(2)(c) of Regulation (EU) No 1024/2013 using the template provided in Annex II of this Decision. The confirmation shall include a legal opinion satisfactory to the ECB confirming that legal acts adopted by the ECB pursuant to Regulation (EU) No 1024/2013 will be binding and enforceable in the requesting Member State and that the relevant national legislation obliges the national competent authority and the national designated authority to follow the ECB's specific instructions, guidelines, requests and measures in relation to significant supervised entities as well as the ECB's general instructions, guidelines, requests and measures in relation to less significant supervised entities, within the timeframe laid down by the ECB, where specified.

3. The requesting Member State shall provide the ECB with all relevant documentation which the ECB deems appropriate for the purpose of assessing its request. The requesting Member State shall also ensure that the ECB is provided with all information which the ECB deems appropriate for the purpose of assessing the significance of credit institutions and for carrying out the comprehensive assessment required by Regulation (EU) No 1024/2013.

Article 4: Assessment by the ECB of the request to enter into a close cooperation

1. The ECB shall acknowledge receipt in writing of a request by a Member State to enter into a close cooperation.

2. The ECB may request all additional information that it considers appropriate for the purposes of the assessment of the Member

State's request, including information for the assessment of the significance of credit institutions and for carrying out the comprehensive assessment. Where the requesting Member State has already made a comprehensive assessment of the credit institutions established in its jurisdiction, it shall provide detailed information on the results. The ECB may decide that no further assessment is required provided that (a) the quality and the methodology of the assessment made by national authorities correspond to the ECB's standards, and (b) the ECB considers that the assessment made by national authorities is still up to date and that no material change to the situation of the credit institutions established in the requesting Member State would require a further assessment.

3. When assessing the relevant national legislation, the ECB's assessment shall also take into account the practical implementation of such legislation.

4. At the latest 3 months following receipt by the ECB of the confirmation referred to in Article 3(2)(c) or, where applicable, the additional information requested by the ECB under paragraph 2, the ECB shall inform the requesting Member State of its preliminary assessment. The requesting Member State shall have the opportunity to provide its views within 20 days from the receipt of the preliminary assessment. Such correspondence between the ECB and the requesting Member State shall be confidential.

Article 5: *Decision establishing a close cooperation*

1. Where the ECB concludes, on the basis of the information submitted by the requesting Member State, that the latter fulfils the criteria set out in Article 7(2)(a) to (c) of Regulation (EU) No 1024/2013 for entering into a close cooperation, and once the comprehensive assessment is concluded and the confirmation is provided in accordance with Annex II to this Decision, the ECB shall adopt a decision on the basis of Article 7(2) of Regulation (EU) No 1024/2013, addressed to the requesting Member State and establishing a close cooperation.

2. The decision referred to in paragraph 1 shall indicate the modalities for the transfer of the supervisory tasks to the ECB, the date of the start of the close cooperation, which shall be conditional, if applicable, on the progress by the requesting Member State in implementing the measures required in relation to the results of the comprehensive assessment.

3. Where, on the basis of the information submitted by the requesting Member State, the ECB concludes that the latter does not fulfil the criteria set out in Article 7(2) of Regulation (EU) No 1024/2013, or where the ECB does not receive the information necessary to perform its assessment within one year from the notification of the request by the Member State, it may adopt a decision addressed to the requesting Member State rejecting the request to establish a close cooperation.

4. The decisions referred to in paragraphs 1 and 3 shall include the reasons on which they are based.

5. In accordance with Article 7(3) of Regulation (EU) No 1024/2013, any decision establishing a close cooperation shall be published in the Official Journal of the European Union and shall apply 14 days after its publication.

Title 2 - *Suspension or termination of a close cooperation*

Article 6: *Suspension or termination*

1. Where the ECB decides to suspend a close cooperation pursuant to Article 7(5) or 7(7) of Regulation (EU) No 1024/2013, it shall state the reasons for doing so, clarify the effects of such suspension decision and shall indicate the date from which the suspension takes effect as well as the period during which the suspension applies. The latter period shall not be longer than 6 months. The ECB may extend the period in exceptional circumstances, but only once.

2. Where the reasons for the suspension under Article 7(5) of Regulation (EU) No 1024/2013 are not remedied or where the ECB decides to terminate a close cooperation, the ECB shall terminate the close cooperation by adopting a new decision for this purpose.

3. Where the ECB decides to terminate a close cooperation pursuant to Article 7(5) or 7(7) of Regulation (EU) No 1024/2013, it shall state the reasons for doing so and shall clarify the effects of such termination decision, as well as indicating the date from which the termination takes effect.

4. Any ECB decision on suspension or termination of a close cooperation may also regulate the modalities for the payment of fees due by the supervised entities located in the Member State concerned.

5. Where the Member State with which a close cooperation has been established pursuant to Article 7 of Regulation (EU) No 1024/2013

requests the ECB to terminate the close cooperation subject to the conditions provided in Article 7(6) and 7(8) of Regulation (EU) No 1024/2013, the ECB shall adopt a decision clarifying the effects of such termination decision, as well as indicating the date from which the termination takes effect.

6. Any ECB decisions adopted in connection with supervised entities in the Member State with which a close cooperation has been established and which were in force prior to the termination of such close cooperation shall remain valid despite the termination of the close cooperation.

7. Decisions to suspend or terminate a close cooperation shall be published in the Official Journal of the European Union.

Article 7: *Entry into force*

This Decision shall enter into force on 27 February 2014.

Done at Frankfurt am Main, 31 January 2014.

[signed]

The President of the ECB

Mario DRAGHI

ANNEX I

TEMPLATE: REQUEST TO ENTER INTO A CLOSE COOPERATION PURSUANT TO ARTICLE 7 OF REGULATION (EU) No 1024/2013

By

[Requesting Member State]

Notification to the ECB of a request to enter into a close cooperation pursuant to Article 7 of Regulation (EU) No 1024/2013

1. The [requesting Member State] hereby requests to enter into a close cooperation with the European Central Bank (ECB) pursuant to Article 7 of Regulation (EU) No 1024/2013 and in accordance with the provisions of Decision ECB/2014/5 of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro.

2. The [requesting Member State] hereby undertakes:

(a) to ensure that its national competent authority and national designated authority will adhere to any instructions, guidelines, measures or requests issued by the European Central Bank in respect of supervised entities (as defined in Decision ECB/2014/5);

In particular, the relevant national legislation will also ensure that the national competent authority and national designated authority will be obliged to follow the ECB's specific instructions, guidelines, requests and measures in relation to significant supervised entities and the ECB's general instructions, guidelines, requests and measures in relation to less significant supervised entities. In this respect the requesting Member State hereby undertakes

- to adopt the relevant national legislation to ensure that legal acts adopted by the ECB pursuant to Regulation (EU) No 1024/2013 are binding and enforceable in [the Member State concerned] and that its national competent authority and national designated authority will be obliged to adopt any measure in relation to supervised entities requested by the ECB, in accordance with Article 7(4) of Regulation (EU) No 1024/2013

- to notify the ECB of the date on which the relevant national legislation has entered into force.

(b) to provide at any time after the request to enter into a close cooperation is notified to the ECB [and before the establishment of a close cooperation] and upon request by the ECB, and at any time thereafter, also all information on the supervised entities established in that Member State that the European Central Bank may require for the purpose of carrying out a comprehensive assessment of those supervised entities, including confidential information.

The information [to be] provided to the ECB shall include:

(i) a copy of the draft relevant national legislation;

(ii) up to date information on institutions established in the requesting Member State

including as a minimum: a complete list of the following entities located in the Member State:

- credit institutions,

- financial holding companies or mixed financial holding companies at the top of supervised groups, and

- cross-border branches of credit institutions from other countries,

including total assets figures for each entity.

For credit institutions which are subsidiaries, and in the case of branches, identification of their direct and ultimate parent institutions shall be provided.

For supervised groups headquartered and supervised in the Member State, information on their foreign group components shall be provided.

(iii) contact persons at the national competent authority and national designated authority to whom to address ECB requests for further information.

For the Member State

[Signature]

cc:

(i) the European Commission

(ii) the European Banking Authority

(iii) the other Member States

ANNEX II

TEMPLATE: STATEMENT PURSUANT TO ARTICLE 7(2)(c) OF REGULATION (EU) No 1024/2013

By

[Requesting Member State]

To

European Central Bank (ECB)

Statement pursuant to Article 7(2)(c) of Regulation (EU) No 1024/2013 relating to the request to enter into a close cooperation pursuant to Article 7 of Regulation (EU) No 1024/2013

[The Member State concerned] hereby:

- confirms that it has adopted relevant national legislation to ensure that legal acts adopted by the ECB pursuant to Regulation (EU) No 1024/2013 are binding and enforceable in [the Member State concerned] and that its national competent authority and national designated authority will be obliged to adopt any measure in relation to the supervised entities requested by the ECB, in accordance with Article 7(4) of Regulation (EU) No 1024/2013, and

that this relevant national legislation entered into force on [INSERT DATE].

In addition, we enclose a legal opinion confirming that the relevant national legislation also ensures that the national competent authority and national designated authority will be obliged to follow the ECB's specific instructions, guidelines, requests and measures in relation to significant supervised entities and the ECB's general instructions, guidelines, requests and measures in relation to less significant supervised entities.

For the Member State

[Signature]

Appendix: Copy of the relevant national legislation adopted by the requesting Member State to ensure that legal acts adopted by the ECB pursuant to Regulation (EU) No 1024/2013 are binding and enforceable in [the Member State concerned] and that its national competent authority and national designted authority will be obliged to adopt any measure in relation to supervised entities requested by the ECB.

II.7 PROCEDURAL RULES FOR THE EUROZONE

§56. EuroSummits, 14 March 2013, available at http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/136051.pdf

The guiding principles for the conduct of proceedings of Euro Summit meetings shall be to ensure the transparency and effectiveness of the working methods, allowing the Euro Summit Members the full capacity to discuss among themselves all issues of common interest to the euro area while respecting the substantive and procedural rights of the other Members of the Union and giving preference to inclusive methods whenever justified and possible.

For points of organisation not decided in the rules, the Rules of Procedure of the European Council shall be used mutatis mutandis as a source of reference.

RULES FOR THE ORGANISATION OF THE PROCEEDINGS OF THE EURO SUMMITS

1. NOTICE AND VENUE OF MEETINGS

1. The Euro Summit shall meet at least twice a year, convened by its President. Its ordinary meetings shall, whenever possible, take place after the European Council meetings.

2. The Euro Summit shall meet in Brussels, unless otherwise decided by the President and in agreement with the Members of the Euro Summit.

3. Exceptional circumstances or cases of urgency may justify derogations from the present rules.

2. PREPARATION AND THE FOLLOW-UP TO THE PROCEEDINGS OF THE EURO SUMMIT

1. The President of the Euro Summit will ensure the preparation and continuity of the work of the Euro Summit, in close cooperation with the President of the Commission, and on the basis of the preparatory work of the Euro Group.

2. The Euro Group shall conduct preparatory work for and ensure the follow-up to the meetings of the Euro Summit. Information to Coreper shall be ensured before and after meetings of the Euro Summit.

3. The President shall establish close cooperation with the President of the Commission and the President of the Euro Group, particularly by means of regular meetings, as a rule once a month. The President of the European Central Bank may be invited to participate.

4. In the event of an impediment because of illness, in the event of his or her death or if his or her office is ended in accordance with Article 12 (1) of the TSCG, the President shall be replaced, where necessary until the election of his or her successor, by the member of the Euro Summit representing the Member State holding the six-monthly Presidency of the Council, or, if not applicable, the next Member State whose currency is the euro holding the Presidency of the Council.

3. PREPARATION OF THE AGENDA

1. In order to ensure the preparation provided for in Rule 2(1), the President of the Euro Summit shall, at least four weeks before each ordinary meeting of the Euro Summit as referred to in Rule 1(1), in close cooperation with the President of the Commission and the President of the Euro Group, forward an annotated draft agenda to the Euro Group.

2. The Euro Group shall, as a rule, be convened within the fifteen days preceding a Euro Summit meeting to examine the draft agenda and its President shall report the outcome of the discussions to the President of the Euro Summit. In the light of this report, the President of the Euro Summit shall forward the draft agenda to the Heads of State or Government.

3. When the Heads of State or Government of the Contracting Parties to the TSCG, other than those whose currency is the euro, which have ratified the TSCG, participate in discussions of Euro Summit meetings, these contracting Parties shall be involved in the preparation of

the Euro Summit meetings on the issues referred to in Rule 4(5) in a form to be decided by the President of the Euro Summit.

4. At the beginning of the meeting, the agenda shall be agreed by the Euro Summit, by simple majority.

4. COMPOSITION OF THE EURO SUMMIT, DELEGATIONS AND THE CONDUCT OF PROCEEDINGS

1. The Euro Summit shall consist of the Heads of State or Government of the Member States of the European Union whose currency is the euro, together with its President and with the President of the Commission.

2. The President of the European Central Bank shall be invited to take part.

3. The President of the Euro Group may be invited to attend.

4. The President of the European Parliament may be invited to be heard.

5. The Heads of State or Government of the Contracting Parties to the TSCG, other than those whose currency is the euro, which have ratified the TSCG, shall participate in discussions of Euro Summit meetings concerning competitiveness for the Contracting Parties, the modification of the global architecture of the euro area and the fundamental rules that will apply to it in the future, as well as, when appropriate and at least once a year, in discussions on specific issues of implementation of the TSCG.

6. The total size of the delegations authorised to have access to the building where the meeting of the Euro Summit is held shall be limited to 20 persons for each Member State and for the Commission. That number shall not include technical personnel assigned to specific security or logistic support tasks. The names and functions of the members of the delegations shall be notified in advance to the General Secretariat of the Council.

7. The President of the Euro Summit shall be responsible for the application of these rules and for ensuring that discussions are conducted smoothly. To that end, the President may take any measure conducive to promoting the best possible use of the time available, such as organising the order in which items are discussed, limiting speaking time and determining the order in which contributors speak.

8. Meetings of the Euro Summit shall not be public.

5. THE PRESIDENT OF THE EURO SUMMIT

1. The President of the Euro Summit shall be appointed by the Heads of State or Government of the Member States of the European Union whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office.

2. The President of the Euro Summit:

(a) shall chair it and drive forward its work;

(b) shall draw up meeting agendas;

(c) shall ensure the preparation and continuity of the work of the Euro Summit in cooperation with the President of the Commission and on the basis of the work of the Euro Group;

(d) shall ensure that the work of all relevant Council and ministerial meetings is reflected in the preparation of the Euro Summit;

(e) shall report to the European Parliament after each of the meetings of the Euro Summit;

(f) shall keep the Contracting Parties of the TSCG other than those whose currency is the euro and the other Member States of the European Union closely informed of the preparation and outcome of the Euro Summit meetings;

(g) shall present the outcomes of Euro Summit discussions to the public, together with the President of the Commission.

6. STATEMENTS

1. The Euro Summit may issue statements summarizing common positions and common lines of actions, which shall be made public.

2. Draft statements of the Euro Summit shall be prepared under the authority of the President of the Euro Summit, in close cooperation with the President of the Commission and the President of the Euro Group, on the basis of the preparatory work of the Euro Group.

3. Statements shall be agreed by consensus of the Members of the Euro Summit.

4. The Euro Summit shall issue statements in the official languages of the European Union.

5. Upon proposal by the President of the Euro Summit, draft statements on an urgent matter may be approved by a written procedure, when all Members of the Euro Summit agree to use that procedure.

7. PROFESSIONAL SECRECY AND PRODUCTION OF DOCUMENTS IN LEGAL PROCEEDINGS

Without prejudice to the provisions on public access to documents applicable under the law of the Union, the deliberations of the Euro Summit shall be covered by the obligation of professional secrecy, except insofar as the Euro Summit agrees otherwise.

8. SECRETARIAT AND SECURITY

1. The Euro Summit and its President shall be assisted by the General Secretariat of the Council under the authority of its Secretary-General.

2. The Secretary General of the Council shall attend the meetings of the Euro Summit and shall take all the measures necessary for the organisation of proceedings.

3. The Council's security rules shall apply mutatis mutandis to the Euro Summit.

9. AMENDMENT OF THE RULES

Upon proposal by the President of the Euro Summit, these rules may be amended by consensus. The written procedure may be used for this purpose. The rules should in particular be adapted if this is required by the evolution of the governance of the Euro area.

10. CORRESPONDENCE ADDRESSED TO THE EURO SUMMIT

Correspondence to the Euro Summit shall be sent to its President at the following address:

Euro Summit

Rue de la Loi / Wetstraat 175

1048 Bruxelles / Brussel

Belgique / België

§57. Rules of Procedure of the Interparliamentary Conference on Economic and Financial Governance of the European Union, http://www.notre-europe.eu/media/interparliamentaryconferenceecofinkreilingerne-jdioct2013.pdf?pdf=ok

PREAMBLE

These Rules of Procedure are designed to facilitate and improve the work of the Interparliamentary Conference on Economic and Financial Governance of the European Union, hereinafter referred to as the Interparliamentary Conference on EFG [***other proposals for an acronym are welcome***]. The Interparliamentary Conference on EFG shall be organised in accordance with the decision of the Conference of Speakers of the European Union Parliaments taken on 23 April 2013 in Nicosia to establish a conference foreseen in Article 13 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, hereinafter referred to as the TSCG, as well as Protocol 1 of the Treaty of Lisbon on the role of national Parliaments in the European Union and the Guidelines for Interparliamentary Cooperation in the European Union as adopted at the Conference of Speakers on 21 June 2008 in Lisbon.

The Interparliamentary Conference on EFG is established with the aim of improving democratic legitimacy and accountability in the area of economic and financial governance of the European Union (EU), particularly in the Economic and Monetary Union, strengthening cooperation between national Parliaments and the European Parliament, and ensuring a greater role for national Parliaments in matters covered by the TSCG.

The Interparliamentary Conference on EFG shall be organised in the framework of the parliamentary dimension of the Presidency of the Council of the EU, undertaken by the national Parliament of the Member State holding the Presidency, hereinafter referred to as the Presidency Parliament, and the European Parliament.

These Rules of Procedure were adopted at the meeting of the Interparliamentary Conference on EFG on […].

1. COMPETENCES AND SCOPE

1.1 The Interparliamentary Conference on EFG shall provide a framework for debate and exchange of information and best practices on matters of economic and financial governance of the EU and shall maintain a special focus on the budgetary issues and procedures covered by the TSCG, without prejudicing the competences of the EU Parliaments.

1.2 The Interparliamentary Conference on EFG replaces the meetings of the chairpersons of relevant committees organised in the framework of the parliamentary dimension of the Presidency of the Council by each Presidency Parliament and the European Parliamentary Week of the European Semester organised by the European Parliament in the first semester of each year.

1.3 The Interparliamentary Conference on EFG may, in accordance with the procedures laid down in Article 7 of these Rules of Procedure, adopt Conclusions on matters related to economic and financial governance of the EU, particularly the budgetary matters covered by the TSCG. The Conclusions shall not bind national Parliaments or the European Parliament and shall not prejudge their positions.

2. DESIGNATION OF THE CONFERENCE

2.1 The designation of the Interparliamentary Conference shall be "Interparliamentary Conference on Economic and Financial Governance of the European Union – Interparliamentary Conference on EFG".

3. ROLE OF THE PRESIDENCY AND ORGANISATION OF THE MEETINGS

3.1 **Time and place of the meetings**

The Interparliamentary Conference on EFG shall convene twice a year. It shall be coordinated with the cycle of the European Semester. In the first semester of each year, it shall be held in Brussels and will be co-hosted and co-presided over by the Presidency Parliament and the European Parliament. In the second semester of each year, it shall be held in the Member State holding the Presidency and presided over by the Presidency Parliament. The date of the next meeting shall be fixed and announced by the date of the preceding meeting at the latest.

3.2 **Presidential Troika**

The Presidential Troika of the Interparliamentary Conference on EFG consists of the delegations of the national Parliaments of the Presidency, the preceding Presidency, the following Presidency, and the European Parliament. Each delegation consists of a maximum of four Members of its Parliament.

3.3 **Secretariat**

The hosting Parliament(s) shall be responsible for providing the secretariat. The secretariat of the European Parliament and the co-hosting Presidency Parliament, as well as the hosting Presidency Parliament of the second semester should stay in contact to ensure the continuity of the work of the Interparliamentary Conference on EFG.

3.4 **Conduct of the meetings**

At the beginning of each meeting, the presiding Parliament(s) shall set the timetable of the meeting and shall determine the order and the length of interventions. Meetings shall be chaired by the chairperson(s) of the relevant committees of the presiding Parliament(s).

3.5 **Documents**

The secretariat(s) of the presiding Parliament(s) shall prepare the necessary documents and shall draw up brief minutes of the meeting.

3.6 **Side events**

Apart from the plenary meeting, side events, such as topical debates in smaller groups, working groups or break-out sessions, can be organised in the framework of the Interparliamentary Conference on EFG, including by Parliaments other than the presiding Parliament(s).

3.7 **Voting**

In general the Interparliamentary Conference on EFG shall seek to take decisions, including on the adoption of the Conclusions, by consensus. If this is not possible, decisions shall be taken with a qualified majority of at least 3/4 of the votes cast. The majority of 3/4 of the votes cast must at the same time constitute at least half of all votes. Each Parliament has two votes. In the case of bicameral Parliaments, each Chamber is given one vote.

3.8 **Public access to the meetings**

Meetings of the Interparliamentary Conference on EFG shall be public, unless otherwise determined.

4. COMPOSITION

4.1 **Members**

The Interparliamentary Conference on EFG is composed of delegations from the relevant committees of the national Parliaments of the EU Members States and the European Parliament. The composition and size of delegations shall be determined by each Parliament. The hosting Parliament(s) may, for budgetary or limited facilities reasons, suggest an optimal delegation size.

4.2 **Observers**

National Parliaments of EU candidate countries can be represented by a delegation of a maximum of two observers each. The presiding Parliament(s) may also invite, after consulting the Presidential Troika, observers from other EU institutions or bodies.

4.3 **Member(s) of the Commission responsible for economic and monetary affairs**

Member(s) of the Commission responsible for economic and monetary affairs shall be invited to the Interparliamentary Conference on EFG to set out the priorities and strategies of the EU in the area of economic and financial governance, particularly on matters covered by the TSCG.

4.4 **Special guests**

The presiding Parliament(s), after consulting the Presidential Troika, may also invite special guests and experts as observers.

5. AGENDA

5.1 A draft agenda shall be drawn up by the presiding Parliament(s) in close cooperation with the Presidential Troika. The delegations may propose to the presiding Parliament(s) that a specific item is put on or removed from the draft agenda. The decision on the final agenda shall be made by the Interparliamentary Conference on EFG at the beginning of every meeting.

5.2 The agenda of each meeting shall include matters relating to economic and financial governance of the EU, particularly those matters covered by the TSCG, in line with the scope and role of the Interparliamentary Conference on EFG.

5.3 A draft agenda, together with all relevant information on the practical aspects of the forthcoming meeting, such as travel and accommodation arrangements, shall be communicated by the presiding Parliament(s) to all other Parliaments no later than eight weeks prior to each meeting.

6. LANGUAGES

6.1. The working languages of the Interparliamentary Conference on EFG shall be English and French.

6.2. Simultaneous interpretation from and into English and French, as well as from and into the language of the Presidency Member State shall be provided by the host Parliament(s). Simultaneous interpretation into additional languages may be provided if requested and if technically possible and its costs would be borne by the relevant national delegation or the European Parliament.

6.3. Documents of the Interparliamentary Conference on EFG shall be communicated to national Parliaments and the European Parliament in English and French.

6.4 The Conclusions of the Interparliamentary Conference on EFG shall be drawn up in a single original in English and French, each of these texts being equally authentic.

7. CONCLUSIONS

7.1 The Interparliamentary Conference on EFG may adopt non-binding Conclusions on matters of economic and financial governance of the EU related to the agenda of the meeting.

7.2. Draft Conclusions of the Interparliamentary Conference on EFG shall be drawn up by the presiding Parliament(s) in English and French, in close cooperation with the Presidential Troika, and communicated to all delegations before the relevant meeting in a reasonable time for any amendments to be considered and submitted.

7.3 Once the Conclusions have been adopted, the presiding Parliament(s) shall communicate the final texts in English and French, each of these texts being equally authentic, to all delegations, to the Presidents of national Parliaments and of the European Parliament, to the Presidents of the European Council and the European Commission, and Member(s) of the European Commission responsible for economic and monetary affairs, for their information.

8. REVISION OF THE RULES OF PROCEDURE

8.1. Any national Parliament and the European Parliament may submit proposals to amend

these Rules of Procedure. Amendments shall be submitted in writing to all national Parliaments and the European Parliament at least four weeks before meetings of the Interparliamentary Conference on EFG.

8.2 Any amendments, which the delegations of national Parliaments or the European Parliament may propose to the Rules of Procedure, shall be subject to a decision by the Interparliamentary Conference on EFG, and must be in accordance with the framework set by the Conference of Speakers of the EU Parliaments.

8.3 Proposals for a revision of the Rules of Procedure should be put on the agenda of the first meeting of the Interparliamentary Conference on EFG following the presentation of the proposal.

9. REVIEW OF THE FUNCTIONING OF THE CONFERENCE

9.1 The Interparliamentary Conference on EFG shall appoint an ad hoc review committee which would, in the second semester of 2015, evaluate the workings of the Interparliamentary Conference on EFG. The relevant Presidency Parliament shall submit the conclusions of the review together with specific recommendations to be deliberated upon by the Conference of Speakers of European Union Parliaments in 2016.

10. ENTRY INTO FORCE OF THE RULES OF PROCEDURE

10.1 These Rules of Procedure are drawn up in a single original in English and French, each of these texts being equally authentic. Translations into other official languages of the European Union shall be the responsibility of the relevant Parliaments. They shall enter into force on the adoption date.

CASE LAW

§58. German Constitutional Court, Greek Aid, 2011

http://www.germanlawjournal.com/pdfs/Vol12-No11/PDF_Vol_12_No_11_2071-2076_Recker%20FINAL.pdf

http://www.bundesverfassungsgericht.de/en/press/bvg11-055en.html

Grounds:

A.

The constitutional complaints challenge German and European legal instruments and further measures which are related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union.

I.

1.The Treaty on European Union (Maastricht Treaty) of 7 February 1992 (OJ C 191/1; Federal Law Gazette II p. 1253) provided for a common monetary policy of the Member States, which was in stages to create a European monetary union and finally to communitarise the monetary policy in the hands of a European System of Central Banks (ESCB) (for an earlier decision on the following facts, see Decisions of the Federal Constitutional Court (Entscheidungen des Bundesverfassungsgerichts - BVerfGE) 125, 385 ff.). In the third stage, the euro was introduced in 2002 as the single currency. In order to guarantee financial discipline to support the uniform monetary policy, at the same time the Stability and Growth Pact (Resolution of the European Council on the Stability and Growth Pact, Amsterdam, 17 June 1997, OJ C 236/1) entered into force; in the interest of the stability of the euro, this provides for new borrowing at a maximum rate of 3% of the gross domestic product (GDP) and a maximum level of indebtedness of 60% of the GDP.

2. The Hellenic Republic (hereinafter Greece) has since 2001 been a member of the group of 16 (since January 2011: 17) of the 27 Member States of the European Union (Council Decision 2000/427/EC of 19 June 2000 in accordance with Article 122(2) of the Treaty on the adoption by Greece of the single currency on 1 January 2001, OJ L 167/19) whose single currency is the euro (Eurogroup). The details of the size of the Greek budget deficit in the year 2009 had to be corrected from 5% to almost 13% of the GDP, for 2010, an increase of the national debt to 125% of the GDP and thus more than twice the reference level of 60% of the GDP was expected (see press release of the Economic and Financial Affairs Council <ECOFIN Council>, 16 February 2010).

3. Against this background, the European Council of the heads of state and government met in Brussels on 11 February 2010 in order to deliberate on possible measures relating to Greece. On this occasion, the European Council announced that it would take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole (see Statement by the Heads of State or Government of the European Union, 11 February 2010). On 16 February 2010 the ECOFIN Council tightened the excessive deficit procedure against Greece which had been introduced in April 2009 and called for the deficit to be reduced by 4 percentage points within one year (from 12.7% in the year 2009 to 8.7% in the year 2010) and to further reduce it by 2012 to a maximum of 3% of the GDP (see press release of the ECOFIN Council, 16 February 2010). Following growing unrest on the financial markets, on 25 March 2010 the heads of state and government of the euro countries declared that they were prepared to support Greece in addition to financing by the International Monetary Fund (IMF) with their own bilateral loans (see Statement by the Heads of State and Government of the Euro Area, 25 March 2010). Evidently this statement also failed to convince the financial markets with lasting effect. After the Fitch Ratings Agency downgraded its rating for Greece to BBB- on 9 April 2010 and the risk surcharges on Greek government bonds rapidly reached record levels, on 11 April 2010 the Euro area finance ministers reached agreement on the structure of the aid for Greece, to be granted in the form of

bilateral loans from states in the euro area, and on its extent and the interest rate. In order set incentives for Greece to return to market financing, the IMF's pricing formula, with certain adjustments, was to be used as the reference rate to determine the conditions of the bilateral state loans. On 12 April 2010, the EU Commission, in consultation with the European Central Bank (ECB), entered into negotiations with the IMF and Greece, in which the conditions of the Greek rescue package were specified. The support was to be activated at the moment when it was actually needed, and needed above all to satisfy its liabilities on the bond markets. The participating states were then to decide on the disbursements (see Statement on the support to Greece by Euro area Member States, 11 April 2010).

4.On 23 April 2010, Greece applied for financial aid from the EU and the IMF (see Joint statement by European Commission, European Central Bank and Presidency of the Eurogroup on Greece, IP/10/446, 23 April 2010). Thereupon, on 2 May 2010, the states of the Eurogroup declared that they were ready, in the context of a three-year IMF programme with an estimated total financing requirement in the amount of 110 billion euros, to provide up to 80 billion euros as financial aid to Greece in the form of coordinated bilateral loans, up to 30 billion euros of which would be provided in the first year (see Statement by the Eurogroup, 2 May 2010). The shares of the individual states in the loans are based on the respective shares of the euro area Member States in the capital of the ECB. Germany's share as one of the 15 states which formed the Eurogroup at the time (without Greece) was to be 27.92% (see draft bill of the CDU/CSU and FDP parliamentary groups, Bundestag printed paper (Bundestagsdrucksache, BTDrucks) 17/1544, p. 4). The German share of the credits was therefore, if all Eurogroup states (apart from Greece) participated, approximately 22.4 billion euros, up to 8.4 billion euros of which was payable in the first year. The IMF was to take a share of 30 billion euros (see draft bill of the CDU/CSU and FDP parliamentary groups, BTDrucks 17/1544, p. 1). The financial aid from the Eurogroup is provided subject to strict conditionality which was agreed between the IMF and the EU Commission (in consultation with the ECB) and Greece. The arrangements between the states of the Eurogroup with Greece and between themselves consist of two agreements. On the one hand there is the Loan Facility Agreement between the states of the euro area and Greece, which essentially establishes the loan conditions and requirements for granting the loan, and on the other hand the Intercreditor Agreement, an agreement between the Member States of the euro area which lays down the rights and duties of the Member States between themselves. Both agreements, with regard to Greece's measures of financial and economic policy, relate to the Memorandum of Understanding entered into with Greece (see Greece: Memorandum of Understanding on Specific Economic Policy Conditionality, 2 May 2010), which lays down the conditions for granting loans and in particular makes the disbursement of the financial aid conditional on strict requirements with regard to budget consolidation. The disbursement of the individual tranches is therefore coupled to compliance with quantitative performance criteria. Thus, detailed savings goals are laid down for each quarter; these must be achieved by means of measures such as tax increases or the cancellation of bonuses in the civil service (see Greece: Memorandum of Understanding on Specific Economic Policy Conditionality, 2 May 2010, p. 1). The Intercreditor Agreement also provides for internal balancing of interest and disbursements for financially ailing lender countries. As a result, a lender which has higher refinancing costs than the borrower's interest under the loan agreement may require that it is granted an adjustment of interest which is financed pro rata from the interest revenue of the other lenders. In addition, if it has higher refinancing costs than the borrower's interest under the loan agreement, a lender may apply not to take part in the disbursement of the next tranche. The other lenders decide on this application by a two-thirds majority of their capital shares. As soon as this lender again has lower refinancing costs than the borrower's interest, it is provided that its share of the loan should again be adjusted to the share provided in the loan agreement. No lender is responsible for the commitments of another lender.

5. In order to take the necessary measures on a national level, on 7 May 2010 the German Bundestag passed the challenged Act on the assumption of guarantees to preserve the solvency of the Hellenic Republic necessary for financial stability within the Monetary Union (Act on Financial Stability within the Monetary Union - WFStG, Federal Law Gazette I p. 537). The provisions of the Act on Financial Stability within the Monetary Union are as follows:

§ 1 - Guarantee authorisation

(1) The Federal Ministry of Finance is authorised to give guarantees up to the total amount of 22.4 billion euros to the Hellenic Republic; these are necessary as emergency measures to preserve the solvency of the Hellenic Republic in order to ensure financial stability in the monetary union. The guarantee serves to safeguard loans of the Kreditanstalt fur Wiederaufbau to the Hellenic Republic, which are to be disbursed together with the loans of the other Member States of the European Union whose currency is the euro and of the International Monetary Fund. It is based on the measures agreed between the International Monetary Fund, the European Commission on behalf of the Member States of the European Union and the Hellenic Republic, with the cooperation of the European Central Bank. The loans from the Kreditanstalt fur Wiederaufbau are to be disbursed in the first year up to the amount of 8.4 billion euros.

(2) A guarantee is to be applied against the maximum amount thus authorised in the amount in which the Federal Government can be called upon under the guarantee. Interest and costs are not to be charged on the amount authorised.

(3) Before guarantees are given under subsection 1, the German Bundestag's budget committee must be informed, unless for compelling reasons an exception is advisable. In addition, the German Bundestag's budget committee is to be informed quarterly on the guarantees given and their correct use.

§ 2 - Entry into force This Act shall enter into force on the day after it is promulgated.

6. The share of the aid measures assumed by Germany will be lent by the Kreditanstalt fur Wiederaufbau (KfW), which requires a Federal Government guarantee for this. §1.1 of the Act on Financial Stability within the Monetary Union authorises the Federal Ministry of Finance to give guarantees of this nature, which secure the granting of the guarantee by the KfW.

7. On the same day, 7 May 2010, the heads of state and government of the Eurogroup met again in Brussels and inter alia stated that they were in favour of strengthening economic governance in the euro area and regulating the financial markets more intensively and combating speculation (for an earlier decision on the following facts, see BVerfGE 126, 158 <160ff.>). They reaffirmed their determination to exploit all means to preserve the stability of the euro area. For this purpose they agreed inter alia that the EU Commission should propose a European stabilisation mechanism to preserve the stability of the financial markets in Europe (euro rescue package). Thereupon, on 9 May 2010, the ECOFIN Council passed a resolution to create a European stabilisation mechanism, which consists of two parts: the European Financial Stabilisation Mechanism (EFSM), based on an EU regulation, on the one hand and the European Financial Stability Facility (EFSF), a special purpose vehicle based on an inter-state agreement between the Member States of the Eurogroup to grant loans and credit lines, on the other hand. These instruments are intended to give financial assistance to Member States which are in difficulties caused by exceptional occurrences beyond their control (see the “Agreement on Conditions” on the “central structural elements of the EFSF”). The ECB also agreed to be involved in the new approach by resolving on a “securities markets programme”. Inter alia, the ECB Governing Council in this connection authorised the national central banks of the Eurosystem to purchase on the secondary market debt instruments issued by central governments or public entities of the Member States (OJ L 124/8).

8. Council Regulation No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ L 118/1) is based on Article 122.2 of the Treaty on the Functioning of the European Union (TFEU). This provides that where a Member State is in difficulties or is seriously threatened with severe difficulties caused by exceptional occurrences beyond its control, it may be granted European Union financial assistance. The Council is of the opinion that the exceptional situation consists in the fact that the intensification of the global financial crisis has led to a grave deterioration for more than one Member State of the Eurogroup, which exceeds what can be explained by fundamental economic data. The European Financial Stabilisation Mechanism is to remain in effect for as long as is necessary to preserve the stability of the financial markets and is to have a total financial volume of up to 60 billion euros, which makes it necessary for the EU to borrow. The Regulation lays down the details of the conditions and procedures under which a Member State may be granted financial assistance by the EU. The decision on the grant of financial assistance is made by the Council

on a proposal of the EU Commission, by a qualified majority.

9. In addition to the introduction of the EFSM, the heads of state and government of the Eurogroup agreed to support each other financially through a special purpose vehicle, the EFSF. A special purpose vehicle is a legal person or an entity equivalent to a legal person which is usually founded for a quite specific purpose and is dissolved after this purpose has been achieved. It was resolved that the participating Member States, paying due regard to their constitutional provisions, guarantee the special purpose vehicle in proportion to their share of the paid-in capital of the ECB (see Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union, of 9 May 2010, Council Document 9614/10). The EU Commission may, through the EFSF, be tasked by the Member States of the Eurogroup (see Decision of the Representatives of the Governments of the 27 EU Member States of 9 May 2010, Council Document 9614/10).

10. With regard to this special purpose vehicle, which at this date had not yet been founded, first of all framework conditions were agreed ("Agreement on Conditions"): The shareholders are all Member States of the Eurogroup; every Member State of the Eurogroup delegates one director to the board of the company, and in addition the EU Commission delegates an observer. The special purpose vehicle is to be founded under Luxembourg law. Its purpose is to issue bonds and to grant loans and credit lines to cover the financing requirements, subject to conditions, of Member States of the Eurogroup who are in difficulties. The guarantees for the special purpose vehicle in the amount of 440 billion euros will be shared among the Member States of the Eurogroup in proportion to their share of the capital of the ECB; the liabilities of the Member States under the guarantee are limited to their share plus 20% for each bond issue. The increase of up to 20% results from the fact that not all Eurogroup Member States will be involved in all bond issues. The decisions will be made unanimously; the life of the special purpose vehicle is limited to three years from its foundation, irrespective of the date of maturity of loans granted or bonds issued by the special purpose vehicle and of guarantees given by Eurogroup Member States.

11. In addition, a framework agreement is to be entered into between the Eurogroup participating states and the proposed special purpose vehicle; this will govern the details of the issue of bonds on the capital market by the special purpose vehicle, of the declaration of guarantee of the Eurogroup states and of the terms of the loan extension (see EFSF Framework Agreement, draft of 20 May 2010). On the basis of Germany's share in the ECB capital, the German share of the guarantee volume was to be 123 billion euros; in cases of unforeseen and absolute need, it was anticipated that the amount might be exceeded by 20% (see draft bill of the CDU/CSU and FDP parliamentary groups, BTDrucks 17/1685, p. 1). The total volume of the stabilisation instruments in the amount of 750 billion euros is calculated on the basis of the volume of the EFSM in the amount of 60 billion euros, the volume of the EFSF in the amount of 440 billion euros and the (expected) participation of the IMF in the amount of half of the sums named, that is a further 250 billion euros (see Conclusions of the ECOFIN Council of 9 May 2010, Rat-Dok. SN 2564/1/10 REV 1).

12. In order to create the conditions on a national level to give financial support through the special purpose vehicle (EFSF), on 21 May 2010 the German Bundestag passed the challenged Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (hereinafter: Euro Stabilisation Mechanism Act, Federal Law Gazette I p. 627). After the Bundesrat had resolved on the same day not to refer the bill to the Mediation Committee, the Act was promulgated on 22 May 2010. The provisions of the Euro Stabilisation Mechanism Act are as follows:

§1

Guarantee authorisation

(1) The Federal Ministry of Finance is authorised to give guarantees up to a total amount of 123 billion euros for loans which are raised by a special purpose vehicle founded or commissioned by the euro area Member States to finance emergency measures to preserve the solvency of a euro area Member State, provided these emergency measures for the preservation of the solvency of the affected Member State are necessary to ensure financial stability in the monetary union. The condition is that the

affected Member State has agreed an economic and financial policy programme with the International Monetary Fund and the European Commission with the cooperation of the European Central Bank and that this is approved by mutual agreement of the euro area Member States. Prior to this, the risk to the solvency of a euro area Member State must be established by mutual agreement of the euro area Member States, without the participation of the Member State involved, together with the International Monetary Fund and the European Central Bank. Guarantees under sentence 1 may only be given by 30 June 2013 at the latest.

(2) The giving of guarantees under subsection 1 is subject to the condition that the euro area Member, without the participation of the Member State involved and with the cooperation of the European Central Bank and in consultation with the International Monetary Fund, mutually agree that emergency measures under the Council Regulation to create a European financial stabilisation mechanism are not or not in full sufficient to avert the risk to the solvency of the euro area Member State in question.

(3) A guarantee is to be applied against the maximum amount thus authorised in the amount in which the Federal Government can be called upon under the guarantee. Interest and costs are not to be charged on the amount authorised.

(4) Before giving the guarantees under subsection 1, the Federal Government will endeavour to reach agreement with the German Bundestag budget committee. The budget committee has the right to submit an opinion. If for compelling reasons a guarantee has to be given before agreement has been reached, the budget committee must be subsequently informed without delay; the absolute necessity of giving the guarantee before agreement is reached must be justified in detail. In addition, the German Bundestag's budget committee is to be informed quarterly on the guarantees given and their correct use.

(5) Before the guarantees are given by the Federal Ministry of Finance, the agreement on the special purpose vehicle must be submitted to the German Bundestag's budget committee.

(6) The scope of the guarantees under subsection 1 may, if the requirements of § 37.1 sentence 2 of the Federal Budget Code are satisfied, with the consent of the German Bundestag's budget committee be exceeded by up to 20 per cent of the sum stated in subsection 1.

§2

Entry into force

This Act shall enter into force on the day after it is promulgated.

13. On 7 June 2010, the Grand Duchy of Luxembourg founded the special purpose vehicle, initially alone (see European Financial Stability Facility, Société Anonyme, 7 June 2010). On the same day, the finance ministers of the Eurogroup and a representative of the special purpose vehicle accepted the Framework Agreement (see EFSF Framework Agreement, Execution Version of 7 June 2010). Article 13.8 of this Framework Agreement gives the other Member States the right to assume their shares of the special purpose vehicle.

II.

In their constitutional complaints, the complainants challenge German and European legal instruments and further measures which are related to attempts to solve the current financial and sovereign debt crisis in the area of the European monetary union. All complainants assert that there is a violation of their fundamental rights under Article 38.1, Article 14.1 and Article 2.1 of the Basic Law.

1. The first complainants are of the opinion that Article 38.1 sentence 2 of the Basic Law gives every citizen a right that the principles of the structure of the state in the Basic Law are at least in essence safeguarded. They submit that fundamental principles of the Basic Law have been disregarded, in particular the principle of the social welfare state, and that the principles of the constitutional rules governing public finances have been disregarded and in particular there has been a violation of borrowing limits (Article 115 of the Basic Law). Germany has largely abandoned its budgetary sovereignty. They state that the measures are

contrary to convergence and thus to stability, and that they also violate the fundamental right to property of Article 14.1 of the Basic Law, and they submit as follows:

a) aa) Article 38 of the Basic Law grants an individual right that every instance of European integration policy must be supported

by sufficiently specific decisions of the German Bundestag and of the Bundesrat. Legal instruments which depart from the concept of the European Union monetary union would be ineffective in Germany, for if they took effect, this would lack parliamentary accountability and would therefore violate Article 38.1 of the Basic Law. The German Bundestag has assumed responsibility for the monetary union, but only subject to particular basic conditions to ensure the stability of the European Union currency. The stability criteria are binding not only as the limit of the sovereign powers transferred, because the Bundestag and the Bundesrat were not prepared or entitled to be accountable for a development of the monetary union independent of these stability criteria, but also because a stability community strictly bound by the convergence criteria is a subject agreed on by European Union treaty. Parliament bears responsibility for and legitimises European Union policy only within the limits of the sovereign powers transferred. Just as the policy of a monetary union cannot take effect in Germany without a German Consent Act, such a policy can also not assert itself under the Basic Law contrary to the Consent Act, whose basis is in the treaty. It would also violate the right equivalent to a fundamental right under Article 38.1 of the Basic Law.

bb) If there is a departure from the stability principle of the Maastricht Treaty, the German Bundestag and the Bundesrat are not responsible or accountable for this policy, and this violates the citizen's constitutional rights. Measures which are resolved upon by the European Council and the Council of the Finance Ministers and implemented by the Act on Financial Stability within the Monetary Union disregard the limits of the powers of the European Union and can have no effect in Germany. The measures do not only violate the convergence principle of financial stability law in the narrow sense, but also ignore the requirement of convergence in currency law, that is, the budgetary independence of the members of the monetary union. Decisions of the German Bundestag passed by a simple majority cannot democratically assume responsibility for the aid measures of the European Union and Germany. Whether the monetary union following the stability concept of the Treaty may be expected to result in the European currency being stable depends on whether convergence is realised in such a way that the monetary union can be a community which guarantees stability and in particular monetary stability in the long term (BVerfGE 89, 155 <204>).

b) In the commitment to grant financial aid to other members of the Eurogroup in order to avert their budgetary hardships, Germany has largely abandoned its budgetary sovereignty, which is an essential part of economic sovereignty. In this way, Parliament's right to decide on the budget, which defines democratic parliamentarianism (Article 110.2 sentence 1 of the Basic Law), is restricted in a way which surrenders existential statehood in an anti-democratic manner. Limits to permissible loan guarantees can be found in the fundamental budgetary principle of Article 110.1 sentence 2 of the Basic Law. It is impossible for Germany to satisfy its commitments under the guarantees without borrowing.

c) The measures are contrary to convergence and thus to stability, and they also violate the fundamental right to property of Article 14.1 of the Basic Law. This fundamental right guarantees the “citizen's fundamental right to price stability”. It also receives its substance from the principle of the social welfare state. This guarantee of property is violated by a policy of money instability. Together with the value of money, inflation materially reduces monetary claims. As a result of inflation, monetary wealth loses value to a greater or lesser extent. It is true that the guarantee of property does not generally guarantee the value of assets, but it does afford protection against a state policy which encourages inflation. It also follows from Article 14.1 of the Basic Law that the state has a duty to protect the stability of value of property. The policy of the European Union and of Germany is contrary to convergence and thus to stability and it gives rise to fears of a present and immediate loss of value of the complainants' personal assets. The legal protection of property calls for inflation to be averted in an early stage. For if one waits until inflation has developed, the damage has already occurred. The constitutional complaint proceedings must examine whether the monetary policy of the European Union and of Germany creates a risk of inflation.

d) The federal bodies have no powers to undertake acts which are contrary to the Basic Law; at all events, all powers end where they violate the core of constitutional identity, which under Article 79.3 of the Basic Law is not at the disposal of the policies of the federal bodies. The core of constitutional identity also restricts the powers of the European Union bodies. Both the European Union policy and the national policy of the euro rescue package violate not only the principle of conferral, but in the form of inflation policy also violate the core of Germany's constitutional identity, in

particular the principle of the social welfare state. They even hold the danger of creating a currency reform which is contrary to the social welfare state. The European Union is attempting to develop Article 122.2 TFEU into a form of federal emergency constitution. This is an arrogation of power which has the quality of a *coup d'état*. The European Financial Stabilisation Mechanism creates the "financial union", which is at the same time a "social union". It creates the "transfer union" and the liability community. Financial aid for ailing state budgets is a form of financial compensation which departs from the concept of the monetary union.

2. The second complainant also submits that his fundamental rights and rights equivalent to fundamental rights under Article 38.1, Article 14.1 and Article 2.1 of the Basic Law have been violated. He states that the euro stabilisation mechanism is incompatible with the Treaty on the Functioning of the European Union and has the effect of altering the Treaty (a). Both these elements are significant with regard to more than one violation of a fundamental right ((b) and (c)). He submits as follows:

a) The euro stabilisation mechanism - in the same way as the earlier aid to Greece - violates the bailout prohibition of Article 125.1 TFEU, which rules out European Union liability for commitments of the Member States and liability of the Member States for commitments of other Member States. It is the purpose of this provision to ensure comprehensive legal responsibility of the Member States for their own public-revenue conduct. Only if it is clear to every Member State that neither the European Union nor other Member States are liable for or guarantee that state's own commitments and therefore there is a risk of state insolvency in certain circumstances is there sufficient incentive to satisfy the requirements of stability in the long term and not to engage in an irresponsible debt policy at the cost of the others - who admittedly have no legal obligation, but might see themselves, as a result of the pressure of economic circumstances, de facto forced to be responsible for the commitments of the Member State with unsound economic activity - and to enjoy prosperity on credit in the hope that ultimately the others will pay for this.

A justification of this violation by a state of emergency under Article 122.2 TFEU is out of the question. In particular, the overindebtedness of Greece and other states is not an event comparable to a natural disaster, but the result of a financial policy for which, according to the Treaty, the states in question are solely responsible. In the case of overindebtedness, state bankruptcy is an economic consequence of the state's own conduct, for which the state in question must take responsibility under the meaning and purpose of Article 125 TFEU. If the impending insolvency of a Member State were to be understood as an exceptional occurrence within the meaning of Article 122.2 TFEU, scarcely an area of application for the bailout prohibition would remain.

The contravention of the bailout prohibition by the euro stabilisation mechanism is not an isolated infringement of the Treaty; on the contrary, the concept of the stability union provided for by the Treaty is permanently destroyed, and replaced by the completely different concept of a liability and transfer union. In addition, the euro stabilisation mechanism as such represents the institutionalisation of ongoing failure to fulfil Treaty obligations. In the Maastricht Treaty, the Federal Republic of Germany only consented to monetary union subject to the proviso that the provisions guaranteeing stability should be in force and be strictly applied. Every time it disregards these provisions, the European Union leaves the Treaty foundation of monetary policy and oversteps the scope of competence defined in the Member States' Acts to ratify the Treaty. Politically, there may be differing opinions as to whether such a turning away from the previous conception is desirable or not. But legally, at all events, such a fundamental change of design is possible only by a formal amendment of the Treaty. The participation of the Federal Government and the Bundestag in the de facto alteration, sanctioned by custom, of the Treaty on the Functioning of the European Union is incompatible with the principle of democracy.

b) In its Lisbon judgment, the Federal Constitutional Court recognised a comprehensive right of the individual to participate in the democratic legitimation of state authority - a "right to democracy" - which is not restricted to legitimation in connection with the transfer of sovereign powers. In substance, admittedly, this right equivalent to a fundamental right does not entail a comprehensive review of the lawfulness of the whole of the state's activity, but it does entail a "review of democracy". This right of the individual under Article 38. 1 of the Basic Law has been violated in several ways by the challenged acts and omissions.

aa) Ultra vires acts of the European Union bodies contravene the principle of democracy

and infringe the complainant's right equivalent to a fundamental right under Article 38.1 of the Basic Law because they involve the exercise of sovereignty in Germany which is not democratically legitimised. From Article 38.1 of the Basic Law there follows in general the right of every citizen that state authority and European sovereign power is democratically legitimised, unless the constitution itself - within the limits of Article 79.3 of the Basic Law - permits restrictions or modifications of the democratic principle of legitimation. The challenged acts and omissions of the European Union bodies, as ultra vires acts, contravene Article 38.1 of the Basic Law. This applies to the decision of the Council of 9 May 2010 to introduce a euro stabilisation mechanism (violation of the bailout prohibition of Article 125.1 TFEU), to Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (violation of the bailout prohibition of Article 125.1 TFEU), to the purchase of government bonds of Greece and of other euro area Member States by the European Central Bank (violation of Article 123.1 TFEU) and to the coordination of the rescue packages, that is, of the aid to Greece and the euro stabilisation mechanism, by the Council and the EU Commission (violation of the bailout prohibition of Article 125.1 TFEU). These are manifest and serious cases of overstepping of competence within the meaning of the Federal Constitutional Court's Honeywell case-law.

Unlike in the case of the review against fundamental rights, the Federal Constitutional Court has not retracted its authority for ultra vires review of European Union acts. The focus is not on a constant, regular overstepping of European Union competences; instead, the Federal Constitutional Court reviews every individual overstepping of the limited individual competences. Since European Union acts which are not covered by the limited individual competences can have no legal effect in the Member States, they are subject in full to review by the Federal Constitutional Court. Consequently, the complainant can also challenge the fact that the European Union acts violate Article 14.1 or Article 2.1 of the Basic Law; in this case, the Solange II case-law is not pertinent. From the perspective of German constitutional law, ultra vires acts of the European Union bodies are to be disregarded by German state authority because they are not covered by the German Consent Act ratifying the Treaty and thus are not based on an effective transfer of sovereign powers. Every overstepping of their competence by European Union bodies also severs the democratic legitimation connection which is based on the Consent Act.

bb) Article 38.1 of the Basic Law has also been violated by the Federal Government's cooperation in the ultra vires acts of the European Union bodies.

cc) The same applies to the acts of the Federal Government, which in cooperation with the European Union bodies and with the governments of the other Member States led to a fundamental change of the stability conception of the European monetary union. Not only the Federal Government was involved in this de facto alteration of the Treaty outside the legal Treaty amendment procedure, but also the Bundestag and the Bundesrat, by passing the Act on Financial Stability within the Monetary Union of 7 May 2010 and the Euro Stabilisation Mechanism Act of 22 May 2010. Admittedly, as a rule measures for which Parliament as legislature gives authorisation by statute do not lack democratic legitimation. But it must be noted that the Basic Law makes differing requirements of the democratic legitimation conveyed by the Act of parliament. An amendment of primary European Union law, except where it is a case of a simplified treaty amendment procedure provided for in EU law, requires an international-law treaty and a Consent Act ratifying the treaty within the meaning of Article 23.1 of the Basic Law to be entered into. Treaty amendments without such a ratifying Act do not satisfy the constitutional requirements for democratic legitimation.

dd) In addition, the complainant finds his rights under Article 38.1 of the Basic Law violated in that the de facto abolition of the bailout prohibition encroaches upon the people's constituent power. A liability community and a European centralisation of budget policy may not even be introduced by a Treaty amendment unless the Member States are given other competences by the European Union by way of compensation. For with this impetus to centralisation the limit of what the Federal Constitutional Court, in the Lisbon decision, regarded as constitutional by way of transfer of sovereign powers would be clearly exceeded. In this decision, the Court emphasised the importance of the budgetary sovereignty of the national parliaments as the most important element of state sovereignty.

ee) There is also a violation of the principle of democracy guaranteed by Article 38.1 of the Basic Law because the guarantee authorisation and the institutional embodiment of the special purpose vehicle in the Euro Stabilisation

Mechanism Act is too imprecise and possibilities of parliamentary monitoring and influence were lacking when the Act was implemented. What standards are to be imposed before guarantees are given on the economic and financial policy programme of the Member State which is to benefit and in what way the performance of this programme in practice is monitored and safeguarded cannot be understood from the challenged statute. It is true that the Federal Government

has a right of veto, because the programme has to be approved by mutual agreement of the Member States. However, this veto position is relativised in view of the immense political pressure. In addition, the institutional structure of this special purpose vehicle is not defined in the Act. Nor did the delegates have access to articles of association of the special purpose vehicle when the Act was passed. The "Agreement on Conditions", which sketches the "central structural elements of the EFSF" in a few words, was by no means sufficient to enable the Bundestag to make an accountable decision.

In addition, under § 1.4 of the Euro Stabilisation Mechanism Act, the Federal Government is merely obliged to attempt to reach agreement with the Bundestag budget committee before giving guarantees. This is not enough, since in the case of conflict the obligation to attempt to reach agreement leaves the decision on a financial volume of half of the federal budget to the Federal Government.

ff) With regard to the German Bundestag's budget responsibility, the second complainant finds a violation of Article 38.1 of the Basic Law in particular in the fact that responsibility for the guarantee authorisation given in § 1 of the Euro Stabilisation Mechanism Act in the amount of 147.6 billion euros (123 billion euros plus 20%) exceeds what is possible in a parliamentary democracy. If one adds to this the guarantee authorisation in favour of Greece in the amount of 22.4 billion euros agreed in the Act on Financial Stability within the Monetary Union, this is a total amount which is much larger than the largest federal budget item and which greatly exceeds half of the federal budget. Admittedly, it is not likely that the Federal Government will have to assume liability for all guarantees in full, but it is also not unrealistic to prepare for this possibility. The Bundestag renounces its budget responsibility and its responsibility for the public interest if it ties itself down in this volume in advance for future budget years. With good reason, the Basic Law provides that decisions on revenue and expenditure are to be made in annual budgets or in budgets relating to years, which are adopted as Budget Acts. Admittedly, Article 115. 1 of the Basic Law permits the Bundestag to authorise by statute guarantees of various kinds which may result in expenditure in future financial years. But this presupposes that these are obligations which remain on the scale of customary individual budget items. If, however, half the federal budget is potentially spent in advance in this way, this is a quantum leap. In drafting Article 115 of the Basic Law, the legislature creating the constitution was not thinking of such exorbitant orders of magnitude. It contradicts the principle of parliamentary budget responsibility that the whole or - as in the present case - half of the budget is disposed of in advance and thus room to manoeuvre in order to perform the state's many duties is abandoned.

gg) Moreover, Article 38.1 of the Basic Law is also violated by the fact that the Decision of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union of 9 May 2010 is a treaty under international law and under Article 59.2 in conjunction with Article 115.1 of the Basic Law it required the consent of Parliament in the form of a Consent Act. In the absence of a Consent Act, the democratic legitimation necessary under Article 59.2 of the Basic Law is lacking.

hh) Finally, the second complainant finds a violation of Article 38.1 of the Basic Law in the fact that Parliament was compelled by the Federal Government to pass the Act on Financial Stability within the Monetary Union and the Euro Stabilisation Mechanism Act, in that the Federal Government claimed that there was a state of emergency with threatening catastrophic consequences or actually caused this state of emergency by a number of omissions. A characteristic of parliamentary democracy is that Parliament debates on various possible decisions and the majority decides in favour of one of the alternatives. If parliament is forced to decide in favour of one alternative because otherwise an absolutely intolerable evil threatens, a democratic choice between alternatives on the basis of competing political conceptions is impossible. However, it is debatable whether there really is only one way out of the Greek crisis and the "euro crisis". Respected economists think that a far better solution could be achieved if the creditors take a "haircut". But if there are realistic alternatives, it is undemocratic to put Parliament under such pressure.

c) In addition to Article 38.1 of the Basic Law, Article 14.1 of the Basic Law is also violated by the challenged acts and omissions. They lead to the collapse of the legal stability structure of the currency system. Admittedly, in its decision on the introduction of the euro, the Federal Constitutional Court stated clearly that by law the currency policy must orient itself towards the objective of price stability, which follows from Article 14.1 in conjunction with Article 88 of the Basic Law, but that there is no individual right to demand that this obligation is fulfilled. This is also correct, because and to the extent that the law of economic, financial, currency and social policy allows tolerance for structuring and prognosis. But where there are strict legal commitments with regard to the structuring of the economic regulatory framework for the development of monetary value, no reason is apparent to restrict the individual right under Article 14.1 of the Basic Law. This is precisely the nature of the legal position in the present case. For the policy violates Article 125.1 and Article 123.1 TFEU and thus fails to observe the limits established by treaty of provisions determining the content and limits of property. It would be a one-sided and impermissibly restrictive point of view if one were always to understand provisions determining the content and limits of property only as restrictions of the rights of owners. They are at the same time constitutive elements of the owner's rights. Since the legal scope of owners' rights follows from the totality of the statutory provisions determining the content and limits of property, the individual also has a claim for state authority to observe the provisions determining the content and limits of property.

III.

The German Bundestag (1) and the Federal Government (2) submitted written opinions on the constitutional complaints.

1. The German Bundestag is of the opinion that the constitutional complaints are inadmissible (a) and unfounded (b) and submitted as follows:

a) The complainants disregard the limits of constitutional complaint proceedings and also of the judicial decisions of the Federal Constitutional Court. The constitutional complaint, which is designed to give an individual recourse to justice, is completely pushed into the background and the complainants conduct themselves as if they were champions of the public. The decisions made by the Council of the European Union and the acts and omissions of the ECB and the EU Commission are outside the scope of a constitutional complaint under Article 93.1 no. 4a of the Basic Law and § 90 of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz - BVerfGG). Nor do the Solange II case-law of the Federal Constitutional Court and the statements on European ultra vires acts made in the Lisbon judgment lead to a different result. Independently of this, there is no entitlement to file a specific constitutional complaint, for the complainants are exposed to mere reflex effects, and this is not sufficient to assume a direct effect on them.

aa) The possibility of a violation of Article 14 of the Basic Law has not been shown. It is true that specific property rights are protected, and consequently so is property in the form of money and the basic possibility of being able to exchange money for material assets. However, Article 14 of the Basic Law contains no guarantee of value; the exchange value of property rights is not covered by the guarantee of property, provided that the possibility of exchange is not completely ruled out. The area of protection of Article 14.1 of the Basic Law does not include monetary stability, and therefore there is no fundamental right to a stable currency. Furthermore, the challenged measures serve to ensure the monetary stability of the euro and for this reason too they do not contravene Article 14 of the Basic Law.

bb) An infringement of Article 2.1 of the Basic Law is out of the question. Only if an infringement of Article 14.1 of the Basic Law were to be assumed would there at the same time be an infringement of Article 2.1 of the Basic Law, but by reason of its subsidiarity this would then be overridden as a fall-back fundamental right.

cc) Where the argument is based on objective constitutional law (the principle of the social welfare state), this is outside the area of application of a constitutional complaint. The principle of the social welfare state alone does not give rise to any individual rights. The principle of the social welfare state includes the requirement for the state to create the minimum requirements for an existence inline with human dignity. This does not include the guarantee of a stable currency, because the principle of the social welfare state does not relate to the general economic conditions of environment and existence.

dd) Nor has the possibility of a violation of Article 38 of the Basic Law been shown. State power and the influence on the exercise thereof are legitimised by election, and in the area of application of Article 23 of the Basic Law, Article 38.1 of the Basic Law precludes emptying this of meaning by relocating duties and powers of the Bundestag in such a way that the principle of democracy, insofar as Article 79.3 in conjunction with Article 20.1 and 20.2 of the Basic Law declares it to be inviolable, is violated (BVerfGE 89, 155 <171 >). This guarantee is not relevant, because duties and powers of the German Bundestag are not relocated. The Federal Republic of Germany does not abandon its statehood. The challenged statutes are statements of the German legislature and as such an expression of continuing statehood. In the present context, Article 38.1 of the Basic Law gives no protection against the democratically legitimised legislature.

b) The constitutional complaints are also unfounded. Fundamental rights have not been violated. Nor does an argument which places an alleged contravention of

provisions of European primary law in centre stage carry weight. Insofar as the constitutional complaints assert that there have been violations of law and place these violations in the context of ultra vires review, they overlook the fact that the concept of ultra vires acts does not imply a general review, encroaching upon areas of discretion, by Member State courts of the lawfulness of all European physical acts or legal instruments.

aa) Apart from the fact that violations of the European treaties by the federal legislature cannot be challenged by way of a constitutional complaint, the accusations are also substantively incorrect with regard to European Union acts.

(1) In Article 122 TFEU, there was a legal basis for European Union acts. Under Article 122.2 TFEU, the Council may under certain conditions grant a Member State financial assistance from the European Union if this Member State, by reason of natural disasters or exceptional occurrences beyond its control, is in difficulties or is seriously threatened with severe difficulties. It is true that there is no natural disaster in the present case. However, the financial crisis and the developments on the financial markets are exceptional occurrences within the meaning of Article 122.2 TFEU. They are also beyond the control of the Member States considered, that is Greece, Portugal, Spain, Italy and Ireland. The difficulties within the meaning of Article 122. 2 TFEU need not in their entirety arise without fault. Even if Greece and other euro area Member States had themselves actuated their strained budget situations, it would only have been the financial crisis, contagious tendencies entailed by it and the developments on the financial markets which would have led to difficulties or to the threat of severe difficulties. These difficulties within the meaning of Article 122.2 TFEU consist in a substantial deterioration of loan conditions of some euro area Member States, which could have resulted in these Member States being insolvent, and in the danger that these tensions would spread from the government bonds market to other markets and would adversely affect the functioning of the international financial markets.

(2) The purchase of government bonds of Greece and of other euro area Member States by the European Central Bank is not a violation of Article 123 TFEU. This provision only prohibits the ECB from directly purchasing debt instruments of public-sector bodies and institutions. Consequently, only the purchase of government bonds direct from state issuers, that is, the euro area Member States, is prohibited. The direct purchase of government bonds by the ECB from the secondary market is not prohibited.

(3) There is no violation of Article 125 TFEU and the bailout prohibition contained therein. There is no aspiration to achieve a completely different conception of the monetary union, away from the stability community and towards the liability and transfer community. Article 125 TFEU is open to interpretation to the extent that it may simply contain a “prohibition of a commitment to give financial aid”, with the result that voluntary financial aid is not affected. Under Article 125 TFEU, neither the European Union nor individual Member States are liable for the obligations of sovereign agencies of other Member States and they do not take responsibility for such obligations. In this way the bailout prohibition prevents creditors of Member States or these Member States themselves from being able automatically to call upon the European Union or other Member States as if they were guarantors of the debts of these Member States. However, this does not mean that Article 125 TFEU contains a general prohibition of financial assistance for Member States. There is no obligation to give assistance, but this is not forbidden. The aid from the Member States does not contravene the bailout prohibition for another reason too. Under the wording of Article 125.1 TFEU - “... A Member

State shall not be liable for or assume the commitments ...” - a Member State is only forbidden to enter into the debt relationship between another Member State and its creditor, with the result that the bailout prohibition specifically does not contain a general prohibition of voluntary assistance between the Member States. For this voluntary assistance creates a new, independent commitment and is therefore not conceptually an entry into an old commitment.

In addition, a further reason why the financial assistance of the European Union does not violate Article 125 TFEU is that Article 122.2 TFEU authorises the European Union to grant financial assistance and at the same time can be regarded as the ground of justification for deviating from the prohibition of Article 125 TFEU. Even if one were to infer from the provision a prohibition of assistance, it would still be the case that when choosing between the loss of currency stability and giving assistance, in the last resort European Union law could not stand in the way of giving assistance. On the contrary, it would have to be objectively interpreted following the purposive approach. In the political process, reference has repeatedly been made to the last-resort nature of the present measure. It appears absurd to hold fast to a narrowly interpreted bailout clause if assistance is the last means to preserve the stability of the currency, which is precisely what a narrowly interpreted bailout clause is intended to achieve.

bb) Finally, in all considerations of lawfulness it must be taken into account that this is an area in which considerable latitude must be given to economic and political assessment and prognosis. The Bundestag and the Federal Government are responsible for the stability of the currency. The Federal Constitutional Court cannot release the politically responsible actors of this responsibility by interpretation of constitutional law. If parts of the euro rescue package were invalidated, this would lead to considerable uncertainty on the financial markets and might completely call into question the stabilisation of the financial markets now achieved. Doubt could be cast on Germany's willingness and ability to defend the European integration achieved and the joint currency. Trade-offs on the stabilisation package would directly entail substantial risks to the functioning of the financial system in the euro area. As a consequence, a substantial devaluation of the euro could be expected. The probable effects would be a new acute financial and economic crisis in the euro area and beyond it, high welfare loss in Germany and Europe and further political dangers and distortions, which would extend far beyond the economic area.

2. The Federal Government also regards the constitutional complaints as inadmissible (a), but at all events as unfounded (b). It submitted as follows:

a) With regard to the secondary-law measures and other practices to be regarded as equivalent to these of the bodies of the European Union, the constitutional complaints are at minimum inadmissible because the conditions under which such acts may be the subject of a constitutional complaint are not satisfied. Nor is it sufficiently shown that the protection of fundamental rights regarded as essential in each case is not generally guaranteed on the European Union level. In addition, the complainants are not affected by the challenged measures in an individual manner. The constitutional complaint proceedings give them no right to challenge provisions which could have only indirect effects on them as part of the general public. In other respects too, there is no possibility that a fundamental right or a right equivalent to a fundamental right has been violated.

aa) Article 38.1 of the Basic Law only protects against an erosion of the Bundestag's competences by the transfer of sovereign powers or by ultra vires acts of the European Union. On the basis of Article 38.1 of the Basic Law, losses of substance of democratic freedom of action may be challenged; this also includes encroachments upon the principles laid down in Article 79.3 of the Basic Law as the identity of the constitution. But such a case is not applicable in the

present matter. Nor can the alleged violations of Articles 123 and 125 TFEU be seen as ultra vires acts in the sense of manifestly wrongful recourse to competences not transferred and therefore reserved to the Member States. Consequently, the challenged European Union measures are also incapable of being violations of Article 38.1 of the Basic Law. Insofar as the second complainant asserts that there has been a violation of Article 38.1 of the Basic Law because there is no statute under Article 59.2 of the Basic Law, it is plain that no violation of this right equivalent to a fundamental right is possible. This follows from the mere fact that an alleged violation of Article 59.2 of the Basic Law cannot be challenged by way of a constitutional complaint.

bb) Nor is there a violation of the fundamental right to property under Article 14.1 of the Basic Law. The “civil right to price stability” alleged by the first complainants does not exist. Even if a state duty under objective law to protect monetary value resulted from the principle of the social welfare state or other provisions of the Basic Law, this does not entail a fundamental right of the individual. The second complainant may not rely on the argument that violations of strict legal commitments in shaping economic framework conditions for the development of monetary value could be challenged by constitutional complaint with reference to Article 14.1 of the Basic Law. It is true that the fundamental right to property protects concrete legal interests with the value of assets and thus also property in the form of money, but it does not protect monetary value. The area of protection of Article 14.1 of the Basic Law does not include the purchasing power of money. The subject of protection of the fundamental right is essentially only the substance of specific legal positions which have the value of assets and their use. With regard to money too, only its existence and the possibility of using it as a means of payment are guaranteed, but not its exchange value. In addition, the challenged measures - even if a fundamental right to monetary stability existed - could not violate such a fundamental right, because they would serve to guarantee the euro as currency and thus also the monetary stability of the euro.

b) At all events, the constitutional complaints are unfounded. The practices of German constitutional bodies and bodies of the European Union that are challenged do not adversely affect the fundamental rights or rights equivalent to fundamental rights of the complainants (aa). Even if other German constitutional law (bb) and the law of the European Union (cc) could be matters open to review by a constitutional complaint, there would be no violation of prior-ranking law.

aa) (1) Article 38.1 of the Basic Law has not been violated, for there has been no transfer of sovereign powers on the basis of Article 23.1 of the Basic Law which could have resulted in an erosion of the Bundestag's competences. The German Bundestag's scope of action has in no way been restricted by law. In the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, the Bundestag exercised its competences. The challenged acts of cooperation of the Federal Government in the circle of the representatives of the governments of the Member States meeting within the Council of the European Union and in the passing of decisions in the Council and these decisions themselves also do not violate the right equivalent to a fundamental right under Article 38 of the Basic Law. Political agreement on bilateral measures was made expressly subject to the states' domestic constitutional provisions. The same applies to the decision of the Council of the European Union (Economic and Financial Affairs) of 9 May 2010. The decision of the Council to introduce a European financial stabilisation mechanism, by which it passed Regulation (EU) no. 407/2010, was made on the basis of Article 122.2 TFEU and is not a measure extending competence which could erode the rights of the Bundestag. The acts of cooperation of the current German representative from time to time therefore cannot have been violations of Article 38 of the Basic Law.

(2) Article 14.1 of the Basic Law has also not been violated; its area of protection has not even been touched on. The measures decided on serve to protect financial stability in the euro area, the euro currency as such and thus also monetary stability. For this reason they cannot violate the fundamental right to property. Even if one presumes that the challenged measures carry dangers for the stability of the euro, consideration should be given to the legislature's economic and political latitude for assessment and prognosis, which should at all events be recognised.

bb) (1) The measures of assistance in the form of loan guarantees to threatened Member States do not violate Article 115 of the Basic Law, nor do they contravene other constitutional law relating to the budget. The principle of budgetary equilibrium (Article 110.1 sentence 2 of the Basic Law) requires only a formal balancing of revenue and expenditure, but it forbids neither guarantees nor borrowing. Under Article 115.1 sentence 1 of the Basic Law, guarantees, like borrowing, require authorisation by federal statute in an amount which is either determined or determinable. The legislature exercised the responsibility to safeguard Parliament’s right to decide on the budget which was assigned it by the Basic Law. In addition, the budget committee was given extensive rights of participation and monitoring under § 1.4 and §1.5 of the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism which exceeded the mere right of information which is otherwise customary when guarantees are given (see § 3.8 and § 3.9 of the Budget Act 2010). Article 115 of the Basic Law provides for no

upper limit in figures for guarantees. There is no basis in the Basic Law for limiting the amount of a guarantee to the magnitude of "customary" individual budget items.

(2) Nor do the measures disregard the core of constitutional identity in the form of the principle of the social welfare state. It is true that constitutional identity, which is laid down in Article 79.3 of the Basic Law, includes the core of the principle of the social welfare state. However, monetary stability is not one of the elements which constitute this core based on the concept of the social welfare state.

(3) There is no violation of Article 59.2 of the Basic Law. Even violations of Article 59.2 of the Basic Law are not permitted to be challenged by a constitutional complaint, and there is no violation either with regard to the matters agreed by the government representatives meeting within the Council or with regard to the EFSF Framework Agreement. This follows firstly from the mere fact that these are not agreements under international law. Secondly, even if one were to assume that they were agreements under international law, the requirements in Article 59.2 of the Basic Law which make a Consent Act necessary would not be satisfied.

cc) Nor can Article 38. 1 of the Basic Law have been violated under the aspect that the challenged measures contravene European Union law or lead to an alteration or even destruction of the concept of the monetary union as a stability community. On the contrary, it is precisely their objective to preserve the monetary union as a stability community.

(1) Regulation (EU) No 407/2010 is permissibly based on Article 122.2 TFEU. Under this provision, the Council may under certain conditions grant a Member State financial assistance from the European Union if this Member State, by reason of natural disasters or exceptional occurrences beyond its control, is in difficulties or is seriously threatened with severe difficulties. The global financial crisis and the negative developments on the financial markets, which cannot be explained solely by the basic economic data, constitute such exceptional occurrences. Article 122.2 TFEU authorises only emergency measures. This proves that the Financial Stabilisation Mechanism is only an emergency measure, not a permanent institution which could result in the "liability and transfer community" feared by the complainants. An argument against assuming a permanent institution is the general restriction to measures subject to a time-limit and the obligation of review, which is intended to ensure that the Regulation applies only as long as the exceptional occurrences which threaten the financial stability of the European Union as a whole continue to exist (Article 9 of Regulation <EU> no. 407/2010).

(2) Article 125 TFEU does not conflict with the grant of aid through the Financial Stabilisation Mechanism, for Article 122.2 and Article 125 TFEU are part of a uniform system of provisions introduced at the same time. It is true that Article 125 TFEU is intended to preserve the budgetary discipline of the Member States by obliging them to take out loans on market conditions. For this reason, a narrow interpretation of Article 125 TFEU may suggest forgoing measures of assistance even where there are imminent dangers to financial stability. However, if the Member States had forgone the measures challenged by the constitutional complaint, serious consequences would have had to be feared, not only for the euro area. Every mechanical application of Article 125 TFEU would have considerably endangered the economy and also the currency in the euro area and beyond. The provision is not tailored to the case of an already existing acute danger to the financial stability of the euro system. The Member States were permitted to act to avert this danger because in Article 125 TFEU there is a gap relating to the case of burdens on Member States in the euro area resulting from a financial crisis, at all events insofar as there is an imminent danger to the whole economic and monetary union. This gap, in the sense of the lack of a necessary restriction, can be closed if it is interpreted purposively with the result that Article 125 TFEU does not apply if the monetary union would otherwise be endangered. In the decision on the emergency measures, in the opinion of the Federal Government the federal legislature has latitude of decision and judgment. At all events, the fact that the legislature, on the basis of consultations in the circle of the finance ministers and of opinions of the European Central Bank, decided in favour of this protective mechanism in order to prevent the feared far-reaching market reactions does not overstep the latitude for judgment to which it is entitled. In this connection it is essential that the measures are merely situation-related emergency reactions, which are therefore subject to a time-limit.

(3) In other respects too, the Federal Government did not cooperate in an extra-treaty supplementation of the concept, laid down in the Treaty on the Functioning of the

European Union, to ensure the price stability of the euro. The challenged measures were not a de facto amendment of the European Union treaties. The European Union does not arrogate to itself any sovereign powers not yet transferred to it which erode the competences of the German Bundestag and thus may violate Article 38 of the Basic Law.

The bilateral aid and the German emergency measures provided by the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism are not elements of an overall strategy aimed at creating a liability and transfer community. Nor do they establish an arrangement for permanent financial compensation. The fact that these are emergency measures and not a long-term financial transfer is shown on the one hand by the strict requirements laid down in the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, and on the other hand by the time-limit both for the Act and for the measures of the special purpose vehicle which coordinates the national aid (Article 2.5.b, Article 10, Article 11 of the EFSF Framework Agreement). If the existing extraordinary situation should take a positive course with the result that the emergency measures are no longer needed, there would be nothing to prevent them being terminated prematurely. For this very reason, Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism, which governs the European Union measures preceding the bilateral aid, includes a commitment to a half-yearly review of the need for its continuance. The Federal Government will continue its commitment to the preservation of price stability in the monetary union and also to an improvement of the associated procedures to protect the stability of the euro as a currency. In this connection, the Council, not least as the result of a German initiative, affirmed its complete determination to ensure the sustainability of public finances in all Member States and to accelerate plans for budget consolidation and structural reforms. The Council also affirmed its determination to bring forward reforms with great urgency to reinforce the monetary union framework in order to ensure the sustainability of public finances. The Federal Government supports these measures because they serve the stability of the euro. It would oppose endeavours to develop the stabilisation mechanism into a permanent institution in the form of a transfer union, which would be inconsistent with the concept of the monetary union as a stability community, and would not permit de facto amendments to the treaty.

(4) Finally, the purchase of government bonds by the ECB does not contravene European Union law, for Article 123 TFEU prohibits only the direct acquisition of debt instruments of state issuers, but not purchase on the secondary market.

IV.

As expert third parties (§ 27a of the Federal Constitutional Court Act), the German Bundesbank (1) and the European Central Bank (2) submitted opinions.

1. In the opinion of the German Bundesbank, the decisions of May 2010 are defensible, all in all, from an economic point of view (a). However, they do put quite considerable strain on the foundations of the monetary union (b). Additional reform steps are necessary to safeguard the monetary union as a stability community in future in order to be prepared for financial crises of Member States too (c). The Bundesbank submits as follows:

a) The latest developments have revealed fundamental weaknesses in the current financial policy provisions and have shown the economic consequences where competitive positions in the monetary union diverge in the long term. In view of the risks to the stability of the European monetary union, the decisions made by the European Union finance ministers in May 2010 are defensible, all in all, from an economic point of view. It is true that they do not remove the deeper causes of the intensification of the crisis, that is, the dangerous situation of state finances and the past undesirable macroeconomic developments in some states of the monetary union which entail a continuing high need for capital imports. Countering these undesirable developments calls instead for comprehensive financial and economic corrections, the implementation of which takes time and which often only reach their full effect in the medium term. But in view of the situation of the strongly networked financial sector in the euro area, which as a whole is still fragile, a correction at short notice was not possible in May 2010 without the risk of massive economic distortions throughout the euro area. In order to gain the necessary time and against the background of the dangerous situation, the creation of a

possibility of support subject to strict conditions and a time-limit is a suitable means.

b) However, the decisions put quite considerable strain on the foundations of monetary union. Against the background of the gaps and weaknesses in the existing set of provisions, which became plain to see at the latest in the course of the crisis, it is now important to create a framework for the monetary union which in future will better guarantee policies encouraging stability and in particular solid public finances in the Member States. The current financial provisions of the monetary union have to date not been adequate to prevent the escalation of the situation in May 2010, and they have also been additionally weakened by the rescue measures. It is therefore now necessary to combine these rescue measures, as intended, with a toughening of the fiscal rules and an improvement of the statistical foundations. The Bundesbank has repeatedly pointed out that the criterion of indebtedness has particular importance for a stability-oriented monetary policy. It should be given more weight in future. For indebtedness levels of over 60% it should be laid down how quickly they should be reduced and what sanctions will apply if this is not achieved. The deficit criterion could be strengthened if extraordinary provisions which were relaxed in the reform of the Stability and Growth Pact were once again drafted more narrowly and above all greater pressure were created in the precautionary part of the Pact if the conditions were not complied with. Altogether, there is a need for a quicker reaction to undesirable developments and thus an acceleration of the current procedure. The central concern is to improve the inadequate implementation of the provisions. Thus the imposition of sanctions should be less subject to the political negotiation process and more strongly comply with the rules. A commitment to firmer entrenchment of the European fiscal provisions - and in particular of the medium-term budget objectives - in national budget law, as for example in the German brake on debt, would also be effective. In the case of manifest serious undesirable developments, strengthened macroeconomic monitoring on the European level is also necessary. However, in this connection both the independence of monetary policy within the existing framework and the subsidiarity principle must also be taken into account; a basic tendency to centralisation of economic policy and to fine-tuning of the economic process does not make sense.

c) The future safeguarding of the monetary union as a stability community demands additional reform steps over and above the toughening of the existing set of provisions in order to be prepared for a financial crisis of Member States which nevertheless occurs. In this connection, a variety of instruments have been suggested for discussion. Thus, for example, the introduction of a state insolvency code has been suggested as an essential element of a reformed set of framework provisions. Especially against the background of the latest experience, such a procedure would take account of the no-bailout principle. Thus, the creditors of state debt instruments would also be called upon to solve the debt crisis. They would then have a greater incentive even in advance to demand interest rates appropriate to the risk, and they would have a tendency also to allow for undesirable developments which had not yet become directly observable in fiscal policy figures, for example non-sustainable economic structures or future burdens on government budgets. Using the disciplining function of the financial markets in this way would have the advantage that interest in sound public finances in individual Member States would at least not solely depend on the political decision process on the European level, which in the past has often been shown to be insufficient. Such proposals or further-reaching proposals to supplement the existing framework must be examined if the existing sanction mechanism proves to be inadequate. A critical view must be taken if the present European Financial Stability Facility, which is subject to a time-limit, were to become a long-term support facility. From the view point of the advocates of such a proposal, this would take better account of the fact that the interconnection of the capital markets has greatly increased since the Maastricht Treaty was passed and thus the effects of economic contagion which the payment default of one state in the monetary union has on the other Member States have increased. But at the same time such a course of action would additionally weaken the personal responsibility of the national financial policies, and it would be a further step in the direction of a liability and transfer community. The risk of default on government bonds of individual Member States would be distributed among all states in the monetary union and thus the disciplining effect of the financial markets would be largely removed. The probability that with such an unsound financial policy the creditors of the state in question would call for adequate risk premiums would be reduced and thus the incentive for a cautious budgetary policy would be weakened. In addition, the intended participation of the International Monetary Fund in the present financing facility, which is subject to a time-limit, plays an important role in the

credibility of the consolidation packages from the point of view of the markets, and if there were a long-term European stabilisation facility this participation would probably be extremely difficult to ensure. As part of the collective monetary policy, the euro system is committed to the objective of guaranteeing stable prices in the monetary union. In a monetary union based on stability, however, it is a central duty of financial policy to ensure that sound state finances and a suitable institutional framework appropriately support monetary policy. For the long-term stability of the monetary union, the crucial factor will be not allowing the window of opportunity for reforms to strengthen the financial framework and the capacity for growth in the Member States to pass unused.

2. The European Central Bank points out that the current financial situation and the economic and currency decisions based on it are linked to the global economic and financial crisis. It submits as follows: The crisis began with turbulences on the financial markets in August 2007 and drastically intensified in September 2008 when the collapse of Lehman Brothers led to the financial markets virtually drying up in the industrial countries; this had considerable effects on the real economy in the countries affected. The turbulences on the financial markets and the intensification of the crisis required decisive and energetic measures by the political decision-makers, including the ECB, at that time, in order to guarantee price stability in the euro area. In the weeks and months following this, there was again a drastic and abrupt aggravation of the situation on the financial markets. The epicentre of the tensions was in the European bond markets, in particular in the government bonds markets. These extremely serious tensions on the financial markets affected the whole euro area including the interbank market, the stock market and the foreign exchange market, and it threatened to spread to the global financial markets. The development on the government bonds markets quickly affected the money markets and resulted in a marked increase of uncertainty in connection with the risk of counterparty default. Quotations which reflect this risk of default rose to twelve-month maximums. There was also a liquidity squeeze on the interbank markets. The liquidity position in the area of unsecured loans deteriorated, not only for term money, but also for overnight money. On the European overnight money market, liquidity fell to the lowest level since the beginning of the economic and monetary union in January 1999. The global economic and financial crisis led to unprecedented challenges for political decision-makers, in particular in the industrial countries, which were most severely affected. The latest developments with regard to the increasingly more difficult situation on the government bond markets had the potential to considerably increase the total risk to the financial stability of the euro area, and it should be noted that financial stability is a basic condition of the guarantee of price stability.

V.

Applications by the complainants for the issue of temporary injunctions were rejected by the Federal Constitutional Court in orders of 7 May and 9 June 2010 (BVerfGE 125, 385; 126, 158).

VI.

On 5 July 2011, the Federal Constitutional Court held an oral hearing in which the parties explained and expanded upon their legal viewpoints.

B.

The constitutional complaints against the Act on Financial Stability within the Monetary Union and against the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism are admissible insofar as they challenge an injury to the permanent budgetary autonomy of the German Bundestag on the basis of Article 38.1 sentence 1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law (I). Apart from this, the constitutional complaints are inadmissible (II).

I.

1. The Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism may be the subject matter of a constitutional complaint in constitutional complaint proceedings as measures by German state authority.

2. The complainants submit with sufficient substantiation that they themselves may be presently and directly affected by violation of a fundamental right or right equivalent to a fundamental right which is challengeable under Article 93.1 no. 4a of the Basic Law and §90.1 of the Federal Constitutional Court Act (§23.1 sentence 2, § 92 of the Federal Constitutional Court Act).

a) Insofar as the complainants assert a violation of their right equivalent to a fundamental right under Article 38.1 sentence 1 of the Basic Law by the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism, the entitlement to file a constitutional complaint depends on the contents of the individual challenges (see BVerfGE 123, 267 <329>). The constitutional complaints are admissible with regard to the alleged erosion of the budgetary autonomy of the German Bundestag.

aa) In their submission that the sustained (long-term) budgetary autonomy of the German Bundestag is violated in the sense of the erosion of its competences, the complainants set out with sufficient substantiation the possibility of a violation of their right equivalent to a fundamental right under Article 38.1 sentence 1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law.

(1) Article 38.1 and 38.2 of the Basic Law guarantees the individual right to take part, in compliance with the constitutional election principles, in the election of the Members of the German Bundestag (see BVerfGE 47, 253 <269>; 89, 155 <171 >; 123, 267 <330>). Here, the act of election does not consist solely in a formal legitimation of state power on the federal level under Article 20.1 and 20.2 of the Basic Law. The right to vote also comprises the fundamental democratic content of the right to vote, that is, the guarantee of effective popular government. Article 38 of the Basic Law protects the citizens with a right to elect the Bundestag from a loss of substance of their power to rule, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the Bundestag, above all to supranational institutions (BVerfGE 89, 155 <172>; 123, 267 <330>). The same applies, at all events, to comparable commitments entered into by treaty, which are connected institutionally to the supranational European Union, if the result of this is that the people's democratic self-government is permanently restricted in such a way that central political decisions can no longer be made independently.

(2) This substantive extent of protection of Article 38 of the Basic Law does not in general give rise to any right of the citizens to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them. Article 38.1 of the Basic Law, as the fundamental right to participate in the democratic self-government of the people, therefore in principle grants no entitlement to file a specific constitutional complaint against decisions of Parliament, in particular enactments.

(a) Since the judgment on the Maastricht Treaty on European Union, the Federal Constitutional Court has recognised an exception to this principle if, by reason of relocations of duties and powers of the Bundestag under international agreements, an erosion of Parliament's political legislative possibilities guaranteed by the constitutional system of competences is to be feared (see BVerfGE 89, 155 <172>). This view holds that the principle of representative rule of the people protected by the right to vote may be violated if the Bundestag's rights are substantially curtailed and thus a loss of substance occurs of the democratic freedom of action for the constitutional body which has directly come into being according to the principles of free and equal election (see BVerfGE 123, 267 <341 >). Such a possibility of challenge is restricted to structural changes in the organisation of government such as may occur when sovereign powers are transferred to the European Union.

This review of state power accessed by every citizen's constitutional complaint was already criticised in connection with the Maastricht judgment (Tomuschat, Europäische Grundrechte-Zeitschrift- EuGRZ 1993, p. 489 <491 >; Bryde, Das Maastricht-Urteil des Bundesverfassungsgerichts - Konsequenzen für die weitere Entwicklung der europäischen Integration, 1993, p. 4; König, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht - ZaöRV 54 <1994>, p. 17 <27-28>; Bieber, Neue Justiz - NJ 47 <1993>, p. 241 <242>; Gassner, Der Staat 34 <1995>, p. 429 <439-440>; Cremer, NJ 49 1 <1995>, pp. 5 ff.). Similar opinions were also expressed following the Lisbon judgment (Schönberger, Der Staat 48 <2009>, pp. 535 <539 ff.>; Nettesheim, Neue Juristische Wochenschrift - NJW

2009, p. 2867 <2869>; Pache, EuGRZ 2009, p. 285 <287-288>; Terhechte, Europäische Zeitschrift für Wirtschaftsrecht - EuZW 2009, p. 724 <725-726). However, the Senate adheres to its opinion. The citizen's claim to democracy, ultimately rooted in human dignity (see BVerfGE 123, 267 <341 >) would lapse if Parliament abandoned core elements of political self-determination and thus permanently deprived citizens of their democratic possibilities of influence. The Basic Law has provided, in Article 79.3 and Article 20.1 and 20.2 of the Basic Law, that the connection between the right to vote and state power is inviolable (see BVerfGE 89, 155 <182>; 123, 267 <330>). In the revised version of Article 23 of the Basic Law, the constitution-amending legislature made it clear that the mandate to develop the European Union is subject to permanent compliance with particular constitutional structural requirements (Article 23.1 sentence 1 of the Basic Law) and that in this connection an absolute limit is created by Article 79.3 of the Basic Law to protect the identity of the constitution (Article 23.1 sentence 3 of the Basic Law), which at all events in this context requires less than cases of imminent totalitarian seizure of power for it to be exceeded. Citizens must be able to defend themselves in a constitutional court against a relinquishment of competences which is incompatible with Article 79.3 of the Basic Law. The Basic Law provides for no more extensive right of challenge.

The defensive dimension of Article 38.1 of the Basic Law therefore takes effect in configurations in which the danger clearly exists that the competences of the present or future Bundestag will be eroded in a manner that legally or de facto makes parliamentary representation of the popular will, directed to the realisation of the political will of the citizens, impossible. The entitlement to make an application is therefore only granted if there is a substantiated submission that the right to vote may be eroded.

(b) The entitlement to file a specific constitutional complaint under Article 38.1 of the Basic Law may also exist if, and this is the only matter at issue in this case, guarantee authorisations under Article 115.1 of the Basic Law which implement matters decided in international agreements may by their nature and extent result in massive adverse effects on budgetary autonomy.

The fundamental decisions on public revenue and public expenditure are part of the core of parliamentary rights in democracy. Article 38.1 sentence 1 of the Basic Law excludes the possibility of depleting the legitimation of state authority and the influence on the exercise of that authority provided by the election by fettering the budget legislature to such an extent that the principle of democracy is violated (see BVerfGE 89, 155 <172>; 123, 267 <330> in each case on the relocation of duties and powers of the Bundestag to the European level). By putting the elements into specific terms and objectively tightening the rules for borrowing by Federal and Länder governments (in particular Article 109.3 and 109.5, Article 109a, Article 115 of the Basic Law new, Article 143d.1 of the Basic Law, Federal Law Gazette I 2009 p. 2248), the constitution-amending legislature made it clear that a constitutional commitment of the parliaments and thus a palpable restriction of their power to act is necessary in order to preserve the democratic freedom of action for the body politic in the long term. The act of voting would be devalued if the German Bundestag no longer disposed of these means of organisation to fulfil state functions resulting in expenditure and to exercise its powers, when its power to act is legitimised by the voters to use these very means of organisation.

Whereas conventional guarantee authorisations within the meaning of Article 115.1 of the Basic Law, as the discussion in the oral hearing showed, entail no extraordinary risks to budgetary autonomy and therefore the Basic Law contains no restrictions in this connection, guarantee authorisations to implement obligations which the Federal Republic of Germany undertakes as part of international agreements to preserve the liquidity of states in the monetary union certainly have the potential to restrict the Bundestag's possibilities of political organisation to a constitutionally impermissible extent. Such a case would have to be feared, for example, if the Federal Government, without the requirement of the Bundestag's consent, were permitted to give guarantees to a substantial extent which contribute to the direct or indirect communitarisation of state debts, that is, guarantees where only the conduct of other states decided when the guarantee would be called upon.

(3) In the circumstances of the present case, the complainants' submissions satisfy the strict requirements for showing the violation of a fundamental right.

The present case concerns statutory authorisations for the giving of a guarantee with effect outside the state and the creation of an

international mechanism intended to be temporary to preserve the liquidity of states in the monetary union. With regard to the German Bundestag's right to decide on the budget affected by this, this is a case of the creation of obligations whose effects may be equivalent to a transfer of sovereign powers if the Bundestag is no longer able to dispose of its budget on its own responsibility. Since it has not yet been clarified in the case-law of the Federal Constitutional Court subject to what requirements in such a combination of circumstances the right under Article 38.1, Article 20.1 and 20.2, and Article 79.3 of the Basic Law may be violated, in this respect it is sufficient to submit that the challenged statutes are merely first steps towards a historically unprecedented automatic liability which is becoming established and altogether is constantly increasing and which does indeed correspond to the shaping or transformation of transferred sovereign powers within the meaning of Article 23.1 of the Basic Law and at all events is designed to be such a shaping or transformation.

bb) Insofar as the second complainant submits on the basis of Article 38.1 sentence 1 of the Basic Law that there is also an extra-treaty supplementation of the concept provided in the Treaty on the Functioning of the European Union to ensure the price stability of the euro, his constitutional complaint is inadmissible.

It is true that the principle of the Basic Law's openness towards European law (see BVerfGE 123, 267 <354>; 126, 286 <303>) and the constitutionally protected viability of the European Union’s legal order (see BVerfGE 37, 271 <284>; 73, 339 <387>; 102, 147 <162 ff.>; 123, 267 <399>) subject German agencies to an obligation when they act functionally for the European Union within its institutional organisation, and at the same time constitutionally bind them to observe European Union law. But this is not relevant in the present case. The second complainant has not submitted with sufficient substantiation to what extent domestic requirements of the particular responsibility of German legislative bodies in the European integration process (responsibility for integration) might not be complied with. It may therefore remain undecided subject to what requirements constitutional complaints against extra-treaty supplementation of primary European Union law may be based on Article 38.1 sentence 1 of the Basic Law (see BVerfGE 123, 267 <351 >; with reference to the amendment of treaty law by European Union bodies without ratification procedures). In particular, no decision is necessary as to when measures of German state power which have an extratreaty effect on primary European Union law or which substantively or institutionally supplement it may be challenged in constitutional complaint proceedings in the same way as a Consent Act to agreements under international law. It may also remain undecided whether contraventions of the principle of democracy - at all events in conjunction with the principle of the rule of law - are in principle also challengeable in this way. For the second complainant has at all events not shown a specific context which suggests an extra-treaty supplementation of primary European Union law in such a way that a violation of the right to vote seems possible. In particular, he has not submitted with sufficient substantiation that an extra-treaty supplementation of primary European Union law might be connected to the Act on Financial Stability within the Monetary Union or the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism.

b) The constitutional complaints against the Act on Financial Stability within the Monetary Union and against the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism are also inadmissible insofar as the complainants submit that there is a violation of their fundamental right under Article 14.1 of the Basic Law.

aa) Whether, and if so in what more detailed circumstances, the purchasing power of money is included in the area of protection of the fundamental right to property of Article 14.1 of the Basic Law (see BVerfGE 97, 350 <370-371>) need not be decided here. The same applies with regard to the constitutional protection against inflationary effects which are clearly induced by the state and which may possibly be desired in economic policy (see Herrmann, Wahrungshoheit, Wahrungsverfassung und subjektive Rechte, 2010, p. 338 ff.). In particular, it is not necessary to answer the question as to how far the provision on the organisation of government of Article 88 sentence 2 of the Basic Law, as a result of the statutory requirement of independence and as a result of the commitment to price stability, also serves the goal of the individual protection of property (see BVerfGE 89, 155 <174>; 97, 350 <376>).

bb) At all events, the complainants neither show in a substantiated manner an inflationary effect in the sense of such an intentional state economic policy, nor do they submit sufficient facts to show that the purchasing power of the euro is substantially objectively impaired by the

challenged measures. The fact that the challenged authorisations to give guarantees - with regard to their volume - entail considerable challenges for the budgetary policy of the Federal Republic of Germany does not alter the fact that the sums which have been involved to date do not as yet display such massive effects on monetary stability that a justiciable violation of the guarantee of property is possible, and in particular the submissions of the complainants do not support this. It is not in general the task of the Federal Constitutional Court in the course of constitutional complaint proceedings to review economic and financial policy measures to identify negative effects on monetary stability. Such a form of review only comes into consideration in marginal cases - which have not sufficiently been shown in the present case - where there is a manifest decrease of monetary value as a result of state measures. With regard to the support measures challenged in the present case too, the result is the general conclusion that monetary value is in a particular way related to and dependent on the Community (see BVerfGE 97, 350 <371 >).

II.

With regard to the other subject matters of the constitutional complaints, the constitutional complaints are inadmissible in their entirety.

1. Insofar as the constitutional complaints are directed against the Federal Government's cooperation in the intergovernmental Decisions of the Representatives of the Governments of the Euro Area Member States Meeting within the Council of the European Union and of the Representatives of the Governments of the 27 EU Member States of 10 May 2010 (Council Document 9614/10) and against the cooperation of the Federal Government in the decision of the Council of the European Union of 9 May 2010 to create a European stabilisation mechanism (Conclusions of the Council [Economic and Financial Affairs] of 9 May 2010, Rat-Dok. SN 2564/1/10 REV 1 of 10 May 2010, p. 3), and against the cooperation of the Federal Government in the decision of the Council on the Council Regulation establishing a European financial stabilisation mechanism of 10 May 2010 (Council Document 9606/10), the complainants are not directly burdened (see BVerfG, Order of the Second Chamber of the Second Senate of 12 May 1989-2 BvQ 3/89 -, NJW 1990, p. 974; BVerfG, Order of the Third Chamber of the Second Senate of 9 July 1992 -2 BvR 1096/92 , Neue Zeitschrift fur Verwaltungsrecht - NVwZ 1993, p. 883; Chamber Decisions of the Federal Constitutional Court (Kammerentscheidungen des Bundesverfassungsgerichts - BVerfGK) 2, 75 <76>).

The various acts of cooperation of the Federal Government are not acts of sovereign power against the complainants which are challengeable by constitutional complaint. In this respect, despite the differences between the law of international agreements and supranational law, the same applies as to acts of cooperation of German bodies in agreements under international law (see BVerfGE 77, 170 <209-210>; BVerfG, Order of the Second Chamber of the Second Senate of 12 May 1989 - 2 BvQ 3/89 -, ibid.).

2. The submissions of the complainants that their fundamental rights are directly violated by the intergovernmental decisions of the representatives of the governments of the euro area Member States meeting within the Council of the European Union and of the representatives of the governments of the 27 EU Member States of 10 May 2010 (Council Document 9614/10), the decision of the Council of the European Union of 9 May 2010 to create a European stabilisation mechanism (Conclusions of the Council [Economic and Financial Affairs] of 9 May 2010, Rat-Dok. SN 2564/1/10 REV 1 of 10 May 2010, p. 3), the decision of the Council on the Council Regulation establishing a European Financial Stabilisation Mechanism of 10 May 2010 (Council Document 9606/10) and the purchase of government bonds of Greece and other euro area Member States by the European Central Bank are inadmissible because they are not based on qualified subject matters of constitutional complaints. The challenged acts - notwithstanding other possibilities of review with regard to the right to apply them

in Germany (see BVerfGE 89, 155 <175>; 126, 286 <302 ff>) - are not sovereign acts of German state authority within the meaning of Article 93.1 no. 4a of the Basic Law and § 90.1 of the Federal Constitutional Court Act which may be challenged by the complainants.

3. Insofar as the second complainant's constitutional complaint challenges an alleged

omission of the EU Commission to use the measures against the indebtedness of euro area Member States provided in the Treaty on the Functioning of the European Union and to counteract their disregard of the budgetary discipline laid down in the Treaty and to prevent in this way a state of emergency coming into existence which is now used as the justification of the rescue packages (Greek rescue package and European stabilisation mechanism) which are incompatible with the Treaty, the constitutional complaint is also inadmissible. The same applies insofar as the second complainant submits that the Federal Government omitted to take measures against the speculators who, by the account of the Federal Government, speculate against the euro or against particular euro area Member States so aggressively that the rescue packages are needed to save the stability of the currency.

An omission on the part of the legislature may be the subject of a constitutional complaint if the complainant can rely on an express mandate of the Basic Law which essentially defines the content and scope of the duty to legislate (see BVerfGE 6, 257 <264>; 23, 242 <259>; 56, 54 <70-71 >). Fundamental principles which could justify the assumption of such a duty to act on the part of the Federal Government of the EU Commission have neither been submitted with substantiation by the second complainant, nor are they otherwise apparent.

C.

The constitutional complaints are unfounded insofar as they are admissible. There are no well-founded constitutional objections to the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism.

Article 38.1 sentence 1, Article 20.1 and 20.2 in conjunction with Article 79.3 of the Basic Law determine the basis for judicial review. The right to vote, as a right equivalent to a fundamental right, guarantees the citizens' self-determination and guarantees free and equal participation in the state authority exercised in Germany (see BVerfGE 37, 271 <279>; 73, 339 <375>; 123, 267 <340>, with reference to the respect for the constituent power of the people). The guaranteed content of the right to vote includes the principles of the requirements of democracy within the meaning of Article 20.1 and 20.2 of the Basic Law, which Article 79.3 of the Basic Law guarantees as the identity of the constitution (see BVerfGE 123, 267 <340>).

1. There is a violation of the right to vote if the German Bundestag relinquishes its parliamentary budget responsibility with the effect that it or a future Bundestag can no longer exercise the right to decide on the budget on its own responsibility.

a) The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German Bundestag must make decisions on revenue and expenditure with responsibility to the people. In this connection, the right to decide on the budget is a central element of the democratic development of informed opinion (see BVerfGE 70, 324 <355-356>; 79, 311 <329>). On the one hand, the right to decide on the budget serves as an instrument of comprehensive parliamentary monitoring of the government. On the other hand, the budget brings the fundamental principle of equality of the citizens up to date in the imposition of public charges as an essential manifestation of constitutional democracy (BVerfGE 55, 274 <302-303>). In relation to the other constitutional bodies involved in establishing the budget, the elected parliament has a paramount constitutional position. Article 110.2 of the Basic Law provides that the competence to prepare the budget lies solely with the legislature. This particular position is also expressed by the fact that the Bundestag and Bundesrat are entitled and obliged under Article 114 of the Basic Law to monitor the Federal Government's execution of the budget (see BVerfGE 45, 1 <32>; 92, 130 <137>).

The budget, which under Article 110.2 sentence 1 of the Basic Law is declared by the Budget Act, is not merely an economic plan, but at the same time a sovereign act of government in the form of a statute (see BVerfGE 45, 1 <32>; 70, 324 <355>; 79, 311 <328>). It is subject to a time-limit and task-related. The state functions are presented in the budget as expenses which must be covered by revenue under the principle of compensation (see BVerfGE 79, 311 <329>; 119, 96 <119>). The extent and structure of the budget thus reflect overall government policy. At the same time, the revenue achievable restricts the latitude to exercise state functions resulting in expenditure (see Article 110.1 sentence 2 of the Basic Law). Budget sovereignty is the place of conceptual political decisions on the correlation of economic

burdens and privileges granted by the state. Therefore the parliamentary debate on the budget, including the extent of public debt, is regarded as a general debate on policy (BVerfGE 123, 267 <361 >).

b) As representatives of the people, the elected Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental administration. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany commits itself not only in legally, but also in fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget has not been infringed in a way that could be challenged with reference to the right to vote. The relevant factor for adherence to the principles of democracy is whether the German Bundestag remains the place in which autonomous decisions on revenue and expenditure are made, even with regard to international and European commitments. If decisions were made on essential budgetary questions of revenue and expenditure without the requirement of the Bundestag's consent, or if supranational legal obligations were created without a corresponding decision by free will of the Bundestag, Parliament would find itself in the role of merely re-enacting and could no longer exercise overall budgetary responsibility as part of its right to decide on the budget.

2. Against this background, the German Bundestag may not transfer its budgetary responsibility to other actors by means of imprecise budgetary authorisations. In particular it may not, even by statute, deliver itself up to any mechanisms with financial effect which - whether by reason of their overall conception or by reason of an overall evaluation of the individual measures - may result in incalculable burdens with budget relevance without prior mandatory consent, whether these are expenses or losses of revenue. This prohibition of the relinquishment of budgetary responsibility does certainly not impermissibly restrict the budgetary competence of the legislature, but is specifically aimed at preserving it.

a) Accordingly, the Federal Constitutional Court has already, in connection with the opening up of the state political regime to the European Union which is intended to realise a unified Europe (see Article 23 of the Basic Law), referred to constitutional limits which the Basic Law creates to prevent Parliament limiting its own right to decide on the budget (see BVerfGE 89, 155 <172>; 97, 350 <368- 369>). In this view, a transfer of the right of the Bundestag to adopt the budget and control its implementation by the government which would violate the principle of democracy and the right to elect the German Bundestag in its essential content would at all events occur if the determination of the type and amount of the levies imposed on the citizen were supranationalised to a considerable extent and thus the Bundestag would be deprived of its right of disposal (see BVerfGE 123, 267 <361 >).

A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20.1 and 20.2, Article 79.3 of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of other-directed ness on the part of the bodies and of other Member States of the European Union and remains permanently “the master of its decisions”. There is a considerably strained relationship between this principle and guarantee authorisations which are intended to ensure the solvency of other Member States. Admittedly, it is primarily the duty of the Bundestag itself to decide, while weighing current needs against the risks of medium- and long-term- guarantees, in what maximum amount guarantee sums are responsible (see BVerfGE 79, 311 <343>; 119, 96 <142-143>). But it follows from the democratic basis of budget autonomy that the Bundestag may not consent to an intergovernmental^ or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which - once it has been set in motion - is removed from the Bundestag's control and influence. If the Bundestag were to give indiscriminate authorisation in a substantial degree to guarantees, fiscal disposals of other Member States might lead to irreversible, possible massive, restrictions on national political legislative discretions.

For this reason, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate. The Bundestag must specifically approve every large-scale measure of aid of the Federal Government taken in a spirit of solidarity and involving public expenditure on the international or European Union level. Insofar as supranational agreements are entered into which by reason of their magnitude may be of

structural significance for Parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy, or by participation in equivalent financial safeguarding systems, not only every individual disposal requires the consent of the Bundestag; in addition it must be ensured that sufficient parliamentary influence will continue in existence on the manner in which the funds made available are dealt with. The responsibility for integration borne by the German Bundestag with regard to the transfer of competences to the European Union (see BVerfGE 123, 267 <356ff.>) has its counterpart here for budget measures of equal weight.

b) The provisions of the European treaties do not conflict with the understanding of national budget autonomy as an essential competence, which cannot be relinquished, of the parliaments of the Member States which enjoy direct democratic legitimation, but instead they presuppose this. Strict compliance with them guarantees that the acts of the bodies of the European Union in and for Germany have sufficient democratic legitimation (BVerfGE 89, 155 <199 ff.>; 97, 350 <373>). The treaty conception of the monetary union as a stability community is the basis and subject of the German Consent Act (BVerfGE 89, 155 <205>). In this regard, the treaties are parallel, not only with regard to currency stability, to the requirements of Article 88 sentence 2 of the Basic Law, and if appropriate also of Article 14.1 of the Basic Law, which makes compliance with the independence of the European Central Bank and the primary objective of price stability permanent constitutional requirements of a German participation in the monetary union (see Article 127. 1, Article 130 TFEU). Further central provisions on the design of the monetary union also safeguard constitutional requirements of democracy in European Union law. In this connection, particular mention should be made of the prohibition of direct purchase of debt instruments of public institutions by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (Articles 123 to 126, Article 136 TFEU). Although in this connection the interpretation of these provisions in detail is not essential, it is nevertheless possible to derive from them the fact that the independence of the national budgets is constituent for the present design of the monetary union, and that the acceptance of liability for decisions of other Member States with financial effect which overstretches the bases of legitimation of the association of sovereign states (Staatenverbund) - by direct or indirect communitarisation of state debts - is to be avoided.

3. In establishing that there is a prohibited relinquishment of budget autonomy with regard to the extent of the guarantee given, the Federal Constitutional Court must restrict itself to manifest violations and in particular with regard to the risk of guarantees being called upon it must respect a latitude of assessment of the legislature.

a) restriction to manifest violations applies to the question as to the maximum amount of a guarantee that can be responsibly given, with regard to the risks of its being called on and the consequences then to be expected for the budget legislature's freedom to act. Whether and how far a justiciable limit of the extent of guarantee authorisations can be derived directly from the principle of democracy is questionable. At all events, unlike in the case of borrowing, Article 115.1 of the Basic Law does not explicitly provide for such a restriction (see Kube, in: Maunz/Dürig, GG, Art. 115, marginal nos. 78, 124, 241-242; Wendt, in: von Mangoldt/Klein/Starck, GG, 6th ed. 2010, Art. 115, marginal no. 26; for a more cautious view on the old legal position, see Siekmann, in: Sachs, GG, 5th ed. 2009, Art. 115, marginal no. 21, according to whom guarantees of various types, at all events in the amount of the payment obligations which experience has shown to be realised, should be included in the figure for borrowing without restriction). How far what is known as the brake on debt, which was incorporated into the Basic Law in the year 2009 by the 57th Act Amending the Basic Law (57. Gesetz zur Änderung des Grundgesetzes; Article 109.3, Article 115.2 of the Basic Law), nevertheless imposes an obligation to observe upper limits need not be decided with regard to the challenged statutes. At all events, in the present connection with its general standards based on the principle of democracy, only a manifest overstepping of extreme limits is relevant.

b) With regard to the probability of having to pay out on guarantees, the legislature has a latitude of assessment, which the Federal Constitutional Court must respect. The same applies to the assessment of the future soundness of the federal budget and the economic performance capacity of the Federal Republic of Germany. In this connection, the Federal Constitutional Court may not with its own expertise usurp the decisions of the

legislative body which is the institution first and foremost democratically appointed for this task.

II.

The right to elect the Bundestag under Article 38.1 of the Basic Law is not violated by the Act on Financial Stability within the Monetary Union and the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism. The Bundestag has not eroded its right to decide on the budget in a constitutionally impermissible manner and thus disregarded the material content of the principle of democracy.

1. Insofar as it is possible to derive from the democratic principles of Article 20.1 and 20.2 of the Basic Law, which are declared unamendable by Article 79.3 of the Basic Law, a prohibition for configurations like the present one to burden present or future federal budgets with disproportionately great commitments, even if these are only guarantees, it is at all events impossible in the present case to establish that such a limit to burdens has been overstepped.

An upper limit to the giving of guarantees following directly from the principle of democracy could only be overstepped if in the case where the guarantee is called upon the guarantees took effect in such a way that budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed. This cannot be established in the present case. The legislature considers that the guarantee authorisation contained in § 1 of the Euro Stabilisation Mechanism Act in the amount of 147.6 billion euros (123 billion euros plus 20%) is acceptable from the point of view of the budget even in addition to the guarantee authorisation in favour of Greece contained in the Act on Financial Stability within the Monetary Union in the amount of 22.4 billion euros; this is constitutionally unobjectionable. The same applies to the expectation that even in the case that the guarantee risk were realised in full, the losses of approximately 170 billion euros could be refinanced by way of increases of revenue, reductions of expenses and long-term government bonds, albeit possibly with the loss of growth possibilities and creditworthiness with corresponding losses of income and risk premiums. In this respect, it is in particular not relevant whether the guarantee sum is potentially far greater than the largest federal budget item and substantially exceeds half of the federal budget, because this alone cannot be the yardstick of a constitutional limit of the legislature's latitude for action.

2. None of the challenged statutes creates or consolidates an automatic effect as a result of which the German Bundestag would relinquish its right to decide on the budget. At present there is no occasion to assume that there is an irreversible process with adverse consequences for the German Bundestag's budget autonomy.

a) Even the currently applicable legal basis of the monetary union, which cannot be influenced by the two challenged statutes, does not permit an automatic effect by which the German Bundestag could relinquish its budget autonomy. All legal and factual effects of the two challenged statutes, in particular those of the further steps of execution contained in them, are decisively influenced by the treaty conception of the monetary union. The development of this is laid down in a foreseeable manner and subject to parliamentary accountability (see BVerfGE 89, 155 <204>; 97, 350 <372-373>; 123, 267 <356>). The German Consent Act to the Treaty of Maastricht (Federal Law Gazette II 1992 p. 1253; now as amended by the Treaty of Lisbon, Federal Law Gazette II 2008 p. 1038) continues to guarantee with sufficient constitutional detail that the Federal Republic of Germany does not submit to the automatic creation of a liability community which is complex and whose course can no longer be controlled (see BVerfGE 89, 155 <203-204>). De facto changes which might cast question on the binding character of this legal framework cannot at present be established by the Court; the same applies with regard to the current discussion on changes in the incentive system of the monetary union.

b) The challenged statutes contain no normative provisions which could - in the necessary overall consideration - undermine the principle of permanent budget autonomy.

aa) The Act on Financial Stability within the Monetary Union restricts the guarantee authorisation by amount, indicates the purpose of the guarantee, provides to a certain extent for the payment modalities and makes certain agreements with Greece the basis of the giving of guarantees. Thus the content of the guarantee authorisation is largely defined. Against this background it is acceptable that the German

Bundestag participates in the further execution of the statutes merely in the form of giving information to the budget committee.

bb) The Euro Stabilisation Mechanism Act defines not only the purpose and the basic modalities, but also the volume of possible guarantees, which cannot be altered either by the Federal Government or by the special purpose vehicle without the consent of the Bundestag. The giving of guarantees is possible only during a particular period of time and it is made contingent on agreeing an economic and financial programme with the Member State affected. This programme must be consented to by the mutual agreement of the euro area Member States, which gives the Federal Government a determining influence.

However, § 1.4 of the Act merely obliges the Federal Government to endeavour, before giving guarantees, to reach agreement with the German Bundestag's budget committee, which has the right to state an opinion (sentences 1 and 2). Insofar as compelling reasons mean that a guarantee must be given before agreement is reached, the budget committee must be subsequently informed without delay; the absolute necessity of giving the guarantee before agreement is reached must be justified in detail (sentence 3). in addition, the budget committee is to be informed quarterly on the guarantees given and their correct use (sentence 4). On the basis of these provisions alone, the continuing influence of the Bundestag on the guarantee decisions would not be ensured by procedural precautions - over and above the general political supervision of the Federal Government. For these precautions - even together with the objective, the amount of the guarantee limits and the time-limit of the Euro Stabilisation Mechanism Act - would not prevent parliamentary budget autonomy being affected in a manner which would adversely affect the right to vote. It is therefore necessary, in order to avoid unconstitutionality, for § 1.4 sentence 1 of the Euro Stabilisation Mechanism Act to be interpreted to the effect that the Federal Government, subject to the cases named in sentence 3, is obliged to obtain the prior consent of the budget committee.

D.

This decision was passed by seven votes to one insofar as it treats the constitutional complaints as admissible.

Voßkuhle, Di Fabio, Meilinghoff,

Lübbe-Wolff, Gerhardt Landau,

Huber, Hermanns

§59. Estonian Supreme Court, Constitutional Judgment on the constitutionality of the European Stability Mechanism, Constitutional Judgment 3-4-1-6-12, July 12 th, 2012 http://www.riigikohus.ee/?id=1347

FACTS AND COURSE OF PROCEEDINGS

1. At a meeting of the European Council on 16–17 December 2010 the European Union (EU) Member States agreed about the need to establish for EU Member States where the single currency euro is in use a permanent stability mechanism for ensuring the financial stability (of the euro area). At the same meeting the EU Member States also agreed on amendment of Article 136 of the Treaty on the Functioning of the European Union (TFEU) in such a manner that the euro area Member States would have a clear authorisation to establish a stability mechanism. On 11 July 2011 the Minister of Finance signed the Treaty establishing the European Stability Mechanism (ESM) (the Treaty). On 9 December 2011 at a meeting of the European Council the Heads of Government of the euro area Member States agreed on the amendment of the Treaty.

2. On 26 January 2012 the Chancellor of Justice addressed the Minister of Finance with a memorandum concerning the amendments to the Treaty. The Minister of Finance replied to the Chancellor of Justice on 1 February 2012.

3. On 2 February 2012 the Government of the Republic adopted an order no. 60 “Approval of the Draft Treaty establishing the European Stability Mechanism and grant of authorisation”. By the order the Draft Treaty was approved and the permanent representative of Estonia to the EU was authorised to sign it. On 2 February 2012 the representative of

Estonia in Brussels signed the amended Treaty which the Member States are required to ratify. The Treaty is planned to enter into force in July 2012.

4. On 12 March 2012 the Chancellor of Justice had recourse to the Supreme Court, relying on § 6(1)4) of the Constitutional Review Court Procedure Act (CRCPA), with a request to declare Article 4(4) of the signed Treaty to be in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution.

5. By a ruling of 22 March 2012 the Constitutional Review Chamber of the Supreme Court referred the case to the Supreme Court *en banc*. The Supreme Court *en banc* asked the opinion of experts on the constitutionality of Article 4(4) of the Treaty. Opinions were submitted to the Supreme Court *en banc* by Dr Anneli Albi, the Department of Economics of the Estonian Business School, the Tallinn University Law School, the Faculty of Social Sciences of the Tallinn University of Technology and the Faculty of Law of the University of Tartu.

REQUEST OF THE CHANCELLOR OF JUSTICE

6. The Chancellor of Justice deems the request admissible. § 6(1)4) of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or a provision thereof to be in conflict with the Constitution. The Treaty is a signed international agreement. Review of the constitutionality of international agreements differs from the review provided for in § 142(1) of the Constitution. The CRCPA has granted the Chancellor of Justice the competence to challenge international agreements in order to guarantee what has been provided for in § 123(1) of the Constitution, i.e. that Estonia would not enter into international agreements which are in conflict with the Constitution. Prior submission of a proposal is not a precondition for having recourse to the Supreme Court. If according to the earlier wording of the CRCPA the Chancellor of Justice could file a request after the entry into an international agreement, i.e. after ratification in case of an agreement subject to ratification, then as of 2005 the Act provides that a request may be filed already after signature.

7. The Treaty is an international agreement. It will establish an international financing institution ESM which is not an EU institution. The ESM will have its own members, its own voting procedure, and its employees will have their own privileges and immunities. An international agreement is an agreement governed by international law. The Treaty will be governed by international law; the Contracting Parties to the Treaty will create rights and obligations for themselves by the agreement. For instance, Estonia will be required to irrevocably and unconditionally subscribe the authorised capital stock.

8. In EU law there is a principle of attributed competences and the EU has three types of competences – exclusive competence, shared competence and competence to take measures for supporting, coordinating or complementing measures taken by Member States. Although the monetary policy of the euro area is within the exclusive competence of the EU, then based on Article 5(1) of the TFEU, the EU plays only a supporting role in coordination of economic policies. It means that in the said area the Member States may independently exercise their competence, including to cooperate to this end and to involve EU institutions in the cooperation. It does not arise from the applicable EU law or from Article 136 of the TFEU that the Member States have an obligation to establish a stability mechanism like the ESM. Only the legislation in the adoption of which the procedure provided for in the Treaties establishing the European Union has been adhered to is the legislation of the EU. This position is supported also by the planned amendment to Article 136 of the TFEU. Since the Treaty is not an Act of the secondary law of the EU, the Supreme Court can verify its accordance with the Constitution.

9. Article 4(4) of the Treaty interferes with the principles of parliamentary democracy and reservation by the parliament, and the budgetary powers of the *Riigikogu*. The principle of parliamentary democracy embodies the chain of legitimacy and political responsibility where the executive power is liable to the parliament and the parliament in turn to the people in whom the supreme authority is vested. Based on the reservation by the parliament, the *Riigikogu*shall establish all provisions relevant from the aspect of the functioning of the state and the society. On the basis of § 115(1) of the Constitution, for each year the *Riigikogu* passes a law which contains a budget that sets out all items of government revenue and expenditure. The budget is also an instrument of the *Riigikogu* by which the obligation provided for in § 14 of the Constitution to guarantee the fundamental rights and freedoms of persons is fulfilled. § 65 10) of the Constitution pursuant to which

the *Riigikogu*, acting on a proposal of the Government of the Republic, decides whether to authorise government borrowing or assumption of other financial obligations is related to the budgetary powers. The budgetary powers of the *Riigikogu* is one of the most central elements of the parliamentary organisation of state and the state budget is one of the most important source documents of governance. Budgetary-political choices are within the *Riigikogu*'s core competence where the legislature has wide discretion.

10. The nominal value of the capital stock to be subscribed by Estonia in the Treaty is about 8.5% of the gross domestic product; this means that it is an extremely vast proprietary obligation. In accession to the Treaty the budgetary-political choices of the *Riigikogu* will diminish. It is not to be ruled out that the debt obligations of the ESM shall be reflected as a government debt for the purposes of Article 126(2)(b) of the TFEU and Article 2 of Protocol No. 12 to the TFEU.

11. By ratifying the Treaty the *Riigikogu* will decide only on the assumption of a proprietary obligation, but it has been provided very generally on which conditions the ESM may use the right guaranteed by Estonia to grant financial assistance. A declarative condition that the ESM will exercise its right to grant financial assistance on strict and appropriate conditionality if it is indispensable for safeguarding financial stability in the euro area as a whole and in its member states is not sufficient, with a view to the volume of proprietary obligations which may arise, to legitimise all subsequent decisions of the ESM. It arises from § 65 10) of the Constitution in conjunction with the principle of parliamentary democracy and the budgetary powers of the *Riigikogu* that the *Riigikogu* shall have an option to affect through the Government of the Republic the conditions of a financial assistance agreement. An inevitable precondition for the involvement of the *Riigikogu* is that the Board of Governors of the ESM will take decisions on matters related to the grant of financial assistance provided for in Article 5(6)(f) and (g) of the Treaty exclusively by mutual agreement. However, Article 4(4) of the Treaty enables the ESM to approve financial assistance by a qualified majority of 85% of the votes cast, i.e. the Estonian vote is not decisive. In order to reach 85% only the consent of the six major countries is required.

12. The seriousness of the interference is deepened by the fact that in the emergency procedure provided for in Article 4(4) of the Treaty the volume of financial assistance is limited only to the general lending volume of the ESM. Article 4(4) of the Treaty in Estonian language provides that an emergency procedure shall be used if a failure to urgently adopt a decision would threaten to a significant extent the economic and financial sustainability of the euro area. However, the Treaty in English, German, French and Finnish does not contain the requirement to a significant extent for which reason the emergency procedure according to those languages resembles all the more the general definition in Article 12(1) of the Treaty for grant of financial assistance. The emergency reserve fund established under Article 4(4) of the Treaty does not eliminate interference with constitutional principles accompanied by emergency procedure.

13. Neither the volume nor the nature of the obligations can be compared to other assumed international obligations. Although Estonia cannot prevent the International Monetary Fund (IMF) from granting loans to a country, Estonia's contribution to the IMF is limited to about 108 million euros which amounts to 0.7% of the gross domestic product.

14. Although it is questionable whether the interference with the Constitution accompanying Article 4(4) of the Treaty can be constitutional altogether, the benefit of the contested provision shall be considered on the one hand and the seriousness of the interference on the other. The general purpose of the ESM is to safeguard the financial stability of the euro area and its Member States. The purpose of Article 4(4) of the Treaty is to guarantee to the ESM an option to take necessary decisions in every situation and to ensure the effective functioning of the ESM.

15. Safeguarding the financial stability of the euro area and its Member States is an important purpose but it is decisive to what extent the measure favours the achievement of the purpose. In order to implement an emergency procedure provided for in Article 4(4) of the Treaty it is necessary to have the votes in favour of at least six countries in the case of at least one of which, i.e. Germany, prior approval by the parliament is required based on its Constitution. This takes time. Consequently, an emergency procedure may not always guarantee the speed and efficiency of taking decisions which is pursued by the contested Article. In addition, the speed and efficiency of taking decisions is not guaranteed in cases where one country whose contribution is more than 15% (Germany, France or Italy) is opposed while the rest of the countries as well as the European

Commission and the European Central Bank (ECB) regard the decision as necessary.

16. The benefit accompanying Article 4(4) of the Treaty to the financial stability of the euro area does not outweigh the interference with the principles of parliamentary democracy and reservation by the parliament, and the budgetary powers of the *Riigikogu*. Consequently, the provision is in conflict with the Constitution.

(…)

CONTESTED PROVISION

91. Paragraph (4) of Article 4 "Structure and voting rules" of the Treaty:
"By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten to a significant extent the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast.
Where the emergency procedure referred to in the first subparagraph is used, a transfer from the reserve fund and/or the paid-in capital to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the financial support granted under that emergency procedure. The Board of Governors may decide to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital."

OPINION OF THE SUPREME COURT *EN BANC*

92. The Chancellor of Justice submitted to the Supreme Court a request to declare Article 4(4) of the Treaty in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution.

93. To adjudicate the case, the Supreme Court *en banc* first addresses the nature of the ESM (I). Next, the Supreme Court *en banc* weighs the admissibility of the request submitted by the Chancellor of Justice and determines the extent of the review of the request of the Chancellor of Justice (II). The Supreme Court *en banc* identifies the relevant principles of the Constitution and addresses their interference (III). The Supreme Court *en banc* also establishes the purpose of Article 4(4) of the Treaty and assesses its legitimacy (IV). Thereafter the Supreme Court *en banc* verifies the proportionality of the interference arising from Article 4(4) of the Treaty (V). In part VI of the judgement the Supreme Court *en banc* summarises the main positions outlined in the judgement. In part VII of the judgement the Supreme Court *en banc* addresses issues related to the ratification of the Treaty and in part VIII addresses issues related to Estonia's membership of the European Union.

I. Nature of the ESM

94. In order to assess the constitutionality of Article 4(4) of the Treaty, the Supreme Court *en banc* first introduces its interpretation of the Treaty. The Supreme Court *en banc* notes that based on Article 37(3) of the Treaty, the final interpreter of the Treaty is the Court of Justice of the European Union.

95. Contracting Parties to the Treaty are 17 countries of the euro area. The Treaty will establish an international financing institution ESM which will grant financial assistance to euro area Member States, including to Estonia if necessary, for the purpose of safeguarding the financial stability of the euro area.

96. The authorised capital stock of the ESM is EUR 700 000 million, there is seven million shares, having a nominal value of EUR 100 000 each (Article 8(1) of the Treaty). The authorised capital stock is divided into paid-in shares (total nominal value EUR 80 000 million) and callable shares (EUR 620 000 million – the first sentence of Article 8(2) of the Treaty).

97. Pursuant to Article 8(4) of the Treaty, ESM Members undertake to provide their contribution to the authorised capital stock (EUR 700 000 million) in accordance with their contribution key in Annex I as follows: Kingdom of Belgium 3,4771%, Federal Republic of Germany 27,1464%, Republic of Estonia 0,1860%, Ireland 1,5922%, Hellenic Republic 2,8167%, Kingdom of Spain 11,9037%, French Republic 20,3859%, Italian Republic 17,9137%, Republic of Cyprus 0,1962%, Grand Duchy of Luxembourg 0,2504%, Malta 0,0731%, Kingdom of the Netherlands 5,7170%, Republic of Austria 2,7834%, Portuguese Republic 2,5092%, Republic of Slovenia 0,4276%, Slovak Republic 0,8240%, Republic of Finland 1,7974%.

98. According to the contribution key arising from Annex I to the Treaty, Estonia is required to subscribe 0,1860% of the authorised capital stock which pursuant to Annex II to the Treaty is 13 020 shares with the nominal value of 100 000 euros (Article 8(1) and (2) of the Treaty). Consequently, Estonia's contribution amounts to 1 302 million euros. The capital corresponding to the contribution key contains both paid-in (148.8 million euros) and callable (1 153.2 million euros) capital stock, total of 1 302 million euros. On the basis of Article 42(1) of the Treaty, such amount of capital will apply to Estonia for a period of twelve years after the date of adoption of the euro.

99. Estonia shall be required to pay the paid-in capital to the ESM within five years in equal instalments (Article 41(1) of the Treaty). Estonia shall be required to pay the callable capital (1 153.2 million euros) to the ESM when it is called in under Article 9 of the Treaty.

100. Under Article 9 of the Treaty, unpaid capital may be called in:
1) at any time by a unanimous decision of the Board of Governors (Article 5(6)(c), Article 9(1) of the Treaty);
2) by a simple majority decision of the Board of Governors to restore the level of paid-in capital (i.e. 80 000 million euros) if the amount of the latter is reduced by the absorption of losses below 80 000 million euros (Article 9(2) of the Treaty);
3) by the Managing Director if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors (Article 9(3) of the Treaty). But only in a situation where losses arising in the ESM operations cannot be covered from the reserve fund of the ESM or from the paid-in capital, i.e. 80 000 million euros (Article 25(1) of the Treaty).

101. The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price (Article 8(5) of the Treaty). The Treaty does not give rise to an obligation of an ESM Member to subscribe authorised capital stock (700 000 million euros) to the extent not corresponding to the contribution key of that ESM Member. An ESM Member shall not be required to subscribe contributions of other Contracting States. Consequently, the Treaty does not give rise to an obligation of an ESM Member to subscribe or pay in ESM capital to a greater extent than that agreed upon in Annex II to the Treaty. In case of Estonia it is 13 020 shares, i.e. 1 302 million euros.

102. No ESM Member shall be liable for obligations of the ESM (the second sentence of Article 8(5) of the Treaty). The obligations of ESM Members to contribute to the authorised capital stock are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM (the last sentence of Article 8(5) of the Treaty).

103. Although the capital stock of the ESM is EUR 700 000 million, the maximum lending volume of the ESM is set at EUR 500 000 million (paragraph (6) of the preamble to and Article 41(2) of the Treaty). This means that the ESM will not issue greater loans.

104. Article 25(2) of the Treaty allows to increase the volume of the callable capital. If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. A revised increased capital means that a call made to the ESM Members pursuant to Article 9(2) or (3) increases compared to the initial one. When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members (Article 25(3) of the Treaty). At the same time it is still a call for subscribed but unpaid capital; thereby a maximum limit corresponding to the subscribed capital stock applies, in case of Estonia 1 302 million euros (Article 8(1) of the Treaty in conjunction with Annex I thereto). Such a position has been adopted also by the Chancellor of Justice in paragraph 53 of his request.

105. Article 25(2) of the Treaty does not constitute a legal basis for changing the amount of the authorised capital stock provided for in Article 8(1) of the Treaty (EUR 700 000 million), the bases for capital subscription specified in Annex I and II to the Treaty, or the ESM Member's contribution to the capital stock. Since the ESM Members undertake to subscribe the capital stock according to the contribution key in Annex I and the liability of each ESM Member shall be limited to its portion of the authorised capital stock (Article 8(5) of the Treaty), the Members are not required to subscribe greater capital stock than agreed upon in Annex I to the Treaty or make a contribution larger than their portion. Consequently, the volume of the callable capital provided for in Article 25(2) of the Treaty can be increased in case of every ESM Member only to the limit agreed upon in Annex I and II to the Treaty, that means that the total amount of paid-in and

callable capital in case of Estonia is 1 302 million euros.

106. Should it be necessary to increase the capital stock, the Board of Governors shall, pursuant to Article 10(1) of the Treaty, change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision enters into force after the ESM Members have notified the General Secretariat of the Council of the European Union of the completion of their applicable national procedures (the third sentence of Article 10(1) of the Treaty). If all the ESM Members do not give their consent, the authorised capital stock will not be changed.

107. Pursuant to Article 48 of the Treaty, the Treaty shall enter into force on the date when instruments of ratification, approval or acceptance have been deposited by signatories whose initial subscriptions represent no less than 90% of the total subscriptions. If less than 100% of shares have been subscribed, the key in Annex I will then be recalculated and the total authorised capital stock in Article 8(1) and Annex II and the initial total aggregated nominal value of paid-in shares in Article 8(2) shall be reduced accordingly. This means that if some states withdraw, the maximum liability of any other state will not increase.

II. Admissibility and extent of the request of the Chancellor of Justice

108. The Chancellor of Justice notes in his request that the Treaty is an international agreement because it has been entered into between states, the Contracting Parties have not expressed with the Treaty intent to subject the Treaty to the laws of any state and it does not constitute EU law. Pursuant to § 123(1) of the Constitution, the Republic of Estonia may not enter into international treaties which are in conflict with the Constitution.

109. The Supreme Court *en banc* agrees with the position of the Chancellor of Justice that the Treaty is an international agreement for the purposes of § 123(1) of the Constitution. In the assessment of the Supreme Court *en banc* the Treaty corresponds to the requirements provided for in Article 2(1)(a) of the Vienna Convention on the Law of Treaties because it is an international agreement entered into between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

110. Primary and secondary law of the EU are distinguished for the purposes of the TFEU and TEU. The basis of the European Union law is comprised of Treaties establishing the European Union and Accession Treaties (including the TFEU and TEU), i.e. the primary law which serves as the basis for the legislation adopted in EU institutions, which is the secondary law (regulations, directives, decisions and recommendations within the meaning of Article 288 of the TFEU). Based on competency and procedural rules and requirements of formalities, the Treaty is clearly not the primary law of the EU nor an amendment of the founding treaties of the European Union for the purposes of Article 48 of the TEU. On the same considerations the Treaty is not a legislative act within the secondary law of the EU. The Treaty will not be adopted by an EU institution. The Supreme Court *en banc* is of the opinion that a similar position is shared by experts, e.g. the Faculty of Law of the University of Tartu. For the above-mentioned reasons the Constitution of the Republic of Estonia Amendment Act does not apply in the adjudication of this case.

111. § 6(1)4) of the CRCPA grants the Chancellor of Justice the right to file with the Supreme Court a request to declare a signed international agreement or a provision thereof to be in conflict with the Constitution. The Supreme Court *en banc* is of the opinion that § 6(1)4) of the CRCPA grants the Chancellor of Justice the right to challenge a signed international agreement or a provision thereof both before the ratification of the international agreement, i.e. by way of preliminary review, and after the ratification, i.e. by way of subsequent review. The Supreme Court *en banc*holds that the competence of the Chancellor of Justice arising from § 6(1)4) of the CRCPA is not in conflict with the Constitution.

112. § 139(1) of the Constitution grants the Chancellor of Justice the right to inspect the legislative instruments of the legislative and executive branch of government and of local authorities in terms of their accordance with the Constitution. The Supreme Court *en banc* holds that § 139(1) of the Constitution grants the Chancellor of Justice the right to challenge an act in accordance with which the *Riigikogu* ratifies an international agreement.

113. § 139(2) of the Constitution provides that the Chancellor of Justice also considers proposals made to the Chancellor of Justice concerning the work of state authorities. Neither § 139(1) nor (2) of the Constitution give rise to the competence of the Chancellor of Justice to challenge an international agreement. The

Supreme Court *en banc* notes that the Constitution does not prohibit the legislature from granting to state bodies competences not specified in the Constitution if this does not contradict the Constitution. The Supreme Court found in a case of granting to the National Audit Office the competence to inspect local authorities that compared to constitutional competence, the imposition of additional duties on the National Audit Office must be justifiable by some good reason (judgement of the Constitutional Review Chamber of the Supreme Court of 19 March 2009 in case no. 3-4-1-17-08, point 45).

114. In assessing the competence of the Chancellor of Justice to carry out a preliminary review of an international agreement, it will be taken into account that pursuant to § 123(1) of the Constitution, the Republic of Estonia may not enter into international treaties which are in conflict with the Constitution. A preliminary review of the constitutionality of an international agreement enables the prevention of entry into an unconstitutional agreement and of subsequent difficulties which may occur if the unconstitutionality of the international agreement is established in the course of a subsequent review. According to § 15(3) of the CRCPA, if an international agreement or a provision thereof is declared to be in conflict with the Constitution, the body which entered into the agreement is required to withdraw from it, if possible, or commence denunciation of the international agreement or amendment thereof in a way which guarantees its accordance with the Constitution.

115. A signed unconstitutional international agreement does not become constitutional when ratified by the *Riigikogu*. A preliminary review prevents a situation in which an unconstitutional international agreement should later be withdrawn or denunciated. If doubts as to the unconstitutionality of an international agreement arise after the signing thereof, it is appropriate to verify the constitutionality of the international agreement before its ratification.

116. Such an interpretation also allows the state to take steps to amend the text of an already signed unconstitutional international agreement and to bring it into accordance with the Constitution before it is ratified and brought into force. If a state wishes to amend an international agreement which has entered into force in order to bring it into accordance with the Constitution, this wish in itself does not release the state from carrying out the international agreement which has entered into force.

117. The Minister of Finance holds that since the Chancellor of Justice did not follow the required pre-litigation procedure in the framework of subsequent review, his request is in conflict with § 142 of the Constitution. The Supreme Court *en banc* does not concur with this position of the Minister of Finance. § 142 of the Constitution provides for a procedure for the performance of the duty of the Chancellor of Justice provided for in § 139(1) of the Constitution. The Treaty was signed under the authorisation of the Government of the Republic but does not make a signed international agreement a legislative instrument passed by the legislative or executive branch of government for the purposes of § 142 of the Constitution. It is in line with the meaning of § 123(1) of the Constitution that the legislature has, in accordance with § 6(1)4) of the CRCPA, allowed the Chancellor of Justice to challenge a signed international agreement. If the legislature imposed on the Chancellor of Justice an additional duty, it was also free to choose the procedure for performing it and was not required to tie it to the procedure provided for in § 142 of the Constitution. Therefore, § 142 of the Constitution does not require the Chancellor of Justice to have first submitted his proposal to the body which signed the international agreement, i.e. the Government of the Republic.

118. In keeping with the aforesaid, the Supreme Court *en banc* holds that the request of the Chancellor of Justice is admissible.

119. The Supreme Court *en banc* notes in addition that on 26 January 2012 the Chancellor of Justice addressed the Minister of Finance with a memorandum to which the Minister of Finance replied on 1 February 2012. The Chancellor of Justice found in his memorandum that the emergency procedure established with the amendments to the Treaty may be in conflict with the Constitution, and did not rule out that he would deem it necessary to make further comments on the Treaty. The Chancellor of Justice recommended that Minister of Finance to take steps before the signing of the Treaty to ensure the accordance of the Treaty with the Constitution.

120. In the adjudication of the case, the Supreme Court may declare an international agreement which has entered into force or has not yet entered into force or a provision thereof to be in conflict with the Constitution (§ 15(1)3) of the CRCPA). The Chancellor of Justice requested to declare "Article 4(4) of the Treaty establishing the European Stability Mechanism signed on 2 February 2012 in Brussels to be in conflict with the principle of parliamentary

democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution". The Supreme Court *en banc* holds that the Chancellor of Justice requested the review of the constitutionality of only Article 4(4) of the Treaty and not of the whole Treaty. Such a position was expressed by the Chancellor of Justice in the statement of reasons for his request and in the thesis submitted for the session of the Supreme Court *en banc*. The Chancellor of Justice said also at the session that he was challenging only Article 4(4) of the Treaty.

121. In keeping with the aforesaid, the Supreme Court *en banc* verifies the constitutionality of the Treaty only to the extent challenged by the Chancellor of Justice, and assesses the constitutionality of Article 4(4) of the Treaty.

III. Principles of the Constitution and interference therewith

A. Positions of the Chancellor of Justice on the principles of the Constitution and interference therewith

122. First the Supreme Court *en banc* shall summarise of the main positions on the interference with the principles of the Constitution presented in the request of the Chancellor of Justice.

123. In his request the Chancellor of Justice deems relevant four principles of the Constitution: parliamentary democracy; reservation by the parliament; the budgetary powers of the *Riigikogu* and the competence of the *Riigikogu*to decide on the assumption of financial obligations for the state. Concerning the budgetary powers of the *Riigikogu* (§ 115 and § 65 6) of the Constitution) the Chancellor of Justice holds that this is one of the most central elements of the parliamentary organisation of state and that the state budget is one of the most important source documents of governance. Budget policy choices are within the *Riigikogu*'s core competence where the legislature has wide discretion. At the same time, the budget is also an instrument of the *Riigikogu* by which the obligation provided for in § 14 of the Constitution to guarantee the fundamental rights and freedoms of persons is fulfilled. The Chancellor of Justice notes that the competence of the *Riigikogu* to decide on the assumption of financial obligations for the state is closely related to the budgetary powers of the *Riigikogu* and subjected to the reservation by the parliament (§ 65 10) of the Constitution, also § 121(4) of the Constitution).

124. The Chancellor of Justice compares the obligations arising for Estonia from the Treaty with the provision of a state guarantee (for the purposes of § 402 of the State Budget Act), and finds that provision of a state guarantee must be subjected to reservation by the parliament. This is because a guarantee does not bring about an obligation to pay money to the recipient of the guarantee or his or her creditors, but if the guarantee should be collected in the future, then it will lead to expenses for the state and affect the state budget, irrespective of the *Riigikogu*'s will. The Chancellor of Justice holds that an obligation to subscribe callable shares is a financial obligation for the purposes of § 65 10) and § 121 4) of the Constitution. Since it is a significant financial obligation, merely ratifying the Treaty based on § 121 4) of the Constitution is not enough to adhere to the principle of reservation by the parliament and that of the budgetary powers of the *Riigikogu*. The Chancellor of Justice admits that the Constitution does not explicitly provide a limit on guarantees provided or other financial obligations assumed by the state of Estonia. A situation wherein the*Riigikogu* decided to provide a guarantee or assume other obligations to an extent– in the event of the obligations needing to be performed – that would create the possibility that the *Riigikogu* would not be able to decide on the merits of the budgetary expenditure of future years would be in conflict with the principle of democracy.

125. The Chancellor of Justice emphasises that it would be in conflict with the principle of democracy if the fulfilment of extensive financial obligations assumed would restrict the *Riigikogu*'s discretion to such an extent that the *Riigikogu*would in fact lose its ability to make fundamental political choices through budgetary decisions, including the ability to ensure the fundamental rights of persons at the level required by the Constitution. The Chancellor of Justice notes that predicting the occurrence of such a situation is complicated at the moment of provision of a guarantee or assumption of other financial obligations required to be performed in the future.

B. Position of the Supreme Court *en banc* on the principles of the Constitution under review

126. The Supreme Court *en banc* addresses hereunder the principles of the Constitution which it deems the most relevant in the adjudication of this case.

127. Under § 1(1) of the Constitution, Estonia is an independent and sovereign democratic republic wherein supreme political authority is vested in the people. With this provision the principle of sovereignty has been fixed constitutionally as the basis for the Estonian people and the state of Estonia. The sovereignty of the people gives rise to the sovereignty of the state and thereby all state institutions obtain their legitimation from the people. The core essence of sovereignty is the right of discretion in all matters, irrespective of external influences. One element of the state's sovereignty is its financial sovereignty, which contains taking decisions on budgetary matters and on the assumption of financial obligations for the state.

128. The sovereignty clause of the Estonian Constitution is strict in wording, providing that the independence and sovereignty of Estonia are timeless and inalienable. The sovereignty provision of the Estonian Constitution may not be interpreted to the effect that Estonia may not enter into international agreements or assume obligations before other states. The norms of the Constitution are characterised by wide discretion of interpretation. In the assessment of the Supreme Court *en banc*, despite the strict sovereignty clause the present-day context must be considered in furnishing sovereignty.

129. In legal literature it has been found that before the adoption of the Vienna Convention on the Law of Treaties in 1969, treaties had to be interpreted restrictively and in favour of the sovereignty of the state. This Convention does not contain such a principle and as of the judgement of the European Court of Human Rights of 21 February 1975 in the court case *Golder vs. United Kingdom*, practice which based on a thesis that a convention is a treaty with which sovereign states agree to restrict their sovereignty was established. An international agreement is an instrument by which every Contracting State assumes an obligation to act in a certain manner in certain cases. This means that the state waives the option to choose a different manner of conduct in such cases. Consequently, the state waives a part of its sovereignty, no matter how small of a part it is in that specific case. Estonia has entered into over 1000 international agreements.

130. Entry into international agreements is allowed by Chapter IX of the Constitution. If sovereignty is interpreted as absolute, entry into international agreements should not be allowed, because entering into international agreements always means restricting one's sovereignty to some extent. It follows that the Constitution does not require, despite the strict wording of the sovereignty clause, observation of absolute sovereignty. In her opinion submitted to the Supreme Court, Dr A. Albi refers to the fact that membership of the EU and in international organisations has become a natural part of sovereignty in this day and age.

131. Next, the Supreme Court *en banc* addresses the principle of a democratic state subject to the rule of law. § 10 of the Constitution provides that the rights, freedoms and duties set out in the second chapter do not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and which are in accordance with the principles of human dignity, social justice and a democratic state subject to the rule of law. According to § 3(1) of the Constitution, governmental authority is exercised solely pursuant to the Constitution and laws which are in accordance therewith. § 1(1), § 3(1) and § 10 of the Constitution express the principle of a democratic state subject the rule of law. The principle of a democratic state subject to the rule of law means that the general principles of law that are recognised in the European legal space are valid in Estonia (judgement of the Constitutional Review Chamber of the Supreme Court of 17 February 2003 in case no. 3-4-1-1-03, point 14).

132. The Supreme Court has held that democracy implies the exercising of power with the people’s participation and making important management decisions on a basis that is as broad and harmonized as possible (judgement of the Constitutional Review Chamber of the Supreme Court of 21 December 1994 in case no. III-4/A-11/94). According to the Constitution, democracy is representative democracy where political authority is indeed vested in the people but political authority is exercised by different public bodies under the people's authorisation. The principle of democracy is aimed at the legitimacy of the public authority, containing formation, legitimation and supervision of public bodies, and affecting all stages of formation of a political will. The principle of a democratic state subject to the rule of law, on the other hand, governs the content, extent and manner of the functioning of political authority.

133. The nature of a democratic state subject to the rule of law is also expressed by the principle of reservation by the parliament, which regulates the division of power between the legislature and executive. The Supreme Court has held that what the legislature is justified or obliged to do under the Constitution cannot be

delegated to the executive, not even temporarily and under the condition of court supervision (judgement of the Constitutional Review Chamber of the Supreme Court of 12 January 1994 in case no. III-4/A-1/94).

134. Sovereignty, the principle of a democratic state subject to the rule of law and the principle of reservation by the parliament specifying the latter are general principles. The Constitution contains several norms which specify these principles. The Supreme Court *en banc* notes that the state's financial sovereignty, the principles of a democratic state subject to the rule of law and of reservation by the parliament are also specified in § 65 6) and 10) and § 115(1) and § 121 4) of the Constitution.

135. § 65 of the Constitution provides for the competence of the *Riigikogu* to decide on various matters of the state. Pursuant to § 65 6) of the Constitution, the *Riigikogu* passes the national budget and approves the report on its implementation. The Supreme Court *en banc* holds that in furnishing § 65 6) of the Constitution, the connection of this provision with Chapter VIII of the Constitution "Finance and the National Budget", primarily with § 115(1), pursuant to which the *Riigikogu* passes an act for each year that contains a budget that sets out all items of government revenue and expenditure, must be taken into account.

136. The Supreme Court *en banc* holds that § 65 6) and § 115(1) of the Constitution give rise to the budgetary powers of the *Riigikogu*. The Supreme Court *en banc* agrees with the Chancellor of Justice that the budgetary powers of the *Riigikogu* are one of the core competences of the *Riigikogu* and its essence is the right and obligation of the*Riigikogu* to decide on the revenue and expenditure of the state budget.

137. The Supreme Court *en banc* is of the opinion that § 65 10) and § 121 4) of the Constitution give rise to the competence of the *Riigikogu* to decide on the assumption of financial obligations for the state. § 65 10) of the Constitution provides that the *Riigikogu*, acting on a proposal of the Government of the Republic, decides whether to authorise government borrowing or the assumption of other financial obligations. Under § 121 4) of the Constitution, the *Riigikogu* ratifies or denounces treaties of the Republic of Estonia by which the Republic of Estonia assumes military or financial obligations. § 106(1) of the Constitution does not allow for issues regarding the ratification of international treaties, state budget or financial obligations of the national government to be submitted to a referendum. § 121 4) and § 106(1) of the Constitution thereby give the *Riigikogu* the sole competence to decide on the state's financial sovereignty in the form of assumption of financial obligations.

138. Therefore, from § 65 6) and 10) of the Constitution in conjunction with § 115(1) and § 121 4) of the Constitution arises the right and obligation of the *Riigikogu* to plan budgetary revenue and expenditure and to decide on the assumption of financial obligations which the Supreme Court *en banc* comprehends as the financial competence of the*Riigikogu* and the interference with which is subject to review in this case.

139. The financial competence of the *Riigikogu* gives the *Riigikogu* the right to make budgetary choices and decide on financial obligations. Based on the reservation by the parliament, the financial competence of the *Riigikogu* also ties the *Riigikogu* to the obligation to make decisions concerning financial obligations and budget policy decisions itself. In conclusion, the state must use public assets in a manner which enables the performance of the duty, arising from § 14 of the Constitution, to guarantee the protection of fundamental rights and freedoms.

140. The financial competence of the *Riigikogu* is closely related to the state's financial sovereignty and the principles of a democratic state subject to the rule of law and of reservation by the parliament. By reviewing the interference with the financial competence of the *Riigikogu*, the Supreme Court *en banc* assesses, to a relevant extent, adherence to the principle of sovereignty, the principle of a democratic state subject to the rule of law and the principle of reservation by the parliament which forms part of the latter. The principle of a democratic state subject to the rule of law contains Estonia's parliamentary democracy, including the budgetary powers of the *Riigikogu*, and also the competence of the *Riigikogu* to assume financial obligations, as pointed out by the Chancellor of Justice. Consequently, the Supreme Court addresses, to a relevant extent, all of the principles indicated in the request of the Chancellor of Justice.

C. Position of the Supreme Court *en banc* on the interference with the principles of the Constitution

141. Next, the Supreme Court *en banc* addresses the issue of whether and how Article 4(4) of the Treaty interferes with the principles of the Constitution described above.

142. The Chancellor of Justice found that grant of a loan, in an emergency procedure, to a state in need of assistance affects the possibility that the ESM will make a capital call to Estonia which in turn affects the budgetary powers of the*Riigikogu*. Thereby the budgetary-political choices of the *Riigikogu* diminish and the state budget will be planned so that it would be possible to respond to the capital calls of the ESM.

143. Although the Chancellor of Justice challenges the constitutionality of only Article 4(4) of the Treaty, the Supreme Court *en banc* is of the opinion that the arguments of the Chancellor of Justice concerning interference with the principles of the Constitution are based to a great extent on the Treaty's provisions which govern the performance of the obligations of a Member State, particularly in case of a call for authorised capital stock. Proceeding from the reasoning of the request of the Chancellor of Justice, the Supreme Court *en banc* considers, in assessing the interference with the principles of the Constitution, also other relevant provisions of the Treaty, but the Supreme Court*en banc* will not go beyond the limits of the request of the Chancellor of Justice and will not assess the constitutionality of the rest of the Treaty's provisions.

144. In case of Estonia, the amount of the paid-in capital in the ESM is 148.8 million euros and the callable capital is 1 153.2 million euros. The paid-in and callable capital form the total amount of Estonia's obligations in the ESM, i.e. 1 302 million euros. That is the maximum limit of Estonia's obligations which cannot be changed without the consent of Estonia and without amending the Treaty (see more in part I of the judgement on the nature of the ESM).

145. Estonia is required to pay the paid-in capital of 148.8 million euros within five years in equal instalments (Article 41(1) of the Treaty). In the present case the Supreme Court *en banc* does not assess whether the financial competence of the *Riigikogu* can be interfered by Estonia's obligation to pay to the ESM paid-in capital of 148.8 million euros. This is because decisions on grant of financial assistance taken in an emergency procedure under Article 4(4) of the Treaty cannot affect the payment of 148.8 million euros. The time of performance and the extent of that obligation have been determined in the Treaty (Article 41 of the Treaty).

146. The ESM may call in the paid-in capital from Estonia, if necessary. The grounds and procedure for calling in the capital have been provided for in Articles 9 and 25 of the Treaty. The unpaid capital may be called in:

1) at any time by a unanimous decision of the Board of Governors (Article 5(6)(c), Article 9(1) of the Treaty);

2) by a simple majority decision of the Board of Governors to restore the level of paid-in capital (i.e. 80 000 million euros) if the amount of the latter is reduced by the absorption of losses below 80 000 million euros (Article 9(2) of the Treaty);

3) by the Managing Director if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors (Article 9(3) of the Treaty);

4) by a qualified majority decision of the Board of Governors if an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9(2) or (3) of the Treaty. In that case, a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed (Article 25(2) and Article 5(7)(g) of the Treaty).

147. Article 4(4) of the Treaty is a provision which governs grant of financial assistance to a state in need or taking decisions on implementation of financial assistance in an emergency. In such a situation a decision will not be taken by mutual agreement, i.e. unanimously as upon grant of assistance in a regular procedure, but a decision is taken by a qualified majority of 85%. Both in an emergency and regular procedure the ESM grants financial assistance to a state in need by doing so on account of the ESM's own funds, e.g. by borrowing money from markets.

148. Article 9(2) and (3) and Article 25 of the Treaty enable to call in capital to cover losses arising in the ESM operations. Losses are charged firstly, against the reserve fund, secondly, against the paid-in capital, and lastly, against an appropriate amount of the authorised unpaid (callable) capital, which shall be called in in accordance with Article 9(3) (Article 25(1) of the Treaty). In respect of Article 9(1) of the Treaty, the Treaty does not provide in case of which necessity the Board of Governors of the ESM may decide to call in the capital from the Member States. Unlike other grounds for calling in capital, Article 9(1) of the Treaty prescribes a unanimous decision of the Board of Governors. This means that under that provision capital can be called in only with the consent of the representative of Estonia.

149. The Supreme Court *en banc* holds that Article 4(4) of the Treaty interferes with the financial competence of the*Riigikogu* with a possibility that in the future the ESM may make a capital call to Estonia (1 153.2 million euros). Under Article 4(4) of the Treaty, grant or imposition of financial assistance to a state in need is decided. Grant of financial assistance from the ESM funds may give rise to a need to make to the ESM Members a capital call, and Estonia must fulfil its obligations to the ESM.

150. In taking decisions under Article 4(4) of the Treaty, the participation of the representative of Estonia in the voting does not guarantee the *Riigikogu*'s actual possibility to review Estonia's financial obligations. A precondition for the*Riigikogu*'s possibility for review is that by national law the *Riigikogu* has been granted an opportunity to give to the representative of Estonia binding orders for voting in the ESM bodies. Decisions are taken under Article 4(4) of the Treaty by a qualified majority of 85%. Therefore, the *Riigikogu*'s binding orders to the representative of Estonia may not affect the decisions of the ESM.

151. By ratifying the Treaty, the *Riigikogu* exercises the right arising from its financial competence and assumes financial obligations for Estonia. The *Riigikogu*'s possibility to make new future political choices is thereby restricted because the choices already made have decreased the state's financial resources. The composition of the *Riigikogu*which passes a law giving rise to the state's long-term financial obligations does not thereby restrict only its own possibilities for exercising financial competence within the same year's state budget, but also restricts the budgetary-political choices of next compositions of the *Riigikogu*.

152. The Supreme Court *en banc* notes that the obligations assumed for the state may have different degrees of binding force. That way the *Riigikogu* can decrease the expenditure planned by the state budget, although it may interfere with the principle of legitimate expectation and other constitutional values. Obligations arising from the Treaty have different degree of binding force than the obligations to which the *Riigikogu* ties itself at the national level. The Treaty is an international agreement and amendment thereof is subjected to the international law. This means that the Treaty may be amended by agreement between the parties (the first sentence of Article 39 of the Vienna Convention on the Law of Treaties). Based on Article 8(4) of the Treaty, ESM Members irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock.

153. In keeping with the aforesaid, the Supreme Court *en banc* is of the opinion that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* arising from § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution, and from § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution. The*Riigikogu* cannot fully review, through the representative of Estonia, whether and how financial assistance is granted in an emergency procedure under Article 4(4) of the Treaty. At the same time, a decision on grant of financial assistance taken under Article 4(4) of the Treaty may affect the fulfilment of Estonia's obligations to the ESM in the future – by way of a capital call (1 153.2 million euros). In the opinion of the Department of Economics of the Estonian Business School it is pointed out that the state must be ready for additional financial payments to the extent of the amount referred to. Therefore, financial assistance granted in an emergency procedure under Article 4(4) of the Treaty may affect the revenue and expenditure of the Estonian state budget and thereby restrict the budgetary-political choices of the *Riigikogu*. Such an interference with the financial competence of the *Riigikogu* brings about also an interference with the principle of a democratic state subject to the rule of law and of the state's financial sovereignty since indirectly the people's right of discretion is restricted.

IV. Purpose of Article 4(4) of the Treaty and its legitimacy

154. Next, the Supreme Court *en banc* establishes the purpose of Article 4(4) of the Treaty and assesses whether the purpose is legitimate for interfering with the principles addressed above.

155. Article 4(4) of the Treaty provides that by way of a derogation, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten to a significant extent the economic and financial sustainability of the euro area.

156. In Estonian the procedure of Article 4(4) of the Treaty is called *kiirmenetlus* (expedited procedure). In English, German and French it is more like *hädaabimenetlus* (emergency voting, Dringlichkeitsabstimmungsverfahren, procédure de vote d'urgence). Article 4(4) of the Treaty may not guarantee a faster procedure compared

to taking unanimous decisions. Representatives of the states receive their authorisations under national laws in parallel, not in succession. Consequently, the number of states taking part in decision-making does not significantly affect the speed of taking decisions. The procedure provided for in Article 4(4) of the Treaty is rather an emergency procedure, bearing in mind its purpose.

157. The text of the challenged provision in English, German, French and Finnish does not contain a requirement that a failure to adopt a decision should threaten the economic and financial sustainability of the euro area *to a great extent*. Thus, in other languages the basis for grant of assistance in the general norm (the first sentence of Article 12(1) of the Treaty "if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States") differs little from the special norm of the procedure provided for in Article 4(4) of the Treaty ("would threaten the economic and financial sustainability of the euro area"). Therefore, an opinion must be formed that the emergency procedure has been established for a situation where both the Commission, the European Central Bank and the states representing at least 85% of the ESM capital stock are of the opinion that the economic and financial sustainability of the euro area is threatened without grant or implementation of financial assistance, but some states have not been able to make a decision or they do not wish to grant or implement financial assistance.

158. This means that the purpose of Article 4(4) of the Treaty is to guarantee the efficiency of the ESM also in case the states are unable to make a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area.

159. Next, the Supreme Court *en banc* assesses whether this purpose is legitimate. The Supreme Court *en banc*found that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* provided for in § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution and in § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution, and is related to the principle of a democratic state subject to the rule of law and with the state's financial sovereignty. Consequently, Article 4(4) of the Treaty interferes with the principle of sovereignty arising from the preamble to and from § 1 of the Constitution.

160. The Supreme Court *en banc* held that by verifying the interference with the financial competence of the *Riigikogu*it is possible to consider all the principles challenged by the Chancellor of Justice – the budgetary powers of the*Riigikogu*, the competence of the *Riigikogu* to assume financial obligations, reservation by the parliament and parliamentary democracy. None of the provisions referred to by the Chancellor of Justice provide conditions for the interference with the said principles. The Constitution does also not provide for grounds for restricting the principle of sovereignty (§ 1 of and the preamble to the Constitution) or of a democratic state subject to the rule of law (§ 10 of the Constitution). Therefore, the legitimate aim of the restrictions must be found in other provisions. The legitimate aim of the restrictions must be to protect some other value provided for in the Constitution.

161. In keeping with the aforesaid, the Supreme Court *en banc* ascertains whether the aim of the restriction arising from Article 4(4) of the Treaty to ensure efficient decision-making of the ESM in order to eliminate a threat to the economic and financial sustainability of the euro area coincides with the principles and values of the Constitution.

162. The purpose of Article 4(4) of the Treaty is related to the purpose of the ESM. The first sentence of Article 3 of the Treaty provides that the purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. In brief, the purpose of the ESM is to safeguard the financial stability of the euro area. Article 4(4) of the Treaty seeks to ensure the achievement of the goals of the ESM in an emergency.

163. The Supreme Court *en banc* finds that the economic and financial sustainability of the euro area is contained in the constitutional values of Estonia as of the time Estonia become a euro area Member State. In the referendum on 14 September 2003 the people passed the Constitution of the Republic of Estonia Amendment Act by which they authorised Estonia's accession to the European Union. Due to Estonia's membership in the European Union, Estonia undertook to adopt the single currency euro. Estonia adopted the euro on 1 January 2011, thereby fulfilling its obligation to the European Union. The Supreme Court *en banc* holds that by authorising, in the referendum, Estonia's accession to the European

Union, the people also gave the authorisation for Estonia to adopt the single currency euro.

164. Estonia is a part of the euro area and therefore economically and financially integrated with the other euro area Member States. Pursuant to Article 3(1)(c) of the TFEU, the Union shall have exclusive competence in the monetary policy for the Member States whose currency is the euro. In the field of economic policy of the EU Member States the Union and the Member States have shared competence (Article 3(3) of the TEU, Article 4(1), (2) and Article 120 of the TFEU). According to Article 119(2) of the TFEU, the primary objective of a single monetary policy and exchange-rate policy shall be to maintain price stability. Article 119(3) prescribes that these activities of the Member States and the Union shall entail compliance with the following guiding principles: stable prices, sound public finances and monetary conditions and a sustainable balance of payments. The first sentence of Article 127(1) of the TFEU provides that the primary objective of the European System of Central Banks shall be to maintain price stability. The above-mentioned means that Estonia does not carry out its economic policy alone, but in coordination with EU policy and in cooperation with other Member States; however, the monetary policy is within the sole competence of the European Union.

165. Estonia is a euro area Member State and therefore a threat to the economic and financial sustainability of the euro area is also a threat to the economic and financial sustainability of Estonia. Estonia's economy and finance are closely related to the rest of the euro area and if there are economic and financial problems in the euro area, then it inevitably affects Estonia – export and import of goods and services, state budget and thereby also social and other fields. Problems in the euro area harm also Estonia's competitiveness and reliability. The ESM as a financial assistance system may help to ensure that the euro area as a whole as well as a part of it, Estonia, would be economically and financially competitive. It is necessary to guarantee people's income, quality of life and social security. In a situation where the rest of the euro area would be in difficulties it is not probable that Estonia would be financially or economically successful, including in the field of people's income, quality of life and social security.

166. Economic stability and success ensure the planned receipt of state budget revenue. Incurring necessary expenditure ensures constitutional values. The obligation to guarantee fundamental rights arises from § 14 of the Constitution. Extensive and consistent guarantee of fundamental rights is extremely complicated, if not impossible, without a stable economic environment.

167. From the preamble to the Estonian Constitution arises the obligation of Estonia to strengthen and develop the state which is founded on liberty, justice and the rule of law. In order for such a state to function it is necessary, inter alia, to ensure an environment where state budget revenue is received as planned, enabling the fulfilment of the state's core functions.

168. The common purpose of the euro area Member States to counter threats endangering the economy and financial stability, including by way of efficient decision-making in an emergency, coincides with the purpose of Estonia to fulfil the obligation of the state of Estonia, provided for in the preamble to and in § 14 of the Constitution, to guarantee rights and freedoms. By disregarding the common purpose of the euro area Member States or the measure planned for the achievement thereof, Estonia cannot follow its objectives arising from the Constitution. Consequently, the purpose of safeguarding the efficiency of the ESM also in case the states are unable to take a unanimous decision to eliminate a threat to the economic and financial sustainability of the euro area, including of Estonia, is legitimate.

169. The Supreme Court *en banc* holds that the interference arising from Article 4(4) of the Treaty is justified by substantial constitutional values – obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

V. Review of proportionality

A. Choice of method and competence of the Supreme Court

170. The Supreme Court *en banc* notes that in this case the issue is not one of the interference with fundamental rights, but of the principles of the Constitution. In its earlier case-law the Supreme Court has assessed the proportionality of the interference with not only fundamental rights, but also of principles of the Constitution (see, for instance, the case of funding local authorities from the state budget, the Supreme Court *en banc* judgement of 16 March 2010 in case no. 3-4-1-8-09, point 64).

171. The Supreme Court *en banc* holds that in this case the constitutionality of the interference

with the principles of the Constitution must be assessed by way of review of proportionality.

172. Pursuant to the principles of separation and balance of powers provided for in §§ 4 and 14 of the Constitution, different institutions perform duties prescribed for them by the Constitution. According to the Constitution, the duty of the *Riigikogu* is to ratify or denunciate international treaties (§ 65 4) and § 121 of the Constitution), pass the national budget and approve its implementation (§ 65 6) and § 115 of the Constitution), and decide whether to authorise the assumption of financial obligations (§ 65 10) of the Constitution).

173. § 152 of the Constitution obliges the Supreme Court to verify whether the activities of the legislature and the executive are in accordance with the Constitution. However, by performing this duty the Supreme Court must consider the principle of separation and balance of powers and the competences of state bodies established by the Constitution. The Supreme Court must verify whether the activities of the legislature are constitutional, but it cannot decide on matters entrusted to the *Riigikogu* by the Constitution.

174. By ratifying the Treaty the *Riigikogu* exercises its competence to assume financial obligations for Estonia. Setting economic and budget policy objectives and assessing the state budget possibilities and the state's economic capability have been placed within the competence of the *Riigikogu*. Therefore, the *Riigikogu* is competent to assess risks arising in respect of the state budget and economic capability of Estonia in accession to the Treaty. The Supreme Court could verify by way of constitutional review whether the *Riigikogu* has performed its duty in accordance with the Constitution. In respect of the Treaty the *Riigikogu* has not yet been able to exercise its right of discretion in the ratification procedure.

175. The *Riigikogu* can also decide on how and by which means to fulfil the future obligations arising from the Treaty. Several different ways of fulfilling the obligations arising from the Treaty may be in accordance with the Constitution. The court's duty in constitutional review is not to prescribe for the legislature a choice on how to later fulfil the obligation assumed. Also performance of obligations is a budget policy choice and forms a part of the financial competence of the *Riigikogu*. The court can also verify by way of constitutional review the constitutionality of subsequent choices made by the legislature.

B. Appropriateness and necessity of the interference arising from Article 4(4) of the Treaty

176. Next, the Supreme Court *en banc* weighs the proportionality of the interference with the principles of the Constitution arising from Article 4(4) of the Treaty against its objective. The interference is proportional if it is appropriate, necessary and reasonable for the achievement of the objective. In this part of the judgement the Supreme Court *en banc* addresses the appropriateness and necessity of the interference. Since the appropriateness of the measure for the achievement of the objective and possible alternative measures are under review, the principles interfered are not to be addressed here.

177. The Supreme Court *en banc* notes that a measure is appropriate if it favours the achievement of the objective. Thus, by assessing the appropriateness of the measure for the achievement of the objective, it must be asked whether the measure favours the achievement of the objective or is completely inappropriate for it.

178. In his request the Chancellor of Justice came to the conclusion that it is questionable how large of a benefit the emergency procedure provided for in Article 4(4) of the Treaty has in safeguarding the stability of the euro area. The Chancellor of Justice also noted that the emergency procedure may not always guarantee the speed of taking decisions sought by Article 4(4) of the Treaty because in the emergency procedure provided for in Article 4(4) of the Treaty it is necessary, for granting financial assistance, to have the votes in favour of at least six states and the ESM Members the percentage of whose vote is greater than 15% have de facto right of veto in decision-making. From the aspect of how fast decisions are taken there is no guarantee that those states whose representatives' votes are indispensable for achieving the majority of 85% in the Board of Governors can carry out the national procedures necessary for approving the assistance faster than other ESM Members. Also in the emergency procedure there is a possibility of a situation where the negative vote of one representative in the Board of Governors prevents the grant of financial assistance.

179. In point 158 the Supreme Court *en banc* found that the purpose of Article 4(4) of the Treaty is to guarantee the efficiency of the ESM also in case the states are unable to make a unanimous decision to eliminate a threat to the

economic and financial sustainability of the euro area. The Supreme Court *en banc* holds that the procedure in Article 4(4) of the Treaty facilitates the achievement of the said purpose because it establishes a more efficient mechanism for deciding on grant of financial assistance in an emergency procedure. A possibility of taking decisions by a majority of 85% has been provided by Article 4(4) of the Treaty. In regular procedure, financial assistance is granted by mutual agreement (Article 4(3) of the Treaty). By ensuring a more efficient decision-making process, Article 4(4) of the Treaty facilitates the achievement of the objective – elimination of a threat to the economic and financial sustainability of the euro area. In keeping with the aforesaid, Article 4(4) of the Treaty is an appropriate measure for the achievement of the purpose.

180. The Supreme Court *en banc* concurs with the arguments of the Chancellor of Justice that Article 4(4) of the Treaty may not always and in every situation ensure that in an emergency the ESM can grant financial assistance and eliminate a threat to the financial stability of the euro area. However, the Supreme Court *en banc* is of the opinion that this does not make Article 4(4) of the Treaty inappropriate for the achievement of the purpose. Appropriateness of a measure does not mean that it must guarantee the achievement of the purpose in every situation. A measure is inappropriate if it does not facilitate the achievement of the purpose at all.

181. In respect of the necessity of the measure provided for in Article 4(4) of the Treaty it must be assessed whether the best of the available possibilities was chosen – whether there is no other measure which would facilitate the achievement of the purpose at least as much; thereby restricting the interfered principles less. This means that in verifying the constitutionality of Article 4(4) of the Treaty, the Supreme Court *en banc* assesses whether there is a decision-making mechanism which would enable in an emergency to eliminate a threat to the economic and financial sustainability of the euro area as efficiently, but would interfere with the Estonian Constitution less. The Chancellor of Justice does not point out in his request any alternative measure which would facilitate the achievement of the purpose as much but would interfere with constitutional values less.

182. The Supreme Court *en banc* considers that Article 4(4) of the Treaty is necessary for the achievement of the purpose. The Supreme Court *en banc* is of the opinion that there is no other decision-making mechanism which would ensure as efficiently the sustainability of the euro area for countering a threat thereto but would interfere with the Estonian Constitution less.

183. In case of an international organisation like the ESM, three possibilities in taking decisions are imaginable: unanimous, qualified majority or simple majority decisions. All those decision-making mechanisms are applied in the Treaty.

184. The Supreme Court *en banc* is of the opinion that raising the limit of the qualified majority (i.e. 85%) in Article 4(4) of the Treaty would decrease the interference for Estonia only in case it would be raised higher than 99.814% because Estonia's contribution to the ESM is 0.1860%. In essence, the seriousness of the interference for Estonia would decrease only if unanimous decisions would be provided for in Article 4(4) of the Treaty. Raising the limit of the qualified majority in taking decisions in an emergency procedure provided for in Article 4(4) of the Treaty to taking unanimous decisions would not facilitate the achievement of the purpose as much. If simple majority would be provided for in Article 4(4) of the Treaty, it would facilitate the achievement of the purpose more but the interference with the Estonian Constitution would be even more serious.

185. For the above-mentioned reasons the Supreme Court *en banc* holds that the interference is appropriate and necessary for the achievement of the purpose.

C. Reasonableness of the interference arising from Article 4(4) of the Treaty

186. As the last stage of the review of proportionality the Supreme Court *en banc* verifies the reasonableness of the interference, arising from Article 4(4) of the Treaty, of the financial competence of the *Riigikogu*, also of the financial sovereignty of the state related thereto and of the principle of a democratic state subject to the rule of law compared to the achievement of the purpose.

187. The Chancellor of Justice was of the opinion that the interference with the principles of parliamentary democracy and reservation by the parliament and of the budgetary powers of the *Riigikogu* accompanying Article 4(4) of the Treaty is very serious. The Chancellor of Justice holds that an extremely vast financial obligation is assumed by the Treaty, for which reason merely ratifying the Treaty based on § 121 4) of the Constitution is not enough to adhere to the principle of reservation by the parliament and

the principle of budgetary powers of the *Riigikogu*. In the assessment of the Chancellor of Justice, the Constitution requires that the *Riigikogu* shall have an actual possibility to influence through the Government of the Republic the conditions of an agreement on financial assistance in order to guarantee parliamentary review corresponding to the extent of the obligations assumed by the Treaty.

188. Next, the Supreme Court *en banc* weighs, on the one hand, the extent and seriousness of the interference with the principles of the Constitution, and, on the other hand, the importance of the purpose. In the present case the efficient decision-making procedure of Article 4(4) of the Treaty which must ensure, as the purpose of the Treaty, the financial stability of the euro area, including of Estonia, is on one scale. Financial stability is related to significant constitutional values. The other scale carries the preservation of Estonia's right to decide on its public funds. The Supreme Court *en banc* holds that the financial competence of the *Riigikogu* and Estonia's financial sovereignty are significant principles of the Constitution – values which are closely related to the principle of a democratic state subject to the rule of law.

189. The Supreme Court *en banc* does not concur with the Chancellor of Justice that Article 4(4) of the Treaty interferes with the principles of the Constitution very seriously. The Supreme Court *en banc* holds that in assessing the constitutionality of Article 4(4) of the Treaty, an interference accompanying assumption of a financial obligation in ratification of an agreement and a possible interference in carrying out the agreement in the future must be distinguished.

190. If the *Riigikogu* decides to ratify the Treaty, it will thereby decide assumption of a financial obligation for the state of Estonia. Interference with the financial competence of the *Riigikogu* arises from the possibility that the obligations arising from the Treaty must be performed in the future if Estonia is required to pay a part of or the entire callable capital (up to 1 153.2 million euros) to the ESM. The Supreme Court *en banc* is of the opinion that in case the Treaty is ratified, the interference with the financial competence of the *Riigikogu* is not serious merely because it constitutes a vast financial obligation.

191. Next, the Supreme Court *en banc* assesses circumstances related to carrying out the Treaty and the seriousness of the accompanying interference. First, the Supreme Court *en banc* addresses circumstances related to grant of financial assistance in an emergency procedure under Article 4(4) of the Treaty, and then, the fulfilment of Estonia's obligations in case of a possible capital call.

192. Under Article 4(4) of the Treaty the ESM can grant financial assistance in an emergency procedure if such an opinion is adopted by the European Commission and the European Central Bank. This means that persons who have profound special expertise and are at the disposal of the European Commission and the European Central Bank take part in preparing the decision. One of the decision-makers in the European Central Bank is also the Governor of the Bank of Estonia.

193. In addition, the emergency procedure contains a general condition that financial assistance shall be granted only under strict conditionality. Based on Article 13(1) of the Treaty, the European Commission and the European Central Bank shall assess the following: 1) the existence of a risk to the financial stability of the euro area as a whole or of its Member States; 2) whether public debt is sustainable (together with the IMF); 3) the actual or potential financing needs of the ESM Member concerned. If after the above facts have been determined financial assistance is decided to be granted, the European Commission in liaison with the ECB and together with the IMF will detail the conditionality attached to the financial assistance facility (Article 13(3) of the Treaty). Since financial assistance is granted in instalments, it allows not to make a subsequent instalment if the recipient of the assistance refuses to comply with the agreed conditionality. The ESM shall establish an appropriate warning system to ensure that it receives any repayments due by the ESM Member under the stability support in a timely manner (Article 13(6) of the Treaty). In addition, the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – shall be entrusted with monitoring compliance with the conditionality attached to the financial assistance facility (Article 13(7) of the Treaty).

194. Under paragraph (5) of the preamble to the Treaty, recipients of financial assistance can be only those ESM Members which have ratified the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("TSCG") and which comply with it. Pursuant to the TSCG, the Contracting States shall ensure that their general government deficit does not exceed 3% of their gross domestic product at market prices and that their

general government debt does not exceed 60% of their gross domestic product at market prices (the fourth paragraph of the preamble to the TSCG and Article 3 of the TSCG).

195. Irrespective of whether Estonia is in favour of grant of financial assistance in an emergency procedure or not, it must be presumed that the recipient of the assistance fulfils the obligations it has assumed. It cannot be presumed that the ESM would grant financial assistance to a state if at the time of taking the decision it would be known that the recipient of the assistance does not intend to fulfil its obligations to the ESM. Even if Estonia would have the right of veto upon grant of financial assistance, the *Riigikogu* would not have better chances than the other states and EU institutions to foresee the recipient's future conduct.

196. The Supreme Court *en banc* finds that the *Riigikogu* can decrease the interference with its financial competence and Estonia's financial sovereignty arising from a capital call. The *Riigikogu* has the right to assume financial obligations but it also has the right to decide on how and by which measures the obligation assumed is later fulfilled. Several different ways of fulfilling the obligation may be in compliance with the Constitution. The court's duty is not to prescribe for the legislature how the *Riigikogu* should fulfil financial obligations assumed for the state. The court has no reason to presume that the legislature will choose an unconstitutional manner of conduct. The legislature's subsequent choices in the fulfilment of financial obligations are subject to judicial review.

197. The seriousness of the interference arising from the fulfilment of the obligation is increased by the fact that it is unknown whether, when and to what extent the ESM will require Estonia to pay the callable capital. At the same time, a capital call cannot be completely unexpected for Estonia. The activities of the ESM shall be audited by auditors who shall file annual financial statements which shall be made available for the parliaments of the ESM Members (Articles 28–29 of the Treaty). Thus, it is possible to foresee whether and when the ESM may encounter difficulties and Estonia must start fulfilling its obligations. In addition, losses arising in the ESM operations shall be charged firstly against the reserve fund and secondly against the paid-in capital (Article 25(1) of the Treaty). If the paid-in capital has decreased, it shall be restored by capital calls. Consequently, there is a gap of time between coverage of losses and a capital call. The Supreme Court *en banc* holds that it is not probable that the ESM will require Estonia to pay the entire callable capital (1 153.2 million euros) at once.

198. The Chancellor of Justice admitted in his request that safeguarding the financial stability of the euro area and of its Member States is an important objective. The Supreme Court *en banc* deems the purpose of the interference established in point 169 of the judgement – obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms – very significant.

199. In order to fulfil the obligation arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms, Estonia must ensure a stable economic and financial environment and a sustainable budgetary policy. As pointed out in part IV of the judgement, the efficient decision-making procedure of Article 4(4) of the Treaty is aimed at safeguarding the economic and financial stability of the euro area. What takes place in the finance and economy of the entire euro area directly affects Estonia as a euro area Member State. The stability of the currency used in Estonia can be ensured only by cooperation with the other euro area Member States. By acceding to the ESM, Estonia's chances of participating in ensuring the reliability of the single currency used in Estonia and in ensuring the sustainability of its economy increase.

200. In order to guarantee a sustainable budgetary policy, Estonia must insure itself against possible future economic recessions. Should Estonia's economy encounter difficulties in the future, the ESM is one possibility for assistance (Article 3 and Article 12(1) of the Treaty). Financial assistance granted by international organisations helps a state in economic difficulties to cope with the fulfilment of its core functions and to guarantee the protection of fundamental rights and freedoms.

201. Estonia's interests are advanced by cooperation with various international organisations and other states. This is the way to carry out the foreign and security policy which is at the final stage aimed at guaranteeing the preservation of the Estonian people, the Estonian language and the Estonian culture through the ages provided for in the preamble to the Estonian Constitution. International cooperation ensures that Estonia has in the international environment better chances of surviving and achieving its objectives.

202. In keeping with the aforesaid, the Supreme Court *en banc* finds that Article 4(4) of the Treaty interferes with the financial competence of the *Riigikogu* and also the sovereignty related thereto, and the principle of a democratic state subject to the rule of law, but the interference cannot be deemed serious. The seriousness of the interference also depends on how the *Riigikogu* organises the future fulfilment of the obligations arising from the Treaty. By today the*Riigikogu* has not made those choices and based on the principle of separation of powers, the Supreme Court cannot assess beforehand the constitutionality of the fulfilment of the obligations. The interference is justified, in the assessment of the Supreme Court *en banc*, by very significant constitutional values. Consequently, the Supreme Court*en banc* assumes the position that the interference arising from Article 4(4) of the Treaty is not disproportionate to the purpose.

203. For the above reasons the Supreme Court *en banc* holds that Article 4(4) of the Treaty is not in conflict with the Constitution, and dismisses the request of the Chancellor of Justice under § 15(1)6) of the CRCPA.

VI. Summary of the opinions of the Supreme Court *en banc*

204. The Supreme Court *en banc* addressed the Treaty and obligations arising therefrom for Estonia. First, the Supreme Court *en banc* came to the conclusion that with the contribution key the Treaty determines the upper limit of the obligations of the Member States. Estonia undertakes to contribute 0.1860% of the authorised capital stock of the ESM and Estonia's contribution amounts to 1 302 million euros. The Treaty sets out when and how the capital to be paid in must be paid in – for Estonia it is 148.8 million euros within five years. The Treaty determines the conditions as to how the ESM can make a call for callable capital to a Member State which for Estonia is 1 153.2 million euros.

205. The Supreme Court *en banc* held that the request of the Chancellor of Justice is admissible. The Treaty is an international agreement which the Chancellor of Justice is competent to challenge based on § 123(1) of the Constitution and § 6(1)4) of the CRCPA. The Supreme Court *en banc* was of the opinion that the Treaty is not part of the primary or the secondary law of the European Union. The Chancellor of Justice is not challenging in his request the constitutionality of the entire Treaty, but merely the constitutionality of Article 4(4) of the Treaty. Therefore, the Supreme Court *en banc* is in this case competent to review said provision only.

206. The Supreme Court *en banc* found that Article 4(4) of the Treaty interferes with the financial competence of the*Riigikogu* provided for in § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution and in § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution, and is related to the principle of a democratic state subject to the rule of law. By ratifying the Treaty the *Riigikogu* exercises the right arising from its financial competence and assumes financial obligations for Estonia. The *Riigikogu*'s possibility to make political choices is thereby restricted, because the choices already made have decreased the state's financial resources. It also interferes with the financial sovereignty of the state of Estonia arising from the preamble to and § 1 of the Constitution, because the people's right of discretion is thereby indirectly restricted. Article 4(4) of the Treaty interferes with the financial competence of the*Riigikogu*, as well as the state's financial sovereignty related thereto and the principle of a democratic state subject to the rule of law due to the possibility that at the request of the ESM the callable capital must be paid in the future (up to 1 153.2 million euros).

207. In order to assess the constitutionality of the contested provision, the Supreme Court *en banc* weighed up the interference with principles and its objectives. The Supreme Court *en banc* is of the opinion that the purpose of Article 4(4) of the Treaty is to guarantee for the ESM in an emergency the efficiency of the decision-making mechanism to eliminate a threat to the economic and financial sustainability of the euro area. The Supreme Court *en banc* held that this objective is legitimate for interfering with the financial competence of the *Riigikogu* arising from § 65 6) of the Constitution in conjunction with § 115(1) of the Constitution and from § 65 10) of the Constitution in conjunction with § 121 4) of the Constitution, with the principle of a democratic state subject to the rule of law arising from § 10 of the Constitution, and with the principle of sovereignty arising from § 1 of the Constitution.

208. The purpose of Article 4(4) of the Treaty is related to the purpose of the Treaty to safeguard the financial stability of the euro area. The financial instability and closely related economic instability of the euro area also endanger the financial and economic stability of the state of Estonia, because Estonia is a part of the euro area. Economic and financial stability

is necessary in order for Estonia to be able to fulfil its obligations arising from the Constitution. Consequently, the interference arising from Article 4(4) of the Treaty is justified by substantial constitutional values – the need arising from the preamble to and § 14 of the Constitution to guarantee the protection of fundamental rights and freedoms.

209. The Supreme Court *en banc* assessed the constitutionality of the interference arising from Article 4(4) of the Treaty by way of review of proportionality, and found that Article 4(4) of the Treaty provides for an appropriate, necessary and reasonable measure for the achievement of the objective. In weighing up reasonableness the Supreme Court *en banc* deemed it necessary to distinguish the interference occurring on the ratification of the Treaty and the interference which may occur later in implementing the Treaty when, at the request of the ESM, the callable capital must be paid. The Supreme Court *en banc* held that the interference occurring on ratification is not in itself very serious; however, the interference is based on weighty constitutional values – the need to guarantee the protection of fundamental rights and freedoms. On the basis of the aforesaid, the Supreme Court *en banc* assumed the position that Article 4(4) of the Treaty does interfere with the financial competence of the *Riigikogu* and thereby also the principle of the financial sovereignty of the state and of a democratic state subject to the rule of law, but the objectives justifying the interference are sufficiently significant.

210. In keeping with the aforesaid, the Supreme Court *en banc* found that Article 4(4) of the Treaty is not in conflict with the Constitution, and dismissed the request of the Chancellor of Justice.

VII. About ratification of the Treaty

211. The Supreme Court *en banc* additionally notes that carrying out a ratified international agreement must also be in accordance with the Constitution. A precondition for the constitutionality of an agreement is the constitutionality of the national provisions governing the implementation of the agreement.

212. Ratification of an international agreement may give rise to a need to amend other acts which are related to carrying out the international agreement. Therefore, in addition to passing the international agreement ratification act, a separate act governing the carrying out of the international agreement or amending the existing regulatory frameworks related to the carrying out of the agreement may have to be passed. The Supreme Court *en banc* is of the opinion that it is not excluded that by the ratification act, laws related to the implementation of the international agreement are amended. It is also possible that the ratification act does not formally amend the norms of laws related to the carrying out of the agreement, but it refers to the provisions of an appropriate act. However, it must be taken into account that in such case the ratification act may, due to norms of reference, amend another act so that a new regulatory framework applied in a field related to the international agreement is established.

213. In processing a ratification act, a procedure prescribed for processing the Act which is amended by the ratification Act or to which a reference changing the legal regulatory framework is made by the ratification Act should be followed. Implementation of Article 4(4) of the Treaty may be related to, e.g., the State Budget Act and the*Riigikogu* Rules of Procedure and Internal Rules Act (RRPIRA).

214. The Constitution does not prescribe the number of readings at which bills should be deliberated. § 104(1) of the Constitution provides that the procedure for the passage of laws is provided in the *Riigikogu* Procedure Act. Based on § 111(2) of the RRPIRA, a bill shall be deliberated in a standard procedure at three readings. Under § 115 of the RRPIRA, a bill concerning an international agreement shall be deliberated at two readings unless the leading committee moves to conduct a third reading. The Supreme Court *en banc* is of the opinion that in the event that the ratification act amends other acts or makes a reference to other acts changing their norms, the draft ratification act should be deliberated at three readings. The Supreme Court *en banc* deems it questionable whether it would be in accordance with § 104(1) of the Constitution and § 111(2) of the RRPIRA were the final vote on the ratification act containing or amending legal norms belonging to the scope of application of other acts to take place at the second reading. In the case of a bill passed at three readings the members of the *Riigikogu* have more possibilities of forming their opinions before the final vote.

215. The international agreement under dispute is not a legislation of the European Union, but at the request of the*Riigikogu* it may be deemed a European Union affair for the purposes of § 18(3) and § 1521(2) of the RRPIRA. Therefore, § 18(3) and Chapter 181 (Procedure for Legislative Proceeding of European Union Affairs) of the RRPIRA may also extend to

carrying out Article 4(4) of the Treaty. As a result there may be a situation whereby the activities of the Government of the Republic in carrying out Article 4(4) of the Treaty are only subjected to review by the European Union Affairs Committee of the *Riigikogu*.

216. Based on § 71(1) of the Constitution, a committee of the *Riigikogu* is a working body of the *Riigikogu*. It does not violate the Constitution if a committee of the *Riigikogu* reviews the activities of the Government of the Republic in some area and prescribes binding opinions for the Government in that area. It also does not violate the Constitution if a committee of the parliament adopts in some matters an opinion on behalf of the *Riigikogu*. A situation whereby a committee expresses the opinions of the *Riigikogu* without the *Riigikogu* having a legal opportunity to adopt an opinion in the matter may be in questionable accordance with the Constitution. Within the meaning of the Constitution it may not suffice if the role of the *Riigikogu* is limited to merely receiving information. The budgetary powers of the *Riigikogu*may be strongly interfered with if for casting a vote in the matter of granting financial assistance under Article 4(4) of the Treaty, the representative of Estonia may be prescribed on behalf of the *Riigikogu* a binding opinion only by the European Union Affairs Committee of the *Riigikogu*. Although the granting of financial assistance under Article 4(4) of the Treaty is decided by a qualified majority decision, it may still depend on adherence to the opinion prescribed for the representative of Estonia as to whether the *Riigikogu* is required to amend the state budget after taking the decision on granting financial assistance. The opinion of the *Riigikogu* may not merely constitute a prescription for the representative of the Government of the Republic on how to cast the vote. The *Riigikogu* may prescribe for the Government of the Republic also that steps must be taken in order to form the opinions of contracting partners must be taken.

VIII. About Estonia's membership of the European Union

217. The Supreme Court *en banc* deems it additionally necessary to note the following concerning the Constitution of the Republic of Estonia Amendment Act and Estonia's membership of the European Union.

218. By Article 1 of the European Council Decision No. 2011/199 of 25 March 2011 it was decided to amend Article136 of the TFEU and add the following paragraph thereto: "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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality." According to paragraph (4) of the preamble to the Decision, the stability mechanism will provide the necessary tool for dealing with such cases of risk to the financial stability of the euro area as a whole, and hence help preserve the economic and financial stability of the Union itself.

219. The Treaty was signed by the euro area Member States. It establishes the ESM as an organisation which aims to eliminate threats to the financial stability of the euro area (paragraph (6) of the preamble to the Treaty). In essence, the ESM helps to ensure the functioning of the economic and monetary union and the sustainability of the monetary policy for the purposes of Article 3(4) of the TEU and Article 3(1)(c) and Article 127 of the TFEU.

220. Although the Treaty is neither the primary nor the secondary law of the European Union, it cannot be precluded that in the future it may be integrated into the primary or secondary law of the European Union. In its Resolution of 23 March 2011 the European Parliament noted that all possibilities should be explored with a view to bringing the European stability mechanism fully into the institutional framework of the Union and providing for the involvement in it of those Member States whose currency is not the euro. Also the European Central Bank expressed in its opinion the hope that the ESM would not just be an intergovernmental mechanism, but that it would become a mechanism of the Union. Consequently, there is a wish for the legal relationships that will be formed by the establishment of the ESM to be reflected in the EU law. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union signed on 2 March 2012 at the European Council in Brussels explicitly aims to incorporate this international agreement into the legal framework of the European Union.

221. The Supreme Court *en banc* is of the opinion that the above-mentioned confirms that the Treaty concerns EU law and thereby Estonia's membership of the European Union. Based on the aforesaid the Supreme Court *en banc* notes the following regarding the constitutional basis of Estonia's membership of the European Union.

222. On 14 September 2003, the people of Estonia passed in a referendum the Constitution of the Republic of Estonia Amendment Act (CREAA). Pursuant to § 1 of the CREAA, Estonia may belong to the European Union, provided that the fundamental principles of the Constitution of the Republic of Estonia are respected. According to § 2 of the CREAA, when Estonia acceded to the European Union, the Constitution of the Republic of Estonia applied without prejudice to the rights and obligations arising from the Accession Treaty. The Supreme Court *en banc* is of the opinion that the people of Estonia gave, in a referendum held on 14 September 2003, their consent in form and in substance for Estonia to accede to the European Union and thereby enjoy the rights and obligations arising from the membership of the European Union.

223. The Supreme Court *en banc* holds that § 1 of the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing European Union. Provided the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the *Riigikogu* which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment to the founding treaty the European Union or the new treaty leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the TFEU and TEU.

A dissenting opinion of the justice of the Supreme Court Villu Kõve on the Supreme Court *en banc*judgment in case no. 3-4-1-6-12

1. I am of the opinion that the request of the Chancellor of Justice should not have been reviewed. I do not question the legislature's right to extend the competence of the Chancellor of Justice compared to what has been prescribed in the Constitution (see points 111–116 of the judgement). However, I find that the legislature cannot extend together with the competence of the Chancellor of Justice the principles of constitutional review.

The principles of constitutional review and, thus, the so-called review model have been provided for in the Constitution itself. In general, constitutional review of legislative acts has been prescribed in the Constitution as a so-called subsequent review. A preliminary review of the constitutionality of a legislative act which has not entered into force has been prescribed only as the right of the President of the Republic pursuant to § 107 of the Constitution to refuse to promulgate a law and to apply to the Supreme Court for a declaration of unconstitutionality in respect of that law. I am of the opinion that the legislature cannot extend the competence of the Supreme Court, compared to the Constitution, to make binding judgements in matters of constitutionality, even if it would be so-called practical (see points 115 and 116 of the judgement). I have expressed such an opinion also in the dissenting opinion on the Supreme Court opinion of 11 May 2006 on the interpretation of § 111 of the Constitution (3-4-1-3-06) and I stand by it.

Therefore, § 6(1)4) of the Constitutional Review Court Procedure Act should have been interpreted in this present case so that it allows the Chancellor of Justice to challenge only the constitutionality of a ratified international agreement (or an international agreement which has entered into force) (or a provision thereof) or to declare the provision referred to to be in conflict with the Constitution to the extent of allowed preliminary review.

2. Since the majority of the Supreme Court *en banc* held that the Chancellor of Justice is competent to challenge the Treaty, I proceeded therefrom in subsequent decision-making. At the same time I deem it necessary to note that I am not convinced that the opinions of the Supreme Court *en banc* on the interpretation of the Treaty are correct. Namely, I am not convinced that Estonia's maximum limit of possible obligations according to the Treaty does not in any case exceed 1 302 000 million euros and that obligations larger than that may arise for Estonia only through amendment of the Treaty (see point 144 of the judgement). Although according to the Treaty itself it is

interpreted by the Court of Justice of the European Union (see point 94 of the judgement) and the *Riigikogu* is not able to make any final conclusions on Estonia's possible obligations anyway, the review of the constitutionality of the Treaty should have been extended, next to Article 4(4) of the Treaty directly challenged by the Chancellor of Justice, to at least the provisions related thereto concerning obligations arising for Estonia.

3. I do not feel that in ratifying every international agreement containing financial obligations as in granting another guarantee the exact volume of obligations should be known if there is no risk that these obligations or accompanying conditions would start to influence, inter alia, the state budget so that the fulfilment of Estonia's obligations to its residents would be endangered and thereby also the principle of a democratic state subject to the rule of law, or if a threat to the preservation of the state's sovereignty may arise thereby. The state of Estonia may not enter into an international agreement which, when the obligations arising therefrom need to be performed, casts doubt on the continuance of the statehood as it is (§ 123(1) of the Constitution).

Since the majority of the Supreme Court *en banc* is of the opinion that no such threats arise for Estonia from the Treaty and I am not convinced enough to claim otherwise, declaration of unconstitutionality of Article 4(4) of the Treaty would be premature in such a situation, to say the least. Therefore, based on the opinions of the majority, I support the decision of the judgement to dismiss the request of the Chancellor of Justice.

A dissenting opinion of the justice of the Supreme Court Jüri Ilvest in case no. 3-4-1-6-12

Although I agree with the criticism in the dissenting opinion of the justices of the Supreme Court H. Jõks, O. Järvesaar, E. Kergandberg, L. Kivi, A. Kull and L. Laarmaa, I would still like to emphasise that I look at the matter from a fundamentally different point of view.

I cannot affirm a theory according to which in a globalising world a new "universally infiltrating" content pursuant to which everybody "voluntarily" waives to everybody all elements of identity created over millenniums in order to thereby share the universe with everybody the best is attributed to all concepts – also, e.g., to "sovereignty".

Therefore, the sovereignty declared in the Constitution of the Republic of Estonia – according to my interpretation, a possibility free of external influences (and why not also pride) to make decisions ourselves – is the main criterion determining the legal status of the people who are worthy of their own state.

I find that in the hat trick of this present case the essence of the matter has been nicely concealed by all the debates which appear to have been intensive, as it always is with black magic. Namely, it is sought to make it look like it is a problem of the euro area (money problem) which revolves around safeguarding the stability of the currency. Actually, all participants to the proceedings admit that the Treaty does not constitute EU law, but it is an agreement within the scope of international agreements. An elementary question to follow is – why should EU Members want to conclude among themselves agreements which are not covered by the law of their own union? The answer is just as elementary – the provisions challenged by the Chancellor of Justice could not be established within EU law because the principle of taking unanimous decisions applies there. This unanimity will be lost for Estonia in the future, just like for other "little brothers" of the Treaty. This confirms my belief that one of the concealed purposes of the provision under dispute is – to deviate from the principles of EU law and to usurp the extent of the authorisation granted by nations to representative bodies in accession to the Union. The end justifies the means… a very old jesuitic principle which does not go with my comprehension of the bases of a state based on the rule of law.

Deliberation conforming to my logic shows that interpretation of the Constitution of the Republic of Estonia through these legislations which determine the scope of application of our Constitution after accession to the EU is not applicable in this case because the authorisation granted by the Estonian nation to the political forces reigning at the moment does not contain waiver of any shred of sovereignty which is not in accordance with the fundamental principles of the Constitution of the Republic of Estonia, and particularly emphasising it – outside EU law. Whether waiver of disposition of such an important part of Estonia's annual state budget (and moreover – handing over the right of disposition without an argument) is waiver of sovereignty is naturally a question of everyone's better judgement. Sovereignty is not an object of trade which one composition of the *Riigikogu* can (though maybe in the interests of Estonia) waive "a bit", hoping that the next composition will bargain something back.

Reading Article 4(4) of the Treaty it is very clear that what is gone is gone.

Therefore, my problem is competence, or in other words, who should have the right to decide in such a situation. The high point of this dilemma is the question of whether the constitutional sovereign – the people – has, through a single referendum known to us all, granted to any composition of the *Riigikogu* holding office the right to waive, forever and ever, on current political considerations the sovereignty of the state of Estonia to any extent, or whether affirming such a concept (even through a legal doctrine valuable at first – be it the test of proportionality) is still erroneous bearing in mind the rights of the actual sovereign – the people? I am of the opinion that the Constitution of the Republic of Estonia Amendment Act does not give the *Riigikogu* the right to ratify the Treaty without holding a referendum. It gives rise to my conviction that although the Chancellor of Justice has challenged the constitutionality on a more restricted basis, his ultimate position is correct.

A dissenting opinion of the justices of the Supreme Court Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa on the Supreme Court*en banc* judgment of 12 July 2012 in case no. 3-4-1-6-12

We find that the request of the Chancellor of Justice should have been satisfied.

The dissenting opinion on the Supreme Court *en banc* judgement of 12 July 2012 expresses, above all, the opinion of the justices who were in minority in voting, departing from the decision and several reasons of the judgement. Moreover, in writing this dissenting opinion we also see an opportunity to express our concern over the fact that the Supreme Court *en banc* has made the judgement clearly in a rush. The court case in question is the most important one in our constitutional review history so far. This is precisely why such emotional arguments like "the Treaty will solve the financial crisis of the European Union and will at last ensure the financial stability of the euro area" cannot cause rush with the adjudication of the court case. Due to the rush, the judgement does not reflect by far all the important aspects of the problems which are the object of the court case and extremely significant from the statehood of Estonia point of view.

More specifically, we wish to note the following regarding the problems and decisions of this court case.

1. We admit that in general the writers of a dissenting opinion should not address those opinions and reasons of the judgement with which they agree. However, we feel that in this dissenting opinion it is necessary to explore some more the subject of the competence of the Chancellor of Justice. We agree with the summarising conclusion contained in point 118 of the judgement of the Supreme Court *en banc* that the Chancellor of Justice was competent to challenge in the Supreme Court the constitutionality of Article 4(4) of the Treaty. In point 106 of the judgement it has been sufficiently justified that formally the Treaty is definitely an international agreement and above all points 114–116 of the judgement contain sufficient and convincing reasons as to why the preliminary review of international agreements by the Chancellor of Justice is in accordance with the spirit of the Constitution. In the context of the case as a whole it must be deemed noteworthy that in the opinions of the Government of the Republic as well as of other representatives of the executive powers the Chancellor of Justice lacks competence to initiate the present case. It is sought to be justified in brief by the fact that preliminary review by the Chancellor of Justice would decrease or even eliminate the competence of the *Riigikogu* in ratification of international agreements. In our opinion, rejecting such competence of the Chancellor of Justice significantly complicates the constitutional review of international agreements as a whole. Namely, based on the facts noted in points 114–116 of the judgement, the review of the constitutionality of a ratified international agreement is hindered by those problems which are practical, on the one hand, and which harm a state's international prestige, on the other hand, and which would occur when Estonia would like to withdraw from a ratified international agreement which has been declared unconstitutional. Such rejection of preliminary review of the constitutionality of international agreements with a slight probability of a subsequent review is not, in our opinion, in accordance with § 14 of the Constitution pursuant to which it is the everyday duty of, inter alia, the executive power to guarantee the fundamental rights and constitutional values. By generalising the case-law it can be noticed that the problems of competence are raised for two purposes: either with the intent to guarantee in the legal landscape a more general legal certainty and clarity, or on the other hand – based on the wish of a specific participant to the

proceedings to avoid solving problems of essence. In this present court case the opinion of the representatives of the executive power in the matter of the competence of the Chancellor of Justice does not follow the first purpose of disputes over competence – the purpose of guaranteeing legal certainty and legal clarity in the Estonian legal order.

2. The problem of legal clarity and certainty is, in our opinion, one of the main problems of this case of constitutionality, and it is alarming that the judgement has not been able to solve this problem to a significant extent. As mentioned previously, there is no doubt that formally the Treaty is an international agreement. But without a doubt the Treaty is not an ordinary international agreement by nature. The main question was, is and due to the judgement will be for a certain period of time what should the Treaty be deemed as materially, or in other words: how is the Treaty positioned according to the meaning and intent of its creators in the context of EU law, and how should the controversy between how the Treaty is seen and what is its nature be assessed in order to guarantee as efficient protection of constitutional values as possible. The position of the Government of the Republic reflected in point 19 of the judgement is that due to the dualistic nature of the Treaty, it cannot be addressed apart from the EU legal space, economic and monetary union; that the Treaty must be assessed based on Estonia's membership in the EU because its content and nature are related to membership in the EU and they strongly concern EU law; that the Finnish Eduskunta processes the Treaty as an EU matter and its constitutionality is assessed through Finland's membership in the EU; that in acceding to the EU, Estonia undertook to join the economic and monetary union and to adopt the euro. We find that the arguments concerning the dualism of the Treaty are not convincing. There is no doubt that the motive for establishing the Treaty – inefficiency of the functioning mechanisms of the euro area and the weakness of the review mechanisms – is the second most important matter for Estonia compared to accession to the euro area.

3. In the law of the EU Member States and also in the case-law there really is such a term as "an EU matter", and in addition to Finland, also in a judgement of the German Constitutional Court of 19 June 2012 no. 2 BvE 4/11 (mostly points 100–105 of the judgement) the Treaty has been considered to be an EU matter. It can also not be denied that it appears quite clearly also from § 1521 (2) of the *Riigikogu* Rules of Procedure and Internal Rules Act that it is possible to deem as an EU matter something that is not regulated by EU legislation. However, we find that references to the dualistic nature of the Treaty and, inter alia, the fact that it is an EU matter does not help us in any way in the adjudication of this constitutional review case.

4. In point 222 of the judgement it is appropriately recalled that "[o]n 14 September 2003, the people of Estonia adopted in a referendum the Constitution of the Republic of Estonia Amendment Act. Pursuant to § 1 of the CREAA, Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. According to § 2 of the CREAA, when Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty. The Supreme Court *en banc* is of the opinion that the people of Estonia gave, in a referendum held on 14 September 2003, their consent in form and in substance for Estonia to accede to the European Union and thereby enjoy the rights and obligations arising from the membership in the European Union". We hold that membership in the European Union cannot and should not be easily identified with deeming EU matters completely binding on us. It should not be forgotten that the people have given a clear authorisation to belong to the European Union in accordance with the fundamental principles of the Constitution, but the people hardly consented, by giving the said authorisation, to subjecting themselves to any obligations which do arise from an EU matter but are outside EU law. Or if to interpret the authorisations granted by the people in such an extended manner, then can we state that in subjecting ourselves to any EU matter, the accordance of the matter with the fundamental principles of the Constitution should not be reviewed? We still find that answering that question requires a more thorough analysis than is included in the Supreme Court judgement in question.

5. That is why we consider the following text of point 223 of the judgement debatable: "The Supreme Court *en banc*holds that § 1 of the CREAA is to be considered as an authorisation to ratify the Accession Treaty as well as an authorisation which allows Estonia to be a part of the changing European Union. Provided the amendment of the founding treaties of the European Union or a new treaty is in accordance with the Constitution. At the same time, the Supreme Court *en banc* is of the opinion that the CREAA does not authorise the integration process of the European Union to be

legitimised or the competence of Estonia to be delegated to the European Union to an unlimited extent. Therefore, it is primarily the *Riigikogu* which must, upon a change in any founding treaty of the European Union and also upon entry into a new treaty, deliberate separately and decide whether the amendment to the founding treaty the European Union or the new treaty leads to a deeper integration process of the European Union and thereby an additional delegation of the competence of Estonia to the European Union, and thus also a more extensive interference with the principles of the Constitution. If it becomes evident that the new founding treaty of the European Union or the amendment to a founding treaty of the European Union gives rise to a more extensive delegation of the competence of Estonia to the European Union and a more extensive interference with the Constitution, it is necessary to seek the approval of the holder of supreme power, i.e. the people, and presumably amend the Constitution once again. These requirements are to be considered also if the Treaty leads to amendments to the TFEU and TEU".

We wish to emphasise the doubts which are actually the basis for point 223 of the judgement – the last and probably the most memorable point of the judgement. These are doubts as to doesn't the Treaty itself constitute in substance such amendment of the founding treaty of the European Union which would have given rise to asking for the people's consent. We hold that the Supreme Court *en banc* should have reviewed those doubts and assessed within which limits the European Union may be shaped with instruments outside the EU law.

6. The Supreme Court *en banc* has reviewed the constitutionality of Article 4(4) of the Treaty (but in connection therewith also of the entire Treaty) with a very low intensity. It is revealed, firstly, in the determination of the extent of the review (points 120, 121, 143 of the judgement) where it is stressed that the review is limited to only Article 4(4); secondly, in the determination of the purpose of the interference with the interfered principles of the Constitution; thereby this purpose is hard to catch (points 154, 158, 165, 169, 198); and lastly, in the determination of the competence of the Supreme Court (points 173 and 174 of the judgement). From the purposes of a preliminary review specified in points 114–116 of the judgement arises logically, in our opinion, that a review of a contested international agreement should be as extensive and thorough as possible. Therefore, provisions related to Article 4(4) of the Treaty should have been subjected to the review as well. We find that in addition to Article 4(4) of the Treaty referred to by the Chancellor of Justice, also the irreversible and unconditional nature of the financial obligations to be assumed by the Treaty (point 58 of the judgement) and the limited nature of judicial review of the operations of the ESM (point 62 of the judgement), as referred to by Dr Anneli Albi, jurisprudent, should have been addressed as related provisions.

7. In respect of the thoroughness of the review we cannot concur with the conclusion arising from points 173–175 of the judgement like the Supreme Court could review the constitutionality of the provision in question in full only after the *Riigikogu* has been able to exercise its right of discretion in the ratification procedure. By such a self-restraint the Supreme Court *en banc* made the review of the request of the Chancellor of Justice meaningless in a large part, although in points 114–116 of the judgement the Chancellor of Justice was granted unrestricted competence for filing such a request in the preliminary review stage. The self-restraint may be explained by a wish of the Supreme Court *enbanc* to avoid assumption of final responsibility. If to agree with the position of the Supreme Court *en banc* that the method of preliminary and subsequent review of constitutionality may differ, then final conclusions concerning the constitutionality of one and the same provision may also differ. It is worth mentioning that at the same time with the self-restraint in question the Supreme Court has deemed itself competent, in addressing the necessity of the measure provided in Article 4(4) of the Treaty, to nonetheless assess whether the euro area Member States have a decision-making mechanism which would allow to eliminate in an emergency a threat to the economic and financial sustainability of the euro area as effectively but which would interfere with the Estonian Constitution less (point 182 of the judgement).

8. Unfortunately, the majority of the Supreme Court *en banc* chose in this court case the review of proportionality in order to assess the constitutionality of the interference with the principles of the Constitution; thereby referring to the case of funding local authority budget (the Supreme Court *en banc* judgement of 16 March 2010 in case no. 3-4-1-8-09, point 64). This reference which should justify the choice of review is misleading because the point referred to pertains to the right of a local authority to assume debt obligations and to the authorisation granted to the legislator to restrict the independence of local authorities and to the need of that restriction, i.e. interference, to be

appropriate, necessary and reasonable for the achievement of its purpose. The central issue in that court case was the fundamental right of local authorities – the autonomy clause "all local matters are determined and administered by local authorities, who discharge their duties autonomously in accordance with the law" provided for in § 154 of the Constitution, not the principles of the Constitution: sovereignty of the state, including the financial competence of the parliament and the principle of a democratic state subject to the rule of law. By applying the proportionality test the majority of the Supreme Court *en banc* held that the interference occurring on the ratification of the Treaty is not very serious; however, the interference is based on significant constitutional values – the need to guarantee the protection of fundamental rights and freedoms. It is unclear how the Supreme Court *en banc* could assess the appropriateness and necessity of the interference in a situation where the Supreme Court *en banc* lacked a certain analysis as to how great the benefit of the emergency procedure provided for in Article 4(4) of the Treaty is in safeguarding the stability of the euro area. In assessing reasonableness it was proceeded from unreasoned belief that the interference occurring in the ratification of the Treaty and the interference which could occur later in carrying out the Treaty must be distinguished. We are of the opinion that it should have been assessed whether the contested emergency procedure which leaves the state of Estonia out of the decision-making outweighs the sovereignty of the state of Estonia, including the financial competence of the *Riigikogu* and the principle of a state subject to the rule of law which are one of the most substantial principles. The answer to that question is negative in our opinion.

9. It can be concluded from the reasoning of the judgement that the Supreme Court *en banc* did not assess or even deem it necessary to assess the risks arising for the state budget and economic capability of Estonia in accession to the Treaty. The Supreme Court *en banc* held that the Supreme Court can, in principle, verify whether the *Riigikogu* has fulfilled its duty in accordance with the Constitution only by way of a subsequent review of constitutionality (i.e. after the ratification of the Treaty) (see point 174 of the judgement). Such an approach cannot be agreed with. Already in these present proceedings – therefore in a preliminary review of the constitutionality of a provision of an international agreement the Supreme Court must assess all the risks. This should have been done by the Supreme Court *en banc* also with regard to Article 4(4) of the Treaty. This in turn means that the representatives of the executive power should have actually filed with the Supreme Court a thorough risk analysis, but they failed to do so.

10. The authors of this dissenting opinion cannot understand the line of thought proceeding from points 175 and 189 of the judgement as if after ratifying the Treaty Estonia would have sufficiently various options for carrying out this international agreement and all that is required is to choose the options which are constitutional. The constitutional problem, in fact, is that after ratifying the Treaty Estonia lacks any options in essence. The fact that the Treaty is to be carried out no matter what after its ratification means in the end that Estonia's financial possibilities of carrying out constitutional obligations nationally decrease by the amount which Estonia must pay for carrying out the Treaty. In this context it is irrelevant from which sources the funds necessary for carrying out the Treaty are obtained. Let us note here that in a situation where Article 4(4) of the Treaty would have to be carried out, the conditions for receiving loan money are most likely not favourable.

The Supreme Court *en banc* has noted that the court's duty in the constitutional review is not to prescribe for the legislator a choice on how to later fulfil the obligation assumed and that the court can verify by way of constitutional review also the constitutionality of subsequent choices made by the legislator (point 175 of the judgement). We find that such a position is irrelevant. The constitutionality of carrying out the Treaty is a problem different from the constitutionality of the provisions of the Treaty itself. This present case is not and it cannot be a dispute over how Estonia is going to carry out the Treaty. At the same time the validity of the Treaty does not depend on the validity of legislation adopted for carrying out the Treaty. This means that the Treaty will remain in force also in case some legislation adopted for carrying out the Treaty is declared invalid by the Supreme Court by way of constitutional review.

11. The conclusion of the Supreme Court *en banc* that the Treaty is indispensable for safeguarding the economic and financial stability of the euro area and of Estonia, and through it also the protection of fundamental rights and freedoms (point 208 of the judgement) is unfounded. Such a position should have been based on an economic-scientific analysis.
The fulfilment of financial obligations arising from the Treaty presumably decreases the allocation of state budget funds to Estonian

institutions which guarantee the protection of fundamental rights. There is no doubt that the implementation of the Treaty harms the principle of a social state arising from §§ 10 and 28 of the Constitution because making payments to the capital stock of the ESM decreases state budget funds. Keeping the state budget in balance will probably be more difficult than so far as well. Dr Anneli Albi, legal researcher, pointed out in her opinion the risk of hyperinflation which may accompany the ESM and the interference with the right of ownership related thereto. Unfortunately, these issues have gone unnoticed by the Supreme Court *en banc*.

12. Participation in international cooperation (point 201 of the judgement) is without a doubt an argument in favour of accession to the ESM but the judgement lacks the smallest of analyses that not being a part of the ESM would give rise to serious setbacks for Estonia in international cooperation. It is hard to agree with the comprehension of the majority that if Estonia's economy should encounter difficulties in the future, the ESM is one option to receive assistance (point 200 of the judgement). The source of such optimism is not revealed in the judgement. Both Articles 3 and 12(1) of and paragraph (6) of the preamble to the Treaty referred to in the judgement tie assistance to a threat to the euro area. The situation of Estonia's economy alone does not constitute a threat to the euro area in our opinion.

13. We also note that considering only the lack of Estonia's right of veto is not possible in weighing the constitutionality of the Treaty. It is important to state that in the decision-making process of the ESM, the possibility of small countries, including of Estonia, to jointly protect their interests have significantly decreased. The required 85% majority can be obtained under a decision of merely the six largest Member States. By adding up the votes of Germany's 27.1464, France's 20.3859, Italy's 17.9137, Spain's 11.9037, the Netherlands' 5.7170 and Belgium's 3.4771 we get a majority of 86.5438 votes. In other words, the six Member States have a possibility to take a decision without needing the votes in favour of the remaining 11 Member States. Consequently, unlike decision-making processes in the European Union, the decision-making mechanism of the ESM is based on the fact that the contributed money determines the voting rights (see R. Narits and G. Ginter, ESM lepingu põhiseaduslikkus kui demokraatliku protsessi defitsiidi küsimus (Constitutionality of the Treaty Establishing the ESM as a Matter of Deficit of Democratic Process), Juridica, 2012, No. 5, pp. 343–358).

A dissenting opinion of the justice of the Supreme Court Tambet Tampuu on the Supreme Court *en banc*judgment of 12 July 2012 in case no. 3-4-1-6-12

1. I agree with points 2–13 of the dissenting opinion of the justices of the Supreme Court Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa.

2. Unlike the majority of the Supreme Court *en banc* I find that in assessing the constitutionality of Article 4(4) of the Treaty it was not correct to assess the proportionality of the interference with the principles of the Constitution. The so-called proportionality test is suitable for assessing the constitutionality of a provision of legislation in cases where the matter of an interference with a person's fundamental rights is being adjudicated. This present case does not constitute a dispute of such type.

The main issue of this court case is a question of whether the *Riigikogu* may waive a part of its budgetary powers to the ESM. The Supreme Court *en banc* justifiably held that Article 4(4) of the Treaty interferes, inter alia, the principles of Estonia's sovereignty and a democratic state subject to the rule law provided for in § 1 of the Constitution. I am of the opinion that these principles constitute fundamental principles of the Constitution. The waiver of the *Riigikogu*'s budgetary powers accompanying Article 4(4) of the Treaty does not decrease only Estonia's sovereignty, but is also undemocratic because the people have, by electing the *Riigikogu*, authorised the members of the composition of the*Riigikogu* to make budgetary decisions themselves pursuant to § 65 6) and § 115(1) of the Constitution. Since it is an interference with the fundamental principles of the Constitution which have been provided for in the first chapter of the Constitution, the right to decide on the permissibility of such interferences is vested, based on § 162 of the Constitution, solely in the people of Estonia as a sovereign. In connection with Article 4(4) of the Treaty the *Riigikogu*can decide whether to hold a referendum for amending the Constitution (see § 65 2), § 161, § 163(1) and § 164 of the Constitution).

The Supreme Court *en banc* has wrongly deemed the Treaty as an ordinary international agreement (see points 129 and 130 of the judgement of the Supreme Court *en banc*), failing to notice that Article 4(4) of the Treaty gives rise to a situation where the people's possibility to decide, through *Riigikogu* elections, on how to use state budget funds decreases. By passing annual state

budgets (concerning all revenue and expenses of the state) the *Riigikogu* exercises on behalf of the people the budgetary powers of the state which is one of the most important characteristics of the sovereignty of a state. Since the Treaty and Article 4(4) thereof will remain valid in case the Treaty is ratified also when the people elect future compositions of the *Riigikogu*, the people cannot fully express their political will, by*Riigikogu* elections, in the future in matters related to the expenditure of the state budget.

For the reasons mentioned above I find that the Supreme Court *en banc* should have satisfied the request of the Chancellor of Justice because in order for Article 4(4) of the Treaty to enter into force, the Constitution needs to be amended by way of a referendum.

3. I concur with the opinion of the majority of the Supreme Court *en banc* that the Treaty is not a part of the primary or the secondary law of the European Union. But considering the fact that the Treaty will probably give rise to the amendment of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) (see points 217–223 of the judgement of the Supreme Court *en banc*), the Supreme Court *en banc* should have assessed in this matter whether Article 4(4) of the Treaty is in accordance with the fundamental principles of the Constitution for the purposes of § 1 of the Constitution of the Republic of Estonia Amendment Act (CREAA). Giving such an assessment would eliminate a situation where Estonia accedes to the Treaty validly but the future amendments of the TEU and TFEU related thereto may prove to be in conflict with the fundamental principles of the Constitution and therefore invalid for Estonia.

I would like to note in addition that the people of Estonia did not waive, by passing the CREAA in a referendum, the*Riigikogu*'s budgetary powers to the European Union. It can be concluded from point 223 of the judgement of the Supreme Court *en banc* that in order to waive the *Riigikogu*'s budgetary powers to the European Union the Constitution needs to be amended. Logically, the requirement to amend the Constitution should apply in all cases where the*Riigikogu*'s budgetary powers are waived, including in case of Article 4(4) of the Treaty.

4. I do not agree with the opinion of the majority of the Supreme Court *en banc* that the seriousness of the interference with the Constitution depends also on how the *Riigikogu* organises the fulfilment of the obligations arising from the Treaty (see points 175, 189, 196 and 202 of the judgement of the Supreme Court *en banc*). According to the first sentence of Article 8(4) of the Treaty, ESM Members irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock. Pursuant to the second sentence of Article 8(4) of the Treaty, ESM Members shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty. Consequently, the *Riigikogu* cannot, without breaching the Treaty, alleviate the effect of possible negative consequences for Estonia arising from the application of Article 4(4) of the Treaty.

5. In assessing the seriousness of the interference, the majority of the Supreme Court *en banc* has proceeded also from how the Treaty governs the application of Article 4(4) of the Treaty (see points 191–195 of the judgement of the Supreme Court *en banc*). But the fact that Estonia has no means to affect the application of that provision by way of voting has gone unnoticed.

Dissenting opinion of the justice of the Supreme Court Jaak Luik on the Supreme Court *en banc* judgment of 12 July 2012 in case no. 3-4-1-6-12

I do not agree with the judgment of the Supreme Court *en banc* concerning dismissal of the request of the Chancellor of Justice. The Supreme Court *en banc* was forced to make a rushed judgment in a situation of confusion, uncertainty and legal vagueness dominating in the legal space of both Estonia and the European Union. Reading the judgment of the Supreme Court *en banc* I am overwhelmed with concern, perplexity and puzzlement. I am not capable of thoroughly analysing in the dissenting opinion all the positions, conclusions and beliefs of the judgment of the Supreme Court *en banc*. For that reason I will concentrate on the most important aspects, addressing first the constitutionality of the Treaty from the fundamental principles of the Constitution point of view (I), then the efficiency and possible effect on Estonia of the ESM as an instrument (II).

I

1. The fundamental principles of the Constitution can be divided on the basis of purpose (function): 1) ideas (values bearing a main idea, so-called self-values, e.g. guarantee of preservation of the Estonian nation, culture and language, but also guarantee of human dignity and safe living environment for all who have settled in Estonia); 2) instrumental

(aims/values of a measure, e.g. the state and law, fundamental rights, freedoms and obligations, bases of and procedure for amending the Constitution); and 3) expressing measure (e.g. justice, independence and sovereignty).

2. On the basis of an agreement founded on the national right of self-determination of the people of Estonia (preamble to, Chapter I "General Provisions" and Chapter XV "Amendments of the Constitution" of the Constitution), an integral and single system of the fundamental principles of the Constitution (the fundamental principles can also be called pillars) can be formed: 1) purpose; 2) independent and sovereign democratic republic; 3) sovereign – in which the supreme political authority is vested – the people; and 4) the bases of and procedure for amending the Constitution. In brief, the principle of integrity and unanimity allows us to assess the depth and extent of interference with the fundamental principles.

3. Pursuant to § 1(1) of the Estonian Constitution, Estonia is an independent and sovereign democratic republic wherein supreme political authority is vested in the people. I agree with the position of the Supreme Court *en banc*that the main essence of the sovereignty fixed as the basis for the people and state of Estonia by the Constitution is expressed in the right of discretion in all matters of exercise of political authority irrespective of external influences. The state's financial sovereignty is one element of sovereignty which includes taking decisions on budgetary matters and on assumption of financial obligations for the state (paragraph 127 of the judgment of the Supreme Court *en banc*).

4. By finding that the sovereignty clause of the Estonian Constitution is strict by wording, providing that the independence and sovereignty of Estonia are timeless and inalienable, the Supreme Court *en banc* failed to ascertain the spirit and purpose of timelessness and inalienability of the sovereignty, adopting the opinion that also this norm is characterised by wide discretion of interpretation (paragraph 128 of the judgment of the Supreme Court *en banc*). It is not possible to agree with the linear legal-positivist approach to the concept of sovereignty.

5. According to § 1(2) of the Constitution, the independence and sovereignty of Estonia are timeless and inalienable. In furnishing the timelessness and inalienability of independence and sovereignty it is appropriate to recall that on 21 June 1940 President K. Päts released by a decree no. 55 issued under a special right the Government of the Republic and by a decree no. 56 appointed a Government headed by Prime Minister Johannes Vares. What happened next to Estonia's independence and sovereignty, and people and dignity is well known to us all. Let it be said that the President was competent, on the basis of a special right, to release and appoint the Government. Probably based on those and other fears a special sovereignty protection clause was provided in the Constitution in order to avoid alienation (waiver) of the independence and sovereignty of Estonia merely under competence norms. The sovereignty clause is also an indisputable requirement of safeguarding the self-determination right of the people of Estonia, the democratic state subject to the rule of law and social state, and the dignity of the people and state of Estonia.

6. Since § 1(2) of the Constitution explicitly provides for the timeless prohibition on alienation of independence and sovereignty, here is no room for interpretation – the prohibition on alienation of sovereignty is absolute both in time and in a changing legal space. Also partial handing over (surrender/waiver) of independence and sovereignty is alienation of sovereignty. If as a rule assumption of a financial obligation with an ordinary international agreement narrows/restricts/limits only the state's budgetary-political choices, then assumption of an obligation to partially waive the financial sovereignty in question eliminates in essence parliamentary democracy in issues related to the ESM. As I understand it, the sovereignty provided for in § 1(1) of the Constitution is expressed in entry into international agreements in exchange of amenities and cooperation, based on the parties' free will, which is not related to waiver of competences of an independent and sovereign state. The Republic of Estonia may not enter into international treaties which are in conflict with the Constitution (§ 123(1) of the Constitution). An international agreement containing an obligation to partially waive sovereignty is in conflict with § 1(2) of the Constitution. Thus, in the context of the Constitution, restriction and waiver of sovereignty are in principle terms with different meanings.

7. The principle of a democratic state subject to the rule of law has been derived from § 10 of the Constitution. According to § 3(1) of the Constitution, governmental authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Therefore, also the prohibition on alienation of sovereignty is a requirement of a democratic

state subject to the rule of law which shall be adhered to unconditionally in the exercise of political authority.

8. The Constitution of the Republic of Estonia Amendment Act (CREAA) passed at a referendum did not alter the system of fundamental principles of the Constitution. Pursuant to § 1 of the CREAA, Estonia may belong to the European Union, provided the fundamental principles of the Constitution of the Republic of Estonia are respected. When Estonia has acceded to the European Union, the Constitution of the Republic of Estonia is applied without prejudice to the rights and obligations arising from the Accession Treaty (§ 2 of the CREAA). This is how Estonia as a EU Member State preserved parliamentary democracy, including reservation by the parliament as well as independent budgetary powers.

9. In a meeting of 21 July 2011 between the Heads of State and Government of the euro area Member States it was decided to make the ESM more efficient by replacing, inter alia, in the text of the Treaty signed by the Minister of Finance on 11 July 2011 the original requirement of unanimity with a qualified majority of 85% if the European Commission and the European Central Bank conclude that in order to safeguard the financial and economic stability of the euro area it is necessary to urgently adopt a decision related to financial assistance. Under the Government of the Republic order of 2 February 2012 no. 60 "Approval of the draft "Treaty Establishing the European Stability Mechanism" and grant of authorisation", the representative of Estonia signed the Treaty in Brussels. Hereby I join and agree with the conclusion and its reasoning in paragraph 11 of the dissenting opinion of the justices of the Supreme Court Henn Jõks and others that due to the said replacement, the possibility of small countries, including Estonia, to jointly protect their interests decreased significantly.

10. According to Article 8(4) of the Treaty, ESM Members irrevocably and unconditionally undertake to provide their contribution to the capital stock. Grant of emergency assistance under Article 4(4) of the Treaty may give rise to a capital call (subscribed but not paid 1 153 200 million euros, paid-in 148.8 million euros, total of 1 302 000 million euros). Article 4(4) of the Treaty does not allow the *Riigikogu* to influence the decision-making of the ESM in an emergency procedure. This can be done by the following countries having the right of veto in emergency procedure: Germany, France and Italy. From the aspect of the Constitution it is worth to point out a warning of professor Dr Dietrich Murswiek that the ESM constitutes a transformation from the fundamental principle of the European monetary union (the European Union as a whole or a single Member State is not required to assume the debt obligations of another Member State) to a different principle where market economy, the Member States' own risk, democracy and sovereignty mean less and less, leading to interference with the budgetary and financial policy as well as with economic and social policy of the Member States.

11. The Supreme Court has held in its earlier decision that reservation by the parliament expresses the nature of a democratic state subject to the rule of law: what the legislator is justified or obliged to do under the Constitution cannot be delegated to the executive, not even temporarily and under the condition of court supervision (the Constitutional Review Chamber of the Supreme Court judgment of 12 January 1994 in court case no. III-4/A-94; see also paragraph 133 of the judgment of the Supreme Court *en banc*).

12. In connection with the Treaty, important financial decisions have been made beforehand by the Government instead of the parliament. The Treaty does not allow the *Riigikogu* to make any amendments. So the *Riigikogu* cannot decide independently on Estonia's amount of the paid-in and callable capital or on the method (equation) of calculating the obligation, on the rules of emergency procedure and grant of financial assistance. In carrying out the Treaty the*Riigikogu* does not have the competence to shape, to the extent of capital called in, the conditions for grant of emergency assistance, assess whether emergency assistance has been granted under strict conditionality (the ESM is not required to report to the *Riigikogu*, so it is free to grant emergency assistance on other considerations without setting any conditions) and whether the assistance is productive. At the same time the parliament is liable to the people for the state's expenditure and revenue as well as for the balance between them. Whether and how can the*Riigikogu* bear financial-political general liability within its budgetary powers if it merely plays the role of guaranteeing the execution of a capital call? Now it is time to ask: what is / will be left of the *Riigikogu*'s financial sovereignty besides a merely formal competence to decide on the ratification of the Treaty in question and on the post-ratification obligation to establish a legal environment necessary for the fulfilment of the financial obligation assumed irrevocably and unconditionally and to reserve 1 153 200

million euros to ensure the satisfaction of a claim filed at any given time? In perplexity I place here three question marks.

13. The ESM is a measure for alleviating the consequences of the global financial crisis (in the present situation it is difficult to form an opinion on other purposes which may appear in the ESM operations, also on possibilities of establishment of new instruments and assumption of new obligations). At the same time it is obvious that the Treaty concerns the fundamental principles of the Constitution as a whole: the self-determination right of the people, the state's sovereignty, including financial sovereignty (depth of interference) and monetary policy and functioning of a democratic state subject to the rule of law and social state in all its areas, including guarantee of fundamental rights (extent of interference).

14. § 162 of the Constitution explicitly and unambiguously provides that Chapter I (General Provisions) and Chapter XV (Amendment of the Constitution) of the Constitution may only be amended by referendum. Namely amend: by adding to the Constitution it is not possible to furnish the timeliness and inalienability of Estonia's independence and sovereignty as a fundamental principle differently and to attribute a different purpose to it so that the uniform system of fundamental principles as a whole would remain unchanged. Consequently it is not important whether the Treaty is just an international agreement or an international agreement which concerns EU law more or less: due to the existence of the prohibition on partial waiver of sovereignty, the Constitution does not allow to ratify the Treaty. The Chancellor of Justice submitted to the Supreme Court a request to declare Article 4(4) of the Treaty to be in conflict with the principle of parliamentary democracy arising from § 1(1) and § 10 of the Constitution, and with § 65 10) and § 115 of the Constitution. The Supreme Court has not assessed the conformity of Article 4(4) of the Treaty and of the Treaty as a whole with § 1(2) of the Constitution.

II

15. According to the judgment of the Supreme Court, the purpose of the ESM is to safeguard the financial stability of the euro area. Be it so. But the conclusion of the Supreme Court *en banc* that the economic and financial sustainability of the euro area is included in the constitutional values of Estonia (paragraph 163 of the judgment) is problematic and disputable. Firstly, it is not possible to be sure that by authorising in a referendum Estonia's accession to the European Union the people thereby authorised Estonia's accession to the single currency euro and as a result of that agree to partial waiver of sovereignty and assumption of an enormous financial obligation with inevitably accompanying new restrictions. Secondly, in applying the proportionality test the Supreme Court *en banc* set the fundamental principles (values) and ESM instruments on the same level by considering Article 4(4) of the Treaty as a value justifying restrictions on requirements arising from the principles of sovereignty and a democratic state subject to the rule of law (paragraphs 160–162 of the judgment of the Supreme Court *en banc*). Thirdly, the judgment of the Supreme Court *en banc* does not contain a word about the nature of the global, including of the euro area's financial crisis, about political, economic and ideologic reasons and about the actual situation. Therefore I find that without having a clear overview of the situation and without thoroughly knowing the facts of the financial and economic crisis it was not possible for the Supreme Court *en banc* to make a thoroughly deliberated and reasoned judgment.

16. According to Article 119(2) of the TFEU, the primary objective of a single monetary policy and exchange-rate policy shall be to maintain price stability (including consumer prices). The nations of the wealthiest countries in the euro area still enjoy that benefit. As of the adoption of the euro the consumer prices have constantly risen in Estonia. And so the rise in consumer prices in Estonia this year has been the highest within the euro area. This means the consumer price stability has acquired a negative output in Estonia. Alleged economic success is seeming: Estonia is without a doubt one of the poorest countries in the euro area. A rise in prices due to opening of the electricity market lies ahead. The Constitution obliges us to develop the state which shall ensure to present and future generations social progress and welfare (preamble to the Constitution). Is social progress and welfare to be understood as a guarantee of well-being for few?

17. The Treaty attributes an opposite value also to the principle of solidarity: Estonia undertakes to guarantee with the taxpayer's money the sustainability of the states of the euro area which are many times wealthier than Estonia, including the sustainability of the private sector (banks) of the said states. The idea probably is that the inhabitants of those states are used to well-being which shall be maintained as long as possible. The living standard in Estonia may safely decrease. Estonia is a small country, the people are patient and understanding: it laboured to adopt the euro to meet the

Maastricht criteria, when the economic depression came and in the interests of budget balance it agreed to restrictions without complaining. Is it not unjust? Or does it in the contemporary interpretation mean a state founded on liberty, justice and the rule of law (preamble to the Constitution). I am perplexed.

18. In its earlier judgment the Supreme Court has defined democracy as the exercise of power with the people's participation and making important management decisions on a basis as broad and harmonized as possible (the Constitutional Review Chamber of the Supreme Court judgment of 21 December 1994 in court case no. III-4/A-11/94; see also paragraph 132 of the judgment of the Supreme Court *en banc*). Yet, democratic participation as a national mentality has still not found a place in the Estonian society: the people are not informed of problems related to the Treaty and therefore have not been able to participate at all in the decision-making process or to influence it. An enormous obligation is wished to be assumed for the state; however, it is the people who bear the obligation. My serious concern here is that although pursuant to § 14 of the Constitution it is the duty of the legislature, the executive, the judiciary, and of local authorities, to guarantee rights and freedoms, the Government has failed, in preparing the draft Treaty and in ratifying it, to seriously consider or analyse the conformity of the Treaty in question with the Constitution.

19. The euro is a means of payment, currency and capital. It is common knowledge that the principle of free movement of capital which is known as one of the pillars of the European Union has become, in a situation of lack of supervision and control on the merits of the operations of banks, a factor endangering the financial stability of the euro as well as the sustainability of the euro area Member States. Foundation of a bank and budget union is conceivable as a solution to the problem of capital management and sustainability of the euro area Member States. In guaranteeing sustainability, adherence to the Maastricht criteria could prove to be helpful. But regardless of how hard I try, I cannot understand how emergency assistance/assistance increasing the burden of debt of a state/bank allows in the long run to guarantee the economic and financial sustainability thereof and of the entire euro area (see paragraph 181 of the judgment of the Supreme Court *en banc*). So I find that the beliefs of the Supreme Court *en banc* in the mystical efficiency of the ESM in safeguarding the prosperity of the euro area Member States, including Estonia, (see paragraphs 163–169, 179, 199–201, 208 and 209 of the judgment of the Supreme Court *en banc*) do not fit in the boundaries of intelligent probability.

20. Capital is a phenomenon guided by the principle of absolute greed. It means that capital always moves there where the biggest gain can be expected, being completely indifferent to ethics and other spiritual values. Therefore also being indifferent to the preservation of the Estonian nation, language and culture (paragraph 201 of the judgment of the Supreme Court *en banc*).

21. A financial crisis is a phenomenon of a global value crisis. The nature of a value crisis has been captured well by a theologian Dorothee Sölle: "Our relationship with the world has been defined by the most important idols worshipped by the contemporary culture: money and violence. In terms of language it means that a lot of people have become interestingly helpless with respect to all that cannot be obtained, acquired, taken possession of, conquered, controlled or marketed." A value crisis is chaos in thinking, characterised by aimlessness, shallowness and vagueness, lack of fundamental values as fulcrums, the centre of multiplicity of values is occupied by material gain. In lack of an ethical discipline the reigning political authority deems also the people/person as an instrument. Time will tell whether/when/how the value system of Estonia will change. One thing is clear already: Estonia's attempt to become one of the wealthiest countries in Europe – is not a reasonable goal. However, Estonia may reach the dignified states with the combination of skilful possession of means and understanding. On the twentieth anniversary of the Constitution of the Republic of Estonia I wish the people of Estonia happy endurance in the past, present and future.

§60. August 9th, 2012, 2012/653, French Conseil Constitutionnel, Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/sample-of-decisions-in-relevant-areas-dc/decision/decision-no-2012-653-dc-of-9-august-2012.115501.html

The Constitutional Council was seized by the President of the Republic on 13 July 2012 pursuant to Article 54 of the Constitution with the question as to whether authority to ratify the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed in Brussels on 2 March 2012, may only be granted after the Constitution has been amended;

THE CONSTITUTIONAL COUNCIL,

Having regard to the Constitution of 4 October 1958, and in particular Article 88-1 thereof;

Having regard to Ordinance no. 58-1067 of 7 November 1958 as amended, concerning the basic law on the Constitutional Council;

Having regard to the Treaty on European Union;

Having regard to the Treaty on the Functioning of the European Union;

Having regard to Council Regulation (EC) no. 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies;

Having regard to Council Regulation (EC) no. 1055/2005 of 27 June 2005 amending the aforementioned Regulation (EC) no. 1466/97 of 7 July 1997;

Having regard to Regulation (EU) no. 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending the aforementioned Regulation (EC) no. 1466/97 of 7 July 1997;

Having heard the Rapporteur;

1. Considering that the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was signed on 2 March 2012 in Brussels by the plenipotentiaries of twenty five Member States of the European Union; that the Constitutional Council has been requested to consider whether this Treaty includes any provision which is unconstitutional;

2. Considering that, according to Article 1, the purpose of the Treaty is "to strengthen the economic pillar of the economic and monetary union"; that it applies in full to the Contracting Parties which use the euro as their currency; that the provisions of Title III, including Articles 3 to 8, lay down a range of rules intended to promote budgetary discipline through a "fiscal compact"; that the provisions of Title IV, including Articles 9 to 11, are intended to reinforce the coordination of economic and convergence policies; that the provisions of Title V, including Articles 12 and 13, are intended to "improve the governance of the euro area";

3. Considering that Article 2 provides that this Treaty "shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded" and that it "shall apply insofar as it is compatible with the Treaties... and with European Union law"; that pursuant to Article 16, the States undertake to incorporate the substance of the Treaty into the legal framework of the European Union within five years at most of its entry into force;

THE REFERENCE LEGISLATION

4. Considering that, according to the Preamble to the 1958 Constitution, "the French people solemnly proclaim their attachment to the Rights of Man and the principles of national sovereignty as defined by the Declaration of 1789, confirmed and complemented by the Preamble to the Constitution of 1946";

5. Considering that Article 3 of the 1789 Declaration of the Rights of Man and the Citizen provides that "the principle of all sovereignty resides essentially in the nation"; that the first paragraph of Article 3 of the 1958 Constitution provides that "national sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum";

6. Considering that the fourteenth recital of the Preamble to the 1946 Constitution states that "the French Republic, faithful to its traditions, shall respect the rules of public international law", whilst the fifteenth recital states that "subject to reciprocity, France shall consent to the limitations upon its sovereignty necessary to the organisation and preservation of peace";

7. Considering that Article 53 of the 1958 Constitution enshrines the existence of "treaties or agreements relating to international organization"; that these treaties or agreements may only be ratified by the President of the Republic pursuant to law;

8. Considering that the French Republic participates in the European Union under the

conditions set forth in Title XV of the Constitution; that pursuant to Article 88-1 of the Constitution: "The Republic shall participate in the European Union, constituted by States which have freely chosen to exercise some of their powers in common, by virtue of the treaties on the European Union and on the Functioning of the European Union, as derived from the Treaty signed in Lisbon on 13 December 2007"; that the constituent authority thereby enshrined the existence of a European Union legal system incorporated into the national legal order which is distinct from international law;

9. Considering that, whilst confirming the place of the Constitution at the pinnacle of the national legal order, these constitutional provisions enable France to participate in the creation and development of a permanent European organisation vested with legal personality and endowed with decision making powers as a result of the transfer of competence consented to by the Member States;

10. Considering however that where the commitments signed to this effect or which are closely related to this goal contain a clause which is unconstitutional, call into question the rights and freedoms guaranteed by the Constitution or run contrary to the essential conditions for the exercise of national sovereignty, authorisation to ratify them may only be granted after the Constitution has been amended;

11. Considering that it is having regard to these principles that the Constitutional Council is to examine the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union which, whilst "building upon the Treaties on which the European Union is founded", is not itself one of these treaties; that however those provisions of the Treaty which restate commitments previously made by France are not subject to constitutional review;

THE PROVISIONS ON THE "FISCAL COMPACT

12. Considering that, on the one hand, the first subparagraph of Article 20 of the Constitution provides: "The Government shall determine and conduct the policy of the Nation"; that the first subparagraph of Article 39 provides that "both the Prime Minister and Members of Parliament shall have the right to initiate legislation";

13. Considering on the other hand that Article 14 of the 1789 Declaration states that "All the citizens have a right to decide, either personally or by their representatives, as to the necessity of public contribution; to grant this freely; to know to what uses it is put; and to fix the proportion, the mode of assessment and of collection and the duration of the taxes"; that pursuant to Articles 14 and 15 of the 1789 Declaration, the State's revenue and expenditure must be presented in a sincere manner; that the first subparagraph of Article 24 of the Constitution provides that: "Parliament shall pass statutes. It shall monitor the action of the Government. It shall assess public policies"; that the first subparagraphs of Articles 47 and 47-1 provide that Parliament shall pass finance bills and social security financing bills in the manner provided for by an institutional act; that pursuant to subparagraphs eighteen, nineteen, twenty one and twenty two of Article 34: "Finance acts shall determine the revenue and expenditure of the State in the conditions and with the reservations provided for by an institutional act.

"Social security financing acts shall lay down the general conditions for the financial equilibrium thereof, and taking into account forecasted revenue, shall determine expenditure targets in the conditions and with the reservations provided for by an institutional act.

"The multiannual guidelines for public finances shall be established by Programming Acts. They shall contribute to achieving the objective of balanced accounts for public administrations.

"The provisions of this Article may be further specified and completed by an institutional act";

As regards the rules on balanced public finances:

14. Considering that paragraph 1 of Article 3 of the Treaty reinforces the rules of fiscal discipline for the contracting States by making provision that, in addition to their obligations under European Union law, the States undertake to ensure that the the budgetary position of their public administration is balanced or in surplus; that letter b) of paragraph 1 defines this position as one in which the "annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices"; that it provides that the parties shall ensure rapid convergence towards this objective according to a time-frame which "will be proposed by the European Commission"; that letters c) and d) of paragraph 1 stipulate the situations and circumstances under which the requirement of

convergence on this objective may be relaxed, either temporarily in cases involving "exceptional circumstances" or, subject to a structural deficit limit of 1 % at most, "where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 %" and where "risks in terms of long-term sustainability of public finances are low"; that subparagraph e) provides for "a correction mechanism" in the event of significant deviations "from the medium-term objective or the adjustment path towards it", which requires the contracting State to "implement measures to correct the deviations over a defined period of time";

15. Considering that France is already required to comply with the requirements resulting from Article 126 of the Treaty on the Functioning of the European Union on fighting excessive government deficits as well as protocol no. 12, appended to the Treaties on the European Union, on the excessive deficit procedure; that these requirements include a reference value set at 3 % as the maximum ratio between the expected or actual public deficit and the gross domestic product at market prices;

16. Considering that the aforementioned Regulation of 7 July 1997, as amended by the aforementioned Regulations of 27 June 2005 and of 16 November 2011, sets at - 1 % of gross domestic product the medium-term structural debt objective; that the provisions of paragraph 1 of Article 3 of the treaty reassert the provisions set forth under these regulations and also lower this medium-term objective from - 1 % to - 0.5 % of gross domestic product; that accordingly these provisions reassert those implementing the commitment of the Member States of the European Union to coordinate their economic policies in accordance with Articles 120 to 126 of the Treaty on the Functioning of the European Union; that they do not result in the transfer of any powers over economic or fiscal policy and do not authorise any such transfers; that the commitment to comply with these new rules does not infringe upon the essential conditions for the exercise of national sovereignty any more than the earlier commitments of budget discipline;

As regards the application within national law of the rules on balanced public finances:

17. Considering that pursuant to paragraph 2 of Article 3 of the Treaty: "The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(letter e), on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments";

18. Considering that, as soon as France has ratified the Treaty and it has entered into force, the rules laid down in paragraph 1 of Article 3 will apply to it; that according to the "pacta sunt servanda" rule, France will be bound by these provisions which it will be required to apply in good faith; that the fiscal situation of general government will be required to be balanced or in surplus under the conditions laid down by the Treaty; that pursuant to Article 55 of the Constitution, it will be hierarchically superior to legislation; that it will be for the different organs of State to monitor the application of this Treaty, within the scope of their respective competences; that Parliament will be in particular required to comply with its provisions when enacting finance laws and social security financing laws; that paragraph 2 of Article 3 moreover requires that national legislation be adopted in order to ensure that the rules set forth in paragraph 1 of that Article take effect;

19. Considering that the provisions of paragraph 2 of Article 3 stipulate an alternative whereby the contracting States undertake to ensure that the rules laid down in paragraph 1 of Article 3 take effect under national law either "through provisions of binding force and permanent character, preferably constitutional" or through provisions "otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes";

20. Considering that under the former alternative, the rules on balanced public finances must take effect through "provisions of binding force and permanent character"; that this option requires the direct introduction of such rules into the national legal order in order for them to apply through the latter to finance laws and social security financing laws;

21. Considering that the Constitution lays down the prerogatives of the Government and

Parliament in the elaboration and enactment of finance laws and social security financing laws; that the principle that finance laws are to be enacted annually results from Articles 34 and 47 of the Constitution and applies with respect to the calendar year; that the direct introduction of provisions of binding force and permanent character mandating compliance with rules on balanced public finances requires that these constitutional provisions be amended; that consequently, if France chooses to give effect to the rules laid down in paragraph 1 of Article 3 through provisions of binding force and permanent character, authorisation to ratify the Treaty may only be granted after the Constitution has been amended;

22. Considering that, under the second alternative, the aforementioned provisions leave the States with the freedom to determine the provisions the full respect for and adherence to which "otherwise" guarantees that the rules on balanced public finances will take effect under national law; that in this case, adherence to the rules laid down in paragraph 1 of Article 3 will not be guaranteed by provisions "of binding force"; that on the one hand, it is for the Member States to determine, for the purpose of ensuring that their commitment is respected, the provisions having the effect required under paragraph 2; that on the other hand, the Treaty stipulates that adherence to the rules laid down in paragraph 1 of Article 3 will not be guaranteed under national law by a provision that is hierarchically superior to legislation;

23. Considering that this second alternative implies that the provisions adopted in order to ensure that the terms of paragraph 1 of Article 3 will take effect apply "throughout the budgetary processes"; that they must therefore be of a permanent character; that they must moreover apply to all "government services";

24. Considering that the twenty second subparagraph of Article 34 of the Constitution enables an institutional act to be enacted in order to specify the framework of policy laws on multiannual guidelines for public finances; that on this basis and on the basis of subparagraphs eighteen and nineteen of Article 34 of the Constitution with regard to finance laws and social security financing laws, the institutional act may adopt provisions applicable to these relative laws in order to ensure that the rules laid down in paragraph 1 of Article 3 of the Treaty take effect subject to the conditions provided for under this second alternative, in particular with the medium-term objective as well as the adjustment path for the fiscal situation of general government, the corrective mechanism for the latter and the independent institutions throughout the budgetary process;

25. Considering that the "correction mechanism" provided for under letter e) of paragraph 1 which the States undertake to put in place must be "triggered automatically "in the event of significant observed deviations from the medium-term objective or the adjustment path towards it" and must include "the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time"; that the provisions of the Treaty imply that the implementation of this correction mechanism will lead to measures regarding all public administrations, especially the State, local government and social security bodies; that these provisions do not define either the procedures according to which this mechanism must be triggered or the measures which must be implemented as a result; that they therefore leave the States free to determine these procedures and measures in accordance with their constitutional law; that according to the last phrase of paragraph 2, this correction mechanism cannot breach the prerogatives of the national parliaments; that it does not breach either the principle of freedom in the administration of local government bodies or the constitutional requirements referred to above;

26. Considering that the independent institutions provided for under the Treaty must monitor compliance with all of the rules set forth in paragraph 1 of Article 3; that they will state their opinion on adherence to the balanced budget rules and, as the case may be, on the correction mechanism which is "triggered automatically"; that no constitutional requirement precludes one or more independent institutions being charged on national level with monitoring adherence to the rules set forth in paragraph 1 of Article 3 of the Treaty;

27. Considering that the Constitutional Council is charged with reviewing the constitutionality of policy laws on multiannual guidelines for public finances, finance laws and social security financing laws; that, when seized pursuant to Article 61 of the Constitution, it must in particular ensure that these laws have genuinely been enacted for this purpose; that it must conduct this review taking account of the opinions of independent institutions established in advance;

28. Considering that according to the above, if in order to comply with the commitment stated in paragraph 1 of Article 3, France chooses to

adopt an institutional act having the effect required under paragraph 2, in line with the second alternative stated in the first phrase of paragraph 2 of Article 3, authorisation to ratify the treaty may only be granted after the Constitution has been amended;

As regards Article 8:

29. Considering that Article 8 stipulates the conditions under which, following the presentation of a report by the European Commission which concludes that one of the parties has not complied with paragraph 2 of Article 3, the Court of Justice of the European Union may be seized by one or more parties to the Treaty; that the last sentence of paragraph 1 of Article 8 provides that "the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall implement the necessary measures to comply with the judgment within a period to be decided by the Court of Justice"; that in the event that the Court's ruling is not complied with, it may once again be seized by one of the parties to the Treaty with a view to imposing financial penalties on that State;

30. Considering that paragraph 2 of Article 3 does not require that the Constitution be amended in advance, the provisions of Article 8 do not have the effect of enabling the Court of Justice of the European Union to assess within this framework whether the provisions of the Constitution are compatible with the terms of this Treaty; that accordingly, if France decides to give effect to the rules laid down in paragraph 1 of Article 3 of the Treaty in accordance with the procedures stated in the second alternative in the first sentence of paragraph 2 of Article 3, Article 8 will not infringe the essential conditions for the exercise of national sovereignty;

As regards the other Articles of Title III:

31. Considering that Article 4 concerns excessive deficits resulting from the failure to comply with the debt criteria; that it does not include any clause which is unconstitutional;

32. Considering that Article 5 imposes a duty for any party that is subject to an excessive deficit procedure to put in place a budgetary and economic partnership programme which shall be submitted to the Council of the European Union and to the European Commission for endorsement; that the existence of such a programme does not have any binding consequences under national law;

33. Considering that Article 6 provides that the parties shall report ex-ante on their public debt issuance plans to the Council of the European Union and to the European Commission; that this only establishes a duty to provide information;

34. Considering that Article 7 stipulates that the parties commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a State is in breach of the deficit criterion, unless a qualified majority of the States is opposed to the decision proposed or recommended; that it entails a simple commitment to apply a majority rule with greater binding force than that provided for under European Union law within the ambit of the commitment relating to the excessive deficit procedure; that this change to the applicable decision making rules does not replace the rule of unanimity;

THE OTHER PROVISIONS OF THE TREATY

35. Considering that the provisions of Title IV on economic policy coordination and convergence entail commitments relating to measures applying the treaties on which the European Union is founded; that the provisions of Title V on the governance of the euro area in the same way entail commitments regarding this governance; that none of these provisions contain any new binding clause in addition to the clauses contained in the treaties relating to the European Union, which would hence be unconstitutional;

THE TREATY AS A WHOLE

36. Considering that, for the reasons set out above, subject to the conditions specified in recitals 21, 28 and 30, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union does not contain any unconstitutional provisions.

HELD:

Article 1. – Subject to the conditions specified in recitals 21, 28 and 30, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, signed on 2 March 2012, does not contain any unconstitutional provisions.

Article 2. – This decision shall be served on the President of the Republic and published in the Journal officiel of the French Republic.

Deliberated by the Constitutional Council in its session of 9 August 2012

§61. Czech Constitutional Court, Case Pl. ÚS 5/12, January 31 th,2012, Slovak Pensions, http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2

(…)**REASONING**

I. Outline of the case according to the constitutional complaint

In the petition submitted for delivery to the Constitutional Court on 25 November 2011, i.e., by the deadline specified in § 72 par. 3 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, the complainant seeks the annulment of the judgment of the Supreme Administrative Court of 31 August 2011, file no. 3 Ads 52/2009, and the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40, setting his old age pension. He believes that these decisions of the ordinary courts infringe his fundamental right to adequate material security in old age under Art. 30 of the Charter of Fundamental Rights and Freedoms (the "Charter"), his fundamental right arising from the principles of equality and the prohibition of discrimination under Art. 1 and Art. 3 par. 1 of the Charter and his fundamental right to judicial and other legal protection under Art. 36 of the Charter.

II. Overview of the case in proceedings before the ordinary courts

The complainant, a citizen of the Czech Republic with permanent residence in its territory, was an employee of the Czechoslovak National Railways (the "CNR") from 20 July 1964; his employment relationship was agreed in an employment agreement with the CNR – Northwest Rail Administration in Prague , which was a branch of the CNR. On the basis of that agreement he worked as an engineer in the locomotive depot in Nymburk. From 4 November 1969 he was transferred to CNR – Eastern Rail Administration, which was renamed CNR – Bratislava region, as of 1989, and which was also a branch of the CNR. He worked in the Bratislava locomotive depot from that date, also as an engineer, until 31 May 1993, when his employment relationship was dissolved by agreement. On 1 June 1993, on the basis of an employment agreement, he became an employee of the Czech Railways, again as an engineer.

In its decision of 8 February 2008, ref. no. 450 811 075/428, the Czech Social Security Administration, pursuant to § 29 let. a) of Act no. 155/1995 Coll., on Pension Insurance, and Art. 46 par. 2 of Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (the "Regulation") granted the complainant, as of 11 July 2007, an old age pension of CZK 3,409 per month, with the provision that, under government decree no. 256/2007 Coll., as of January 2008 he was entitled to an old age pension of CZK 3,537 per month. In the reasoning of the decision, it stated that an insurance period of 5,062 days completed in the Czech pension insurance system, and an insurance period of 11,961 days completed in the Slovak pension insurance system were included when setting the amount of the pension. According to the secondary party in the proceeding before the Constitutional Court, the complainant's entitlement to an old age pension arose only taking into account the period of insurance acquired in the Slovak pension insurance system, and under Art. 46 par. 2 of the Regulation the basic and percent components of a pension are set at an amount corresponding to the proportion of the length of insurance periods completed under Czech legal regulations to the total period of insurance in all member states.

The Regional Court in Hradec Králové, Pardubice branch, in its decision of 29 January 2009. ref. no. 52 Cad 35/2008-40, denied the complainant's complaint regarding the cited decision by the secondary party. It reasoned primarily on the basis that the fact that, during the relevant period of the applicable legal framework, the company branches acted in the name of the company and lacked legal capacity, does not, as a consequence, mean that their registered office cannot be considered the registered office of an employer under Art. 20 par. 1 of the Agreement between the Czech Republic and the Slovak Republic on

Social Security, published as no. 228/1993 Coll. (the "Agreement"), and Art. 15 of the Administrative Agreement on implementing the Agreement, published as no. 117/2002 Coll. of International Treaties (the "Administrative Agreement"). Under the cited provision of the Administrative Agreement, the registered office of the employer means the address that is registered in the Commercial Register, and if the employer has registered a separate workplace or other branch in the Commercial Register, the registered office means the address of that separate workplace or branch. Regarding the Constitutional Court's case law (in particular, judgments file no. II. ÚS 405/02, Pl. ÚS 4/06), to which the complainant referred in the administrative complaint, the court stated that it applies to legally and factually different cases, where a pension was granted before the Czech Republic joined the European Union, so its subject matter was not to review the relationship of national regulations to secondary European law. However, according to the Regional Court, in the present matter, the complainant was granted a pension only after the Czech Republic joined the European Union, wherefore it is necessary, when evaluating the grant, to begin with Annex III to the Regulation, which, according to the Court, contains Art. 20 of the Agreement. This provision is part of the directly applicable norms of European Union law, and therefore, according to the Regional Court in Hradec Králové, this procedure cannot be seen to violate the Constitution or the Charter; on the contrary, in its opinion, a different procedure would be inconsistent with Art. 2 par. 2 of the Charter.

The Supreme Administrative Court denied the complainant's cassation complaint concerning the judgment of the Regional Court, by decision of 31 August 2011, file no. 6 Ads 52/2009. In the reasoning, it first recapitulated the relevant case law of the Constitutional Court concerning analogous cases (in particular, judgments file no. III. ÚS 252/04, Pl. ÚS 4/06, IV. ÚS 301/05, I. ÚS 1375/07. It also pointed to the decision of 23 September 2009, ref. no. 3 Ads 130/2008-107, where, in a factually analogous case, it referred questions concerning its subordination under the framework of European law to the Court of Justice of the European Union (the "ECJ") for a preliminary ruling.

In the case which it referred to the ECJ for a preliminary ruling, the Supreme Administrative Court then ruled, by judgment of 25 August 2011, ref. no. 3 Ads 130/2008-204, in which it concluded that, in order to review entitlements for benefit payments arising after 30 April 2004, taking into account Constitutional Court judgment file no. II. ÚS 1009/08, and in consequence of the ECJ decision of 22 June 2011, C-399/09, there is no national legislation that could be considered binding and on the basis of which the insurer would have an obligation to include periods of employment completed by persons in the pension insurance system of the former CSFR until 31 December 1992 in pension calculations in the Czech pension insurance system in a greater scope than is determined by Art. 20 of the Agreement, on the basis of the pension applicant's citizenship and permanent residence. In other words, the Supreme Administrative Court, in that decision, concluded that at the given moment the national rule constituted by the Constitutional Court will not be applied, a rule which permits, when reviewing the entitlement to an old age benefit and setting the amount thereof above the framework of Art. 20 par. 1 of the Agreement, fully including a period of employment in the pension insurance system of the former CSFR until 31 December 1992, on the basis of Czech citizenship and permanent residence in the Czech Republic. This decision also referred to Constitutional Court judgments file no. Pl. ÚS 50/04 and Pl. ÚS 19/08, in which the Constitutional Court agreed with the doctrine supported by the German Constitutional Court (Solange), and on the basis thereof concluded that it can intervene in a matter that was addressed as part of the exercise of powers transferred to the European Union. In the Constitutional Court's opinion, delegation of the powers of national bodies cannot continue in a case where they exercise them beyond the scope of the powers of the European Union. In these cases, community acts would be inapplicable in the Czech Republic, and the Czech national bodies would again take over the relevant powers. Therefore, in the opinion of the Supreme Administrative Court, the Constitutional Court's authority, in a proceeding on a constitutional complaint, to review again a disputed legal issue, which was the subject matter of a ruling on preliminary issues, and to insist on applying its rule, is not affected in any way. That, according to the Supreme Administrative Court, is its undoubted authority, not questioned by anyone at the national level, arising from its role as the guardian of the constitutionality and the sovereignty of the Czech Republic. Such a judgment would be directly binding as

a precedent both for the Czech pension insurer, and for all ordinary courts.

In the present case of complainant K. H., the Supreme Administrative Court concludes from the foregoing that a conclusion that the ECJ judgment of 22 June 2011, C-399/09, according to the cited judgments file no. Pl. ÚS 50/04 and file no. Pl. ÚS 19/08, is inapplicable, can be made only by the Constitutional Court. Therefore, as in the case file no. 3 Ads 130/2008, in the present case the Supreme Administrative Court must take this EU act as a starting point; even an expanded panel could not deviate from it, if the legal issue in dispute were passed on to it for a decision under § 17 of the Administrative Procedure Code. In the given situation, when evaluating the entitlement to an old age benefit and setting the amount thereof above the framework of Art. 20 par. 1 of the Agreement it was possible to fully include the period of employment completed until the dissolution of the Czechoslovak federation only if the rule were applied not only to Czech citizens with permanent residence in the Czech Republic, but also to Czech citizens with permanent residence outside the Czech Republic, and especially to citizens of other member states of the European Union. This rule too would correspond to the conclusions stated in the Court of Justice of the European Union decision of 22 June 2011, C-399/09. However, such a procedure would go even further beyond the framework of Art. 20 par. 1 of the Agreement than the national rule constituted by the Constitutional Court, and therefore, in the adjudicated matter, the Supreme Administrative Court did not find any arguments for applying it. On the contrary, in the given situation it agreed with the conclusion of the judgment of 25 August 2011, ref. no. 3 Ads 130/2008-204, under which the rule created by the Constitutional Court is not applied at the given moment. According to the Supreme Administrative Court, for the foregoing reasons, when reviewing the complainant's entitlement to an old age pension and the amount thereof from the Czech social security system, periods of employment until 31 December 1992 could not be considered Czech periods of employment solely on the basis of the complainant's Czech citizenship and his permanent residence in the Czech Republic.

III. Overview of objections and the proposed verdict of the constitutional complaint

The complainant first objects that in the decisions contested by the constitutional complaint the Supreme Administrative Court, as well as the Regional Court in Hradec Králové, reached the incorrect conclusion, based on Art. 15 par. 1 of the Administrative Agreement, that his employer in the period in question had its registered office in the Slovak Republic. In his opinion, the cited provision was no longer valid, under Annex III to the Regulation; he considers the interpretation that it is applicable, with the exception of expressly designated Articles, to be inconsistent with the text of the Regulation and with its intentions. In this regard he refers to judgment file no. III. ÚS 939/10 of 3 August 2010 (N 153/58 SbNU 295), in which the Constitutional Court considered in detail the interpretation of Art. 15 of the Administrative Agreement in relation to Art. 20 of the Agreement and to § 61 of Act no. 155/1995 Coll., and concluded, in agreement with the opinion of the public Defender of Rights, that the organizational unit Czechoslovak National Railways, Transportation Revenue Administration, with its registered office in Bratislava, lacked legal capacity, and thus was also not an entity authorized to enter into employment agreements. In this regard he argues with the opinion of the Supreme Administrative Court, that it is not possible to conclude, solely on the basis of Art. 20 of the Agreement, that the registered office of the complainant's employer was not located, as of the day when the federation was dissolved at "the address of the CNR central office in Prague," because he did not perform his work at the CNR central office in Prague, nor did he ever claim to do so – as a locomotive engineer he performed his work ordinarily and regularly in the Czech Republic, where he conducted trains, in particular on the routes Komárno – Bratislava – Brno – Praha – Ústí nad Labem and back, or the route Košice – Praha and back. He is of the opinion that the argument based on his de facto performing his work activity in the entire territory of the then Czechoslovakia permits breaking through the rule that arises from Art. 20 par. 1 of the Agreement and Art. 15 par. 1 of the Administrative Agreement.

The complainant also refers to the Constitutional Court's settled case law (in particular, judgments file no. IV. ÚS 228/06, II. ÚS 405/02, III. ÚS 252/04 and Pl. ÚS 4/06) in analogous cases. In connection with the different review of the entitlements of citizens of the Czech Republic to social security benefits, in view of recognition of insurance periods based on employment relationships until 31 December 1992 with an employer that had its registered office in what is now the Slovak Republic, exercised before and after the Czech Republic's entry into the European Union,

the complainant refers to Constitutional Court judgment file no. I. ÚS 1375/07 – he believes that the legal conclusions following from it also apply to entitlements exercised after the Czech Republic's entry into the European Union.

As regards the ECJ opinion stated in its judgment of 22 June 2011, C-399/09, the complainant states that he meets the conditions that ensue from it for a supplementary payment to an old age pension.

Due to the foregoing, i.e. for violation of his fundamental right to adequate material security in old age under Art. 30 of the Charter, his fundamental right arising from the principle of equality and the prohibition of discrimination under Art. 1 and Art. 3 par. 1 of the Charter, and his fundamental right to judicial and other protection under Art. 36 of the Charter, the complainant seeks annulment of the judgment of the Supreme Administrative Court of 31 August 2011, file no. 6 Ads 52/2009, and the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40.

IV. Overview of the essential parts of the statements from the parties and the secondary party

In response to the Constitutional Court's request, under § 42 par. 4 and § 76 par. l of Act no. 182/1993 Coll., as amended by later regulations, the party to the proceedings submitted a statement on the constitutional complaint. The statement was delivered to the Constitutional Court on 20 December 2011. It states that in the present case the Supreme Administrative Court concluded that the employment periods completed by the complainant until 31 December 1992 cannot be considered as Czech periods of pension insurance. In this regard, the panel ruling in the matter, 6 Ads, took as its starting point the decision of the Supreme Administrative Court of 25 August 2011, ref. no. 3 Ads 130/2008-204, which was issued in the case in which questions were submitted to the ECJ for a preliminary ruling. In its process, it also took into account the fact that even an expanded panel of the Supreme Administrative Court could not deviate from the decision by the ECJ if the disputed issue were passed on to it for a ruling. In this situation, the statement expresses the opinion that the complainant's fundamental rights provided in Art. 30 and 36 of the Charter were not violated in the proceedings before the courts.

The party to the proceeding agrees with the complainant that, according to the ECJ judgment "where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favored category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining." However, according to statement, in the decision contested by the constitutional complaint, the Supreme Administrative Court took as its starting point the position that, for purposes of reviewing an entitlement to benefits arising after 30 April 2004, as a consequence of the ECJ judgment there is no national rule that could be considered binding, and on the basis of which the insurer would have an obligation to include period of employment completed by participants in the social security system of the former CSFR until 31 December 1992 in the Czech pension insurance system in a scope greater than that determined by Art. 20 of the Agreement, on the basis of the pension applicant's citizenship and permanent residence. As a result of the non-application of the rule to entitlements recognized as of 1 May 2004, there is also no administrative practice that could have aroused a legitimate expectation among pension applicants that their applications to have period of employment served in the pension insurance system of the former CSFR until 31 December 1992 included beyond the scope of Art. 20 par. 1 of the Agreement would be guaranteed and that supplementary benefits would be granted. According to the party to the proceeding, the specific case of former CNR employees does not represent settled administrative practice, in terms of the definition provided in the decision by the expanded panel of the Supreme Administrative Court, ref. no. 6 Ads 88/2006-132, of 21 July 2009, because the employment periods were included for them in a negligible number of cases, and the practice has been in place for a relatively short time since the issuance of Constitutional Court judgment file no. III. ÚS 939/10. In view of the conclusions in the ECJ judgment, which the ruling panel applied in accordance with the Supreme Administrative Court's decision in the case file no. 3 Ads 130/2008, the statement expresses the belief that the issued decisions likewise did not violate the fundamental rights arising from the principle of equality and the prohibition of discrimination under Art. 1 a Art. 3 par. 1 of the Charter.

In a situation where, in the Supreme Administrative Court's opinion, the ECJ judgment described the rule arising from the Constitutional Court's judgments to be discriminatory (point 50 of the judgment), it was not possible to grant the complainant's claim to provide a supplementary benefit. Although it would be possible to object, for example, that the ECJ did not have at its disposal all the decisive circumstances (point 47 of the judgment states that the ECJ was not presented with any facts that could justify discriminatory treatment), the party to the proceeding believes that the ECJ's conclusions are clear that, in the framework of the relevant provisions of the Regulation, the criterion of citizenship and the criterion of residence are indirectly discriminatory.

Based on the grounds thus laid out, the Supreme Administrative Court proposes that the Constitutional Court dismiss the present constitutional complaint.

In response to the Constitutional Court's request under § 42 par. 4 and § 76 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, the secondary party, the Czech Social Security Administration, in its statement, delivered to the Constitutional Court on 25 January 2012, after repeating the conduct of the case, in particular its facts, refers to the relevance of Art. 20 of the Agreement and Art. 15 par. 1 of the Administrative Agreement for evaluation of the case. It states that "the purpose of Art. 20 of the Agreement was to create a criterion for evaluating period of pension insurance completed during the existence of the Czechoslovak federation so that expenses for payment of pensions would be divided between the successor states." According to the secondary party, Art. 15 par. 1 of the Administrative Agreement is a reaction to the existence of companies active nationwide, and to the need, in these cases, to set the company's registered office as a factor for distributing the expenses. From this viewpoint, it objects to the consequences which it believes arise from the legal opinion contained in judgment file no. III. ÚS 939/10, as a result of which, in such cases the full expenses for payment of pensions would be borne by the successor state where the registered office of a company active nationwide was located. It fully agrees with the conclusions reached on this issue by the party to the proceeding (in particular in decisions ref. no. 6 Ads 14/2009-41, 3 Ads 37/2009-62, 4 Ads 80/2009-198, 6 Ads 25/2010-146, and 3 Ads 130/2008-204).

Regarding the complainant's objection that he should be granted a supplementary benefit to his old age pension, the secondary party states that no conditions for an entitlement to the requested supplementary benefit to the old age pension are provided in any legislation, and at present granting a supplementary benefit, or granting analogous benefits, is on the contrary disqualified by § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., which provides that a pension from Czech pension insurance cannot be granted or increased for periods of pension insurance completed under Czechoslovak legislation before the date of dissolution of the CSFR, i.e. before 1 January 1993, which, under Art. 20 of the Agreement are considered to be periods of pension insurance of the Slovak Republic, nor can balancing, settlements, supplemental payments or similar amounts related to a pension or part thereof, or provided instead of a pension or part thereof, be granted on the basis of these periods. Further, in the opinion of the Czech Social Security Administration, the Constitutional Court's existing case law does not apply to cases in which a pension was granted after the Czech Republic entered the European Union, because "it does not comprehensively consider the relationship of national legislation and coordinating Regulations, especially a conflict between the fundamental constitutional values in the form of unilateral protection of citizens of the Czech Republic with the principle of equal treatment also enshrined in the primary law of the European Communities."

In conclusion, the statement expresses the belief that the secondary party, in reviewing the complainant's pension entitlements, acted with respect for the "unquestioned purpose of Art. 15 par. 1 of the Administrative Agreement" and acted in accordance with Czech legal regulations.

V. Assumption of the matter by the Plenum of the Constitutional Court

Under Art. 1 par. 1 let. j) of the decision of the Plenum of the Constitutional Court of 9 August 2011, ref. no. Org. 40/11, on assuming competence, the Plenum of the Constitutional Court, pursuant to § 11 par. 2 let. k) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, shall decide to assume a matter upon the petition of any judge on the panel assigned to review and rule in the matter, based on its exceptional gravity, with the consent of all judges of the relevant panel and of the parties to the proceeding.

In response to the request of the Constitutional Court, both the complainant, in a filing delivered to the Constitutional Court on 11 January 2012, and the party to the proceeding, in a filing delivered to the Constitutional Court on the same day, gave consent to the assumption. In response to a petition from all the judges of panel III, assigned to review and rule on the matter file no. III. ÚS 3536/11 in the work schedule for 2012 (Org. 1/12), the Plenum of the Constitutional Court decided to assume the matter, by resolution of 24 January 2012 ref. no. Pl. ÚS 5/12-1.

VI.Waiver of a hearing

Under § 44 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, the Constitutional Court can, with the consent of the parties, waive a hearing, if it cannot be expected to clarify a matter in greater detail. In view of the fact that the parties, i.e. the complainant impliedly to the express request of the Constitutional Court, and the Supreme Administrative Court, in a filing delivered to the Constitutional Court on 18 January 2012, stated their consent to waive a hearing, and in view of the fact that the Constitutional Court believes that a hearing cannot be expected to clarify the matter in greater detail, a hearing in this matter was waived.

VII. Review of the case under European law

In the decision contested by the constitutional complaint, the Supreme Administrative Court took as its starting point the legal conclusions stated in case file no. 3 Ads 130/2008. Primarily, it referred to its decision of 23 September 2009, ref. no. 3 Ads 130/2008-107, in which, in a factually analogous case, it submitted the following questions to the Court of Justice of the European Union for a preliminary ruling:

1. Must point 6 of Annex III(A) to Council Regulation (EC) No 1408/71 … read in conjunction with Article 7(2)(c) [thereof], according to which the criterion for determining the successor state competent to determine the value of periods of insurance completed by employed persons before 31 December 1992 under the social security scheme of the Czech and Slovak Federal Republic is to remain applicable, be interpreted as precluding the application of a rule of national law which provides that the Czech social security institution is to take into account, with regard to entitlement to a benefit and setting the amount thereof, the entire period of insurance completed in the territory of the Czech and Slovak Federal Republic before 31 December 1992, even though, according to the abovementioned criterion, it is the social security institution of the Slovak Republic which is competent to determine the value of that period of insurance?

2. If the first question is answered in the negative, must Article 12 EC in conjunction with Articles 3(1), 10 and 46 of Regulation (EC) No 1408/71 … be interpreted as meaning that the period of insurance completed under the social security scheme of the Czech and Slovak Federal Republic before 31 December 1992, which has already been taken into account once to the same extent for benefit purposes under the social security scheme of the Slovak Republic, cannot, pursuant to the abovementioned national rule, be taken into account in its entirety only in respect of nationals of the Czech Republic resident in the territory of the Czech Republic for the purposes of entitlement to old age benefit and setting the amount thereof ?

In its judgment of 22 June 2011, C-399/09, the ECJ stated that by the first question, the referring court sought in essence to ascertain whether the provisions of point 6 of Annex III(A) to Regulation No 1408/71, read in conjunction with Article 7(2)(c) thereof, preclude a national rule, such as that at issue in the main proceedings, which provides for the payment of a supplement to old age benefit where the amount of such benefit, awarded under Article 20 of the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic. It noted that the effect of the abovementioned provisions of Regulation No 1408/71 is to preserve Article 20 of the Agreement, which establishes that the criterion for the identification of the applicable scheme and the authority with competence to grant social security benefits is the country in which the employer was resident at the time of the dissolution of the Czech and Slovak Federal Republic. According to the ECJ, it is clear from the case–law of the Constitutional Court in analogous matters that the rule on the allocation of competence, as between the Czech and Slovak social security institutions for the purpose of taking into account periods of insurance completed before the date of the dissolution of the Czech and Slovak Federal Republic, a rule introduced by Article 20 of the Agreement, is neither called into question nor affected, since the objective of the case-law of the Constitutional Court is

simply to increase the amount of the Czech old age benefit awarded under the Agreement in order to bring it to the level which would have been awarded under national law alone. Accordingly, what is at issue is not the award of a parallel Czech old age benefit, nor one and the same period of insurance being taken into account twice, but merely the elimination of an objectively established difference between benefits from different sources. The ECJ stated that such an approach avoids 'the overlapping of national legislations applicable', in accordance with the objective set out in the eighth recital of the preamble to Regulation No 1408/71, and does not run counter to the criterion for the allocation of competence established in Article 20 of the Agreement, which is maintained under Article 7(2)(c) of Regulation No 1408/71, read in conjunction with point 6 of Annex III(A) to that regulation. In the light of the foregoing, its answer to the first question referred was that the provisions of point 6 of Annex III(A) to Regulation No 1408/71, read in conjunction with Article 7(2)(c) thereof, do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of such benefit, awarded under Article 20 of the Agreement, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.

According to the ECJ, by the second question the referring court sought, in essence, to ascertain whether the Constitutional Court judgment, which allows payment of a supplement to old age benefit solely to individuals of Czech nationality residing in the territory of the Czech Republic, constitutes discrimination which is prohibited under Article 12 EC and the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71. In this regard the ECJ notes that the purpose of Article 3(1) of Regulation No 1408/71 is to ensure, in accordance with Article 39 EC, equality of treatment in matters of social security, without distinction based on nationality, for the persons to whom that regulation applies by abolishing all discrimination in that regard deriving from the national legislation of the member states (Case C-332/05 *Celozzi* [2007] ECR I-563, paragraph 22). According to the ECJ, the documents before the Court show undoubtedly that the Constitutional Court judgment discriminates, on the ground of nationality, between Czech nationals and the nationals of other member states. As regards the requirement of residence in the territory of the Czech Republic, it also notes that the principle of equality of treatment, as referred to in Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (*Celozzi*, paragraph 23). Therefore, it considers that conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of the latter (see *Celozzi*, paragraph 24). That applies to a condition of residence, such as that at issue in the main proceedings, which essentially affects migrant workers who reside in the territory of member states other than their state of origin. Moreover, the ECJ notes that Article 10(1) of Regulation No 1408/71 establishes the principle that residence clauses are to be waived by protecting the persons concerned from any negative effect which might be caused by the transfer of their residence from one member state to another. From the foregoing, the ECJ concludes that [49] the Ústavní soud judgment involves a direct discrimination based on nationality and indirect discrimination based on nationality, as a result of the residence test, against those who have made use of their freedom of movement. As regards the consequences of failure to observe the principle of equal treatment in a situation such as that in the main proceeding, the ECJ states that where discrimination contrary to EU law has been established, as long as measures reinstating equal treatment have not been adopted, observance of the principle of equality can be ensured only by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category, the latter arrangements, for want of the correct application of EU law, being the only valid point of reference remaining (Case of 26 January 1999, Terhoeve, C-18/95, [1999] ECR I-345, paragraph 57, and the case law cited).

As regards the possible retroactive effects of its decision, the ECJ states that, as regards the implications, for persons, such as Ms Landtová, belonging to the category of those who have benefited from the rule deriving from the Constitutional Court judgment, of

the finding that that judgment is discriminatory, while, as Czech law currently stands, the competent authority for the purpose of granting the pension cannot lawfully refuse to extend entitlement to the supplement to those who are placed at a disadvantage, nothing precludes that authority from maintaining that right for the category of persons who already benefit from it under the national rule. EU law does not, provided that the general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured (see Case C-200/91 *Coloroll Pension Trustees* [1994] ECR I-4389, paragraph 33). However, before such measures are adopted, there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection, such as that at issue in the main proceedings, should be deprived of it. In the light of the foregoing, the ECJ's answer to the second question referred was that the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71 preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, but it does not necessarily follow, under EU law, that an individual who satisfies those two requirements should be deprived of such a payment.

On the basis of these considerations, the European Court of Justice, in its judgment of 22 June 2011, C-399/09 answered the referred questions as follows:

1. The provisions of point 6 of Annex III(A) to Council Regulation (EC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 and as amended by Regulation (EC) No 629/2006 of the European Parliament and of the Council of 5 April 2006, read in conjunction with Article 7(2)(c) thereof, do not preclude a national rule, such as that at issue in the main proceedings, which provides for payment of a supplement to old age benefit where the amount of that benefit, granted pursuant to Article 20 of the bilateral agreement between the Czech Republic and the Slovak Republic signed on 29 October 1992 as a measure to regulate matters after the dissolution of the Czech and Slovak Federal Republic, is lower than that which would have been received if the retirement pension had been calculated in accordance with the legal rules of the Czech Republic.

2. The combined provisions of Article 3(1) and Article 10 of Regulation No 1408/71, as amended by Regulation No 629/2006, preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, but it does not necessarily follow, under European Union law, that an individual who satisfies those two requirements should be deprived of such a payment.

In a number of its decisions the Constitutional Court defined the constitutional context for evaluating the relationship between the Czech Republic and the European Union, particularly by interpreting Art. 10 and 10a, as well as Art. 1 par. 1 and 2 and Art. 9 par. 2 of the Constitution. The key judgments in this regard are file no. Pl. ÚS 50/04, Pl. ÚS 66/04, Pl. ÚS 19/08, and Pl. ÚS 29/09.

The Constitutional Court determined the following principles for evaluating the relationship between the laws of the Czech Republic and European law:

The Constitutional Court stated the principle of Euro-conformity in judgment file no. Pl. ÚS 66/04 regarding the constitutionality of the legal institution of a European arrest warrant: "A constitutional principle can be derived from Article 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes its."

In judgment file no. Pl. ÚS 50/04 the Constitutional Court formulated the principle of double binding subordination of transferred European law, i.e. it must be consistent both with European law and with the constitutional order. Thus, although the frame of reference for review by the Constitutional Court are still the norms of

the constitutional order, the Constitutional Court cannot completely overlook the effect of Community law on the creation, application, and interpretation of national law, in an area of legal regulation whose creation, functioning, and object are directly connected to Community law.

A certain parallel to the decisions by the German Constitutional Court, "Solange I," "Solange II," and "Maastricht-Urteil" can be found in judgment file no. Pl. ÚS 50/04, defining the fundamental viewpoints for evaluation of the relationship between the Constitution of the Czech Republic and European law: "There is no doubt that, as a result of the Czech Republic's accession to the EC, or EU, a fundamental change occurred within the Czech legal order, as at that moment the Czech Republic took over into its national law the entire mass of European law. Without doubt, then, just such a shift occurred in the legal environment formed by sub-constitutional legal norms, which necessarily must influence the examination of the entire existing legal order, constitutional principles and maxims included, naturally on the condition that the factors which influence the national legal environment are not, in and of themselves, in conflict with the principle of the democratic law-based state or that the interpretation of these factors may not lead to a threat to the democratic law-based state. Such a shift would come into conflict with Art. 9 par. 2, or Art. 9 par. 3 of the Constitution of the Czech Republic… "The current standard within the Community for the protection of fundamental rights cannot give rise to the assumption that this standard for the protection of fundamental rights through the assertion of principles arising therefrom, such as otherwise follows from the above-cited case-law of the ECJ, is of a lower quality than the protection accorded in the Czech Republic, or that the standard of protection markedly diverges from the standard up till now provided in the domestic setting by the Constitutional Court." The principle of protection in Art. 1 par. 1 and Art. 9 par. 2 of the Constitution is also contained in judgment file no. Pl. ÚS 66/04: The constitutional principle that national law shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text. Article 1 par. 2 of the Constitution is thus not a provision capable of arbitrarily modifying the significance of any other express constitutional provision whatsoever. If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution. Naturally, the Constituent Assembly may exercise this authority only under the condition that it preserves the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art. 10a of the Constitution can assign the authority to modify these attributes." The Constitutional Court also accentuated this principle in judgment file no. Pl. ÚS 19/08 and subsequently in judgment file no. Pl. ÚS 29/09: "The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law, which also clearly answers the contested issue of the sovereignty of the Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic, which have the highest legal force on Czech territory, it is obvious that Art. 1 par. 1 of the Constitution can not be violated. if European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution), such legal acts could not be binding in the Czech Republic. In accordance with this, the Czech Constitutional Court also intends to review, as ultima ratio, whether the legal acts of European bodies remain within the bounds of the powers that were provided to them. In this regard the Constitutional Court basically agreed with certain conclusions of the German Federal Constitutional Court, stated in its Maastricht decision (see above), under which the majority principle, per the imperative of mutual regard, arising from loyalty to the Community, has its limits in the constitutional principles and elementary interests of the member states; the exercise of sovereign power by an association of states, the European Union, is based on authorization from the states, which remain sovereign, and which, through their governments, regularly act in the inter-state area, and thus guide the integration process. In judgment file no. Pl. ÚS 19/08 it emphasized, from a procedural viewpoint, the thesis that its intervention is conceivable, particularly with the application of European law in particular cases, which may come to the Constitutional Court through individual constitutional complaints tied to possible (exceptional) interference by EU

bodies and EU law into the fundamental rights and freedoms. It defined the context for its review of the exercise of transferred competences by European Union bodies by three areas: the non-functioning of its institutions, the protection of the material core of the Constitution, not only in relation to European law but also to the particular application thereof, and, finally, the functioning as ultima ratio, i.e. the authority to review whether an act by European Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; these could be, in particular, abandoning a value identity and exceeding the scope of the entrusted competences.

In the present case, it is the task of the Constitutional Court to evaluate, in terms of the safeguards thus outlined, the effects of ECJ judgment of 22 June 2011, C-399/09 on the present case.

The core of the arguments in the matter is application of Council Regulation (EEC) 1408/71 of 14 June 1971, on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, to the legal relationships governed by the Agreement, the object of which is regulating the exercise of entitlements arising from the social security system until the dissolution of the Czech and Slovak Federal Republic between the successor states, the Czech Republic and the Slovak Republic.

According to the consolidated version of the Regulation, its purpose, stated in the preamble, is to coordinate the effects of the social security schemes of European Union member states, in view of the principle of free movement of workers who are nationals of member states. Under Art. 2 par. 1, the Regulation applies to persons (in particular, employed persons or self-employed persons and students) who are or have been subject to the legislation of one or more member states and who are nationals of one of the member states. According to Annex III point A/9, Art. 12, 20 and 33 of the Agreement remain applicable, notwithstanding Art. 6 and Art. 7 par. 2 let. c) of the Regulation. This provision of Annex III was introduced into the Regulation by European Parliament and Council Regulation (EC) No 629/2006 of 5 April 2006. Under Art. 6 of the Regulation, with the exception of Articles 7, 8 and Art. 46 par. 4, the Regulation replaces, as regards personal and material jurisdiction which it covers the provisions of any social security convention binding either a) two or more member states exclusively, or b) at least two member states and one or more other states, where settlement of the cases concerned does not involve any institution of one of the latter states. Under Art. 7 par. 2 let. c) of the Regulation, Art. 6 notwithstanding, certain provisions in social security conventions concluded by member states before the date of applicability of the Regulation remain applicable, if they are more advantageous for the benefit recipients or if they arose on the basis of special historical circumstances, their effect is for a limited period of time, and they are listed in Annex III. It must be noted here that the decisions of the administrative courts contested by the constitutional complaint are based precisely on Art. 20 of the Agreement, which, under Annex III of the Regulation, is applicable, notwithstanding Art. 6 and Art. 7 par. 2 let. c) of the Regulation. Its applicability is defined – notwithstanding the Regulation – by the relevant case law of the Constitutional Court. In terms of European Union law, the provisions of Annex III are of a declaratory, not constitutive nature: the key factor for applying the Regulation is its object and the nature of the reviewed legal relationships, which must contain a "foreign" element.

Under Art. 12 of the Agreement, survivor pensions are granted and paid by the insurer of the state party to which the pensions from which the survivor pensions are calculated are considered to belong, or would be considered to belong. Art. 20 par. 1 of the Agreement provides that insurance periods served before the date of dissolution of the Czech and Slovak Federal Republic are considered to be insurance periods of the state party in whose territory the citizen's employer had its registered office as of the date of dissolution of the Czech and Slovak Federal Republic, or on the last date before that date. Paragraph 2 provides that if a citizen did not, as of the date of dissolution of the Czech and Slovak Federal Republic, or on the last date before that date, have an employer with its registered office in the Czech and Slovak Federal Republic, insurance periods served before that date are considered to be insurance periods of the state party in which the citizen had permanent residence as of the date of dissolution of the Czech and Slovak Federal Republic, or on the last date before that date. Finally, under Art. 33 of the Agreement, pensions granted as of a date that falls into the period before the dissolution of the Czech and Slovak Federal Republic by the insurers of the Czech Republic or the Slovak Republic will continue to be considered pensions of that state

party whose insurer was, or would be, responsible for payment of those pensions as of the date of dissolution o the Czech and Slovak Federal Republic.

Art. 30 par. 1 of the Charter, i.e. the right to adequate material security in old age, is a fundamental right tied to citizenship of the Czech Republic; that is, only citizens of the Czech Republic, and not other persons, can be a differential group when testing for potential differing treatment under Art. 3 par. 1 of the Charter. The tenor of the Constitutional Court's case law applicable in this regard to Art. 30 par. 1 of the Charter (see file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07, III. ÚS 939/10 and Pl. ÚS 4/06) is respecting the constitutional principle of equality, i.e. ruling out unjustified inequality, in this case between citizens of the Czech Republic. The Constitutional Court expressly addressed the purpose of the Agreement in judgment file no. I. ÚS 1375/07. It stated that "the object of concluding an international treaty cannot be to reduce the pension entitlements of one's own citizens, whose entitlement to a higher pension arises independently of such a treaty, under national legislation." It described as constitutionally impermissible discrimination of one versus other groups of citizens of the Czech Republic an inequality established "only as a result of a particular circumstance that originates in the dissolution of the then-existing Czechoslovak federation."

In the Constitutional Court's opinion, a period of employment with an employer with its registered office in the present-day Slovak Republic during the existence of the Czechoslovak state cannot be retroactively considered to be a period of employment abroad. All citizens of the Czech Republic have a right to equal treatment in the area of social security with regard to years worked until 31 December 1992 (i.e. to the date of dissolution of the Czech and Slovak Federal Republic) regardless of the place where the work was performed and the employer's registered office being in the then-Czechoslovakia. Therefore, neither the place where work was performed, nor the employer's registered office in the subsequent Slovak Republic can be considered as being in the territory of a foreign state. Moreover, during the entire time of existence of the Czechoslovak federation, social security fell within federal jurisdiction, and Constitutional Act no. 4/1993 Coll., on Measures related to the Dissolution of the Czech and Slovak Federal Republic, enshrined the continuity of the Czech and Czechoslovak legal order. The territory of the present-day Slovak Republic until 31 December 1992, as either a place where work was performed or the location of an employer's registered office cannot, for purposes of social security for Czech citizens, be considered as the territory of a foreign state. It follows from this maxim that the relationships of social security and entitlements arising from them in this context do not contain a foreign element, which is a condition for applying the Regulation.

For the cited reasons, citizens of the Czech Republic who were employed by an employer with its registered office in the territory of the present-day Slovak Republic in the period until 31 December 1992, are entitled to a supplementary payment to the aggregate of their (partial) old age pension granted by the Czech insurer and their (partial) old age pension granted by the Slovak insurer, up to the amount of the expected (theoretical) pension that would have been granted if all the insurance periods from the time of the joint state were considered to be Czech periods. This solution is the result of the international agreement between the Czech Republic and the Slovak Republic, governing the allocation of expenses for social security between the successor states in relation to entitlements established by employment periods until 31 December 1992.

This entire issue is not comparable to evaluating entitlements for social security in view of the inclusion of periods served in various countries; it is an issue of the consequences of the dissolution of Czechoslovakia and evaluating the entitlements of citizens of the Czech Republic with regard to the allocation of expenses for social security between the successor countries (as the secondary party also says in its statement). Insofar as, as previously stated, Art. 2 par. 1 of the Regulation states that it shall apply to persons (in particular employed persons or self-employed persons and students) who are or were subject to the legislation of one or more member states and who are nationals of one of the member states, then within the indicated case law of the Constitutional Court, in the case of citizens of the Czech Republic all the effects arising from their social security until 31 December 1992 must be considered to be subject to the legal regulation of the state of which they are citizens. Failure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships

arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.

Due to the foregoing, European law, i.e. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and members of their families moving with the Community, cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; and, based on the principles explicitly stated by the Constitutional Court in judgment file no. Pl. ÚS 18/09, we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires.

Moreover, the Constitutional Court also points to deficiencies concerning the safeguards of a fair trial in the proceeding before the ECJ in case C-399/09. Although the Constitutional Court, as the judicial body for protection of the constitutionality of the Czech Republic, was not a party to the proceeding on the preliminary question before the ECJ, and although it was not even asked by the ECJ to submit a statement, it did provide supplementary information and arguments for the proceeding in case C-399/09 on the preliminary questions referred by the Supreme Administrative Court in the case Marie Landtová versus the Czech Social Security Administration. It submitted its statement of 8 March 2011 file no. Př. 31/11 with the knowledge that the Czech government, as a party to the proceeding on the preliminary question, unprecedentedly stated in its statement that the case law of the Constitutional Court violates European Union law (See also the position of Advocate General Pedro Cruz-Villalón of 3 March 2011, the "Advocate General's statement," point 3). It pointed out that this position of the Czech government is inconsistent with Art. 89 par. 2 of the Constitution of the Czech Republic, under which the enforceable decisions of the Constitutional Court are binding for all bodies and persons, i.e. including the government of the Czech Republic and its agent. It pointed out that, under § 4 par. 1 let. b) of Act no. 582/1991 Coll., on the Organization and Implementation of Social Security, as amended by later regulations, the government, or the member thereof at the head of the Ministry of Labor and Social Affairs, directly governs the Czech Social Security Administration, which was a party to the proceedings before the administrative courts of the Czech Republic and which, on that basis, was also a (unsuccessful) secondary party to the proceeding before the Constitutional Court. If the Czech government had no hesitation to appear at all as a party to the proceeding on a preliminary question before the ECJ against its own Constitutional Court, the Constitutional Court in its statement expressed the expectation that, at least in order to preserve the appearance of objectivity, the ECJ would familiarize itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic, which it draws from the common constitutional tradition with the Slovak Republic, that is from the over seventy years of the common state and its peaceful dissolution, i.e. from a completely idiosyncratic and historically created situation that has no parallel in Europe. The absence of explanatory arguments, which made it more difficult for the ECJ to orient itself in the merits of the matter, was also reflected in the statement of the "Advocate General," who noted this fact several times (points 45, 47, 51, 52). In addition to the foregoing, the statement also declares that the government's position contains data that are inconsistent with reality. In the Constitutional Court's case law, provision of a supplementary benefit was tied only to the applicant's being a Czech citizen, not to the condition of permanent residence in the Czech Republic as well, as reference order of the Supreme Administrative Court confusingly and incorrectly states in point 8 i. f. and in point 18, and as the Czech government also claims (the foregoing is adopted in the Advocate General's statement – see points 18, 39, 43, 48-52). In the judgment cited there, file no. III. ÚS 252/04 the Constitutional Court merely stated that "[i]nsofar as Act no. 155/1995 Coll., as amended by later regulations, permits exercising claims arising from it regardless of nationality, i.e. in connection to permanent residence, in terms of constitutional protection the Constitutional Court considers inequality to be unjustified only in connection with distinguishing citizens of the Czech Republic in their entitlements arising from social security, but not in relation to other categories of persons."

In the submission of 25 March 2011 the head of the judicial office of the ECJ, based on an instruction from the chairperson of the fourth chamber of the ECJ returned the statement in question to the Constitutional Court with the justification that "pursuant to established customs, members of the ECJ do not correspond with third persons regarding cases that have been submitted to the ECJ."

In this regard, the Constitutional Court notes that the ECJ regularly makes use of the institution of amici curiae in proceedings on preliminary questions, especially in relation to the European Commission. In a situation where the ECJ was aware that the Czech Republic, as a party to the proceeding, in whose name the government acted, expressed in its statement a negative position on the legal opinion of the Constitutional Court, which was the subject matter for evaluation, the ECJ' statement that the Constitutional Court was a "third party" in the case at hand cannot be seen otherwise than as abandoning the principle audiatur et altera pars.

VIII. Review of the constitutionality of the interpretation and application of the ordinary law relevant in the case

Reviewing the constitutionality of interference by a public authority into the fundamental rights and freedoms involves several components (file no. III. ÚS 102/94, III. ÚS 114/94, III. ÚS 84/94, III. ÚS 142/98, III. ÚS 224/98 and others). The first is evaluating the constitutionality of the applied legislative provision (which follows from § 78 par. 2 of Act no. 182/1993 Coll., as amended by later regulations). Further components are reviewing the observance of constitutional procedural rights, and finally reviewing the constitutional conformity of the interpretation and application of substantive law.

In terms of the ordinary law relevant in constitutional law review, the legislation applicable to the present matter is § 61 of Act no. 155/1995 Coll., Art. 20 of the Agreement, and Art. 15 par. 1 of the Administrative Agreement.

In the present matter, the Constitutional Court found no grounds for proceeding according to § 78 par. 2 of Act no. 182/1993 Coll., as amended by later regulations, with § 61 of Act no. 155/1995 Coll.; it is not endowed with the authority to evaluate the constitutionality of directly applicable provisions of international treaties.

The Constitutional Court has spoken regarding the issue of the constitutionality of the relationship of § 61 of Act no. 155/1995 Coll. to Art. 20 of the Agreement in a number of its decisions (see judgments file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07, Pl. ÚS 4/06, III. ÚS 939/10 and III. ÚS 1012/10).

The Constitutional Court only points out and repeats that the tenor of these decisions is respecting the constitutional principle of equality, i.e. ruling out unjustified inequality, in this case between citizens of the Czech Republic. As early as judgment file no. Pl. ÚS 31/94 the Constitutional Court declared the acceptance of the internationally recognized principle that ratification of international treaties does not affect more advantageous rights, protection, and conditions provided and guaranteed by national legislation. In a case where a special incorporative norm, contained in § 61 of Act no. 155/1995 Coll., establishes the priority of an international treaty over national law, where application of the law is controlled by the rule of interpretation lex specialis derogat legi generali, as the Constitutional Court is not endowed with the authority to review the constitutionality of ratified international treaties, this principle of interpretation, that specific legislation takes priority over general legislation, must give way to the constitutional principle applicable to the application and interpretation or relevant ordinary law, the principle of constitutionally conforming interpretation and application. In the present case, this constitutional principle is the fundamental right arising from the constitutional principle of the equality of citizens and the ruling out of unjustified differentiation in their rights. As already stated, the Constitutional Court explicitly addressed the purpose of the Agreement in judgment file no. I. ÚS 1375/07. It stated that "the object of concluding an international treaty cannot be to reduce the pension entitlements of one's own citizens, whose entitlement to a higher pension arises independently of such a treaty, under national legislation." It described as constitutionally impermissible discrimination of one versus other groups of citizens of the Czech Republic an inequality established "only as a result of a particular circumstance that originates in the dissolution of the then-existing Czechoslovak federation." Under judgment file no. IV. ÚS 228/06, the fact that the Czech Republic concluded a treaty with the Slovak Republic on implementation of social security (the Agreement between the Czech Republic

and the Slovak Republic on Social Security, published as no. 228/1993 Coll.) cannot operate to the detriment of a Czech citizen as regards the amount of his pension entitlements, even if he was employed in Slovakia as of the date of dissolution of the CSFR. In judgment file no. I. ÚS 1375/07 the Constitutional Court summarized its previous deliberations thus: "The Constitutional Court has already considered the issue of application of the Agreement in its decisions file no. II. ÚS 405/02 and III. ÚS 252/04. It spoke in detail on these conclusions, and especially interpretation thereof, in the judgment of the Plenum of 20 March 2007, file no. Pl. ÚS 4/06. In these decisions it stated that 'the Czech Republic and the Slovak Republic were created as of 1 January 1993 by the dissolution of the joint Czechoslovak state. The joint state had a unified pension insurance system. In terms of the laws in effect at the time, it was legally irrelevant which part of the Czechoslovak state a citizen was employed in, or where his employer had its registered office.'"

From this point of view, the Constitutional Court's deliberations on the interpretation of Art. 15 par. 1 of the Administrative Agreement, contained in judgment file no. III. ÚS 939/10, apply to sub-constitutional law, and in terms of the arguments concerning the relationship between the law of the Czech Republic and European law, and interpretation of Art. 30 par. 1 of the Charter in terms of the constitutional principle of equality they appear to have only a supporting role.

On the periphery of the secondary party's arguments, according to which, in the case of the complainant and other analogous cases, the full costs of paying pensions would be borne by the successor state on whose territory the registered office of a company operating nationwide was located, the Constitutional Court emphatically points out and reiterates the legal opinion that it stated in judgment file no. III. ÚS 939/10: "The Constitutional Court also emphasizes that allocating a pension in this matter under the Agreement and § 4 par. 3 of Act no. 582/1991 Coll., on the Organization and Implementation of Social Security, as amended by later regulations, can be accepted, in accordance with constitutionally conforming interpretation of Art. 20 of the Agreement, Art. 15 par. 1 of the Administrative Agreement and § 61 of Act no. 155/1995 Coll., only in the sense of an entitlement to an arranged payment of a benefit provided by the Social Insurance Company in Bratislava, adjusted up to the amount of pension to which the entitled person would be entitled if the Czech Social Security Administration were competent to assess all the periods of insurance (employment), including replacement periods, which the person completed, i.e., including periods before the dissolution of the joint state. In these circumstances the legislation in question only regulates the allocation of the shares of both successor states in payment of a pension, but it does not affect the protected position of a citizen of the Czech Republic, which follows from the Constitutional Court's case law (see judgments file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07 and Pl. ÚS 4/06)."

Due to the foregoing, i.e. violation of Art. 30 par. 1 in conjunction with Art. 4 par. 4 a Art. 3 par. 1 of the Charter, the Constitutional Court annulled the judgment of the Supreme Administrative Court of 31 August 2011, file no. 3 Ads 52/2009, the judgment of the Regional Court in Hradec Králové, Pardubice branch, of 29 January 2009, ref. no. 52 Cad 35/2008-40, and the decision of the Czech Social Security Administration of 8 February 2008, ref. no. 450 811 075/428 [see § 82 par. 1 and par. 3 let. a) of Act no. 182/1993 Coll., on the Constitutional Court]. The Constitutional Court also applied the grounds for cassation to the decision by the secondary party, for reasons of procedural efficiency, as well as the fact that the unconstitutional interference in the complainant's fundamental rights and freedoms was already established by its decision.

IX. Obiter dictum

Article XII, point 18 of Act no. 428/2011 Coll. of 6 November 2011, which Amends Certain Acts in Connection with the Adoption of the Act on Pension Savings and of the Act on Supplementary Pension savings, amends and supplements Act no. 155/1995 Coll., on Pension Insurance, as amended by later regulations, by inserting after § 106 a new § 106a, which reads (including the heading):

"§ 106a Evaluation of certain periods during the period before 1993

Pensions from Czech pension insurance (security) cannot be granted or increased for periods of pension insurance completed before 1 January 1993 under Czechoslovak legislation, which, under the Agreement between the Czech Republic and the Slovak Republic on Social Security of 29 October 1992 are considered to

be periods of pension security or insurance of the Slovak Republic, nor can adjustments, balancing, supplements or analogous payments for a pension or part thereof, or amounts provided instead of a pension or part thereof, be provided by taking these periods into account; these periods can be taken into account, in accordance with Art. 4 of Constitutional Act no. 4/1993 Coll., on Measures Related to the Dissolution of the Czech and Slovak Federal Republic, only under the conditions and in the scope provided by that treaty or that Act (§ 61)."

Under the transitional provision Art. XIII of that Act: "Applications for the provision of adjustments, settlements, supplements, and analogous payments set forth in § 106a of Act no. 155/1995 Coll., in the wording in effect from the day this Act goes into effect, shall be set aside, and proceedings shall not be conducted on them; if these applications were filed before the day this Act went into effect, proceedings on them shall be stopped. Measures taken before the day this Act went into effect on the basis of these applications shall remain unaffected, with the provision that the relevant payment, after accounting for advance payments during 2011, shall remain in the resulting amount without change, if, under the legislation of the Czech Republic and the Slovak Republic, there is a continuing entitlement to a pension that was the grounds for granting the payment; upon termination of an entitlement for a pension under the legislation of one of these states the entitlement to the relevant payment also terminates permanently."

Under Art. XXVI of Act no. 428/2011 Coll., the provisions of Art. XII point 18 and Art. XIII go into effect on the day it is promulgated, that day being 28 December 2011, when part 149/2011 of the Collection of Laws, in which Act no. 428/2011 Coll. was published, was distributed.

The background report to the government bill adopted as Act no. 428/2011 Coll. does not contain any justification for Art. XII and XIII. That is because these provisions were proposed in the second reading of the Chamber of Deputies discussion of the government bill (publication 414) on 30 August 2011 by Deputy Gabriela Pecková, as a reaction to the ECJ judgment in the Landtová case: "Provision of a supplementary benefit is based on the previous case law of the Constitutional Court of the Czech Republic. The Court of Justice of the European Union decided that adjusting Slovak pensions through a supplementary benefit cannot be limited by the condition of Czech citizenship and residence in the Czech Republic, because such a limitation is discrimination contrary to European Union law. In connection with this judgment, I propose adopting legislation that would generally rule out supplements to Slovak pensions."

(See http://www.psp.cz/eknih/2010ps/stenprot/022schuz/s022029.htm.)

As the secondary party correctly states in its statement, the conditions for entitlement to the requested supplementary benefit to the old age benefit are not governed by any legislation. Thus, § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., enshrines a prohibition on payment of social benefits that is not governed by law. This is undoubtedly contradictio in adiecto, it is certainly a statutory provision which makes no sense in and of itself. It is necessary to answer the question of whether a supplementary benefit, that is tied to application of the Agreement, really is not established on any other legally relevant grounds and whether the interference by the legislature regarding it is relevant.

The transcript of the Chamber of Deputies discussion of the bill of the Act in question indicates that the proponent of the amending proposal, and thus the entire Chamber, were aware that "provision of a supplementary benefit is based on the previous case law of the Constitutional Court of the Czech Republic."

If the purpose of adopting § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., and Art. XIII of Act no. 428/2011 Coll., was a reaction to the consequences of the ECJ judgment of 22 June 2011, C-399/09 with "derogative" consequences for the case law of the Constitutional Court, then we cannot do otherwise than conclude that the essential grounds for this Constitutional Court judgment, which declares that the ECJ's actions in the case at hand were ultra vires, makes the cited statutory provisions obsolete (§ 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., and Art. XIII of Act no. 428/2011 Coll.), based on the legal principle cessante ratione legis cessat lex ipsa (if the reason for the law ceases to exist, the law itself ceases to exist).

The Constitutional Court did not open a proceeding on review of norms concerning § 106a of Act no. 155/1995 Coll., as amended by Act no. 428/2011 Coll., and Art. XIII of Act no. 428/2011 Coll., because the present case

did not meet the requirements for proceeding under § 78 par. 2 of Act no. 182/1993 Coll., on the Constitutional Court, i.e. the legislative provisions in question were not applied in proceedings from which the decisions contested by the constitutional complaint arose.

Instruction: This judgment cannot be appealed.

Dissenting opinion of Judge Jiří Nykodým to judgment of the Plenum file no. Pl. ÚS 5/12

I disagree with the majority opinion of the Plenum, annulling the decision of the Supreme Administrative Court due to violation of the constitutional principle of the equality of citizens and ruling out unjustified differences in their rights when providing adequate material security under Art. 30 par. 1 of the Charter of Fundamental Rights and Freedoms. The reasons for my disagreement relate to the arguments applied in the dissenting opinion filed to Constitutional Court judgment file no. Pl. ÚS 4/06, the relevant points of which I summarize and to which I refer in full.

First. I do not consider correct the conclusion that European law, i.e. Regulation (EEC) of the Council 1408/71 of 14 June 1971, on application of social security schemes to employed persons and their families moving within the Community cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1993, and that therefore the ECJ judgment of 22 June 2011, C-399/09, affecting cases analogous to the complainant's is an overreaching by an EU body.

The CR joined the European Union on 1 May 2004. The EU coordinates national social security schemes through the abovementioned regulation so that it will be possible to ensure, among other things, one of the four fundamental freedoms – the free movement of persons. The purpose of the legislation is to ensure that a person employed in several countries will not lose his entitlement to social benefits on the grounds of different citizenship or residence, or because he has not completed in any country the necessary insurance period set forth by the legislation of that country. Coordination has four fundamental principles: it prohibits all discrimination based on nationality (Art. 7), the legal order of one state is applied – that of the state where the employed person works, regardless of place of residence (Art. 13), insurance periods in all member states are aggregated (Art. 45 for pensions), entitlements to benefits can be exercised regardless of place of residence, and benefits are paid abroad. Under Art. 6, Regulation 1408/71 replaces the provisions of any agreement on social security between two member states; Art. 7 partially limits Art. 6, to the effect that, notwithstanding Art. 6, agreements on social security listed in Annex III remain applicable [Art. 7 par. 2 let. c)]. The content of Art. 20 of the Agreement on transfer of obligations by the Czech and Slovak Republics in the field of pension security for the period until the dissolution of the CSFR was, in connection with the Czech and Slovak Republics' accession to the European Union, included in Annex III to Regulation 1408/71 (by the Agreement on Accession to the EU); thus, it became EU law, and is a provision that is binding for all member states. In its current case law regarding Art. 7, the ECJ has so far not deviated from its respect for the will of mMember states to preserve by treaty certain individual features existing since the time before accession to the EU, set forth in Annex III to Regulation 1408/71. In my dissenting opinion to judgment file no. Pl. 4/06 I already pointed to the exemplary decision in this regard, ECJ decision 305/92, Hoorn, of 28 April 1994. Thus, as of 1 May 2004, Art. 20 of the Agreement is a component of EU law, and as such it is applied by the executive branch and will be applied, including to incomplete cases that were begun before the entry to the EU and have not yet been completed (Art. 118 of Regulation 574/72).

This involves a rule for settling obligations from pension security between two member states; therefore, the ECJ had the authority to address the issue and interpret the rule. In its judgment, in view of the text of the Regulation, it did not rule out the possibility that the Czech Republic could introduce a rule on the basis of which a supplementary benefit would be paid, provided of course, that it would not discriminate against nationals of other member states.

Second. I also do not agree that the annulled decisions by the administrative courts failed to respect the constitutional principle of equality, or did not, in relation to the complainant, arrange to rule out unjustified inequality between citizens of the Czech Republic. The right to security in old age is a fundamental human right, but it can be exercised only within the bounds of the law. Inequality in the amount of benefit cannot be understood at a constitutional level, because no one is guaranteed to have the same pension as another citizen. The essence of the constitutional complaint from which the present judgment arose is dissatisfaction with the amount of the granted pension. The difference in

the amount of benefit calculated according to the Act on Pension Insurance and the Czech regulation compared to the amount to which one is entitled in accordance with Art. 20 of the Agreement on assumption of obligations by the Czech and Slovak Republics in pension insurance for the period until the dissolution of the CSFR, is a consequence of the dissolution of the CSFR, allocation of its obligations between the successor states, and the subsequent different legal and economic history of these states. In this regard I must note that the amounts of pensions are approaching each other, and it is not impossible that in future the Slovak pension will be more advantageous, for example, for certain groups of insured persons; does that mean that persons who are now affected by the rule will then, in contrast, receive a constitutionally unacceptable advantage? The Agreement on assumption of obligations by the Czech and Slovak Republics in pension insurance for the period until the dissolution of the CSFR had to observe certain constitutional limits provided by Constitutional Act no. 4/1993 Coll. I consider it reasonable to try to allocate the burden of obligations so that the obligated subject is not primarily only the Czech Republic, where most employers active in the entire territory of the then Czechoslovakia had their registered offices. Perhaps it would have been more suitable to choose as a criterion the place where work was performed, but at this point this is merely an academic question. In individual cases – and the complainant's case is obviously one of them – this provision, or the system of allocation of the obligations of the dissolved state could have harsh effects. However, that is not sufficient to conclude that it is unconstitutional. The principles of certainty and predictability of the law are unquestionable elements of a law-based state. These principles were generally observed by acceptance of legal continuity, specifically in the field of pension insurance, by preserving the entitlement as such, and aggregating completed insurance periods. This is important from the viewpoint of constitutional guarantees. I do not agree that citizens of the CR could not have different pension rights based on where they worked. The existence of Czechoslovakia as a joint state and its dissolution do not, from the viewpoint of constitutional principles, justify a need for every citizen of the Czech Republic to receive a so-called "Czech pension" for periods completed through 1992.

The judgment argues that citizens of the Czech Republic employed until 31 December 1992 by an employer with its registered office in the territory of the present-day Slovak Republic are entitled to a supplementary benefit to the aggregate of partial pensions granted by the Czech and Slovak insurer. However, the Act on Pension Insurance does not contain any a supplementary benefit. It does not regulate the manner of calculating such a supplementary benefit. Moreover, the Act on Pension Insurance, as amended by the "small pension reform" expressly prohibits supplementary adjustment. Thus, a body ruling on pension matters receives contradictory instructions, which is it bound to observe.

Third. I disagree with the overall concept of the Constitutional Court's approach to the issue of so-called "Slovak pensions." It is evident from the previous decisions concerning this issue that it involves a wide and diverse range of factual situations: from the case of the complainant, where some sort of general sense of justice leads to a belief that a "Czech pension" would be adequate, to cases where the insured person completed the substantial part of his employment in the Slovak part of the joint republic, lived in Slovakia during the entire time, and had Slovak citizenship at the time of dissolution of the joint state. In other words, cases that would not even require a special regime under an international agreement, and could be resolved according to the basic principle that the Czech Republic, in the area of public subjective rights, assumed only obligations vis-à-vis those persons who had permanent residence in its territory as of the date of dissolution of the joint state. By adopting a general interpretation in a matter with a completely specific factual context, the Constitutional Court is attempting to replace the legislature, or the governments of the Czech Republic and the Slovak Republic, who would be competent to make any amendments to the regime agreed upon at the time of dissolution of the joint state in the cited Agreement. Only future complaints and constitutional complaints will reveal the risks that these actions bring.

§63. Pringle, Supreme Court's Submission of a Preliminary Ruling to the European Court of Justice, July 31st, 2012, available at http://www.bailii.org/ie/cases/IESC/2012/S47.html

The Supreme Court has decided to refer to the Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the European Union (hereinafter "TFEU") the question of the validity of European Council Decision 2011/199/EU of 25th March 2011 (hereinafter the "European Council Decision") and the question of whether Ireland, by entering into and ratifying the Treaty establishing the European Stability Mechanism done at Brussels on 2nd February 2012 (hereinafter "the ESM Treaty"), would undertake obligations incompatible with the Union Treaties.

I. The Proceedings

The plaintiff, the appellant in the appeal pending before the Supreme Court, (hereinafter "the appellant") is a citizen of Ireland and a member of Dáil Éireann, one of the Houses of the Oireachtas, the national parliament.

The appellant opposes participation by Ireland in the ESM Treaty. He claims that that Treaty would transfer to a new international institution sovereign monetary powers and powers of monetary policy of the State and any ratification would be unlawful and unconstitutional in the absence of approval of the people in a referendum pursuant to Article 46 of the Constitution.

The Issues before the National Court

By reason of his opposition to the ESM Treaty, the appellant on 13th April 2012 commenced an action in the High Court against the Government of Ireland, Ireland and the Attorney General. In that action the appellant claims:

that participation by the Government on behalf of the State in the adoption and proposed ratification of the ESM Treaty is contrary to the Constitution of Ireland and involves a delegation of the sovereignty of the State and an excessive exercise by the Government of its executive powers in conducting the external relations of the State ("the sovereignty claim");

that the legislative measure by which effect is sought to be given to the ESM Treaty in Ireland (the European Stability Mechanism Act, 2012) involves a constitutionally impermissible transfer of power from the national parliament to the Minister for Finance ("the power transfer claim").

that by adopting the ESM Treaty, Ireland would undertake obligations which would be in contravention of provisions of the Treaty on European Union (hereinafter "TEU") and the TFEU concerning Economic and Monetary policy and would directly encroach on the exclusive competences of the Union in the matter of the euro and related policies ("the ESM Treaty claim");

That the European Council Decision:

Was not lawfully adopted pursuant to the simplified revision procedures provided by Article 48(6) TEU because it entails an alteration of the competences of the Union contrary to the third paragraph of Article 48(6) TEU;

Is inconsistent with provisions of the Treaties concerning economic and monetary union and general principles of the law of the European Union, in particular the principle of legal certainty ("the European Council Decision claim").

5. orders restraining the Government from ratifying the ESM Treaty pending the finalisation of these proceedings ("the injunction claim").

This reference concerns the third and fourth of the above claims.

It should also be noted that the appellant further argues that in the event that participation in the ESM Treaty would amount to a breach of obligations under the Union Treaties, an independent breach of the Irish Constitution would occur.

II. The European Council Decision

Article 48(6) TFEU, under the heading, simplified revision procedures, provides as follows:

6. The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the

European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

Article 136 TFEU provides in its version prior to the amendment proposed by the European Council Decision:

"1. In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:

(a) to strengthen the coordination and surveillance of their budgetary discipline;

(b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.

2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote.

A qualified majority of the said members shall be defined in accordance with Article 238(3)(a)."

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 recites that at "the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change required to that effect."

The European Council Decision also recites the proposal of the Belgian Government and the opinions of the European Parliament, the Commission and the European Central Bank and states that the amendment does not increase the competences conferred on the Union in the Treaties.

The European Council Decision provides, at Article 1, that the following paragraph is to be added to Article 136 TFEU, namely:

"3. 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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

The European Council Decision provides, finally, at Article 2:

"Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements.

This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph."

The European Council Decision was published in the Official Journal of the European Union on 6th April 2011.

Ireland has, by passing the European Communities (Amendment) Act 2012, enacted into law on the 3rd day of July 2012, commenced the process of giving approval to the European Council Decision. That Act was passed following the hearing of the present proceedings in the High Court. The Act will come into operation on such day or days as the Minister for Foreign Affairs and Trade may appoint in accordance with section 2(3). The appellant, by an amendment to his statement of claim, seeks a declaration that that Act is unconstitutional.

III The proceedings before the national courts to date

The case was heard over seven days in the

High Court by Laffoy J, who delivered her judgment on 17th July 2012. She dismissed the appellant's claims under all headings.

It should be noted that Laffoy J rejected the argument of the State to the effect that the appellant's claim was commenced outside the two-month time-limit laid down in Article 263 TFEU for annulment actions and applied by analogy (Case C – 188/92 TWD Textilwerke Deggendorf GmbH v. Germany [1994] ECR 1 – 833) to proceedings commenced in the national court and referred by way of request for preliminary ruling to the Court of Justice pursuant to Article 267 TFEU. The learned trial judge was not satisfied that the European Council Decision would have been of individual concern to the appellant. There is no appeal to the Supreme Court against that determination and the Supreme Court does not find it necessary to address the matter.

It should also be noted that the High Court declined to refer to the Court of Justice for preliminary ruling the question of the validity of the European Council Decision. In accordance with the decision of the Court of Justice in Case 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199, the learned judge held that the European Council Decision is "completely valid." The judge did, however, decide that a reference was necessary concerning the effect of the failure of one or more Member States to give notice of ratification of the European Council Decision in accordance with Article 2 and its effect on the coming into effect of the ESM Treaty.

The appellant appealed immediately to the Supreme Court against the High Court decision. Counsel for the parties appeared before the Court. Due to the exceptional urgency and public importance of the matter, the Court decided to grant an early hearing of the sovereignty claim, the question of whether, and if so in what form, issues arising out of the ESM claim and the European Council Decision claim should be referred to the Court of Justice and the injunction claim.

The Decision of the Supreme Court

Having heard argument the Supreme Court decided, on the 31st July, 2012 to:-

reject the sovereignty claim;

refer the questions herein contained to the Court of Justice; and

reject the injunction claim;

The remaining issues have been deferred pending the result of this reference.

IV The appellant's arguments

The European Council Decision

The appellant advances arguments under two headings in his claim that the European Council Decision is invalid:

Use of the simplified revision procedure is incompatible with Article 48(6) TEU; the amendment proposed should have been carried out by means of the ordinary revision procedure, which, it is claimed, would have necessitated a referendum in Ireland.

The European Council Decision is contrary to the Union Treaties and to the General Principles of European Union Law, in particular, the principle of legal certainty.

Use of simplified revision procedure

The appellant submits that the proposed amendment of Article 136 TFEU constitutes an impermissible and unlawful amendment of that Treaty in that it fundamentally alters the basic law and principles of the European Union without using the ordinary revision procedure provided by Article 48 (1) to (5) TEU. He says that any instrument adopted on the basis of Article 48(6) must comply with the conditions governing the use of the simplified revision procedure. Some of the appellant's submissions under this heading are illustrated by reference to the actual provisions of the ESM Treaty.

They are as follows:

the amendment proposed purports to confer on Member States whose currency is the euro the power to establish a stability mechanism to safeguard the stability of the euro area as a whole and thus to confer a competence in the area of monetary policy, a subject in which the Union has exclusive competence by reason of Article 3 TFEU;

the proposed amendment increases and/or reduces the competences of the Union and thus extends beyond the limitation provided for in the third paragraph of Article 48(6) TEU;

the amendment proposed purports to

authorise Member States to establish a European stability mechanism, participation in which is reserved to Member States whose currency is the euro, and which is designed to safeguard the stability of the euro area as a whole; this constitutes a provision for the formation of a closer economic union;

the creation of such a mechanism entails the creation of new competences in connection with such a closer Union which are to be implemented or exercised through a body and pursuant to treaty rules which are outside and detached from the framework of the European Union.

the stability mechanism described in the European Council Decision would in essence be an institution of euro Member States; its functions concern euro zone Member States only, and its objective is to support the euro currency, whereas the definition and conduct of the single currency is within the exclusive competence of the Union.

the proposed Article 136(3) TFEU would confer on such a mechanism new powers not at present provided by the Treaties: to grant financial assistance subject to strict conditionality.

the appellant says that his concerns are not merely theoretical but are clearly reflected in the actual text of the ESM Treaty; that treaty expressly refers to the proposed amendment in its second recital and confers new powers on the ESM Institution that are incompatible with the express provisions of Part Three, Title VIII of the TFEU.

any stability mechanism designed to provide financial assistance to euro-zone Member States is necessarily acting in an area that falls within exclusive Union competences.

furthermore, any functions which would be performed by the Commission and the European Central Bank in the context of the ESM Treaty have no legal basis in the Treaties, and are liable to be incompatible with the Union Treaties. At least they would amount to new roles and competences for those Union institutions.

Arguments that the European Council Decision is contrary to the existing treaties and primary norms of Union law

The European Council Decision constitutes an "act of the institutions" within the meaning of Article 267 TFEU. Assessment of its validity pursuant to that Article implies an evaluation of its conformity with primary norms, such as the Union Treaties, the Charter of Fundamental Rights and the General Principles of Union law.

If the Member States wish to introduce changes to the Union Treaties that contravene general principles of Union law, then such amendment could not be adopted by means of the simplified revision procedure.

The European Council Decision purports to authorise Member States to take actions that are in contravention of existing Treaty provisions, namely, in Part Three, Title VIII of the TFEU and, in particular, Articles 122, 123, 125, 126, and 127 TFEU, including the object and spirit underlying such provisions as a whole. Those provisions regulate and limit the conditions under which financial assistance may be granted to Member States, and the extent to which one Member State may assume the financial commitments of another Member State. In particular, as can be illustrated by reference to the actual terms of the ESM Treaty:

the stability mechanism purportedly authorised by the amendment would circumvent prohibitions contained in the Treaty by way of an intergovernmental agreement that is at odds with the Union Treaties and in breach of the duty of sincere co-operation enshrined in Article 4(3) TEU.

it would conflict with Article 121(2) TFEU, which provides that "the Council shall, on a recommendation from the Commission, formulate a draft for the broad guidelines of the economic policies of the Member States and of the Union."

it would contravene in particular Articles 122(2), 123, and 125 TFEU, whose objective is to regulate and limit the granting of financial assistance, directly or indirectly, to other Member States.

by establishing a mechanism parallel to TFEU to facilitate Member States offering financial assistance to other Member States, it would contravene the prohibitions in Articles 123 and 125 TFEU.

such a stability mechanism would make contracting Member States liable to put up funds precisely to enable recipient Member States to meet their obligations and thereby safeguard the stability of the euro, which is contrary to Article 125(1) TFEU, known as

the "no-bail" out clause.

such a mechanism would be a conduit by which Member States would be liable to assume commitments of public undertakings and central governments of other Member States and therefore is manifestly incompatible with Article 125 TFEU. It would involve one Member State advancing finance to another Member State in order to allow it to comply with its financial commitments, which is prohibited by Article 125 TFEU.

Furthermore, the amendment proposed by the European Council Decision provides a vague and open-ended amendment that enables the granting of financial assistance without limitations or restrictions as provided for in the Union Treaties. The appellant cites Case C-540/03 Parliament v. Councilas authority for the proposition that a provision of secondary EU law that would expressly or impliedly authorise Member States to act in contravention of primary norms would itself violate Union Law.

The ESM Treaty

The appellant advances arguments under five headings in his claim that the ESM Treaty entails obligations that are incompatible with obligations under the Union Treaties. They are as follows:

The ESM Treaty entails a direct and substantive breach of the "no bail-out" principle reflected in Article 125 TFEU and in the provisions of Part Three, Title VIII of the Treaty on the Functioning of the European Union.

In establishing the ESM as provided for in the Treaty of 2 February 2012, the Member States whose currency is the euro will have created for themselves a permanent autonomous international institution with the purpose of evading the strictures, prohibitions, and restrictions of Part Three, Title VIII of the TFEU which are intended to be of general application to all EU Member States. The ESM Treaty entails Member States circumventing prohibitions contained in the EU Treaties by way of an intergovernmental agreement outside the Union legal order that is in conflict with the Union Treaties and in breach of the duty of sincere co-operation enshrined in Article 4(3) TEU.

The ESM Treaty breaches the allocation of competences between the national and Union legal orders as defined in the Union Treaties.

The ESM Treaty confers new competences on Union Institutions and entails performance by them of tasks that are incompatible with their functions as defined in the EU Treaties.

The ESM Treaty is incompatible with respect for the general principle of effective judicial protection as enshrined in the European Convention on Human Rights and in the Charter of Fundamental Rights and as recognised as a General Principle of EU law and the general principle of legal certainty.

V Submissions of the Government, Ireland and the Attorney General

(a) The European Council Decision

The respondents on the appeal (hereinafter "the State") fully support the decision of the High Court, in particular the finding of the learned High Court judge that it is clear that that the effect of the European Council Decision "will not be to increase the competences of the Union in the Treaties."

The State submits that the effect of the European Council Decision is that the Treaty will recognise that Member States whose currency is the euro may establish a stability mechanism the purpose of which is to safeguard the stability of the euro area as a whole. However, the stability mechanism may be activated only if it is indispensable to achieve that purpose.

The stability mechanism is an intergovernmental mechanism, in which the participants are the Member States whose currency is the euro.

Use of the simplified revision procedure

The State submits that the use of the simplified revision procedure was appropriate.

The State says that the High Court acted entirely appropriately in having regard to the opinions, respectively of the Commission of 15th February 2011, of the European Central Bank of 17th March 2011 and of the European Parliament of 23rd March 2011. The European Council was required by Article 48(6) TEU to consult those institutions and each of them had expressed the opinion that the amendment proposed by the European Council Decision would not

have the effect of increasing the competences conferred on the Union in the Treaties. Such opinions cannot be regarded as not having legal effect and national courts may, in certain circumstances, be required to take them into consideration. (Case C-322/88 Grimaldi v Fonds des Maladies Professionnelles [1989] ECR 4407). In view of the fact that these opinions are expressly envisaged by Article 48(6) TEU, they have a treaty status which entitles them to particular respect. [at paras 125 to 131 of the State's written submissions]

The State further submits that the functions conferred on the Union institutions by the ESM Treaty have clear legal bases in the Union Treaties:

The State submits that the Commission has power to perform the tasks conferred on it by the ESM Treaty by virtue of Article 17 TEU and notes that the Commission is already performing similar tasks in the context of the so-called "Six Pack" legislation. See Regulation (EU) 1173/2011 (based on Articles 136 and 121(6) TFEU); Regulation (EU) 1174/2011 (based on Articles 136 and 121(6) TFEU); Regulation (EU) 1175/2011 (based on Articles 121(6) TFEU); Regulation (EU) 1176/2011 (based on Article 121(6) TFEU); Regulation (EU) 1177/2011 (based on Article 126(14) TFEU, second sub-para); and Directive 2011/85/EU (based on Article 126(14), third sub-para).

Having regard to Article 282 TFEU, the State submits that the ESM Treaty does not confer any function on the European Central Bank in breach of Union law, while a similar role to that envisaged by the ESM Treaty for the European Central Bank is already performed by it in the context of the "Six Pack" and in the context of Articles 126 and 127 TFEU.

The State submits that the Court of Justice has power to accept referrals from the ESM pursuant to Article 273 TFEU given that (1) a referral would entail a dispute between ESM Members or arise where one ESM Member contests the view taken by the others on the ESM Board of Governors; (2) the subject matter of the ESM Treaty is related to the subject matter of the Union Treaties; and (3) the provision in the ESM Treaty conferring jurisdiction on the Court of Justice constitutes a "special agreement" between the parties.

Alleged incompatibility with Union Treaties and general principles

The State responds to the appellant's submissions that the establishment of a stability mechanism (many of which are made by reference to the ESM Treaty). The State submits:

Insofar as the appellant argues that the establishment of a stability mechanism violates the exclusive competence of the Union in monetary policy for Member States whose currency is the euro pursuant to Article 3(1)(c) TFEU, the State says that monetary policy is part of broader economic policy dealing with interest rates and money supply. A funding mechanism cannot be engaged in any way with monetary policy.

Article 121 TFEU: is concerned with the Council's function in formulating the broad outlines of the economic policies of the Member States. The State, referring to the text of the ESM Treaty,— and in particular to Article 13(3) of the ESM Treaty which provides that any conditions set by the ESM, as negotiated by the Commission and the European Central Bank, must be "fully consistent" with any measure of economic policy coordination provided for in the TFEU— says that the High Court was correct to conclude that there is no scope for conflict with this Article.

Article 122(2) TFEU provides for Union financial assistance to Member States which are "in serious difficulties or...seriously threatened……" The State says that: firstly, this Article relates to Union competence via the Council and is irrelevant to the grant of funding to Member States pursuant to an international agreement under which an international financial institution would grant funding; secondly, the far-reaching submission of the appellant is unsustainable, as, to quote the High Court, "the Union does not have exclusive competence to grant financial assistance to Member States embroiled in financial difficulties;" thirdly, both the European Parliament and the Commission, in their opinions, considered that such a stability mechanism would involve no reduction in the competences of the Union.

Article 123 TFEU prohibits the provision of credit by the European system of banks to governments of the euro area and other public bodies. The State fully supports the conclusion of the High Court, which was that:

"The prohibition on the provision of credit in Article 123 binds the European Central Bank

and the central banks of Member States. It does not bind the ESM institution which is a distinct entity, which is funded by capital contributions from its Members and borrowing on international capital markets."

The State also submits that the fact that a Member State undertakes to subscribe to the authorised capital stock of a stability mechanism would not mean that the Member State was providing overdraft facilities or any other type of credit facility as envisaged by Article 123 TFEU.

Article 125 TFEU prohibits the Union from assuming the commitments of central governments or other public bodies of the Member States. For several reasons the State says that a stability mechanism does not involve any commitment prohibited by this Article. It is addressed to the Union and to Member States, but not to an international organization such as that to be established under the stability mechanism provisions. Like the argument related to Article 122(2), this argument would have the far-reaching consequence that a Member State such as Ireland could not participate in any international funding mechanism (including the International Monetary Fund). The Article prohibits assistance by Member States and not by an international organisation with legal personality distinct from its Members such as is envisaged. In the particular context of the ESM Treaty, the State adds that none of the financial instruments available to the ESM entails liability or assumption of commitments within the meaning of Article 125 TFEU.

Article 126 TFEU obliges Member States to "avoid excessive Government deficits…" As was held by the High Court, there is again "no scope for conflict" with this provision. In the context of the ESM Treaty, the State submits that Member States are free to decide whether or not to accept financial assistance on the conditions imposed by the ESM and that, as observed above, Article 13(3) of the ESM Treaty requires any conditions imposed by the ESM to be "fully consistent" with any measures of economic policy coordination adopted by the Union.

Article 127 TFEU deals with monetary policy. The State says that the argument that a stability mechanism would violate this provision must fail for the same reasons as the argument relating to Article 3(1)(c) TFEU. It supports the finding of the High Court the stability mechanism is not concerned with the definition or implementation of monetary policy and does not encroach on the policy area governed by Article 3(1)(c), Article 119(2), or Article 127 or the TFEU.

Article 4(3) TEU: the State submits that the proposed stability mechanism could not involve Ireland in a breach of its obligation of sincere cooperation pursuant to this Article. The mechanism would not involve any breach of the Treaties. The State further submits that participation in a stability mechanism which aims to preserve the euro would involve fulfilment of the State's Article 4(3) TEU obligations as it would involve participating in activities "which flow from the Treaties".

The Charter of Fundamental Rights/General Principles of Union Law: the State contends that, in addition to its general observation that it is difficult to envisage circumstances in which a stability mechanism would violate human rights, in the particular context of the ESM Treaty, given the record of the Court of Justice in upholding human rights, the review role accorded to the Court of Justice would ensure that human rights are fully protected within the ESM legal order.

The ESM Treaty

The State's submissions on the ESM Treaty are largely already summarised above. In particular, the State submits that the ESM Treaty provides for a funding mechanism with a clearly–stated purpose and limited powers, which would neither give the ESM Institution any role in defining or implementing the monetary policy of the Union, nor any role in the coordination of the economic polices of the Member States. Moreover, participation in the ESM Treaty would not violate the "no bail-out" principle reflected in either Article 125 TFEU or in other provisions of Part Three, Title VIII TFEU. The State also submits that the ESM Treaty does not purport to confer any new competences on the EU Institutions and agrees with the High Court's finding that "the ESM Treaty does not purport to affect the allocation of responsibilities as defined in the Union Treaties" (at para. 78 of High Court judgment). The State contends further that the principle of effective judicial protection is fully protected by virtue of Article 37 of the ESM Treaty which provides that disputes may be submitted to the Court of Justice.

VI The questions referred

Given that the Supreme Court has rejected the sovereignty claim, the questions which will determine these proceedings involve those which arise on the European Council Decision claim and the ESM Treaty claim.

In those circumstances outlined above, one of the issues of law which arises in the appeal pending before the Supreme Court concerns the validity of the European Council Decision.

A further issue of law which arises is whether an EU Member State is entitled, consistent with the Union Treaties, to enter into and ratify an international agreement such as the ESM Treaty, and whether any such entitlement is dependent on the validity and entry into force of the European Council Decision.

The Supreme Court, in the light of the foregoing, and considering that an answer to those questions is necessary for its decision on the appeal before it, refers to the Court of Justice for preliminary ruling pursuant to Article 267 TFEU, the following questions:

(1) Whether European Council Decision 2011/199/EU of 25th March 2011 is valid:

Having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties;

Having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union.

(2) Having regard to

Articles 2 and 3 TEU and the provisions of Part Three, Title VIII TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;

the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;

the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII, TFEU;

the powers and functions of Union Institutions pursuant to principles set out in Article 13 TEU;

the principle of sincere cooperation laid down in Article 4(3) TEU;

the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union and the general principle of legal certainty;

is a Member State of the European Union whose currency is the euro entitled to enter into and ratify an international agreement such as the ESM Treaty?

If the European Council Decision is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?

Accelerated procedure

The Supreme Court requests the Court of Justice to apply to this reference for preliminary ruling the accelerated procedure pursuant to Article 104a of the Rules of Procedure. The Court considers the matter to be one of exceptional urgency. The High Court accepted evidence from the State to the effect that the ESM Treaty Members, including Ireland, and the Member States of the European Union all have pressing interest in Ireland's timely ratification of the ESM Treaty and that the stability of the euro area would be seriously damaged by delayed ratification. The State says that it is essential that Ireland be involved in the ESM Treaty from the outset, in order that it may participate and vote on early decisions of the ESM taken by mutual agreement.

The State says that a range of adverse consequences may ensue if Ireland does not ratify the ESM Treaty in the short term, for example, detrimental impact on Ireland's phased re-entry into the financial markets and a serious set-back to the substantial progress made to date by Ireland towards completing and exiting the EU-IMF programme by 2013. The State says that Ireland's timely ratification of the ESM Treaty is of the utmost importance for other Members of the ESM, and, in particular, the Members who are in need of financial assistance. In evidence placed before the Supreme Court on the injunction issue, it was suggested that a

failure to ratify and implement the measures contained within the ESM Treaty at the earliest possible stage would lead to irreparable harm both to the interests of Ireland and those of the euro zone generally.

For these and other reasons, the High Court and the Supreme Court declined to grant an injunction restraining the State from ratifying the ESM Treaty.

The Supreme Court believes that the intention of the State to ratify the Treaty as a matter of urgency justifies the earliest possible determination of all relevant legal issues and the answer of the Court of Justice will inform this Court's determination of the domestic proceedings.

[x]§63. C-370/12, Pringle ECJ, Advocate General Kokott, October 26 th 2012, REFERENCE, OJ C 26 of January 26th, 2013, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CP0370&rid=1

1. Europe is experiencing a public debt crisis. To deal with the crisis the European Union and the Member States are adopting measures which are not wholly conventional. The Court of Justice must in this reference for a preliminary ruling clarify whether the 'European Stability Mechanism', as one of those measures, complies with the requirements of European Union law.

I – Legal framework

[not reproduced in this compilation]

II – The main proceedings and procedure before the Court of Justice

10. Mr Pringle, who is a member of the lower House of the Irish Parliament ('the applicant'), sought in proceedings brought against the Irish Government and Others before the Irish High Court a declaration that the intended amendment of Article 136 TFEU by means of Decision 2011/199 is impermissible and unlawful. He further sought an order restraining the Irish Government from ratifying, approving or accepting the ESM Treaty. The High Court dismissed both of the applicant's claims.

11. Hearing an appeal against the decision of the High Court, the Supreme Court, Ireland considers that answers to the following questions referred for a preliminary ruling are required:

(1) Is European Council Decision 2011/199/EU of 25th March 2011 valid:

– having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties;

– having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union?

(2) Is a Member State of the European Union whose currency is the euro, having regard to

– Articles 2 and 3 TEU and the provisions of Part Three, Title VIII TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;

– the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;

– the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII, TFEU;

– the powers and functions of Union institutions pursuant to principles set out in Article 13 TEU;

– the principle of sincere cooperation laid down in Article 4(3) TEU;

– the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union and the general principle of legal certainty;

entitled to enter into and ratify an international agreement such as the ESM Treaty?

(3) If the European Council Decision is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?

12. At the request of the referring court, by order of 4 October 2012 the President of the Court of Justice ordered that the accelerated procedure under Article 104a of the Rules of Procedure be applied to the reference for a preliminary ruling.

13. Written observations were submitted in the proceedings by the applicant, by Ireland, by the Governments of the Kingdom of Belgium, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Austria, the Slovak Republic and the United Kingdom, and by the European Council and the Commission. At the hearing on 23 October 2012, in addition to the applicant, the European Parliament, Ireland, and all the abovementioned governments and institutions of the European Union participated, with the exception of the governments of the Republic of Cyprus and the Republic of Austria.

III – Legal assessment

A – *Consideration of the first question referred: validity of Decision 2011/199*

14. By its first question the referring Court seeks to ascertain whether Decision 2011/199 is valid having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and having regard to the content of the proposed amendment.

1. Admissibility of the question referred

15. Various Member States question the admissibility, in whole or in part, of the first question referred.

a) Priority of an action for annulment under Article 263 TFEU

16. Ireland submits that the applicant ought to have challenged the validity of Decision 2011/199 by means of an action for annulment under Article 263 TFEU, that the time-limit for bringing such proceedings has however already expired, and that it follows from settled case-law of the Court of Justice that an indirect challenge to the validity of the act of an institution in the main proceedings and by means of a reference for a preliminary ruling on the matter is not possible if the conditions governing the admissibility of an action for annulment under Article 263 TFEU are thereby circumvented.

17. It is indeed correct that, in accordance with settled case-law, a person who could have challenged an act of an institution under Article 263 TFEU and who allowed the mandatory time-limit in that regard to expire is not permitted thereafter to call into question the legality of that act before the national courts[1].It is nevertheless also settled case-law that that rule presupposes that an action based on Article 263 TFEU brought against the contested provision would beyond doubt have been admissible[2].That condition however is obviously not satisfied so far as concerns the applicant, because he is not a person to whom Decision 2011/199 was beyond doubt of direct and individual concern in accordance with the fourth paragraph of Article 263 TFEU and who therefore would have had a right to institute proceedings.

b) The jurisdiction of the Court of Justice

18. In addition, the European Council and various Member States consider that the second part of the first question, which concerns the compatibility of the content of Decision 2011/199 with primary law, is inadmissible.

19. Their view is that the Court of Justice has no jurisdiction to review the compatibility of Decision 2011/199 with the Treaties and with the general principles of European Union law. The Court of Justice may in the present case of

[1] See inter alia Case C 188/92 TWD Textilwerke Deggendorf [1994] ECR I 833, paragraph 17 and Case C 550/09 E and F [2010] ECR I 6213, paragraph 46.

[2] See inter alia Case C 408/95 Eurotunnel and Others [1997] ECR I 6315, paragraph 29, and Case C 343/09 Afton Chemical [2010] ECR I 7023, paragraph 19.

a decision which amends a Treaty provision at most review compliance with the procedural requirements for the amendment which are laid down in Article 48(6) TEU, but may not review whether the content of the decision is compatible with primary law. Since the decision creates a new Treaty provision, a review of its validity is as a matter of principle outwith the powers of the Court of Justice. The consequence of reviewing the substantive compatibility of an agreed Treaty amendment with existing Treaty provisions would moreover be to preclude amendments to the Treaties.

20. The admissibility of the second part of the first question referred is governed by Article 267 TFEU. As a number of Member States have correctly submitted, it follows from indents (a) and (b) of the first paragraph of that provision that the Court of Justice does not have jurisdiction to give preliminary rulings on the validity of the Treaties, but only on the validity of acts of the institutions of the European Union.

21. Decision 2011/199 can however not be placed in the category of 'Treaties' for the purposes of indent (a) of the first paragraph of Article 267 TFEU, but rather constitutes, under the first sentence of the second paragraph of Article 48(6) TEU, merely an act intended to effect a Treaty amendment. The European Council, which is the author of the decision is, in accordance with the second paragraph of Article 13(1) TEU, one of the Union's institutions. Consequently, the Court of Justice, as various Member States and the Commission have stated, has, in principle, jurisdiction to rule on the validity of that decision.

22. However, the question then arises to what extent the Court of Justice can review the validity of a decision whose content consists of a Treaty amendment.

23. It must first be observed that a restriction on the jurisdiction of the Court of Justice to a review of compliance with procedural requirements cannot, in such terms, be found in the Treaties. That finding is particularly significant given that Article 269 TFEU expressly lays down such a restriction in other circumstances, namely in respect of acts adopted pursuant to Article 7 TEU. Consequently, the Court of Justice may in principle review not only the procedure relating to a decision on a Treaty amendment adopted pursuant to Article 48(6) TEU, but also its content.

24. Next, it is however necessary to clarify by what criteria the substantive validity of a Treaty amending decision is to be assessed.

25. The first criterion is offered by the third paragraph of Article 48(6) TEU, namely that the decision is not to increase the competences of the Union. That is not contested by either the European Council or the Member States, although that provision does not govern procedure, but rather imposes a requirement as to the content of the decision.

26. The second criterion for the substantive validity of the decision is constituted by the restriction, stated in the first sentence of the second paragraph of Article 48(6) TEU, to amendments of provisions of Part Three of the TFEU.

27. In that regard, it follows that the content of the decision cannot be assessed by reference to precisely those provisions of Part Three. An amending decision will almost inevitably be in conflict with the existing provisions of Part Three of the TFEU. That will be particularly clear in the case of a decision which – as expressly permitted by the first sentence of the second paragraph of Article 48(6) TEU – would amend all the provisions of Part Three of the TFEU. If a Treaty amending decision were to be assessed by reference to those very provisions of Part Three of the TFEU, it would equally inevitably have to be found to be invalid. That would render the use of the simplified revision procedure of Article 48(6) TEU impossible. From that perspective, such a decision cannot infringe provisions of the Treaty which are to be found in Part Three of the TFEU.

28. The restriction to an amendment solely of Part Three of the TFEU necessitates however an examination in the light of the provisions of primary law established elsewhere. That is because, pursuant to the first sentence of the second paragraph of Article 48(6) TEU, the European Council may not amend any provisions outside Part Three of the TFEU. That rule must be applied not only when considering the form, but also, as indeed the Italian Government emphasises, when considering the substance. A formal amendment of Part Three of the TFEU must not have as a consequence a substantive amendment of primary law which may not be amended by means of the simplified revision procedure.

29. Accordingly, the European Council is not merely barred from adopting a decision to amend the text of the Treaties outside Part Three of the TFEU. It is equally barred from

amending the text of Part Three of the TFEU in a way that is incompatible with provisions of primary law outside Part Three.

30. If an amending decision of the European Council adding a provision to Part Three of the TFEU which for example provided for the temporary suspension of a provision of Part Two, or established additional conditions for its application, were to be held valid, then the restriction of the simplified revision procedure to amendments of Part Three of the TFEU would be disregarded. All the provisions of the Treaties could then be amended using that procedure, provided only that the specific provision formally amended was in Part Three.

31. That finding does not call into question the fundamental power of Member States to amend all the provisions of primary law. If however the simplified revision procedure under Article 48(6) TEU is chosen – as it was without doubt in this case[3] – for an amendment, then the restrictions on that procedure must be respected. To that extent, the scope of the review by the Court of Justice, contrary to the submissions of the French Government, is indeed subject to the specific revision procedure which is chosen.

32. Consequently, a decision of the European Council adopted pursuant to the first sentence of the second paragraph of Article 48(6) TEU must also be assessed by reference to provisions of primary law which lie outside Part Three of the TFEU. To that extent it is for the Court of Justice to review whether the object of such a decision is a Treaty amendment which is confined to an amendment of Part Three of the TFEU or constitutes an amendment of other provisions of primary law.

33. In the light of the foregoing, it appears to me that there is no justification, though the Commission has so proposed, for such a review to be confined solely to the general principles of other primary law. The first sentence of the second paragraph of Article 48(6) TEU provides no basis for such a distinction.

c) Interpretation of the first question referred

34. The scope of examination of the first question referred must therefore be confined to whether Decision 2011/199 is valid in respect of its compliance with all the conditions of Article 48(6) TEU. That includes, as seen above, consideration of primary law that is not governed by Part Three of the TFEU. Accordingly, the second part of the question referred, which seems to refer to the entire body of primary law, must be restrictively interpreted.

35. Moreover, examination of the validity of Decision 2011/199 must be limited to the grounds of invalidity which the referring Court has specified in the reasoning set out in its order for reference.[4]

36. Having regard to that reasoning, and notwithstanding the wording of the second part of the first question referred, the view cannot be taken that the referring court intended to call into question the substantive compliance of Decision 2011/199 with all the provisions of primary law.

37. In so far as it is suggested in the claims of the applicant as reproduced in the order for reference that the legality of Decision 2011/199 is also affected by the fact that it reduces the competences of the Union, the referring Court has not mentioned that as a ground of invalidity, and the applicant has not commented on that point in these proceedings.

2. Increase of the competences of the European Union

38. The referring court first raises the question whether the amendment of Article 136 TFEU which is provided for in Decision 2011/199 leads to an increase in the competences conferred on the Union in the Treaties. Under the third subparagraph of Article 48(6) TEU, that is prohibited.

39. In that regard, the applicant has submitted that the addition to Article 136 TFEU covertly increases the competences of the Union. The addition empowers the euro area Member States to develop extended cooperation in the areas of economic policy and monetary policy. That cooperation takes place however within the framework of a supranational organisation whose decisions are binding on those Member States. Ultimately, the competences of the Union are increased, because European Union law henceforth is to govern an area of activity which previously had been retained by the Member States themselves.

40. I cannot share that view.

41. In accordance with the first sentence of the new Article 136(3) TFEU the euro area Member States may 'establish a stability mechanism'. The second sentence of the new paragraph

[3] In that regard, see the citations in Decision 2011/199.

[4] See, with regard to such a restriction, Case C 408/95 Eurotunnel and Others [1997] ECR I 6315, paragraph 34.

specifies that this 'mechanism' is to grant financial assistance.

42. Consequently, the proposed amendment is directed solely to the Member States and does not regulate any powers of the Union. Further, there is not thereby imposed on the Member States any obligation under European Union law to act.

43. Moreover, the mere fact that a rule of European Union law is affected at all cannot entail an increase in the competences of the Union within the meaning of the third subparagraph of Article 48(6) TEU. Otherwise that provision would prevent any Treaty addition in accordance with the simplified revision procedure of Article 48(6) TEU.

44. Finally, it is certainly true that obligations which European Union law imposes on the Member States could, depending on their subject matter, constitute a substantive increase in the competences of the Union. Such an obligation could, in the present case, be identified at most in the fact that the new second sentence of Article 136(3) TFEU provides that the granting of financial assistance 'will be made' subject to 'strict conditionality'. It could be inferred that the Member States are to be prohibited under European Union law in the future from acting freely in the area of financial assistance.

45. In any event, it is however clear from the scheme of the provision[5] and its legislative history[6] that the subject matter of such 'strict conditionality' must be in the area of economic policy. Under the second part of the second sentence of the first subparagraph of Article 5(1), Article 119(1) and Article 120 et seq. TFEU, the Union already has a general competence for economic policy, including the rules relating to financial assistance.

46. Lastly, in relation to a submission by the applicant on the point, it must be observed that any conferral of competences on institutions of the European Union by the ESM Treaty is of no relevance to the assessment of the legality of the additional Article 136(3) TFEU. The Commission has in these proceedings also expressed that opinion. The only matter for consideration is whether the provision of the new Article 136(3) TFEU is itself in breach of the third subparagraph of Article 48(6) TEU. The ESM Treaty however does not define the regulatory content of Article 136(3) TFEU. Since the proposed Article 136(3) TFEU does not itself provide for any conferral of competences on institutions of the European Union, an infringement of the third subparagraph of Article 48(6) TEU is consequently excluded.

47. Consequently Decision 2011/199 does not increase the competences conferred on the Union in the Treaties. The decision therefore does not infringe the third paragraph of Article 48(6) TEU.

3. Infringement of Article 3(1)(c) TFEU

48. In relation to the second part of the first question referred it must now be examined whether the addition of Article 136(3) TFEU is restricted to an amendment of Part Three of the TFEU, as is laid down in the first sentence of the second paragraph of Article 48(6) TEU. That would not be the case if that provision were to amend substantive provisions of primary law outside Part Three of the TFEU.

49. According to the order for reference, the only doubt on which any argument is produced concerns Article 3(1)(c) TFEU, which provides that the Union has exclusive competence for the monetary policy of the euro area Member States.

50. In that regard, the applicant has claimed that the insertion of Article 136(3) TFEU by means of Decision 2011/199 infringes Article 3(1)(c) TFEU. Since by means of the new provision in the TFEU Member States are given the power to establish a stability mechanism for the stabilisation of the euro area, they thereby acquire, contrary to Article 3(1)(c) TFEU, competences in the area of monetary policy.

51. Irrespective of the question whether under Decision 2011/199 competence in the area of monetary policy is indeed conferred on Member States[7], an observation should be made on the legal significance of the Union having an exclusive competence. Under the second part of Article 2(1) TFEU the Member States may, even in areas where the Union has an exclusive competence, also act, if they are empowered to do so by the Union. Where the Union has an exclusive competence under Article 3 TFEU, that does not mean that only the Union may act in that area.

52. Any empowerment by the proposed Article 136(3) TFEU of Member States to act in an area

[5] See recital 4 of the preamble to Decision 2011/199.

[6] European Council Conclusions of 20 April 2011 on the meeting of 24/25 March 2011, EUCO 10/1/11 REV 1, paragraph 16 et seq. and Annex II.

[7] See, with regard to the subject matter of the ESM Treaty, point 75 et seq., below.

where the Union has exclusive competence would therefore not mean that there was any substantive alteration of the provisions relating to the Union's exclusive competence under Article 2(1) and Article 3(1)(c) TFEU. The existing force of those provisions is unaffected.

53. Accordingly, having regard to Article 3(1)(c) TFEU, it must be held that Decision 2011/199 does not infringe the restrictions on the simplified revision procedure under Article 48(6) TEU.

4. Breach of the principle of legal certainty

54. Finally, the order for reference, in conjunction with the applicant's claims, raises the question whether the specified addition to Article 136 TFEU is in breach of the general principle of legal certainty.

55. In the applicant's opinion, the specified provision is so vaguely worded that it could permit the Member States to undertake action which might exceed the bounds of what is permissible on the basis of a Treaty amendment in the simplified revision procedure of Article 48(6) TEU. The applicant claims that the wording of Treaty provisions which are adopted using this procedure must expressly reflect the restrictions to be found in Article 48(6) TEU, because after such provisions enter into force the limits of the simplified revision procedure are no longer apparent.

56. This argument does not in fact concern any infringement of the principle of legal certainty, for instance in the form of the requirement that the law should be clearly defined.[8] The applicant is not concerned that the proposed Article 136(3) TFEU as such is so imprecise that the addressee of the rule cannot discern what obligations are imposed by it and that the rule therefore can have no validity. His submission is rather that because the proposed insertion is made using the simplified revision procedure, the limits of that procedure must also be expressly reflected in the wording of the provision, because otherwise it could be interpreted as being unrestricted. Accordingly, the applicant is concerned with the scope of the requirements of Article 48(6) TEU as to the content of an amended Treaty provision.

57. The applicant is partly correct in so far as in this case it would not be acceptable to apply a provision added in accordance with the simplified revision procedure of Article 48(6) TEU in a way that, for example, contrary to the third subparagraph of that provision, entailed an increase in the competences of the Union. Such an application of the added Treaty provision would infringe the third subparagraph of Article 48(6) TEU.

58. For that reason it is imperative that a Treaty provision adopted in accordance with the simplified revision procedure of Article 48(6) TEU must be interpreted in a way that takes into account the restrictions on that procedure.

59. The applicant's insistence that these restrictions must necessarily be reflected in the wording of the amended Treaty provision is based on the false premise that a provision added using the simplified revision procedure could, after its entry into force, extend its normative content entirely without regard to the limits of Article 48(6) TEU. That is not the case. The limits which are imposed on a Treaty amendment in the procedure of Article 48(6) TEU also determine the limits of the normative content of the amended Treaty provision.

60. That requirement does mean that a certain hierarchy of provisions of primary law is created, with a consequent increase in the legal complexity of European Union law. That hierarchy is however the necessary consequence of the restrictions on the simplified revision procedure under Article 48(6) TEU.

61. It is imperative therefore that a future Article 136(3) TFEU should be interpreted in a way which, first, excludes any increase in the competences of the Union, and, secondly, ensures that the provisions of primary law laid down outside Part Three of the TFEU are not infringed. In the light of the foregoing, Decision 2011/199, notwithstanding its general wording, is not in breach of either Article 48(6) TEU or the principle of legal certainty.

5. Interim conclusion

62. Examination of the first question referred has disclosed nothing capable of affecting the validity of Decision 2011/199.

B – *The second question referred: right to conclude and ratify the ESM Treaty*

63. By its second question the referring Court seeks to ascertain whether a Member State, having regard to a number of provisions of primary law, is entitled to enter into and ratify an international agreement such as the ESM Treaty.

[8] See, inter alia, Case 169/80 Gondrand and Garancini ECR [1981] 1931, paragraph 17, and Case C 582/08 Commission v United Kingdom [2010] ECR I 7191, paragraph 49.

64. This question concerns the interpretation of the current law. In order to answer that question the third paragraph added to Article 136 TFEU by Decision 2011/199 – since it has not yet entered into force – cannot be taken into consideration. Although in that decision the European Council described the Treaty amendment as required for the establishment of the ESM[9], it cannot be ruled out that the conclusion and ratification of the ESM Treaty is also compatible with the existing Treaties. In that regard both the European Council and the Member States indeed submit that the Treaty amendment provided for in Decision 2011/199 is solely designed to provide clarification.

1. Admissibility of the question referred

65. A number of parties to the proceedings have called into question the admissibility of the second question referred, from a number of different viewpoints.

a) Jurisdiction of the Court of Justice

66. First, the Spanish Government has submitted that the Court of Justice has no jurisdiction to answer the second question referred. The ESM Treaty is an international agreement and not a matter of European Union law. In accordance with the Court's case-law, the Court is not competent to interpret such agreements unless the Union is a contracting party.[10]

67. It is correct that under Article 267 TFEU the Court of Justice has jurisdiction only to interpret European Union law. The subject matter of the question referred however is solely the interpretation of European Union law, and not the interpretation of the ESM Treaty. The referring court seeks to clarify the nature of the obligations imposed on the Member States by the provisions referred to in the second question and whether those obligations preclude the conclusion and ratification of an international agreement such as the ESM Treaty. The subject matter of the present proceedings is therefore comparable to that of a reference for a preliminary ruling which concerns the compatibility of a provision of national law with European Union law. In such a case the Court of Justice is equally not called upon to interpret national law. [11] The interpretation of European Union law by the Court of Justice must however in such a case have particular regard to the content of national law as stated by the referring court.

68. The Court therefore has jurisdiction to answer the second question referred for a preliminary ruling.

b) Sufficient information in the order for reference

69. Further, various Member States have contested the admissibility of the second question in that the referring Court has not sufficiently explained in what way the provisions referred to in the second question are supposed to preclude the conclusion and ratification of the ESM Treaty. In particular, the French Government has in that regard mentioned the protection provided to the Member States by the opportunity to submit observations on a reference for a preliminary ruling.

70. In accordance with settled case-law, the Court of Justice can refuse to rule on a reference for a preliminary ruling where it does not have before it the factual or legal material necessary to give a useful answer to the questions referred to it. [12]Accordingly, the information provided in an order for reference must not only be such as to enable the Court to give a useful answer but must also enable the Governments of the Member States and other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice. [13]

71. In the light of the foregoing, the objections of the Member States to admissibility are in part well-founded. Within the second question referred the national court does refer to a host of Treaty provisions and even globally to Title VIII of Part Three of the TFEU. The reasoning stated in the reference for a preliminary ruling does not however contain a comment on each of the Treaty provisions there referred to. In particular there is no explanation in relation to a number of provisions – as is true for example of Articles 119 and 120 TFEU which have been highlighted by the Slovakian Government – of how their interpretation is unclear. To that extent, the second question referred requires a degree of concentration, in order to satisfy the requirements of the case-law on the necessary information in a reference for a preliminary ruling.

[9] See recital 2 in the preamble to Decision 2011/199.
[10] See, inter alia, Case C 132/09 Commission v Belgium [2010] ECR I 8695, paragraph 43 and case-law cited.
[11] See, inter alia, Case C 504/10 Tanoarch [2011] ECR I 0000, paragraph 43.
[12] See, inter alia, the judgment of 19 July 2012 in Case C 470/11 Garkalns, paragraph 18 and case law cited.
[13] See, inter alia, Case C 241/09 Fluxys [2010] ECR I 12773, paragraph 30 and case law cited.

72. In the reasoning relating to the second question the national court refers to five claims of the applicant and has apparently transposed those claims into the six indents of the second question. [14]The substance of the second question referred must therefore be determined on the basis of those claims, and it is not necessary here to discuss all the provisions of the Treaties specified by the national court.

73. According to those claims by the applicant, the ESM Treaty is contrary to the division of competences between the Union and Member States (Section 2 below) and is also contrary to the so-called 'no bail-out' clause in Article 125 TFEU (Section 3 below). The applicant is also of the opinion that contrary to the Treaties the ESM confers new competences on the institutions of the European Union (Section 4 below). The applicant further claims that the ESM Treaty is incompatible with the principle of effective judicial protection under Article 47 of the Charter of Fundamental Rights and with the principle of legal certainty (Section 5 below). Finally, he claims that the creation of the ESM as an independent international organisation is a circumvention of the provisions of European Union law which is incompatible with the principle of sincere cooperation under Article 4(3) TEU (Section 6 below).

2. Division of competences between the Union and Member States

74. The first matter to be examined is whether the conclusion and ratification of the ESM Treaty infringes the provisions of the Treaties on the division of competences between the Union and the Member States. The applicant is of the opinion that the Member States thereby encroach on the competences of the Union for monetary policy (subsection (a) below), the coordination of economic policy (subsection (b) below) and the conclusion of international agreements (subsection (c) below).

a) Monetary Policy

75. Under Article 3(1)(c) TFEU the Union has exclusive competence in the area of 'monetary policy for the Member States whose currency is the euro'. Under Article 2(1) TFEU the Member States may themselves act in this area only 'if so empowered by the Union or for the implementation of Union acts'.

76. The applicant submits in that regard that the objective of the ESM Treaty is centred on the protection of the euro-currency. Moreover the activity of the ESM will obviously influence money supply and therefore price stability in the euro area. Consequently it has direct effects on monetary policy, which lies under the exclusive control of the Union and the European Central Bank.

77. The Member States who are parties to the proceedings state the contrary view that the ESM Treaty does not encroach on the Union's exclusive competence in the area of monetary policy. To the same effect various Member States have also expressed the opinion that the activity of the ESM represents economic, not monetary, policy.

78. No explicit definition of the concept of monetary policy is to be found either in primary law or, to date, in the case-law of the Court of Justice. None the less, the area of monetary policy for the euro area Member States is covered in Chapter 2 of Title VIII of the TFEU, which is headed 'Monetary policy'. Accordingly, a definition of the area of monetary policy must be found by examining the provisions of that chapter.

79. Articles 127 to 133 of the chapter on monetary policy essentially describe the tasks, powers and organisation of the European System of Central Banks ('ESCB') which, in accordance with the second sentence of Article 282(1) TFEU is alone to conduct the monetary policy of the Union. Article 127(2) TFEU describes, as 'basic tasks' of the ESCB monetary policy, foreign-exchange operations consistent with the exchange-rate policy under Article 219 TFEU, management of foreign reserves of the Member States and promotion of the smooth operation of payment systems. Those tasks therefore describe the scope of monetary policy within the meaning of Article 3(1)(c) TFEU.

80. It is necessary to examine whether the ESM Treaty and those tasks of the ESCB are compatible.

81. The first sentence of Article 3 of the ESM Treaty provides that the ESM is to provide 'stability support' to ESM Members when the access of an ESM Member to other sources of financing is impaired.[15] The support must accordingly be 'indispensable' to 'safeguard the financial stability of the euro area as a whole

[14] See the order for reference, p. 12 et seq.: The first claim is set out in the first indent, the second in the fifth indent, the third in the second and third indents, the fourth in the fourth indent and the fifth claim in the last indent.

[15] See also recitals (1) and (13) of the preamble to the ESM Treaty.

and of its Member States'. As demonstrated by the individually specified 'Financial assistance instruments' in Articles 14 to 18 of the ESM Treaty, the object is that there should be available to the ESM Members, subject to certain requirements and conditions, the provision of loans to finance their public expenditure.

82. Such a provision of credit facilities does not fall as such under any of the tasks of the ESCB under Article 127(2) TFEU. In addition, Articles 123 and 124 TFEU, which directly concern the conditions governing the financing of Member States, are to be found in the chapter on economic policy and precisely not in the chapter on monetary policy.

83. Consideration of the conditions to be attached to loans leads to no other conclusion. The possible conditions, in accordance with the second sentence of Article 12(1) of the ESM Treaty, range 'from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions'. Admittedly, it is not immediately obvious from that wording what content, other than a macro-economic adjustment programme, the conditions could have. As is however clear from the second subparagraph of Article 13(3) of the ESM Treaty, the conditions agreed with the ESM Member concerned are to be 'fully consistent with the measures of economic policy coordination provided for in the TFEU'. Consequently, the conditions are to be categorised as relating to economic policy, not monetary policy.

84. The activity of the ESM also does not, because it might directly affect money supply, therefore fall under Article 127(2) TFEU and constitute monetary policy. That is, contrary to the submission of the applicant, not the case. The ESM is not a commercial bank which by the extending of credit can create money. The loans granted by the ESM must on the contrary be wholly funded from paid-up share capital or, under the second sentence of Article 3 of the ESM Treaty, by the taking up of credit facilities.

85. Finally, it must be observed that – as the German Government to an extent correctly submitted – not every form of economic policy can be treated as equivalent to monetary policy solely because it may indirectly affect the price stability of the euro. If it were otherwise, the entire economic policy would be reserved to the ESCB and the rules of the Treaty on the coordination of economic policy within the Union would be devoid of meaning.

86. The conclusion therefore is that a legal arrangement such as the ESM Treaty does not affect the exclusive competence of the Union for the economic policy of the euro Member States under Article 3(1)(c) TFEU.

b) Coordination of economic policies

87. In that regard the question however arises whether entering into and ratifying the ESM Treaty is compatible with the competence of the Union for the coordination of the economic policies of the Member States.

88. Under Article 2(3) and Article 5(1) TFEU the Member States are to coordinate their economic policies within the Union. For that purpose Articles 120 and 121 TFEU in particular contain rules, including, inter alia, the provision in Article 121(2) TFEU for the Council to make recommendations for the broad guidelines of the economic policies of the Member States. In addition, the chapter on economic policy contains Article 126 TFEU which, in order to avoid excessive government deficits, subjects the Member States to specific procedures including, inter alia, the provision in Article 126(7) that the Council recommend the elimination of an excessive deficit and the provision in Article 126(11) of possible penalties.

89. The applicant is of the opinion that the conditions attached to the provision of stability support by the ESM serve the same function as the recommendations under Article 121 und 126 TFEU. He claims that because under the second sentence of Article 2(2) TFEU the Member States are entitled to act in an area of shared competence only to the extent that the Union has not exercised its competence, the ESM therefore unlawfully encroaches on a competence of the Union.

90. I do not share that view.

91. To the extent that the conditions of a financial assistance instrument granted through the ESM under the second paragraph of Article 13(3) of the ESM Treaty are in line with the coordination of economic policy within the Union, economic policy between Member States is not thereby coordinated, but effect is thereby given merely to the coordination already achieved at Union level.

92. On the other hand, to the extent that the conditions operate outside the area of the coordination of economic policy already achieved at Union level, it follows that there can be no question of coordination of the economic

policies of the Member States by means of the ESM, for the simple reason that the conditions represent the requirements of the ESM as imposed on an individual Member State and not a harmonisation of the individual economic policies of the Member States. Moreover it cannot be seen that the conditions within the framework of the ESM are in the nature of penalties.

93. In the light of the foregoing, first, no decision needs to be made on the question whether the coordination of economic policy of Member States under Article 2(3) and Article 5 TFEU does indeed constitute a shared competence of the Union. That it does not is suggested by the fact that those provisions have a specific wording, which differs from other provisions in the Treaty governing competence, whereby the Union does not have competence for the coordination of the economic policies of the Member States, but instead the Member States are to coordinate their economic policies within the Union. Article 4 TFEU, which specifies the areas of shared competence, however presupposes in Article 4(1) the existence of a Union competence and does not in Article 4(2) establish any shared competence for economic policy.

94. Further, it is unnecessary to consider whether the view expressed in these proceedings on behalf of the Commission is correct, namely that Article 5(1) TFEU is to be interpreted in such a way that a coordination of the economic policies of the Member States may, as a matter of principle, be effected only within the Union, but not at other levels.

95. Consequently a legal arrangement such as the ESM Treaty also does not infringe Article 2(3) and Article 5(1) TFEU.

c) Conclusion of international agreements

96. As a final point with regard to the division of competences between the Union and the Member States it is necessary to examine whether the exclusive competence of the Union for the conclusion of international agreements under Article 3(2) TFEU precludes the conclusion and ratification of the ESM Treaty.

97. That provision states particularly that the Union is to have exclusive competence in so far as the conclusion of an international agreement 'may affect common rules or alter their scope'. In the opinion of the applicants the purpose of the ESM Treaty is to affect the Union rules relating to economic policy and monetary policy.

98. It must in that regard be observed that Article 3(2) TFEU, as is clear when read with Article 216 TFEU, solely governs the exclusive competence of the Union for agreements with third countries and international organisations. Accordingly Member States are, under that provision, read together with Article 2(1) TFEU, prohibited only from concluding such agreements with*third countries*. The parties to the ESM Treaty are however exclusively Member States.

99. A priori therefore it cannot be accepted that by means of a legal arrangement such as the ESM Treaty there is any failure to observe Article 3(2) TFEU. In so far as the applicant's submission on Article 3(2) TFEU ultimately concerns the fact that he regards the ESM Treaty as affecting the Union rules relating to economic policy and monetary policy, that will be considered below when I examine whether the conclusion and ratification of the ESM Treaty is in breach of the relevant provisions.

3. The 'No bail-out clause' in Article 125 TFEU

100. Article 125 TFEU might preclude the conclusion and ratification of a Treaty such as the ESM Treaty.

101. The view of the applicant is that the ESM Treaty is incompatible with Article 125 TFEU. He claims that, in effect, it constitutes a guarantee of the existing liabilities of the euro Member States. Article 125 TFEU further prohibits Member States undertaking a commitment such as that provided for, in the opinion of the applicant, in the ESM Treaty, to make available funds with the aim of assuming liability for the debts of another Member State. That argument is, he claims, not affected by the fact that the financial support under the ESM Treaty is granted only subject to conditions.

102. In the opinion of the applicant, not only the financial assistance instruments of the ESM but also the provisions for capital calls are in breach of Article 125 TFEU. The provision in Article 25(2) of the ESM Treaty concerning an increased capital call in the event of a default of an ESM Member constitutes a guarantee by the ESM Members of the debts of other ESM Members.

103. The question now to be examined therefore is whether Article 125 TFEU is to be regarded as a prohibition with regard to the financial assistance instruments provided for under the ESM Treaty (subsection (a) below) and with regard to the rules on capital calls (subsection (b) below).

a) Financial assistance instruments under Articles 14 to 18 of the ESM Treaty

104. Articles 14 to 18 of the ESM Treaty lay down rules relating to a number of 'financial assistance instruments'. Articles 14 to 16 permit the granting of various forms of loans to the ESM Members. Under Articles 17 and 18, the ESM is additionally empowered to buy the bonds of ESM Members either from the member itself or from a third party. In accordance with Article 12(1) and (2) of the ESM Treaty, the ESM may provide those financial assistance instruments only subject to 'strict conditionality, appropriate to the financial assistance instrument chosen'.

105. All the Member States and institutions of the European Union who are parties to proceedings submit that Article 125 TFEU does not in any way prohibit the financial assistance instruments of the ESM, if the conditions of the future Article 136(3) TFEU are met. Under that provision it is a prerequisite that action to safeguard the stability of the euro area is indispensable and that the financial assistance is made subject to 'strict' conditionality.

i) Acts of the Member States

106. It must first be clarified whether the conclusion and ratification by the Member States of the ESM Treaty is sufficiently connected with the deployment by the ESM of financial assistance instruments to justify an argument that the Member States are infringing Article 125 TFEU.

107. Some Member States have in this connection submitted that the second sentence of Article 125(1) TFEU is only a prohibition addressed to the Member States, not to an independent international organisation such as the ESM. Consequently that provision is a priori not applicable to the activity of the ESM.

108. In accordance with the second sentence of Article 125(1) TFEU 'a Member State' is not to be liable for the commitments of any public authorities, other bodies governed by public law or public undertakings of another Member State (the first alternative). Further that provision states that a Member State is also not to assume such commitments (the second alternative).

109. Although the ESM is to be treated as an independent international organisation, the Member States are to adjust their conduct within that organisation to the requirements of European Union law. When giving effect to commitments assumed under international agreements, Member States are required to comply with the obligations that European Union law imposes on them. [16] Consequently the Member States, particularly when decisions are to be made on the financial assistance instruments under consideration, are bound by the requirements of Article 125 TFEU. The granting of such assistance requires, in accordance with Articles 14 to 18 of the ESM Treaty, on each occasion a decision of the Board of Governors, which under Article 5 of the ESM Treaty consists of representatives of each of the Governments of the ESM Members.

110. Whether the granting of such a financial assistance instrument is contrary to Article 125 TFEU is not necessarily dependent on whether the ESM is bound by that provision. The question is rather whether the Member States, by the fact that they bring about the granting of a financial assistance instrument by the ESM, disregard the requirements of Article 125 TFEU. Since the Member States have complete control over the ESM and since the funds of the ESM under Article 9 of the ESM Treaty at least in part are derived from the paid-up share capital of the Member States, the possibility that the Member States are in breach of Article 125 TFEU by reason of the granting of financial assistance instruments via the ESM is not a priori precluded by the fact that the financial assistance instruments are funded through the ESM and not directly from the budgets of the Member States. In connection with each individual financial assistance instrument of the ESM it is consequently necessary to examine whether its granting has the effect of causing *the Member States* to be liable for, or *the Member States* to assume, the commitments of another Member State.

111. Further, not only the actual granting of financial assistance instruments, but even the prior conclusion and ratification of the ESM Treaty by the Member States might be the basis of a breach of Article 125 TFEU. Admittedly, the financial assistance instruments of the ESM are not yet granted by conclusion and ratification of the ESM Treaty, because on each occasion they first require a decision of the Board of Governors. The Government representatives when exercising their voting rights after the entry into force of the ESM Treaty are, as seen above, in any event bound by Article 125 TFEU. Notwithstanding that obligation, the prior conclusion and ratification of the ESM Treaty would itself be in breach of Article 125 TFEU if the financial assistance

[16] See Case C 55/00 Gottardo [2002] ECR I 413, paragraph 33.

instruments of the ESM Treaty could not be decided upon compatibly with Article 125 TFEU, because their granting would necessarily clash with that provision.

112. Consequently, the Member States would by the prior conclusion and ratification of the ESM Treaty be in breach of Article 125 TFEU if that provision prohibits them as a matter of principle from granting financial assistance instruments via the ESM under Articles 14 to 18 of the ESM Treaty. That presupposes that the granting of such financial assistance instruments is forbidden to the Member States themselves and their granting via the ESM would constitute acts of the Member States, a matter which must be examined below.

ii) The ESM as guarantee of the commitments of a Member State

113. With regard to the financial assistance instruments which are available it is first necessary to examine the applicant's submission that the ESM Treaty as a whole constitutes a guarantee of the existing commitments of the euro Member States and thereby is in breach of Article 125 TFEU.

114. As the Commission has correctly stated, the exclusion of liability laid down in the first alternative of the first part of the second sentence of Article 125(1) TFEU first makes clear that the existence of monetary union does not mean that there is any implicit mutual guarantee of the commitments of Member States. Under European Union law no Member State is under any obligation to satisfy the creditors of another Member State.

115. Further, Article 125 TFEU also contains a prohibition of the *voluntary* assumption of liability. The second part of the second sentence of Article 125(1) TFEU exempts from that provision mutual financial guarantees for the joint execution of a specific project. If such an exception is explicitly provided for, it follows *a contrario* that as a matter of principle the voluntary assumption of liability for the commitments of another Member States would be in breach of Article 125 TFEU.

116. However, the financial assistance instruments of the ESM Treaty do not constitute such guarantees of the commitments of another Member State. As stated above, the financial assistance instruments require on each occasion a decision of the Board of Governors, [17]and to that extent there is no prior liability of the ESM. Moreover, neither loans nor the purchase of bonds guarantee to the creditors of a Member State repayment of the sums owed to them. Although it also appears to be a task of the ESM to increase confidence in the creditworthiness of ESM Members, [18] no guarantee of the commitments of its Member States is involved in the financial assistance instruments which the ESM has at its disposal for that purpose. It can accordingly remain an open question whether any guarantee by the ESM should also be regarded as being granted by the Member States.

117. Consequently, the financial assistance instruments of the ESM Treaty considered globally do not constitute a guarantee by the Member States of the commitments of other Member States. To that extent the conclusion and ratification of the ESM Treaty are not in breach of Article 125 TFEU.

iii) Loans as the assumption of the commitments of a Member State

118. The next question which arises is whether Article 125 TFEU prohibits the Member States from granting loans to an ESM Member via the ESM. This presupposes that Member States are prohibited from granting such loans and that the granting of loans via the ESM is in fact by the Member States.

119. First, loans are not equivalent to becoming liable for the commitments of a Member State. [19] However, in addition to the exclusion of liability, the second alternative of the first part of the second sentence of Article 125(1) TFEU also prohibits Member States from assuming liability for the commitments of another Member State. It is necessary to examine whether that prohibition also extends to the granting of loans.

– Wording and scheme

120. The wording used in the German text namely the expression 'Eintreten für Verbindlichkeiten' does not correspond to any well-known legal concept. [20]In accordance with the ordinary meaning of that German expression, it can describe both the assumption of liability in the place of the debtor, that is the creation of personal liability, and also the actual discharge of the liability of another party. While

[17] See point 109 above.

[18] See recital (4) of the preamble to the ESM Treaty.

[19] See point 116 above.

[20] There is occasional reference in German legal texts to 'Eintreten "in" ein Schuldverhältnis' [enter into a debtor relationship], see. § 563 of the German Civil Code on 'Eintrittsrecht bei Tod des Mieters' [right to take over a tenancy on the death of a tenant].

the French-language text of the provision, which uses 'les prend à sa charge' appears to have the same meaning, it may be that the English-language text which uses 'assume the commitments' focuses rather more on the assumption of liability than on its discharge.

121. While there appear to be certain nuances in the language versions, their common theme is however the direct acts of Member States with regard to the commitments of another Member State. The prohibition on assumption of commitments therefore prevents a Member State, in accordance with the wording of the first part of the second sentence of Article 125(1) TFEU, from taking upon itself the commitments of another Member State, either by discharging the commitment by making payment or by itself becoming the obligated party subject to the commitment, which it then has to discharge at a later date.

122. Those conditions are not satisfied by the granting of a loan. By granting a loan an existing commitment of another Member State is neither assumed nor discharged; instead a new commitment is imposed on that Member State.

123. The other provisions of the Treaties also offer no basis for the argument that the first part of the second sentence of Article 125(1) TFEU prohibits the granting of loans among Member States. Admittedly, the Treaty subjects certain cases of the granting of loans to Member States to conditions. For example, Article 143(2)(c) TFEU provides for the 'granting of credits' to Member States whose currency is not the euro by other Member States. That may occur on the basis of a measure adopted by the Council in cases of balance of payments difficulties outside the monetary union. In addition, Article 122(2) TFEU provides for Union 'financial assistance' in favour of a Member State, which might also cover loans.

124. Contrary to the opinion of the applicant, it cannot however be inferred from the existence of those provisions that European Union law otherwise prohibits any granting of loans to a Member State. First, there is in Article 125 TFEU no reference to Articles 143 or 122 TFEU. It is not therefore evident that those provisions should be regarded as exceptions to a fundamental prohibition contained in Article 125 TFEU. Secondly, both those provisions of the Treaty, which have as their subject the granting of loans to Member States, do not relate to the case before the Court of a loan from and to euro Member States. While Article 122(2) TFEU concerns loans by the Union, the subject of Article 143(2)(c) TFEU is also a Union measure using the support of funds provided by Member States, which can be granted as loans only to Member States who do not have the euro as their currency. The conditions attached to the granting of loans under Articles 122(2) and 143(2) TFEU will therefore not become obsolete, if loans from and to the euro Member States are subject to no restrictions under European Union law.

125. In particular however, measures taken by the Union and measures taken by the Member States are in different contexts. For Union measures, in accordance with Article 4(1) and the first sentence of Article 5(1) TEU, the principle of conferred powers applies, while for the actions of Member States the principle of comprehensive power applies. In that light, Articles 122(2) and 143(2) TFEU empower the Union to grant credit facilities; a power which the Member States on the other hand do not need. To infer, from the fact that powers are conferred on the Union to grant credit facilities and that those powers are subject to restrictive conditions, that there is a comprehensive prohibition preventing the Member States from granting loans would be at variance with the principles relating to the division of powers between Member States and the Union.

– Objectives of Article 125 TFEU

126. However, it remains debatable whether the above findings on the basis of the wording and scheme of Article 125 TFEU are not called into question by the spirit and purpose of that provision.

127. For an understanding of the objective pursued by Article 125 TFEU the preparatory work and the background to the conclusion of the FEU Treaty can be taken into consideration. These can be used as supplementary guides to interpretation.

128. Article 125 TFEU is essentially a continuation of Article 104a EC which was introduced by the Maastricht Treaty. [21] It is clear from the explanation in the Commission's proposal which underlay Article 104a EC that that provision in conjunction with the current Articles 123 and 124 TFEU was designed to counteract excessive budget deficits and debts on the part of the Member States. Those were – inter alia because of the fear of instability on the financial markets – regarded as endangering monetary stability and the survival of the

[21] Treaty on European Union, signed in Maastricht on 7 February 1992 (OJ 1992 C 191, p. 1).

economic and monetary union. [22] In order that the debts of Member States should not be excessive, the Member States were, inter alia, required to practise budgetary discipline, and the incurring of debt was thereby to become more difficult.

129. That is the purpose of Articles 123 to 125 TFEU. Article 123 TFEU denies to the Member States funding from the central banks. Article 124 TFEU further prohibits the Member States from having privileged access to other financial institutions.

130. Finally, according to the Commission proposal, Article 125 TFEU was to prevent a Member State from relying on an unconditional guarantee of its public debt by the Union or another Member State. [23] The draft Article 104a EC as it appeared in the proposal was then restricted to a prohibition of the 'granting by the Community or the Member States of an unconditional guarantee in respect of the public debt of a Member State'. In the course of negotiations between the Member States on the Maastricht Treaty the prohibition was extended to its present form, as it first appears in a proposal by the Netherlands Presidency of the Council. [24]In particular, the addition of a prohibition on assuming liability for commitments is said to stem from a proposal by the German Government. [25] In any event however there are no publicly accessible sources for that proposal, its precise motives and in particular how it was understood within the Intergovernmental Conference of the Member States.

131. In the light of its legislative history, Article 125 TFEU was clearly designed at least to exclude the possibility of Member States relying on other Member States to pay their debts and to thereby ensure that they pursue a restrained budgetary policy.

132. Accordingly, I consider that the European Council and a number of Member States are correct in their submission that the objective of Article 125 TFEU is to maintain the Member States' budgetary discipline by ensuring that the disciplinary effect of interest rate spreads on the capital markets according to the individual financial positions of Member States is preserved after the establishment of economic and monetary union. The extent of those interest rate spreads is ideally governed by the expectations of potential creditors with regard to differences in the creditworthiness of individual Member States. The factor which determines creditworthiness is the financial capacity of the Member State concerned. Consequently, the objective pursued by Article 125 TFEU is to ensure that that capacity is not dependent on the financial capacity of other Member States.

133. Both objectives – ensuring that neither debtor Member States nor the capital markets can rely on the financial capacity of other Member States – would be achieved to the greatest extent if Member States were prohibited from providing any financial support to other Member States. That is because any financial support can also be used by the recipient Member State to discharge its commitments. That is true not only in respect of support in the form of loans but also for example in respect of the provision of liquidity on the sale of goods of one Member State to another Member State. While that would indeed amount to a prohibition of trade and commerce between Member States as such, in the case of such a comprehensive prohibition it would be clear to all concerned that a Member State which incurs commitments is not receiving any financial assistance from other Member States, in any form whatsoever. The discharge of all commitments would then be dependent solely on the individual financial capacity of the debtor Member State.

134. That was however not the course taken by Article 125 TFEU. No rule can there be identified that there is a prohibition on any financial support to a Member State.

135. In the light of the objectives of Article 125 TFEU, it is however conceivable, by means of a broad interpretation of that provision, that there is at least an exclusion of such financial support as might have the effect of discharging the commitments of a Member State. The scope of the second alternative of the first part of the second sentence of Article 125 (1) TFEU would then be extended to assumption of liabilities which is *only indirect*. That could, for example, be considered to be the case where a loan to a Member State just enables it to discharge its commitments. That would be particularly obvious where the amount of the loan corresponded to the level of the commitments to

[22] See Draft Treaty for the amendment of the Treaty establishing the European Economic Community for the construction of an economic and monetary union, Commission Notice of 21 August 1990, Bulletin of the European Communities, Supplement 2/91, p. 25.

[23] Ibidem.

[24] See Document SN 3738/91 (UEM 82): 'Proposal by the Presidency to the Intergovernmental Conference on Economic and Monetary Union' of 28 October 1991, Article 104a.

[25] See Jan Viebig, Der Vertrag von Maastricht, Die Positionen Deutschlands und Frankreichs zur Europäischen Wirtschafts- und Währungsunion, p. 314.

be discharged by the Member State in favour of its creditors.

– Basic structural principles of the European Union

136. To stretch the wording of Article 125 TFEU in such a manner, on the basis of its objective, might however come into conflict with the basic principles of the Union, which rank as of at least equal importance to Article 125 TFEU.

Sovereignty of the Member States

137. The first issue here is the protection of the sovereignty of Member States. The Union was established by still sovereign States. The principle stated in the first sentence of Article 5(1) TEU of conferred powers in order to define the competences of the Union is both an expression of that sovereignty and a safeguard of it.

138. The creation of the ESM does not however have the effect of transferring powers of the Member States to the Union and thereby restricting the sovereignty of the Member States. The ESM Treaty is rather, as a Treaty governed by international law, an expression of the Member States' sovereignty and their freedom to enter into treaties.

139. If a prohibition under European Union law even on indirect assumption of liabilities were recognised, that would hinder the Member States from deploying financial resources in order to attempt to prevent the negative effects of the bankruptcy of another Member State on their own economic and financial situation. Given the mutual interdependence of the Member States' individual economic activities which is encouraged and intended under European Union law, substantial damage could be caused by the bankruptcy of one Member State to other Member States also. That damage might possibly be so extensive that an additional consequence would be to endanger the survival of monetary union, as submitted by a number of parties to the proceedings.

140. There is no question here of finding that such a danger to the stability of the monetary union exists or of examining how such a danger should best be combated. It must only be emphasised that a broad interpretation of Article 125 TFEU would, also in such circumstances, deprive the Member States of the power to avert the bankruptcy of another Member State and of the ability thereby to attempt to avert damage to themselves. In my opinion, such an extensive restriction on the sovereignty of the Member States to adopt measures for their own protection cannot be founded on a broad teleological interpretation of a legal provision the wording of which does not unambiguously state that restriction.

141. That is particularly true in the light of the fact that the Treaties have in other cases laid down an explicit prohibition in respect of the loans here at issue. Article 123(1) TFEU expressly prohibits the European Central Bank and the national central banks from any 'overdraft facilities or any other type of credit facility' in favour of the Member States. The central banks are thereby prohibited from granting loans to the Member States.[26] On the other hand, Article 125 TFEU does not contain such wording with regard to the granting of loans to Member States.

Solidarity of the Member States

142. Further, a broad interpretation of Article 125 TFEU would be incompatible with the concept of solidarity, as laid down at various points in the Treaties. For example the parties to the EU Treaty are, in accordance with the preamble to that Treaty, pursuing the desire 'to deepen the solidarity between their peoples'. Under the third subparagraph of Article 3(3) TEU the Union is to promote 'economic, social and territorial cohesion, and solidarity among Member States'. In the chapter on economic policy, Article 122(1) TFEU refers explicitly to solidarity between Member States.

143. Admittedly, it cannot be inferred from the concept of solidarity that there exists a duty to provide financial assistance of the kind that is to be provided by the ESM. None the less, a broad teleological interpretation of Article 125 TFEU would also indeed prohibit the Member States, in a case of emergency, for example, to prevent the serious economic and social effects associated with a State bankruptcy, from *voluntarily* providing mutual assistance. Emergency assistance to any third State would be permitted, while emergency assistance within the Union would be banned. Such a prohibition, it appears to me, would call into question the very purpose and objective of a Union.

144. Basic fundamental principles of the Treaties therefore militate against a broad interpretation of Article 125 TFEU.

[26] See also Article 1(1)(a) of Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Article 104 and 104b(1) of the Treaty, which is based on Article 125(2) TFEU.

– Circumvention and protection of the objectives associated with Article 125 TFEU

145. The objection may however be made that it would deprive the prohibition in the second sentence of Article 125(1) TFEU of any sense, if the Member States were prohibited from directly assuming liabilities, but the provision could easily be circumvented by means of their indirectly doing so. I agree with that opinion up to a point, namely that Article 125 TFEU cannot be interpreted in such a way that the prohibitions laid down therein become entirely devoid of meaning.

146. That, however, is not the case. The exclusion of liability and the prohibition on the assumption of commitments, as laid down in the first part of the second sentence of Article 125(1) TFEU, still have an 'effet utile' even if they are applied on the basis of the regulatory content which is expressed in their wording.

147. Thus, by means of the first alternative of exclusion of liability, as the Greek Government in particular has rightly submitted, any *duty* on the part of a Member State to discharge the commitments of another Member State is excluded. Such a duty cannot be inferred from European Union law, nor may a Member State – with the exception of the guarantees mentioned in the second sentence of Article 125(1) TFEU – impose such a duty on itself. Every Member State and its potential creditors therefore know that a right to hold another Member State liable cannot exist.

148. Further, by means of the second alternative in the first part of the second sentence of Article 125(1) TFEU, the prohibition on the assumption of commitments, there is ultimately a prohibition on directly giving preference to creditors. The Member States may therefore not directly meet the demands of creditors of another Member State. Direct support of the creditors is prohibited, while indirect support, which arises as a result of the support to the debtor Member State, is not prohibited. The creditors of a Member State will therefore as a rule benefit from support given to that Member State. There remains however for the potential creditors of a Member State an additional uncertainty as to whether possible financial assistance to a Member State may actually lead to the satisfaction of their demands. To that extent, the voluntary support of a Member State need not inevitably be accompanied by either a complete or even partial satisfaction of the Member State's creditors. That uncertainty is intended to promote the objective that Member States have differentiated interest rates on the capital markets.[27]

149. In the light of the above, loans by a Member State would only constitute assumption of the commitments of another Member State if the loans directly benefited the creditors of the recipient Member State. That might be considered to be the case if the Member State possessed no control over disposal of the loan funds.

150. As regards the interpretation which was in particular advocated by the European Council, namely that financial support to a Member State must in addition to the protection of the primary objective of maintaining Member States' budgetary discipline be accompanied by 'strict conditionality', if it is not to circumvent Article 125 TFEU, no decision need be made in the present case. In any event, the euro Member States have made provision for such conditionality under Article 12(1) of the ESM Treaty.

– Interim conclusion

151. Consequently, the second alternative of the first part of the second sentence of Article 125(1) TFEU, having regard to its wording, scheme and teleology, prohibits only the *direct* assumption of the commitments of another Member State in the sense of taking responsibility for or discharging those commitments, whereby the creditors are directly benefited. Accordingly the granting of a loan by a Member State to another Member State is in principle not prohibited.

152. By the conclusion and ratification of the ESM Treaty the Member States thus do not infringe Article 125 TFEU in respect of the loans to be granted by the ESM in accordance with Articles 14 to 16 of the ESM Treaty.

153. Should however the Court of Justice in the context of a broader interpretation of the first part of the second sentence of Article 125(1) TFEU come to the conclusion that the Member States are also prohibited from granting loans to each other, it would then have to be considered whether the granting of loans by the ESM constitutes acts of the Member States. If Article 125 TFEU is to be interpreted broadly that appears to me to be self-evident. If the granting of a loan to a Member State were to be regarded as indirectly discharging the commitments of that Member State, its granting by the ESM would have to constitute, at least indirectly, its

[27] See point 132 above.

granting by the Member States. For the Member States have established the ESM and control it. In addition it is they who, on the basis of the provisions on coverage of losses in Article 25(1) of the ESM Treaty, are ultimately to raise the loan funds in full.

iv) Purchase of bonds as assumption of liability for the commitments of a Member State

154. As regards the financial instruments, it remains lastly to be examined whether the purchase, under Articles 17 and 18 of the ESM Treaty, of the bonds of a Member State from that Member State itself or from a third party is compatible with Article 125 TFEU. That would again presuppose that the Member States are prohibited under Article 125 TFEU from making such bond purchases.

155. The acquisition of a bond directly from an issuing Member State under Article 17 of the ESM Treaty constitutes only a particular form of loan. As argued above, the granting of loans in accordance with the ESM Treaty is compatible with Article 125 TFEU.

156. The purchase of the bonds of a Member State from a third party in accordance with Article 18 of the ESM Treaty in principle also does not constitute the assumption of the commitments of that Member State, because thereby no commitment of a Member State is discharged. The Member State issuing the bonds continues to be the party subject to the commitment, as the Commission has correctly pointed out. The Member State's commitment therefore remains substantively unaltered, only the creditor changes.

157. The objection may however be made that the situation which arises after the purchase of a bond is economically indistinguishable from an ordinary discharge of the commitment of a Member State to a third party, as a consequence of which the Member State effecting such a discharge acquires a claim for repayment against the Member State which is relieved of that commitment. It is true that such a claim for repayment and that which arises directly by means of a claim acquired through a purchase of bonds are substantively distinct. Further, the purchase price of the bonds of a Member State in need of assistance may consistently be markedly lower than the value of the commitment. The result, however, is that the existing creditor, when bonds are purchased, obtains at least a part of his claim directly from the acquiring Member State.

158. To that extent, the question arises whether the purchase of bonds from a third party is in breach of Article 125 TFEU for the reason that it directly benefits the bond holder as previous creditor of the Member State. [28] Although in the event of such a purchase of bonds the funds of the ESM flow directly to the creditor, in my opinion the prohibition on directly benefiting creditors continues to be observed if the bonds are acquired on normal market terms. The reason is that, in that case, the previous bondholder obtains his money as he would from any ordinary third party and does not derive any specific advantage from the capacity of another Member State. When an ordinary purchase is made on the securities market the creditor would also be unaware that the purchaser of the bond is a Member State. Such a bond purchase is therefore not designed to build up the confidence of potential creditors of a Member State in the capacity of another Member State.

159. It is not evident that the deployment of financial assistance instruments under Article 18 of the ESM Treaty would necessarily deviate from the circumstances described. The purchase of bonds by the ESM in accordance with that provision therefore is not a priori necessarily incompatible with Article 125 TFEU; [29] rather there exists in any event the possibility of effecting those purchases in a way that complies with its provisions. Accordingly, for the purposes of the present enquiry, in relation to bond purchases the question whether the activities of the ESM would, to that extent, have to be attributed at all to the Member States in the context of Article 125 TFEU can also remain open.

160. In any event therefore, the conclusion and ratification of the ESM Treaty with regard to the purchase of bonds by the ESM in accordance with Articles 17 and 18 of the ESM Treaty are again not in breach of Article 125 TFEU.

b) Capital call under Article 25 of the ESM Treaty

161. Finally, with regard to the prohibition in Article 125 TFEU, it remains to be examined whether the provisions for increased capital call, as governed by Article 25(2) of the ESM Treaty, are compatible with that prohibition.

162. The first alternative of the first part of the second sentence of Article 125(1) TFEU prohibits one Member State from voluntarily

[28] See point 148 above.
[29] See point 111 above.

becoming liable for the commitments of another. [30]

163. The authorised capital stock of the ESM is, under the first sentence of Article 8(2) of the ESM Treaty, to be divided into paid-in and callable shares. In accordance with Article 9 of the Treaty, unpaid capital may be called in for payment by the Board of Governors and the Board of Directors subject to certain conditions. Article 25(2) of the ESM Treaty provides that if an ESM Member does not comply with such a capital call by the ESM, an increased capital call may be made to the other ESM Members.

164. However those rules entail no voluntary taking of liability as a result of the conclusion of the ESM Treaty. Every ESM Member must, in accordance with those rules, comply only with its own obligation to make a capital contribution. In the event that an ESM Member does not comply with a capital call, the only consequence, under the first sentence of Article 25(2) of the ESM Treaty, is that other ESM Members are called upon to pay an increased amount in respect of their own obligations to contribute. They are, on the other hand, under no obligation to meet the obligation to contribute of another ESM Member. The defaulting ESM Member remains, as is clear from the second sentence of Article 25(2) of the ESM Treaty, as before under the obligation to make its contribution to the ESM.

165. That finding is moreover confirmed by the joint explanation of the parties to the ESM Treaty dated 27 September 2012, to the effect that the Treaty does not at all impose on any Member State an obligation of payment which exceeds its own share at any time in the authorised capital stock.[31] Thus, if a Member State has fully paid its own contribution, then no increased capital call can subsequently be made on it under the first sentence of Article 25(2) of the ESM Treaty.

c) Interim conclusion

166. It can therefore be held that Article 125 TFEU does not prohibit the Member States from concluding and ratifying an agreement in which there is provision for an increased capital call such as that provided for in the first sentence of Article 25(2) of the ESM Treaty and which provides for financial assistance instruments of an international organisation, such as those provided for in the form of loans and bond purchases in Articles 14 to 18 of the ESM Treaty.

4. Conferral of new competences on the institutions of the European Union

167. It must next be examined whether the conclusion and ratification of the ESM Treaty is in breach of European Union law in so far as it confers new tasks on the Union's institutions. For example, the ESM Treaty at very many points provides for action on the part of the Commission, the Court of Justice and the European Central Bank, although within the ESM Treaty only the Member States are acting, but not the Union.

168. The applicant considers that conferral of tasks to be incompatible with the duties of the institutions laid down in the Treaties. In particular he holds the opinion that such use of the Union's institutions is only possible within the procedure for enhanced cooperation under Article 20 TEU.

169. It is therefore now necessary to examine whether the tasks laid down in the ESM Treaty for the Commission (Section (a) below), the European Central Bank (Section (b) below) and the Court of Justice (Section (c) below) are in breach of the first sentence of Article 13(2) TEU, which provides that each institution is to act within the limits of the powers conferred on it in the Treaties.

a) The Commission

170. The Commission, in accordance with the third sentence of Article 13(1) of the ESM Treaty, is to undertake, at the request of the Chairperson of the Board of Governors, various assessments of a request for stability support made by an ESM Member, which are to be the basis for the granting of financial assistance by the ESM. Further, in accordance with Article 13(3) and (4) of the ESM Treaty, it is to be the task of the Commission – in liaison with the European Central Bank and wherever possible with the International Monetary Fund – to negotiate the conditions of assistance to the ESM Member concerned with that ESM Member. Under Article 13(4), for the conditions to have legal force however the approval of the Board of Governors is also needed. Again, monitoring compliance with the conditions, under Article 13(7) of the ESM Treaty, is to be undertaken solely by the Commission. In addition, the ESM Treaty provides for further

[30] See point 115 above.

[31] See the Note of the Permanent Representative of Cyprus to the European Union to the European Council General Secretariat of 27 September 2012, Document No SGE12/010319.

assessments and reports from the Commission in various situations. [32]

171. The Court of Justice had held, in relation to the former fourth indent of Article 155 of the EEC Treaty which described the tasks of the Commission, that that provision did not prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council. [33] In a subsequent judgment the Court of Justice stated that no provision of the Treaty prevents Member States from using, outside its framework, procedural steps drawing on specific rules applicable to the European Union and from associating the institutions of the European Union with the procedure thus set up. [34] It follows from that case-law that the Commission, on the initiative of the Member States, may also act outside the tasks conferred on it in the Treaties.

172. The representatives of the Governments of all Member States adopted on 20 June 2011 a decision, according to which 'the ESM Treaty is to contain provisions under which the European Commission and the European Central Bank are to perform the tasks provided for in the Treaty'. [35] That decision goes beyond the cited case-law, inasmuch as the ESM Treaty is not an act undertaken by all Member States and the exact content of the ESM Treaty concluded on 2 February 2012 was not yet known at the time of that decision.

173. None the less, on the basis of the cited case-law, I consider that the Commission is in principle entitled to carry out the tasks which are prescribed to it in the ESM Treaty. First, the support of the decision by representatives of all Governments demonstrates sufficient collective action on the part of the Member States. Secondly, the essential content of the ESM Treaty was known to the representatives of the Member States at the time of the decision, because the European Council had already on 20 April 2011 approved the essential features of the ESM. [36]

174. I am not persuaded by the applicant's view that the procedure for enhanced cooperation under Article 20 TEU involves a sort of bar on the conferral of tasks on the Union's institutions. Admittedly, Article 20(1) TEU explicitly provides that the Member States in that procedure may 'make use of … institutions' of the Union. Enhanced cooperation however goes further than a mere conferral of tasks in accordance with the cited case-law of the Court of Justice. It is not confined to the possibility of making use of the Union's institutions, but primarily permits the adoption of legal acts of the Union which, under Article 20(4) TEU, are binding only on participating Member States. It is therefore not apparent that the parties to the Treaties wanted, by means of the insertion of rules on enhanced cooperation, to restrict the possibility, confirmed by the Court of Justice in the cited case-law, of making use of the Union's institutions outside the scope of the Treaties.

175. It must moreover be emphasised that for the Commission, unlike the situation arising from enhanced cooperation under Article 20 TEU, there is no obligation to carry out the tasks imposed on it in the ESM Treaty. The cited case-law of the Court of Justice should not be understood as meaning that the Member States can oblige the Commission to act outside the framework of the European Union. Such an obligation can be imposed on the Commission as a Union institution only as a consequence of the tasks laid down in European Union law. It must be added that the Commission, under the third subparagraph of Article 17(3) TEU, is to be completely independent in carrying out its responsibilities and its members are not to take instructions from any Government or other institution. The euro area Member States seem to be of the same opinion, if in recital (10) of the preamble to the ESM Treaty they refer to the authorisation from all Member States of the Union, to require ['aufzufordern' [37]] the Commission to perform the tasks provided for in that Treaty. Consequently, the ESM Treaty does not assume that the Commission is under any obligation to do so.

176. In the light of the foregoing, the conclusion and ratification of the ESM Treaty would only infringe European Union law if that Treaty required the Commission to perform tasks which the Treaties prohibited. The Commission remains, even when it acts within the framework of the ESM, an institution of the Union and as such is bound by the full extent of

[32] See the first sentence of the first subparagraph of Article 4(4), Article 14(5) and (6), Article 15(5) Article 16(5) and Article 17(5) of the ESM Treaty.

[33] See Joined Cases C 181/91 and C 248/91 Parliament v Council and Commission [1993] ECR I 3685, paragraph 20.

[34] See Case C 316/91 Parliament v Council [1994] ECR I 625, paragraph 41.

[35] See Council Cover Note of 24 June 2011, Document-No 12114/11, and recital 10 in the preamble to the ESM Treaty.

[36] See Conclusions of the European Council of the meeting of 24/25 March 2011 with Cover Note of the European Council of 20 April 2011, Document No EUCO 10/1/11 REV 1, Paragraph 17 and Annex II.

[37] Clearer on that point is the version in French of the ESM Treaty, which speaks only of 'demander' ('ask').

European Union law, including the Charter of Fundamental Rights.

177. I can however not discern any infringement of European Union law. On the contrary, the fact that within the ESM the Commission is entrusted with the task of ensuring that the conditions attached to financial assistance instruments under the second subparagraph of Article 13(3) of the ESM Treaty are consistent with European Union law serves to protect European Union law.

178. Accordingly, the first sentence of Article 13(2) TEU is not infringed if the Commission performs the tasks specified for it in the ESM Treaty while respecting its obligations under European Union law.

b) The European Central Bank

179. The ESM Treaty also entrusts a number of tasks to the European Central Bank. Those tasks are relatively minor in comparison with those of the Commission. Individual tasks of assessment are provided for only in the first sentence of the first subparagraph of Article 4(4) and Article 18(2) of the ESM Treaty. For the rest, the Commission is, under Article 13(1), (3) and (7) and Article 14(6) of the ESM Treaty at times to act 'in liaison' with the European Central Bank. In those cases therefore it is not so much that tasks are allocated to the European Central Bank but that it has a qualified right to be consulted.

180. The abovementioned case-law of the Court of Justice on the delegation of tasks to the Commission can, as the Netherlands Government in particular has submitted, be transposed to the European Central Bank. That is in any event true where, as in the case of the ESM Treaty, there is a connection to the tasks associated with general economic policy, the support of which, under Article 282(1) and the third sentence of Article 282(2) TFEU, is one of the tasks of the European Central Bank.

181. It must however again be emphasised that the European Central Bank is under no obligation to perform the tasks allocated to it in the ESM Treaty. In the case of the European Central Bank that is of particular importance in the light of its independence as established in Article 130 TFEU.

182. Accordingly, it must also held with regard to the European Central Bank that the conclusion and ratification of the ESM Treaty does not infringe the first sentence of Article 13(2) TEU if it performs the tasks specified for it in the ESM Treaty while respecting its obligations under European Union law.

c) Court of Justice

183. Finally it must be clarified whether the envisaged role of the Court of Justice in the framework of the ESM is compatible with European Union law.

184. Under Article 37(2) of the ESM Treaty, the Board of Governors is to decide 'on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty'. Under Article 37(3) the dispute is to be submitted to the Court of Justice, if an ESM Member contests the decision of the Board of Governors. As is clear from recital (16) of the ESM Treaty, the parties to the ESM Treaty base this role for the Court of Justice on Article 273 TFEU.

185. Under Article 273 TFEU, the Court of Justice 'shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties'. It must be examined whether the quoted provisions of Article 37 of the ESM Treaty satisfy those conditions.

186. First, disputes on the interpretation and application of the ESM Treaty must relate to the subject matter of the Treaties. As is clear from a comparison with the provisions in Article 259(1) TFEU on actions brought by one Member State against another for an infringement of an obligation under the Treaties, Article 273 TFEU does not concern disputes on the actual interpretation of the Treaties. It is sufficient if the dispute is merely related. Since the allocation of tasks under Article 273 TFEU is dependent on a special agreement between the parties, it is moreover sufficient if the subject matter of such an agreement is related to the subject matter of the European Union Treaties. It is not a requirement that every single dispute arising from the ESM Treaty must imperatively be shown to be related to the European Union Treaties.

187. In the case of the ESM there is such a relationship, because the second subparagraph of Article 13(3) provides that the conditions attached to financial assistance instruments are to be consistent with the measures of economic policy coordination provided for in the TFEU. Moreover disputes on the interpretation of

Article 125 TFEU (the 'no bail-out clause') might arise with regard to specific grants of financial assistance instruments. Accordingly, disputes on the interpretation and application of the ESM Treaty are, within the meaning of Article 273 TFEU, related to the subject matter of the Treaties.

188. The second question which arises is whether Article 37 of the ESM Treaty concerns disputes between Member States within the meaning of Article 273 TFEU. However, the ESM Treaty provides for the Court of Justice to be seised even where a dispute has arisen between an ESM Member and the ESM as an international organisation.

189. The parties to the ESM Treaty are exclusively the euro Member States, who under Article 5 of the ESM Treaty act through their Government representatives in the highest body within the ESM, the Board of Governors. As the Government of the United Kingdom in particular has correctly stated, in such circumstances a dispute between an ESM Member and the ESM is in fact, or at least can be assimilated to, a dispute between the ESM Member and the other ESM Members, who within the ESM have adopted a majority decision. Further, Member States when acting within the framework of the organisation are bound by particular European Union legal obligations. The competence of the Court of Justice thereby secures the uniform application of European Union law. In addition, it strengthens the Union system of legal remedies, which corresponds to the objective of Article 273 TFEU. It may be added that for the Member States that provision is optional. Accordingly, a broad interpretation of that provision is unexceptionable. Article 273 TFEU may be applied to the disputes of Member States within an organisation established solely by them, even when that organisation is itself party to the dispute.

190. The role allocated to the Court of Justice under the ESM Treaty is consequently compatible with the first sentence of Article 13(2) TEU.

5. Article 47 of the Charter of Fundamental Rights and the principle of legal certainty

191. It must next be examined whether the ESM Treaty is compatible with the right to an effective legal remedy under Article 47 of the Charter of Fundamental Rights and with the general principle of legal certainty.

192. In that regard the applicant has submitted that the ESM under Article 37(2) of the ESM Treaty is subject to only a limited power of review by the Court of Justice, although, by way of example, the conditions which the ESM may attach to stability support could particularly have an adverse effect on the social rights in Title IV of the Charter. Proceedings before the Court of Justice could however only be brought by the euro area Member States. The applicant claims that the activity of the ESM is not therefore subject to any legal remedy before a court as required by Article 47 of the Charter of Fundamental Rights.

193. The first sentence of Article 51(1) of the Charter states that the provisions thereof are addressed to the Member States 'only when they are implementing European Union law'. Accordingly the view of the Commission is that Article 47 of the Charter of Fundamental Rights is not applicable to the activity of the ESM. It can at this time be left open whether that view is correct. That is because in any event the right of individuals to an effective legal remedy in respect of the activity of the ESM is sufficiently protected.

194. The compatibility with European Union law of the acts of the Member States within the ESM – as indeed the present proceedings show – are subject under the ordinary procedure of Article 267 TFEU to review by the Court of Justice and the national courts and tribunals. The Member States have to that extent under the second subparagraph of Article 19(1) TEU provided for the required legal remedies to secure effective legal protection at least with regard to the national application of the conditions. [38](39)

195. With regard to the principle of legal certainty also referred to in the question, it is not apparent in what way that principle might be infringed by the activity of the ESM.

196. The conclusion and ratification of the ESM Treaty accordingly are not in breach of either Article 47 of the Charter of Fundamental Rights or the principle of legal certainty.

6. Principle of sincere cooperation under Article 4(3) TEU

197. Finally the referring Court has doubts as to the compatibility of the ESM Treaty with Article 4(3) TEU. That provision establishes the 'principle of sincere cooperation' pursuant to which the Union and the Member State are, in

[38] See, to that effect, Case C–432/38 Unibet [2007] ECR I–2271, paragraphs 38 and 42 and case law cited.

full mutual respect, to assist each other in carrying out the tasks which flow from the Treaties.

198. In that regard, the applicant has submitted that the Member States are in breach of that principle because by creating an independent international organisation such as the ESM they intended to circumvent European Union law and in particular the prohibitions of Article 125 TFEU.

199. It cannot however be held, as explained above, [39] that there has been any circumvention of obligations under European Union law, in particular Article 125 TFEU. The issue of circumvention of obligations under European Union law should moreover be assessed exclusively within the framework of interpreting the actual obligations. As regards the provisions of European Union law already examined for that purpose in the context of the second question referred it is impossible to discern in what way the principle of sincere cooperation is supposed to be adversely affected by the ESM Treaty. The tasks conferred on the Commission and the European Central Bank in the ESM Treaty seem to be evidence to the contrary.

200. The conclusion and ratification of the ESM Treaty is therefore not in breach of Article 4(3) TEU.

7. Interim conclusion

201. In the light of the foregoing the answer to the second question is that Article 4(3) and Article 13 TEU; Article 2(3), Article 3(1)(c) and (2), Article 122, Article 123 and Article 125 TFEU; Article 47 of the Charter of Fundamental Rights, and the principle of legal certainty do not prevent a Member State from concluding and ratifying an international agreement such as the ESM Treaty.

C – *The third question referred: whether the answer to the second question is affected by the entry into force of the Decision*

202. Finally, by its third question the referring court seeks to ascertain whether the right of Member States to conclude and ratify an international agreement such as the ESM Treaty is dependent on the entry into force of Decision 2011/199.

203. Since the Member States, as explained above in relation to the second question, may in accordance with current law conclude and ratify an international agreement such as the ESM Treaty, their right to do so is not dependent on the addition of a new paragraph (3) in Article 136 TFEU on the basis of Decision 2011/199. The third question referred must for that reason be answered in the negative.

IV – Conclusion

204. In the light of the foregoing considerations, I propose that the Court of Justice should reply as follows to the questions referred for a preliminary ruling by the Supreme Court, Ireland:

(1) Consideration of the matter has disclosed nothing capable of affecting the validity of Decision 2011/199.

(2) Article 4(3) and Article 13 TEU; Article 2(3), Article 3(1)(c) and (2), Article 122, Article 123 and Article 125 TFEU; Article 47 of the Charter of Fundamental Rights, and the principle of legal certainty do not prevent a Member State whose currency is the euro from concluding and ratifying an international agreement such as the ESM Treaty before the entry into force of Decision 2011/199.

[39] See above, Point 100 e

§64. Pringle, European Court of Justice, November 27 th 2012, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62012CJ0370&rid=2

1. This reference for a preliminary ruling concerns, first, the validity of European Council Decision 2011/199/EU 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 (OJ 2011 L 91, p. 1), and, secondly, the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU, 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principles of effective judicial protection and legal certainty.

2. The reference was made in an appeal against a judgment of the High Court (Ireland) in proceedings brought by Mr Pringle, a member of the Irish Parliament, against the Government of Ireland, Ireland and the Attorney General seeking a declaration, first, that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 constitutes an unlawful amendment of the FEU Treaty and, secondly, that by ratifying, approving or accepting the Treaty establishing the European stability mechanism 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, concluded in Brussels on 2 February 2012 ('the ESM Treaty'), Ireland would undertake obligations incompatible with the Treaties on which the European Union is founded.

I –Legal context

(Not reproduced here)

II – The background to the main proceedings and the questions referred for a preliminary ruling

24. On 13 April 2012 Mr Pringle brought before the High Court (Ireland) an action against the defendants in the main proceedings in support of which he claimed, first, that Decision 2011/199 was not lawfully adopted pursuant to the simplified revision procedure provided by Article 48(6) TEU because it entails an alteration of the competences of the European Union contrary to the third paragraph of Article 48(6) TEU and that Decision 2011/199 is inconsistent with provisions of the EU and FEU Treaties concerning economic and monetary union and with general principles of European Union law.

25. Mr Pringle further claimed that Ireland, by ratifying, approving or accepting the ESM Treaty, would undertake obligations which would be in contravention of provisions of the EU and FEU Treaties concerning economic and monetary policy and would directly encroach on the exclusive competence of the Union in relation to monetary policy. He claimed that by establishing the ESM the Member States whose currency is the euro are creating for themselves an autonomous and permanent international institution with the objective of circumventing the prohibitions and restrictions laid down by the provisions of the FEU Treaty in relation to economic and monetary policy. Further, he claimed that the ESM Treaty confers on the Union's institutions new competences and tasks which are incompatible with their functions as defined in the EU and FEU Treaties. Lastly, he claimed that the ESM Treaty was incompatible with the general principle of effective judicial protection and with the principle of legal certainty.

26. By a judgment of 17 July 2012 the High Court dismissed Mr Pringle's action in its entirety.

27. On 19 July 2012 Mr Pringle brought an appeal against that judgment before the referring court.

28. In those circumstances the Supreme Court decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Is … Decision 2011/199… valid:

– having regard to the use of the simplified revision procedure pursuant to Article 48(6) TEU and, in particular, whether the proposed

amendment to Article 136 TFEU involved an increase in the competences conferred on the Union in the Treaties?

– having regard to the content of the proposed amendment, in particular whether it involves any violation of the Treaties or of the general principles of law of the Union?

(2) Is a Member State of the European Union whose currency is the euro, having regard to

– Articles 2 and 3 TEU and the provisions of Part Three, Title VIII, TFEU, and in particular Articles 119, 120, 121, 122, 123, 125, 126, and 127 TFEU;
– the exclusive competence of the Union in monetary policy as set out in Article 3(1)(c) TFEU and in concluding international agreements falling within the scope of Article 3(2) TFEU;
– the competence of the Union in coordinating economic policy, in accordance with Article 2(3) TFEU and Part Three, Title VIII, TFEU;
– the powers and functions of Union institutions pursuant to principles set out in Article 13 TEU;
– the principle of sincere cooperation laid down in Article 4(3) TEU;
– the general principles of Union law including in particular the general principle of effective judicial protection and the right to an effective remedy as provided under Article 47 of the Charter of Fundamental Rights of the European Union ['the Charter'] and the general principle of legal certainty,

entitled to enter into and ratify an international agreement such as the ESM Treaty?

(3) If … Decision [2011/199] is held valid, is the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty subject to the entry into force of that Decision?'

III –Consideration of the questions referred for a preliminary ruling

A –The first question

29. By its first question, the referring court seeks to ascertain whether Decision 2011/199 is valid in so far as it amends Article 136 TFEU by providing for the insertion, on the basis of the simplified revision procedure under Article 48(6) TEU, of an Article 136(3) relating to the establishment of a stability mechanism.

1. The jurisdiction of the Court

30. Ireland, the governments of the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Kingdom of the Netherlands, the Republic of Austria and the Slovak Republic, the European Council and the Commission submit that the jurisdiction of the Court to examine the first question is limited, if not excluded, because the question relates to the interpretation of primary law. They contend that the Court has no power under Article 267 TFEU to assess the validity of provisions of the Treaties.

31. In that regard, first, it must be borne in mind that the question of validity concerns a decision of the European Council. Since the European Council is one of the Union's institutions listed in Article 13(1) TEU and since the Court has jurisdiction, under indent (b) of the first paragraph of Article 267 TFEU 'to give preliminary rulings concerning ... the validity … of acts of the institutions', the Court has, in principle, jurisdiction to examine the validity of a decision of the European Council.

32. Next, it must be stated that Decision 2011/199 concerns the insertion of a new provision of primary law in the FEU Treaty, namely paragraph 3 of Article 136 TFEU.

33. As submitted by Ireland and the governments and institutions mentioned in paragraph 30 of this judgment, it is true that, in accordance with indent (a) of the first paragraph of Article 267 TFEU, the examination of the validity of primary law does not fall within the Court's jurisdiction. Nonetheless, after the entry into force of the Treaty of Lisbon, which introduced, in addition to the ordinary procedure for the revision of the FEU Treaty, a simplified revision procedure under Article 48(6) TEU, the question arises whether the Court is required to ensure that the Member States, when they undertake a revision of the FEU Treaty using that simplified procedure, comply with the conditions laid down by that provision.

34. In that regard, it must be recalled that, under the first subparagraph of Article 48(6) TEU, the simplified revision procedure concerns 'revising all or part of the provisions of Part Three of the [FEU] Treaty, relating to the internal policies and actions of the Union'. The second subparagraph of Article 48(6) confirms that

'[t]he European Council may adopt a decision amending all or part of the provisions of Part Three of the [FEU] Treaty'. Under the third subparagraph of Article 48(6), such a decision 'shall not increase the competences conferred on the Union in the Treaties'.

35. Since it is necessary that compliance with those conditions be monitored in order to establish whether the simplified revision procedure is applicable, it falls to the Court, as the institution which, under the first subparagraph of Article 19(1) TEU, is to ensure that the law is observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) TEU.

36. To that end, it is for the Court to verify, first, that the procedural rules laid down in Article 48(6) TEU were followed and, secondly, that the amendments decided upon concern only Part Three of the FEU Treaty, which implies that they do not entail any amendment of provisions of another part of the Treaties on which the European Union is founded, and that they do not increase the competences of the Union.

37. It follows from the foregoing that the Court has jurisdiction to examine the validity of Decision 2011/199 in the light of the conditions laid down in Article 48(6) TEU.

2. Admissibility

38. Ireland claims that the question referred for a preliminary ruling is inadmissible because, first, in accordance with the case-law established in Case C-188/92 TWD Textilwerke Deggendorf[1994] ECR I-833, the applicant in the main proceedings should have brought a direct action under Article 263 TFEU for the annulment of Decision 2011/199 within the time-limit for proceedings laid down in the sixth paragraph of that Article and, secondly, he should in any event have brought his action to challenge the validity of that decision before the national courts within a reasonable time. Mr Pringle did not commence the main proceedings until 13 April 2012, although Decision 2011/199 was adopted on 25 March 2011.

39. In that regard, it must be recalled that any party has the right, in proceedings before the national courts, to plead, before the court hearing the case, the invalidity of an act of the Union and to ask that court, which has no jurisdiction itself to declare the act invalid, to put that question to the Court by means of a reference for a preliminary ruling (see Case C-239/99 Nachi Europe [2001] ECR I-1197, paragraph 35; Case C-50/00 P Unión de Pequeños Agricultores v Council [2002] ECR I-6677, paragraph 40, and Case C-550/09 E and F [2010] ECR I-6213, paragraph 45). It must be emphasised that under indent (b) of the first paragraph of Article 267 TFEU the admissibility of a reference for a preliminary ruling made on the basis of that provision is not subject to a condition that such a party has complied with a time-limit within which a case challenging the validity of the Union act concerned must be brought before the national court or tribunal with jurisdiction. In the absence of regulation by the Union, time-limits for the introduction of actions before national courts are to be determined by the national rules of procedure and it is exclusively for the courts and tribunals of the Member States to assess whether such time-limits have been respected in the main proceedings.

40. It is clear from the order for reference both that the High Court rejected Ireland's argument that the action brought before it was out of time and that the referring court found it unnecessary to re-consider the matter.

41. Nonetheless, the point must be made that the recognition of a party's right to plead the invalidity of an act of the Union presupposes that that party did not have the right to bring, under Article 263 TFEU, a direct action for the annulment of that act (see, to that effect, TWD Textilwerke Deggendorf, paragraph 23; E and F, paragraph 46, and Case C-494/09 Bolton Alimentari[2011] ECR I-647, paragraph 22). Were it to be accepted that a party who beyond doubt had standing to institute proceedings under the fourth paragraph of Article 263 TFEU for the annulment of an act of the Union could, after the expiry of the time-limit for bringing proceedings laid down in the sixth paragraph of Article 263 TFEU, challenge before the national courts the validity of that act, that would amount to enabling the person concerned to circumvent the fact that that act is final as against him once the time-limit for his bringing an action has expired (see, to that effect, TWD Textilwerke Deggendorf, paragraphs 18 and 24; E and F, paragraphs 46 and 48, and Bolton Alimentari, paragraphs 22 and 23).

42. In the present case, it is not evident that the applicant in the main proceedings had beyond doubt standing to bring an action for the annulment of Decision 2011/199 under Article 263 TFEU.

43. Accordingly, Ireland's argument that the first question should be declared to be inadmissible cannot be accepted.

44. It follows from the foregoing that the first question is admissible.

3. Substance

45. It is necessary to examine, first, whether the amendment of the FEU Treaty envisaged by Decision 2011/199 concerns solely provisions of Part Three of the FEU Treaty and, secondly, whether it increases the competences conferred on the Union in the Treaties.

a) Whether the revision of the FEU Treaty concerns solely provisions of Part Three of that treaty

46. It must be stated that Decision 2011/199 amends a provision of Part Three of the FEU Treaty, namely Article 136 TFEU, and thereby formally satisfies the condition stated in the first and second subparagraphs of Article 48(6) TEU that the simplified revision procedure may concern solely provisions of that Part Three.

47. However, the referring court is unsure whether the revision of the FEU Treaty does not also affect provisions of Part One of that treaty. It seeks to ascertain whether Decision 2011/199 encroaches on the competence of the Union in the area of monetary policy and in the area of the coordination of the economic policies of the Member States.

48. In that regard, it must be recalled that, under Article 119(2) TFEU, the activities of the Member States and the Union are to include a single currency, the euro, and the definition and conduct of a single monetary policy and exchange-rate policy. The monetary policy of the Union is the subject of, inter alia, Article 3(1)(c) TFEU and Articles 127 TFEU to 133 TFEU.

49. Further, under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union.

50. Article 3(1)(c) TFEU states that the Union is to have exclusive competence in the area of monetary policy for the Member States whose currency is the euro.

51. Moreover, under Article 119(1) TFEU, the activities of the Member States and the Union are to include the adoption of an economic policy based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, conducted in accordance with the principle of an open market economy with free competition. The Union's economic policy is the subject of Articles 2(3) TFEU, 5(1) TFEU and 120 TFEU to 126 TFEU.

52. It must therefore be determined, first, whether Decision 2011/199, in so far as it amends Article 136 TFEU by adding a paragraph 3 which provides that '[t]he Member States whose currency is the euro may establish a stability mechanism', grants to Member States a competence in the area of monetary policy for the Member States whose currency is the euro. If that were the case, the Treaty amendment concerned would encroach on the Union's exclusive competence as laid down in Article 3(1)(c) TFEU and, since the latter provision is to be found in Part One of the FEU Treaty, such an amendment could be made only by using the ordinary revision procedure provided for in Article 48(2) to (5) TEU.

53. In that regard, it must first be observed that the FEU Treaty, which contains no definition of monetary policy, refers, in its provisions relating to that policy, to the objectives, rather than to the instruments, of monetary policy.

54. Under Articles 127(1) TFEU and 282(2) TFEU, the primary objective of the Union's monetary policy is to maintain price stability. The same provisions further stipulate that the European System of Central Banks ('ESCB') is to support the general economic policies in the Union, with a view to contributing to the achievement of its objectives, as laid down in Article 3 TEU. Further, under Article 139(2) TFEU, Article 127(1) TFEU is not to apply to Member States with a derogation within the meaning of Article 139(1).

55. It is necessary therefore to examine whether or not the objectives to be attained by the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 and the instruments provided to that end fall within monetary policy for the purposes of Articles 3(1)(c) TFEU and 127 TFEU.

56. As regards, first, the objective pursued by that mechanism, which is to safeguard the stability of the euro area as a whole, that is clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union's monetary policy. Even though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro.

57. As regards, secondly, the instruments envisaged in order to attain the objective concerned, Decision 2011/199 states only that the stability mechanism will grant any required financial assistance; it contains no other information on the operation of that mechanism. The grant of financial assistance to a Member State however clearly does not fall within monetary policy.

58. It must next be stated that, as is confirmed moreover by the conclusions of the European Council of 16 and 17 December 2010 to which reference is made in recital 4 of the preamble to Decision 2011/199, the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 serves to complement the new regulatory framework for strengthened economic governance of the Union. Constituted by various regulations of the European Parliament and the Council adopted on 16 November 2011, namely Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1), Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ 2011 L 306, p. 8), Regulation (EU) No 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ 2011 L 306, p. 12), Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances (OJ 2011 L 306, p. 25); by Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ 2011 L 306, p. 33), and by Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ 2011 L 306, p. 41), that framework establishes closer coordination and surveillance of the economic and budgetary policies conducted by the Member States and is intended to consolidate macroeconomic stability and the sustainability of public finances.

59. While the provisions of the regulatory framework referred to in the preceding paragraph and the provisions in the chapter of the FEU Treaty relating to economic policy, in particular Articles 123 TFEU and 125 TFEU, are essentially preventive, in that their objective is to reduce so far as possible the risk of public debt crises, the objective of establishing the stability mechanism is the management of financial crises which, notwithstanding such preventive action as might have been taken, might nonetheless arise.

60. In the light of the objectives to be attained by the stability mechanism the establishment of which is envisaged by Article 1 of Decision 2011/199, the instruments provided in order to achieve those objectives and the close link between that mechanism, the provisions of the FEU Treaty 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 falls within the area of economic policy.

61. That finding is not called into question by the fact that the ECB issued, on 17 March 2011, an opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (OJ 2011 C 140, p. 8). Although it must be accepted that the second subparagraph of Article 48(6) TEU provides that '[t]he European Council shall act by unanimity, after consulting … the [ECB] in the case of institutional changes in the monetary area', the fact remains that it is clearly apparent from the wording of recital 5 of the preamble to Decision 2011/199 that the European Council consulted the ECB on its own initiative and not because it was under any obligation under that provision to do so.

62. In any event, the consultation of the ECB on the draft of Decision 2011/199 cannot affect the nature of the envisaged stability mechanism.

63. Consequently, Article 1 of Decision 2011/199 which, by the addition of a paragraph 3 to Article 136 TFEU, envisages the establishment of a stability mechanism, is not capable of affecting the exclusive competence held by the Union under Article 3(1)(c) TFEU in the area of monetary policy for the Member States whose currency is the euro.

64. Secondly, as regards whether Decision 2011/199 affects the Union's competence in the area of the coordination of the Member States' economic policies, it must be observed that, since Articles 2(3) and 5(1) TFEU restrict the role of the Union in the area of economic policy to the adoption of coordinating measures, the provisions of the EU and FEU Treaties do not confer any specific power on the Union to establish a stability mechanism of the kind envisaged by Decision 2011/199.

65. Admittedly, Article 122(2) TFEU confers on the Union the power to grant ad hoc financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the preamble to Decision 2011/199, Article 122(2) TFEU does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that decision. The fact that the mechanism envisaged is to be permanent and that its objectives are to safeguard the financial stability of the euro area as a whole means that such action cannot be taken by the Union on the basis of that provision of the FEU Treaty.

66. Further, even if Article 143(2) TFEU also enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, that provision covers only Member States whose currency is not the euro.

67. As to whether the Union could establish a stability mechanism comparable to that envisaged by Decision 2011/199 on the basis of Article 352 TFEU, suffice it to say that the Union has not used its powers under that Article and that, in any event, that provision does not impose on the Union any obligation to act (see Case 22/70 Commission v Council ('ERTA') [1971] ECR 263, paragraph 95).

68. Consequently, having regard to Articles 4(1) TEU and 5(2) TEU, the Member States whose currency is the euro are entitled to conclude an agreement between themselves for the establishment of a stability mechanism of the kind envisaged by Article 1 of Decision 2011/199 (see, to that effect, Joined Cases C-181/91 and C-248/91 Parliament v Council and Commission[1993] ECR I-3685, paragraph 16; Case C-316/91 Parliament v Council [1994] ECR I-625, paragraph 26, and Case C-91/05 Commission v Council [2008] ECR I-3651, paragraph 61).

69. However, those Member States may not disregard their duty to comply with European Union law when exercising their competences in that area (see Case C-55/00 Gottardo [2002] ECR I-413, paragraph 32). However, the reason why the grant of financial assistance by the stability mechanism is subject to strict conditionality under paragraph 3 of Article 136 TFEU, the Article affected by the revision of the FEU Treaty, is in order to ensure that that mechanism will operate in a way that will comply with European Union law, including the measures adopted by the Union in the context of the coordination of the Member States' economic policies.

70. It follows from all the foregoing that Decision 2011/199 satisfies the condition laid down in the first and second subparagraphs of Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified revision procedure may concern only provisions of Part Three of the FEU Treaty.

b) Whether the revision of the FEU Treaty increases the competences conferred on the Union in the Treaties

71. The referring court further seeks to ascertain whether Decision 2011/199 satisfies the condition laid down in Article 48(6) TEU that a revision of the FEU Treaty by means of the simplified procedure may not have the effect of increasing the competences of the Union.

72. In that regard, it should be recalled that Article 136(3) TFEU, the insertion of which is provided for by Article 1 of Decision 2011/199, confirms that Member States have the power to establish a stability mechanism and is further intended to ensure, by providing that the granting of any financial assistance under that mechanism will be made subject to strict conditionality, that the mechanism will operate in a way that will comply with European Union law.

73. That amendment does not confer any new competence on the Union. The amendment of Article 136 TFEU which is effected by Decision 2011/199 creates no legal basis for the Union to be able to undertake any action which was not possible before the entry into force of the amendment of the FEU Treaty.

74. Even though the ESM Treaty makes use of the Union's institutions, in particular the Commission and the ECB, that fact is not, in any event, capable of affecting the validity of Decision 2011/199, which in itself provides only for the establishment of a stability mechanism by the Member States and is silent on any possible role for the Union's institutions in that connection.

75. It follows that Decision 2011/199 does not increase the competences conferred on the Union in the Treaties.

76. It follows from all the foregoing that the answer to the first question is that examination of that question has disclosed nothing capable of affecting the validity of Decision 2011/199.

B –The second question

77. The second question concerns the interpretation of Articles 2 TEU, 3 TEU, 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU, and 125 TFEU to 127 TFEU, and of the general principles of effective judicial protection and legal certainty. The referring court seeks to ascertain whether those Articles and principles preclude a Member State whose currency is the euro from concluding and ratifying an agreement such as the ESM Treaty.

1. The jurisdiction of the Court

78. The Spanish Government maintains that, since the Union is not a contracting party to the ESM Treaty, the Court has no jurisdiction to interpret, in the context of a reference for a preliminary ruling, the provisions of that treaty (see Case C-132/09 Commission v Belgium [2010] ECR I-8695, paragraph 43 and case-law cited).

79. In that regard, suffice it to say that the second question, by its very wording, concerns the interpretation of various provisions of European Union law and not the interpretation of provisions of the ESM Treaty.

80. The Court has jurisdiction to provide the national court with all the criteria for the interpretation of European Union law which may enable it to assess whether the provisions of the ESM Treaty are compatible with European Union law (see, to that effect, Case C-489/09 Vandoorne [2011] ECR I-225, paragraph 25 and case-law cited).

81. The Court therefore has jurisdiction to examine the second question.

2. Admissibility

82. A number of the governments who submitted observations to the Court, along with the Commission, maintain that the second question is partly inadmissible because the referring court failed to provide any information as to how the interpretation of certain provisions and certain principles referred to in the second question is of any relevance to the outcome of the dispute before it.

83. It should first be recalled that, in accordance with settled case-law of the Court, the procedure provided for by Article 267 TFEU is an instrument for cooperation between the Court and national courts by means of which the Court provides national courts with the criteria for the interpretation of European Union law which they need in order to decide the disputes before them (see, inter alia, Case C-83/91 Meilicke [1992] ECR I-4871, paragraph 22; Case C-380/01 Schneider [2004] ECR I-1389, paragraph 20; and the order of 13 January 2010 in Joined Cases C-292/09 and C-293/09 Calestani and Lunardi, paragraph 18).

84. The Court has previously held that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary that the national court should give at least some explanation of the reasons for the choice of the European Union law provisions of which it requests an interpretation (order of 3 May 2012 in Case C-185/12 Ciampaglia, paragraph 5 and case-law cited).

85. Further, it must be emphasised in that regard that the information provided in orders for reference serves not only to enable the Court to give useful answers but also to ensure that governments of the Member States and other interested parties have the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case-file that may be sent to the Court by the national court (order of 23 March 2012 in Case C-348/11 Thomson Sales Europe, paragraph 49 and case-law cited).

86. In the present case, as stated by Ireland, the Slovak Government and the Commission, the order for reference gives no explanation of the relevance to the outcome of the dispute of the interpretation of Articles 2 TEU and 3 TEU. As maintained by the German, Spanish and French Governments and the Commission, the same is true of the interpretation of the general principle of legal certainty.

87. Consequently, the second question is inadmissible in so far as it concerns the interpretation of Articles 2 TEU and 3 TEU and the general principle of legal certainty.

88. Further, the Netherlands Government and the Commission express their uncertainty as to the direct effect of Articles 119 TFEU to 121 TFEU. Since those Articles do not impose on Member States clear and unconditional obligations which may be relied on by individuals before the national courts, they contend that the question is inadmissible in so

far as it concerns the interpretation of those Articles. Ireland, which considers that none of the provisions referred to in the question has direct effect, maintains that the question is inadmissible in its entirety.

89. In that regard, in accordance with the Court's case-law, the Court has jurisdiction to give preliminary rulings concerning the interpretation of provisions of European Union law irrespective of whether or not they have direct effect (see Case C-254/08 Futura Immobiliare and Others [2009] ECR I-6995, paragraph 34 and case-law cited).

90. Further, it is clear that the purpose of the referring court's question is not to determine whether the applicant in the main proceedings can assert a right directly based on the Articles concerned of the EU and FEU Treaties. The purpose of requesting criteria for interpretation from the Court is solely to enable the referring court to assess whether the provisions of the ESM Treaty are compatible with European Union law.

91. It follows from all the foregoing that the second question is admissible in so far as it concerns the interpretation of Articles 4(3) TEU and 13 TEU, of Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and of the general principle of effective judicial protection.

3. Substance

92. Interpretation is therefore required, first, of the provisions of the FEU Treaty relating to the Union's exclusive competence, namely Articles 3(1)(c) TFEU and 127 TFEU on the Union's monetary policy and Article 3(2) TFEU on the Union's competence for the conclusion of an international agreement, secondly, of provisions relating to the Union's economic policy, namely Articles 2(3) TFEU, 119 TFEU to 123 TFEU, 125 TFEU and 126 TFEU and, finally, of Articles 4(3) TEU and 13 TEU and the general principle of effective judicial protection.

a) Interpretation of provisions relating to the Union's exclusive competence

i) Interpretation of Articles 3(1)(c) TFEU and 127 TFEU

93. The referring court seeks to ascertain whether the stability mechanism established by the ESM Treaty falls under monetary policy and, accordingly, under the Union's exclusive competence. It follows from Article 3 of the ESM Treaty that its purpose is to support the stability of the euro. The referring court further refers to the argument of the applicant in the main proceedings that the grant of financial assistance to Member States whose currency is the euro or the recapitalisation of their financial institutions, and the necessary borrowing for that purpose, on the scale envisaged by the ESM Treaty, would increase the amount of euro currency in circulation. The Treaties on which the Union is founded confer on the ECB the exclusive power to regulate money supply in the euro area. The applicant argues that those Treaties do not allow a second entity to carry out such tasks and to act in parallel with the ECB, outside the framework of the European Union legal order. Further, an increase in money supply has a direct influence on inflation. Consequently, the applicant claims that the activities of the ESM could have a direct impact on price stability in the euro area, which would go to the very core of the Union's monetary policy.

94. In that regard, as is apparent from paragraph 50 of this judgment, the Union has, under Article 3(1)(c) TFEU, an exclusive competence in the area of monetary policy for the Member States whose currency is the euro. Under Article 282(1) TFEU, the ECB and the central banks of the Member States whose currency is the euro, which constitute the Eurosystem, are to conduct the monetary policy of the Union. The objective pursued by the ESCB in general and the Eurosystem in particular is, in accordance with Articles 127(1) TFEU and 282(2) TFEU, to maintain price stability.

95. However, the activities of the ESM do not fall within the monetary policy which is the subject of those provisions of the FEU Treaty.

96. Under Articles 3 and 12(1) of the ESM Treaty, it is not the purpose of the ESM to maintain price stability, but rather to meet the financing requirements of ESM Members, namely Member States whose currency is the euro, who are experiencing or are threatened by severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. To that end, the ESM is not entitled either to set the key interest rates for the euro area or to issue euro currency, while the financial assistance which the ESM grants must be entirely funded – the provisions of Article 123(1) TFEU being respected – from paid-in capital or by the issue of financial instruments, as provided for in Article 3 of the ESM Treaty.

97. As is apparent from paragraph 56 of this judgment, any effect of the activities of the

ESM on price stability is not such as to call into question that finding. Even if the activities of the ESM might influence the rate of inflation, such an influence would constitute only the indirect consequence of the economic policy measures adopted.

98. It follows from the foregoing that Articles 3(1)(c) TFEU and 127 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 3(2) TFEU

99. The referring court asks whether the ESM Treaty is an international agreement the operation of which may affect the common rules on economic and monetary policy. To that end, the national court refers to recital 1 of the preamble to that treaty which states that the ESM will assume the tasks currently fulfilled by the EFSF and the EFSM.

100. In that regard, it must be recalled that, under Article 3(2) TFEU, the Union is to have 'exclusive competence for the conclusion of an international agreement when its conclusion … may affect common rules or alter their scope'.

101. It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope. However, the arguments put forward in this context have not demonstrated that an agreement such as the ESM Treaty would have such effects.

102. First, since the EFSF was established by the Member States whose currency is the euro outside the framework of the Union, the assumption by the ESM of the tasks conferred on the EFSF is not such as to affect common rules of the Union or alter their scope.

103. Secondly, even if it is apparent from recital 1 of the preamble to the ESM Treaty that the ESM will, among other tasks, assume the tasks hitherto allocated temporarily to the EFSM, established on the basis of Article 122(2) TFEU, that fact is not such as to affect common rules of the Union or alter their scope.

104. The establishment of the ESM does not affect the power of the Union to grant, on the basis of Article 122(2) TFEU, ad hoc financial assistance to a Member State when it is found that that Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

105. Moreover, since neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confers a specific power on the Union to establish a permanent stability mechanism such as the ESM (see paragraphs 64 to 66 of this judgment), the Member States are entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area.

106. The conclusion and ratification of the ESM Treaty by the Member States whose currency is the euro therefore does not jeopardise in any way the objective pursued by Article 122(2) TEU or by Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism (OJ 2010 L 118, p. 1), adopted on the basis of that provision, and does not prevent the Union from exercising its own competences in the defence of the common interest (see, to that effect, Case C-476/98 Commission v Germany [2002] ECR I-9855, paragraph 105).

107. Consequently, Article 3(2) TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

b) Interpretation of various provisions of the ESM Treaty relating to economic policy

i) Interpretation of Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU

108. The national court refers to the argument of the applicant in the main proceedings that the ESM Treaty constitutes an amendment which fundamentally subverts the legal order governing economic and monetary union and which is incompatible with European Union law. The applicant claims that it is clear from recital 2 in the preamble to Decision 2011/199 that the European Council itself considered that the establishment of a permanent stability mechanism required an amendment of the FEU Treaty. The applicant further claims that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU confer on the Union's institutions the competence for the coordination of economic policy. The referring court also seeks to ascertain whether the ESM Treaty encroaches on the power of the Council of the European Union to issue recommendations under Article 126 TFEU and, in particular, whether 'conditionality' provided for by the ESM Treaty is the equivalent of the recommendations provided for by that Article.

109. In that regard, first, it is apparent from paragraph 68 of this judgment that the Member States have the power to conclude between themselves an agreement for the establishment of a stability mechanism such as the ESM Treaty provided that the commitments undertaken by the Member States who are parties to such an agreement are consistent with European Union law.

110. Next, the ESM is not concerned with the coordination of the economic policies of the Member States, but rather constitutes a financing mechanism. Under Articles 3 and 12(1) of the ESM Treaty, the purpose of the ESM is to mobilise funding and to provide financial stability support to ESM Members who are experiencing, or are threatened by, severe financing problems.

111. While it is true that, under Article 3, Article 12(1) and the first subparagraph of Article 13(3) of the ESM Treaty, the financial assistance provided to a Member State that is an ESM Member is subject to strict conditionality, appropriate to the financial assistance instrument chosen, which can take the form of a macro-economic adjustment programme, the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union.

112. The second subparagraph of Article 13(3) of the ESM Treaty expressly provides that the conditions attached to any stability support are to be 'fully consistent with the measures of economic policy coordination provided for in [the FEU Treaty]'. Further, it is apparent from Article 13(4) that the Commission is to check, before signing the MoU defining the conditionality attached to stability support, that the conditions imposed are fully consistent with the measures of economic policy coordination.

113. Lastly, nor does the ESM Treaty affect the competence of the Council of the European Union to issue recommendations on the basis of Article 126(7) and (8) TFEU to a Member State in which an excessive deficit exists. First, the ESM is not called upon to issue such recommendations. Secondly, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty provide that the conditions imposed on ESM Members who receive financial assistance must be consistent with any recommendation which the Council might issue under the abovementioned provisions of the FEU Treaty.

114. It follows that Articles 2(3) TFEU, 119 TFEU to 121 TFEU and 126 TFEU do not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) Interpretation of Article 122 TFEU

115. It must first be recalled that, under Article 122(1) TFEU, the Council of the European Union may decide, in a spirit of solidarity between Member States, upon measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.

116. Since Article 122(1) TFEU does not constitute an appropriate legal basis for any financial assistance from the Union to Member States who are experiencing, or are threatened by, severe financing problems, the establishment of a stability mechanism such as the ESM does not encroach on the powers which that provision confers on the Council.

117. Next, in relation to Article 122(2) TFEU, the referring court, in order to assess whether the ESM encroaches on the competence attributed to the Union by that provision, asks whether that provision exhaustively defines the exceptional circumstances in which it is possible to grant financial assistance to Member States and whether that Article empowers solely the Union's institutions to grant financial assistance.

118. In that regard, it must be stated that the subject-matter of Article 122 TFEU is solely financial assistance granted by the Union and not that granted by the Member States. Under Article 122(2) TFEU, the Council of the European Union may grant, under certain conditions, such assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

119. The exercise by the Union of the competence conferred on it by that provision of the FEU Treaty is not affected by the establishment of a stability mechanism such as the ESM.

120. Further, nothing in Article 122 TFEU indicates that the Union has exclusive

competence to grant financial assistance to a Member State.

121. It follows that the Member States remain free to establish a stability mechanism such as the ESM, provided however that, in its operation, that mechanism complies with European Union law and, in particular, with measures adopted by the Union in the area of coordination of the Member States' economic policies (see paragraphs 68 and 69 of this judgment). As is apparent from paragraphs 111 to 113 of this judgment, the second subparagraph of Article 13(3) and Article 13(4) of the ESM Treaty are intended to ensure that any financial assistance granted by the ESM will be consistent with such coordinating measures.

122. Consequently, Article 122 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iii) Interpretation of Article 123 TFEU

123. Article 123 TFEU prohibits 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 bodies of the Union and of Member States and from purchasing directly from them their debt instruments.

124. The referring court asks whether the conclusion and ratification by the Member States whose currency is the euro of an agreement such as the ESM Treaty is not intended to circumvent the prohibition laid down in Article 123 TFEU since those Member States may not, either directly or through intermediary bodies created or recognised by them, derogate from European Union law or condone such a derogation.

125. In that regard, it must be held that Article 123 TFEU is addressed specifically to the ECB and the central banks of the Member States. The grant of financial assistance by one Member State or by a group of Member States to another Member State is therefore not covered by that prohibition.

126. It is apparent from Articles 3, 12(1) and 13 of the ESM Treaty that it is the ESM which grants financial assistance to an ESM Member when the conditions stated in those provisions are met. Accordingly, even if the Member States are acting via the ESM, the Member States are not derogating from the prohibition laid down in Article 123 TFEU, since that Article is not addressed to them.

127. Moreover, there is no basis for the view that the funds provided by the ESM Members to the ESM might be derived from financial instruments prohibited by Article 123(1) TFEU.

128. Consequently, Article 123 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

iv) Interpretation of Article 125 TFEU

129. The referring court asks whether an agreement such as the ESM Treaty is in breach of the 'no bail-out clause' in Article 125 TFEU.

130. It must be stated at the outset that it is apparent from the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to 'be liable for … the commitments' of another Member State or 'assume [those commitments]', that that Article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.

131. That reading of Article 125 TFEU is supported by the other provisions in the chapter of the FEU Treaty relating to economic policy and, in particular, Articles 122 TFEU and 123 TFEU. First, Article 122(2) TFEU provides that the Union may grant ad hoc financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. If Article 125 TFEU prohibited any financial assistance whatever by the Union or the Member States to another Member State, Article 122 TFEU would have had to state that it derogated from Article 125 TFEU.

132. Secondly, Article 123 TFEU, which prohibits the ECB and the central banks of the Member States from granting 'overdraft facilities or any other type of credit facility', employs wording which is stricter than that used in the 'no bail-out clause' in Article 125 TFEU. The difference in the wording used in the latter Article supports the view that the prohibition stated there is not intended to prohibit any financial assistance whatever to a Member State.

133. Accordingly, in order to determine which forms of financial assistance are compatible

with Article 125 TFEU, it is necessary to have regard to the objective pursued by that Article.

134. To that end, it must be recalled that the origin of the prohibition stated in Article 125 TFEU is to be found in Article 104b of the EC Treaty (which became Article 103 EC), which was inserted in the EC Treaty by the Treaty of Maastricht.

135. It is apparent from the preparatory work relating to the Treaty of Maastricht that the aim of Article 125 TFEU is to ensure that the Member States follow a sound budgetary policy (see Draft treaty amending the Treaty establishing the European Economic Community with a view to achieving economic and monetary union, Bulletin of the European Communities, Supplement 2/91, pp. 24 and 54). The prohibition laid down in Article 125 TFEU ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline. Compliance with such discipline contributes at Union level to the attainment of a higher objective, namely maintaining the financial stability of the monetary union.

136. Given that that is the objective pursued by Article 125 TFEU, it must be held that that provision prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. As is apparent from paragraph 5 of the ECB opinion on the draft European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions.

137. However, Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.

138. As regards the ESM Treaty, it is clear, first, that the instruments for stability support of which the ESM may make use under Articles 14 to 18 of the ESM Treaty demonstrate that the ESM will not act as guarantor of the debts of the recipient Member State. The latter will remain responsible to its creditors for its financial commitments.

139. The granting of financial assistance to an ESM Member in the form of a credit line, in accordance with Article 14 of the ESM Treaty, or in the form of loans, in accordance with Articles 15 and 16 of the ESM Treaty, in no way implies that the ESM will assume the debts of the recipient Member State. On the contrary, such assistance amounts to the creation of a new debt, owed to the ESM by that recipient Member State, which remains responsible for its commitments to its creditors in respect of its existing debts. It should be observed in that regard that, under Article 13(6) of the ESM Treaty, any financial assistance granted on the basis of Articles 14 to 16 thereof must be repaid to the ESM by the recipient Member State and that, under Article 20(1) thereof, the amount to be repaid is to include an appropriate margin.

140. As regards the stability support facilities provided for in Articles 17 and 18 of the ESM Treaty, first, the purchase by the ESM of bonds issued by an ESM Member on the primary market is comparable to the granting of a loan. For the reasons set out in the preceding paragraph, the ESM does not by purchasing such bonds assume the debts of the recipient Member State.

141. Next, as regards the purchase on the secondary market of bonds issued by an ESM Member, it is clear that, in such a situation, the issuing Member State remains solely answerable to repay the debts in question. The fact that the ESM as the purchaser on that market of bonds issued by an ESM Member pays a price to the holder of those bonds, who is the creditor of the issuing ESM Member, does not mean that the ESM becomes responsible for the debt of that ESM Member to that creditor. That price may be significantly different from the value of the claims contained in those bonds, since the price depends on the rules of supply and demand on the secondary market of bonds issued by the ESM Member concerned.

142. Secondly, the ESM Treaty does not provide that stability support will be granted as soon as a Member State whose currency is the euro is experiencing difficulties in obtaining financing on the market. In accordance with Articles 3 and 12(1) of the ESM Treaty, stability support may be granted to ESM Members which are experiencing or are threatened by severe financing problems only when such support is indispensable to safeguard the financial stability

of the euro area as a whole and of its Member States and the grant of that support is subject to strict conditionality appropriate to the financial assistance instrument chosen.

143. It is apparent from paragraphs 111 and 121 of this judgment that the purpose of the strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States comply with measures adopted by the Union in particular in the area of the coordination of Member States' economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy.

144. Thirdly, the national court refers to an argument of the applicant in the main proceedings that the rules relating to capital calls stated in Article 25(2) of the ESM Treaty are incompatible with Article 125 TFEU in that they imply that the ESM Members guarantee the debt of the defaulting member.

145. In that regard, it must be noted that Article 25(2) of the ESM Treaty provides that where a Member State that is an ESM Member fails to pay the sum called for, a revised increased capital call is to be made to all the other ESM Members. However, under that same provision, the defaulting ESM Member State remains bound to pay its part of the capital. Accordingly, the other ESM Members do not act as guarantors of the debt of the defaulting ESM Member.

146. Consequently, a mechanism such as the ESM and the Member States who participate in it are not liable for the commitments of a Member State which receives stability support and nor do they assume those commitments, within the meaning of Article 125 TFEU.

147. It follows that Article 125 TFEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

c) Interpretation of Article 4(3) TEU

148. Pursuant to the principle of sincere cooperation, established in Article 4(3) TEU, Member States are, inter alia, to refrain from any measure which could jeopardise the attainment of the Union's objectives.

149. The national court refers to the argument of the applicant in the main proceedings that the establishment of the ESM is incompatible with the provisions of the FEU Treaty relating to economic and monetary policy and, consequently, also with the principle of sincere cooperation contained in Article 4(3) TEU.

150. Such an argument cannot be accepted.

151. It is apparent from paragraphs 93 to 98 and 108 to 147 of this judgment that the establishment of a stability mechanism, such as the ESM, does not infringe the provisions of the FEU Treaty relating to economic and monetary policy. Further, as is apparent from paragraphs 111 to 113 of this judgment, the ESM Treaty contains provisions which ensure that, in carrying out its tasks, the ESM will comply with European Union law.

152. It follows that Article 4(3) TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

d) Interpretation of Article 13 TEU

153. Article 13(2) TEU provides that each institution of the Union is to act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

154. The referring court asks whether the allocation, by the ESM Treaty, of new tasks to the Commission, the ECB and the Court is compatible with their powers as defined in the Treaties. It is appropriate to examine separately the role which the Commission and the ECB, on the one hand, and the Court, on the other, will be called upon to play under the ESM Treaty.

i) The role allocated to the Commission and the ECB

155. The ESM Treaty allocates various tasks to the Commission and to the ECB.

156. As regards the Commission, those tasks consist of assessing requests for stability support (Article 13(1)), assessing their urgency (Article 4(4)), negotiating an MoU detailing the conditionality attached to the financial assistance granted (Article 13(3)), monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)), and participating in the meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)).

157. The tasks allocated to the ECB consist of assessing the urgency of requests for stability support (Article 4(4)), participating in the

meetings of the Board of Governors and the Board of Directors as an observer (Articles 5(3) and 6(2)) and, in liaison with the Commission, assessing requests for stability support (Article 13(1)), negotiating an MoU (Article 13(3)) and monitoring compliance with the conditionality attached to the financial assistance (Article 13(7)).

158. In that regard, it is apparent from the case-law of the Court that the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance (see Parliament vCouncil and Commission, paragraphs 16, 20 and 22, and Parliament v Council, paragraphs 26, 34 and 41), provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties (see, inter alia, Opinion 1/92 [1992] ECR I-2821, paragraphs 32 and 41; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-0000, paragraph 75).

159. The duties allocated to the Commission and to the ECB in the ESM Treaty constitute tasks of the kind referred to in the preceding paragraph.

160. First, the activities of the ESM fall under economic policy. The Union does not have exclusive competence in that area.

161. Secondly, the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Further, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM.

162. Thirdly, the tasks conferred on the Commission and the ECB do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties.

163. As regards the Commission, it is stated in Article 17(1) TEU that the Commission 'shall promote the general interest of the Union' and 'shall oversee the application of Union law'.

164. It must be recalled that the objective of the ESM Treaty is to ensure the financial stability of the euro area as a whole. By its involvement in the ESM Treaty, the Commission promotes the general interest of the Union. Further, the tasks allocated to the Commission by the ESM Treaty enable it, as provided in Article 13(3) and (4) of that treaty, to ensure that the memoranda of understanding concluded by the ESM are consistent with European Union law.

165. As regards the tasks allocated to the ECB by the ESM Treaty, they are in line with the various tasks which the FEU Treaty and the Statute of the ESCB [and of the ECB] confer on that institution. By virtue of its duties within the ESM Treaty, the ECB supports the general economic policies in the Union, in accordance with Article 282(2) TFEU. Moreover, it is clear from Article 6.2 of the Statute of the ESCB that the ECB is entitled to participate in international monetary institutions. Article 23 of that Statute confirms that the ECB may 'establish relations … with organisations'.

166. The argument that, since the judgments in Parliament v Council and Commission and Parliament v Council predate the inclusion in the Treaties of provisions relating to enhanced cooperation, the Member States whose currency is the euro should have established enhanced cooperation between themselves in order to be entitled to make use of the Union's institutions within the ESM, cannot be accepted.

167. It is clear from Article 20(1) TEU that enhanced cooperation may be established only where the Union itself is competent to act in the area concerned by that cooperation.

168. However, it is apparent from paragraphs 64 to 66 of this judgment that the provisions of the Treaties on which the Union is founded do not confer on the Union a specific competence to establish a permanent stability mechanism such as the ESM.

169. In those circumstances, Article 20 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

ii) The role allocated to the Court

170. It must be recalled that, under Article 37(2) of the ESM Treaty, the Board of Governors is to decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of the ESM Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with that treaty. Under Article 37(3) thereof, if an ESM Member contests the decision referred to in paragraph 2,

the dispute is to be submitted to the Court of Justice.

171. In that regard, first, it is apparent from recital (16) of the preamble to the ESM Treaty that the jurisdiction which the Court is called upon to exercise under Article 37(3) of the ESM Treaty is based directly on Article 273 TFEU. Under that Article, the Court has jurisdiction in any dispute between Member States which relates to the subject-matter of the Treaties, if that dispute is submitted to it under a special agreement.

172. Secondly, while it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the existence of a special agreement, there is no reason, given the objective pursued by that provision, why such agreement should not be given in advance, with reference to a whole class of pre-defined disputes, by means of a provision such as Article 37(3) of the ESM Treaty.

173. Thirdly, the disputes to be submitted to the jurisdiction of the Court are related to the subject-matter of the Treaties within the meaning of Article 273 TFEU.

174. In that regard, it must be observed that a dispute linked to the interpretation or application of the ESM Treaty is likely also to concern the interpretation or application of provisions of European Union law. Under Article 13(3) of the ESM Treaty, the MoU which is to be negotiated with the Member State requesting stability support must be fully consistent with European Union law and, in particular, with the measures taken by the Union in the area of coordination of the economic policies of the Member States. Accordingly, the conditions to be attached to the grant of such support to a Member State are, at least in part, determined by European Union law.

175. Fourthly, it is true that the jurisdiction of the Court under Article 273 TFEU is subject to the condition that only Members States are parties to the dispute submitted to it. That said, since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU.

176. It follows that the allocation by Article 37(3) of the ESM Treaty of jurisdiction to the Court to interpret and apply the provisions of that treaty satisfies the conditions laid down in Article 273 TFEU.

177. It follows from all the foregoing that Article 13 TEU does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

e) Interpretation of the general principle of effective judicial protection

178. The national court observes, referring to an argument put forward by the applicant in the main proceedings, that the establishment of the ESM outside the European Union legal order may have the consequence that the ESM is removed from the scope of the Charter. The referring court seeks to ascertain whether the establishment of the ESM is thereby in breach of Article 47 of the Charter which guarantees that everyone has the right to effective judicial protection.

179. In that regard, it must be observed that, under Article 51(1) of the Charter, its provisions are addressed to the Member States only when they are implementing Union law. Under Article 51(2), the Charter does not extend the field of application of Union law beyond the powers of the Union, or establish any new power or task for the Union or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it (see Case C-400/10 PPU McB. [2010] ECR I-8965, paragraph 51, and Case C-256/11 Dereci and Others [2011] ECR I-0000, paragraph 71).

180. It must be observed that the Member States are not implementing Union law, within the meaning of Article 51(1) of the Charter, when they establish a stability mechanism such as the ESM where, as is clear from paragraph 105 of this judgment, the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism.

181. It follows from the foregoing that the general principle of effective judicial protection does not preclude either the conclusion by the Member States whose currency is the euro of an agreement such as the ESM Treaty or their ratification of it.

182. In those circumstances, the answer to the second question is that Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude either the conclusion by the Member States whose currency is the euro of an agreement

such as the ESM Treaty or the ratification of that treaty by those Member States.

C– The third question

183. By this question, the referring court asks whether the Member States may conclude and ratify the ESM Treaty before the entry into force of Decision 2011/199.

184. In that regard, it must be recalled that the amendment of Article 136 TFEU by Article 1 of Decision 2011/199 confirms the existence of a power possessed by the Member States (see paragraphs 68, 72 and 109 of this judgment). Accordingly, that decision does not confer any new power on the Member States.

185. Consequently, the answer to the third question is that the right of a Member State to conclude and ratify the ESM Treaty is not subject to the entry into force of Decision 2011/199.

IV – Costs

186. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Full Court) hereby rules:

1. Examination of the first question referred has disclosed nothing capable of affecting the validity of European Council Decision 2011/199/EU 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.

2. Articles 4(3) TEU and 13 TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU to 123 TFEU and 125 TFEU to 127 TFEU, and the general principle of effective judicial protection do not preclude the conclusion between the Member States whose currency is the euro of an agreement such as the Treaty establishing the European stability mechanism 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, concluded at Brussels on 2 February 2012, or the ratification of that treaty by those Member States.

3. The right of a Member State to conclude and ratify that Treaty is not subject to the entry into force of Decision 2011/199.

§65. Portuguese Constitutional Court, Ruling 187/2013, April 5 th 2013, http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187s.html

The Constitutional Court was asked to review the constitutionality of various norms contained in the State Budget Law for 2013:

1. The Constitutional Court declared the suspension of the additional holiday month of salary or equivalent for Public Administration staff (which also applied to the same types of amount payable under teaching and research contracts) to be unconstitutional with generally binding force, because it was in violation of the principle of equality that requires the just distribution of public costs. The Court did not exclude the possibility that, in exceptional economic/financial circumstances and in order to quickly reduce the public deficit, the legislator could lower the income of Public Administration staff, even if such a measure were to lead to unequal treatment compared to persons who earn income in the private economic sector. However, when not matched by equivalent sacrifices on the part of virtually all the other citizens earning income from other sources, the cumulative, ongoing effects of the sacrifices imposed on people who earn income in the public sector represent a difference of treatment for which the goal of reducing the public deficit does not provide adequate grounds. This does instead constitute a breach of the principle of proportional equality, based on the idea that an inequality derived from a difference between situations must be judged from the point of view of whether it is proportional or not, and cannot go too far.

A different treatment for public-sector staff cannot continue to be justified by the idea that pay-reduction measures are more effective than

other possible cost-containment alternatives. Nor can the special employment bond that ties such workers to the public interest serve as grounds for continuing to require them to make sacrifices in the form of a unilateral reduction in their salaries. Penalising a given category of people, in a way that is made worse by the combined effect of this reduction in pay and the generalised increase in the fiscal burden, undermines both the principle of equality with regard to public costs and the principle of fiscal justice.

2. Partial suspension of the holiday month for pensioners

The Court considered that the suspension of the holiday month of pensions for public and private-sector retirees should also be declared unconstitutional with generally binding force, for substantially the same reasons as those given in relation to the salaries of Public Administration workers.

The right to a private or public-sector pension is situated on the same level as the right to a salary. If there is a difference, it is in the sense that pensioners possess a legal position which warrants added protection in terms of the principle that trust must be protected. In their case, we are dealing with rights that have already been constituted, and not future rights. At the moment when a person's professional working life ends and he/she is entitled to start receiving the pension benefit, the pensioner no longer enjoys mechanisms that enable him/her to protect him/herself and to adapt his/her own behaviour to his/her new circumstances. This produces a situation in which there must be increased trust in the stability of the legal order and the maintenance of the rules that serve to define the content of the right to a pension.

The Court recognised the seriousness of the current economic/financial situation and the need to attain the public-deficit goals included in the specific economic policy conditions laid down in the memoranda of understanding between the Portuguese government, the European Union and the International Monetary Fund. However, it was of the view that the different treatment imposed on people who receive pay and pensions that come from public funds, in the form of the suspension of the holiday month, went beyond the limits established by the prohibition on excess where proportional equality is concerned, and that in the case of pensioners the situation of inequality in relation to public costs was even worse.

The imposition of the so-called extraordinary solidarity contribution, which sought to make the reduction in pensions equivalent to that in the monthly pay of public-sector staff, already means that pensioners are experiencing the same fall in disposable income as the latter. The suspension of the holiday month has also further aggravated an already unequal situation, not only in relation to other pensioners whose holiday month was not suspended, but also compared to people with other forms of income, who were only faced with the generalised increase in the fiscal burden applicable to all taxpayers.

3. Contribution payable on unemployment and sickness benefits

The Court declared the norm that provided for a contribution payable on unemployment and sickness benefits to be unconstitutional with generally binding force, because it violated the principle of proportionality.

The Constitution says that workers have a right to material assistance when they involuntarily find themselves in an unemployment situation, and also requires the legislator to provide for forms of material assistance for workers who are ill, in both cases within the context of a social security system. This objective must thus be achieved via the legal regimes that ensure social protection in cases of unemployment and sickness.

It is true that the Constitution does not establish a right to a concrete amount of material assistance, even in the event of unemployment. The scope of the protection provided by a worker's right to material assistance in situations of unemployment or illness does not mean that it is impossible to reduce the amounts of those benefits, unless the reduction is so great that it de-characterises them by making the welfare function they perform – that of replacing earned remuneration – unviable.

In the cases of both the unemployment benefit and the sickness benefit, the new contribution was accompanied by other measures that increased the amount of the payments to which involuntarily unemployed or ill workers are entitled in certain specific situations (the unemployment benefit is now higher when both spouses are unemployed and have dependent children; and the calculation of the reference remuneration used to determine the sickness benefit has been changed to consider total remuneration from the beginning of the reference period until the day before that on which the beneficiary became unfit for work,

thereby taking into account any reductions in income over the course of the reference period).

The ability to fulfil the constitutional programme under which citizens are protected when they are ill or unemployed is dependent on financial and material factors, and it is the legislator's job to make the content of the corresponding social right operable by defining the list of situations in which protection is required.

The fact that the measure before the Court was exceptional and transitory, with the reductions in the sickness and unemployment benefits imposed solely for the current budget year, could lead to the conclusion that the norm was constitutional.

However, the Court's view was that the absence of any safeguard clause meant that in practice it was not impossible for the cash amounts involved to be reduced to a point at which, in some cases, the benefit might fall below the minimum level already established in legislation. Such a solution would violate the principle of proportionality by affecting the beneficiaries in the most vulnerable situations, in that it encompasses social benefits whose function is to replace earned pay a worker has been deprived of and whose amount is supposed to be at least equal to the minimum material assistance already guaranteed by law. The fact is that the Constitutional Court has gradually been recognising the existence of a guarantee of a right to a minimum level of subsistence – a right which it has founded on a combination of the principle of the dignity of the human person and the right to social security in situations of need, as measured against the standard of the national minimum wage (SMN) or the guaranteed minimum salary (RMG).

4. Reduction in remunerations paid out of public funds

The Court did not declare the continued reduction in remunerations paid out of public funds to be unconstitutional.

This is the third consecutive year in which this reduction in the remunerations paid within the scope of the legal public employment relationship has been in effect, and in this respect the 2013 Budget Law simply maintained the norms and reductions set out in its predecessors. The Court recalled its previous jurisprudence, in which it said that the rule under which salaries cannot be reduced is not an absolute one, but rather an infra-constitutional rule. The only absolute prohibition is that neither a public nor a private employer can arbitrarily reduce pay, unless a legal norm allows it to do so. The Court thus rejected the argument that there is a right under which salaries are irreducible – a right that was said to exist in labour legislation, but to have been given the nature of a fundamental right under the open clause in the Constitution which says that fundamental rights do not have to be expressly contained in the Constitution itself, but can also be established in infra-constitutional laws or derived from international-law rules that apply in Portugal.

The Court upheld its previous position (Ruling no. 396/2011) on the argument that the reductions in the pay of public-sector workers are in breach of the principle of equality because they only target people who work for the state and other public-law legal persons, and do not apply to workers who are paid for providing subordinate labour in the private or cooperative sectors, independent workers, or anyone else who earns income from other sources. It concluded that there are legitimate grounds for this differentiation, both because no evidence was presented to refute the position that only pay cuts are capable of guaranteeing a sure and immediate reduction in the weight of public spending, and because where this objective is concerned, people who are paid out of public funds are not in the same position as other citizens. For these reasons the Court felt that the additional sacrifice demanded of this category of persons for a transitory period of time does not constitute an unjustifiably unequal form of treatment.

5. Payment of overtime

The Court decided not to declare the unconstitutionality of a norm that provides for a reduction in overtime payments to public-sector staff.

As we have already said, the Court does not recognise the existence of a constitutional guarantee that salaries cannot be reduced. It said that this guarantee is infra-constitutional, and that the reduction in overtime payments does not breach either the principle of trust, or the principle of equality.

Unlike the extra holiday and Christmas-month payments, additional pay for doing overtime does not possess the habitual or regular nature that typically characterises remuneratory payments in the technical-legal sense.

Inasmuch as overtime pay is variable and unpredictable, because it depends on managerial

decisions that fall exclusively within the employer's sphere of authority, this measure is not in violation of the constitutional principle of trust. The Court considered that the reasons why the measures involving the reduction and suspension of elements of people's pay packets are not unconstitutional to be even more valid here, and that this reduction in overtime payments does not cause damage that can be criticised on constitutional grounds, notwithstanding the fact that the expectation of immutability is actually more consistent and lastingly formed in this particular situation.

6. Extraordinary solidarity contribution (CES) payable on pensions

Nor did the Court find that the norm which subjects pensions to an extraordinary solidarity contribution to be unconstitutional, considering instead that this measure is appropriate and proportional and does not include elements that would constitute a confiscation.

The CES was designed to work in conjunction with other measures to respond to the economic and financial crisis. The combination of a decrease in the revenues of the social security system, a major rise in unemployment and the ensuing increase in expenditure on the provision of support for the unemployed in particular and situations of poverty in general, falling salaries and thus falling social security contributions, and new migratory trends, is all requiring the state to subsidise the social security system. It also means that, within the overall framework of the basic choices available to the political authorities, there is an urgent need to strengthen that system's financing at the cost of its beneficiaries.

The Court acknowledged that, having reached the end of their professional working lives and secured the right to the payment of a pension calculated on the basis of the social security contributions deducted from their incomes during their working careers, retirees are legitimately entitled to expect continuity in the legislative framework and the maintenance of their legal positions. They cannot be required to have made alternative plans for a possible change in public policy that is capable of having negative effects in their legal sphere.

However, in the present case the Court was of the opinion that a para-fiscal contribution to be made by the universe of pensioners is a measure that is appropriate to the goals pursued by the legislator. It also felt that the measure fulfils the principle of need, in that the Court was not aware of any alternatives which, while remaining coherent with the system of which such measures form a part, would simultaneously cause less damage to the holders of the legal positions at stake and serve the public interest to the same extent.

Nor did the Court find the norm to be disproportionate or excessive, bearing in mind its exceptional and transitory nature and the effort the legislator made to ensure that the sacrifice demanded of private individuals is proportional to their income levels.

7. Changes in the Personal Income Tax Code (CIRS)

The Court rejected the suggestion that the norms in the State Budget Law for 2013 concerning a reduction in the number of taxable income brackets, an amendment to the additional solidarity rate, limitations on tax-deductible items, and the creation of Personal Income Tax (IRS) surtax, are unconstitutional.

On the subject of the reduction in the number of tax brackets and the increase in the normal and average rates applicable to each one, the Court held that the system is still sensitive to differences in levels of income. The initial amount of income that is free of tax continues to be proportionally higher for lower incomes, and the degree of progression from one bracket to the next is substantial. Although the changes do represent a certain reduction in this degree of progressivity, the Court did not consider it to be enough to be unconstitutional.

Under the IRS heading, the petitioners also questioned the constitutionality of the reductions in, or elimination of, tax-deductible items (in this case, deductible from the actual amount of tax payable, as opposed to reductions in the taxable income, which would thus only influence the calculation of the latter).

The Court held that the decision as to whether these measures are compatible with the principle of the capacity to pay taxes, which is itself derived from the principle of equality, is included within the scope of the legislator's freedom to shape ordinary legislation.

On the question of whether the IRS surtax is capable of breaching the principles of the unitary and progressive nature of income taxes, the Court felt that when the system is taken as a whole, the norm maintains enough progressivity to avoid criticism in constitutional terms.

The Court also found that the exceptional and transitory nature of the measures – designed as

they are to offer a response to extraordinary public finance needs – means that they are not in violation of the rule that taxes on personal income must be unitary.

8. Difference between the fiscal treatment of income from work and pensions and the taxation of income from capital

The Court declined to pronounce itself on the question of whether the Constitution – and specifically the principle of equality in the distribution of public costs and the principle of fiscal justice – is compatible with the legislator's decision to set rates of tax on income from work and pensions that can exceed 50%, while subjecting capital incomes to a single rate of 28%.

The Court was of the view that such a comparison is not viable. Firstly, because such rates apply to forms of income that are not calculated in the same way; and secondly, because the nature of the rates and the ways in which they operate are different, and it is thus not possible to make a comparison based on their nominal amount. What is more, the rates in question correspond to mechanisms that function on the basis of different logics (progressive vs. proportional), and thus concretely distribute the fiscal burden in different manners: the general rates are based on the concept of personal taxation – i.e. the idea that it is people who are taxed on their income; whereas "liberatory" withholding taxes or autonomous taxes represent the direct taxation of a specific item or amount.

§66. Portuguese Constitutional Court, Ruling 602/13, September 20 th 2013, http://www.tribunalconstitucional.pt/tc/en/acordaos/20130602s.html

General remarks. A group of Members of the Assembly of the Republic asked the Constitutional Court to conduct an abstract *ex post facto* review of norms contained in a 2012 Law that made the third set of amendments to the 2009 Labour Code (CT). These norms addressed a number of issues: hour banks (individual and group); doing away with some forms of compensatory rest; overtime payments; abolishing a certain number of public holidays; eliminating a mechanism whereby the number of days of annual holiday could be increased (as a reward for the worker's assiduity, subject to certain conditions); requisites for dismissing workers because their jobs are eliminated; requisites for dismissing workers on the grounds that they are unsuited to their work; relations between regulatory sources (Labour Code versus collective labour regulation instruments); and payments for working on public holidays.

The norms regarding relations between the CT and IRCTs included those providing for: 1) the nullification of IRCT provisions which say that workers should receive higher amounts in compensation than those which the Labour Code lays down for (a) collective dismissal, and (b) termination of their labour contract; 2) the nullification of IRCT provisions and labour-contract clauses regarding compensating for overtime by attributing additional rest periods; 3) cuts of up to three days in increases in the length of annual holidays provided for in IRCTs and clauses in labour contracts dated after 1 December 2003; 4) a two-year suspension of IRCT provisions and labour-contract clauses on (a) the payment of overtime rates over and above those laid down in the CT, and (b) extra payments for normal work done on public holidays or the award of compensatory rest periods for the same thing, at companies that are not required to suspend operations on such days; and 5) an automatic halving by law of overtime rates if the IRCT provisions governing labour-contract clauses on the matters covered by points 1 to 4 are not revised by the end of the two-year suspension.

The Court began by emphasising that the records of the preparatory work leading up to the Law containing the norms before it for review make it clear that the Law was designed as a response to undertakings in the labour law field made within the framework of the 2011 Memorandum of Understanding on Specific Economic Policy Conditionality (MUSEPC), with a view to promoting the economy. The legislator was also seeking to move towards fulfilment of the obligations undertaken in the Commitment for Growth, Competitiveness and Employment (CCCE) that was signed in 2012 by the government and the majority of the social partners with seats on the Standing Commission for Social Concertation (CPCS).

From the perspective of its author (the government), this reform of the CT is of fundamental interest if workers are to be given a labour market with opportunities that are more numerous and more diverse. The concrete

measures approved by the Assembly of the Republic primarily entailed making the labour law more flexible, with a view to restraining salaries, reducing costs linked to work done outside normal hours, making the regimes governing suspending working or reducing staff numbers more suited to the vicissitudes of both the economic cycle and the employer's production cycles, and modifying the preconditions for dismissing workers on objective grounds (dismissal because the worker's job is eliminated, and dismissal because the worker is unsuited to the work).

1. Individual and group hour banks

Hour banks are part of a range of measures intended to increase the flexibility of the ways in which working time is organised, by counting that time in average terms with reference to periods of more than a day or a week. They are working-time organisation mechanisms that are different from the weekly scheme based on eight hours a day or forty hours a week, and make it possible to match working hours to companies' needs. The resulting increases in the hours worked in a given day or week do not count as overtime and are not paid as such. Nor can the worker give what the Labour Code classifies as 'a reason the employer is required to accept' in order to justify refusing to work them – something he/she could do if they were overtime. By creating hour banks, the legislator sought to address the additional cost of overtime, the limitations on its use, and the varying and unpredictable nature of production cycles. The format was first introduced in the 2009 Labour Code, and in that original version could only actually be implemented as part of an IRCT.

In almost every case the extra hours worked in one period are compensated for by a correlative reduction in the hours worked at another time, within a fixed reference period that cannot exceed twelve months. As a rule, a worker can work more hours on a given day or in a given week, on condition that he/she works less hours on another day or in another week and the result is that the average for a predefined period is at most eight hours a day and forty hours a week. The employer can use this 'bank account', in which it and the worker have a credit or debit balance in hours, under the terms and conditions laid down in a collective or individual instrument to require the worker to work more or less than the standard number of hours in the company's formal work schedule, without having to change the latter each time.

The only thing the law requires is that the worker be given the amount of advance notice of both the periods in which he/she is to work more and those in which he/she is to work less – dates that it is up to the employer to decide – set out in the applicable hour-bank or collective labour agreement.

The 2012 Law permits three hour bank formats: an hour bank created by an IRCT (this was the system that already existed); the individual hour bank (created by *ad hoc* agreement or prearranged in the individual labour contract between the employer and the employee); and the group hour bank (an extension of one of the other two regimes, but applicable to a group of workers within a company).

The Court recalled that the MUSEPC already called for reforms of the regimes governing working hours in the shape of new, more flexible formats.

The CCCE (2012) said that it was necessary to mould the regimes in ways that permit a better use of resources, but safeguard the existence of both rest periods in general – particularly as regards mandatory daily and weekly rest – and an annual period of paid holiday.

An individual hour bank can be created by agreement between the employer and the worker. The question that was brought before the Court in this respect concerned the legal presumption that if an employer proposes the creation of such a bank, the worker is deemed to accept it unless he/she actually opposes it in writing. This presumption of agreement on the part of the worker is thus based on attaching value to the latter's silence (or inaction), which is deemed to constitute a declaration of acceptance.

In this respect the Court followed its earlier jurisprudence, which says that while in general silence does not possess declaratory value, this does not mean that the law cannot give it such a value if the legislator takes the view that it is reasonable to impose a duty to respond.

The norm does not provide for a unilateral imposition of the individual hour bank, pure and simple; it does allow the worker to oppose the bank in writing and by a certain deadline.

The Court considered that although there are real obstacles that can make it difficult for the worker in a labour relationship to enjoy a true freedom of decision, a requirement for express

consent would not eliminate or significantly lessen the factual constraints on him/her.

The Court also said that the nature of the individual hour bank could in itself ensure an availability of free time which would essentially foster the fundamental rights that protect workers' personal and family lives.

This legislative option falls within the scope of the legislator's right to shape legislation.

The question with regard to the group hour bank concerned the fact that an employer can unilaterally decide to impose such a bank on workers who have not consented to it. This can be done by extending an hour bank that is already provided for in an IRCT and already encompasses 60% of the workers in a given team, section or economic unit, even when a particular worker who opposes it is not a union member, or is a union member but his/her union is not a party to that IRCT; and the employer can also impose the bank by extending individual agreements with 75% of the other workers in the unit, even if the worker in question expressly refuses it.

The group hour bank regime is designed to permit the implementation of this working-time organisation format beyond the universe of labour relations covered by an IRCT that allows hour banks, thereby making it possible to overcome obstacles derived from non-union-membership or refusals to accept individual hour banks.

The petitioners to the Court argued that this type of hour bank could be imposed on workers who have expressed their refusal of it; and that a unilateral extension by an employer of an hour bank that is provided for in a collective labour agreement (CCT) to workers who do not belong to a union, or who do belong to one, but that union is not a party to the agreement, constitutes a breach of the principle of the freedom to belong to a trade union or not.

The Court considered that it is justified for the group hour bank regime – which says that if a majority of workers are willing to accept a flexible working-hour system, this prevails over the specific situations of individual workers – to seek to ensure a practical solution to conflicting interests. The possibility of imposing this regime is underlain by an idea of solidarity that justifies subordinating individual interests to the collective interest, in articulation with the interest in ensuring good business management. In this situation the collective principle and the principle of the prevalence of the interests of good management are more important than the individual interests of members of a given working team – a prevalence that is reflected in the advantages to be gained from making working time more malleable in ways that match management needs. The principle of safeguarding the interests of good management provides the grounds for the various rules which, subject to certain limits, ensure that the company's position prevails over a negotiated agreement. The constitutional bases for this are the freedom of private initiative and the freedom to manage private enterprises.

For it to be permissible for a scheme for modulating working times to be applied to a set of situations in which individuals provide their labour and which are especially linked to one another, it must be possible to make a judgement that there is a need for a functional adaptation that must also be based on management criteria.

The group hour bank (like the other mechanisms for increasing flexibility) is shaped by a rationale that justifies the option which the law makes available to the employer and under which the latter can unilaterally require certain workers to work within the framework of a working-time modulation scheme that they had no part in defining, or may even have expressly opposed.

The Court was of the opinion that this norm does not even interfere with the negative dimension of the freedom to choose whether or not to belong to a trade union.

In the case of the group hour bank, workers are not directly encompassed by the efficacy of collective labour agreements entered into by trade unions to which they do not belong or in relation to which they have not exercised their right to choose. The concrete application of this regime is instead based on the employer's power to direct, subject to certain preconditions and assumptions that are laid down by law.

The Constitution of the Portuguese Republic (CRP) also admits the possibility that the ordinary law can, when based on reasons with suitable material grounds, expand the scope of the personal application of collective agreements to workers who are not members of the trade unions that signed the agreements in question. There is no doubt in constitutional terms that an individual worker can be bound by a collective labour agreement founded on a collective autonomy, without the need for him/her to specifically accept that instrument.

The presumption that workers are in favour of the implementation of the group hour bank regime is not an absolute one. The law imposes substantiated limits on the right of workers to collective labour agreements. The Labour Code says that workers who are covered by a collective agreement which says that such a regime is not permissible, and workers who are represented by a trade union which opposed the ministerial order extending the collective agreement in question, are excepted from this presumption.

The Court admitted the possibility that a number of other issues might also be at stake:the right to rest (given the existence of biological cycles that affect physical and intellectual tiredness, which mean that concentrating work into a given period of time is not arithmetically compensated for by a correlative reduction in time worked later on); the reconciliation of work and family life; and minimum fulfilment of the right that work be organised under socially dignifying conditions, in such a way as to permit personal self-fulfilment. It considered that these limitations on the rights of workers who have not adhered to, or are opposed to the concrete implementation of, the group hour bank regime are indispensable to the operationalisation of this working-time format, inasmuch as it is only practicable when applied to the whole of a given organisational unit. When this uniformity is not necessary, employers can always resort to less intrusive formats based solely on collective regulations or individual agreement.

The importance of the preconditions for the exercise of the above option on the employer's part is linked to the dimension 'representativeness of workers' interests', which means that this working-time modulation regime cannot be unfavourable to the workers it covers when they are taken as a whole. One must conclude that if a collective agreement which encompasses 60% of the workers in question opts for the possibility of a solution of this kind, it recognises that that solution is in the workers' overall interest; and the legislator took the stance that, in cases in which no such agreement is applicable to at least 60% of the workers, the fact that 75% of them accept their employer's hour bank proposal is sufficient evidence that the proposed agreement is not unfavourable to the workers' interests in overall terms. In both cases the law requires the employer's proposal to receive very substantial support from either the workers it is going to cover, or the qualified representatives of that same universe of workers.

What is at stake here is the fulfilment of interests which, at a given moment in time, are deemed to prevail over rest and family life – interests which can, for example, be those represented by the need to ensure the company's economic viability and thus the continued existence of the workers' jobs and working conditions.

From a perspective of a fair balance in the sacrifices imposed on workers, the Labour Code itself provides for maximum daily, weekly and annual limits in the increases in working hours, and dispenses workers in the most vulnerable situations (women who are pregnant, have recently given birth or are breastfeeding; minors; and, in certain cases, workers who are disabled or suffer from a chronic illness, and student-workers).

Parenthood (the existence of dependent minors) also implies dispensation from working under flexible working-time regimes.

The Court held that these limitations on the individual rights of workers who do not directly or indirectly consent to the implementation of the group hour bank regime are merely those needed in order to ensure the exercise of the employer's power to direct in the common interest of the workers in question, and that, in their own right and because they do not represent a more damaging sacrifice than that which might result if one where not to consider the interests which the regime protects in this way, the limitations are not excessive.

2. The elimination of compensatory rest periods; overtime payments

The petitioners questioned the constitutionality of the CT norms that did away with certain forms of compensatory rest and halved the extra payment for overtime and for work done on public holidays.

They also questioned the norm that abolished the compensatory rest due for work done on normal working days. The 2012 Law only maintained the right to paid compensatory rest for work done on mandatory weekly rest days and during the daily rest period, and for normal work done on public holidays at companies that are not required to close on such days (albeit in the latter case, the employer may choose to give extra pay as an alternative).

The increases in hourly pay for overtime work were halved, and the possibility of IRCTs waiving increased rates for overtime was extended. The petitioners calculated that this

reduction in overtime payments means that workers are no longer paid for an annual equivalent of 93.75 hours, which is a significant drop in salary and the value of their labour.

These measures were designed to reduce the cost of overtime, and in introducing them the legislator stuck closely to the terms of the MUSEPC and the CCCE.

Overtime means work "done outside working hours", and the notion excludes other situations related to the setting of work schedules (e.g. time a worker uses to go on vocational training). Overtime represents an increase in the time in which a worker is available to his/her employer, to the prejudice of his/her right to daily rest. The conditions under which an employer can require people to work overtime are linked to abnormal management needs and situations of *force majeure*. Resorting to overtime is conditioned by a range of legal requirements. If a certain set of those conditions is in place, workers must obligatorily do overtime unless they give a reason which the law says the employer is required to accept for dispensing them; certain categories of worker are prohibited (minors) or dispensed (workers who are pregnant, have a child below the age of one, or are disabled) from doing overtime; and the amount of overtime is subject to both daily and annual limits.

In certain cases and subject to certain limits, overtime entitles the worker to compensatory rest and increased pay. The Court considered that the legislative amendments in question reduce both salary and the value attributed to work, but that halving the increases in pay due for overtime is not something that in its own right is capable of harming the constitutional right to be paid for work in accordance with the latter's quantity, nature and quality. This is because, despite the major reduction, work done as overtime is still treated differently, and the definition of remuneratory differentiation is a matter that the Constitution necessarily leaves to the ordinary legislator.

The Court was also of the view that there is no place here for a finding of unconstitutionality on the grounds that the norms breach workers' rights to rest, the reconciliation of work and family life, and/or the protection of the family. Paid compensatory rest still exists in the situations that most deeply undermine the right to rest. The legislative amendments that were questioned by the petitioners do not expand the legal grounds on which employers can require people to work overtime (although the number of situations that are deemed to fall within the concept of overtime has been cut); nor have the exceptions to the obligation to work overtime been restricted, and the daily and annual time limits on the amount of overtime worked have not been raised.

The Court accepted that doing away with compensatory rest is clearly one more measure designed to reduce labour costs, inasmuch as the time spent taking compensatory rest is paid. However, in the cases in which overtime pay has been reduced, it is still the object of quantitative differentiation in the form of a higher rate, albeit the amount of the increase is now less. The Court also pointed out that the new legal regime governing compensatory rest is not imperative – both IRCTs and individual labour contracts can establish terms that are more favourable to workers.

The Court therefore considered that the first line of defence of workers' rights to rest, the reconciliation of work and family life and the protection of the latter – a line based on the exceptional nature of the requirement to work overtime, the time limits on working it, and the possibility for workers to be dispensed from it for reasons linked to their condition and personal or family life – has been preserved and that the new rules still ensure workers are not in situations in which they must be unrestrictedly available to provide their employer with work outside the stipulated time schedule.

3. The abolition of mandatory public holidays and of the increase in the annual holiday period as a reward for the worker's assiduity

The question here was the abolition of four mandatory public holidays and of a mechanism whereby the number of days of annual holiday could be increased (by up to three days, as a reward for the worker's assiduity).

Mandatory public holidays are significant elements in the labour relations field, inasmuch as any activity that is not permitted on Sundays must also be suspended on such days.

The Court said that the idea behind stopping work in such cases is to make it possible to collectively celebrate dates or events that are considered important. Abolishing mandatory public holidays is not an offence against workers' rights, because the purpose of creating public holidays is not directly to protect workers' rights, but rather to pursue public objectives on the social, political, religious or cultural levels. This is not a right which the worker possesses in relation to his/her employer (right to rest), but a duty that employers have to

the state – a duty that is in turn articulated with a subjective public right on the part of workers to have free time in which to take part in the commemoration in question.

The Court agreed that to eliminate public holidays is to restore working on days when work used to be suspended, and that this means that more days are worked without any corresponding increase in pay. However, on the legal level this effect cannot be attributed to the legislative measure that abolished the holidays. Pay is not indexed to a fixed or minimum number of annual public holidays. To be precise, calendar days (except for weekly rest days and annual holidays) are *ab initio* working days, unless the law suspends work because it says that the day is a public holiday. It is up to the legislator, in pursuit of the public interest, to determine which days are public holidays.

Nor was there any violation of the principle of trust, because there is no expectation deserving of legal protection – let alone a right – that the legal list of mandatory public holidays will never change.

Turning to the abolition of the norm that used to increase the length of an assiduous worker's annual holiday, the Court recalled that this legal mechanism was not directly intended to increase the duration of the holiday period, but rather to fight absenteeism by linking a lack of absences from work to the benefit of longer holidays.

The 2012 legislator decided to do away with this incentive, probably in favour of the economic goals that have led to other amendments to the CT and are designed to increase productivity levels in Portugal.

These are choices that imply making considered judgements that fall within the scope of the legislator's power to act and whose correctness it is not the Court's place to assess. Besides which, there is nothing to stop collective agreements or individual contracts from establishing holidays that are longer than the legal minimum.

Given that the issue here is not a change in the minimum duration of the annual holiday period, but rather the elimination of a regime under which that duration was increased in the light of a worker's assiduity, the 2012 amendment does not fall within the scope of the protection afforded to the right to holidays or the right to rest. It is therefore not unconstitutional.

4. Dismissal on the grounds that the worker's job is being eliminated

The format under which a worker can be dismissed because his/her job is eliminated is invoked at the employer's initiative and is justifiable when it is due to market, structuraland/or technological reasons that are affecting the company. The norm before the Court addressed the requisites for this form of dismissal. The possible reasons were: a) market-related: the company is reducing its activities due to a predicted fall in the demand for goods or services or to a supervening practical or legal change that is making it impossible to place those goods or services in the marketplace; b) structural: an economic/financial imbalance, a change of business, a restructuring of the company's production organisation, or the replacement of dominant products; and/or c) technological: changes in manufacturing techniques or processes, the automation of production, control or loading equipment, or the computerisation of services or the automation of means of communication.

The questioned norm said that when faced with multiple jobs with exactly the same functional content, it was up to the employer to define relevant, non-discriminatory criteria for deciding which individual employee's position should be eliminated. The modifications made by the 2012 Law were already set out in the 2011 MUSEPC.

The Court emphasised that the regime governing dismissal because a worker's job has been eliminated rests on two fundamental decisions that must be taken by the employer: the decision to abolish a position, which must necessarily be based on the abovementioned market, structural and/or technological reasons; and the decision to dismiss a particular worker. In order for the employer's final decision to terminate a specific employment contract to be lawful, the grounds and requisites which the law imposes for each of these two decisions must be in place.

This regime must remain within the bounds laid down by the principle of job security, whose negative aspect precludes dismissal without just cause or for political or ideological reasons.

As part of the process of making the constitutional concept of just cause legally operable, the Constitutional Court has taken the stance that this concept can encompass a range of objective facts, situations or circumstances and is not limited to the notion of disciplinary just cause.

The existence of fault on the part of the worker – i.e. linked to some situation in which he/she is

the object of ethical/legal censure – is not a precondition for dismissal for objective reasons. The termination of the labour bond is not derived from a fact that the worker ought to have avoided or prevented; nor can it be laid at the employer's door. It must instead be objectively impossible for the job to continue to exist, and in order for this impossibility to exist, the substantive and procedural regulations governing this type of dismissal for just cause must be different from those applicable to disciplinary just cause, in a way that safeguards the requirements derived from the principle of proportionality. The regulations applicable to this format must prevent dismissals for which there are no justifiable reasons or which are *ad nutum*, including those based merely on the enterprise's convenience.

The constitutional concept of just cause includes both subjective just cause (disciplinary situations in which fault exists), and objective just cause, in which the situation is one in which the employer cannot be required to continue the labour relationship.

In addition to prohibiting reasons for dismissal which the Constitution does not consider just, the fundamental right to job security also requires the state to act by issuing suitable procedural rules for the protection of the right itself. The constitutional prohibition on dismissal without just cause can be breached by both legal provisions that allow inappropriate grounds for dismissal, and provisions that establish rules which do not do enough to safeguard the workers' positions.

In the present case, the challenged norms regulated aspects of the regime that were directly related to the employer's decision to dismiss a specific employee.

With regard to the criterion for selecting which job to eliminate – which is the same thing as choosing which worker to dismiss – the new text of the norm replaced a seniority-based criterion with sub-criteria that were defined by the employer and had to be relevant and non-discriminatory in the light of the objectives that underlay the elimination of the position.

When the legislator takes the trouble to set preferential criteria for choosing which job to eliminate in situations involving multiple jobs with the same functional content, the goal is to ensure that the dismissal is objective. The idea is to prevent employers from being able to use the excuse of objective reasons linked to the enterprise in order to get rid of an employee whose contract it wants to terminate, but in relation to whom it does not have subjective just cause.

The Court said that whereas in the pre-2012 version of the Law, this individualisation of the job that is to be eliminated is subject to a clearly defined legal provision based on a purely objective type of criterion (seniority and the person's level within the same professional category), the new norm delegated the task of defining the criterion(a) that must govern the selection of which worker to dismiss to the employer, who was only given a number of directives to follow.

This means that it was now the entity with the interest in dismissing someone that formulated the criteria for justifying that dismissal. However, it is only if the law rigorously lays down parameters which in turn impose conditions and limits, that one can make a subjective choice impossible and also ensure that a court can effectively control the dismissal's validity by objectively verifying the reason for it and that the decision is a fit one, and consequently determine whether the dismissal is legal or illegal.

The new norm only required the criteria for choosing which job is to be eliminated to be relevant and non-discriminatory, and that these characteristics be weighed up against the objectives underlying the abolition of the position in question.

The Court found these concepts to be vague and indeterminate and lacking the efficacywhich would make it possible to adequately set goalposts within which the employer must make its choice, and which would thus prevent the employer from being able to arbitrarily decide which worker to dismiss.

The 2012 Law maintained an existing norm which says that it is a general requisite for a person to be dismissed on the grounds that his/her job is being eliminated that it must be impossible to maintain the labour relationship between him/her and the employer by giving him/her another position. However, whereas the old version thus requires the employer to show that it does not have another position which is compatible with the dismissed worker's professional category and which is open for the worker to occupy, the new text said that this requisite was automatically fulfilled when the employer showed that it had adopted criteria that were relevant and non-discriminatory in the light of the objectives underlying the abolition of the position.

In other words, in order to determine that it was impossible for the labour relationship to continue to exist, in cases where there are multiple jobs with the same functional content the 2012 Law used the same criterion as that to which it subjected the choice of the position that was to be abolished. In practice the new text revoked the rule that imposes a duty on the employer to offer the worker an alternative job at the company, if one exists. The regime which the 2012 Law sought to replace ensures that satisfaction of the employer's interest in doing away with a position is compatible with the principle of job security, in that the elimination of the job does not automatically entail termination of the labour bond, because the employer is obliged to propose a change of position if there is one at the company which the worker in question can occupy. The Court said that this was the balance that would be lost as a result of the new text of the norm.

The regime that was challenged by the petitioners made it possible to dismiss workers within a framework of circumstances in which the company has another vacant position which the worker who would otherwise be dismissed might want to take up – circumstances in which doing away with one job would not in itself preclude the preservation of the worker's employment. The Court held that by freeing the employer from the obligation to propose a different position, the new regime caused unnecessary and excessive harm to the right to job security and was therefore unconstitutional.

Moreover, this unconstitutional flaw was worsened by the inappropriate nature of the criterion which the legislator adopted to replace the employer's duty. This new criterion invoked concepts that were so indeterminate and vague that they were effectively equivalent to the absence of any legal criterion at all, with the employer free to choose them at will.

5. Dismissal on the grounds of unsuitability

The Court was asked to review the constitutionality of a norm that sets out the requisites for the format under which employees can be dismissed because they are not, or are no longer, suited to their work. This format consists of termination of the labour contract by the employer on the grounds that the worker has become unsuited to his/her job. Existence of this kind of supervening unsuitability is demonstrated by the way in which the worker performs his/her functions, and must be such that it makes it impossible for the labour relationship to continue. Manifestations include: (a) an ongoing drop in productivity or quality; (b) repeated malfunctions in the resources allocated to the worker's position; and/or (c) risks to the health and safety of the worker, his/her colleagues and/or third parties. Such situations can come about when changes have been made to the worker's job or job station or, if this is not the case, if there has been a substantial change in the worker's performance and it is reasonably foreseeable that this change will be permanent.

The 2012 Law provides for two types of dismissal due to unsuitability: one represents the traditional situation, in which a worker becomes unsuitable after changes have been made to his/her job or job station; the other type is new (the petitioners and some authors call it "ineptitude" rather than unsuitability) and entails a substantial change in the worker's performance that is reflected in a lasting fall in productivity or quality, regardless of whether his/her job or job station has changed. The new norm did away with two requisites for dismissal due to unsuitability following changes to the employee's job or job station: that the employer not have another vacant position that is compatible with his/her professional qualifications; and that the unsuitability not be derived from a lack of health and safety conditions at work for which the employer was responsible. The petitioners also questioned the constitutionality of the revocation of these preconditions for dismissal on the grounds of unsuitability.

The petitioners argued that the grounds for this dismissal format based on unsuitability and without reference to changes in the employee's job or job station were subjective (the worker is personally responsible for them) and therefore outside the parameters which the Constitution admits in relation to dismissals for objective reasons. They said that this was because in such situations it is not possible to adequately determine the concrete causes of the dismissal, or for a court to control whether it is objectively impossible for the labour relationship to continue to exist, and that this meant that the new norm permitted unjustified and arbitrary dismissals.

On the question of the constitutional conformity of the format under which a worker can be dismissed because he/she is unsuited to his/her job and this is revealed by a substantial and permanent change in the way in which he/she performs his/her functions, the Court recalled that although the legal concept of unsuitability concerns an objective, definitive fact in relation to the worker, it is not the kind of subjective impossibility which would mean that the labour

contract would have to end under the general provisions of contract law.

The fact that this substantial change in the worker's performance is not a consequence of alterations in the context in which he/she works means that it is deemed to be linked to the way in which he/she does his/her job, as reflected in a range of objective elements that reveal a professional performance which possesses less quality or produces less output, but in which there is no fault on the worker's part.

The cause that underlies this dismissal format is objective, in that the decision to dismiss is based on facts linked to the worker's behaviour. The requisites imposed by the norm are fulfilled if the worker behaves in ways that lead to an ongoing reduction in the quality or productivity of his/her work. The reason for dismissal is related solely to the worker and the way in which he/she performs his/her functions, and the only requisites are that the unsuitability demonstrated by the poor results of his/her performance at work cannot be attributed to fault on his/her part (when another format would be applicable) and that it is reasonably foreseeable that this unsuitability will be permanent.

This combination of poor results and a lack of fault is an objective one. What is at stake here is a situation in which it is deemed that the employer cannot be required to maintain the labour relationship. From this perspective it is useful to weigh up the fundamental rights that are in conflict here – the right to job security on the one hand, and the right to free economic initiative on the other.

In the light of this conflict, an employer cannot be required to maintain the labour bond with a worker who is unable to work with the equipment provided to him/her, who endangers his/her safety or that of others by the way in which he/she works, or whose productivity falls drastically and permanently.

From all this, the Court concluded that dismissal on the grounds of unsuitability demonstrated solely by a reduction in the quality of the work done as reflected in either of the above situations and in cases in which it is reasonable to predict that that reduction will be permanent is not unconstitutional. There is no violation of the prohibition on dismissal without just cause, because these grounds for dismissal fall within the possible scope of the criterion 'just cause', whose definition the constitutional legislator has left to the ordinary legislator.

The substantial and procedural requisites which the Labour Code imposes in terms of the relevance of these grounds for dismissal also make it possible to objectively gauge just cause in controllable terms, and the worker is given the opportunity to both defend him/herself and correct his/her performance.

However, on the absence of an alternative job as a requisite for dismissal to be permissible, the Court said that the finding of unconstitutionality with regard to the norm that revoked the requisite that there be no other available job also applied to the question of dismissal on the grounds of unsuitability.

If one can say that in order not to be required to keep an employee whose unsuitability has been revealed following changes in his/her job or job station, it is essential that the employer not have another position at the company that is compatible with the worker's professional qualifications, then the same conclusion must be reached with regard to a situation in which the worker's unsuitability becomes apparent regardless of any alterations in the working environment. The criterion for not requiring the employer to give the employee another job is that it be impossible in practical terms for the labour relationship to continue to exist, and this criterion is the same in both situations. The issue here is the collision between the right to job security and the right to free economic initiative, and the former can only justifiably be sacrificed to the strict extent needed to safeguard the latter. The 'prohibition on excess' aspect of the principle of proportionality means that if is there is another job available at the company that is compatible with the worker's professional qualifications and present ability to work, then he/she must be offered that position.

This requisite is not fulfilled if such another job does exist. The Court thus said that dismissal on the grounds of the worker's unsuitability can only occur if no alternative position is available.

6. Questions of constitutionality regarding relations between sources of regulation

The petitioners also alleged a violation of the right to enter into collective labour agreements and the ensuing unconstitutionality of the norm regarding relations between sources of regulation (CT and IRCTs) that nullifies, reduces or suspends certain IRCT provisions.

They argued that this precept addresses matters which the Constitution reserves to collective labour agreements and on which the ordinary legislator cannot legislate because they form

part of the essential core of the right to enter into such agreements, which is a fundamental right that pertains to workers. They considered that inasmuch as the revocation of clauses in collective agreements by an imperative law constitutes a limitation on collective bargaining and is thus a restriction on that fundamental right, in order for it to be valid it would have to comply with the principles of proportionality, appropriateness and necessity, in conformity with the requirements which the Constitution imposes on any law that restricts fundamental rights, freedoms and guarantees.

The petitioners also argued that by reducing terms and conditions that had been validly agreed in current collective labour agreements or declaring them null and void, the norm in question breached the principle of the protection of trust that in turn results from the principle that legal certainty must be protected, both of which are an inseparable part of the implementation of the principle of a democratic state based on the rule of law.

The Court pointed out that under the Constitution workers are the holders of the right to enter into collective labour agreements, albeit they can only exercise it via trade unions. This exercise is guaranteed "under the terms laid down by law". Because this guarantee is founded in the Constitution, the fact that the details are left to "the terms laid down by law" cannot mean that the guarantee itself is placed in the hands of the ordinary legislator. The law must at least guarantee that an ability to enter into collective agreements be reserved to workers, because this is a right that is directly derived from the Constitution and not from the ordinary law.

Portuguese constitutional jurisprudence has leant towards the interpretation that the right to collective agreements is a right which it is up to the ordinary law to format, but that in doing so the latter can neither empty the right of its content, nor itself decide every aspect of labour law in ways that cannot be opted out of by collective agreements. The ordinary law can only regulate the right to collective bargaining and agreements in such a way as to delimit it while simultaneously leaving a minimally significant range of matters open to collective negotiation. Now if the ordinary law cannot delimit the untouchable core of the right to enter into collective labour agreements, because otherwise one would be inverting the normative hierarchy and emptying the constitutional precept of its legal force, then one must interpret the elements provided by the Constitution as meaning that the CRP entrusts the defence of workers' rights and interests to the trade unions and lays down the list of both those rights and the commands it gives the state with regard to the terms and conditions governing labour relations.

In its jurisprudence the Constitutional Court has already addressed various matters linked to the concrete implementation of the area that is reserved to collective agreements. Over the years it has found some proposed norms unconstitutional and others constitutional.

The question of constitutionality under analysis here was whether the 2012 Law norms on relations between regulatory sources (CT and IRCTs) that remove various matters from the ambit of collective labour agreements do or do not respect that minimally significant set of matters, which the ordinary law is required to leave open to collective bargaining. The norms make certain aspects of the labour rules that are laid down in the 2012 Law mandatory, with the new legal provisions taking the place of those contained in IRCTs that were entered into before that Law entered into force. The Court also had to gauge whether the legal certainty and the protection of trust derived from the principle of the state based on the rule of law were safeguarded, inasmuch as in the new precept the legislator sought to change labour terms and conditions that had been validly agreed as part of collective agreements that were currently in effect, before those agreements reached their normal term – i.e. that agreed by the parties or imposed by law.

In these norms, the legislator nullified, suspended or reduced the scope of IRCT provisions (that were more favourable to workers than the equivalent legal provisions) on various matters.

By nullifying or reducing the efficacy of provisions that resulted from collective bargaining, the norm definitively terminated their effect, or in the case of those it suspended, rendered them temporarily ineffective.

The legislator's objective was to ensure that the legislative amendments it made were effective and uniform by preventing the continued existence of earlier, more favourable regimes included in collective agreements.

All the norms in the 2012 Law that were before the Constitutional Court in this case were intended to prevail over the IRCT provisions on the same matters. However, the Court highlighted the fact that not all of the Labour

Code norms whose efficacy the 2012 Law sought to ensure are imperative.

The Court recalled that, as an expression of collective autonomy, the law recognisesIRCTs to be a specific source of law governing labour contracts, and that the limits on the content of IRCTs include imperative legal norms contained in the CT. It also noted that legal norms can possess different degrees of imperativeness.

It is possible for the legislator to establish new imperative legal norms that are incompatible with the content of earlier IRCTs, thereby undermining the latter's continued existence. In order to conclude that an IRCT provision is no longer valid, it is necessary for the law to unequivocally determine that because its new content seeks to pursue values that are in the public interest, the new norms it lays down also constitute limits on collective agreements, including those that have already been reached in earlier IRCTs. In such cases the latter's intrinsic fitness to produce the effects they are designed to have is affected in ways that are commonly known as 'supervening invalidity'.

6.1. On the subject of the compensation for collective dismissals and the amounts of and criteria for defining the compensation due for the termination of labour contracts, the 2012 Law has nullified IRCT provisions for amounts above those set out in the Labour Code when the IRCT in question took effect before the new Law.

It also says that IRCTs subsequent to that date must comply with the CT in this respect, failing which they are null and void from day one.

The Court was of the view that it is not possible to exclude the compensation due for the termination of labour contracts from the scope of collective bargaining, but that, given the interests in play, nor can one exclude the legislator's competence to set limits – higher or lower – on the amounts payable under this heading. It said that in the concrete case before it, the issue was the delimitation of the material scope of the exercise of the right concerned, and not an intrusion into the so-called reservation of certain matters to collective labour agreements.

Because what was at stake is only the setting of goalposts and not the total elimination of the exercise of collective autonomy in the field of the termination of labour contracts, the regime governing which tends to be imperative due to the fact that it possesses guarantee-based characteristics, the Court held that the norm does not go beyond the simple regulation of the right to enter into collective labour agreements and does not impinge on the scope of the protection afforded to the latter.

Looking at this question from the viewpoint of a norm which restricts fundamental rights, freedoms and guarantees and which, as such, must comply with the requirements imposed by the Constitution in that respect, with any restrictions limited to those needed to safeguard other constitutionally protected rights or interests, the Court considered the norm to be justified because it only seeks to equalise the financial compensation that employers must pay to workers when the latter's labour contracts are terminated on certain grounds. This equalisation is warranted from the perspective of both the costs for the enterprises and the benefits for the workers, given that it ensures that the reduction in compensation deemed appropriate in the 2012 Law applies to all identical situations of this kind.

6.2. On the 2012 Law norms that revoked the compensatory rest due for overtime worked on normal working days, complementary weekly rest days or public holidays, and the increases in the length of annual holidays, the Court said that these matters do not come within the scope of an imperative regime. There is nothing in either the 2012 Law or the Labour Code that prevents the terms of IRCTs entered into after the 2012 Law came into effect from being more favourable to workers.

The combination of the fact that the results of past collective bargaining would no longer count in the future and this openness in relation to new IRCTs, above all in domains that fall within the scope of the protection afforded to the right to enter into collective labour agreements as a result of its links to workers' rights – particularly the rights to rest, the reconciliation of work and family life and the protection of the family – makes it clear that that the legislator acted in such a way as to cut this protective scope. Without prejudice to the fact that it continues to recognise the right to compensatory rest and bonuses in the form of increases in the length of holidays, the 2012 Law effectively waived earlier IRCTs by revoking this part of their provisions. The CT only sets minima for the rest designed to compensate for overtime which prevents the worker from taking daily rest or which is worked on mandatory weekly rest days, and IRCTs are not precluded from establishing rest periods that compensate for overtime done under other circumstances. There is thus nothing imperative that would limit the permissible

content of IRCTs and would justify their nullity, be it supervening or from the start.

The Court also took the stance that revoking provisions of earlier IRCTs would condition future collective agreements that address the same matters, because it would eliminate the point of reference that serves as their starting point. The CT says that a mere succession of agreements cannot be used to reduce the overall level of protection available to workers, and that the rights derived from an agreement can only be reduced by a new agreement whose text expressly shows that its overall content is more favourable.

The law models the right to enter into collective agreements in the material domains addressed by the norms whose constitutionality was being reviewed by the Court under this heading. The norms meant that matters concerning compensatory rest for overtime done on normal working days, complementary weekly rest days or public holidays and up to three-day increases in the length of annual holidays that were freely agreed by workers and employers before the entry into effect of the 2012 Law, ceased to be valid, and that the negotiations for and entry into new collective labour agreements on these matters should not consider the threshold those provisions had already reached in earlier agreements.

The Court emphasised that the solution adopted by the Law was not fit for the purpose behind the standardisation of the applicable collective-agreement regimes – that of achieving a reduction in the costs associated with the factor 'labour'. By entering into new collective agreements, workers and employers could once again agree exactly the same solutions (or even more favourable ones) as the ones that the 2012 precepts sought to do away with. The Court said that this possibility showed that achieving the law's proposed goal did not depend on the efficacy of the legislative measures in question, but rather on the actions of third parties. The measures were neither a necessary nor a sufficient condition for bringing about the labour-cost reduction results intended by the legislator. The fact that the measures were not fit in turn proved that they were unnecessary, regardless of any assessment as to whether the purposes targeted by the law matched constitutionally protected rights or interests which the legislator is required to safeguard by restricting the right to enter into collective labour agreements.

The Court therefore declared these norms unconstitutional with generally binding force.

6.3. The Court then addressed the 2012 Law norms that imposed a two-year suspension on IRCT provisions on increased overtime rates above those set out in the Labour Code and on the pay or compensatory rest due for normal work done on public holidays at companies that are not obliged to suspend operations on such days.

The 2012 Law has significantly reduced the extra costs associated with work done in the above situations, halving both hourly overtime bonuses and the compensatory rest and the alternative additional pay for normal work on public holidays at such companies.

This suspension affects all IRCTs, whether dated before the entry into effect of the new Law, or after it. Regardless of the provisions of existing IRCTs, from 1 August 2012 to 1 August 2014 both overtime rates and the compensatory rest or pay for normal work on public holidays must be those laid down by the Law which, albeit temporary, is absolutely imperative.

The Court considered that this suspension constitutes an interference by the legislator within the scope of the protection due to the right to enter into collective labour agreements, inasmuch requiring a legal norm that reduces salaries and the value attached to labour to prevail over IRCTs necessarily interferes with the right to be paid for one's work in accordance with its nature and volume. However, in the light of the desired purpose and of the norm's temporary nature, the Court took the view that the measure is appropriate, necessary and balanced in terms of the safeguarding of constitutionally important interests, such as the fulfilment of the goals Portugal set and the undertakings it made within the framework of the MUSEPC.

6.4. Turning to the automatic reduction by law imposed in the event that the relevant IRCT provisions (overtime rates, and pay or compensatory rest for normal work on public holidays) were not revised by the end of the two-year period, the scope of the norm meant that if they were not changed, the IRCT figures would be halved (on condition that they did not fall below the rates provided for in the CT).

The Court said that in this case the Law was modelling the contents of contracts by replacing solutions that were created by means of collective autonomy and interfering with matters that are reserved to collective bargaining. This represents a direct interference with the balance decided by the parties, and

applying the norm would have produced a variable result (and not a standardisation), depending on the exact terms of each provision agreed by collective negotiation.

Nothing in the 2012 Law or the CT prevented IRCTs dated after 1 August 2014 (the end of the imperative suspension period) from re-establishing the same solutions as those that applied before the suspension, or indeed more favourable ones. The general CT principle that legal norms which regulate labour contracts can be waived by IRCTs is applicable in this case.

With regard to the provisions of IRCTs dated before 1 August 2014, the Court was unable to see any constitutionally protected right or interest that might have justified the halving *ope legis* of the value of the additional rates paid for overtime and normal work on public holidays, when greater than the amounts laid down in the Labour Code. This solution by the Law was not fit for the purpose behind the standardisation of the applicable collective-agreement regimes once the suspension ended, and the goal of stimulating collective bargaining does not correspond to any constitutionally important interest and therefore cannot justify interfering in a field that is reserved to collective bargaining.

The Court therefore declared the norm to be unconstitutional.

6.5. The Court also looked at the 2012 Law norms on relations between sources of regulation, from the perspective of whether they are constitutionally compatible with the principles of legal certainty and the protection of trust.

These precepts only affect the future effects of past normative acts; they do not prohibit effects of new collective or individual regulatory acts. While their own effect is not retroactive, because they do not affect effects that have already occurred, they do have retrospective efficacy, inasmuch as they affect the present effects of situations that were constituted in the past.

Determining whether a retrospective law is in conformity with the Constitution requires one to comparatively weigh up assets or interests – particularly in the light of the weight that should be attached to the public interest pursued by the legislator on the one hand and the importance that should be given to the expectations of private persons on the other. The practical scope of the principle of the protection of trust can only be delimited by an *ad hoc* assessment that takes the circumstances of the concrete case in question into account. The expectations must be legitimate, and importance should not be attached to positions based on illegalities or undue omissions on the part of the state.

The effects of a collective labour agreement are limited in time – normally to a time limit set either by the will of the parties, or by applying a suppletive legal rule that sets a one-year limit that can be successively renewed for another year at a time. There is no minimum limit, so an agreement can last for less than a year.

The legislator has prevented collective agreements from being perpetual by laying down that even when the parties agree a clause that says that such an agreement only ends when it is replaced by another instrument, that clause lapses five years after certain facts come to pass.

While the question of the duration of collective labour agreements was not directly at stake here, the Court said that, within the current legal framework, the regime governing that duration does help form the view that there is a certain diminution in the grounds for a firm trust that the effects of agreement-based instruments for regulating labour relations will be maintained.

The collective interest of the enterprise, seen as the common interest of both employers and workers in the survival and flourishing of both their jobs, is founded on the need to ensure the effectiveness and uniformity of the amendments with which the 2012 Law sought to achieve an increase in the productivity and competitiveness of the Portuguese economy.

The limitations on the efficacy of IRCTs imposed by the above precepts must be said to be included within the broad margin within which the legislator is free to shape legislation. Even if they can be criticised to some extent, the precepts are not ostensibly inappropriate to the pursuit of the public interests which the authors of the Law invoked as the reasons for amending the regime governing labour relations.

When there is a change in the framework applicable to a legal regime that is characterised by the imperative nature of the preconditions and terms governing its application and in which the dominant values are public and social, it is justifiable to seek to ensure uniformity and equality in that application. This fundamental guarantee-related interest must prevail over the trust that earlier agreement-based regimes will be maintained. It is this same interest that justifies the regime's imperativeness and the consequent fact that it

cannot be changed by collective bargaining. The Court said that it was therefore clear that in the present case there were public-interest reasons which, when weighed up against the alternatives, warranted the regime's prevalence over the interests of both workers and employers.

With regard to the two-year suspensions of some IRCT provisions, the constitutional design of the right to enter into collective labour agreements is regulated by law, with some room in which the legislator can limit and restrict it. If one looks at the norm in question on the level of the resolution of the conflict between legal norms and agreement-based norms, one sees that all it does is temporarily make current IRCT provisions ineffective, and that once the suspension period is over, it does not preclude the efficacy of collective agreements that are entered into *ex novo*. There are thus insufficient grounds for any expectation that this constitutional right will apply in this two-year period with enough weight to overcome the reasons underlying the legislator's choice – the desire to reduce the costs of overtime in order to increase the competitiveness of the country's enterprises. This option is based on reasons that are valid at the present time, given the particularly difficult situation which the Portuguese economy as a whole is currently going through. The Court therefore considered that here too, when weighed up against the alternative, the public-interest reasons in question were important enough to justify the prevalence of the legislator's choice over any opposing arguments.

The Constitutional Court thus concluded that these norms are not unconstitutional, because they do not breach the principles of legal certainty and the protection of trust.

Supplementary information:

The exceptional number of dissenting opinions, all except one of which were accompanied by explanatory texts, reflects the extremely complex nature of the matters before the Court. The majority in relation to each of the questions varied in both size and individual composition.

1) Declared a number of norms contained in a Law that amended the Labour Code (CT) **unconstitutional with generally binding force**. These norms sought to: a) change the requisites for dismissing workers because their jobs are eliminated; b) do away with the requirement that, for an employer to be able to dismiss a worker whose existing job is eliminated, there cannot be another position at the same employer that is available and compatible with the worker's qualifications; and c) nullify certain provisions of collective labour regulation instruments (IRCTs) and clauses of labour contracts that were entered into before the entry into effect of the Law that made the amendments in question, with regard to rest periods attributed as compensation for working overtime on normal working days, compensatory weekly rest days or public holidays.

2. Declined to declare the unconstitutionality of norms which are contained in a Law that amended the Labour Code and which concern:

a) the individual hour bank format; b) the group hour bank format; c) doing away with some forms of compensatory rest and halving the additional amounts paid for overtime; d) abolishing certain mandatory public holidays; e) eliminating the possibility that the length of annual holiday periods can be increased for workers who are especially assiduous; f) requisites for dismissing workers on the grounds that they are unsuited to their work; g) norms regarding certain aspects of relations between regulatory sources (Labour Code versus collective labour regulation instruments); and h) a two-year suspension of some IRCT norms and labour-contract clauses containing provisions on additional overtime rates above those laid down in the CT, and on payment or compensatory rest periods for normal work done on public holidays, at companies that are not required to suspend operations on such days.

§67. Portuguese Constitutional Court, Ruling 862/13, December 19 th 2013, Ruling 862/13, http://www.tribunalconstitucional.pt/tc/en/acordaos/20130862s.html

The Decree of the Assembly of the Republic containing the norms before the Court for review was designed to deepen social-protection convergence mechanisms by bringing in

measures regarding CGA old-age, retirement, invalidity and survivor's pensions with a gross monthly amount of more than six hundred euros. It cut the value of pensions subject to the regime set out in the Statute governing the Retirement of Public Sector Staff by ten per cent and provided for the application of a new formula for calculating the pensions. It formed part of the general reform intended to ensure convergence between the general social security system and that protecting Public Administration staff – an idea that dates back almost to the creation of the CGA (which began operating in 1929) itself, albeit the intention was then abandoned more than once, before reappearing with the current Constitution.

Like its predecessors, the existing Basic Law governing Social Security (passed in 2007) maintained the idea that the social protection regime applicable to the public service should continue to converge with the social security system regimes.

The Retirement Statute, which regulates the complex of rights and duties that form the legal situation of public sector retirees, was successively amended by various legislative acts. In an initial phase, the first of those acts provided for regimes that differed from the general social security regime, both as regards the length of service needed in order to retire, and in the way in which pensions were calculated. A second phase began in 2004 and entailed new rules for both these questions, with a view to bringing the systems closer together and ensuring their sustainability.

It was decided that no new subscribers to the CGA would be allowed as of 1 January 2006, and that staff who began working from then onwards would obligatorily be registered under the general social security regime.

The gradual move towards convergence between the CGA subscriber regime and the general social security regime also entailed changes in the length of service and age conditions required for both ordinary and early retirement from the public sector. The calculation of pensions was made subject to a differentiated regime depending on the date each beneficiary registered with the CGA.

The Law that approved the State Budget for 2013 (LOE13) subjected applications for retirement made after 1 January 2013 to immediate convergence of the conditions for retiring under both the public-sector and the general regimes.

Survivor's pensions also became the object of a differentiated regime, depending on whether the deceased beneficiary was registered with the CGA or the general social security regime, with the Statute governing Survivor's Pensions applying to the former. In 2005, it was decided that the right to, and the conditions for awarding, pensions should be subject to the general social security regime rules. The way in which survivor's pensions were calculated was also changed in another move towards convergence, with provision made for two systems depending on the date of registration of the subscriber whose death caused the award of the pension.

These are social benefits included in a welfare and protection system based on the principle that the system will be contributory or self-financing. Cuts in pensions could thus be configured as social security contributions. In this case it would be the synallagmatic relationship between the legal obligation to contribute and the right to a pension that would justify the possibility of cutting the amount of the pension, in an economic context in which the contributions of current contributors are not enough for the protection system to fund itself; and the principles of solidarity and intergenerational fairness would justify the contributory effort of existing beneficiaries.

The Court pointed out that although the cut in pensions was presented as a structural measure, it was along the lines of similar measures that had previously been taken within the context of the economic and financial emergency in which the country found itself and had already been brought before the Constitutional Court for review.

Where serving Public Administration staff were concerned, the Court had already pronounced itself on norms that imposed a cut in gross monthly pay in 2011, suspended the extra holiday and Christmas months of pay in 2012, and maintained the pay cut and totally or partially suspended the holiday month (or equivalent) in 2013; while in the case of pensioners, the Court had ruled on the suspension of the extra holiday and Christmas months of pension in 2012, and the imposition of an Extraordinary Solidarity Contribution (CES) in 2013.

Reducing pensions is a legislative measure whose effects make it similar or equivalent to cuts in wages and salaries. The Court recalled that in its jurisprudence it has not recognised restrictions on the right to be paid that is inherent in the legal public employment

relationship as possessing the nature of taxation, and said that that jurisprudence could also be applied to restrictions on the right to a pension linked to the legal relationship involved in retirement from the public sector. In the latter case the legal situation arises when the legal public employment relationship ends, but the retiree continues to be bound to the Public Administration by a new legal relationship (retirement). In the social protection system the pension is a monetary payment that replaces the work-based income lost as a consequence of the termination of the legal public employment relationship. On the constitutional level, interventions that restrict the complex of rights, duties and incompatibilities which goes to make up the 'status of public sector retiree' mobilise both the material principle of social security and the constitutional principles that condition restrictive measures.

The right to a pension is a positive constitutional-law social right with a co-respective element composed of true facere obligations on the part of the state. It is both an incumbency on the state (objective aspect) and a complex of rights and duties pertaining to individual persons (subjective aspect). It encompasses various concrete options – namely protection in the form of monetary payments (retirement, invalidity, survivor's pensions) and payments in kind (e.g. the provision of care).

When it comes to determining the extent to which the right to social security is binding on the ordinary legislator, the relevant constitutional precepts have generally not been developed in operational terms, with some norms possessing a programmatic nature and thus implying a legally binding, but attenuated, status. However, there are other constitutional norms that require the state to perform concrete, defined tasks in terms of the implementation of social rights.

This different nature possessed by norms linked to fundamental social rights is reflected in the freedom with which the legislator can implement social rights and then later change their infra-constitutional configuration.

Some legal theorists argue that whenever the ordinary law has already implemented precise constitutional requirements, even if they are of a programmatic nature, the legislator's scope for passing legislation that represents a backward step is diminished, at least when that step represents the creation or re-creation of a failure to comply with the Constitution by omission. They believe that the legislator's freedom to shape legislation is limited by the level of legislative implementation that has already been attained and has established a place in the general legal awareness, which they say gives it the status of a materially constitutional right.

The Court recalled that complete fulfilment of the constitutional programme of social rights depends on the resources that are available at any given moment in time. The Constitution does not expressly create an autonomous right to a pension, but that right is one of the corollaries to the right to social security as a whole.

The Constitution does not set the pension system and the criteria for determining theaward and amount of pensions in the form of a rule that can be directly applied. Depending on the amount of money available and within the limits of the applicable political choices, the ordinary legislator is given a freedom to decide, which itself varies depending on the extent to which each constitutional rule is determinable.

For example, the Constitutional Court has already held that the nature of the right derived from the so-called 'principle of totalisation', which requires that the whole of the time a beneficiary has spent working be counted in order to calculate his/her benefits, is analogous to that of constitutional rights, freedoms and guarantees. However, this principle does not mean the ordinary legislator is constitutionally bound to guarantee the pensioner a pension that precisely corresponds to the pay he/she earned during the period in which he/she contributed to the system. One cannot say there is a principle that the amount of contributions and the amount of benefits must be the same, given that the benefit system is based on mechanisms for sharing the funds that enter the system and not capitalisation mechanisms. Saying the Constitution recognises a right to a pension does not mean that one can say there is a right to a specific pension. The precise content of a pension is determined by ordinary legislation, and this in turn means that the precise pension's binding nature is an infra-constitutional creation. It is only from the moment at which the ordinary legislator sets the exact content of the right to a pension, fulfilment of which can then be demanded of the state, that that right acquires a fully definitive status in the legal order. On the other hand, nor is there an absolute intangibility of the right to a pension – a right which from that moment on benefits from the specific protection derived in particular from the key principles that structure a state based on the rule of law, such as the principles of the protection of trust, and of proportionality.

The legislator is not prohibited from changing the way in which it materialises the right to a pension, and it can alter or even reduce the latter's amount in the light of variations in economic or social circumstances. It is, however, forbidden to altogether do away with the 'institute' (retirement, invalidity and survivor's pensions) or its essential content.

The right to a pension is particularly dependent on the funds the state has available, and is open to pressure from conjunctural factors. This special vulnerability is derived from the fact that the right to a pension results in the immediate allocation of financial resources, and lasts for a medium and long-term timeframe. The economic contexts in which the state exists can change radically over the lifetime of the benefit.

Pensions are also highly dependent on the reservation imposed by that which is possible, in that they form part of a solidary welfare and benefit system which itself exists within a generational context.

In a social protection system based on sharing the available funds, beneficiaries cannot ignore the risks involved, including the possibility that the rights which are in the process of being formed and accruing to them may change.

When the legislator shapes the right to a pension at any given moment in time, it must respect the various constitutional norms and principles that bind it – namely those derived from the principle of a state based on the rule of law. Any changes the legislator wants to make must be based on justified reasons (with particular emphasis on the financial sustainability of the system, for example), but they cannot affect the principles of equality, the dignity of the human person, the existence of a social minimum, and the protection of trust. In its jurisprudence, when it has applied the latter principle to the legislative power, the Constitutional Court has made the principle operable using a formula it has applied in successive cases: a) expectations cannot be unfavourably affected when this would constitute a mutation in the legal order which the targets of the norms in question could not reasonably be expected to predict; and b) nor are such effects permissible unless they are dictated by the need to safeguard other rights or interests to which the Constitution also affords its protection and which must be considered prevalent.

For the constitutional-law protection of trust to apply, the state (especially the legislator) must have behaved in ways that were capable of generating expectations among private entities that there would be continuity in the future; those expectations must be legitimate and founded on good reasons; the private persons concerned must have made life plans that took the prospect of the continuity of the state's behaviour into account; and in addition, there cannot be public-interest reasons which, when weighed against the private interests, warrant the non-continuity of the behaviour that generated the expectant situation.

It is not possible to weigh up this balance with regard to the principle of the protection of trust without first knowing the legislative-policy interests that make a reduction and recalculation of pensions possible and justifiable.

The author of the challenged norms said that the main justification for cutting pensions was the need to ensure the sustainability of the public pension system; and that it was also seeking to promote proportional equality and solidarity between generations.

The legislator in this case highlighted the CGA's financial situation as the reason why pensions should be reduced. It pointed to the CGA's structural financial imbalance, with an annual deficit of 2.6% of GDP, which is covered by transfers from the State Budget that amount to around 60% of the benefits paid each year. This situation is linked to the economic/financial emergency the country is experiencing, and the imbalance is making the position unsustainable and demanding measures like the ones set out in the norms before the Court.

From the point of view of the norms' author, pursuit of the public interest in convergence justified only applying the pension-cutting measure to CGA pensioners, in that from the perspective of the desired goals, their pensions represent an extra charge or an excessive weight, compared to those received by pensioners under the general regime.

The Court noted that when the right to a pension is recognised, or when all the requisites for that recognition are in place, the right enters the public sector retiree'slegal sphere with the nature of a true subjective right – an acquired right, whose fulfilment can be demanded under the exact terms of the recognition. This kind of right is different from the so-called 'rights in the process of formation', in relation to which the future beneficiary has begun to contribute, but that contribution is not yet complete. Abstractly speaking, with regard to both the latter rights and those that have already been acquired, there is a situation involving the formation of

expectations that deserve protection. There is always the trust that the amount of the pension, whether it is still only predicted or has already been fixed, will not change later on (except as a result of the periodic updating determined by law).

The formed right to a pension is more protected in relation to any subsequent legislative changes. Holders of these so-called 'acquired rights' are in a situation that demands stronger protection than that of a worker who is still forming his/her 'contributory career'. In the case of pensions that are in the process of being formed, while there can also be expectations that warrant protection, the future beneficiaries can expect the possibility of changes, because the legislator warns them in advance that the public sector retirement regime is determined on the basis of the law that is in force and the situation that exists on the date on which the preconditions for taking retirement are met.

The trust generated in the exact maintenance of the amount of the pension determined when beneficiaries take retirement is also legitimate, because our system is one of defined benefits, in which each pensioner is guaranteed a fixed rate of replacement of the working income that served as a reference for the calculation.

What is more, in the exercise of its legislative function, the state has, over a period of time, driven and entrenched the idea of certainty and trust in the maintenance and even upward updating of the quantum of each pension set in the final order recognising the individual right to a pension.

The way in which the pension regime has evolved over time to date shows that whenever the legislator has intervened with regard to the regime in a way that was unfavourable to subscribers and pensioners, both in terms of the conditions required to take retirement and with regard to the formula for calculating pensions, it has safeguarded both legal situations in the process of formation and those that have already been formed.

The four Basic General Laws governing the Social Security System that have been published under the current Constitution have all established a principle that both acquired rights and those under formation should be safeguarded. This principle was also always respected in the successive legislation that gradually imposed more demanding conditions on the subscribers to and beneficiaries of the CGA social protection system. The legislator always created transitional rules within the various legislative acts, under which the amount of pensions that were being paid out on the date on which the new act came into force would not be reduced.

Where the convergent social protection system (which includes the people targeted by the challenged norms) in its own right is concerned, the legislator committed itself to maintaining the level of protection that existed prior to the convergence. The so-called 'rights in the process of formation' were also always taken into account in the form of provisions for regimes that were either transitional or came into force gradually.

The targets of the norms the Court scrutinised in this review case were a very specific group: the beneficiaries currently receiving CGA pensions. The persons who comprise this universe are in an especially vulnerable situation, in that the fact that they have already left the active life means it is no longer as easy for them to adapt to more demanding economic conditions. Since the moment at which they retired, this target group has been managing their daily lives on the basis of a given income, whose amount they thought was fixed. In the light of this fixed income and of their belief in its stability, these pensioners may even have made a variety of commitments which the measure could have rendered unviable.

Faced with the successive legislation which increased the retirement age and the number of years for which contributions were required and which changed the rules for calculating pensions, albeit while safeguarding their rights as subscribers and future beneficiaries, today's pensioners were also able to make life plans from the perspective of the continuity of a given regime, which they believed to be more favourable. It is reasonable to accept that trust in the maintenance of a given legal regime may have been a determining factor in the irreversible choice they made to take retirement from the public sector on a given date. For example, someone who chose to retire early at the expense of a reduction in their pension of 4.5% or 6% for each year below the standard number provided for by law, certainly trusted that the lifetime monthly pension he/she was going to receive would not be the object of further cuts. Similarly, it is not hard to accept that the expectations based on positive forms of behaviour by the state suggesting that there would be continuity in the way in which their pensions were calculated on the date of their retirement were also a key factor in deciding not to invest in complementary protection systems.

Against this background, the reduction in pensions brought about by the norms under review constituted a regressive measure that undermined pensioners' legitimate trust in the maintenance of the amount of the pension that was set on the basis of the legislation in force on the date on which they took retirement. The guarantee that this amount would be maintained was given at the moment at which each person's pension was set in the final CGA decision that definitively regulated that beneficiary's right to a pension and the amount thereof. The same guarantee continued to be affirmed in the successive modifications of and limitations contained in the pension-calculation regime, in which the state gave clear and express signs in the letter of the law that the amount of people's pensions would remain untouchable.

This means that although pensioners can count on new legislative activity in relation to this matter, they cannot legitimately be expected to foresee one-off measures that abruptly interfere with their already consolidated legal positions. On top of this, the trust that pensioners place in the inalterability of the rules which served as the basis for calculating the pension that was set for each one when he/she took retirement, also results from the contributory nature of the social protection system. Even if there is no direct correlation between the contribution a person pays and the pension he/she is then awarded, the right to a pension not only presupposes fulfilment of the obligation to contribute, but also constitutes a benefit that replaces the income the pensioner used to earn by working.

Each subscriber contributes a proportion of his/her income with a view to obtaining a pension whose amount will proportionately reflect the pay which formed the basis of the calculation. This means that one must see the right to a certain amount of pension – a right that was formed in accordance with a given monthly remuneration – as deserving an especially strong protection. This amount is also a counterpart for the sums that were paid over the course of the pensioner's contributory career, without which the right would not have been formed in the first place. This heightens the importance of the values of stability, trust, continuity and legal certainty that must guarantee validly acquired and consolidated pensions.

The Court also highlighted the fact that the alleged disparity between the retirement regimes applicable to CGA and social security beneficiaries – said to favour the former – was far from evident. To begin with, it is not actually possible to compare the pensions that are effectively awarded in the two cases, because historically, different pension-calculation criteria have always been applied to the two regimes, and their practical effects still persist today.

Under the general social security regime the amount of a person's pension is determined by a reference remuneration that represents the total pay received in the whole of his/her lifetime of contributions (the so-called 'principle of contributivity'). However, this method only became fully applicable to contributors who registered with the system on or after 1 January 2002, whereas the legislator has always created safeguard clauses and more favourable transition regimes for beneficiaries registered prior to that date, in such a way as to uphold both their acquired rights and those of their rights that were still in the process of being formed. These regimes are still in force today.

The previous regime objectively gave people higher pensions by basing that calculation on the most favourable period at the end of the beneficiary's working life (not to mention a number of situations in which the calculation of the amount of pensions was deliberately manipulated). This enabled a category of contributors to receive high pensions that were not matched by the average income declared over the course of their contribution history. This was particularly evident in the case of members of the governing bodies of legal persons, who were dispensed from contributing to the social security system in accordance with their actual remuneration. They were able to fulfil their obligation to contribute by paying a minimum amount based on the highest minimum monthly salary required by law for workers in general, but then pay contributions on the basis of their real pay during the final phase of their working lives, thereby obtaining a higher pension.

In the CGA system on the other hand, subscribers had to contribute a 'quota' in the shape of a percentage set by law of the total remuneration applicable to their position, and their retirement pension was based on their monthly pay, less the quota itself. In other words, in this system there was always a tendency towards a co-respective relationship between workers' contributions (linked to the pay they effectively received) and the right to pension payments, all subject to a rigorous 'principle of contributivity'.

Against this legislative background, the disparity between the rate at which pensions have been formed under the public sector social

protection regime and under the general social security regime (setting aside any other elements of the systems and of the differentiation between the various formulas used to calculate specific pensions) is not one that demonstrates the existence of a material benefit or advantage in the way in which the amount of the pensions of CGA subscribers is calculated, compared to that applicable to their general social security regime counterparts (and assuming the beneficiaries have been registered as receiving pay for the same number of calendar years). The rate at which the pensions are formed cannot therefore in its own right be seen as a structural measure designed to ensure that pensions converge, nor would it have any effect that would restore intergenerational fairness or equity within the public social security system. It instead represented a mere one-off measure designed to cut spending by affecting the already constituted rights of CGA pensioners, and to reduce the budgetary imbalance in the public sector social protection system, which at the end of the day was caused by the legislator's own choice not to admit new CGA subscribers, thereby inevitably making it impossible for the system to fund itself.

The existence at a given moment in time of legal regimes that differ in terms of the conditions required for retirement and the calculation of the ensuing pension undoubtedly resulted from recognition that there were sufficient material grounds to justify the difference between them. One cannot consider the Statute governing the Retirement of Public Sector Staff and the legal rules that complemented it to have been arbitrary pieces of legislation without a legitimate sense and lacking in serious and reasonable grounds. The staff and other agents of the Public Administration who retired under this regime could not but trust that these rules existed in order to protect them in old age and/or invalidity, and that the rules' ultimate objective was to make the fundamental right to retirement a concrete reality. The existence of a different regime for calculating pensions is entirely the responsibility of the state, which felt it necessary to ensure the protection of Public Administration workers in old age and invalidity in a different way. The principle of trust becomes particularly important in connection with the state's responsibility for its own actions, in that the increase in the expectation of trustworthiness can only be attributed to the legislator's own behaviour. The current beneficiaries of the CGA regime fulfilled all the legal obligations that were imposed on them in order to benefit from their pension; they could not have chosen otherwise, so now they cannot be the only ones to pay the price for the difference, on the pretext of the need to restore equality.

The Court also said that safeguarding the system's fairness on both the intragenerational and intergenerational levels required that possible solutions be looked at in terms of the public system as a whole, and not just within the scope of one of that system's component parts. The circumstance that the cut in pensions only encompassed part of the beneficiaries of the convergent social system, taken in isolation from the other elements that make up the social security system, would have produced a solution that was both inappropriate and potentially unjust in terms of the system as a whole.

By definition, the principle of systemic solidarity – i.e. that social solidarity must be systemic – is a requisite if the social security system is to be constructed in accordance with the fundamental values of equality and fairness. However, the regulatory force of this principle does not mean that any differences that may have existed in the past between two legal regimes – both of which were normal at the time – should be combated solely on the basis of the difficulties experienced by one of those regimes and by sacrificing only the consolidated rights of that regime's beneficiaries. For a solution to be appropriate to the system and be recognised as just, it must be one whose point of reference is the system as a whole, and not just one of its parts.

The a-systemic nature of the legislative measure that sought to cut the amount of pensions was also confirmed by its dubious nature. On the one hand, the Decree's "Exposé of Reasons" justifies it as a measure that was intended to contribute to the reform of the system; on the other, the challenged norms themselves said they were temporary, and they were accompanied by other measures designed to ensure their transitional nature (whether or not this was achievable is another matter).

The so-called "reversibility clause" contradicted the measure's alleged structural nature: in the event the economic situation improved, the state would entirely discard the importance of the interests it invoked when it decided to take the pension-cutting measure. As such, the reduction in pensions was a one-off, short-term measure designed to resolve immediate budgetary balance and consolidation problems, and not a measure intended to ensure the CGA's financial sustainability.

The Court concluded that the breach of the expectations at stake could only be justifiedwithin the context of a structural reform that included an across-the-board weighing up of various factors.

The public interests of the sustainability of the public pension system as a whole and ofintergenerational fairness might justify a revision of the amounts of pensions that have already been awarded. However, the revision criteria would have to envisage placing all the beneficiaries of both systems on the same level.

The Court therefore declared the norms before it to be unconstitutional.

A number of norms contained in a Decree of the Assembly of the Republic were subjected to prior review. They sought to amend the Statute governing the Retirement of Public Sector Staff, and to revoke norms that add extra time to the length of service people have actually worked in certain especially demanding situations, for the purposes of calculating their retirement entitlements in cases in which pensions are paid by Caixa Geral de Aposentações (CGA, the public sector pension fund).

The Court held that these norms were in breach of the constitutional principle of the protection of trust.

It found that the measures did not adequately pursue the public interests invoked by the author of the norms (the sustainability of the CGA system, intergenerational fairness, and the need for the country's different social protection systems to converge), in a way that would have made it acceptable for them to prevail over the injury caused to the rights already acquired by existing CGA pensioners and the latter's legitimate expectations that the amounts of the pensions they will receive in the future will remain the same.

The Constitutional Court took the view that these measures would have resulted in a simple, abrupt cut in the pensions concerned, and did not form part of a framework of structural cross-cutting measures designed to ensure across-the-board progress in fulfilling the interest of convergence on other levels.

The petitioner in this case (the President of the Republic) argued that these norms brought about a coactive, unilateral and definitive reduction in pensions by cutting them by a fixed percentage of their gross amount. He said that this meant they should be seen as norms that created taxes. In this respect the Court was of the opinion that the norms affected social rights which are part of legal 'institutes' that inform the social security system. Classifying the norms as being covered by social security law would not in itself preclude them from possessing a fiscal nature, but some of the fundamental elements needed to categorise this cut in pensions as a tax were missing. There would be no direct payment to the state of the amount by which the pensions were reduced, inasmuch as within the legal relationship involved in public sector pensions, the entity with the duty to pay those pensions is the same as the one charged by the norms with cutting them. A cut in a pension is itself founded on a legal bond under which there is an obligation to pay that pension; whereas the legal precondition for the formation of the obligation to pay a tax is not linked to any relationship between the taxpayer and the Administration. A tax is a payment that is required of persons who possess the capacity to contribute, within the overall framework of the relationship between the fiscal state and citizens as a whole. This was not the case here, in addition to which the purpose of taxes is to provide general funding for public spending, and not to finance specific public expenses.

On the alleged violation of the principle of protection against reverses in fundamental social rights, the Court emphasised that purely forbidding going backwards in social terms is impracticable, because it would presuppose the idea that the available resources are always going to grow. It may be necessary to lower levels of essential benefits in order to maintain the essential core of the social right in question. From this perspective, guaranteeing the minimum content of the right to a pension may itself mean reducing the amount of that pension.

The Court noted that although the norms before it were intended to have effect in the future – the legal effects of the pension cut would only apply from 1 January 2014 onwards – they addressed legal relations regarding public sector retirement that were formed under an earlier regime. This was a situation of inauthentic or retrospective retroactivity, in which the force of the norms is ex nunc, but they affect rights that were constituted in the past and whose effects are ongoing at the present time.

There are no constitutional rules that would preclude retrospective laws which reduce the quantum of pensions that have already been recognised, but one must gauge whether such laws do respect a number of constitutional principles – namely the principle of the protection of trust, which itself arises out of the

principle of legal certainty, which is in turn a material element of the state based on the rule of law.

The Court had already said in the past that from the point of view of the principle of the protection of trust, it is not unconstitutional to decrease the amount of the pensions of CGA beneficiaries. However, it held that the reasons underlying its earlier findings did not apply in the present case.

The budgetary consolidation reflected in these norms only addressed one part of the public pension system (the CGA social protection regime), not all of it. This meant it was the protection of the trust of certain pensioners that had to be considered and weighed against the position of the rest of the country's public pensioners. At the same time, the new measure was not temporary, but indefinite, given that while reversing it at some time in the future was seen as a possibility, this would depend on a favourable evolution in macroeconomic variables directly linked to an increase in the capacity to fund the structural deficit of the CGA pension system by means of transfers from the State Budget.

The Court said it was necessary to evaluate whether the public interest in reducing the transfers from the State Budget used to finance the CGA's structural deficit justified cutting the pensions of the CGA's beneficiaries. The outcome of that evaluation was negative. Firstly, because the CGA pension system was closed to new beneficiaries as of 1 January 2006. The legislator accepted the burden of the system's financial unsustainability – to which the explanatory preamble to the Decree containing the norms in question specifically refers – as one of the costs of the convergence of the benefit regimes included in the overall public social security system. This is why the Decree said that public sector retirement and survivor's pensions payable under the CGA regime would be co-funded by "transfers from the State Budget". The Court noted that in the medium and long terms, a benefit system that no longer accepts new subscribers inevitably ceases to be self-financing and self-sustaining. The numerical ratio of subscribers to beneficiaries will gradually decrease as the former retire, until one eventually reaches the extreme situation in which there are no subscribers left. The continuous fall in this ratio will end up causing the CGA to be funded by transfers from the State Budget, and the contributory regime will turn into a non-contributory one. The future horizon for such a system can never be one of self-sustainability. The Court said that in a system that is closed to new subscribers, cutting pensions is not in itself a measure with the capability to safeguard the system's sustainability. By itself, a closed system is unsustainable in the medium and long terms. This characteristic means that such a system must necessarily resort to funding from taxation and/or forms of capitalisation, in that it will no longer be viable to resort solely to techniques for sharing out the money that is already in the system.

Secondly, one cannot sacrifice the rights of CGA pensioners and no one else for these budgetary consolidation reasons, inasmuch as it is legitimate for the pensioners in both regimes (the general social security system and the protection system applicable to Public Administration staff) to be considered holders of rights to a pension that possess equal legal consistency: from the constitutional viewpoint, the pensioners in both systems are simply state pensioners, and it is up to the state to guarantee the system under which both types of pensioner have contributed as required to by law. Any inequalities between them at the level of the legal rules governing the two public regimes that have come from the past and have financial consequences in the present cannot be corrected solely on the basis of difficulties experienced by one of the two regimes and by exclusively sacrificing the constituted rights of the beneficiaries of that regime.

The possible solutions to the problem of the system's lack of financial sustainability must be looked at in terms of the public system as a whole. The problem requires answers that safeguard the system's fairness on both the intragenerational and the intergenerational levels.

Sacrificial solutions motivated by reasons linked to financial unsustainability are asymmetric or one-off measures, and are intended to achieve goals (avoiding increases in transfers from the State Budget by sacrificing CGA pensioners and no one else) that have no place in the constitutional design of a unified public pension system. The criterion underlying such solutions – the convergence of the systems – objectively contradicts the legitimacy of, and the good reasons for, the trust that had previously been engendered among those beneficiaries in terms of the amount of the pensions that were awarded to them.

§68. German Constitutional Court, ESM Treaty and Fiscal Compact, September 12th, 2012, Press Release,

https://www.bundesverfassungsgericht.de/en/press/bvg12-067en.html (Press Release)

Today, the Federal Constitutional Court pronounced its judgment regarding several applications for the issue of temporary injunctions. The main objective of the applications is to prohibit the Federal President from signing the statutes passed by the Bundestag and the Bundesrat on 29 June 2012 until the decision in the principal proceedings; by signing the statutes, the Federal President would create the precondition for the ratification of the international agreements –the Treaty establishing the European Stability Mechanism (ESM Treaty) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (known as the Fiscal Compact) – which are approved therein.

(…) The Second Senate of the Federal Constitutional Court refused the applications for the issue of temporary injunctions with the proviso that the ESM Treaty may only ratified if at the same time it is ensured under international law that

1. the limitation of liability set out under Article 8 (5) sentence 1 of the ESM Treaty (TESM) limits the amount of all payment obligations arising to the Federal Republic of Germany from this Treaty to its share in the authorised capital stock of the ESM (EUR 190 024 800 000) and that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative,

2. the provisions of the ESM Treaty concerning the inviolability of the documents of the ESM (Article 32 (5), Article 34 and Article 35 (1) TESM) and the professional secrecy of all persons working for the ESM (Article 34 TESM) do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat.

The Federal Republic of Germany must express that it does not wish to be bound by the ESM Treaty in its entirety if the reservations made by it should prove to be ineffective.

In essence, the decision is based on the following considerations:

I. Extent of review/Admissibility of the main action

1. Diverging from the usual extent of review in temporary injunction proceedings, the Senate did not restrict its review in the present temporary injunction proceedings to a mere weighing of the consequences of its decision. Instead, it performed a summary review of the challenged Acts of assent and of the accompanying laws under the aspect of whether the violations of their rights which the applicants admissibly assert can indeed be established. A summary review of the legal position was required because with the ratification of the Treaties, the Federal Republic of Germany will enter commitments under international law whose cancellation would not be easily possible in the event that violations of the constitution should be established in the principal proceedings. If a summary review in temporary injunction proceedings were to establish a high probability that there is indeed the alleged violation of the precept of democracy, which Article 79 (3) of the Basic Law (Grundgesetz – GG) lays down as the identity of the constitution, a serious detriment to the common good would result in the temporary injunction not being issued. The economic and political disadvantages which could result from a deferred entry into force of the challenged statutes cannot be weighed against this.

2. The Senate only regarded the principal proceedings as admissible to the extent that the applicants, relying on Article 38 GG, assert a violation of the overall budgetary responsibility of the German Bundestag, which is entrenched in constitutional law through the principle of democracy (Article 20 (1) and 2, Article 79 (3) GG).

To the extent that the applicants in proceedings 2 BvR 1421/12 object to euro rescue measures taken by the European Central Bank, in particular to the acquisition of government bonds on the secondary market, arguing that the measures, as what is known as “ausbrechende Rechtsakte”, transgress the framework of authorisation established by the German Acts of assent to the European Union Treaties, their application for a declaration to this effect is not

encompassed by the application for the issue of a temporary injunction and therefore can only be reviewed in the principal proceedings.

II. Standard of review

As the Senate already held in its decision regarding the aid to Greece and the European Financial Stability Facility of 7 September 2011, Article 38 GG in conjunction with the principle of democracy (Article 20 (1) and (2), Article 79 (3) GG) demands that as a fundamental part of the ability of a constitutional state to democratically shape itself, the decision on public revenue and public expenditure must remain in the hand of the German Bundestag. As elected representatives of the people, the Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental governing. In this respect, the German Bundestag is prohibited from establishing mechanisms of considerable financial importance which may result in incalculable burdens with budget significance being incurred without the mandatory approval of the Bundestag In this context, the Bundestag, as the legislature, is also prohibited from establishing permanent mechanisms based on international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate. The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Sufficient parliamentary influence must also be ensured on the manner of dealing with the funds provided.

The overall budgetary responsibility of the German Bundestag is also safeguarded by the design as a stability union that the monetary union has to date been given under the Treaties, in particular by the provisions of the Treaty establishing the European Union and of the Treaty on the Functioning of the European Union (TFEU). However, a democratically legitimised change of the stability requirements under European Union law is not from the outset incompatible with Article 79 (3) of the Basic Law. The Basic Law does not guarantee the unchanged further existence of the law in force but those structures and procedures which, also in the context of a continuous further development of the monetary union with the objective to comply with the stability mandate, keep the democratic process open and at the same time safeguard parliament's overall budgetary responsibility. In this context, obliging the budget legislature to pursue a specific budget and fiscal policy is not from the outset contrary to democracy; such an obligation can also take place on the basis of European Union law or international law.

III. Subsumption

Measured against these standards, the applications prove to be unfounded for the most part.

1. The Act of assent to the insertion of Article 136 (3) TFEU does not impair the precept of democracy. Article 136 (3) TFEU, which was provided for by the European Council decision of 25 March 2011, contains the authorisation to establish a permanent mechanism for mutual aid between the Member States of the euro currency area. Admittedly, this changes the present design of the economic and monetary union in such a way that it moves away from the principle of the independence of the national budgets which has characterised the monetary union so far.

This, however, does not relinquish the stability-oriented character of the monetary union because the essential elements of the stability architecture, in particular the independence of the European Central Bank, the commitment of the Member States to observe budget discipline and the autonomous responsibility of the national budgets remain intact.

The possibility of establishing a permanent stability mechanism, which is opened up under European Union Law by Article 136 (3) TFEU, does not result in a loss of national budget autonomy because through the challenged Act of assent, the German Bundestag does not yet transfer budget competences to bodies of the European Union or to institutions created in connection with the European Union. Article 136 (3) TFEU itself does not establish a stabilisation mechanism but merely opens up to the Member States the possibility of installing such a mechanism on the basis of an international agreement. The requirement of ratification for the establishment of a stability mechanism makes a participation of the legislative bodies a precondition before the stability mechanism enters into force.

2. The challenged Act of assent to the ESM Treaty essentially takes account of the requirements set out under constitutional law with regard to the safeguarding of the overall budgetary responsibility of the German Bundestag.

a) However, it is required to ensure in the framework of the ratification procedure under international law that the provisions of the ESM Treaty may only be interpreted or applied in such a way that the liability of the Federal Republic of Germany cannot be increased beyond its share in the authorised capital stock of the ESM without the approval of the Bundestag and that the information of the Bundestag and the Bundesrat according to the constitutional requirements is ensured.

Admittedly, it can be assumed that the express limitation of the liability of the ESM Members to their respective portions of the authorised capital stock, which is provided for in Article 8 (5) sentence 1 TESM, bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the activities of the ESM to EUR 190 024 800 000; this ceiling can also be assumed to apply to all capital calls made according to Article 9 TESM, including the "revised increased" capital calls according to Article 25 (2) TESM, which in the case of the payment shortfall of an ESM Member may be made to the remaining Members that are able to pay, and which will correspondingly increase the burden on them. However, it cannot be ruled out that the ESM Treaty is interpreted in the sense that in the case of a revised increased capital call, the ESM Members cannot rely on the liability ceiling because the wording of Article 25 (2) TESM does not contain a limitation of the amount and because the provision is intended to secure the creditworthiness of the ESM, and to maintain its ability to act, even in unexpected emergency situations. To meet the constitutional requirement of determining the burdens on the budget in a clear and definitive manner, the Federal Republic of Germany must ensure the required clarification in the ratification procedure, and it must ensure that it is only bound by the Treaty in its entirety if no payment obligations that go beyond the liability ceiling can be established for it without the consent of the Bundestag.

Such a reservation in the ratification procedure is also required with regard to the provisions of the ESM Treaty on the inviolability of the documents (Article 32 (5), Article 35 (1) TESM) and on the professional secrecy of the legal representatives of the ESM and of all persons working for the ESM (Article 34 TESM). Admittedly, a good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorised third parties, for instance to actors on the capital market, but not to the parliaments of the Member States, which must bear political responsibility for the commitments based on the ESM Treaty vis-à-vis their citizens also during further treaty implementation. However, the provisions do not explicitly address the information of the national parliaments by the ESM; with a view to the fact that the situation under constitutional law as regards the parliament's rights of participation and its rights to be informed is different in the Member States, an interpretation is therefore conceivable which would stand in the way of sufficient parliamentary monitoring of the ESM by the German Bundestag. A ratification of the ESM Treaty is therefore only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, Bundestag and Bundesrat will receive the comprehensive information which they need to be able to develop an informed opinion.

b) In other respects, the other provisions of the ESM Treaty are unobjectionable according to the summary review. Admittedly, the provision under Article 4 (8) TESM, according to which all voting rights of an ESM Member are suspended if it fails to fully meet its obligations to make payment vis-à-vis the ESM, is not unproblematic with a view to its potentially far-reaching consequences under the aspect of overall budgetary responsibility because for so long as the default continues, the Member concerned can no longer influence the decisions of the ESM. Consequently, the participation of the German Bundestag in the decisions of the German representative in the bodies of the ESM, which is provided for at national level, would fail, and the context of legitimation between parliament and the ESM would be interrupted during this period. However, the provision does not violate the overall budgetary responsibility of the Bundestag because the latter can, and must, see to it that the German voting rights are not suspended. It must make the budgetary arrangements necessary in this context to ensure that it will be possible at any time to completely pay in Germany's shares in the authorised capital stock of the ESM.

Furthermore, it cannot be established that the amount of the payment obligations entered into through the participation in the ESM of a total nominal value of EUR 190 024 800 000 exceeds the limit of the burden on the budget to such an extent that the budget autonomy effectively fails. This also applies taking into account Germany's overall commitment undertaken with regard to the stabilisation of the European monetary union. When examining whether the amount of payment obligations and commitments to accept liability will result in the

Bundestag relinquishing its budget autonomy, the legislature has broad latitude of assessment, which also applies to the assessment of the future soundness of the Federal budget and the economic performance capacity of the Federal Republic of Germany, including the consideration of the consequences of alternative options of action. The legislature's assessment that the risks involved with making available the German shares in the European Stability Mechanism are manageable, while without the granting of financial assistance by the ESM the entire economic and social system would be under the threat of unforeseeable, serious consequences, does not transgress its latitude of assessment and must therefore be accepted by the Federal Constitutional Court.

The objection that the ESM can become the vehicle of unconstitutional state financing by the European Central Bank cannot be raised against the ESM itself. As borrowing by the ESM from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with the prohibition of monetary financing entrenched in Article 123 TFEU, the Treaty can only be taken to mean that it does not permit such borrowing operations. The European Stability Mechanism is one of the institutions specified in Article 123 (1) TFEU to which no loans may be granted by the European Central Bank. A depositing of government bonds by the ESM with the European Central Bank as a security for loans would also infringe the ban on the direct acquisition of debt instruments of public entities. Here, it can remain open whether this would constitute a direct acquisition of debt instruments of state issuers on the primary market or whether after their intermediate acquisition by the ESM it would be tantamount to an acquisition on the secondary market. For an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is prohibited as well, as it would circumvent the prohibition of monetary financing. To what extent the decision taken by the Governing Council of the European Central Bank on 6 September 2012 on a programme concerning the purchase of government bonds of financially weak Member States whose currency is the euro complies with these legal requirements was not a matter for decision in the present proceedings for the issue of temporary injunctions, proceedings which exclusively relate to the Acts of assent to the ESM Treaty and the Fiscal Compact and to the respective accompanying laws.

3. The provisions on the involvement of the German Bundestag in the decision-making processes of the ESM, which result from the Act of assent to the ESM Treaty and from the ESM Financing Act (ESM-Finanzierungsgesetz – ESMFinG), also essentially comply with the requirements placed on the safeguarding of the principle of democracy at national level. This applies to the elaboration of the rights of participation of the German Bundestag as well as with regard to its rights to be informed and to the personal legitimation of the German representatives in the bodies of the ESM. They are to take part in the meetings of the bodies of the ESM and to implement the resolutions of the German Bundestag. The ESM Financing Act presumes that the German representatives are bound by the resolutions of the Bundestag and are accountable to it.

a) Admittedly, it is questionable whether the participation of the Bundestag also with regard to the issuing of shares of the ESM's authorised capital stock higher than at par (Article 8 (2) sentence 4 TESM) is sufficiently provided for at national level, or whether in this respect, the possible far-reaching consequences on the Federal budget require express authorisation by a Federal statute, as is the case with an increase of the capital stock of the ESM. If § 4 (1) ESMFinG is interpreted in conformity with the constitution, the approval of an issuing of shares higher than at par is reserved to the plenary session of the Bundestag, no temporary injunction is required in this respect.

b) With regard to the allocation of the rights of participation to the plenary session, the budget committee and the special committee, the legislature took the criteria as a guideline which the Federal Constitutional Court detailed in its judgment of 28 February 2012 (2 BvE 8/11; see Press Release no. 14/2012, which is available in English on the Federal Constitutional Court's website) However, it does not appear to be ruled out that the ESM Financing Act assigns powers to the budget committee which due to their implications are to be exercised by the plenary session, for instance decisions on material changes of the procedure and of the conditions of the ESM's capital calls. In this respect, however, a temporary injunction is not required either. For the plenary of the German Bundestag can counter objections raised against the constitutionality of the allocation of rights of participation to the budget committee at any time by assuming to itself the powers of the budget committee, thus exercising its right under § 5 (5) ESMFinG.

4. The Act of assent to what is known as the Fiscal Compact (TSCG) does not violate the overall budgetary responsibility of the German Bundestag.

a) The regulatory content of the Treaty, whose objective is to strengthen the economic and monetary union by fostering budgetary discipline, is for the most part identical with the existing requirements of the Basic Law's "debt brake" (Article 109, 115 and 143d GG) and with the budgetary obligations arising from the Treaty on the Functioning of the European Union. In particular, the Contracting Parties' obligation under Article 5 (1) TSCG to submit, in the event of an excessive deficit, a budgetary and economic partnership programme that requires approval has been incorporated into the excessive deficit procedure that has already been codified under primary law (Article 126 TFEU). No direct "reach-through" of the bodies of the European Union to national budget legislation is provided for.

b) The Fiscal Compact also does not grant the bodies of the European Union powers which affect the overall budgetary responsibility of the German Bundestag.

To the extent that a correction mechanism is to be put in place by the Contracting Parties at national level in the event of significant deviations from the medium-term objective of submitting a balanced budget, on the basis of the principles to be proposed by the European Commission (Article 3 (2) TCSG), this provision only concerns institutional but not specific substantive requirements for the preparation of the budgets. Instead, the provision expressly clarifies that the prerogatives of the national parliaments shall be fully respected and thus precludes from the outset a partial transfer of budgetary responsibility to the European Commission. The competencies of the Court of Justice of the European Union, whose jurisdiction can be invoked according to Article 8 (1) TCSG in case of a failure to comply with the obligations arising from Article 3 (2) TCSG, also do not encroach upon the national legislature's specific budgetary freedom.

c) Finally, by ratifying the Fiscal Compact, the Federal Republic of Germany does not undertake an irreversible commitment to pursue a specific budget policy. It is true that the Treaty does not provide for a right of termination or resignation for the Contracting States. It is, however, recognised under customary international law that the resignation from a treaty by mutual agreement is always possible, and that unilateral resignation is at any rate possible in the event of a fundamental change in the circumstances which were relevant upon the conclusion of the treaty.

§69. Decision 2012 German Constitutional Court, September 12th , 2012, http://www.bverfg.de/entscheidungen/rs20120912_2bvr139012en.html (complete text)

(…) Judgment holds as follows:

The applications for the issue of a temporary injunction are refused with the proviso that the Treaty establishing the European Stability Mechanism (Bundestag printed paper 17/9045, pages 6 ff.) may only be ratified if at the same time it is ensured under international law that

1. the provision under Article 8 paragraph 5 sentence 1 of the Treaty establishing the European Stability Mechanism limits the amount of all payment obligations arising to the Federal Republic of Germany from this Treaty to the amount stipulated in Annex II to the Treaty in the sense that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative;

2. the provisions under Article 32 paragraph 5, Article 34 and Article 35 paragraph 1 of the Treaty establishing the European Stability Mechanism do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat.

GROUNDS

A.

[1] In their applications, the applicants seek the issue of a temporary injunction, the essential effect of which would be to prohibit the Federal President until the decision in the principal proceedings in each case from signing the statutes passed by the *Bundestag* and the *Bundesrat* on 29 June 2012 as measures to deal with the sovereign debt crisis in the euro currency area and from ratifying the agreements under international law approved therein.

I.

[2] 1. In the Treaty on European Union of 7 February 1992 (OJ C 191; Federal Law Gazette (*Bundesgesetzblatt* – BGBl II p. 1253), known as the Maastricht Treaty, the parties agreed to a common monetary policy of the Member States, which was intended in stages to create a European monetary union and finally to communitarise the monetary policy in the hands of the European System of Central Banks (ESCB). In the third stage of this process, the euro was introduced as the single currency. In order to guarantee financial discipline to support the uniform monetary policy, at the same time the Stability and Growth Pact (Resolution of the European Council on the Stability and Growth Pact), Amsterdam, 17 June 1997, OJ C 236, was agreed; this provides for new borrowing at a maximum rate of 3% of the gross domestic product (GDP) and a maximum level of indebtedness of 60% of the GDP and was amended in the years 2005 and 2011.

[3] 2. On 23 April 2010, Greece, as a Member State of the euro currency area, applied for financial aid from the European Union and the International Monetary Fund (IMF). Thereupon, the Member States of the euro currency area granted Greece coordinated bilateral financial aid. In order to take the necessary measures on a national level, the German *Bundestag* passed the Act on the Assumption of Guarantees to Preserve the Solvency of the Hellenic Republic Necessary for Financial Stability in the Monetary Union (*Gesetz zur Übernahme von Gewährleistungen zum Erhalt der für die Finanzstabilität in der Währungsunion erforderlichen Zahlungsfähigkeit der Hellenischen Republik, Währungsunion-Finanzstabilitätsgesetz* – WFStG, Act on Financial Stability within the European Union) of 7 May 2010 (Federal Law Gazette I p. 537). For the further details, reference is made to the Order of the Second Senate of the Federal Constitutional Court of 7 May 2010 (Decisions of the Federal Constitutional Court – *Entscheidungen des Bundesverfassungsgerichts*, BVerfGE 125, 385 ff.) and the judgment of the Second Senate of the Federal Constitutional Court of 7 September 2011 (BVerfGE 129, 124 <128 ff.>).

[4] 3. Following this, the European Council and the Economic and Financial Affairs Council (ECOFIN Council) agreed to create a European stabilisation mechanism ("euro rescue package"), which was to comprise two components: the European Financial Stabilisation Mechanism (EFSM), based on an EU regulation, and the European Financial Stability Facility (EFSF), a special purpose vehicle based on an inter-state agreement between the Member States of the euro currency area. In order to implement these decisions, on 11 May 2010, on the proposal of the European Commission on the basis of Article 122 (2) of the Treaty on the Functioning of the European Union (TFEU), the Council issued Council Regulation (EU) No 407/2010 establishing a European financial stabilisation mechanism (OJ L 118 of 12 May 2010, p. 1). In addition, on 7 June 2010, the European Financial Stability Facility, a joint-stock company incorporated in Luxembourg, was founded. Its purpose is to issue bonds and to grant loans and credit lines to cover the financing requirements, subject to conditions, of Member States of the euro currency area which are in financial difficulties. The guarantees for the special purpose vehicle are allocated among the Member States of the euro currency area proportionately according to their share of the capital of the European Central Bank. The life of the special purpose vehicle is limited to three years. In the Act on the Assumption of Guarantees in Connection with a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus – Stabilisierungsmechanismusgesetz* – Euro Stabilisation Mechanism Act – StabMechG) of 22 May 2010 (Federal Law Gazette I p. 627), the Federal legislature created on a national level the requirements for financial aid to be given by the European Financial Stability Facility. For the further details, reference is made to the Order of the Second Senate of the Federal Constitutional Court of 7 May 2010 (BVerfGE 125, 385 ff.), the Order of the Second Senate of the Federal Constitutional Court of 9 June 2010 (BVerfGE 126, 158 ff.) and the judgment of the Second Senate of the Federal Constitutional Court of 7 September 2011 (BVerfGE 129, 124 <133 ff.>).

[5] 4. The continuingly tense situation on the financial markets induced the Member States of the euro currency area to provide the European Financial Stability Facility with additional, more flexible instruments, in order to enable more effective assistance to the over-indebted Member States. The heads of state and government, at the European Council on 21 July 2011, decided to commit the originally agreed maximum lending capacity of the European Financial Stability Facility of 440 billion euros in full. The EFSF was to be able *inter alia* to undertake purchases of government bonds both on the primary and on the secondary market. In Article 1 of the Act to Amend the Act on the Assumption of Guarantees in Connection with a

European Stabilisation Mechanism (*Gesetz zur Änderung des Gesetzes zur Übernahme von Gewährleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*) of 9 October 2011 (BGBl I p. 1992), the German *Bundestag* amended the Euro Stabilisation Mechanism Act and adapted it to the changed legal position. For the further details, reference is made to the judgment of the Second Senate of the Federal Constitutional Court of 28 February 2012 – 2 BvE 8/11 – (*Neue Zeitschrift für Verwaltungsrecht* – NVwZ 2012, pp. 495 ff.).

[6] 5. In a letter of 8 February 2012, Greece requested the President of the Group of Finance Ministers of the Member States of the euro currency area (Eurogroup) to provide further emergency loans – for the first time – from the European Financial Stability Facility. On 27 February 2012, the German *Bundestag* agreed to the second Greece aid package under § 3 (1) of the Euro Stabilisation Mechanism Act (*Bundestag* printed paper 17/8730).

[7] 6. Since as early as the end of 2010, the Member States of the European Union have also been endeavouring to create a permanent crisis management mechanism, over and above the present "euro rescue package". At the meeting of the European Council of 28/29 October 2010, the heads of state and government agreed to establish a "permanent crisis mechanism to safeguard the financial stability of the euro area as a whole" (EUCO 25/1/10 REV 1, Conclusions, p. 2). On 28 November 2010, the finance ministers of the Member States of the euro currency area agreed on the general characteristics of the future crisis mechanism.

[8] a) On 16/17 December 2010, the European Council fundamentally agreed on an amendment of the Treaty on the Functioning of the European Union, which is to add a new paragraph 3 to Article 136. On 17 March 2011, the German *Bundestag* adopted the motion of the CDU/CSU and FDP parliamentary groups for the German *Bundestag* and the Federal Government to agree to the addition to Article 136 TFEU (BTDrucks 17/4880; *Bundestag* Minutes of Plenary Proceedings – *Bundestagsplenarprotokoll* – BTPlenprot no. 17/96, p. 11015 C). On 25 March 2011, the European Council adopted the (final) draft of a future Article 136 (3) TFEU with the following wording (EUCO 10/11, Conclusions, Annex II, pp. 21 ff.):

[9] (3) 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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality.

[10] b) Following this a draft – a first draft – of a Treaty establishing the European Stability Mechanism (TESM) was prepared and then signed by the ministers of economics and finance of the Member States of the euro currency area on 11 July 2011. When the financial markets failed to calm down as hoped even in the course of the year 2011, the heads of state and government of the euro currency area agreed on 21 July 2011 that in addition to the European Financial Stability Facility they would also furnish the European Stability Mechanism (ESM) with further instruments. The corresponding renegotiations of the Treaty were completed on 2 February 2012 with the second signing of the draft – the second draft – of the Treaty establishing the European Stability Mechanism.

[11] By the Treaty establishing the European Stability Mechanism, the Contracting Parties (ESM Members) create an international financial institution, the "European Stability Mechanism" (Article 1 TESM). If this appears indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen (Article 12 TESM); this may include "precautionary financial assistance" in the form of a precautionary conditioned credit line or an enhanced conditions credit line (Article 14 TESM), financial assistance through loans for the purpose of re-capitalising financial institutions (Article 15 TESM) or generally in favour of an ESM Member (Article 16 TESM) and the purchase of government bonds of an ESM Member on the primary or secondary market (Articles 17, 18 TESM). With regard to the procedure, Article 13 TESM provides that on receipt of the request for stability support, the European Commission in liaison with the European Central Bank is to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, to assess whether public debt is sustainable and to assess the actual or potential financing needs of the ESM Member concerned. On the basis of the request and the assessment, the Board of Governors (see Article 5 TESM) then decides whether the ESM Member concerned is to be granted stability support. If the decision is positive, the European Commission – in liaison with the European Central Bank and, wherever possible, together with the International

Monetary Fund – negotiates with the ESM Member concerned a memorandum of understanding (an MoU) detailing the conditionality attached to the financial assistance facility. The European Commission signs the MoU on behalf of the European Stability Mechanism, subject to approval by the Board of Governors. The European Commission – in liaison with the European Central Bank and, wherever possible, together with the International Monetary Fund – is entrusted with monitoring compliance with the economic conditionality attached to the financial assistance facility. The provisions which are material to the present proceedings are as follows [...]:

[12] Article 3

[13] Purpose

[14] The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.

[15] Article 4

[16] Structure and voting rules

[17] (1) The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director [...].

[18] (2) The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. [...]

[19] (3) The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. […]

[20] (5) The adoption of a decision by qualified majority requires 80 % of the votes cast.

[21] (6) The adoption of a decision by simple majority requires a majority of the votes cast.

[22] (7) The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II.*(Under Annex II, the Federal Republic of Germany was allocated 1,900,248 shares of the authorised capital stock of the ESM out of a total of 7,000,000 shares (= 27.1464 %).)*

[23] (8) If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

[24] Article 5

[25] Board of Governors

[26] (1) Each ESM Member shall appoint a Governor and an alternate Governor. [...] The Governor shall be a member of the government of that ESM Member who has responsibility for finance. [...]

[27] (6) The Board of Governors shall take the following decisions by mutual agreement: [...]

[28] b) to issue new shares on terms other than at par, in accordance with Article 8 (2); [...]

[29] f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13 (3), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18; [...]

[30] i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19; [...]

[31] m) to delegate to the Board of Directors the tasks listed in this Article.

[32] Article 6

[33] Board of Directors

[34] (1) Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. [...]

[35] (5) The Board of Directors shall take decisions by qualified majority, unless

otherwise stated in this Treaty. Decisions to be taken on the basis of powers delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5 (6) and (7). [...]

[36] Article 7

[37] Managing Director

[38] (1) The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, relevant international experience and a high level of competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either. [...]

[39] Article 8

[40] Authorised capital stock

[41] (1) The authorised capital stock shall be EUR 700 000 million. [...]

[42] (2) The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms. [...]

[43] (4) ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.

[44] (5) The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

[45] Article 9

[46] Capital calls

[47] (1) The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

[48] (2) The Board of Directors may call in authorised unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8 (2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

[49] (3) The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt. [...]

[50] Article 10

[51] Changes in authorised capital stock

[52] (1) The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I. […]

[53] Article 25

[54] Coverage of losses

[55] (1) Losses arising in the ESM operations shall be charged:

[56] a) firstly, against the reserve fund;

[57] b) secondly, against the paid-in capital; and

[58] c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9 (3).

[59] (2) If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9 (2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.

[60] (3) When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members in accordance with rules to be adopted by the Board of Governors. [...]

[61] Article 32

[62] Legal status, privileges and immunities

[63] [...] (5) The archives of the ESM and all documents belonging to the ESM or held by it, shall be inviolable.

[64] (6) The premises of the ESM shall be inviolable. [...]

[65] (9) The ESM shall be exempted from any requirement to be authorised or licensed as a credit institution, investment services provider or other authorised licensed or regulated entity under the laws of each ESM Member. [...]

[66] Article 34

[67] Professional secrecy

[68] The Members or former Members of the Board of Governors and of the Board of Directors and any other persons who work or have worked for or in connection with the ESM shall not disclose information that is subject to professional secrecy. They shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

[69] Article 35

[70] Immunities of persons

[71] (1) In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.

[72] (2) The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.

[73] (3) The Managing Director may waive any such immunity in respect of any member of the staff of the ESM other than himself or herself.

[74] (4) Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly. [...]

[75] The Treaty establishing the European Stability Mechanism contains no express right of resignation or termination.

[76] 7. On 2 March 2012, as a further measure to end the sovereign debt crisis, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was signed; the wording of the Treaty (in part) is as follows [...]:

[77] Article 1

[78] (1) By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion. [...]

[79] Article 2

[80] (1) This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4 (3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

[81] (2) This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union.

[82] Article 3

[83] (1) The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law:

[84] a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus;

[85] b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0.5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;

[86] c) the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;

[87] d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1.0 % of the gross domestic product at market prices;

[88] e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

[89] (2) The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1 (e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.

[90] (3) For the purposes of this Article, the definitions set out in Article 2 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, shall apply.

[91] The following definitions shall also apply for the purposes of this Article:

[92] a) "annual structural balance of the general government" refers to the annual cyclically-adjusted balance net of one-off and temporary measures;

[93] b) "exceptional circumstances" refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.

[94] Article 4

[95] When the ratio of a Contracting Party's general government debt to gross domestic product exceeds the 60 % reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council

Regulation (EU) No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union.

[96] Article 5

[97] (1) A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact.

[98] (2) The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission. […]

[99] Article 7

[100] While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

[101] Article 8

[102] (1) The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3 (2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3 (2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

[103] (2) Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

[104] (3) This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union. [...]

[105] Article 16

[106] Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.

[107] The Treaty on Stability, Coordination and Governance in the Economic and Monetary

Union contains no express right of termination or resignation.

[108] 8. On 29 June 2012, the German *Bundestag* and the *Bundesrat* adopted the draft bill of an Act on the European Council Decision of 25 March 2011 to Amend 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 (*Gesetz zu dem Beschluss des Europäischen Rates vom 25. März 2011 zur Änderung des Artikels 136 des Vertrags über die Arbeitsweise der Europäischen Union hinsichtlich eines Stabilitätsmechanismus für die Mitgliedstaaten, deren Währung der Euro ist* – BTDrucks 17/9047), the draft bill of an Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism (*Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus*) as amended by the Recommendation for a Resolution of the budget committee (BTDrucks 17/9045; 17/10126; 17/10172) and the draft bill of an Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (*Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*) as amended to include the proposed amendments approved by the budget committee on 27 June 2012 (BTDrucks 17/9046; 17/10125; 17/10171), in each case these were adopted by a two-thirds majority. Article 1 of each of these statutes contains the approval of the relevant Treaty or decision. In addition, the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism in essence provides as follows:

[109] Article 2

[110] (1) Increases of the authorised capital stock under Article 10 (1) of the Treaty may enter into effect only subject to Federal-law authorisation of the provision of further capital.

[111] (2) The German Governor in the Board of Governors of the European Stability Mechanism, and in the case of a delegation of the decision under Article 5 (6) (m) of the Treaty the German Director on the Board of Directors of the European Stability Mechanism, may approve a resolution proposal for the amendment of the financial assistance instruments under Article 19 of the Treaty or abstain from voting on such a resolution proposal if this has been authorised in advanced by a Federal statute.

[112] (3) Changes in the authorised capital stock under Article 10 (3) of the Treaty and adjustments to the contribution key under Article 11 (3) and (4) in conjunction with Article 11 (6) and Annex I of the Treaty shall be published in the Federal Law Gazette (*Bundesgesetzblatt*).

[113] 9. Also on 29 June 2012, the German *Bundestag* adopted the draft bill of an Act for Financial Participation in the European Stability Mechanism (*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz* – ESM Financing Act, ESMFinG) as amended by the Recommendation for a Resolution of the budget committee (BTDrucks 17/9048; 17/10126). The *Bundesrat* approved this Act. Under § 1 ESMFinG, the Federal Republic of Germany participates in the total amount of the capital of the European Stability Mechanism to be paid in with a sum in the amount of 21.71712 billion euros and in the total amount of callable capital with a sum in the amount of 168.30768 billion euros. The Federal Ministry of Finance is authorised to give guarantees for the callable capital in the amount of 168.30768 billion euros. The other provisions of the Act for Financial Participation in the European Stability Mechanism are, in part, as follows:

[114] § 4

[115] Requirement of parliamentary approval for decisions in the European Financial Stability Mechanism

[116] (1) In matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German *Bundestag*, this responsibility shall be exercised by the plenary session of the German *Bundestag*. The overall budgetary responsibility is affected in particular

[117] 1. in the decision under Article 13 (2) of the Treaty establishing the European Stability Mechanism to give a Contracting Party to the European Stability Mechanism, on that Contracting Party's request, stability support in the form of a financial assistance facility provided for in the Treaty,

[118] 2. in the acceptance of a financial assistance facility agreement under Article 13 (3) sentence 3 of the Treaty establishing the European Stability Mechanism and of consent to a corresponding Memorandum of Understanding under Article 13 (4) of the

Treaty establishing the European Stability Mechanism,

[119] 3. in decisions in connection with the European Stability Mechanism to change the authorised capital stock and the maximum lending volume under Article 10 (1) of the Treaty establishing the European Stability Mechanism; Article 2 (1) of the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism is not affected.

[120] (2) In the cases which relate to the overall budgetary responsibility, the Federal Government may through its representative only vote in favour of a proposed resolution in matters of the European Stability Mechanism or abstain from voting on a resolution when the plenary session has passed a resolution in favour of this. Without such a resolution of the plenary session, the German representative must vote against the proposed resolution. The representative of the Federal Government must participate in the passing of the resolution.

[121] (3) If under Article 5 (6) point (m) of the Treaty establishing the European Stability Mechanism tasks of the Board of Governors are delegated to the Board of Directors, §§ 3 to 6 shall apply with the necessary modifications.

[122] § 5

[123] Participation of the budget committee of the German *Bundestag*

[124] (1) In all other matters of the European Stability Mechanism which affect the budgetary responsibility of the German *Bundestag* and in which a decision of the plenary session under § 4 is not provided for, the budget committee of the German *Bundestag* shall be involved. The budget committee shall supervise the preparation and enforcement of the agreements on stability support.

[125] (2) The following require the prior approval of the budgetary committee:

[126] 1. Decisions on the provision of additional instruments without changing the total financing volume of an existing financial assistance facility or material changes of the conditionality of the financial assistance facility,

[127] 2. decisions on calling in capital under Article 9 (1) of the Treaty establishing the European Stability Mechanism and accepting or materially changing the terms and conditions which apply to calls on capital under Article 9 (4) of the Treaty establishing the European Stability Mechanism,

[128] 3. the acceptance or material change of the guidelines on the modalities for implementing the individual financial assistance facilities under Articles 14 to 18, of the pricing guidelines under Article 20 (2), of the guidelines for borrowing operations under Article 21 (2), of the guidelines for investment policy under Article 22 (1), of the guidelines for dividend policy under Article 23 (3) and of the rules for the establishment, administration and use of other funds under Article 24 (4) of the Treaty establishing the European Stability Mechanism,

[129] 4. the detailed terms and conditions for capital changes under Article 10 (2) of the Treaty establishing the European Stability Mechanism,

[130] 5. the acceptance of provisions or interpretations legislating on professional secrecy under Article 34 of the Treaty establishing the European Stability Mechanism.

[131] In these cases, the Federal Government may through its representative only vote in favour or abstain from voting on a resolution proposal on matters of the European Stability Mechanism when the budget committee has passed a resolution in favour of this. The Federal Government may also make an application to this effect in the budget committee. Without such a resolution of the budget committee, the German representative must vote against the proposed resolution. The representative of the Federal Government must participate in the passing of the resolution.

[132] (3) In the cases not covered by paragraph 2 which affect the budgetary responsibility of the German *Bundestag*, the Federal Government shall involve the budget committee and take account of its opinions. This applies in particular to resolutions on the disbursement of individual tranches of the stability support granted.

[133] (4) The Governor appointed by Germany under Article 5 (1) of the Treaty establishing the European Stability Mechanism and the alternate Governor shall, on the request of a minimum of one quarter of the members of the budget committee of the German *Bundestag*, which must be supported by a minimum of two parliamentary groups in the committee, inform the budget committee and provide details except where circumstances under § 6 of this Act are affected.

[134] (5) The plenary session of the German *Bundestag* may, by a resolution passed

by a simple majority, at any time assume to itself and exercise by ordinary resolution the powers of the budget committee.

[135] (6) An application or a submission of the Federal Government shall be deemed to have been transferred to the budget committee within the meaning of the Rules of Procedure of the *Bundestag*. § 70 of the Rules of Procedure applies with the necessary modifications; the request of one quarter of the members of the budget committee must be supported by a minimum of two parliamentary groups in the committee.

[136] § 6

[137] Involvement by way of a special committee

[138] (1) If the purchase of government bonds on the secondary market under Article 18 of the Treaty establishing the European Stability Mechanism is intended, the Federal Government may assert that the matter is particularly confidential. Particular confidentiality exists where the mere fact of consultation or passing of a resolution must be kept secret in order not to thwart the success of the measures. The Federal Government must give reasons for the assumption of particular confidentiality.

[139] (2) In this case, the participation rights set out in §§ 4 and 5 may be exercised by members of the budget committee who are elected by the German *Bundestag* for the duration of one parliamentary term by secret ballot by the majority of the members of the German *Bundestag* (special committee). [...]

[140] § 7

[141] Information by the Federal Government

[142] (1) The Federal Government shall inform the German *Bundestag* and the *Bundesrat* in matters of this statute comprehensively, at the earliest possible date, continuously and as a general rule in writing. It shall give the German *Bundestag* an opportunity to express an opinion in matters which affect its competencies and shall take account of its opinions.

[143] (2) The Federal Government shall communicate to the German *Bundestag* all documents available to it for the exercise of the participation rights of the German *Bundestag*. It shall also communicate these documents to the *Bundesrat*. [...]

[144] (9) The representatives in the ESM appointed by Germany or by the German Governor shall not be entitled to rely on professional secrecy under Article 34 of the Treaty establishing the European Stability Mechanism vis-à-vis a request for information from the German *Bundestag* or its committees and members.

[145] (10) The rights of the German *Bundestag* under the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union and the rights of the Bundesrat under the Act on Cooperation between the Federation and the Länder in Matters concerning the European Union are not affected.

II.

[146] The first to fifth applicants are essentially of the opinion that the challenged statutes – each individually and also in their combined effect – violate the applicants' rights under Article 38 (1) in conjunction with Article 79 (3) and under Article 20 (1) and (2) of the Basic Law. In addition, the first applicant submits that Article 3 (1) of the Basic Law is violated and the second applicants submit that Article 14 (1) and Article 20 (4) of the Basic Law are violated.

[147] The sixth applicant submits that the decision of the German *Bundestag* on the challenged statutes violates its rights under Article 38 (1) sentence 2 of the Basic Law in conjunction with Article 20 (1) and (2), Article 23 (1) and (2) and Article 79 (3) of the Basic Law and under Article 23 (2) sentence 1 of the Basic Law and submits that rights of the German *Bundestag*are violated.

[148] As grounds for these submissions, the applicants assert the following, weighted in various degrees in the individual case:

[149] 1. Article 136 (3) TFEU not only gives clarification but also creates rights and duties. It largely devalues the bailout prohibition (Article 125 TFEU) and thus removes a necessary condition for the safeguarding of parliamentary freedom to decide in matters concerning the budget. This signifies not only a fundamental change of monetary policy in the direction of a transfer and liability community, but in addition constitutes a further stage of integration which fundamentally changes the nature of the European Union. The prohibition of direct acquisition of debt instruments of public institutions by the European Central Bank and the prohibition of the assumption of liability as

the decisive cornerstones of the economic and monetary union would be removed from the stability community. In addition, the provision is extremely vague. The amendment to the Treaty on the Functioning of the European Union was also effected, in error, using the simplified procedure under Article 48 (6) TEU.

[150] The sixth applicant submits that in the case of a Treaty amendment of this significance a convention should have been established, which would have permitted the national parliaments to be involved.

[151] 2. The approval of the Treaty establishing the European Stability Mechanism has the effect of transferring essential duties and powers to the European Stability Mechanism in a way which is incompatible with the structural principles of the Basic Law, in particular with the principle of democracy. In this way, the German *Bundestag* unconstitutionally divests itself of its budget autonomy. The *Bundestag* also curtails the budget autonomy of a future *Bundestag* by setting in motion an automatic process of liability and performance which such a future*Bundestag* cannot escape. The instruments of the stability support are substantially extended in contrast to the European Financial Stability Facility. As part of the comprehensive provision on allocation of tasks in Article 3 TESM, the European Stability Mechanism is empowered to make far-reaching decisions with extremely serious and scarcely foreseeable consequences for the budgets of the Member States. Thus it ultimately becomes a financing bank, but without being subject to banking supervision. If the European Stability Mechanism receives a banking licence, it will be able to obtain loans in a practically unlimited amount in return for depositing government bonds with the European Central Bank; Germany will share liability for default on these loans in the amount of its share of the capital of the European Central Bank.

[152] a) Against the background of the liability risks already existing under other euro rescue measures, the additional liability volume created by the Treaty establishing the European Stability Mechanism and the Act for Financial Participation in the European Stability Mechanism plainly exceeds the limit of what is responsible. Germany takes on risks in a volume which exceeds the measures of what is constitutionally permissible. In addition, the obligations resulting from the ESM Treaty are incompatible with the Basic Law's debt brake (Article 109 (3), Article 115 (2) of the Basic Law).

[153] b) The transfer of competencies to decide which have budgetary relevance to bodies of the European Stability Mechanism is only compatible with the principle of democracy of Article 20 (1) and (2) of the Basic Law if it is guaranteed by the requirement of parliamentary approval that their decisions are subject to the mandatory approval of the *Bundestag*. But such requirements of parliamentary approval are not contained in the Treaty; in so far as the Act of assent and the Act for Financial Participation in the European Stability Mechanism contain requirements, these are incomplete or insufficient in substance.

[154] aa) Article 8 (5) TESM does not limit the liability of the Member States. The wording of the provision, which is ostensibly unambiguous, conflicts with the duties to make subsequent contributions which are expressly contained in the provisions on capital calls and loss set-off of Article 9 (2) and (3), Article 25 (2) TESM; these counteract the restriction of the liability risk. If a member became insolvent, the members which were still solvent would have to make higher payments in order to proportionately set off the default. Even now there is already a high degree of likelihood that such duties to make subsequent contributions will arise. In this way, at all events, the European Stability Mechanism indirectly results in a communitarisation of state debts. In addition, the issue of shares above par under Article 8 (2) TESM may make it possible to leverage the funds of the European Stability Mechanism. The actual risks thus extend far beyond the capital expressly to be paid in and the callable sum. The extent of the capital to be paid in by Germany is therefore ultimately not determined in the Treaty, but dependent on the decisions of other states.

[155] bb) There are no provisos under international law in favour of the German *Bundestag*. Thus, for example, against the wishes of Germany and without any mandatory authorisation of the*Bundestag*, the Board of Directors and the Managing Director could decide on calls on capital in sums of many billion dollars. But with regard to the manner in which the funds are used too, no sufficient rights of monitoring and participation of the German *Bundestag* are provided for, although the way in which the funds are granted and their amount are extremely indefinite and in addition Article 19 TESM provides for the provision of further financial assistance instruments. In this way, the national parliaments would find themselves in the role of mere subsequent enforcement, even if their approval were necessary.

[156] cc) Under Article 4 (8) TESM voting rights may automatically be removed, even where there is only a short-term default in payment or in the case of extremely high and possibly unjustified calls on capital. The loss of all voting rights is a gross violation of the principle of democracy. If the German voting rights were suspended, the Board of Governors and the Board of Directors would be able to pass resolutions which could seriously impair the overall budgetary responsibility of the *Bundestag*.

[157] dd) It is true that the European Stability Mechanism is democratically linked to the national parliaments through the members of the Board of Governors and of the Board of Directors. But it is not guaranteed that the German Director has parliamentary responsibility. The members of the bodies are subject to a duty of professional secrecy (Article 34 TESM); as a result, they cannot satisfy their duties to provide information under Article 23 (2) of the Basic Law.

[158] c) Finally, the permanent binding effect of the Treaty establishing the European Stability Mechanism encroaches upon Germany's statehood. The Treaty contains no termination provision and is therefore de facto impossible to terminate. The *clausula rebus sic stantibus* (Article 62 of the Vienna Convention on the Law of Treaties – VCLT of 23 May 1969 [...]) can apply only subject to strict requirements. Bearing in mind the long-term binding effect, in addition, the relative strengths of the members may change, as a result of which Germany could lose its veto position.

[159] d) The first applicant also submits that the immunity of the members of the Board of Governors and of the Board of Directors and of their alternates under Article 35 TESM violates Article 3 (1) of the Basic Law.

[160] 3. The Act for Financial Participation in the European Stability Mechanism, in the absence of introduction in parliament corresponding to Article 76 (1) and (2) of the Basic Law, is unconstitutional on formal grounds alone, because the draft bill had a gap in the place where rights of participation would have been provided for. In addition, its §§ 3 to 7 inadequately guarantee the rights of participation and rights to information of the German *Bundestag*. Furthermore, in many cases only the budget committee participates, although these are fundamental changes which affect the overall budgetary responsibility and for which the plenary session is competent.

[161] 4. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union obliges the Federal Republic of Germany to permanently retain the debt brake inserted into the Basic Law, as a result of which the debt brake is substantively integrated in the unchangeable core of the constitution. Even if the Treaty contains no essential changes of the present state of law, the existing commitments under secondary European Union law and under the debt brake already contained in the Basic Law will acquire a new legal quality as a result of being laid down in international law.

[162] a) The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union creates rights and duties. The 0.5% criterion in Article 3 (1) point (b) sentence 1 TSCG creates a stricter requirement for the medium-term budget target than under secondary European Union law. In the case of material deviations from the medium-term budget objective or from the adjustment path towards it, in addition, there is provision for an automatic correction mechanism which must be based on common principles proposed by the European Commission with regard to the nature, scope and supervision of the corrective measures to be undertaken. Further, the Treaty provides for a binding report by the European Commission evaluating whether the contracting states have effectively implemented in national law the mechanism for limiting borrowing and the obligation of orientation towards the Commission's proposals in the formulation of exceptions and in particular with regard to the instruments of the possible correction mechanisms. The Treaty also changes the substantive constitutional position. At present, the Basic Law has never contained either a borrowing limit for the state as a whole, including local authorities and social security organisations, nor an automatic mechanism. In addition, the states whose total borrowing exceeds the Maastricht criterion of 60% of the gross domestic product would have to undertake cutback measures with the aim of reducing the part over 60% by an average of one-twentieth per year.

[163] b) Article 4 TSCG obliges Germany to make an annual reduction of debt in the amount of 26 billion euros. This is incompatible with Article 109 (3), Article 115 (2), Article 143d (1) of the Basic Law and requires a change of the Basic Law, because the budget law governs only the reduction of deficit, but not the reduction of public debt.

[164] c) The budget autonomy is eroded in particular by the provision of Article 5 TSCG.

This provides that the European Commission must approve budgetary and economic partnership programmes which last for longer than one parliamentary term and are capable of restricting parliament's possibilities of decision. This goes beyond the current requirements and possibilities of sanction under secondary law. The automatic correction mechanism will also result in requirements of the European Commission eroding the budgetary sovereignty of the Member States.

[165] d) Finally, the irreversibility of the obligation violates the Basic Law. No termination is permitted, nor can one be derived from the nature of the Treaty. It is therefore only possible to terminate the multilateral Treaty by mutual agreement. In this way, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union not only installs permanent mechanisms of supervision and sanction, but also irreversibly determines the economic policy of the Contracting States.

[166] 5. On the applications for the issue of temporary injunctions, it is submitted that the weighing of consequences makes them necessary, because the ratification of the Treaties cannot be reversed under international law and Germany would be forced to disregard their binding effect under international law if the Federal Constitutional Court granted the applications in the principal proceedings. The issue of temporary injunctions is absolutely necessary in order to prevent the Federal Constitutional Court from finding itself facing a fait accompli when deciding in the principal proceedings.

III.

[167] The Federal President, the German *Bundestag*, the *Bundesrat*, the Federal Government and all *Land* (state) governments were given the opportunity to express an opinion.

[168] 1. The Federal Government is of the opinion that both the constitutional complaints and the application in *Organstreit* proceedings (proceedings on a dispute between supreme Federal bodies) are patently unfounded and the applications for the issue of temporary injunctions are therefore inadmissible, or at all events unfounded.

[169] a) Article 136 (3) TFEU does not change the orientation of the monetary union, nor does it remove the prohibition contained in Article 125 TFEU of assuming the liabilities of other Member States; it merely contains a clarification. The measures of stability support of the Member States are not measures of monetary policy for which, under Article 3 (1) point (c) TFEU, the European Union would be competent. The granting of financial assistance is a measure of economic policy, for which the Member States are competent.

[170] b) The European Stability Mechanism is essentially structured on the model of the European Financial Stability Facility, but its capital structure makes it more efficient. With regard to the participation of the German *Bundestag*, therefore, the same questions arise as in connection with the European Financial Stability Facility pursuant to the judgments of the Federal Constitutional Court of 7 September 2011 and of 28 February 2012. The Act for Financial Participation in the European Stability Mechanism complies with these requirements. By reason of these provisions, there can be no automatic liability. For voting in the Board of Governors, the Treaty establishing the European Stability Mechanism provides for either mutual agreement – and thus unanimity – or a qualified majority of 80% of the votes cast. Since the Federal Finance Minister is delegated to the Board of Governors and a Permanent Secretary to the Board of Directors, it is guaranteed, together with the Act for Financial Participation in the European Stability Mechanism, that the overall budgetary responsibility of the German*Bundestag* is safeguarded.

[171] The provisions of the Treaty establishing the European Stability Mechanism limit liability to a Member State's share of the capital stock, which cannot be increased without the approval of the German *Bundestag*. Article 8 (5) TESM expressly provides that the liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price and that no ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The maximum amount for which Germany would be liable is therefore approximately 190 billion euros. This – like the temporary existence of the guarantees for the European Financial Stability Facility – does not result in exceeding an upper limit derived from the Basic Law or to an erosion of parliament's right to decide on the budget. In addition, there is no risk-free alternative to these assistance measures. Thus, according to the assessments of the German Bundesbank, the European Central Bank, the European Commission and the International Monetary Fund, far greater political and economic damage would arise from the

insolvency of individual Member States. Nor does the European Stability Mechanism constitute entry into a transfer union; long-term payments similar to financial equalisation remain out of the question.

[172] c) The Act for Financial Participation in the European Stability Mechanism is formally in conformity with the Basic Law. Even if it was introduced without the provision for the participation of the *Bundestag*, it was a complete draft bill, which *inter alia* contained the statutory authorisation required under Article 115 (1) of the Basic Law. It was not necessary for the participation rights of the *Bundestag* to be dealt with in this statute.

[173] § 4 ESMFinG subjects all matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German *Bundestag* to the consent of the *Bundestag*plenary session. § 7 ESMFinG provides for comprehensive rights of information of the German *Bundestag* in matters of the European Stability Mechanism. There is a double safeguard when capital stock is increased. Under the Act of assent, the German representative must be authorised by a Federal statute for an alteration of the financial assistance instruments. In addition, for changes of the conditions for financial assistance which have no effect on the total financing volume, and for the provision of additional instruments within existing financial assistance measures, § 5 (2) no. 2 ESMFinG provides for the consent of the budget committee. The budget committee supervises the implementation of the agreements entered into for the grant of financial assistance. Finally, § 6 ESMFinG provides for a special committee for the purchase of government bonds on the secondary market, although this is only competent to make decisions where there are requirements of particular confidentiality. The waiver of a right of veto for Germany in the cases of capital calls under Article 9 (2) and (3) TESM is appropriate and safeguards the creditworthiness of the European Stability Mechanism.

[174] d) The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union is intended to create a strong orientation towards stability, for its central provisions oblige the Contracting Parties to lay down the precept of budgetary discipline in their national law, preferably in constitutional law. Article 3 TSCG does not create a material new restriction of the budget autonomy of the Member States, but puts into concrete terms the already existing provisions of European Union law. In addition, the Treaty guards against excessive public debt and in this way prevents further state financial crises in future; in this way it also supplements the Treaty establishing the European Stability Mechanism substantively and functionally. The monitoring of the budgetary and economic partnership programmes of the Member States contained in Article 5 TSCG is not an impermissible restriction of the legislative discretion of the budget legislature. Nor is the obligation to submit budgetary and economic partnership programmes to the Council of the European Union and to the European Commission contained in Article 5 (1) sentence 3 TSCG a restriction, for lack of associated legal consequences. The limitation of government borrowing is compatible with the Basic Law, since in this case it is only the definition of a framework to be filled in by the Member States and this framework precisely corresponds to the model of the German debt brake. The proposals which Article 3 (2) TSCG requires the European Commission to make on common principles for national correction mechanisms and on the time-frame for convergence towards the medium-term budget objective under Article 3 (1) point (b) sentence 3 TSCG are merely interpretation guides putting the provision in concrete terms.

[175] The indefinite duration of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – and of the Treaty establishing the European Stability Mechanism – is not a violation of the constitution. It is quite customary for important agreements under international law to be entered into without a fixed term or a termination clause. Even a treaty entered into for an indefinite period of time may be terminated at any time by all contracting parties by mutual agreement. In addition, in the case of fundamental changes of the circumstances existing at the date of entry into the treaty a party may withdraw from the treaty on the basis of Article 62 of the VCLT.

[176] e) The applications for the issue of temporary injunctions must be refused. In the present fragile situation, an appreciably delayed ratification of the two treaties entails massive consequences for some Member States. Since the Federal Republic of Germany has a share of somewhat more than 27% of the capital in the European Stability Mechanism, the latter cannot enter into effect without the deposit of the German instrument of ratification. The Federal Government proceeds on the assumption that it is urgently necessary to permit at most short-term uncertainty to arise as to the progress of the German ratification procedure. The Federal Constitutional Court has already, in particular

cases, taken account of the prospects of success in the main proceedings in the proceedings on the issue of temporary injunctions; it is requested that the Court so proceed in the present case too.

[177] 2. The German *Bundestag* regards the applications in the principal proceedings as inadmissible in so far as they are directed against the Act of assent to Article 136 (3) TFEU and assert a violation of Article 3 (1), Article 14 and Article 20 of the Basic Law; in this respect, the applicants are not entitled to apply. Apart from this, the applications in the principal proceedings are patently unfounded.

[178] a) The Act of assent to the European Council decision to amend Article 136 TFEU does not impair the position of the German *Bundestag* laid down in the Basic Law. In the unanimous agreement of the Member States of the European Union, Article 125 TFEU does not prevent the voluntary grant of assistance. Article 136 (3) TFEU once more makes this clear and is sufficiently specific. The provision serves to safeguard the stability of the monetary union and specifically does not make it possible to introduce a comprehensive liability and transfer union, but instead gives selective authorisation, in a situation which is sufficiently clearly discernible, for assistance measures for a limited period of time; in addition, it contains strict conditionality. The accusation that convention proceedings should have been conducted is mistaken, because Article 136 (3) TFEU does not expand the competence of the European Union.

[179] b) The Act of assent to the Treaty establishing the European Stability Mechanism and the Act for Financial Participation in the European Stability Mechanism do not impair the budgetary responsibility of the budget legislature. The Treaty establishing the European Stability Mechanism makes it sufficiently clear what burdens it creates. The requirement of specificity does not exclude the possibility that the provisions of the Treaty are autonomously further developed, but instead is aimed to enable parliament to follow the process of development sufficiently and to guide it effectively.

[180] The overall budgetary responsibility of the *Bundestag* is not endangered. The European Stability Mechanism cannot make any decisions with budget significance which have not already been approved by the legislature in the Treaty or which need a legislative decision in the course of further development. The authority to generate outside capital is therefore no more questionable than the authority to be able to grant financial assistance in the form of a loan and in other forms. Calls on capital merely result in fulfilling an obligation already created. There can be no increase against its will or without its consent of the shares allocated to the Federal Republic of Germany, for under Article 8 (5) TESM the liability of a Member State is limited "in all circumstances" to its portion of the authorised capital stock. In particular, this provision cannot be overridden by the provisions on the revised increased capital call (Article 25 (2) TESM). The consequential effects are also clear; the purpose of the action, the scope of the operation and the ESM equity capital available are clearly limited. The danger of automatic events is excluded both contractually and procedurally. Admittedly, the European Stability Mechanism is of a permanent nature, but the assistance measures are not. These are intended to achieve a return to complete autonomy and by reason of the conditionality they are necessarily limited in duration. The sums to be paid by the Member States do not burden the budget immediately, but at most are to be paid in stages over a period of time. It is in fact possible for the latitude to be extended by reviewing whether the maximum lending volume is appropriate, under Article 10 TESM, but this does require the cooperation of the legislature. The danger of substantial losses in carrying out operations under Article 21 TESM is so small that it may be disregarded.

[181] Even in the unlikely event that the Federal Republic of Germany has completely paid in its capital contributions and there is a sudden devaluation of the capital stock, the burdens arising from this would merely increase German state deficit by approximately eight percentage points. The Federal Republic of Germany would then have a level of indebtedness of approximately 90% of the gross domestic product, which would not deprive future budget legislatures of all latitude. However, in these conditions it would only be possible to observe the debt brake by relying on the emergency clause. According to the calculations of the Federal Ministry of Finance and the Federal Audit Office (*Bundesrechnungshof*), all rescue measures at the present time would result in a conceivable maximum burden of approximately 310 billion euros, and it is not to be expected that this would be realised suddenly. A waiver of the measures of assistance in question would be highly likely to start a process which would result in burdens for the present and for future budget legislatures which would be equally large or even larger.

[182] The democratic supervision of the work of the European Stability Mechanism is largely effected by way of rights of approval and participation. The fundamental decisions of the European Stability Mechanism are subject to approval in the German *Bundestag*. The office holders involved in the decisions of the European Stability Mechanism are subject to sufficient parliamentary monitoring and are therefore democratically legitimated. On a second level, the acts of the German representatives require the approval of the budget committee; the plenary session, however, may assume the matter to itself at any time. The mechanisms of governance and monitoring are so far upstream that parliament can exercise influence on the process of deciding on the granting of assistance.

[183] c) The conditions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union do not constitute a curtailment of budgetary sovereignty, but serve to restrict the German liability risk. The Treaty relates to the law of the European Union, without being intended to change the law. Thus the Treaty creates no direct legal effects on the budgets of the Member States, but only indirect effects by way of the sanctions; a budget Act which violates the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union does not cease to be legally valid.

[184] By reason of the federal structure of the Federal Republic of Germany, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union differs in some respects from the debt brake in the Basic Law, but these differences do not result in a substantially different legislative concept. The state as a whole, that is, the Federal and *Länder*governments and local authorities and all other public budgets, are subject to this. Sanctions by the bodies of the European Union may be directed solely to the Federal Government; there is no scope for a reach-through to *Länder* or local authorities. The road of debt reduction provided in the Basic Law is defined by Article 143d (1) of the Basic Law, while the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union leaves it to be put into concrete terms by the European Commission. Admittedly, it is not certain that the European Commission will ultimately decide on an identical road of debt reduction to that provided in the Basic Law; however, the Commission has a duty to take account of country-specific risks and in this respect may orient itself towards the legal position of the Member State in question.

[185] The substantive provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union scarcely add to the number of substantive commitments. The Member States assume the obligations of their own volition and are not compelled to participate, not even de facto. The Treaty arranges for the autonomous enforcement of voluntary contractual agreements and complies with already existing provisions of European Union law. It is true that Article 7 TSCG with its "reverse" rule on a qualified majority is an innovation, but this has no constitutional relevance for the budgetary sovereignty of the national parliaments; the agreement on a particular voting procedure does not modify the excessive deficit procedure in substance. Nor is there a transfer of substantive legislative competencies to other bodies with sovereign power. Article 8 TSCG merely grants the Court of Justice the competence with regard to compliance with Article 3 (2) TSCG to decide legal actions of the Contracting Parties and in the case of a violation to impose a penalty payment on a Contracting Party.

[186] Admittedly, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union contains no express provision for termination or withdrawal, but this does not exclude the application of the general rules of termination of international law.

IV.

[187] Under § 65 (1), § 94 (5) of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz* – BVerfGG) the Federal Government has declared its intervention in proceedings named in the recitals; it wishes to intervene in the sixth proceedings on the side of the German *Bundestag*. The *Bundestag* in turn has declared its intention to intervene in the proceedings I to V under § 94 (5) BVerfGG.

V.

[188] In the oral hearing of 10 July 2012, the parties reaffirmed and enlarged upon their submissions. The Senate also heard Dr. Jens Weidmann, the President of the German Bundesbank, Prof. Dr. Dieter Engels, the President of the Federal Audit Office, Mr. Rolf Strauch and Mr. Ralf Jansen of the European Financial Stability Facility, Prof. Dr. Dres. h.c. Hans-Werner Sinn (Ifo Institute), Dr. Friedrich Heinemann (Centre for European Economic Research) and Prof. Dr. Clemens Fuest (University of Oxford) as expert witnesses. These persons expressed opinions in particular

on the extent of the total burden on the Federal budget entailed by the entry into effect of the European Stability Mechanism, by possible speculative losses and duties to make subsequent contributions, by the German liability risks arising from participation in the European Central Bank; on the existing financing volume of the European Financial Stability Facility; and on the risks of a delayed entry into effect of the European Stability Mechanism.

B.

[189] The admissible applications are largely unfounded.

I.

[190] 1. Under § 32 of the Federal Constitutional Court Act, the Federal Constitutional Court, in a case of dispute, may provisionally provide for a situation by temporary injunction if this is advisable for the common good in order to avert serious detriment, to prevent imminent violence or for another compelling reason. In reviewing whether the requirements of § 32 (1) BVerfGG are satisfied, a strict yardstick must always be applied by reason of the far-reaching effects of a temporary injunction (see BVerfGE 55, 1 <3>; 82, 310 <312>; 94, 166 <216-217>; 104, 23 <27>; 106, 51 <58>). This yardstick becomes even stricter if a measure with repercussions in international law or foreign policy is under consideration (see BVerfGE 35, 193 <196-197>; 83, 162 <171-172>; 88, 173 <179>; 89, 38 <43>; 108, 34 <41>; 118, 111 <122>; 125, 385 <393>; 126, 158 <167>; 129, 284 <298>).

[191] In the decision on the temporary injunction, the reasons which are submitted to show that the challenged measures are unconstitutional must in principle be disregarded, unless the declaration sought in the principal proceedings or the application made in the principal proceedings is revealed from the outset to be inadmissible or patently unfounded (see BVerfGE 89, 38 <44>; 103, 41 <42>; 118, 111 <122>; established case-law). If the outcome of the principal proceedings is found to be open, the Federal Constitutional Court must in principle only in the course of a weighing of consequences weigh the disadvantages which would occur if a temporary injunction were not granted but the constitutional complaint or the application in*Organstreit* proceedings were successful in the principal proceedings against the disadvantages which would occur if the temporary injunction sought were granted but success were refused in the principal proceedings (see BVerfGE 105, 365 <371>; 106, 351 <355>; 108, 238 <246>; 125, 385 <393>; 126, 158 <168>; 129, 284 <298>; established case-law).

[192] 2. a) But if the Act of assent to a treaty under international law is presented for review in the principal proceedings, it may be advisable not to restrict the review to a pure weighing of consequences, but to make a summary review at an early stage, in the proceedings under § 32 (1) BVerfGG, to determine whether the reasons submitted to show that the challenged Act of assent indicate with a high degree of probability that the Federal Constitutional Court will find that the Act of assent is unconstitutional (see BVerfGE 35, 193 <196-197>). In this way it can on the one hand be ensured that the Federal Republic of Germany does not enter into any commitments under international law which are incompatible with the Basic Law. On the other hand, it may be avoided in this way that a potential violation of law in the refusal of temporary judicial relief could no longer be reversed, that is, the decision in the principal proceedings were too late (see BVerfGE 46, 160 <164>; 111, 147 <153>), as is typically the case when the instrument of ratification of an agreement under international law is deposited. A summary review of the legal position is advisable in particular in such cases when a violation of the protected interests of Article 79 (3) of the Basic Law is under consideration. In such a situation, it must be the duty of the Federal Constitutional Court to protect the identity of the constitution. If the summary review in the injunctive relief proceedings reveals a high probability of an alleged violation of Article 79 (3) of the Basic Law, the failure to grant legal protection would constitute a serious disadvantages for public welfare within the meaning of § 32 (1) BVerfGG (see BVerfGE 111, 147 <153>).

[193] b) Accompanying legislation may also fall under this review yardstick and be subjected to a summary review if there is a close factual connection with the treaty which is challenged at the same time. This must be assumed in particular if the statute is intended to guarantee that the measure agreed under international law has the connection to parliament which is fundamentally constitutionally required and if reviewing the Act of assent and the accompanying legislation separately would mean both artificially splitting up a unified fact situation and also subordinating them to different yardsticks.

[194] 3. In accordance with these principles, the agreements under international law challenged

in the present constitutional complaints and the *Organstreit* proceedings, including the accompanying legislation, are to be summarily reviewed to determine whether the violations of law admissibly asserted by the applicants are present in so far as they are material to the objective of legal protection pursued in the application for the issue of temporary injunctions. In ratifying the treaties, the Federal Republic of Germany enters into commitments in international law from which it could not easily withdraw if constitutional violations were established. The economic and political disadvantages which may arise from a delayed entry into force of the challenged statutes may be of great weight, but at the same time they cannot be weighed against democracy, which is the interest protected by Article 79 (3) of the Basic Law. The Act for Financial Participation in the European Stability Mechanism contains the domestic safeguards to preserve the budget autonomy of the German *Bundestag* with regard to the European Stability Mechanism and must be included in the summary review.

II.

[195] 1. The constitutional complaints are not inadmissible at the outset to the extent that the applicants assert a violation of their rights under Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law; with regard to the other challenges, however, the constitutional complaints are inadmissible.

[196] a) The constitutional complaints essentially submit that in the challenged statutes the German *Bundestag* takes incalculable risks, democratic decision processes are shifted to the supranational or intergovernmental level and it is no longer possible for the German *Bundestag* to exercise overall budgetary responsibility. In these submissions, the applicants set out with sufficient substantiation that the permanent budgetary autonomy of the German *Bundestag* is impaired and their rights under Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law are violated (on admissibility and on the requirements for substantiation of this challenge, see BVerfGE 129, 124 <167 ff.>).

[197] b) Apart from this, the challenges are inadmissible.

[198] aa) To the extent that the first applicant submits that the ESM Financing Act is formally unconstitutional because it was not correctly introduced into the German *Bundestag*, he has not set out in a substantiated manner that his right under Article 38 (1) of the Basic Law might be eroded in this way (see BVerfGE 129, 124 <170>).

[199] bb) To the extent that, in addition to this, he submits that the provision of Article 35 (1) TESM, which grants the office holders of the European Stability Mechanism personal immunity from jurisdiction with regard to their official acts, is arbitrary and violates the general principle of equality before the law of Article 3 (1) of the Basic Law, the first applicant suffers no adverse effects from this provision and consequently a violation of Article 3 (1) of the Basic Law is out of the question (see BVerfGE 63, 255 <265-266>). Substantively, the first applicant asserts a general claim to the enforcement of a statute. Such a claim can be derived neither from the general principle of equality before the law nor from Article 19 (4) of the Basic Law or Article 2 (1) of the Basic Law (see Schmidt-Aßmann, in: Maunz/Dürig, *GG*, *Art. 19 Abs. 4*, marginal no. 122 <February 2003>; Schulze-Fielitz, in: Dreier, *GG*, vol. 1, 2nd ed. 2004,*Art. 19 Abs. 4*, marginal no. 70). If the subject of a fundamental right is not affected in his or her own legal position by a measure or by an omission – that is, for example, if the measure has no effect on the person's legally protected interests – that person can derive neither defensive claims nor claims for performance from Article 3 (1) of the Basic Law (see Rüfner, in:*Bonner Kommentar*, vol. 1, *Art. 3 Abs 1*, marginal nos. 148 ff., 158 <October 1992>; Heun, in: Dreier, *GG*, vol. 1, 2nd ed. 2004, *Art. 3*, marginal no. 45). This is the case with regard to the provision of Article 35 (1) TESM.

[200] cc) The constitutional complaint of the second applicants is inadmissible to the extent that they assert a violation of their fundamental right under Article 14 (1) of the Basic Law with regard to inflationary developments as a result of the Treaty establishing the European Stability Mechanism and the accompanying legislation and on the basis of acts of the European Central Bank. A review by the Federal Constitutional Court of economic and financial policy measures to determine whether there are negative consequences for monetary stability may be considered at most in cases of a clear reduction of monetary value (see BVerfGE 129, 124 <174>). The second applicants have not submitted sufficient facts to justify a review by the Federal Constitutional Court.

[201] dd) The assertion by the second applicants of a violation of the right equivalent to a fundamental right under Article 20 (4) of the Basic Law is inadmissible. The right to resist

any person seeking to abolish the constitutional order is a subsidiary exceptional right which – as the Senate has stated (BVerfGE 123, 267 <333>) – cannot be asserted in cases such as the present one.

[202] c) To the extent that the second applicants challenge measures of the European Central Bank to rescue the euro, in particular the purchase of government bonds on the secondary market, with the argument that these are *ultra vires* legal acts, their relevant application for a determination, when judiciously interpreted, is not covered by the application for the issue of a temporary injunction and is therefore reserved to a review in the principal proceedings.

[203] 2. The application in *Organstreit* proceedings is inadmissible to the extent that the applicant, with regard to the Act on the European Council Decision of 25 March 2011 to Amend 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 challenges a violation of its rights under Article 38 (1) sentence 2 of the Basic Law. Apart from this, the application is admissible.

[204] a) In connection with the Act on the European Council Decision of 25 March 2011 to Amend 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, the applicant submits that the choice of the simplified treaty amendment procedure violated its right under Article 38 (1) sentence 2 of the Basic Law to participate in a Convention under the regular treaty amendment procedure under Article 48 (2) to (5) TEU.

[205] The applicant has not even shown in what way it would be possible to derive from the Basic Law a right of the German *Bundestag* or of the applicant itself to participate in a Convention under Article 48 TEU, and thus has not shown what right granted by the Basic Law within the meaning of § 64 of the Federal Constitutional Court Act is said to be affected. In addition, the violation of rights alleged has not been set out in a substantiated manner. European Union law does not provide for any rights of consultation for the parliaments of the Member States in the choice of the treaty amendment procedure. On the contrary, under Article 48 (3) subparagraph 2 TEU the European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention in the case of a treaty amendment in the ordinary revision procedure should this not be justified by the extent of the proposed amendments. A review together with Article 48 (3) subparagraph 1 sentence 2 TEU shows that this also applies to institutional changes in the monetary area. According to this, a violation of rights of the German *Bundestag* might apply, if at all, if a Convention procedure had actually been held in the case of the ordinary revision procedure under Article 48 (2) to (5) TEU and the German *Bundestag* had not been permitted to participate in it. The applicant made no submissions on any of these requirements in connection with the amendment of Article 136 TFEU.

[206] b) Apart from this, the application in *Organstreit* proceedings is admissible. In particular, the applicant, as a parliamentary group of the German *Bundestag*, is authorised to assert on behalf of the latter that in the challenged statutes the German *Bundestag* divests itself of its overall budgetary responsibility (see BVerfGE 123, 267 <338-339>).

III.

[207] To the extent that they are to be considered here in the context of the applications for a temporary injunction, the applications in the principal proceedings will, on summary review, be unsuccessful for the most part.

[208] 1. a) The right to elect the German *Bundestag* (Article 38 (1) of the Basic Law, as a right equivalent to a fundamental right, guarantees the citizens' self-determination and guarantees free and equal participation in the state authority exercised in Germany (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 37, 271 <279>; 73, 339 <375>; 123, 267 <340>). Its guaranteed content includes the principles of the precept of democracy within the meaning of Article 20 (1) and (2) of the Basic Law; these principles are protected by Article 79 (3) of the Basic Law as the identity of the constitution even against interference by the constitution-amending legislature (see BVerfGE 123, 267 <340>; 129, 124 <177>).

[209] aa) The Basic Law not only prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) to the European Union or to institutions created in connection with the European Union (see BVerfGE 89, 155 <187-188, 192, 199>; see also BVerfGE 58, 1 <37>; 104, 151 <210>; 123, 267

<349>). Blanket empowerments for the exercise of public authority may also not be granted by the German constitutional bodies (see BVerfGE 58, 1 <37>; 89, 155 <183-184, 187>; 123, 267 <351>). It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character, or if they can still be interpreted in a manner that respects the responsibility for integration, to establish, at any rate, suitable safeguards for the effective exercise of such responsibility. Accordingly, the Act of assent and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union, or for institutions created in connection with the European Union, of taking possession of *Kompetenz-Kompetenz* or of otherwise violating the Basic Law's constitutional identity, which is not open to integration. For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, make effective arrangements in its legislation accompanying the Act of assent to ensure that the responsibility for integration of the legislative bodies can sufficiently develop (BVerfGE 123, 267 <353>).

[210] bb) There is a violation of Article 38 (1) of the Basic Law in particular if the German *Bundestag* relinquishes its parliamentary budget responsibility with the effect that it or a future*Bundestag* can no longer exercise the right to decide on the budget on its own responsibility (BVerfGE 129, 124 <177>). The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German *Bundestag* must therefore make decisions on revenue and expenditure with responsibility to the people. In this connection, the right to decide on the budget is a central element of the democratic development of informed opinion (see BVerfGE 70, 324 <355-356>; 79, 311 <329>; 129, 124 <177>).

[211] (1) As representatives of the people, the elected Members of the German *Bundestag* must retain control of fundamental budgetary decisions even in a system of intergovernmental governing. In its openness to international cooperation, systems of collective security and European integration, the Federal Republic of Germany binds itself not only legally, but also with regard to fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget is not necessarily infringed in a way that could be challenged with reference to Article 38 (1) of the Basic Law. Rather, the relevant factor for adherence to the principles of democracy is whether the German *Bundestag* remains the place in which autonomous decisions on revenue and expenditure are made , including those with regard to international and European liabilities (see BVerfGE 129, 124 <177>; Federal Constitutional Court (*Bundesverfassungsgericht* – BVerfG), judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, NVwZ 2012, p. 495 <497>; BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal no. 114). If essential budget questions relating to revenue and expenditure were decided without the mandatory approval of the German*Bundestag*, or if supranational legal obligations were created without a corresponding decision by free will of the *Bundestag*, parliament would find itself in the role of mere subsequent enforcement and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget (BVerfGE 129, 124 <178-179>).

[212] (2) In its judgment of 7 September 2011 (BVerfGE 129, 124) the Senate stated in detail that the German *Bundestag* may not transfer its budgetary responsibility to other entities by means of imprecise budgetary authorisations. The larger the financial amount of the commitments to accept liability or of commitment appropriations is, the more effectively must the German *Bundestag*'s rights to approve and to refuse and its right of monitoring be elaborated. In particular, the German *Bundestag* may not deliver itself up to any mechanisms with financial effect which – whether by reason of their overall conception or by reason of an overall evaluation of the individual measures – may result in incalculable burdens with budget significance without prior mandatory consent, whether these are expenses or losses of revenue. This prohibition of the relinquishment of budgetary responsibility does not impermissibly restrict the budgetary competence of the legislature, but is specifically aimed at preserving it (see BVerfGE 129, 124 <179>).

[213] (3) A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 (1) and (2), Article 79 (3) of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently "the master of its decisions" (see BVerfGE 129, 124 <179-180>).

Admittedly, it is primarily the duty of the *Bundestag* itself to decide, while weighing current needs against the risks of medium- and long-term guarantees, in what maximum amount guarantee sums are responsible (see BVerfGE 79, 311 <343>; 119, 96 <142-143>). But it follows from the democratic basis of budget autonomy that the *Bundestag* may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, which – once it has been set in motion – is removed from the *Bundestag*'s control and influence (BVerfGE 129, 124 <180>).

[214] (4) Moreover, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states, above all if they entail consequences which are hard to calculate. The *Bundestag* must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure. Insofar as supranational agreements are entered into which by reason of their scale may be of structural significance for parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy, or by participation in equivalent financial safeguarding systems, not only every individual disposal requires the consent of the *Bundestag*; in addition it must be ensured that sufficient parliamentary influence shall continue to be made on the manner of dealing with the funds provided (see BVerfGE 129, 124 <180-181>). The responsibility for integration borne by the German *Bundestag* with regard to the transfer of competences to the European Union (see BVerfGE 123, 267 <356 ff.>) has its counterpart here for budget measures of equal weight (BVerfGE 129, 124 <181>).

[215] (5) The German *Bundestag* cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions with budgetary implications for which is accountable. The principle of democracy under Article 20 (1) and (2) of the Basic Law therefore requires that the German *Bundestag* is able to have access to the information which it needs to assess the fundamental bases and consequences of its decision (see only Article 43 (1), Article 44 of the Basic Law as well as BVerfGE 67, 100 <130>; 77, 1 <48>; 110, 199 <225>; 124, 78 <114>). The core of the right of parliament to be informed is therefore also entrenched in Article 79 (3) of the Basic Law. Sufficient information of parliament by the government is therefore a necessary precondition of an effective preparation of parliament's decisions and of the exercise of its monitoring function (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, loc. cit., marginal no. 107). This principle not only applies in national budget law (see for instance Article 114 of the Basic Law) but also in matters concerning the European Union (see Article 23 (2) sentence 2 of the Basic Law).

[216] cc) Whether and how far a justiciable limit of the assumption of payment obligations or of commitments to accept liability can be derived directly from the principle of democracy has been left open by the Senate in its judgment of 7 September 2011 (see BVerfGE 129, 124 <182>). At all events, in the present connection with its general standards based on the principle of democracy, only a manifest overstepping of extreme limits is relevant (BVerfGE 129, 124 <182>). An upper limit following directly from the principle of democracy could only be overstepped if in the case where they are called upon the payment obligations and commitments to accept liability took effect in such a way that budget autonomy, at least for an appreciable period of time, was not merely restricted but effectively failed (see BVerfGE 129, 124 <183>).

[217] When examining whether the amount of payment obligations and commitments to accept liability will result in the *Bundestag* relinquishing its budget autonomy, the legislature has broad latitude of assessment, in particular with regard to the risk of the payment obligations and commitments to accept liability being called upon and with regard to the consequences then to be expected for the budget legislature's freedom to act; the Federal Constitutional Court must in principle respect this latitude. The same applies to the assessment of the future soundness of the Federal budget and the economic performance capacity of the Federal Republic of Germany (see BVerfGE 129, 124 <182-183>), including the consideration of the consequences of alternative options of action.

[218] dd) Since the entrance into the third stage of the Economic and Monetary Union, the German *Bundestag*'s overall budgetary responsibility is safeguarded not least by the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union. These provisions do not conflict with national budget autonomy as an essential competence, which cannot be relinquished, of the parliaments of the Member

States which enjoy direct democratic legitimation, but instead they presuppose it.

[219] (1) The current programme of European integration designs the monetary union as a stability community. As has been repeatedly emphasised by the Federal Constitutional Court (see BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181-182>), this is the essential basis of the Federal Republic of Germany's participation in the monetary union. Not only with regard to currency stability, the treaties are parallel to the requirements of Article 88 sentence 2 of the Basic Law, and if appropriate also of Article 14 (1) of the Basic Law, which makes compliance with the independence of the European Central Bank and the primary objective of price stability permanent constitutional requirements of a German participation in the monetary union (see Article 127 (1), Article 130 TFEU); further central provisions on the design of the monetary union also safeguard the constitutional requirements in European Union law. This applies in particular to the prohibition of monetary financing by the European Central Bank, the prohibition of accepting liability (bailout clause) and the stability criteria for sound budget management (Articles 123 to 126, Article 136 TFEU; see BVerfGE 129, 124 <181>).

[220] In view of the transfer of monetary sovereignty to the European System of Central Banks, the German *Bundestag*'s overall budgetary responsibility is safeguarded particularly by the fact that the European Central Bank subjects itself to the strict criteria of the Treaty on the Functioning of the European Union and of the Statute of the European System of Central Banks with regard to the independence of the Central Bank and to the priority of monetary stability (see BVerfGE 89, 155 <204-205, 207 ff.>; 129, 124 <181-182>). In this context, an essential element of safeguarding the constitutional requirements resulting from Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law in European Union Law is the prohibition of monetary financing by the European Central Bank (see BVerfGE 89, 155 <204-205>; 129, 124 <181-182>).

[221] (2) However, the design as a stability union that the monetary union has to date been given under the Treaties does not mean that a democratically legitimised change in the concrete structure of the stability requirements under European Union law would be incompatible with Article 79 (3) of the Basic Law from the outset. Not every single manifestation of the stability community is guaranteed by paragraphs 1 and 2 of Article 20 of the Basic Law in conjunction with Article 79 (3) of the Basic Law, which are the only relevant provisions here.

[222] Article 79 (3) of the Basic Law does not guarantee the unchanged further existence of the law in force but those structures and procedures which keep the democratic process open and, in this context, safeguard parliament's overall budgetary responsibility. Already in its Maastricht judgment, the Federal Constitutional Court held that, in order to comply with the stability mandate, a continuous further development of the monetary union may be necessary if otherwise the conception of the monetary union, which had been designed as a stability union, would be departed from (see BVerfGE 89, 155 <205>). If the monetary union cannot be achieved in its original structure through the valid integration programme, new political decisions are needed as to how to proceed further (see BVerfGE 89, 155 <207>; 97, 350 <369>). It is for the legislature to decide how possible weaknesses of the monetary union are to be counteracted by amending European Union law.

[223] ee) The principle of democracy under Article 20 (1) and (2) of the Basic Law, which is oriented towards fundamental legal reversibility, may also be violated by a long-term restriction of budget autonomy by the transfer of essential budgetary decisions to bodies of a supranational or international organisation or to other states, or by the assumption of corresponding obligations under international law.

[224] (1) However, it is not anti-democratic from the outset for the budget legislature to be bound by a particular budget and fiscal policy (see BVerfGE 79, 311 <331 ff.>; 119, 96 <137 ff.>). By putting into specific terms and objectively tightening the rules for borrowing by Federal and *Länder* governments (in particular Article 109 (3) and (5), Article 109a, Article 115 of the Basic Law new, Article 143d (1) of the Basic Law), the constitution-amending legislature made it clear that a constitutional commitment on the part of the parliaments and thus a palpable restriction of their budgetary power to act may be necessary precisely in order to preserve the democratic power to shape affairs for the body politic in the long term (BVerfGE 129, 124 <170>). Even if such a commitment restricts democratic legislative discretion in the present, it serves at the same time to guarantee it for the future. Admittedly, even a long-term worrying development of the level of indebtedness is not

a constitutionally relevant impairment of the legislature's competence for a situation-dependent discretionary fiscal policy. Nevertheless, it results in a de facto constriction of discretion (see BVerfGE 119, 96 <147>). Keeping discretion as broad as possible is a legitimate goal of the (constitutional) legislature.

[225] (2) The commitment of the budget legislature to a particular budget and fiscal policy may also be made under European Union law or international law.

[226] (a) The requirements for sound budget management contained in the Treaty on the Functioning of the European Union (Article 123 to Article 126, Article 136 TFEU) restrict the national legislature's discretion in exercising its overall budgetary responsibility. A similar situation – assuming that it complies with primary law, which it is not the task of the present decision to examine – applies to secondary European Union legislation (see in particular what is known as the "Six Pack": Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306 of 23 November 2011, p. 1; Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, OJ L 306 of 23 November 2011, p. 8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJ L 306 of 23 November 2011, p. 12; Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJ L 306 of 23 November 2011, p. 25; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJ L 306 of 23 November 2011, p. 33; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States; OJ L 306 of 23 November 2011, p. 41).

[227] (b) Apart from this, the Member States are free to enter into further commitments beyond the existing fiscal and budgetary commitments of European Union law, to the extent that these do not conflict with the requirements of European Union law (see Article 4 (3) TEU). The Federal Republic of Germany may therefore introduce stricter domestic rules for its budget policy and enter into contracts to this effect (see BVerfGE 129, 124 <181-182>).

[228] (3) In this context, it is primarily the duty of the legislature to weigh whether and to what extent, in order to preserve the discretion for the democratic shaping of affairs and making of decisions, commitments with regard to spending behaviour should be entered into for the future too, and therefore – demonstrating the mirror image principle – a restriction of their discretion for the democratic shaping of affairs and making of decisions in the present must be accepted. In this connection, the Federal Constitutional Court may not with its own expertise usurp the place of legislative bodies, which are first and foremost entrusted with this (BVerfGE 129, 124 <183>). However, it must ensure that the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions (see BVerfGE 5, 85 <198-199>; 44, 125 <142>; 123, 267 <367>; Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. 1995, marginal no. 143; Hofmann/Dreier, *Repräsentation, Mehrheitsprinzip und Minderheitenschutz*, in: Schneider/Zeh,*Parlamentsrecht und Parlamentspraxis*, § 5, marginal no. 58; Sommermann, in: v. Mangoldt/Klein/Starck, *GG*, vol. 2, 6th ed. 2010, *Art. 20*, marginal no. 86), and that an irreversible legal prejudice to future generations is avoided (Kotzur, *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* – VVDStRL 69 <2010>, p. 173 <192-193>).

[229] b) The submission that there is a violation of the German *Bundestag*'s right to exercise overall budgetary responsibility may also be asserted by a parliamentary group of the German*Bundestag* in *Organstreit* proceedings. In this connection, the review standard corresponds to that of a constitutional complaint (Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law).

[230] 2. Under these standards, the applications are shown to be predominantly unfounded.

[231] a) On summary review, the Act on the European Council Decision of 25 March 2011 to Amend 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 does not violate Article 38 (1), Article 20 (1) and (2) in

conjunction with Article 79 (3) of the Basic Law.

[232] aa) (1) Admittedly, the introduction of Article 136 (3) TFEU constitutes a fundamental reshaping of the existing economic and monetary union (see Calliess, *Zeitschrift für europarechtliche Studien* – ZEuS 2011, p. 213 <279>; Kube, *Wertpapier-Mitteilungen* – WM 2012, p. 245 <247>). Since the third stage of the monetary union was effected by the Treaty of Maastricht (Treaty on European Union of 7 February 1992, OJ EC C 191) under European Union law it is provided that assistance payments by individual Member States of the European Union are to be given only to Member States whose currency is not the euro (now Article 143 (2) sentence 2 point (c) TFEU). The institution of a permanent mechanism for mutual rendering of assistance of the Member States of the euro currency area outside the framework of the European Union is detached, if not completely, from the principle of independence of the national budgets which has to now characterised the monetary union (on this, see BVerfGE 129, 124 <181-182>). For it relativises the market dependence associated with this principle with regard to the possibilities of state refinancing in that the rendering of assistance is also permitted between the Member States of the euro currency area if this is essential for the stabilisation of the euro currency area as a whole.

[233] (2) But incorporating Article 136 (3) TFEU into European Union law does not mean abandoning stability-directed orientation of the monetary union. Even with regard to this release provision, essential parts of the stability architecture remain in place. Thus in particular the independence of the European Central Bank, its commitment to the paramount goal of price stability (see Article 127, 130 TFEU) and the prohibition of monetary financing (Article 123 TFEU) are unaffected; on the contrary, the authorisation by Article 136 (3) TFEU of the installation of a permanent mechanism to grant financial assistance confirms the will of the European Union and its Member States to strictly limit the tasks of the European Central Bank to the limits prescribed for it in European Union law. Equally, Article 136 (3) TFEU does not provide release from the obligation of budgetary discipline (see Article 126, Article 136 (1) TFEU). Only in connection with the exclusions of liability laid down in Article 125 (1) TFEU does Article 136 (3) TFEU now permit voluntary financial assistance, although this may not be granted without satisfying further requirements or granted for any purposes regardless of what they are. Instead, Article 136 (3) TFEU lays down both the purpose of authorisation and the nature of the provision as an exceptional provision, in that the financial assistance must serve the stability of the euro and in addition may only be permitted to be granted if this is indispensable to the stability of the euro currency area as a whole.

[234] The decision of the legislature to supplement the structure of the monetary union, which remains oriented towards stability, by adding to the existing elements of an independent central bank committed to price stability (Article 127 (1), Article 130 TFEU), commitment to budgetary discipline (see Article 126, Article 136 (1) TFEU) and the personal responsibility of the national budgets aimed at stimulating the market (Article 123 to Article 125 TFEU) the possibility of active stabilisation measures, and the associated prognosis that by means of such measures the stability of the monetary union can be guaranteed and further developed, must in principle be respected by the Federal Constitutional Court in view of the latitude of assessment – which includes assessment of the risks of alternative options of action – of the competent constitutional bodies (see B.II.1.b)cc)); it must also be respected in that on the basis of this decision risks to price stability cannot be ruled out.

[235] bb) Following the introduction of Article 136 (3) TFEU, European Union law expressly provides the possibility of establishing a stability mechanism on the basis of international law; this does not lead to a loss of national budgetary autonomy.

[236] In the Act of assent to Article 136 (3) TFEU, the German *Bundestag* does not transfer any budgetary authorisations to other actors. There is no danger that the Federal Republic of Germany will, without the prior mandatory consent of the German *Bundestag*, be placed at the mercy of a mechanism with financial effect which is capable of resulting in complex burdens with budgetary significance or in unavoidably accepting liability for decisions of other states. Article 136 (3) TFEU does not itself put a stability mechanism into effect, but merely gives the Member States the possibility of establishing such mechanisms on the basis of an international agreement. In this way, at all events, no competencies are transferred to the bodies of the European Union; on the contrary, the competencies of Member States are to be taken up and their relationship to the rules and regulations on European Union currency law is to be laid down. At the same time, by way of a

stability mechanism in treaty law, it will be guaranteed that the only Member States liable are those which participate in it. Regarded in this light, Article 136 (3) TFEU confirms the sovereignty of the Member States in that it entrusts to them the decision as to whether and in what way a stability mechanism is established.

[237] As a result of this, there is no question of the precept of democracy being adversely affected by the consent to the introduction of Article 136 (3) TFEU, for one reason because the requirement of ratification for the establishment of the stability mechanism presupposes that the legislative bodies are involved before it enters into effect. In this case, the stability mechanism established under Article 136 (3) TFEU itself receives democratic legitimation, through which the parliamentary legislature also assumes responsibility for its specific structure. How far the structure of the mechanism approved by the legislature satisfies constitutional requirements does not affect the question which is important in the present case as to whether the German *Bundestag* was entitled to consent to the introduction of Article 136 (3) TFEU, preserving the core area protected by Article 79 (3) of the Basic Law.

[238] cc) On summary review, Article 136 (3) TFEU is also sufficiently definite. Since Article 136 (3) TFEU does not transfer any sovereign rights (on this, see BVerfGE 89, 155 <204>), under the aspect of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law no conditions are to be imposed on the specificity of the authorisation to guarantee the responsibility of the legislative bodies for integration. Article 136 (3) TFEU determines the use of the stability mechanism and imposes restrictive conditions on it. There are no grounds for criticising this on summary review.

[239] b) On summary review, the Act Concerning the Treaty of 2 February 2012 establishing the European Stability Mechanism essentially takes account of the requirements of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law.

[240] However, certain interpretations of the provisions on the revised increased capital call (Article 9 (2) and (3) sentence 1 in conjunction with Article 25 (2) of the Treaty establishing the European Stability Mechanism – TESM) and of the provisions on the inviolability of the documents (Article 32 (5), Article 35 (1) TESM) and on the professional secrecy of the legal representatives of the ESM (Article 34 TESM) might violate the *Bundestag*'s overall budgetary responsibility. This must be effectively precluded by declarations under international law made upon ratification of the Treaty (aa). By contrast, the provisions on the suspension of voting rights under Article 4 (8) TESM in the cases provided for under Article 5 (6) points (b), (f) and (i) TESM are ultimately constitutionally unobjectionable (bb). The same applies to the amount of the payment obligations and commitments to accept liability which are intended to be assumed or have already been assumed (cc). On summary review, other provisions of the Treaty establishing the European Stability Mechanism also do not affect the *Bundestag*'s overall budgetary responsibility (dd).

[241] aa) In its judgment of 7 September 2011, the Senate held that the German *Bundestag*'s overall budgetary responsibility was safeguarded with regard to the giving of guarantees in the context of the aid to Greece and of the European Financial Stability Facility because the amount of the Federal Republic of Germany's overall financial commitment was limited, the German *Bundestag* had to individually approve every large-scale aid measure, the *Bundestag* was entitled to monitor the conditionality of the measures, and the aid measures were subject to a time-limit (see BVerfGE 129, 124 <185-186>). With a view to the Federal Republic of Germany's overall financial commitment involved with the Treaty establishing the European Stability Mechanism (1), and with a view to the *Bundestag*'s rights to be informed, which are necessary to safeguard the *Bundestag*'s overall budgetary responsibility (2), the Treaty establishing the European Stability Mechanism only fulfils these requirements if it is interpreted in conformity with the constitution.

[242] (1) The authorised capital stock of the European Stability Mechanism is EUR 700 000 million (Article 8 (1) TESM), with shares of a total nominal value of EUR 190 024 800 000 having been subscribed by the Federal Republic of Germany (Annex II to the Treaty establishing the European Stability Mechanism). As results from Article 8 (5) TESM, the portion of the authorised capital stock is the ceiling of all payment obligations arising from the Treaty establishing the European Stability Mechanism, and thus also of the maximum burden on the Federal budget ((a)). It can be assumed that this ceiling also applies with regard to capital calls under Article 9 and Article 25 (2) TESM ((b)). As the Treaty establishing the European Stability Mechanism might be amenable to a different interpretation

in this respect, the Federal Republic of Germany must ensure the required clarification in the ratification procedure ((c)).

[243] (a) It can be assumed that the express limitation of the liability of the ESM Members to their respective portions of the authorised capital stock, which is provided for in Article 8 (5) sentence 1 TESM, bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the activities of the European Stability Mechanism to EUR 190 024 800 000.

[244] (aa) According to the wording of Article 8 (5) sentence 1 TESM, the liability of each ESM Member shall be "limited, in all circumstances, to its portion of the authorised capital stock at its issue price". Thus, Article 8 (5) sentence 1 TESM confirms the limitation of the payment obligations to the ESM Members' respective portions of the authorised capital stock, which already results from Article 8 (4) TESM. That Article 8 (5) sentence 1 TESM is to preclude a burdening of the Federal Republic of Germany beyond the amount of EUR 190 024 800 000 was confirmed by the Federal Minister of Finance and the President of the Federal Audit Office (*Bundesrechnungshof*), during the oral hearing. Subject to a capital increase under Article 10 TESM and to the decisions to be taken in accordance with Article 8 (2) sentence 4 TESM (see B.III.2.b)aa)(1)(a)(bb)), the complete payment of this amount is to cover all payment obligations of the Federal Republic of Germany arising from the Treaty establishing the European Stability Mechanism. On the basis of this interpretation of the Treaty, the German *Bundestag* adopted the Act approving the Treaty (see *Bundestag* printed paper 17/9045, p. 5).

[245] (bb) It can be assumed that the possibility provided for in Article 8 (2) sentence 4 TESM of issuing shares of the European Stability Mechanism's authorised capital stock higher than at par also does not stand in the way of this limitation of the amount. Admittedly, Article 8 (5) sentence 1 in conjunction with Article 8 (2) sentence 4 TESM in principle permits expanding the obligation to accept liability and the payment obligation via an increase of the issue price. However, this can be assumed not to affect the issue of the shares of capital stock initially subscribed, that is, of the shares of the authorised capital stock within the meaning of Article 8 (1) sentence 1 TESM in the amount of EUR 700 000 million (Article 8 (2) sentence 3 TESM) but only the issue of other shares of capital stock after capital increases; capital increases, in turn, require a unanimous decision by the Board of Governors (Article 5 (6) point (b) TESM; see B.III.2.a)bb)(1)(d)(aa)). Subject to such an increase of the authorised capital stock under Article 10 TESM, an extension of liability beyond the amount of EUR 190 024 800 000 Euro can hence be assumed to be precluded at present.

[246] (b) The limitation of the amount of the burdens on the budget to EUR 190 024 800 000 can be assumed to also apply to the Federal Republic of Germany's obligations to make payment arising from Article 8 (4) sentence 2 TESM as a consequence of capital calls made in accordance with Article 9 TESM ((aa)); it can also be assumed to apply if they are made as "revised increased" capital calls under Article 25 (2) TESM ((bb)).

[247] (aa) Apart from the authorisation of the Board of Governors to take the decisions to make general capital calls (Article 9 (1) in conjunction with Article 5 (6) point (c) TESM), the Treaty establishing the European Stability Mechanism also contains provisions in its Article 9 (2) and (3) which authorise the Board of Directors and the Managing Director to call in authorised capital.

[248] Under Article 9 (2) TESM, the Board of Directors may call in authorised unpaid capital from the ESM Members by simple majority decision to restore the level of paid-in capital set out in Article 8 (2) TESM if it is reduced below the established level by the coverage of losses arising from the operations of the European Stability Mechanism (see also Article 25 (1) point (b) TESM). The amount of a capital call made in accordance with Article 9 (2) TESM is determined by the amount of the losses covered by the paid-in capital. Pursuant to Article 9 (3) sentence 1 TESM, the Managing Director calls authorised unpaid capital if there is a danger of the European Stability Mechanism defaulting on its creditors. No specific ceiling is provided for a call made in accordance with Article 9 (3). The call serves to meet all scheduled or other payment obligations due to ESM creditors and can thus relate to all payment obligations of the European Stability Mechanism; with a view to its possibilities to act (see Articles 12 ff., Articles 21 and 22 TESM) the obligations can result from a vast range and multitude of legal transactions, and the amounts involved can be considerable.

[249] However, according to the wording of Article 9 (2) and (3) TESM ("authorised unpaid capital") as well as according to the structure of

the treaty, the payment obligation can be assumed to be limited by the nominal value of the respective share of the authorised capital stock because the shares are only "callable" to this extent (see Article 8 (2) sentence 1 TESM). Should the situation arise that the amount of the losses to be covered by a capital call made in accordance with Article 9 (2) TESM, or the amount of the payment obligations to be met by a capital call made in accordance with Article 9 (3) TESM, exceeds the total aggregate nominal value of the callable capital that is still available, it follows from this interpretation that a payment obligation only arises for the Members subject to the precondition that the authorised capital stock was increased by an unanimous decision of the Board of Governors under Article 10 (1) and Article 5 (6) point (d) TESM in a timely manner before the capital call.

[250] (bb) It can be assumed that a payment obligation exceeding the German share of the authorised capital stock in the amount of EUR 190 024 800 000 does probably also not arise from the possibility of a revised increased capital call provided for in Article 25 (2) TESM. Admittedly, such a capital call can lead to the Federal Republic of Germany having to mobilise funds which according to the provisions of the Treaty would actually have to be mobilised by other Members. Should an ESM Member not (be able to) meet a capital call made in accordance with Article 9 (2) or (3) TESM, a revised increased capital call is made to all ESM Members; the text of the Treaty expressly provides that the function of a revised increased capital call is to ensure that the total amount of capital needed is paid in, and it is in the nature of it that this can only be ensured by a higher burden on the Members which are willing and able to pay. One will, however, not be able to conclude from this that it is intended to make a burdening of these Members possible beyond the ceiling established by Article 8 (5) sentence 1 TESM. Otherwise, the ceiling would serve no purpose. In particular, it can hardly be assumed that Article 8 (5) sentence 1 TESM is to solely limit the Members' liability in relation to the creditors of the European Stability Mechanism and not also their obligations towards the European Stability Mechanism itself because the Treaty from the outset does not provide a liability of the Members vis-à-vis third parties. On the contrary, Article 8 (5) sentence 2 TESM expressly precludes a liability of its Members for obligations of the European Stability Mechanism. The Treaty establishes the European Stability Mechanism as an institution with full legal personality (Article 32 (2) TESM), an institution beside which the Members are not to become parties to agreements with potential creditors.

[251] (c) As the oral hearing has shown, systematic and teleological arguments can, however, be used to interpret the categorical limitation of liability in the context of the provisions on the "revised increased" capital calls (Article 9 (2) and (3) in conjunction with Article 25 (2) TESM), which is intended by Article 8 (5) sentence 1 TESM and which was once again explicitly confirmed by the *Bundestag* and the Federal Government, in a way that would no longer be compatible with the constitutional requirement of determining the burdens on the budget in a clear and definitive manner ((aa)). It is hence required for the Federal Republic of Germany to remove such doubts regarding interpretation in the framework of the ratification procedure under international law ((bb)).

[252] (aa) A strict limitation of the amount of the German payment obligations in the framework of the application of the provisions legislating on revised increased capital calls made in accordance with Article 9 (2) and (3) in conjunction with Article 25 (2) TESM cannot at any rate be inferred from the wording of Article 25 (2) TESM; therefore an interpretation cannot be ruled out which considers Article 8 (5) sentence 1 TESM inapplicable to this case, so that the amount of EUR 190 024 800 000 that is stipulated in the Treaty would not completely determine Germany's overall commitment in the framework of the European Stability Mechanism. In this context, a justification appears conceivable which uses the argument that even higher payments would not breach this ceiling because claims for compensation against the European Stability Mechanism would arise to the Member making advance payments, and that thus, a sufficient equivalent amount would be available (see Article 25 (3) TESM, *Bundestag* printed paper 17/9045, p. 33). As the revised increased capital calls have been designed for unexpected emergency situations to make it possible to remedy, even at very short notice, a capital shortfall which impairs the European Stability Mechanism's capability of working, teleological considerations could also result in a restrictive interpretation of Article 8 (5) sentence 1 TESM. It could be reasoned, for instance, that if a Member were allowed to postpone the payment that had been considered necessary until a capital increase in accordance with Article 10 TESM became effective arguing that it had already completely paid in its shares of the authorised capital stock, this would make it more difficult to reach the objective pursued by

Article 25 (2) TESM, namely to guarantee the European Stability Mechanism's ability to act by securing its optimum creditworthiness in all circumstances and at any time.

[253] (bb) If the German *Bundestag*'s overall budgetary responsibility, which is protected by Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, requires that the Federal Republic of Germany's liability in the framework of the European Stability Mechanism cannot be increased beyond EUR 190 024 800 000 without the consent of the *Bundestag*, a ratification of the Treaty establishing the European Stability Mechanism is, in the light of the foregoing, only admissible if the Federal Republic of Germany ensures that Article 8 (5) sentence 1 TESM, subject to decisions taken in accordance with Article 10 (1) and Article 8 (2) sentence 4 TESM, limits the amount of all payment obligations arising from this Treaty to the amount indicated in Annex II to the Treaty, and that provisions of this Treaty, in particular Article 9 (2) and (3) sentence 1 in conjunction with Article 25 (2) sentence 1 TESM, may only be interpreted or applied in such a way that no higher payment obligations are established for the Federal Republic of Germany. The Federal Republic of Germany must clearly express that it cannot be bound by the Treaty establishing the European Stability Mechanism in its entirety if the reservation made by it should prove to be ineffective.

[254] (2) On summary review, it can be assumed that the provisions of Article 32 (5), Article 34 and Article 35 (1) TESM do not violate the core of the right to vote under Article 38 (1), Article 20 (1) and (2) of the Basic Law, which is protected by Article 79 (3) of the Basic Law, because they admit of an interpretation which makes sufficient parliamentary monitoring of the European Stability Mechanism by the German *Bundestag* possible ((a)). However, in view of conceivable other interpretations ((b)) it is required here as well to ensure under international law an interpretation that is compatible with the Basic Law ((c)).

[255] (a) Under Article 32 (5) TESM, all official papers and documents of the European Stability mechanism are inviolable; they can therefore at any rate not be reclaimed or inspected without or against the will of the European Stability Mechanism. Article 34 TESM subjects the members of the bodies of the European Stability Mechanism and its staff members to a duty of professional secrecy, while Article 35 (1) TESM provides for their immunity from legal proceedings with respect to acts performed by them in their official capacity and inviolability in respect of their official papers and documents. According to their wording, the obligations, privileges and immunities laid down in Article 32 (5), Article 34 and Article 35 (1) TESM apply comprehensively.

[256] The Treaty does not provide for exceptions in favour of the national parliaments. A special provision regarding the information of national parliaments and supreme audit institutions on the European Stability Mechanism's use of funds and its submission and auditing of accounts can only be found in Article 30 (5) TESM. In contrast, the national parliaments are not explicitly mentioned in Article 32 (5), Article 34 and Article 35 (1) TESM. This, however, should not preclude their comprehensive information. If in one of its Member States, decisions of the European Stability Mechanism require to be dealt with not only at government level, to which the necessary information is always available, but also to be discussed and approved in parliamentary bodies, it is absolutely necessary for the latter to be informed as well.

[257] The meaning and purpose of Article 32 (5), Article 34 and Article 35 (1) TESM can also be assumed to prove that the fact that the national parliaments are mentioned in Article 30 (5) TESM cannot be assumed to justify the conclusion e contrario that their information is precluded in other cases. A good argument can be made that these provisions are above all intended to prevent a flow of information to unauthorised third parties, for instance to actors on the capital market, but not to the entities responsible for the European Stability Mechanism themselves. As holders of the budget authority, which must bear political responsibility for the commitments based on the Treaty establishing the European Stability Mechanism vis-à-vis their citizens also during further treaty implementation (see BVerfGE 104, 151 <209>; 123, 267 <434-435>), the parliaments of the Member States, including the German *Bundestag*, are not among the third parties to be excluded from the flow of information. Moreover, it is significant that a restrictive interpretation of the provisions in question about obligations, privileges and immunities which makes the effective and comprehensive information of the national parliaments possible is also suggested by the coherence with European Union law, which is mandatory for the European Stability Mechanism (see *Bundestag* printed papers 17/9045, p. 29; 17/9047, p. 4; Rathke, *Die Öffentliche Verwaltung* – DÖV 2011 p. 753

<759-760>; Kube,*Wertpapier-Mitteilungen* 2012 p. 245 <246 ff.>; Calliess, NVwZ 2012, p. 1 <1-2>). Accordingly, not only the constitutional identity of the Member States is to be respected (see Article 4 (2) sentence 1 TFEU), which is of importance here with a view to the German *Bundestag*'s overall budgetary responsibility. The position of the national parliaments in the institutional structure of the European Union has been strengthened time and again in recent years to use their reservoir of legitimation to benefit European processes (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal no. 98 with further references). In the present context, this is all the more important, and the Contracting Parties must have been aware of this, as, due to the form chosen for the treaty – that of an international treaty complementing the integration programme of the European Union (see also Lorz/Sauer, DÖV 2012, p. 573 <575>: "*völkerrechtliches Ersatzunionsrecht*" (international law substituting European Union law) – no monitoring by the European Parliament is possible (see BVerfGE 123, 267 <353 ff.>).

[258] (b) However, this is only one possible interpretation of Article 32 (5), Article 34 and Article 35 (1) TESM, albeit one that stands to reason, and it by no way needs to correspond to the view taken by the European Stability Mechanism and by other Members; this particularly applies because the situation under constitutional law as regards the parliament's rights of participation and its rights to be informed is different in the Member States, and because due to different legal and factual circumstances, for instance with regard to precautions concerning parliamentary secrecy, the assessment of the consequences of disclosing to the parliaments also information that is to be kept away from the financial markets may be different.

[259] (c) If the German *Bundestag*'s overall budgetary responsibility, which is protected by Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, requires that the German*Bundestag* is able to receive the information which it needs to assess the fundamental bases and consequences of its decisions (see B.III.1.a)bb)(5)), a ratification of the Treaty establishing the European Stability Mechanism is only permissible if the Federal Republic of Germany ensures an interpretation of the Treaty which guarantees that with regard to their decisions, *Bundestag* and *Bundesrat* will receive the information which they need to be able to develop an informed opinion. The Federal Republic of Germany must clearly express that it cannot be bound by the Treaty establishing the European Stability Mechanism in its entirety if the reservation made by it should prove to be ineffective.

[260] (d) Article 32 (5), Article 34 and Article 35 (1) TESM are thus to be interpreted in such a way that they do not stand in the way of the information of the German *Bundestag*, with the consequence that a violation of the German *Bundestag*'s right under Article 23 (2) sentence 2 of the Basic Law, which can only be challenged in *Organstreit* proceedings, to be informed comprehensively and at the earliest possible date (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 –, *juris*, marginal no. 107) is ruled out from the outset.

[261] bb) Admittedly, with a view to its potentially far-reaching consequences, the suspension of the Members' voting rights in accordance with Article 4 (8) TESM appears to be not unproblematic under the aspect of overall budgetary responsibility (1). However, with regard to its function and to the conditions of its application, the provision legislating on the suspension of voting rights differs from other provisions with potentially far-reaching budgetary consequences in a manner which admits of regarding it as constitutional (2).

[262] (1) Under Article 4 (8) TESM, all voting rights of an ESM Member are suspended if it fails to fully meet its obligations to make payment that it has vis-à-vis the European Stability Mechanism. Until payment of all requested capital shares has been made, the Member concerned *ipso iure* loses all voting rights in all collegial bodies of the European Stability Mechanism; consequently, for so long as the default continues, the Member can no longer influence the decisions of the Board of Governors and of the Board of Directors, even if they bear no relation to the payment obligation at issue. Under Article 4 (8) sentence 2 TESM, the voting thresholds that have been agreed under the Treaty, which relate to the quorum of the bodies (Article 4 (2) sentence 2 TESM) and to the majorities required in the respective case (Article 4 (4) to (6) TESM), are recalculated accordingly for so long as the voting rights of one or several Members are suspended. Hence, irrespective of the number of voting rights suspended, the suspension of voting rights will under no circumstances result in the lack of a quorum or in the impossibility of reaching certain majorities in the bodies.

[263] (a) Article 4 (8) TESM covers all payment obligations of the Members in relation to paid-in shares or to capital calls under Articles 8, 9 and 10 TESM, or in relation to the reimbursement of financial assistance granted. What is problematic with a view to the *Bundestag*'s budgetary responsibility is in particular the issue of new shares on terms other than at par in accordance with Article 8 (2) sentence 3 and sentence 4 TESM, as well as capital calls made in accordance with Article 9 TESM (if necessary in conjunction with Article 25 (2) TESM).

[264] As the suspension of voting rights leads to the voting thresholds being recalculated (Article 4 (8) sentence 2 TESM), all decisions of the European Stability Mechanism – with the exception of decisions regarding changes in the authorised capital stock (see Article 10 (1) sentences 2 and 3 TESM) – including the decisions on the granting of stability support in individual cases and on its terms and conditions (Articles 13 ff. TESM) and on a review of the list of financial assistance instruments (Article 19 TESM) can be taken without the participation of the Members whose voting rights have been suspended in accordance with Article 4 (8) sentence 1 TESM.

[265] (b) The Treaty establishing the European Stability Mechanism does not provide for a legal remedy that suspends the effect of the suspension of voting rights in accordance with Article 4 (8) sentence 1 TESM. To the extent that an unilateral objection made against the suspension of voting rights would be deemed a "dispute arising between an ESM Member and the ESM" it would be decided on – again, however, with the votes of the Member affected being suspended (Article 37 (2) sentence 2 TESM) – by the Board of Governors by qualified majority; it would be possible to contest the decision of the Board of Governors before the Court of Justice of the European Union (Article 37 (3) TESM). The wording and the structure of the Treaty suggest the assumption that the suspension of voting rights continues during the entire duration of the proceedings.

[266] (c) If voting rights of ESM Members are suspended in accordance with Article 4 (8) sentence 1 TESM, their respective representatives in the Board of Governors (Article 5 (1) TESM) and in the Board of Directors (Article 6 (1) TESM) are excluded from voting. Consequently, the German *Bundestag*'s participation in the decisions of the German representatives in the bodies of the European Stability Mechanism, which is provided for at national level, would fail. This would mean that the decisions taken by the European Stability Mechanism in this period would not be legitimised and monitored by the German *Bundestag*, regardless of which voting rules are provided for by the Treaty with regard to the decisions to be made in the specific situation. This would also concern decisions which affect the German *Bundestag*'s overall budgetary responsibility and which therefore in principle require the participation of the German *Bundestag* (see BVerfGE 129, 124 <179 ff.>), such as decisions on the issue of shares on terms other than at par (Article 8 (2) sentence 4 TESM), on the granting of stability support including the detailing of the conditionality attached to it in the Memorandum of Understanding under Article 13 (3) TESM and on the choice of the instruments and the detailing of the financial terms and conditions in accordance with Articles 12 to 18 TESM, and on changes to the list of the financial assistance instruments which the European Stability Mechanism can use (Article 19 TESM).

[267] (2) Nevertheless, Article 4 (8) TESM does not infringe Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law.

[268] (a) The German *Bundestag* must include the Federal Republic of Germany's share in the initial capital, which is set out in Article 8 (2) sentence 2 TESM, in the budget; it must ensure to the extent necessary that in the event of calls made in accordance with Article 9 TESM, if necessary in conjunction with Article 25 (2) TESM, it will be possible at any time to completely pay in Germany's further shares in the authorised capital stock in accordance with Article 8 (1) TESM in a timely manner (see Article 110 (1) of the Basic Law, § 22 of the Law on Budgetary Principles (*Haushaltsgrundsätzegesetz* – HGrG), § 16 of the Federal Budget Code (*Bundeshaushaltsordnung* – BHO)). Thus, a suspension of the German voting rights can virtually be ruled out.

[269] (b) This also applies to cases in which different opinions regarding the justification of a capital call or its amount exist. There can, for instance, be different opinions on whether Germany made complete payment of its share in the authorised capital stock, whether the constitutive elements of a capital call made in accordance with Article 9 (2) and (3) (if necessary in conjunction with Article 25 (2) TESM) exist, whether in this case, the German share has been correctly determined, or whether capital must be returned if the situation provided

for under Article 25 (3) TESM arises. In such cases, the Federal Republic of Germany must meet the capital call to prevent the suspension of its voting rights. To assert its legal view, it must rely on the procedure provided for under Article 37 (2) and (3) TESM; if necessary, it can – without prejudice to Article 8 (4) TESM, which recognisably is not intended to cover such circumstances – make payment subject to the proviso of revocation, make use of possibilities to offset payments, or request securities.

[270] (c) Also otherwise it must be ensured under all circumstances that the context of legitimation between parliament and the European Stability Mechanism is not interrupted. If necessary, the Federal Government and the *Bundestag* have to make arrangements in a timely manner to avoid a suspension of the voting rights.

[271] cc) According to the standards indicated above (see B.III.1.a)cc)), the legislature's assessment that the payment obligation for shares in the European Stability Mechanism of a total nominal value of EUR 190 024 800 000, which is set out in § 1 (1) of the ESM Financing Act (*ESM-Finanzierungsgesetz* – ESMFinG) and referred to as a "guarantee authorisation" in its paragraph 2, does not lead to a complete failure of budget autonomy is to be accepted by the Federal Constitutional Court. This also applies if the German participation in the European Financial Stability Facility, bilateral assistance in favour of Greece and risks resulting from the participation in the European System of Central Banks and in the International Monetary Fund are included in the calculation of Germany's overall commitment undertaken with regard to the stabilisation of the European monetary union. In the oral hearing, the *Bundestag* and the Federal Government stated in detail that the risks involved with making available the German shares in the European Stability Mechanism were manageable, while without the granting of financial facilities by the European Stability Mechanism the entire economic and social system was under the threat of unforeseeable, serious consequences. Even though these assumptions are the subject of great controversy among economic experts, they are at any rate not evidently erroneous. Therefore the Federal Constitutional Court may not replace the legislature's assessment by its own.

[272] dd) Finally, on summary review, no threat of impairing the overall budgetary responsibility results from the possibility of an issue of future shares on terms other than at par pursuant to Article 8 (2) sentence 4 TESM ((1)), from capital calls made in accordance with Article 9 (2) and (3) TESM ((2)), from a possible interplay of the European Stability Mechanism and the European Central Bank ((3)) and from the lack of an express right of resignation or termination ((4)).

[273] (1) The possibility of issuing capital stock on terms other than at par (Article 8 (2) sentence 4 TESM) does not impair the overall budgetary responsibility. Under Article 8 (2) sentence 4, the Board of Governors decides on a change to the terms of issue. Under Article 5 (6) point (b) TESM, the decision is to be taken by mutual agreement. A decision without the participation of the German representative is ruled out also in the event of a delegation of the authorisation to decide to the Board of Directors (Article 5 (6) point (m) in conjunction with Article 6 (5) TESM). In this respect, the *Bundestag*'s overall budgetary responsibility can therefore be safeguarded through its participation in the decision to be taken by the respective German representative in the bodies of the European Stability Mechanism; consequently, the overall budgetary responsibility is not impaired by the Treaty.

[274] (2) Furthermore, no impairment of the overall budgetary responsibility results from the authorisations to make capital calls in accordance with Article 9 (2) and (3) TESM. Admittedly, calls made in accordance with Article 9 (2) TESM are decided on by the Board of Directors by simple majority, and calls made in accordance with Article 9 (3) TESM are decided on by the Managing Director, so that the German representatives in the bodies of the European Stability Mechanism have no blocking minority in this respect. However, the appraisal of these instruments against the standard of constitutional law must take into account that they are not only based on the abstract approval by the *Bundestag* of the German overall involvement set out in the Treaty establishing the European Stability Mechanism (Article 8 (1), Annexes I and II) and in § 1 (1) and (2) ESMFinG, but that every single stability support measure taken in accordance with Article 13 (2) TESM, as well as the signing of the respective Memorandum of Understanding in accordance with Article 13 (4) TESM, require a decision by mutual agreement of the Board of Governors and can be, and actually are, made contingent on the approval by the German *Bundestag*. As the *Bundestag* can exercise the constitutionally required influence through its approval of stability support and can participate in the decision on the amount, on the terms and

conditions and on the duration of stability support in favour of Members seeking help, the *Bundestag* itself lays the most important foundation of possible capital calls made in accordance with Article 9 (2) TESM.

[275] Admittedly, there are no comparable possibilities for the *Bundestag* of exerting influence with regard to possible losses resulting from the activities of the European Stability Mechanism. It can, however, influence the activities of the European Stability Mechanism via the guidelines for borrowing operations (Article 21 (2) TESM) and the investment policy (Article 22 (1) TESM). Moreover, according to the Federal Government's assessment, which has not been opposed by the applicants in a substantiated manner, such losses are not to be expected against the background of the experience made with other international financial institutions.

[276] (3) Contrary to the allegations made by the first and second applicants, the objection that the European Stability Mechanism can become the vehicle of unconstitutional state financing by the European Central Bank cannot be raised against the Treaty establishing the European Stability Mechanism. The ban on monetary financing as an important element for safeguarding the constitutional requirements of the precept of democracy under European Union law (see above B.III.1.a)dd)) is not affected by the Treaty establishing the European Stability Mechanism. In the applicable primary legislation, the ban on monetary financing is expressed in Article 123 TFEU. It contains the prohibition of overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States, and the ban on purchasing debt instruments directly from them by the European Central Bank or national central banks. It can be left open whether the European Stability Mechanism's taking up of loans with the European Central Bank is already precluded by Article 21 (1) TESM, which merely provides for borrowing "on the capital markets". As an internal agreement between European Union Member States, the Treaty establishing the European Stability Mechanism must at any rate be interpreted in conformity with European Union law (see Court of Justice of the European Communities, Case C-235/87, *Matteucci*, ECR 1988, p. 5589, marginal no. 19; Kube, WM 2012, p. 245 <246 ff.>; *Bundestag* printed papers 17/9045, p. 29; 17/9047, p. 4; on the reference of the TESM to European Union law see Rathke, DÖV 2011, p. 753 <759-260>; Calliess, NVwZ 2012, p. 1 <1-2>). As borrowing by the European Stability Mechanism from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with European Union law, the Treaty can only be taken to mean that it does not permit such borrowing operations.

[277] As a financial institution belonging to the public sector within the meaning of Article 3 of Council Regulation (EC) No 3603/93 of 13 December 1993 (OJ L 332 of 31 December 1993, p. 1), the European Stability Mechanism is one of the institutions specified in Article 123 (1) TFEU to which no loans may be granted. Due to its objectives, it is not covered by the exemption from the prohibition of monetary financing set out in Article 123 (2) TFEU. Pursuant to this provision, Article 123 (1) TFEU does not apply to publicly owned credit institutions. However, Article 123 (2) TFEU does not apply to institutions whose funds directly benefit European Union Member States because this would circumvent the prohibition set out in Article 123 (1) TFEU. This would be the case with the European Stability Mechanism. Under Article 3 sentence 1 TESM, the purpose of the European Stability Mechanism is to provide stability support under strict conditionality to the benefit of ESM Members. It uses the funds at its disposal for direct financial stabilisation of its members, which the European Central Bank is prevented from doing by Article 123 (1) TFEU. Accordingly, in its opinion of 17 March 2011 (CON/2011/24, OJ C 140 of 11 May 2011, p. 8, observation 9), the European Central Bank assumes that Article 123 TFEU would not allow the European Stability Mechanism to become a counterparty of the Eurosystem under Article 18 of the Statute of the ESCB.

[278] A depositing of government bonds by the European Stability Mechanism with the European Central Bank as a security for loans would also infringe the ban on the direct acquisition of debt instruments of public entities. Here, it can remain open whether this would constitute a direct acquisition of debt instruments of state issuers on the primary market or whether after their intermediate acquisition by the European Stability Mechanism, it would be tantamount to an acquisition on the secondary market. For an acquisition of government bonds on the secondary market by the European Central Bank aiming at financing the Members' budgets independently of the capital markets is

prohibited as well, as it would circumvent the prohibition of monetary financing (see also Recital 7 of Council Regulation (EC) No 3603/93 of 13 December 1993 (OJ L 332 of 31 December 1993, p. 1)). This is taken account of by the Treaty establishing the European Stability Mechanism, whose Recital 4 calls for strict observance of the European Union framework, the integrated macroeconomic surveillance, in particular the Stability and Growth Pact, the macroeconomic imbalances framework and the economic governance rules of the European Union. Article 123 TFEU is one of these rules.

[279] (4) Finally, an impairment of the German *Bundestag*'s overall budgetary responsibility also does not result from the circumstance that the Treaty establishing the European Stability Mechanism does not provide for express rights of resignation or termination. With a view to the binding limitation of the burdens on the budget to EUR 190 024 800 000, which is to be ensured by a reservation to this effect, the safeguarding of the *Bundestag*'s overall budgetary responsibility does not require providing a special right of resignation or termination in the Treaty. The limitation of liability sufficiently ensures that the entry into force of the Treaty alone does not establish an automatic and irreversible procedure regarding payment obligations or commitments to accept liability. Instead, every new payment obligation or commitment to accept liability requires a new mandatory decision by the German *Bundestag*. In other respects, the general provisions apply in this context.

[280] c) On summary review, the provisions on the integration of the German *Bundestag* in the decision processes of the European Stability Mechanism, which follow from the Act on the Treaty Establishing the European Stability Mechanism and the ESM Financing Act, essentially satisfy the requirements of Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law, for the structuring of the participation rights and possibilities of exerting influence of the German *Bundestag* to ensure democratic governance of the European Stability Mechanism and to ensure its overall budgetary responsibility (aa). However, in the principal proceedings closer consideration must be given to the issue of shares of the capital stock of the European Stability Mechanism on terms other than at par (Article 8 (2) sentence 4 TESM) and the budgetary guarantee that Article 4 (8) TESM will not be applied to the Federal Republic of Germany. In this connection, however, a temporary injunction is not necessary (bb). To the extent that the Act of assent to the Treaty establishing the European Stability Mechanism and the ESM Financing Act on a provisional assessment do not fully guarantee a constitutional functional allocation of competencies between the bodies of the *Bundestag*, it is questionable whether this violates the core of the right to vote protected by Article 38 (1) sentence 1, Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law; at all events, here too there is no need for a temporary injunction (cc).

[281] aa) The requirements of domestic safeguarding of the principle of democracy are essentially satisfied, both with regard to the consultation rights of the *Bundestag* ((1)) and with regard to its rights of information ((2)) and the personal legitimation of the German representatives in the bodies of the European Stability Mechanism ((3)).

[282] (1) The accompanying legislation has the function of modelling and putting into concrete terms in national law the constitutionally required rights of the legislative bodies to participate in the work of the European Stability Mechanism (see BVerfGE 123, 267 <433>). It must ensure that the *Bundestag* – mediated through the Federal Government – has a determining influence on the actions of the European Stability Mechanism (see BVerfGE 123, 267 <356, 433 ff.>) and in this way is in a position to exercise its overall budgetary responsibility and the responsibility for integration (see BVerfGE 129, 124 <177 ff., 186>).

[283] On summary review, it is not apparent that the legislature – except in the case of Article 8 (2) sentence 4 TESM (on this, see B.III.2.b)aa)(1)(a)(bb) and B.III.2.c)bb)(1)) – omitted to tie decisions of the European Stability Mechanism which have consequences in practice and are thus essential to the exercise of the overall budgetary responsibility to a participation of the*Bundestag*. The constitutionally required participation of the German *Bundestag* is in principle sufficiently provided for in the Act on the Treaty establishing the European Stability Mechanism and in the ESM Financing Act. For the decisions of the European Stability Mechanism which play a role for the overall budgetary responsibility, the legislature has provided for a connection to parliament by laying down in Article 2 of the Act of assent to the ESM Treaty, in § 4 (2) of the ESM Financing Act and in § 5 (2) of the ESM Financing Act that the German members of the Board of Governors and Board of Directors must attend the meetings of the

bodies of the European Stability Mechanism and must implement the decisions of the German *Bundestag* in their voting in the bodies. The fact that some of the decisions to be expected are subject to the vote of the plenary session (see § 4 (1) ESMFinG) and others merely to that of the budget committee (see § 5 (2) ESMFinG) does not affect the basic question of the participation of the German *Bundestag*.

[284] The further development of the instruments provided for in the ESM Treaty (see Article 19 TESM) does not make it possible at this stage to determine in detail and legislate for all cases in which a participation of parliament will be advisable. However, the participation rights must keep pace with the development of the treaty – whether by statutory amendment, whether by interpretation – in order that the effective exercise of the parliamentary budgetary responsibility and responsibility for integration is guaranteed in every eventuality. Against this background, the legislature has made a change of the financial assistance instruments under Article 19 TESM contingent on the requirement of authorisation by Federal legislation (Article 2 (2) of the Act of Assent to the ESM Treaty). If it appears in the enforcement of the ESM Treaty that further essential participation requirements are not expressly provided for, the provision of § 4 (1) ESMFinG, which names only three areas of decision of the European Stability Mechanism by way of example ("in particular") in which the plenary session is to decide, offers sufficient scope for constitutional treatment. The same applies to the catch-all provision § 5 (3) ESMFinG, which obliges the Federal Government to involve the *Bundestag*budget committee and to take account of the budget committee's opinion in all cases not provided for elsewhere in which not the overall budgetary responsibility, but merely the*Bundestag*'s budget responsibility, is affected.

[285] (2) On summary review, the rights to information of the German *Bundestag* contained in the ESM Financing Act satisfy the requirements of Article 23 (2) sentence 2 of the Basic Law – which is the standard of review in *Organstreit* proceedings – (on the possibility of informing the national parliaments, which in particular is not excluded by Article 34 TESM, see above B.III.1.a)bb)(5)).

[286] The work of the European Stability Mechanism is a matter concerning the European Union within the meaning of Article 23 (2) of the Basic Law, and just like the establishment and structuring of the Mechanism it gives rise to rights of participation and information of the *Bundestag* (see BVerfG, judgment of the Second Senate of 19 June 2012 – 2 BvE 4/11 – , *juris*, marginal nos. 90 ff.). § 7 (1) to (3) ESMFinG reproduce the determining constitutional requirements imposed by Article 23 (2) sentence 2 of the Basic Law on the duties of information of the Federal Government and thus guarantee the parliamentary right of information. In addition, § 7 (10) ESMFinG refers to the more extensive rights under the Act on Cooperation between the Federal Government and the German *Bundestag* in Matters Concerning the European Union.

[287] (3) Under the aspect of personal democratic legitimation too, there are no grounds for criticising the structuring of Germany's representation in the European Stability Mechanism. It is part of the inviolable content of the principle of democracy under Article 79 (3) of the Basic Law that the exercise of state duties and the exercise of state powers can be traced back to the citizens of the state and the decisions are in principle accounted for to them. In this connection it is crucial that the *Bundestag* retains substantial influence on the decisions of the German representatives in the bodies of the European Stability Mechanism which affect the *Bundestag*'s budgetary responsibility (see BVerfGE 89, 155 <182>; 107, 59 <94>). This requires the representatives to be bound by the decisions of the *Bundestag*. The Basic Law does not lay down in what way the legislature here ensures that the substantive decisions of the German *Bundestag* are correctly implemented by the respective representatives in the bodies. Nevertheless, in this connection parliamentary responsibility and dependence on instructions of the German representatives in the bodies of the European Stability Mechanism are a decisive precaution. Constitutionally it must at least be required that the Federal Minister of Finance as a member of the Board of Governors and the German member of the Board of Directors are accountable to the German *Bundestag* and that in this way it is made possible for the German *Bundestag*'s budgetary responsibility and responsibility for integration to be effectively exercised.

[288] The ESM Treaty does not prevent this. It proceeds on the basis that the members of its bodies are responsible to their parliaments – in particular on the basis of the constitutionally required interpretation of the provisions on professional secrecy (Article 34 TESM) and personal immunity (Article 35 TESM), which must be ensured by international law. This follows from the fact that the ministers of

finance of the ESM members are represented on the Board of Governors (Article 5 (1) sentence 3 TESM), and from their authority – subject to no conditions – to appoint a Director and an alternate Director on the Board of Directors and to revoke the appointments (Article 6 (1) sentence 2, Article 43 TESM). The provision makes it possible to enforce a commitment to instructions from the national government and in this way to ensure the influence of parliament.

[289] The ESM Financing Act clearly assumes that the German representatives are bound by the decisions of the *Bundestag* and are accountable to it. The German member of the Board of Governors is the Federal Minister of Finance (Article 5 (1) sentence 3 TESM), who is not only indirectly dependent on the trust of the *Bundestag* (Article 64 (1), Article 67 (1) of the Basic Law), but also accountable to it (Article 114 of the Basic Law). In the oral hearing, the Federal Government also stated that a Permanent Secretary will be entrusted with the function of the German member of the Board of Directors. Finally, the ESM Financing Act clearly assumes, in providing that the German representatives must reject decisions of the European Stability Mechanism with budgetary relevance if the German *Bundestag* has made no resolution of consent (§ 4 (2) and (3), § 5 (2) sentence 4 ESMFinG), that they are bound by parliamentary requirements.

[290] bb) With regard to the issue of shares of the capital stock of the European Stability Mechanism on terms other than at par under Article 8 (2) sentence 4 TESM (1) and the budgetary guarantee that Article 4 (8) TESM will not be applied to the Federal Republic of Germany (2), this must be considered in more depth in the principal proceedings.

[291] (1) The issue of shares of the capital stock of the European Stability Mechanism on terms other than at par under Article 8 (2) sentence 4 TESM is capable of being a decisive factor for the burdening of the Federal budget and its effects are not substantially different from those of the increase of capital stock laid down in Article 2 (1) of the Act of assent to the ESM Treaty. The legislature has linked this to the requirements of authorisation under Federal law because it affects the overall budgetary responsibility of the German *Bundestag* (see also BVerfGE 129, 124 <177-178>). But there is no express provision with regard to the elements of Article 8 (2) sentence 4 TESM and the corresponding competence of the Board of Governors (Article 5 (6) point (b) TESM).

[292] But since, in view of its non-definitive nature ("in particular"), as set out above (see B.III.2.c)aa)(1)), § 4 (1) ESMFinG may be interpreted in conformity with the constitution to the effect that it may also be applied to decisions under Article 5 (6) point (b) TESM, then – independent of the question as to how far an express provision would be desirable here – at all events there is no need for a temporary injunction to be issued.

[293] (2) In § 1 (1) ESMFinG, the Supplementary Budget Act of 14 June 2012 (BTDrucks 17/9650, 17/9651) and § 1 (2) sentence 1 ESMFinG, the legislature has made funds available in the amount of 21.71712 billion euros and authorised the Federal Ministry of Finance to give guarantees for the callable capital in the amount of 168.30768 billion euros. Whether this guarantees with sufficient certainty that the Federal Republic of Germany can make all capital calls, including short-term ones (Article 9 (3 TESM) and exclude a loss of voting rights must be reserved for the decision in the principal proceedings.

[294] cc) The Federal Constitutional Court has not yet decided in what circumstances a complainant may challenge the allocation of competencies between the plenary session, the budget committee and other subsidiary bodies of the German *Bundestag* in exercising its rights of participation in matters concerning the European Union (see BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, NVwZ 2012, p. 495 <498> with further references) as a violation of the core of the right to vote, protected by Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. The clarification of this question is reserved for the principal proceedings, as is the review of the submission that *Bundestag* members' rights have been violated, which was made in the *Organstreit* proceedings but not included in the application for the issue of a temporary injunction. For a temporary injunction may not be issued, firstly, because the plenary session of the German *Bundestag* is capable of countering claims that the allocation of rights of participation to the budget committee is unconstitutional by exercising its right of revocation under § 5 (5) ESMFinG. The German *Bundestag*'s right to decide on the budget and its overall budgetary responsibility are in principle exercised by negotiation and passing resolutions in the plenary session (see BVerfG, judgment of the Second Senate of 28 February 2012 – 2 BvE 8/11 –, loc. cit., p. 495 <498> with further references). To the extent that supranational agreements are entered into

which by reason of their scale may be of structural significance for parliament's right to decide on the budget, the German *Bundestag*, in the plenary session, must decide on every large-scale measure resulting in expenditure and on fundamental questions of the manner in which the funds provided are dealt with. Consequently, the budget committee may act independently in place of the plenary session only in the case of decisions which either are subordinate or have already been determined sufficiently clearly in advance by the plenary session.

[295] In allocating the rights of participation to the plenary session, the budget committee and the special committee, the legislature oriented itself towards these criteria.

[296] (1) In the case of matters which relate to the overall budgetary responsibility, it has either already provided for them in the statute itself (Article 2 of the Act of assent to the Treaty establishing the European Stability Mechanism) or allocated them to the plenary session (§ 4 ESMFinG). Cases where § 4 (1) sentence 1 ESMFinG applies are illustrated by concrete examples in § 4 (1) sentence 2 no. 1 to no. 3 ESMFinG. In this, the concept of overall budgetary responsibility is at the same time given sufficient contours for the present context. To the extent that it is only the budgetary responsibility which is affected, § 5 ESMFinG provides that the budget committee shall make the decision. It is true that the legislature allocated the decisions on granting and conditions of a stability support to the plenary session, but it left the decision on the modalities of implementation without substantial effects on the volume and risks of liability to the budget committee (§ 5 (2) sentence 1 no. 1 ESMFinG) and at the same time provided that in the case of an increase of the volume over that of the fundamental decision under Article 13 (2) TESM the plenary session is once more competent (Budget Committee printed paper 4410 of the 17th electoral period – *Haushaltsausschuss-Drucks 4410 der 17. Wahlperiode*, legislative rationale of § 5 ESMFinG). The weighting expressed in this corresponds to the provision of § 5 (2) sentence 1 no. 4 ESMFinG, which provides that the detailed terms and conditions for capital changes under Article 10 (2) TESM require only the consent of the budget committee, because the change of the capital stock under Article 10 (1) TESM is subject to the constitutional requirement of the specific enactment of a statute. There are no constitutional objections to this.

[297] (2) In contrast, it is possible that in § 5 (2) sentence 1 no. 2 and no. 3 ESMFinG competencies are allocated to the budget committee which by reason of their scope should be exercised by the plenary session.

[298] § 5 (2) sentence 1 no. 2 ESMFinG relates to decisions of the Board of Governors on capital calls (Article 9 (1) TESM) and the acceptance or material change of the terms and conditions which apply under Article 9 (4) TESM. § 5 (2) sentence 1 no. 3 ESMFinG refers to the acceptance or material change of the guidelines on the modalities for implementing the individual financial assistance facilities under Articles 14 to 18 TESM, of the pricing guidelines under Article 20 (2) TESM, of the guidelines for borrowing operations under Article 21 (2) TESM, of the guidelines for investment policy under Article 22 (1) TESM, of the guidelines for dividend policy under Article 23 (3) TESM and of the rules for the establishment, administration and use of other funds under Article 24 (4) TESM. The decisions named must be assessed against the background that the ESM Treaty is a legal framework which contains a large number of possibilities of development and leaves room for putting matters into specific terms, whether by the by-laws, whether by guidelines or whether by terms and conditions. The interpretation of the abstract powers and their exercise, however, for example in the field of investment policy, will typically have effects on the overall budgetary responsibility which is to be exercised by the plenary session of the *Bundestag*.

[299] Taking capital calls under Article 9 (1) TESM as an example, it can be shown that more detailed consideration is needed in this connection. Even if the calling of the capital stock already "granted" by the legislature will typically not (any longer) affect the overall budgetary responsibility itself, the situation appears to be different with regard to the terms and conditions set out in Article 9 (4) TESM. As is shown by a draft document submitted to the Court by the representative of the Federal Government, they will, for example, lay down authorisation proceedings which precede the relevant meetings. They are to lay down periods of time within which the members of the ESM bodies receive proposals for capital calls, and to lay down concrete deadlines for payment. In addition, the areas of application of the various types of capital call by the Board of Governors (Article 9 (1) TESM), the Board of Directors (Article 9 (2) TESM) and the Managing Director (Article 9 (3) TESM), which differ with regard to the nature of potential parliamentary involvement, are specified. Thus,

for example, the draft document submitted provides that the capital calls under Article 9 (3) TESM, which according to the system of the provision are likely to be rare, are also intended to include accelerated payment of capital under Article 41 (2) "during the initial phase". The decision on the terms and conditions under Article 9 (4) TESM may therefore restrict the subject or size of the powers of the bodies to make capital calls under Article 9 TESM or also extend them beyond the degree laid down in the foreseeable wording of the provisions. In view of the importance of these restrictions for the *Bundestag*, which as the holder of the right to decide on the budget needs to know in good time of planned capital calls and their amount, and in view of the risks for the voting rights under Article 4 (8) TESM, which are suspended if payment is not made in time, the supplementary abstract general provisions affect the overall budgetary responsibility of the German *Bundestag*.

[300] d) On summary review, the Act of assent to the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union also does not violate Article 38 (1), Article 20 (1) and (2) in conjunction with Article 79 (3) of the Basic Law. The content of the Treaty largely coincides with constitutional requirements already in existence and with primary-law duties under the Treaty on the Functioning of the European Union (aa). It grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German *Bundestag* (bb) and does not force the Federal Republic of Germany to lay down its economic policy permanently in a way that can no longer be reversed (cc).

[301] aa) The aim of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, pursuant to its Article 1 and to the "fiscal compact" laid down in Title III, is the strengthening of the economic pillar of the economic and monetary union by fostering budgetary discipline. It coincides in part with the requirements of Article 109, 115 and 143d of the Basic Law as amended by the Act Amending the Basic Law (*Gesetz zur Änderung des Grundgesetzes*) of 29 July 2009 (BGBl I p. 2248) ((1)), and in part with the provisions for the budget management of the Member States contained in the Treaty on the Functioning of the European Union, in particular with the provisions laid down in Article 126 TFEU and its supplementary protocols (above all Protocol <no. 12> on the excessive deficit procedure and protocol <no. 13> on the convergence criteria) ((2)). This does not affect the overall budgetary responsibility of the German *Bundestag* ((3)).

[302] (1) The obligations in international law under Article 3 TSCG, which in many places takes up concepts and contents from the secondary-law "Six Pack", are essentially similar in structure to the provisions contained in Article 109, 109a, 115 and 143d of the Basic Law, whose aim is already taken from the European stability policy. The constitutional rules on indebtedness were reformed in the year 2009 because the provisions of the Basic Law which applied until that date were incapable of preventing the development of an excessive level of indebtedness (see also BVerfGE 119, 96 <141-142>) and the legislature believed that the approaches of the preventive and the corrective arm of the European Stability and Growth Pact (Regulations (EC) No 1466/97 and (EC) No 1467/97) would be more effective (see BTDrucks 16/12410, p. 1, 5-6, 10; see also Kube, in: Maunz/Dürig, *GG*, *Art. 109*, marginal nos. 24-25 <May 2011>; Pünder, in: Friauf/Höfling, *Berliner Kommentar zum Grundgesetz*, *Art. 115*, marginal nos. 17-18, 34; Gregor Kirchhof, in: v. Mangoldt/Klein/Starck, *GG*, vol. 3, 6th ed. 2010,*Art. 109*, marginal nos. 28-29; Siekmann, in: Sachs, *GG*, 6th ed. 2011, *Art. 109*, marginal no. 83; Christ, NVwZ 2009, p. 1333 <1337>; Scholl, DÖV 2010, p. 160 <164>).

[303] (a) Article 3 (1) point (a) TSCG requires the submission of a budget which is at least balanced. Under Article 3 (1) point (b) TSCG, such a budget is deemed to have been achieved if the annual structural balance is at the country-specific medium-term objective to be laid down by the Member States themselves, as defined in the revised Stability and Growth Pact (see Article 2a (2) of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011), with a lower limit of a structural deficit of 0.5% of the gross domestic product. These deficit limits need not be achieved immediately. However, under Article 3 (1) point (b) sentence 2 and sentence 3 TSCG the Contracting Parties have a duty to ensure convergence towards their respective medium-term objectives within an individual time frame. The essential characteristics of this "adjustment path" follow from secondary law (Article 3 (2) point (a), Article 5 (1) subparagraphs 2 ff. of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011). In the case of a level of indebtedness of up to 60% of the gross domestic product, the balance is to be corrected by a target value of 0.5% p.a. of the gross domestic product. In the case of a higher level of indebtedness, the target value is over 0.5%. In

the case of exceptional circumstances, the Treaty permits deviations from the medium-term objective or from the adjustment path towards it (Article 3 (1) point (c) TSCG). This refers to periods of severe economic downturn and other unusual events which are outside the control of the Contracting Party concerned (Article 3 (3) sentence 2 point (b) TSCG).

[304] Significant deviations from the medium-term objective or the adjustment path towards it, under Article 3 (1) point (e) TSCG, automatically trigger a correction mechanism. Whether there is a significant deviation is evaluated on the basis of an overall assessment; the medium-term objective or the adjustment path may be fallen short of by up to 0.5% of the gross domestic product (Article 6 (3) of Regulation (EC) No 1466/97 as amended by Regulation (EU) No 1175/2011). The correction mechanism is to be put in place at national level in an institutionalised form by the Contracting Parties (Article 3 (2) sentence 2 TSCG). The Contracting Parties are to put it in place on the basis of principles to be proposed by the European Commission.

[305] (b) Under Article 109 (3) sentence 1 of the Basic Law too, the budget is in principle to be balanced without revenue from credits. The core demand of the European debt brake under Article 3 (1) point (a) TSCG corresponds to this.

[306] (aa) Like Article 3 (1) point (b) TSCG, Article 109 (3) sentence 4 in conjunction with Article 115 (2) sentence 2 of the Basic Law also creates a legal fiction to achieve a balanced budget if this target only barely fails to be achieved. The path of adjustment provided for in Article 3 (1) point (b) sentence 2 and sentence 3 TSCG is reflected in Article 143d (1) sentence 5, sentence 6 and sentence 7 of the Basic Law. Under the requirements of the Basic Law too, the objective of a balanced budget need not be achieved immediately; instead, what is envisaged is the continuous reduction of the deficit within a concrete time frame. As under the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, it is sufficient if the legal fiction is finally achieved. Whether the Basic Law lays down indebtedness limits only for the Federal Government and the *Länder*, as the fourth applicants submit, whereas under European Union law local government and social security funds are also to be taken into consideration (see recital 23 of Directive 2011/85/EU of 8 November 2011, part of the Six Pack) need not be decided. This would not result in a change to the structural comparability of the provisions. A difference in the financial volume would have no different effect than under the existing deficit provisions of Article 126 TFEU.

[307] (bb) Under Article 109 (3) sentence 2 in conjunction with Article 115 (2) sentence 3 of the Basic Law, in the case of a market development which deviates from normal conditions and in the case of natural disasters or unusual emergency situations which are beyond government control and which substantially harm the state's financial situation, it is permitted to deviate from the deficit requirements. Article 3 (1) point (c) in conjunction with (3) sentence 2 point (b) TSCG also names as a ground for deviation a serious economic downturn and an "unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government". On the level of international law, the last-named ground for deviation is described in abstract terms; the Basic Law names it specifically as natural disasters.

[308] (cc) Article 109a sentence 1 no. 1 of the Basic Law in conjunction with the Stability Council Act (*Stabilitätsratsgesetz* (BGBl I 2009 p. 2702)), which was passed in this connection, provides that in order to avoid budget emergencies a Stability Council should be established to provide constant supervision of the budget management, that is – as provided under Article 3 (2) sentence 2 TSCG – an institutionalised form of supervision of the substantive budget criteria. Under Article 115 (2) sentence 4 of the Basic Law in conjunction with the national implementing statute (*Ausführungsgesetz* (BGBl I 2009 p. 2704)) passed in this connection if the deficit limits are exceeded, reaching a particular threshold value automatically triggers the obligation to decrease the deficit in a manner appropriate to the economic situation, and in this respect is similar to the requirements of Article 3 (1) point (e) TSCG.

[309] (2) Another aspect that is important to the constitutional assessment is the fact that the provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union repeat provisions of European Union law or put them into more concrete terms.

[310] (a) Thus, for example, Article 4 sentence 1 TSCG obliges the Contracting States, where the reference value for the level of indebtedness of 60% of the gross domestic product (Article 126 (2) sentence 2 point (b), sentence 3 TFEU in conjunction with Article 1 of Protocol <no. 12> on the excessive deficit procedure) is

exceeded, to reduce the ratio between the two by an average of one-twentieth per year as a benchmark. As is shown by the reference to Article 2 of Regulation (EC) No 1467/97 as amended by Regulation (EU) No 1177/2011, this is likely to result in the obligation to reduce the part exceeding a level of indebtedness of 60% of the gross domestic product by one-twentieth per year (this is also stated in BTDrucks 17/9046, p. 21). In effect, this puts into concrete terms Article 126 (2) sentence 2 point (b) TFEU, which is not specific in this connection but for the monitoring of which the Commission and the Council continue to have an obligation under the procedure laid down in Article 126 TFEU (Article 4 sentence 2 TSCG).

[311] (b) The obligation to submit budgetary and economic partnership programmes subject to approval under Article 5 (1) TSCG is embedded in the deficit procedure, which is governed by primary law (Article 126 TFEU). Article 5 (1) TSCG alters its course only in a manner benefiting the Contracting Parties. They are no longer restricted to reacting to recommendations of the European Union bodies which are subject to sanctions, but can now themselves structure their budgets when submitting the budget programme. This idea is expressed not least in the recitals of the secondary legislation which is decisive in the present case, which without exception emphasises the necessity of greater national responsibility for compliance with rules jointly agreed on (see Regulation (EU) No 1175/2011, recital 8; Regulation (EU) No 1177/2011, recital 4 and Directive 2011/85/EU, recital 1). A direct "reach-through" of the bodies to national budget legislation is not provided for in Article 5 TSCG (see also Conseil constitutionnel, Décision n°2012-653 DC of 9 August 2012, cons. 32).

[312] (c) Article 7 TSCG also fits into the procedure under Article 126 TFEU. Article 7 TSCG, which refers to the "deficit criterion" in the singular, relates only to the criterion named in Article 126 (2) sentence 2 point (a) TFEU of the government deficit (reference value 3%) and obliges Member States whose currency is the euro to support the proposals or recommendations of the European Commission in a procedure under Article 126 TFEU (sentence 1). By Article 7 sentence 2 TSCG, the obligation does not apply if a qualified majority of the Member States whose currency is the euro votes against the proposed or recommended resolution in the Council. Article 7 TSCG does not alter the course of procedure laid down in Article 126 TFEU. However, it binds the political freedom to decide of the Contracting Parties in the Council and in this way strengthens both legally and effectively the influence of the European Commission in the deficit procedure. Whether the provision of Article 7 TSCG is compatible with European Union law need not be decided here; at all events, it does not entail an impairment of the budgetary sovereignty of the German *Bundestag*.

[313] (3) The budget-specific provisions of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union therefore in principle coincide with Article 109, 109a, 115, 143d of the Basic Law and with Article 126 TFEU, which has not only been approved several times by the Federal Constitutional Court (see BVerfGE 89, 155 <204-205>; 129, 124 <181-182>), but has also been expressly referred to by the constitution-amending legislature in Article 109 (2) of the Basic Law. In view of this broad equivalence between the "debt brake" of the Basic Law and the deficit provisions of the Treaty on the Functioning of the European Union, the constitutionality of which was not called into question in the constitutional complaints, the applicants have not shown any evidence that the substantive requirements of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union violate the core of the right to vote and the principle of democracy under Article 20 (1) and (2) of the Basic Law, which are protected by Article 79 (3) of the Basic Law.

[314] bb) On summary review, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union grants bodies of the European Union no powers which affect the overall budgetary responsibility of the German *Bundestag*.

[315] (1) On summary review, Article 3 (2) sentence 2 TSCG has no adverse effect on the overall budgetary responsibility of the German *Bundestag*. Under this provision, the Contracting Parties, in establishing the corrective mechanism, rely on common principles, to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be taken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the deficit and indebtedness criteria. Article 3 (2) sentence 3 TSCG, however, emphasises that this corrective mechanism must fully preserve the prerogatives of the national parliaments. Article 3 (2) sentence 2 TSCG can therefore only be understood to the effect that it is

restricted to the institutional provisions and gives the European Commission no authority to impose specific substantive requirements for the structuring of the budgets (see also Conseil constitutionnel, Décision n°2012-653 DC of 9 August 2012, cons. 25). Thus a partial transfer of the budget responsibility to the European Commission is excluded from the outset (for a similar view, see also Commission communication of 20 June 2012, KOM <2012> 342 final, according to BTDrucks 17/10069 transferred to a number of *Bundestag* committees on 26 June 2012).

[316] (2) Under Article 8 (1) TSCG, the Court of Justice of the European Union may be requested to deal with a violation of the obligations under Article 3 (2) TSCG. In this connection, the jurisdiction of the court is restricted from the outset to reviewing the incorporation of the deficit limits and the adjustment path and the corrective mechanism into the national legal system (Article 8 (1) sentence 2 TSCG). It thus extends only to the codification of these instruments, but not to their concrete application. In this way, Article 8 TSCG only procedurally safeguards, as set out, obligations under Article 3 (2) TSCG.

[317] On summary review, there are no constitutional objections to the specific structuring of this procedural safeguard. Judicial review is modelled on the two-stage proceedings for failure to fulfil Treaty obligations of Article 259-260 TFEU. In the first stage of the proceedings, the Court of Justice may at first only establish a violation of Article 3 (2) TSCG. In the second stage of the proceedings, it is possible to impose a financial sanction, but this too does not result in a direct reach-through of the bodies of the European Union to the specific freedom of drafting of the national budget legislature.

[318] cc) Finally, in ratifying the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union the Federal Republic of Germany is not entering into an irreversible commitment to a particular budget policy.

[319] Under Article 3 (2) sentence 1 TSCG, the provisions under paragraph 1 (deficit limits, adjustment path and correction mechanism) are to take effect in the national law of the Contracting Parties through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes, at the latest one year after the entry into force of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. Irrespective of whether Article 3 (2) sentence 1 TSCG actually prevents the constitution-amending legislature from later removing the existing "debt brake" under Article 109 (3), Article 109a, Article 115 (2) and Article 143d of the Basic Law, there is no question of the Federal Republic of Germany being irreversibly bound by these requirements if only because it is possible to leave the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. It is true that the Treaty does not provide for a right of withdrawal or termination for the Contracting Parties. Whether the Treaty is intended, notwithstanding the evaluation provision contained in Article 16 TSCG – this provides that on the basis of the experience obtained in the next five years, there shall be an attempt to incorporate it into European Union law – to permanently exclude this is not necessary to decide; the same applies to the question as to whether treaties which affect the core of the Contracting Parties' economic and social constitutions do not, for reasons of democracy alone, already have an inherent right of termination under Article 56 (1) point (b) of the Vienna Convention on the Law of Treaties – VCLT (see Fulda, *Demokratie und pacta sunt servanda*, 2002, p. 209). It is recognised in customary international law that the withdrawal by mutual agreement from a treaty is always possible, and a unilateral withdrawal is possible at least if there is a fundamental change of the circumstances which applied when the treaty was entered into (see Article 62 VCLT). In this connection it is of particular importance that the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union also presupposes membership of the European Union (recitals 1 and 5; Article 1 (1), (2) sentence 1, Article 15 sentence 1 TSCG). If a Member State left the European Union (see BVerfGE 123, 267 <350, 396>), the basis for the further participation in the mutual obligations of the Member States of the European Union would cease to exist as a result of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (see Article 1 TSCG). The continuing membership of the common currency is also a fundamental basis for the commitment of the Federal Republic of Germany to the requirements of Article 3 ff. TSCG (see Article 14 (5) TSCG) which would cease to apply if it left the monetary union (on this, see BVerfGE 89, 155 <205>).

§70. January 14th, 2014 OMT, Press Release, https://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html (complete text)

The Second Senate of the Federal Constitutional Court will pronounce its judgment on the subjects of the proceedings that relate to the establishment of the European Stability Mechanism (ESM) and the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (Fiscal Compact). The conditions for accreditation will be announced at a later stage; currently, no accreditations are possible.

The Senate has separated the matters that relate to the OMT Decision of the Governing Council of the European Central Bank of 6 September 2012, stayed these proceedings and referred several questions to the Court of Justice of the European Union for a preliminary ruling. The subject of the questions referred for a preliminary ruling is in particular whether the OMT Decision is compatible with the primary law of the European Union. In the view of the Senate, there are important reasons to assume that it exceeds the European Central Bank's monetary policy mandate and thus infringes the powers of the Member States, and that it violates the prohibition of monetary financing of the budget. While the Senate is thus inclined to regard the OMT Decision as an ultra vires act, it also considers it possible that if the OMT Decision were interpreted restrictively in the light of the Treaties, conformity with primary law could be achieved. The Senate decided with 6:2 votes; Justice Lübbe-Wolff and Justice Gerhardt both delivered a separate opinion.

Facts of the Cases:

In a reasonable assessment of their applications, the complainants and the applicant challenge, first, the participation of the German Bundesbank in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (OMT Decision), and secondly, that the German Federal Government and the German Bundestag failed to act regarding this Decision. The OMT Decision envisages that the European System of Central Banks can purchase government bonds of selected Member States up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the European Stability Mechanism. The stated aim of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or "singleness" of the monetary policy. The OMT Decision has not yet been put into effect.

Essential Considerations of the Senate:

1. According to the established case-law of the Federal Constitutional Court, the Court's powers of review cover the examination of whether acts of European institutions and agencies are based on manifest transgressions of powers or affect the area of constitutional identity of the Basic Law, which cannot be transferred and is protected by Art. 79 sec. 3 of the Basic Law (Grundgesetz – GG).

2. If the OMT Decision violated the European Central Bank's monetary policy mandate or the prohibition of monetary financing of the budget, this would have to be considered an ultra vires act.

a) Pursuant to the Federal Constitutional Court's Honeywell decision (BVerfGE 126, 286), such an ultra vires act requires a sufficiently qualified violation. This means that the act of authority of the European Union must be manifestly in violation of powers, and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States.

b) The mandate of the European Central Bank is limited in the Treaties to the field of monetary policy (Art. 119 and 127 et seq. TFEU, Art. 17 et seq. ESCB Statute). It is not authorised to pursue its own economic policy but may only support the general economic policies in the Union (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU; Art. 2 sentence 2 ESCB Statute). If one assumes – subject to the interpretation by the Court of Justice of the European Union – that the OMT Decision is to be qualified as an independent act of economic policy, it clearly violates this distribution of powers. Such a shifting of powers would also be structurally significant, because the OMT Decision could be superimposed onto assistance measures which are part of the "Euro rescue policy" and which belong to the core aspects of the Member States' economic policy responsibilities (cf. Art.

136 sec. 3 TFEU). Moreover, the Outright Monetary Transactions can lead to a considerable redistribution between the Member States, and can thus gain effects of a system of fiscal redistribution, which is not entailed by the European Treaties.

c) Should the OMT Decision violate the prohibition of monetary financing of the budget (Art. 123 TFEU), this, too, would have to be considered a manifest and structurally significant transgression of powers. The violation would be manifest because primary law stipulates an explicit prohibition of monetary financing of the budget and thus unequivocally excludes such powers of the European Central Bank. The violation would also be structurally significant, because the prohibition of monetary financing of the budget is one of the fundamental rules for the design of the Monetary Union as a "community of stability". Apart from this, it safeguards the overall budgetary responsibility of the German Bundestag.

3. The existence of an ultra vires act as understood above creates an obligation of German authorities to refrain from implementing it and a duty to challenge it. These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs.

a) It is derived from the responsibility with respect to integration that the German Bundestag and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest and structurally significant transgressions of powers by European Union organs, to actively pursue the goal to reach compliance with the integration programme. They can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law, and by formally transferring the exercised sovereign powers in proceedings pursuant to Art. 23 sec. 1 sentences 2 and 3 GG. However, insofar as this is not feasible or wanted, they are generally obliged within their respective powers, to pursue the reversal of acts that are not covered by the integration programme, with legal or political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible.

b) A violation of these duties violates individual rights of the voters that can be asserted with a constitutional complaint. According to the established case-law of the Senate, Art. 38 sec. 1 sentence 1 GG is violated if the right to vote is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people. On the other hand, Art. 38 sec. 1 sentence 1 GG does not entail a right to have the legality of decisions taken by a democratic majority reviewed by the Federal Constitutional Court.

Vis-à-vis manifest and structurally significant transgressions of the mandate by the European institutions, the safeguard provided by Art. 38 sec. 1 sentence 1 GG also consists of a procedural element: In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right to have a transfer of sovereign powers only take place in the ways envisaged, which are undermined when there is a unilateral usurpation of powers. A citizen can therefore demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers can be restored, and that they decide which options they want to use to pursue this goal. An ultra vires act can further be the object of Organstreit proceedings [proceedings relating to disputes between constitutional organs].

4. Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with primary law; another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law.

a) The OMT Decision does not appear to be covered by the mandate of the European Central Bank. The monetary policy is to be distinguished according to the wording, structure, and purpose of the Treaties from (in particular) the economic policy, which primarily falls into the responsibility of the Member States. Relevant to the delimitation are the immediate objective of an act, which is to be determined objectively, the instruments envisaged to achieve the objective, and its link to other provisions.

The classification of the OMT Decision as an act of economic policy is supported by its immediate objective, which is to neutralise spreads on government bonds of selected Member States of the euro currency area. According to the European Central Bank, these spreads are partly based on fear of investors of a reversibility of the euro; however, according to the Bundesbank, such interest rate spreads only reflect the scepticism of market participants that individual Member States will show sufficient

budgetary discipline to stay permanently solvent.

The purchase of government bonds from selected Member States only is a further indication of the OMT Decision being an act of economic policy because the monetary policy framework of the European System of Central Banks does generally not have an approach which would differentiate between individual Member States. The parallelism of the OMT with assistance programmes of the EFSF or the ESM and the risk of undermining their objectives and requirements confirm this assessment. The purchase of government bonds to provide relief to individual Member States that is envisaged by the OMT Decision appears, in this context, as the functional equivalent to an assistance measure of the above-mentioned institutions – albeit without their parliamentary legitimation and monitoring.

b) Art. 123 sec. 1 TFEU prohibits the European Central Bank from purchasing government bonds directly from the emitting Member States. It seems obvious that this prohibition may not be circumvented by functionally equivalent measures. The above-mentioned aspects, namely the neutralisation of interest rate spreads, selectivity of purchases, and the parallelism with EFSF and ESM assistance programmes indicate that the OMT Decision aims at a prohibited circumvention of Art. 123 sec. 1 TFEU. The following aspects can be added: The willingness to participate in a debt cut with regard to the bonds to be purchased; the increased risk; the option to keep the purchased government bonds to maturity; the interference with the price formation on the market, and the encouragement, coming from the ECB's Governing Council, of market participants to purchase the bonds in question on the primary market.

c) In the view of the Federal Constitutional Court, the objective mentioned by the European Central Bank to justify the OMT Decision, namely to correct a disruption to the monetary policy transmission mechanism, cannot change this assessment. The fact that the purchase of government bonds can, under certain conditions, also help to support the monetary policy objectives of the European System of Central Banks does not turn the OMT Decision itself into an act of monetary policy. If purchasing of government bonds were admissible every time the monetary policy transmission mechanism is disrupted, it would amount to granting the European Central Bank the power to remedy any deterioration of the credit rating of a euro Member State through the purchase of that state's government bonds. This would largely suspend the prohibition of monetary financing of the budget.

d) In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could be interpreted or limited in its validity in conformity with primary law in such a way that it would not undermine the conditionality of the assistance programmes of the EFSF and the ESM, and would indeed only be of a supportive nature with regard to the economic policies in the Union. In light of Art. 123 TFEU, this would probably require that the acceptance of a debt cut must be excluded, that government bonds of selected Member States are not purchased up to unlimited amounts, and that interferences with price formation on the market are to be avoided where possible. Statements by the representatives of the European Central Bank in the course of the proceedings and the oral hearing before the Senate suggest that such an interpretation in conformity with primary law would most likely be compatible with the meaning and purpose of the OMT Decision.

5. Whether the OMT Decision and its implementation could also violate the constitutional identity of the Basic Law is currently not clearly foreseeable and depends, among other factors, on the content and scope of the OMT Decision as interpreted in conformity with primary law.

Separate Opinion of Justice Lübbe-Wolff:

In an effort to secure the rule of law, a court may happen to exceed judicial competence. In my view, this has occurred here. The motions should have been rejected as inadmissible. How Bundestag and Federal Government are to react to a violation, martial or non-martial, of German sovereign rights is a question that cannot reasonably be answered by rules making certain predetermined positive actions mandatory.

Selecting from the variety of possible reactions, which range from expressions of disapproval to an exit from the Monetary Union, can only be a matter of political discretion. Accordingly, it comes as no surprise that no such rules are detectable either in the text of the Constitution or in the case-law interpreting it.

The assumption that under specified conditions not only acts of German federal organs which positively restrict sovereign rights, but also mere inaction in the face of qualified transgressions on the part of the European Union can be challenged on the basis of Art. 38

sec. 1 GG departs from earlier case-law, just recently corroborated, according to which parliamentary or governmental inaction is contestable in constitutional complaint proceedings only if the complainant can rely on an explicit constitutional mandate substantially specifying the content and reach of the alleged duty to act. With respect to Organstreit challenges of inaction, too, the Senate has just recently repeated that they are admissible only if directed against a specific omission, i.e. against the omission of a specific action which can arguably be presented as constitutionally imperative. Moreover, the notion that a mere omission of certain governmental behaviour on the Union level can be a proper object of constitutional complaint would seem to stand in contrast to recent case-law according to which even positive acts of governmental cooperation in EU decisions or in intergovernmental decisions related to the Union will not be examined.

Separate Opinion of Justice Gerhardt:

I hold that the constitutional complaints and the application in the Organstreit proceedings, in so far as they relate to the OMT Decision, are inadmissible. The Senate's decision extends the possibilities of the individual to initiate via Art. 38 sec. 1 GG – without connection to a substantive fundamental right – a review of the acts of Union institutions by the Constitutional Court. By admitting such an ultra vires review, the door is opened to a general right to have the laws enforced (allgemeiner Gesetzesvollziehungsanspruch), which the Basic Law does not contain.

The responsibility with respect to integration (Integrationsverantwortung) of the German constitutional organs exists vis-à-vis the general public, and yields nothing for the construction of a subjective right of any person entitled to vote to have constitutional organs take action. With regard to the question of whether there exists a qualified ultra vires act, the Federal Government and the Bundestag must have a margin of appreciation and discretion, which the citizen needs to accept. The decision is based on the assumption that a transgression of powers can also be manifest if it is preceded by a lengthy clarification process. This case shows in abundant clarity how difficult it is to handle the criterion "manifest". Monetary and economic policies relate to each other and cannot be strictly separated.

In an overall assessment, it seems to me that the claim, that the objective of the OMT Decision is first and foremost the re-establishment of the monetary transmission mechanism, cannot be contradicted with the unequivocalness to be required.

That, with the help of the Federal Constitutional Court, an individual may steer the Bundestag's right of initiative into a specific direction, does not fit into the constitutional framework of parliamentary work. The citizens can influence the way and objectives of the political process through petitions, the political parties and Members of Parliament, and in particular through the media. The Bundestag could readily have criticised the OMT Decision by political means, threatened, if necessary, to bring proceedings for annulment before the Court of Justice of the European Union, waited for the reactions of the European Central Bank and the financial markets and then taken further steps. The fact that it did none of this does not indicate a democratic deficit, but is an expression of its majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area.

§71. OMT, Ruling, January 14th, 2014

https://www.bundesverfassungsgericht.de/entscheidungen/rs20140114_2bvr272813en.html

(complete text)

The Federal Constitutional Court – Second Senate – with the participation of Justices (…)held on 14 January 2014 as follows:

I. The proceedings are suspended.

II. Pursuant to Article 19 section 3 letter b of the Treaty on European Union and Article 267 section 1 letters a and b of the Treaty on the Functioning of the European Union, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

a) Is the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions incompatible with Article 119 and Article 127 sections 1 and 2 of the Treaty on the Functioning of the European Union, and with

Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, because it exceeds the European Central Bank's monetary policy mandate, which is regulated in the above-mentioned provisions, and infringes the powers of the Member States?

Does a transgression of the European Central Bank's mandate follow in particular from the fact that the Decision of the Governing Council of the European Central Bank of 6 September 2012

aa) is linked to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

bb) envisages the purchase of government bonds only of selected Member States (selectivity)?

cc) envisages the purchase of government bonds of Member States in addition to assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (parallelism)?

dd) might undermine the terms and conditions of the assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (bypassing)?

b) Is the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions incompatible with the prohibition of monetary financing enshrined in Article 123 of the Treaty on the Functioning of the European Union?

Is the compatibility with Article 123 of the Treaty on the Functioning of the European Union precluded in particular by the fact that the Decision of the Governing Council of the European Central Bank of 6 September 2012

aa) does not envisage quantitative limits for the purchase of government bonds (volume)?

bb) does not envisage a certain time lag between the emission of government bonds on the primary market and their purchase by the European System of Central Banks on the secondary market (market pricing)

cc) allows that all purchased government bonds may be held to maturity (interference with market logic)?

dd) contains no specific requirements for the credit rating of the government bonds that are to be purchased (default risk)?

ee) envisages equal treatment of the European System of Central Banks and private as well as other government bondholders (debt cut)?

In the alternative that the Court of Justice of the European Union does not consider the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions to be an act of an institution of the European Union and thus not a qualified object for a reference pursuant to Article 267 section 1 letter b of the Treaty on the Functioning of the European Union:

a) Are Article 119 and Article 127 of the Treaty on the Functioning of the European Union and Articles 17 to 24 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank to be interpreted in such a way that they – alternatively or cumulatively – allow the Eurosystem

aa) to make the purchase of government bonds contingent on the existence and adherence to economic assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (conditionality)?

bb) to purchase government bonds of selected Member States only (selectivity)?

cc) to purchase government bonds of Member States in addition to assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (parallelism)?

dd) to undermine the terms and conditions of the assistance programmes of the European Financial Stability Facility or of the European Stability Mechanism (bypassing)?
b) Regarding the prohibition of monetary financing: Is Article 123 of the Treaty on the Functioning of the European Union to be interpreted in such a way that the Eurosystem is allowed – alternatively or cumulatively –aa) to purchase government bonds without quantitative limits (volume)? ; bb) to purchase government bonds without a minimum time lag after their emission on the primary market (market pricing)?; cc) to hold all purchased government bonds to maturity (interference with market logic)?; dd) to purchase government bonds without minimum

credit rating requirements (default risk)? ee) to accept equal treatment of the European System of Central Banks and private as well as other government bondholders (debt cut)?; ff) to influence pricing by communicating the intent to buy or in other ways, coinciding with the emission of government bonds by Member States of the euro currency area (encouragement to purchase newly issued securities)?

Reasons:

A. Facts of the Case

[1] In a reasonable assessment of their applications, the complainants and the applicant challenge, complainants I to IV via constitutional complaints pursuant to Art. 93 sec. 1 no. 4a of the Basic Law (Grundgesetz – GG), § 13 no. 8a, §§ 90 et seq. of the Federal Constitutional Court Act (Bundesverfassungsgerichtsgesetz – BVerfGG), and applicant V via Organstreitproceedings [proceedings relating to disputes between constitutional organs] pursuant to Art. 93 sec. 1 no. 1 GG, § 13 no. 5, §§ 63 et seq. BVerfGG, first, inter alia, the participation of the German Bundesbank in the implementation of the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions, and secondly, that the German Federal Government and the German Bundestag failed to act regarding the Decision of the Governing Council of the European Central Bank of 6 September 2012 on Technical Features of Outright Monetary Transactions (hereinafter: OMT Decision).

I. Subject Matter of the Proceedings

[2] The OMT Decision envisages that government bonds of selected Member States can be purchased up to an unlimited amount if, and as long as, these Member States, at the same time, participate in a reform programme as agreed upon with the European Financial Stability Facility or the European Stability Mechanism. The stated aim of the Outright Monetary Transactions is to safeguard an appropriate monetary policy transmission and the consistency or "singleness" of the monetary policy. The Minutes of the 340th meeting of the Governing Council of the European Central Bank on 5 and 6 September 2012 in Frankfurt/Main read in this respect as follows:

[…]

With regard to Outright Monetary Transactions (OMT), on a proposal from the President, the Governing Council:

(b) approved the main parameters of the Outright Monetary Transactions (OMT), which would be set out in a press release to be published after the meeting (Thursday, 6 September 2012);

[3] The press release which was published on this subject on 6 September 2012 has the following wording:

6 September 2012 – Technical features of Outright Monetary Transactions

As announced on 2 August 2012, the Governing Council of the European Central Bank (ECB) has today taken decisions on a number of technical features regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy. These will be known as Outright Monetary Transactions (OMTs) and will be conducted within the following framework:

Conditionality

A necessary condition for Outright Monetary Transactions is strict and effective conditionality attached to an appropriate European Financial Stability Facility/European Stability Mechanism (EFSF/ESM) programme. Such programmes can take the form of a full EFSF/ESM macroeconomic adjustment programme or a precautionary programme (Enhanced Conditions Credit Line), provided that they include the possibility of EFSF/ESM primary market purchases. The involvement of the IMF shall also be sought for the design of the country-specific conditionality and the monitoring of such a programme.

The Governing Council will consider Outright Monetary Transactions to the extent that they are warranted from a monetary policy perspective as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme.

Following a thorough assessment, the Governing Council will decide on the start, continuation and suspension of Outright Monetary Transactions in full discretion and acting in accordance with its monetary policy mandate.

Coverage

Outright Monetary Transactions will be considered for future cases of EFSF/ESM macroeconomic adjustment programmes or precautionary programmes as specified above. They may also be considered for Member States currently under a macroeconomic adjustment programme when they will be regaining bond market access.

Transactions will be focused on the shorter part of the yield curve, and in particular on sovereign bonds with a maturity of between one and three years.

No ex ante quantitative limits are set on the size of Outright Monetary Transactions.

Creditor treatment

The Eurosystem intends to clarify in the legal act concerning Outright Monetary Transactions that it accepts the same (pari passu) treatment as private or other creditors with respect to bonds issued by euro area countries and purchased by the Eurosystem through Outright Monetary Transactions, in accordance with the terms of such bonds.

Sterilisation

The liquidity created through Outright Monetary Transactions will be fully sterilised.

Transparency

Aggregate Outright Monetary Transaction holdings and their market values will be published on a weekly basis. Publication of the average duration of Outright Monetary Transaction holdings and the breakdown by country will take place on a monthly basis.

Securities Markets Programme

Following today's decision on Outright Monetary Transactions, the Securities Markets Programme (SMP) is herewith terminated. The liquidity injected through the SMP will continue to be absorbed as in the past, and the existing securities in the SMP portfolio will be held to maturity.

[4] The OMT Decision has not yet been put into effect.

II.History of the Proceedings

1. Submissions of the Complainants and the Applicant

[5] The complainants and the applicant argue that the Federal Government and the German Bundestag are obliged to work towards a repeal of the OMT Decision, or at least to prevent its implementation, and that the German Bundesbank may not take part if the Decision is put into effect. They give the following reasons for this view: The OMT Decision is a so-called ultra vires act. It is not covered by the mandate of the European Central Bank pursuant to Art. 119, 127 et seq. of the Treaty on the Functioning of the European Union (TFEU); apart from this, it violates the prohibition of monetary financing (Art. 123 TFEU) and the independence of the European Central Bank. The purchase of government bonds is only permitted within the framework of monetary policy. For a number of reasons, however, the OMT Decision is not an act of monetary policy. It transgresses the boundaries of monetary policy and violates the prohibition of monetary financing of the budget by the European Central Bank by envisaging that only bonds of selected states will be purchased, that government bonds will be purchased for which no buyers exist on the market, and that the purchase of government bonds will be made contingent on political conditions, specifically on the participation of the Member State that benefits in a programme of the European Financial Stability Facility or of the European Stability Mechanism. Monetary policy must relate to the entire euro currency area and must be free from discrimination with regard to individual Member States of the Eurosystem. At the same time, linking OMT purchases to decisions of the European Financial Stability Facility or of the European Stability Mechanism and to the conditionalities agreed to therein collides with the independence of the European Central Bank. There are in fact no upheavals on the government bond markets, which are required for an intervention of the European Central Bank. The OMT Decision amounts to a suspension of the market mechanisms which violates the Treaties. The European Central Bank does not have a mandate to defend the euro by any means, including those that lead to large-scale redistributions between banks and taxpayers and between taxpayers of different Member States; in this respect, it does not enjoy sufficient democratic legitimation. The transfer of sovereign powers to the independent European Central Bank has only been politically authorised and constitutionally approved under the condition that it would be limited to the area of monetary policy. Since the OMT Decision can create liability and payment risks affecting the federal budget to such an extent that the overall budgetary responsibility of the

German Bundestag, and thus also its budgetary rights, can be impaired, the decision also violates the principle of democracy enshrined in Art. 20 sec. 1 and 2 GG, and impairs the constitutional identity of the Basic Law, which the eternity clause of Art. 79 sec. 3 GG protects not only against amendments of the Constitution but also against an erosion in the process of European integration.

2. Statements Submitted by the European Central Bank and the German Bundesbank

[6] In the proceedings before the Federal Constitutional Court, the European Central Bank and the German Bundesbank have submitted statements.

[7] a) According to the European Central Bank, the OMT Decision is covered by its mandate and does not violate the prohibition of monetary financing. Its monetary policy is no longer appropriately implemented in the Member States of the euro currency area because the so-called monetary policy transmission mechanism is disrupted. In particular, the link between the key interest rate and the bank interest rates is impaired. Unfounded fears of investors with regard to the reversibility of the euro have resulted in unjustified interest spreads. The Outright Monetary Transactions were intended to neutralise these spreads. The requirement for the purchase of government bonds on the basis of the OMT Decision is that the benefitting Member State has entered into agreements with the European Financial Stability Facility or with the European Stability Mechanism on macroeconomic, structural, budgetary and financial policy reforms, and complies with the agreements. The Outright Monetary Transactions are only intended to cut off unjustified interest rate hikes. If a Member State does not comply with its obligations, the purchases were to be stopped, even if this will result in major economic difficulties for the Member State concerned. Another condition is that the Member State has, or regains, access to the bond market so that the fiscally disciplining effect of the interest rate mechanism is upheld.

[8] The European Central Bank further states that the Eurosystem will not claim preferred creditor status with regard to the government bonds purchased on the basis of the OMT Decision. While the European Central Bank objects to agreeing to a debt cut and to completely or partially waiving claims against the Member States concerned, it would accept equal treatment with other owners if, in a meeting of creditors, a majority voted in favour of a debt cut.

[9] The European Central Bank argues that considering the Spanish, Italian, Irish and Portuguese bonds on the market, the potential volume of purchases on the basis of the OMT Decision would currently amount to approximately EUR 524 000 000 000 (status of 7 December 2012). The European System of Central Banks does not, however, intend to purchase the maximum possible amount of these bonds, but cannot publish the envisaged amount for tactical reasons.

[10] The European Central Bank further states that immediately before and after the emission of government bonds, there shall be no purchases on the secondary market so that a market price can be formed; an appropriate time lag of some days will be observed for this. The exact locking period will be determined in a guideline, but not be published.

[11] The European Central Bank further argues that the OMT Decision can be based on Art. 18.1. of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank (hereinafter: ESCB Statute). The purchase of government bonds on the secondary market does not serve to finance the budgets of the respective Member States independent from the financial markets, and it is not aimed at rendering market incentives ineffective; it is aimed at adapting interest rate levels to normal market activities. Moreover, the European System of Central Banks is called upon to support the general economic policies in the European Union to the extent that this does not conflict with maintaining price stability. However, the European Central Bank is independent in this respect (Art. 130 TFEU, Art. 7 ESCB Statute) and will always undertake an autonomous analysis of the overall situation.

[12] According to the European Central Bank, there is no liability risk for the national budgets because the European System of Central Banks has ensured sufficient risk prevention, mostly through provisions and reserves. If losses occur nevertheless, they can be carried forward and balanced with revenues in the following years.

[13] b) In the view of the German Bundesbank, the assumption of a disruption to the monetary policy transmission mechanism is questionable and does not justify the OMT Decision. According to the German Bundesbank, interest spreads on government bonds cannot be split into either justified or irrational components. A poorer economic development in a Member State justifies a higher interest spread. The fact that a disruption to the monetary policy transmission mechanism shall be tolerated if a

Member State does not comply with its obligations under agreements with the European Financial Stability Facility or the European Stability Mechanism shows that the OMT Decision is in fact not about the effectiveness of monetary policy.

[14] The German Bundesbank argues that the purchase of government bonds on the secondary market can also disconnect the benefitting state's financing terms from the financial market if the market participants can rely on being able to sell their government bonds to the Eurosystem at any time. The sooner such purchases are made after issuing, and the higher the purchase volume, the lower the risk. Moreover, a large-scale purchase of government bonds carries considerable risk and can lead to an ever-increasing amount of a Member State's debts being assumed by the Eurosystem.

[15] The German Bundesbank further adds that every loss it incurs burdens the German federal budget, so that the risks ensuing from purchases of government bonds by the Eurosystem are no different, in economic terms, from those of the European Stability Mechanism. Unlike the European Stability Mechanism, the Eurosystem, however, lacks parliamentary monitoring.

III. Relevant Legal Provisions and Jurisprudence

1. Legal Provisions

[16] The relevant Articles of the Basic Law for the Federal Republic of Germany of 23 May 1949, most recently amended by the 59th Act Amending the Basic Law (59. Gesetz zur Änderung des Grundgesetzes) of 11 July 2012 (Federal Law Gazette, Bundesgesetzblatt – BGBl I p. 1478) read as follows: (A translation of the Basic Law provided by the Federal Ministry of Justice and Consumer Protection can be found online: http://www.gesetze-im-internet.de/englisch_gg/index.html.)

Art. 20

(1) The Federal Republic of Germany is a democratic and social federal state.

(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) …

Art. 23

(1) With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law. […] The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, shall be subject to sections (2) and (3) of Article 79.

(1a) to (7) …

Art. 38

(1) Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections. […]

Art. 79

(1) ...

(2) Any such law shall be carried by two thirds of the Members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Art. 88

The Federation shall establish a note-issuing and currency bank as the Federal Bank. Within the framework of the European Union, its responsibilities and powers may be transferred to the European Central Bank, which is independent and committed to the overriding goal of assuring price stability.

2. Jurisprudence of the Federal Constitutional Court

[17] a) In its established case-law, the Federal Constitutional Court interprets these provisions so that they impose limits on the Federal Republic of Germany's participation in European integration; the Federal Constitutional Court can review whether these limits are respected, also upon complaints lodged by individual citizens. According to the

jurisprudence which was established in 1993 with the Maastricht judgment, the individual's right to vote under Art. 38 sec. 1 sentence 1 GG has also a substantive content:

BVerfGE 89, 155 <171 and 172>: "Art. 38 GG does not merely guarantee that a citizen has the right to elect the German Bundestag and that the constitutional principles of electoral law will be complied with in the election. The guarantee also covers the fundamental democratic content of this right: Germans entitled to vote are guaranteed a subjective right to partake in the election of the Bundestag and to thereby contribute to the legitimation of state authority by the people at the federal level and to influence the exercise of this authority. (...) Art. 38 GG excludes the possibility that, in the area of application of Art. 23 GG, the legitimation of state authority and the influence on its exercise which an election provides is depleted by a transfer of the Bundestag's responsibilities and powers to such a degree, that the democratic principle is violated to the extent that Art. 79 sec. 3 GG in conjunction with Art. 20 sec. 1 and 2 GG declares it inviolable."

[18] The Federal Constitutional Court has affirmed and further substantiated this in later decisions (cf. only BVerfGE 123, 267 <330 et seq.; 340 et seq.>; 129, 124 <167 et seq.>).

[19] This substantive content of what is guaranteed by the right to vote is violated only, but always so, if this right is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people – through the German Bundestag – is permanently restricted in such a way that central political decisions can no longer be made independently (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 129, 124 <168>). However, Art. 38 sec. 1 sentence 1 GG does not extend this right any further and does not grant citizens a right to have the lawfulness of democratic majority decisions reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them (cf. BVerfGE 129, 124 <168 et seq.>; BVerfG, Order of the First Chamber of the Second Senate of 17 April 2013 – 2 BvQ 17/13 –, Neue Zeitschrift für Verwaltungsrecht – NVwZ 2013, p. 858 <859>).

[20] b) The actions of the institutions and agencies of the European Union are democratically legitimated – as far as Germany is concerned – in the legislative Acts of Assent to the Treaty establishing the European Union and the Treaty on the Functioning of the European Union, which were enacted on the basis of Art. 23 sec. 1 GG, and in the programme of integration set out therein. An essential element of this programme of integration is the principle of conferral.

[21] Against this background, actions of institutions and agencies of the European Union have a binding effect in the Federal Republic of Germany only within certain limits:

BVerfGE 89, 155 <187 and 188>: "Since the Germans entitled to vote exercise their right to participate in the democratic legitimation of the institutions and organs entrusted with sovereign authority mostly via the election of the German Bundestag, the Bundestag must also decide on the German membership in the European Union, its continued existence, and its development. (...) What is decisive is that the membership of the Federal Republic of Germany and the ensuing rights and obligations – especially the legally binding direct acts of the European Communities within the national legal sphere – have been defined in the Treaty so as to be predictable for the legislature, and have been enacted by it with sufficient certainty in the act of assent (cf. BVerfGE 58, 1 <37>; 68, 1 <98 and 99>). This implies that subsequent substantial changes to the programme of integration set out in the Union Treaty and to its powers to act are no longer covered by the Act of Assent to this Treaty (cf. BVerfGE 58, 1 <37>; 68, 1 <98 and 99> Mosler in: Handbuch des Staatsrechts, Vol. VII [1992], sec. 175, n. 60). Thus, if European agencies or institutions were to administer the Union Treaty, or develop it by judicial interpretation, in a way that is no longer covered by the Treaty as it underlies the Act of Assent, the ensuing legislative instruments would not be legally binding within the area of German sovereignty. For constitutional reasons, the organs of the German government would be prevented from applying these instruments in Germany. The Federal Constitutional Court thus examines whether the legislative instruments of European agencies and institutions remain within the limits of the sovereign powers conferred upon them or whether they transgress those limits (cf. BVerfGE 58, 1 <30 and 31>; 75, 223 <235, 242>)."

[22] c) The Federal Constitutional Court's powers of review cover the examination of whether acts of European institutions and agencies are based on manifest transgressions of powers (aa) or affect the area of constitutional identity, which cannot be transferred (Art. 79

sec. 3 in conjunction with Art. 1 and Art. 20 GG; cf. BVerfGE 75, 223 <235, 242>; 89, 155 <188 >; 113, 273 <296>; 123, 267 <353 and 354>; 126, 286 <302>; BVerfG, Judgment of the First Senate of 24 April 2013 – 1 BvR 1215/07 –, NJW 2013, pp. 1499 et seq. <1501> n. 91) (bb), which means that constitutional organs, authorities and courts are prohibited from taking part in putting them into effect (cc).

[23] aa) Following the admissible challenge of an ultra vires act, the Federal Constitutional Court must review the applicability and binding effect of acts of institutions and other agencies of the European Union in Germany insofar as these acts provide the basis of actions taken by German authorities.

[24] The requirements for an ultra vires review have been further outlined in the Honeywell decision:

BVerfGE 126, 286 <303 and 304>: "Ultra vires review may only be exercised in a manner which is friendly towards European law (see BVerfGE 123, 267 <354>). (…) The Union understands itself as a legal community; it is in particular bound by the principle of conferral and by fundamental rights, and it respects the constitutional identity of Member States (see in detail Art. 4 sec. 2 sentence 1, Art. 5 sec. 1 sentence 1 and Art. 5 sec. 2 sentence 1, as well as Art. 6 sec. 1 sentence 1 and Article 6 sec. 3 TEU). According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the powers of control which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is cautious and friendly towards European law. This means for the ultra viresreview at hand that the Federal Constitutional Court must in principle comply with the rulings of the Court of Justice as a binding interpretation of Union law. Prior to the acceptance of an ultra vires act by European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Art. 267 TFEU. (…) Ultra vires review by the Federal Constitutional Court can moreover only be considered if it is manifest that acts of European institutions and agencies have taken place outside the transferred powers (see BVerfGE 123, 267 <353, 400>). A breach of the principle of conferral is only manifest if the European bodies and institutions have transgressed the boundaries of their powers in a manner specifically violating the principle of conferral (Article 23.1 of the Basic Law), the breach of powers is, in other words, sufficiently qualified (see on the wording "sufficiently qualified" as an element in Union liability law, for instance, ECJ Case C-472/00 P Fresh Marine, judgment of 10 July 2003, <2003> ECR I-7541 n. 26-27). This means that the act of authority of the European Union must be manifestly in violation of powers and that the impugned act is highly significant for the allocation of powers between the Member States and the Union with regard to the principle of conferral and to the binding nature of the statute under the rule of law (see Kokott, Deutschland im Rahmen der Europäischen Union - zum Vertrag von Maastricht, Archiv des öffentlichen Rechts – AöR 1994, p. 207 <220>: "erhebliche Kompetenzüberschreitungen" (considerable transgressions of powers) and <233>: "drastische" (drastic) ultra vires acts; (...))."

[25] This applies not only if independent expansions of powers affect areas which are part of the constitutional identity of the Member States or particularly depend on the process of democratic discourse in the Member States (see BVerfGE 123, 267 <357-358>), though transgressions of powers weigh particularly heavy here (BVerfGE 126, 286 <307>).

[26] With regard to Art. 20 sec. 1 and 2 GG, this review cannot be waived. Otherwise, the power to dispose of the fundamental aspects of the Treaties would be shifted in such a way to the institutions and other agencies of the European Union that their understanding of the law could result in an amendment of a Treaty or in an expansion of powers (cf. BVerfGE 123, 267 <354 and 355>; 126, 286 <302 et seq.>). It is inevitable and due to the fact that in the European Union, Member States are invariably the masters of the Treaties, that constitutional and Union law perspectives do not completely match in the marginal cases of possible transgressions of powers by institutions and other agencies of the European Union – which are to be expected rarely according to the institutional and procedural precautions of Union law (cf. BVerfGE 75, 223 <242>; 89, 155 <190>; 123, 267 <348 and 349; 381 et seq.>; 126, 286 <302 and 303>). Unlike the primacy of application of federal law in a federal state, the precedence of Union law, which is based on national legislation giving effect to it, cannot be comprehensive (cf. BVerfGE 73, 339 <375>; 123, 267 <398>; 126, 286 <302>).

[27] bb) If an act of an institution or other agency of the European Union has

consequences which affect the constitutional identity protected by Art. 79 sec. 3 GG, it is, from the outset, inapplicable in Germany. Such an act cannot be based on primary law because even the legislature that decides on integration with the majority required by Art. 23 sec. 1 sentence 3 GG in conjunction with Art. 79 sec. 2 GG may not transfer sovereign powers to the European Union whose exercise would affect the constitutional identity protected by Art. 79 sec. 3 GG. If conferrals which originally have been in accordance with the Constitution were expanded in such a way, this would amount to ultra vires acts. Whether the principles which are declared inviolable by Art. 79 sec. 3 GG are affected by an act of the European Union is subject to review by the Federal Constitutional Court via a review of identity (cf. BVerfGE 123, 267 <353 and 354>). In such a case the Federal Constitutional Court will take the interpretation which the Court of Justice gives in a preliminary ruling pursuant to Art. 267 sec. 2 and 3 TFEU as a basis. In their cooperative relationship, it is for the Court of Justice to interpret the act. On the other hand, it is for the Federal Constitutional Court to determine the inviolable core content of the constitutional identity, and to review whether the act (in the interpretation determined by the Court of Justice) interferes with this core.

[28] Identity review can, in particular, affect the safeguarding of the overall budgetary responsibility of the German Bundestag:

BVerfGE 132, 195 <239 n. 106>: "There is a violation of Article 38 sec. 1 of the Basic Law in particular if the German Bundestag relinquishes its parliamentary budget responsibility to the effect that it or a future Bundestag can no longer exercise the right to decide on the budget in its own responsibility (BVerfGE 129, 124 <177>). The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (see BVerfGE 123, 267 <359>). The German Bundestag must therefore make decisions on revenue and expenditure with responsibility to the people. Insofar, the right to decide on the budget is a central element of the democratic development of informed opinion (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>)."

BVerfGE 132, 195 <240 n. 109 and 110>: "A necessary condition for the safeguarding of political latitude in the sense of the core of identity of the constitution (Article 20 sec. 1 and 2, Article 79 sec. 3 of the Basic Law) is that the budget legislature makes its decisions on revenue and expenditure free of heteronomy on the part of the bodies and of other Member States of the European Union and remains permanently 'the master of its decisions' (…). (…) It follows from the democratic basis of budget autonomy that the Bundestag may not consent to an automatism of bonds or benefits that are agreed upon intergovernmentally or supranationally and that is not subject to strict specifications and whose effects are not limited, and which – once it has been set in motion – is removed from the Bundestag's control and influence (BVerfGE 129, 124 <180>).

Moreover, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions made freely by other states, above all if they entail consequences which are hard to calculate. The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity that results in expenditure." (cf. already BVerfGE 129, 124 <177 et seq.>).

[29] Since Art. 79 sec. 3 GG also sets an "ultimate limit" (BVerfGE 123, 267 <348>) to the applicability of Union law within the German jurisdiction under the Basic Law, the principles which are stipulated therein may not be balanced against other legal interests (cf. BVerfGE 123, 267 <343>). Thus, the identity review performed by the Federal Constitutional Court is fundamentally different from the review under Art 4 sec. 2 sentence 1 TEU by the Court of Justice of the European Union. Art. 4 sec. 2 sentence 1 TEU obliges the institutions of the European Union to respect national identities. This is based on a concept of national identity which does not correspond to the concept of constitutional identity within the meaning of Art. 79 sec. 3 GG, but reaches far beyond (cf. ECJ, Judgment of 22 December 2010, Case C 208/09, Sayn-Wittgenstein, ECR 2010 p. I – 13693, n. 83 – "Law on the Abolition of the Nobility" as an element of national identity). On this basis, the Court of Justice of the European Union treats the protection of national identity, which is required according to Art. 4 sec. 2 sentence 1 TEU, as a "legitimate aim" which must be taken into account when legitimate interests are balanced against the rights conferred by Union law (cf. ECJ, Judgment of 2 July 1996, Case C-473/93, Commission v Luxembourg, ECR 1996, p. I-3207 n. 35; Judgment of 14 October 2004, Case C-36/02, Omega, ECR 2004, p. I-9609, n. 23 et seq.; Judgment of 22 December 2010, Case C-208/09, ECR 2010 p. I-13693, n. 83; Judgment of 12 May 2011, Case C-391/09, Runevic-Vardyn and Wardyn, ECR

2011, p. I-3787, n. 84 et seq.; Judgment of 24 May 2011, Case C-51/08, Commission v Luxembourg, ECR 2011, p. I-4231, n. 124; Judgment of 16 April 2013, Case. C-202/11, Las, ECR 2013, p. I-0000, n. 26, 27). However, as an interest which may be balanced against others, the respect of national identity which is required according to Art. 4 sec. 2 sentence 1 TEU does not meet the requirements of the protection of the core content of the Basic Law according to Art. 79 sec. 3 GG, which may not be balanced against other legal interests. The protection of the latter is a task of the Federal Constitutional Court alone.

[30] cc) The above-mentioned principles concerning the protection of the constitutional identity and of the limits of the transfer of sovereign powers to the European Union can also be found, with modifications depending on the existence or non-existence of unamendable elements in the respective national constitutions, in the constitutional law of many other Member States of the European Union (cf. for instance for the Kingdom of Denmark: Hojesteret, Judgment of 6 April 1998 – I 361/1997 –, para. 9.8.; for the Republic of Estonia: Riigikohus, Judgment of 12 July 2012 – 3-4-1-6-12 –, sec. no. 128, 223; for the French Republic: Conseil constitutionnel, Decision no. 2006-540 DC of 27 July 2006, 19th recital; Decision no. 2011-631 DC of 9 June 2011, 45th recital; for Ireland: Supreme Court of Ireland, Crotty v. An Taoiseach <1987>, I.R. 713 <783>; S.P.U.C. (Ireland) Ltd. v. Grogan, <1989>, I.R. 753 <765>; for the Italian Republic: Corte costituzionale, Decision no. 183/1973; Decision no. 168/1991; for the Republic of Latvia: Satversmes tiesa, Judgment of 7 April 2009 – 2008-35-01 –, sec. no. 17; for the Republic of Poland: Trybunal Konstytucyjny, Judgments of 11 May 2005 – K 18/04 –, n. 4.1., 10.2., of 24 November 2010 – K 32/09 –, n. 2.1. et seq.; of 16 November 2011 – SK 45/09 –, n. 2.4., 2.5., with further references; for the Kingdom of Sweden: Chapter 10 Art. 6 sentence 1, Form of government; for the Kingdom of Spain: Tribunal Constitucional, Declaration of 13 December 2004, DTC 1/2004; for the Czech Republic: Ústavni Soud, Judgment of 31 January 2012 – 2012/01/31 – Pl. ÚS 5/12 –, para. VII.). At national level, they have consequences not only for the Federal Constitutional Court but also for other public authorities. German authorities may not take part in the decision making process and the implementation of ultra vires acts (cf. BVerfGE 89, 155 <188>; 126, 286 <302 et seq.>) and are not entitled to participate in measures affecting the constitutional identity protected by Art. 79 sec. 3 GG. This applies to all constitutional organs, authorities and courts. It results from the constitutional principles of democracy (Art. 20 sec. 1 and sec. 2 GG) and the rule of law (Art. 20 sec. 3 GG), as well as from Art. 23 sec. 1 GG, and is safeguarded under European Union law by the principle of conferral (Art. 5 sec. 1 sentence 1 and sec. 2 TEU) and the obligation of the European Union to respect the national identities of the Member States (Art. 4 sec. 2 sentence 1 TEU, cf. BVerfGE 123, 267 <352>).

[31] Besides the institutions of the European Union, German constitutional organs are also responsible to make sure that the programme of integration is observed. In this respect, the judgment on the Treaty of Lisbon reads as follows:

BVerfGE 123, 267 <352 and 353>: “If in the process of European integration primary law is amended, or expansively interpreted by institutions, a constitutionally important tension will arise with the principle of conferral and with the individual Member State’s constitutional responsibility with respect to integration. If legislative or administrative powers are only transferred in an unspecified manner or with a view to further dynamic development, or if the institutions are permitted to re-define expansively, fill lacunae or factually extend powers they risk transgressing the predetermined programme of integration and acting beyond the powers granted to them. They are moving on a road at the end of which there is the power of disposition of their foundations laid down in the treaties, i.e. the competence of freely disposing of their competences. There is a risk of transgression of the constitutive principle of conferral and of the conceptual responsibility with respect to integration incumbent upon Member States if institutions of the European Union can decide without restriction, without any outside control, however restrained and exceptional, how treaty law is to be interpreted. It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character or if they can still be interpreted in a manner that respects the national responsibility with respect to integration, to establish, at any rate, suitable national safeguards for the effective exercise of such responsibility. Accordingly, the Act approving an international agreement and the national accompanying laws must therefore be capable of permitting European integration continuing to take place according to the principle of conferral without the possibility for the European Union of taking possession of Kompetenz-Kompetenz or to violate the Member States’ constitutional identity, which is not open to integration, in this

case, that of the Basic Law. For borderline cases of what is still constitutionally admissible, the German legislature must, where necessary, take precautions in its legislation accompanying approval to ensure that the responsibility with respect to integration of the legislative bodies can sufficiently develop." (cf. also BVerfGE 129, 124 <180 and 181>; 132, 195 <238 and 239, n. 105>).

[32] d) Finally, with regard to the constitutional foundations of Germany's membership in the monetary union and to the transfer of powers to the European Central Bank, the Federal Constitutional Court held as follows:

BVerfGE 89, 155 <207 et seq.>: "The Bundestag's, and thus the voters', possibilities to influence the exercise of sovereign powers by European institutions have, however, been taken away almost completely insofar as the European Central Bank has been provided with independence vis-à-vis the European Community and the Member States (Art. 107 EC). An essential policy that supports individual freedom through the maintenance of the monetary value and that determines through the money supply also public finances and the political spheres dependent thereon, is excluded from the regulatory power of sovereign authorities, and also – unless there is a treaty amendment – from the legislature's control of fields of functions and means of action. Placing most of the tasks of monetary policy on an autonomous basis with an independent central bank disconnects the exercise of governmental authority from direct governmental or supranational parliamentary responsibility, in order to free the monetary system from the access of interest groups and holders of political office who are concerned about their re-election (as stated in the Government Draft of the Bundesbank
Act, Bundestag document, Bundestagsdrucksac he – BTDrucks. 2/2781 pp. 24 and 25).

This limitation of democratic legitimation, which is derived from the voters in the Member States, affects the principle of democracy, but is compatible with Art. 79 sec. 3 GG as a modification of this principle that is envisaged in Art. 88 sentence 2 GG. The addition to Art. 88 GG, which was made with a view to the European Union, allows a transfer of powers from the Bundesbank to a European Central Bank if it meets the "strict criteria of the Maastricht Treaty and the Statute of the European System of Central Banks and the priority of a stable currency" (Recommendation and Report of the Special Committee on 'European Union [Maastricht Treaty]' of 1 December 1992, BTDrucks. 12/3896 p. 21). The intention of the legislature amending the Constitution was thus clearly to create a constitutional basis for the monetary union envisaged in the Union Treaty, but to restrict the granting of the ensuing above-mentioned independent powers and institutions to that case. This modification of the principle of democracy in order to protect the confidence placed in the value of a currency is justifiable because it takes account of the special feature of monetary policy – tried and tested in the German legal order, and also by the scientific community – that an independent central bank is more likely to safeguard the monetary value, and thus the general economic basis for governmental budgetary policies as well as for private plans and transactions in exercise of the economic freedoms, than state bodies whose options and means for action depend on money supply and monetary value and which need to rely on short-term approval by political forces. To that extent, placing the monetary policy on an autonomous basis under the sovereign jurisdiction of an independent European Central Bank, which cannot be transferred to other political areas, satisfies the constitutional requirements according to which the principle of democracy may be modified (cf. BVerfGE 30, 1 <24>; 84, 90 <121>)."

B. On the Validity of the OMT Decision

(First Question Referred for a Preliminary Ruling)

I. Relevance to the Decision

[33] The first question referred for a preliminary ruling is relevant to the Federal Constitutional Court's decision. It is relevant even though the OMT Decision does not yet have legal effects on others (1.). The applications would be successful if the OMT Decision, transgressing the European Central Bank's mandate, encroached upon the powers of the Member States for economic policy and/or violated the prohibition of monetary financing of the budget. According to German constitutional law, the OMT Decision would then have to be qualified as a manifest and structurally significant ultra vires act (2.). In this case, the German constitutional organs would, because of their inactivity, not have met their responsibility with respect to integration (Integrationsverantwortung), and they would thus have violated the complainants' constitutional rights as well as the legal positions of the German Bundestag invoked by the applicant in the Organstreit proceedings (3.).

1. Preventive Legal Protection

[34] The admissibility of the constitutional complaints does not depend on whether the OMT Decision can already be understood as an act with an external dimension within the meaning of Art. 288 sec. 4 TFEU, or only as the announcement of such an act. It is also irrelevant for the present proceedings whether the OMT Decision affects the complainants and the applicant directly within the meaning of Art. 263 sec. 4 TFEU (cf. EGC, Order of 10 December 2013, Case T-492/12, von Storch and Others v ECB, ECR 2013, p. II-0000, n. 35 et seq.). Neither the scope nor the conditions of legal protection under national law against activities or omissions by national authorities regarding the OMT Decision are predetermined by this (cf. EGC, Order of 10 December 2013, loc. cit., n. 46 and 48). According to German law, the requirements for granting preventive legal protection are met. The case-law of the Federal Constitutional Court recognises that preventive legal protection can also be warranted in constitutional complaint proceedings in order to avoid consequences that cannot be corrected (cf. BVerfGE 1, 396 <413>; 74, 297 <318 ff.>; 97, 157 <164>; 108, 370 <385>; 112, 363 <367>; 123, 267 <329>; BVerfG, Order of the Third Chamber of the Second Senate of 11 March 1999 - 2 BvQ 4/99 -, NJW 1999, p. 2174 <2175>).

[35] The complainants comprehensibly stated that the execution of the OMT Decision could lead to such consequences that could not be corrected. It is true that the purchase programme requires further implementing measures (cf. EGC, Order of 10 December 2013, loc. cit., n. 38). However, it has been sufficiently specified by the Decision of 6 September 2012 and, according to the European Central Bank, only requires some further specification regarding its details, which – as the European Central Bank's representative explained at the oral hearing – can be done at any time and within a very short timeframe.

2. Ultra Vires Act

[36] If the OMT Decision violated the European Central Bank's monetary mandate or the prohibition of monetary financing of the budget, this would have to be considered an ultra vires act in the sense of the above-mentioned (n. 23) Honeywell decision.

[37] a) A sufficiently qualified violation of the integration programme requires that the violation is manifest and that the challenged act entails a structurally significant shift in the allocation of powers to the detriment of the Member States (cf. BVerfGE 126, 286 <304 and 305 with further references>). Transgressions of the mandate are structurally significant especially (but not only) if they cover areas that are part of the constitutional identity of the Federal Republic of Germany, which is protected by Art. 79 sec. 3 GG, or if they particularly affect the democratic discourse in the Member States (cf. BVerfGE 126, 286 <307>).

[38] b) It would have to be considered a manifest and structurally significant transgression of its mandate if the European Central Bank acted beyond its monetary policy mandate (aa), or if the prohibition of monetary financing of the budget was violated by the OMT programme (bb).

[39] aa) If the European Central Bank exceeded its monetary policy mandate with the OMT Decision, it would thus interfere with the responsibility of the Member States for economic policy. According to Title VIII of the Treaty on the Functioning of the European Union and notwithstanding the special powers expressly assigned to the Union (e.g. Art. 121, 122, 126 TFEU), the responsibility for economic policy lies clearly with the Member States. In this field of economic policy, the European Union is – apart from individual exceptions that are in particular regulated in Part Three of the Treaty on the Functioning of the European Union – essentially limited to a coordination of Member States' economic policies (Art. 119 sec. 1 TFEU). The European Central Bank may only support the general economic policies of the Member States (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU; Art. 2 sentence 2 ESCB Statute). It is not authorised to pursue its own economic policy. If one assumes – subject to the interpretation by the Court of Justice – that the OMT Decision is to be qualified as an independent act of economic policy, it manifestly violates this distribution of powers.

[40] Such an act would also be structurally significant. This derives in particular from the fact that the OMT Decision – functionally equivalent in this regard – could be superimposed onto assistance measures which are part of the "Euro rescue policy" and which, due to their significant financial scope and general political implications, belong to the core aspects of the Member States' economic policy responsibilities (cf. Art. 136 sec. 3 TFEU). Decisions on the choice of instruments for the stabilisation of the monetary union or on the

composition of the euro currency area substantially depend on the democratic process in the Member States. In addition, actions by the European Central Bank in this area could make diverging decisions by the Member States politically no longer feasible or sensible.

[41] Acts of the kind that were announced in the OMT Decision are structurally significant especially because they lead to a considerable redistribution between the budgets and the taxpayers of the Member States, and can thus gain effects of a system of fiscal redistribution, which is not entailed in the integration programme of the European Treaties. On the contrary, independence of the national budgets, which opposes the direct or indirect common liability of the Member States for government debts, is constituent for the design of the monetary union (cf. Art. 125 TFEU; ECJ, Judgment of 27 November 2012, Case C-370/12, Pringle, ECR 2012, p. I-0000, n. 135; BVerfGE 129, 124 <181 and 182>).

[42] bb) Should the OMT Decision violate the prohibition of monetary financing of the budget, this, too, would have to be considered a manifest and structurally significant transgression of powers.

[43] The violation would be manifest because the Treaty on the Functioning of the European Union stipulates an explicit prohibition of monetary financing of the budget and the Treaty thus unequivocally excludes such powers of the European Central Bank (cf. Art. 123 sec. 1 TFEU). The violation would also be structurally significant. The current integration programme designs the monetary union as a "community of stability". As the Federal Constitutional Court has repeatedly emphasised (cf. BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181 and 182>; 132, 195 <243>, n. 115), this is the basis for the participation of the Federal Republic of Germany in the monetary union. The prohibition of monetary financing of the budget is one of the fundamental rules that guarantee the design of the monetary union as a "community of stability". Apart from this, it safeguards the overall budgetary responsibility of the German Bundestag (for more details cf. BVerfGE 129, 124 <181>; 132, 195 <243 and 244> n. 115 and 116).

3. Obligations to Act and not to Act of German Authorities

[44] An ultra vires act as understood above creates an obligation of German authorities to refrain from implementing it and a duty to challenge it (a and b). These duties can be enforced before the Constitutional Court at least insofar as they refer to constitutional organs (c).

[45] a) If an institution or other agency of the European Union acts ultra vires in the above-mentioned sense, German constitutional organs, authorities, and courts may neither participate in the decision making process nor in the implementation of the act. This also applies to the German Bundesbank.

[46] b) Moreover, the German Bundestag and the Federal Government may not simply let a manifest or structurally significant usurpation of sovereign powers by European Union organs take place.

[47] aa) The Member States and their constitutional organs – next to the institutions of the European Union – have to ensure that the integration programme is observed (responsibility with respect to integration, cf. BVerfGE 123, 267 <352 et seq., 389 et seq., 413 et seq.>; 126, 286 <307>; 129, 124 <181>; 132, 195 <238 and 239> n. 105). In the Federal Republic of Germany, it is the task of all constitutional organs to meet this responsibility with respect to integration.

[48] Among other provisions, the special constitutional requirement of the enactment of a statute (Art. 23 sec. 1 sentence 2 GG), according to which sovereign powers may only be transferred by a law and with the approval of the Bundesrat, serves to protect this responsibility with respect to integration (cf. BVerfGE 123, 267, 355). Neither does the Basic Law authorise the constitutional organs to transfer sovereign powers in such a way that their exercise could independently establish other powers for the European Union. It prohibits the transfer of sovereign powers to decide on its own powers (Kompetenz-Kompetenz) (cf. BVerfGE 123, 267 <349>; 132, 195 <238 and 239>, n. 105). For this reason, Parliament may not cede the power to decide whether and to what degree sovereign powers are to be transferred, and it may not transfer this power to the institutions of the European Union. It is, in fact, obliged to decide on its own and in formal proceedings about the transfer of powers in the scope of European integration, in order to avoid that the constitutionally required principle of conferral is undermined.

[49] bb) It is derived from the responsibility with respect to integration that the German Bundestag and the Federal Government are obliged to safeguard compliance with the integration programme and, in case of manifest

and structurally significant transgressions of powers by European Union organs, to not only refrain from any participation and implementation, but to actively pursue the goal to reach compliance with the integration programme. To this end, they can retroactively legitimise the assumption of powers by initiating a corresponding change of primary law that adheres to the limits of Art. 79 sec. 3 GG, and by formally transferring the exercised sovereign powers in proceedings pursuant to Art. 23 sec. 1 sentences 2 and 3 GG. However, insofar as this is not feasible or wanted, they are generally obliged within their respective powers, to pursue the reversal of acts that are not covered by the integration programme with legal or political means, and – as long as the acts continue to have effect – to take adequate precautions to ensure that the domestic effects remain as limited as possible.

[50] c) A violation of these duties, which follow from the responsibility with respect to integration of the German Bundestag and Federal Government, also violates individual rights of the voters that can be asserted with a constitutional complaint (aa). It can also be a subject of Organstreit proceedings (bb).

[51] aa) According to the established jurisprudence of the Federal Constitutional Court, the individual's right under Art. 38 sec. 1 sentence 1 GG to elect the German Bundestag is not limited to a formal legitimation of (federal) state power, but also entails the fundamental democratic content of the right to vote (cf. BVerfGE 89, 155 <171>; 129, 124 <168>). This grants the individual the right to influence the political formation of opinions with his or her vote and to have an impact on them. Within the scope of Art. 23 GG, citizens who are entitled to vote are thus protected from being deprived of the right to a legitimate government and to influence the exercise of public authority, which an election provides, by transferring the responsibilities and powers of the German Bundestag to the European level to such an extent that it violates the principle of democracy (cf. BVerfGE 89, 155 <172>; 123, 267 <330>).

[52] The substantive content of that right is violated if the right to vote is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people – embodied in particular in the German Bundestag – is permanently restricted in such a way that vital political decisions can no longer be made independently (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 129, 124 <168>). On the other hand, Art. 38 sec. 1 sentence 1 GG does not entail a right that reaches beyond safeguarding the above-mentioned rights and that would let citizens have the legality of decisions taken by a democratic majority reviewed by the Federal Constitutional Court. The right to vote does not serve to monitor the content of democratic processes, but is intended to facilitate them (cf. BVerfGE 129, 124 <168 et seq.>; BVerfG, Order of the First Chamber of 17 April 2013 - 2 BvQ 17/13 -, NVwZ 2013, p. 858 <859>).

[53] Vis-à-vis manifest and structurally significant transgressions of the mandate by the European institutions, this safeguard against an erosion of the legislature's substantial scope of action consists not only of a substantive, but also of a procedural element. In order to safeguard their democratic influence in the process of European integration, citizens who are entitled to vote generally have a right, deriving from Art. 38 sec. 1 sentence 1 GG, to have a transfer of sovereign powers only take place in the ways envisaged in Art. 23 sec. 1 sentences 2 and 3, Art. 79 sec. 2 GG. The democratic decision-making process, which these regulations guarantee in addition to the necessary specificity of the transfer of sovereign powers (cf. BVerfGE 123, 267, 351 et seq.), is undermined when there is a unilateral usurpation of powers by institutions and other agencies of the European Union. A citizen can therefore demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers entailed in the treaties can be restored, and that they decide which options they want to use to pursue this goal.

[54] bb) The same applies to Organstreit proceedings. The responsibility with respect to integration enshrined in Art. 23 GG includes rights and obligations of the German Bundestag, the violation of which parliamentary groups can assert in their own name, on behalf of the Bundestag (§ 64 sec. 1 BVerfGG), also vis-à-vis Parliament (cf. BVerfGE 123, 267 <337>; 132, 195 <247>, n. 125). The German Bundestag may not waive those rights and obligations that it holds in the context of European integration, and it may not remain passive when facing an imminent erosion of its freedom to act because of an usurpation of powers by institutions and agencies of the European Union. If the Bundestag does not meet its responsibility with respect to integration, parliamentary groups can – on behalf of the Bundestag – take action against this.

II. Interpretation of Union Law by the Federal Constitutional Court

[55] The OMT Decision is to be considered as a decision about purchases of government bonds of individual Member States of the euro currency area, which are not limited ex ante, and which are politically motivated; the primary objective (or at least the necessary intermediate objective) of the purchases is the reduction of the interest rates the Member States that benefit have to pay on the capital markets for new government bonds. Subject to the interpretation by the Court of Justice of the European Union, the Federal Constitutional Court considers the OMT Decision incompatible with Art. 119 and Art. 127 sec. 1 and 2 TFEU and Art. 17 et seq. of the ESCB Statute because it exceeds the mandate of the European Central Bank that is regulated in these provisions and encroaches upon the responsibility of the Member States for economic policy (1.). It also appears to be incompatible with the prohibition of monetary financing of the budget enshrined in Art. 123 TFEU (2.). The European Central Bank's reference to a "disruption to the monetary policy transmission mechanism" is not likely to change the assessment of these two points (3.). Accordingly, the applications would probably be successful. Another assessment could, however, be warranted if the OMT Decision could be interpreted in conformity with primary law (4.).

1. Transgression of the European Central Bank's Mandate

[56] Art. 119 and 127 et seq. TFEU and Art. 17 et seq. ESCB Statute include in principle a mandate that is limited to monetary policy for the European System of Central Banks in general and the European Central Bank in particular (cf. BVerfGE 89, 155 <208 and 209>) (a). In addition, the European System of Central Banks is only allowed to support the general economic policies in the Union (b). Following these principles, the OMT Decision does not appear to be covered by the mandate of the European Central Bank (c).

[57] a) The principle of conferral applies to the powers of the European System of Central Banks (aa). According to the Treaty on European Union and the Treaty on the Functioning of the European Union, the European Central Bank is responsible for monetary policy (bb). The responsibility for economic policy, however, rests, apart from individual cases, with the Member States (cc).

[58] aa) The division of powers between the European Union and the Member States is governed by the principle of conferral (Art. 5 sec. 1 and 2 TEU). This also applies to functions and powers that are assigned by the Treaties to the European System of Central Banks, which consists of the European Central Bank and the national central banks (Art. 282 sec. 1 sentence 1 TFEU). In order to meet democratic requirements, this mandate must be shaped narrowly (1). The compliance with its limits is fully subject to judicial review; this review first and foremost falls within the responsibility of the Court of Justice of the European Union, whose task it is to ensure that the law is observed in the interpretation and application of the Treaties (Art. 19 n. 1 TEU) (2).

[59] (1) The independence which the European Central Bank and the national central banks enjoy in the exercise of the powers conferred upon them (Art. 130, Art. 282 sec. 3 sentences 3 and 4 TFEU) diverges from the requirements the Basic Law states with regard to the democratic legitimation of political decisions. For Germany, the Federal Constitutional Court has expressly held that the democratic legitimation which emanates from the voters in the Member States is restricted by the transfer of monetary policy powers to an independent European Central Bank, and that this affects the principle of democracy. Nevertheless, this restriction is still compatible with democratic principles because it takes the tested and scientifically documented special character of monetary policy into account that an independent central bank is more likely to safeguard monetary stability, and thus the general economic basis for budgetary policies, than state bodies whose actions depend on money supply and value and which need to rely on short-term approval by political forces. The constitutional justification of the independence of the European Central Bank is, however, limited to a primarily stability-oriented monetary policy and cannot be transferred to other policy areas (cf. for the German Constitution Art. 88 sentence 2 GG; BVerfGE 89, 155 <208 and 209>; 97, 350 <368>).

[60] (2) The independence of the European Central Bank does not preclude judicial review with regard to the delineation of its mandate (ECJ, Judgment of 10 July 2003, Case C-11/00,Commission v. ECB, ECR 2003 p. I-07147, n. 135 et seq.). The independence guaranteed by Art. 130, Art. 282 sec. 3 sentences 3 and 4 TFEU only refers to the actual powers (and their specific content) that the Treaties confer on the European Central Bank, but do not refer to the determination of the

extent and scope of its mandate. It would be incompatible with the principle of conferral (Art. 5 sec. 2 TEU) if an institution of the European Union could autonomously determine the powers assigned to it. Moreover, the delimitation of powers of the European Central Bank cannot be exempt from judicial review because the European Central Bank would otherwise have the opportunity to expand its mandate at will.

[61] bb) Pursuant to Art. 3 sec. 1 letter c TFEU, the European Union has the exclusive responsibility in the field of monetary policy for the Member States of the euro currency area. The Treaties do not define the term "monetary policy" (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, Pringle, ECR 2012, p. I-0000, n. 53). The responsibility in question is, however, substantiated by the Treaty on the Functioning of the European Union and the ESCB Statute.

[62] The primary objective of the European System of Central Banks is to maintain price stability (Art. 127 sec. 1 sentence 1, Art. 282 sec. 2 sentence 2 TFEU). The basic tasks of the System are, pursuant to Art. 127 sec. 2 TFEU, to define and implement the monetary policy of the Union (first indent), to conduct foreign-exchange operations (second indent), to hold and manage the official foreign reserves of the Member States (third indent), and to promote the smooth operation of payment systems (fourth indent). The Statute of the European System of Central Banks and the European Central Bank specifies, in Chapter IV, the monetary functions and operations of the European System of Central Banks and authorises it to open accounts (Art. 17 ESCB Statute), to conduct open market and credit operations (Art. 18 ESCB Statute), to define minimum reserves (Art. 19 ESCB Statute), and to use other instruments of monetary control (Art. 20 ESCB Statute). Pursuant to Art. 22 ESCB Statute, the European Central Bank and the national central banks may also provide facilities, and the ECB may issue regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries. Art. 23 ESCB Statute authorises them to enter into external operations with other countries and international organisations, and Art. 24 ESCB Statute authorises them to enter into other auxiliary fiscal operations.

[63] cc) The monetary policy is to be distinguished – and thereby further defined – according to the wording, structure, and purpose of the Treaties from (in particular) the economic policy, which primarily falls into the responsibility of the Member States. Relevant to the delimitation are the immediate objective of an act, which is to be determined objectively, the instruments envisaged to achieve the objective, and its link to other provisions (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, Pringle, ECR 2012, p. I-0000, n. 53 et seq. <summarising at n. 60>).

[64] As far as the classification from the point of view of the distribution of powers is concerned, it is thus crucial, first, whether the act directly pursues economic policy objectives. In thePringle case, the Court of Justice has affirmed this with regard to the European Stability Mechanism, because its aim is the stabilisation of the euro currency area as a whole. The Court of Justice has held that such an act could not be treated as equivalent to an act of monetary policy for the sole reason that it might have indirect effects on the stability of the euro (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 56 and 97). On the basis of this case-law, purchases of government bonds may not qualify as acts of monetary policy for the sole reason that they also indirectly pursue monetary policy objectives.

[65] However, what is relevant is not only the objective, but also the instruments used for reaching the objective and their effects. According to the case-law of the Court of Justice, acts of monetary policy are, for instance, the decision on key interest rates for the euro currency area and the release of the euro currency (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 95 and 96). In contrast, the grant of financial assistance "clearly" does not fall within monetary policy (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 57). To the degree that the European System of Central Banks thus grants financial assistance, it pursues an economic policy that the European Union is prohibited from conducting.

[66] Finally, it is relevant how the act in question relates to other provisions. In particular, references of an act to other provisions and the embedding of an act in an overall regulation that consists of several individual measures can indicate its adherence either to the economic or the monetary policy. Thus, the Court of Justice has decided, with regard to the European Stability Mechanism, that Decision 2011/199 of the European Council of 25 March 2011, which aims at the conclusion of the ESM Treaty, because of its reference to the economic provisions of the Treaty on the Functioning of the European Union as well as to the secondary legislation of the so-called six-

pack, has to be regarded as an additional part of the new regulatory framework to strengthen the economic governance of the Union, and that this indicates that the European Stability Mechanism belongs to the area of economic policy (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 58-60).

[67] The control of budgetary policy is, in any case, not part of monetary policy. The Treaties envisage the integration of the System of European Central Banks into the economic and budgetary policy only to a very limited degree, namely during a hearing in an excessive deficit procedure (Art. 126, sec. 14, sub-sec. 2 TFEU). The same applies in so far as during the financial and sovereign debt crisis provisions have been adopted in secondary law (cf. Art. 11 sec. 3 Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, OJEU No L 306 of 23 November 2011, p. 12 <23>; Art. 13 sec. 3 Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, OJEU No L 306 of 23 November 2011, p. 25 <31>; Art. 10a sec. 3 Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, OJEU No L 306 of 23 November 2011, p. 33 <39>) and outside the framework of European Union law (cf. Art. 12 sec. 1 sentence 2 of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union) which enable a representative of the European Central Bank to participate in monitoring missions of the so-called Troika. This, however, has obviously no effect on the allocation of powers between the Union and the Member States under primary law.

[68] b) Rather, the responsibility for economic policy under Title VIII of the Treaty on the Functioning of the European Union lies – if it reaches beyond the special powers expressly assigned to the Union (e.g. Art. 121, 122, 126 TFEU) – with the Member States. They are responsible, in particular, for defining the objectives and choosing the instruments of economic policy (Art. 5 sec. 1, Art. 120 et seq. TFEU). Pursuant to Art. 2 sec. 3 and Art. 5 sec. 1 TFEU, the role of the Union is restricted to the adoption of coordinating measures (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 64). The European System of Central Banks is only authorised to support the general economic policies in the Union to the degree that this is possible without compromising the objective of price stability (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2, Art. 282 sec. 2 sentence 3 TFEU). The authority to support the general economic policies of the Member States at Union level (Art. 127 sec. 1 sentence 2 TFEU) does not justify any steering of economic policies by the System of European Central Banks.

[69] c) According to these principles, it is likely that the OMT Decision – if one bases the assessment on its wording – is not covered by the mandate of the European Central Bank. Based on an overall assessment of the delimitation criteria that the Federal Constitutional Court considers relevant, it does not constitute an act of monetary policy, but a predominantly economic-policy act. This is supported by its immediate objective (aa), its selectivity (bb), the parallelism with assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (cc), and the risk of undermining their objectives and requirements (dd). Therefore, it is likely that the OMT Decision can also not be justified as an act to support the Union's economic policy (ee). Against this background, there are considerable doubts concerning its validity.

[70] aa) The OMT Decision aims to neutralise spreads on government bonds of selected Member States of the euro currency area which have emerged in the markets and which adversely affect the refinancing of these Member States (thus ECB, Monthly Bulletin September 2012, p. 7; ECB, Monthly Bulletin October 2012, pp. 7 and 8).

[71] According to the European Central Bank, these spreads are partly based on fear – declared to be irrational – of investors of a reversibility of the euro. However, according to the convincing expertise of the Bundesbank, such interest rate spreads only reflect the scepticism of market participants that individual Member States will show sufficient budgetary discipline to stay permanently solvent. Pursuant to the design of the Treaty on the Functioning of the European Union, the existence of such spreads is entirely intended. As the Court of Justice of the European Union has pointed out in its Pringle decision, they are an expression of the independence of national budgets, which relies on market incentives and cannot be lowered by bond purchases by central banks without suspending this independence (cf. with regard to Art. 125 TFEU ECJ, judgment of 27 November 2012, loc. cit., n. 135; ECB,

Statement [filed with the Federal Constitutional Court] of 16 January 2013, p. 13: "The prohibition of monetary financing <...> prohibits < ... > the suspension of the independence of the national budgets which relies on market incentives"). In any case, according to explanations given by the Bundesbank, one cannot in practice divide interest rate spreads into a rational and an irrational part (cf. also Jahresgutachten 2013/2014 des Sachverständigenrates – Annual Economic Report 2013/14 of the German Council of Economic Experts –, n. 200, on the significance of essential factors for yield differences on government bonds).

[72] As for the European Central Bank claiming to safeguard the current composition of the euro currency area with the OMT Decision (cf. ECB Press Release of 26 July 2012), this is obviously not a task of monetary policy but one of economic policy, which remains a responsibility of the Member States. Pursuant to Art. 140 TFEU, the decisions on the composition of the euro currency area are the responsibility of the Council, the European Parliament, the Commission and the Member States; the European Central Bank only has a right to be heard in the decision making process concerning the abrogation of the derogations pursuant to Art. 139 TFEU, i.e. for the accession of new Member States to the euro currency area (Art. 140 sec. 3 TFEU). Following this division of powers, the Member States have taken a variety of measures in recent years to safeguard the economic and political conditions for the lasting cohesion of the euro currency area. They have granted each other bilateral assistance, set up the European Financial Stability Facility (cf. BVerfGE 129, 124 <133 and 134>), and finally created the European Stability Mechanism on the basis of the new Art. 136 sec. 3 TFEU. Its fundamental objective is to prevent the reversibility of the Euro via a combination of assistance measures and reform requirements for individual Member States (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 56, 60, 96; BVerfGE 132, 195 <249>, n. 130). The Euro Plus Pact (Conclusions of the European Council of 24/25 March 2011, EUCO 10/11, annex 1) and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (BGBl II 2012 p. 1006, pp. 1008 et seq.) serve this purpose, too.

[73] bb) The conclusion that the OMT Decision has no monetary policy objective is further suggested by its selectivity. Under the guidelines adopted by the European Central Bank, the monetary policy framework of the European System of Central Banks does generally not have a targeted approach, which would necessarily differentiate between individual Member States (Annex I no. 1.1 of the Guideline of the European Central Bank of 20 September 2011 on monetary policy instruments and procedures of the Eurosystem <ECB/2011/14>, OJEU No L 331 of 14 December 2011, p. 1, as amended by the Guideline of the European Central Bank of 26 November 2012 amending Guideline ECB/2011/14 on monetary policy instruments and procedures of the Eurosystem <ECB/2012/25>, OJEU No L 348 of 18 December 2012, p. 30). Monetary measures such as the fixing of key interest rates or the reserve ratio are applicable to all Member States and the resident commercial banks alike. Different effects that derive from these measures are a consequence of the open market economy, which Union law presupposes (Art. 127 sec. 1 sentence 3 TFEU), and an indirect effect that can be controlled by the European System of Central Banks only to a limited degree. Because the OMT Decision envisages a targeted purchase of government bonds of selected Member States, however, the spreads on government bonds issued by these states are levelled by changes in market conditions, and the government bonds of other Member States are eventually placed at a disadvantage.

[74] cc) The fact that the OMT Decision links the purchase of bonds to the economic policy conditionality of assistance programmes of the European Financial Stability Facility or the European Stability Mechanism (parallelism) is another argument against counting the OMT Decision among the powers assigned to the European System of Central Banks by Art. 119 sec. 2, Art. 127 sec. 1 and 2 TFEU.

[75] Pursuant to the OMT Decision, a purchase of government bonds shall only be undertaken under the condition that the Member State that benefits fully complies with the obligations of an assistance programme of the European Financial Stability Facility or the European Stability Mechanism, which envisages the purchase of government bonds of that Member State on the primary market. The respective obligations of the assistance programme relate not only to the general economic and social policy, but especially to the fiscal policy of the Member States. As follows from Art. 126 TFEU, it is, however, for the Commission (Art. 126 sec. 2 sentence 1 TFEU) or the Council (Art. 126 sec. 5 to sec. 14 TFEU) to monitor this.

[76] It particularly speaks against a compatibility of the OMT Decision with the mandate of the European Central Bank that the European Central Bank plans to engage, with the intended purchases, in an activity which both the European Financial Stability Facility (Art. 2 sec. 1 letter b, Art. 3 sec. 1, Art. 10 sec. 5 letter a of the EFSF Framework Agreement) and the European Stability Mechanism (Art. 18 ESM Treaty) perform and which is – as the Court of Justice of the European Union has held in the Pringle case –, because of its objectives and mechanisms, an activity that belongs to the field of economic policy (cf. ECJ, Judgment of 27 November 2012, loc. cit., n. 60).

[77] By tying the purchase of government bonds of selected Member States to full compliance with the requirements of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism and thus retaining its own conscientious examination, the European Central Bank makes the purchase of government bonds on the basis of the OMT Decision an instrument of economic policy. This is also confirmed by the fact that it plans to refrain from buying government bonds if the Member State concerned does not meet the economic policy conditions (any more) ("as long as programme conditionality is fully respected, and terminate them once their objectives are achieved or when there is non-compliance with the macroeconomic adjustment or precautionary programme").

[78] The purchase of government bonds of selected Member States that is envisaged by the OMT Decision, and which is unilaterally tied to economic policy conditions of the European Financial Stability Facility or the European Stability Mechanism, appears, in this context, as the functional equivalent to an assistance measure of the above-mentioned institutions – albeit without their parliamentary legitimation and monitoring.

[79] dd) The approach planned by the European Central Bank is likely to bypass the conditions and conditionalities envisaged by the two "rescue packages" for purchase programmes of government bonds on the secondary market (bypassing). The European Stability Mechanism can only adopt a secondary market support facility when both the general requirements for the granting of stability support under Art. 12 sec. 1 of the ESM Treaty are met (indispensability to safeguard the financial stability of the euro currency area as a whole and of its Member States), and in case of "exceptional financial market circumstances and risks to financial stability" (Art. 18 sec. 2 of the ESM Treaty, Art. 1 of the "Guideline on the Secondary Market Support Facility"). There is also a stricter conditionality towards the states concerned corresponding with this: While, for instance, an "Enhanced Conditions Credit Line" is already an option if the Member State takes certain "corrective measures" (cf. Art. 2 sec. 4 of the "Guideline on Precautionary Financial Assistance"), a Secondary Market Support Facility requires that the Member State either subjects itself to a macroeconomic adjustment programme or at least meets a number of strict criteria (cf. Art. 2 of the "Guideline on the Secondary Market Support Facility"). Thus, pursuant to Art. 18 of the ESM Treaty, the European Stability Mechanism may only purchase government bonds on the secondary market in an acute crisis and within narrow limits, while precautionary financial assistance under Art. 14 of the ESM Treaty is meant to prevent precisely such crises and is thus granted under considerably more generous terms. The OMT Decision does not envisage similar conditions for actions by the European Central Bank.

[80] ee) In the view of the Federal Constitutional Court, the purchase of government bonds on the basis of the OMT Decision exceeds the support of the general economic policies in the European Union that the European System of Central Banks is allowed to pursue (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU).

[81] First, the volume of assistance measures, which is a key aspect for the decisions of the European Stability Mechanism, could de facto be considerably broadened, and potentially even multiplied, through parallel purchases of government bonds by the Eurosystem. If the members of the European Stability Mechanism agree on a certain volume of assistance and its conditions, this decision could be thwarted if the Eurosystem unilaterally increased the assistance volume significantly. This cannot be qualified as "support".

[82] On the other hand, due to the independence of the European Central Bank as laid down in Art. 130 TFEU, the Council of the European Central Bank wants to, and must, decide independently, and ultimately without being tied to the decisions of the European Financial Stability Facility or the European Stability Mechanism, whether, to what extent, and under which conditions it may purchase government bonds in selected cases (Decision of 6 September 2012: "in full discretion") and/or to stop a purchasing programme that it had started.

This inevitably requires independent economic assessments which must not merely retrace the decisions of the Commission, the so-called Troika or other institutions, and which, for this reason alone, extends beyond a mere "support" of the economic policy in the Union.

[83] The Federal Constitutional Court holds the view that the purchases envisaged by the OMT Decision could only be considered as support of economic policy assistance measures under the responsibility of the Member States within the framework of the European Financial Stability Facility and the European Stability Mechanism (Art. 119 sec. 2, Art. 127 sec. 1 sentence 2 TFEU), if their volumes were so limited that parallel assistance programmes of the Member States and their underlying political decisions could not be thwarted. The "factual" limitation of the volume of bond purchases by the amount of the government bonds issued already in the currently scheduled maturity spectrum of one to three years – highlighted by the European Central Bank in the proceedings before the Federal Constitutional Court – is not likely to sufficiently ensure an adequate quantitative limitation. By changing their refinancing policies, the Member States that benefit can increase the volume of government bonds that are currently covered by the OMT Decision; it is unclear what would follow from the European Central Bank's intention to observe the emission behaviour of individual Member States. In addition to this, the purchases would also have to be approved on the merits and legitimised by the Member States.

2. Violation of the Prohibition of Monetary Financing of the Budget

[84] The prohibition of monetary financing of the budget enshrined in Art. 123 TFEU also includes a prohibition of bypassing (a). The OMT Decision is likely to violate this prohibition as well (b).

[85] a) Art. 123 TFEU and Art. 21.1. ESCB Statute forbid the purchase of government bonds "directly" from the emitting Member States, i.e. the purchase on the primary market. This prohibition is, however, not limited to this interdiction, but is an expression of a broader prohibition of monetary financing of the budget (cf. Borger, German Law Journal 2013, p. 113 <119, 134>; de Gregorio Merino, CMLR 2012, p. 1613 <1625, footnote 36, 1627>; Lenaerts/van Nuffel, European Union Law, 3rd ed. 2011, n. 11-037). Union law recognises the legal concept of bypassing as do the national legal systems. It is ultimately based on the principle of effectiveness ("effet utile") and has repeatedly been alluded to in the Court of Justice's jurisprudence (cf. most recently ECJ, Judgment of 20 June 2013 Case C-259/12, Rodopi-M 91, ECR 2013, p. I-0000, n. 41).

[86] b) Also in the present context, the Court of Justice has (in the Pringle case) largely focused on the objective pursued by the provision for the interpretation of Art. 125 TFEU (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, Pringle, ECR 2012, p. I-0000, n. 133) and thus conducted a teleological interpretation. It seems obvious that this must also apply to the interpretation of Art. 123 TFEU, and that the prohibition of the purchase of government bonds directly from the issuing Member States may not be circumvented by functionally equivalent measures. Council Regulation (EC) No 3603/93 (7th recital of the Council Regulation (EC) No 3603/93 of 13 December 1993, OJEC No L 332 of 31 December 1993, p. 1), which is primarily addressed to the Member States, and to the European Central Bank itself (ECB, Monthly Bulletin October 2012, p. 8), does assume this, too.

[87] c) In addition to the above-mentioned aspects, namely the neutralisation of interest rate spreads (n. 67 et seq.), selectivity (n. 70), and the parallelism with EFSF and ESM assistance programmes (n. 71 et seq.), the following aspects – at least when taken together – also indicate that the OMT Decision aims at a circumvention of Art. 123 TFEU and violates the prohibition of monetary financing of the budget: The willingness to participate in a debt cut with regard to the purchased bonds (aa), the increased risk of such a debt cut regarding the purchased government bonds (bb), the option to keep the purchased government bonds to maturity (cc), the interference with the price formation on the market (dd), and the encouragement of market participants to purchase the bonds in question on the primary market (ee).

[88] aa) If the Eurosystem (partially) waived securitised claims against individual Member States of the euro currency area that are contained in government bonds, this would amount to an illegal monetary financing of the budget of these countries. It is not planned for the Eurosystem to maintain a preferred creditor status with regard to the government bonds that are to be purchased on the basis of the OMT Decision. This essentially means that the Eurosystem would have to participate in a debt cut adopted by the majority of creditors (Art. 12 sec. 3 of the ESM Treaty), and that it would have to renounce a (substantial) part of the

securitised claims contained in the purchased government bonds in such a case. This is not likely to be compatible with Art. 123 TFEU. At least if a purchase contains, from the outset, the prospect of subsequently becoming part of a potential debt cut, one cannot, considering the regulatory purpose of Art. 123 sec. 1 TFEU, establish a relevant difference between waiving the repayment obligation from a loan and providing funds that are a priori irrevocable and not tied to any performance.

[89] bb) A purchase of government bonds that carry an increased risk of failure or even of a debt cut is likely to violate the prohibition of monetary financing, too. As the predecessor programme SMP also indicates (Decision of the European Central Bank of 14 May 2010 establishing a securities markets programme <ECB/2010/5>, OJEU No L 124 of 20 May 2010, p. 8), it is planned that, based on the OMT Decision, the Eurosystem purchases government bonds which carry an increased risk of failure because of their lower credit rating; at the same time, the banks in the participating states shall be able to discharge these risky securities. In doing so, the Eurosystem would not only take over the function of a "bad bank" for the banks in the participating states; it would also indirectly contribute to the financing of their budgets. Though there are no provisions under Union law that completely prohibit the Eurosystem from entering into potentially loss-making monetary policy operations, the provisions concerning the compensation of losses of the European System of Central Banks such as Art. 33.2. ESCB Statute show that their activities can always entail losses and that the legislature has generally approved of this possibility. However, this, according to the considerations of the Federal Constitutional Court, does not include the authorisation to take large and unnecessary risks of losses.

[90] cc) To hold government bonds to maturity may, under certain conditions, also collide with the prohibition of monetary financing of the budget (Art. 123 sec. 1 TFEU; interference with the market logic). It is true that Art. 18.1. first indent ESCB Statute allows the Eurosystem the "outright" purchase of marketable instruments. A purchase of government bonds that are mostly held to maturity by the Eurosystem can, however, have an impact on monetary financing of the budget. In particular, if a substantial amount of the government bonds issued by selected Member States is permanently removed from the market, certain effects that result from the sale of the bonds prior to maturity cannot occur. The Eurosystem would in such a case not only prevent an unbiased price determination; it would also contribute to the financing of the respective budgets. If government bonds are held to maturity, this results in any case in a shortage of the supply of bonds circulating on the secondary market, which may amount to a circumvention of Art. 123 TFEU.

[91] The OMT Decision relates to government bonds with a maturity of one to three years. It contains no provisions regarding the question of how long the bonds acquired under the programme are to be held, and thus does not exclude the possibility that they are taken from the market until maturity. That this is an option under the Decision, especially in order to prevent or at least delay the disclosure of losses actually incurred on the balance sheet, follows from the accounting rules enacted by the Council of the European Central Bank, which require that the purchase costs and not the current market prices are used when including government bonds (cf. recital 1 and annex IV, balance sheet item assets 7.1, of the Guideline of the European Central Bank of 17 July 2009 amending Guideline ECB/2006/16 on the legal framework for accounting and financial reporting in the European System of Central Banks <ECB/2009/18>, OJEU No L 202 of 4 August 2009, p. 65).

[92] dd) It can be another indication for a circumvention of the prohibition of monetary financing of the budget if government bonds are purchased on the secondary market to a considerable extent and shortly after their emission by the Eurosystem (market pricing).

[93] ee) Similar effects can also be caused by announcements of the Council of the European Central Bank on this issue (encouragement to purchase newly issued securities). The announcement of imminent purchases of government bonds of selected Member States prior to a new emission can – independently of market conditions – cause private and institutional first takers to do what Art. 123 sec. 1 TFEU does not allow the European System of Central Banks to do. By providing first takers with the prospect that the European System of Central Banks will assume the financial risk associated with this acquisition, a bypassing of Art. 123 sec. 1 TFEU seems obvious.

[94] The OMT Decision and the accompanying communication of the Council of the European Central Bank (cf. ECB Press Release of 26 July 2012, President of the European Central Bank Mario
Draghi, http://www.ecb.int/press/key/date/2012/html/sp120726.en.html) encourage third parties to purchase the government bonds at issue on

the primary market by providing the prospect of assuming the risk associated with the acquisition. It is true that no details are provided regarding the volume of potential purchases or the required time lag between the emission and the potential acquisitions by the Eurosystem. Yet it seemed also clear at the oral hearing before the Federal Constitutional Court on 11 and 12 June 2013, that the announcement nevertheless gave the market participants the impression that the Eurosystem would in any case be available as a "lender of last resort" for the government bonds in question. This is not likely to be compatible with Art. 123 sec. 1 TFEU.

3. Irrelevance of a Reference to a "Disruption to the Monetary Policy Transmission Mechanism"

[95] In the view of the Federal Constitutional Court, the objective mentioned by the European Central Bank to justify the OMT Decision, namely to correct a disruption to the monetary policy transmission mechanism, can neither change the above-mentioned transgression of the European Central Bank's mandate, nor the violation of the prohibition of monetary financing of the budget.

[96] The fact that the purchase of government bonds can, under certain conditions, help to support the monetary policy objectives of the European System of Central Banks does not turn the OMT Decision itself into an act of monetary policy. In this respect, it also applies vice versa what the Court of Justice has said regarding the allocation of assistance measures of the European Stability Mechanism (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, Pringle, ECR 2012, p. I-0000, n. 56). The (economic) accuracy or plausibility of the reasons for the OMT Decision are irrelevant in this respect.

[97] Moreover, one can expect a significant deterioration of the monetary policy transmission mechanism in virtually every debt crisis of a state. A critical deterioration of the solvency of a state typically coincides with a corresponding deterioration of the solvency of the national banking sector (so-called bank-state nexus). As a result, in this situation, the lending practices of the banks tend to hardly reflect the reductions in the key interest rate anymore; the monetary policy transmission mechanism is disrupted. If purchases of government bonds were admissible every time the monetary policy transmission mechanism is disrupted, it would amount to granting the European Central Bank the power to remedy any deterioration of the credit rating of a euro area Member State through the purchase of that state's government bonds. This would suspend the prohibition of monetary financing of the budget.

[98] Finally, it seems irrelevant in this regard that the European Central Bank only intends to assume a disruption to the monetary policy transmission mechanism if the amount of the refinancing interest of a Member State of the euro currency area were "irrational". Spreads always only result from the market participants' expectations and are, regardless of their rationality, essential for market-based pricing. To single out and neutralise supposedly identifiable individual causes would be tantamount to an arbitrary interference with market activity (cf. above n. 88). Ultimately, the distinction between rational and irrational is meaningless in this context and can in any case not be operationalised.

4. Possibility of an Interpretation in Conformity With Union Law

[99] The Federal Constitutional Court believes that these concerns regarding the validity of the OMT Decision, based on the interpretation used here, could be met by an interpretation in conformity with Union law. This would require that the content of the OMT Decision, when comprehensively assessed and evaluated, essentially complies with the above-mentioned conditions.

[100] In the view of the Federal Constitutional Court, the OMT Decision might not be objectionable if it could, in the light of Art. 119 and Art. 127 et seq. TFEU, and Art. 17 et seq. of the ESCB Statute, be interpreted or limited in its validity in such a way that it would not undermine the conditionality of the assistance programmes of the European Financial Stability Facility and the European Stability Mechanism (cf. n. 72 et seq.; 77; 79 et seq.), and would only be of a supportive nature with regard to the economic policies in the Union (cf. n. 68 et seq.; 71; 79 et seq.). This requires, in light of Art. 123 TFEU, that the possibility of a debt cut must be excluded (cf. n. 86 and 87), that government bonds of selected Member States are not purchased up to unlimited amounts (cf. n. 81), and that interferences with price formation on the market are to be avoided where possible (cf. n. 88 et seq.). Statements by the representatives of the European Central Bank in the proceedings before the Constitutional Court concerning the framework for the implementation of the OMT Decision (limited volume of a possible purchase of government bonds; no participation in a debt cut; observance of certain time lags between the emission of a

government bond and its purchase; no holding of the bonds to maturity) suggest that such an interpretation in conformity with Union law would also most likely be compatible with the meaning and purpose of the OMT Decision.

C. In the Alternative, Questions Referred for a Preliminary Ruling on the Interpretation of Various Provisions of Union Law

[101] Considering the obligation of the Federal Constitutional Court to grant preventive legal protection, the interpretation of Union law is also relevant for the outcome of the legal dispute at hand should the Court of Justice not qualify the OMT Decision as a suitable subject for a referral under Art. 267 sec. 1 letter b TFEU. The responsibility with respect to European integration of the Federal Government and the German Bundestag would also apply with regard to ultra vires acts that have merely been announced, but the content of which is already sufficiently defined. The Federal Constitutional Court would then have to answer the preliminary question whether implementation of the OMT Decision would be compatible with Union law. To this end, the Federal Constitutional Court submits to the Court of Justice of the European Union the above-mentioned auxiliary questions on the interpretation of Art. 119, 123, and 127 TFEU, and of Art. 17 to 24 of the ESCB Statute.

D.

[102] Whether the budgetary autonomy of the German Bundestag, which is guaranteed by Art. 20 sec. 1 and 2 in conjunction with Art. 79 sec. 3 GG, and its overall budgetary responsibility can be affected by the OMT Decision or its implementation with regard to possible losses of the Bundesbank, is not clearly foreseeable at present. The OMT Decision could violate the constitutional identity of the Basic Law if it created a mechanism which would amount to an assumption of liability for decisions of third parties which entail consequences that are difficult to calculate (cf. BVerfGE 129, 124 <179 et seq.>), so that, due to this mechanism, the German Bundestag would not remain the "master of its decisions" and could no longer exercise its budgetary autonomy under its own responsibility (cf. BVerfGE 129, 124 <177>; 132, 195 <239>). Whether this is the case depends on the compliance of the OMT Decision with the mandate assigned to the European Central Bank, and on its content and scope as interpreted in conformity with primary law in compliance with this mandate. The Senate will have to decide on this on the basis of the answers given to the questions it referred for a preliminary ruling.

[103] At present, it is not foreseeable whether in addition to this, through individual implementation measures of the OMT Decision and with regard to possible losses of the Bundesbank and ensuing effects on the federal budget, consequences for the budgetary autonomy of the German Bundestag could arise in a way that affects Art. 79 sec. 3 GG. If necessary, the Senate would have to examine this on the basis of the Court of Justice's interpretation of the OMT Decision without another question referred for a preliminary ruling, and it would have to determine the inapplicability of the respective act of implementation in Germany, because the identity review is not to be assessed according to Union law but exclusively according to German constitutional law.

E.

[104] Pursuant to § 33 sec. BVerfGG, the procedures shall be suspended pending the decision of the Court of Justice of the European Union. After completion of the proceedings for a preliminary ruling, the Federal Constitutional Court will resume the proceedings ex officio.

F.

[105] The decision was taken with 6:2 votes.

Dissenting Opinion of Justice Lübbe-Wolff

[1] In an effort to secure the rule of law, a court may happen to exceed judicial competence. In my view, this has occurred here. The motions should have been rejected as inadmissible.

I.

[2] I skip my doubts as to the whether the summary interpretation of the present actions as being, all of them, at least inter alia directed against parliamentary and governmental inaction with respect to the ECB's OMT decision is correct, as to whether their admissibility can be judged sufficiently on the basis of this summary, generalising interpretation, and as to whether the Senate complies with its obligation to state reasons in treating the motions – insofar as they are directed against parliamentary and governmental inaction – as admissible without presenting, and dealing with, the relevant objections raised by Bundestag and Federal Government.

[3] At any rate, what the plaintiffs, insofar as they turn against federal inaction with respect to the OMT decision, petition the Federal Constitutional Court to order goes, in my view, beyond the limits of judicial competence under the principles of democracy and separation of powers.

[4] The demarcation of these limits is open to debate. There may also be good reasons for controversy over the question which of the various techniques to avoid overstraining judicial power (political question doctrines, other criteria of admissibility, recognition of margins of appreciation or application of other restrained standards of review) is applicable in a given case. Under German law, which has so far been interpreted as not containing a political question doctrine, such controversy will concern the choice between admissibility criteria and reduced intensity of review as instruments of judicial restraint.

[5] A judge considering the limits of justiciability transgressed will therefore typically not be able to invoke clear standards in support of that claim. I must admit that this is so in the present case, but I do think that some guidelines can be derived from the principles of democracy, separation of powers and the rule of law. To mention only those which have a bearing on the case at hand:

[6] 1. The limits of reasonable governance by rules must be respected, because under the principles of democracy and separation of powers, decisions by judges at whom the citizens cannot, either directly or indirectly, come back by exercising their right to vote are justifiable only as decisions according to legal rules.

[7] 2. The need for determinative legal standards, even if they be just judge-made standards from earlier case-law, grows with the importance of the decision to be made. The judicial branch of government will not work without a creative element. But the more far-reaching, the more weighty, the more irreversible – legally and factually – the possible consequences of a judicial decision, the more judicial restraint is appropriate where, due to vagueness, the legitimating force of existing legal rules appears feeble.

[8] 3. In determining the reach of judicial competence, the reach of judicial power to implement should be considered. This is not just a pragmatic maxim serving to avoid losses of authority that might endanger the proper functioning of a court, but also a legal imperative, since from the means of power vested or not vested in a court or in the courts in general by constitutional and other statutory rules, inferences can be drawn as to intended competences.

[9] 4. The more judicial restraint is required, the more preferable is it to exercise such restraint by way of refusal to go into the merits (political question doctrine, criteria of admissibility) rather than by way of applying restrained standards of review (recognition of margins of appreciation, substantive obviousness criteria and the like). That is because the former path is the path of greater restraint. Dealing with the substance of the case is altogether avoided here, while the mere application of restrained standards of review will typically result in some kind of benediction, although reduced in scope, of the object of judicial review.

[10] 5. It should be kept in mind that the limits of justiciability are not necessarily the same for national and transnational courts, but may diverge – in varying directions, depending on the nature of the case – because national and transnational courts differ in the sources of legitimacy of their operation, notably in the legal bases of their competence and implementing power.

II.

[11] These guidelines suggest inadmissibility of the present motions. They do so regardless of the fact that so far, nothing but a referral of some questions and proposed answers to the Court of Justice has been effected. By treating the motions as admissible, at least in the generalising interpretation given to them, the Senate declares itself competent and obliged to make a decision on the merits later, be it after the referred questions have been answered by the Court of Justice, or be it after the Court of Justice has rejected the Senate's offer of dialogue by holding the referral inadmissible. The latter possibility is not to be ruled out since because of the last word claimed by the Federal Constitutional Court under certain conditions (cf. n. 21 et seq., 27 et seq.), the answers given by the Court of Justice would be only potentially relevant to the Federal Constitutional Court's final decision.

[12] 1. How Bundestag and Federal Government are to react to a violation, martial or non-martial, of German sovereign rights is a question that cannot reasonably by answered by rules making certain predetermined positive actions mandatory. Selecting from the variety of possible reactions (see 2. below) can only be a

matter of political discretion (cf. dissenting opinion of my colleague Michael Gerhardt).

[13] 2. Accordingly, it comes as no surprise that no such rules are detectable either in the text of the constitution or in the case-law interpreting it. That would already seem awkward in more innocuous cases. Given the enormous stakes in the present case, a decision on the merits is unacceptable on such an airy basis.

[14] The otherwise notorious tendency of the overburdened, relief-seeking Federal Constitutional Court to cultivate and extend admissibility hurdles in constitutional complaint cases is generally absent in matters of European integration. However, the Senate's readiness to hear complaints in this field has never been extended as far as in the present case.

[15] According to an originally bold, now established doctrine of the Court's case-law, every single German citizen can, subject to certain conditions, seize the Federal Constitutional Court on the basis of Art. 38 sec. 1 GG (right to vote) with a challenge of legislation which positively transfers German sovereign rights to the European Union (cf. BVerfGE 89, 155 <171 et seq.>; 123, 267 <330 et seq.>). Without admitting to any innovation, it was recently held that the same applies to legislation on international treaties submitting the exercise of sovereign rights to other bonds and influences (cf. BVerfGE 129, 124 <168>).

[16] It is not inconsistent that while, so far, only a diminution of competences of the Bundestag that would run counter to the principles protected by the eternity clause of Art. 79 sec. 3 GG (so-called "constitutional identity") had been considered as challengeable on the basis of Art. 38 sec. 1 GG (cf. BVerfGE 129, 124 <167 et seq.>; 132, 195 <234 et seq.>; cf. also, for corresponding claims of parliamentary groups in Organstreit proceedings, BVerfGE 123, 267 <338 et seq.>), the Senate now holds that Art. 38 sec. 1 GG also allows to address the Federal Constitutional Court with the assertion of a qualified ultra vires act (n. 44 et seq., 53) which does not necessarily include a violation of constitutional identity. The earlier cases mentioned did not raise the ultra vires question because only legislative transfers, or approvals of conventionary restrictions, of sovereign rights had been submitted to scrutiny. However, the admission of challenges of ultra vires acts based on Art. 38 sec. 1 GG is a novelty without a basis in earlier case-law.

[17] An even more blatant innovation for which the Court cannot rely on determinative standards from previous case-law lies in the assumption that under specified conditions not only acts of German federal organs which positively transfer or restrict sovereign rights, but also mere inaction in the face of qualified transgressions on the part of the European Union can be challenged on the basis of Art. 38 sec. 1 GG or, if the applicant is a parliamentary group, on the basis of the constitutional rights of the Bundestag.

[18] With this assumption, the Senate departs from earlier case-law, just recently corroborated, according to which parliamentary or governmental inaction is contestable in constitutional complaint proceedings only if the complainant can rely on an explicit constitutional mandate substantially specifying the content and reach of the alleged duty to act (cf. BVerfGE 129, 124 <176>, with further references). With respect to Organstreit challenges of inaction, too, the Senate has just recently repeated that they are admissible only if directed against aspecific omission (cf. BVerfG, decision of the Second Senate of 17 September 2013 –2 BvE 6/08, 2 BvR 2436/10 – juris, n. 158; BVerfGE 131, 152 <190>; 121, 135 <151>; 118, 244 <257>), i.e. against the omission of a specific action which can arguably be presented as constitutionally imperative.

[19] Interpretable as the requirements of explicitness of the constitutional mandate and of specificity of the constitutionally imperative action may be, they are certainly not met in this case. Indeed, the present order for referral shies away from clearly specifying the action that would be due with respect to the OMT decision should this decision turn out to be ultra vires or to violate the German Constitution in its core content ("identity").

[20] Possible reactions range from more or less inconsequential communicative behaviour, for instance expressions of disapproval of the kind Chancellor Adenauer once used to comment on what he deemed an arrogation of competence by the Federal Constitutional Court ("That ain't wha' we imagined!"), via action before the Court of Justice (as postulated by complainant I.), negotiating efforts of all kinds or a partial blockade of OMT action by means of ESM and EFSF voting rights (as advocated by applicant V.) to an exit from the monetary union (for the latter possibility see BVerfGE 89, 155 <204>; 97, 350 <369>; 123, 267 <350, 396>; 129, 124 <181 and 182>; 132, 195 <236 and 237>, n. 215). Even if the choice from this array of

options were reasonably determinable by legal rules, which it is not, such rules would at any rate be missing in German constitutional law.

[21] Moreover, the notion that a mere omission of certain governmental behaviour on the Union level – like e.g. the omission to work towards a change of treaty that would adapt the law to ECB behaviour (cf. n. 49) – can be a proper object of constitutional complaint would seem to stand in strange contrast to recent case-law according to which even positive acts of governmental cooperation in EU decisions or in intergovernmental decisions related to the Union will not be examined (cf. BVerfGE 129, 124 <174 and 175>).

[22] According to n. 53 of the order for referral, the Senate holds it actionable that Bundestag and Federal Government deal with the question of how the allocation of competences can be restored, and come to a positive decision in this matter. I doubt that any of the motions can be interpreted as being directed against the omission of an open-ended governmental or parliamentary debate. In relation to the specified objects of challenge, this is not a minus but an aliud. Apart from that, where the Federal Constitutional Court finds itself unable to identify specific decisions as mandatory under the Constitution, it is in my view not entitled to order, as an alternative or as a preliminary to further obligations not yet specified, that parliament or other supreme organs conduct a debate. Under German constitutional law, certain well-defined types of decisions can only be made by parliament (cf. BVerfGE 131, 88 <121>; 130, 318 <345 et seq.>; 126, 55 <69 f.>, each with further references), but there is no requirement of parliamentary or governmental blue-sky debate.

[23] The Senate probably does not envisage such dealing with the matter as the only reaction that Bundestag and Federal Government can be sued to display in reaction to qualified ultra vires acts or violations of constitutional identity by the ECB. Notes 44 and 50 suggest that other reactions may be demandable. It remains unclear, however, what further steps can be claimed (exit from the monetary union, too?) and how they have to be taken (alternatively? cumulatively? successively? in which order?). This is only too understandable in view of the lack of legal sources from which answers to these questions might flow. But then one ought to refuse being sent on grand desert tours that will not lead to any spring.

[24] 3. Even if this case were not a particularly inappropriate occasion for twists in the case-law, the present difficulty – the problem that the steps to be taken by Bundestag and Federal Government in the event of a qualified violation of German sovereign rights are not reasonably determinable by legal rules – could not be outrunned into justiciable terrain by dropping the above-mentioned criterion of specificity of the act that should have been performed, i.e. by admitting constitutional complaints and Organstreit motions against inaction without that prerequisite. This appears to be the Senate's course when, positing an unspecified duty to work towards recovery of a sovereign right that has been violated (n. 49), it leaves the act whose omission is supposed to be objectionable largely indeterminate and, apparently, holds the corresponding unspecified motion (no. 1, first part) of applicant V. admissible. The problem of indeterminateness and indeterminability of what is positively due will not thereby be spirited away. It will remain virulent as a problem of indeterminateness and, accordingly, unenforceability of what the Court decides.

[25] Even if the Court were to identify certain well-defined reactions of some avail as legally due, enforceability would not be much improved. The object of such duties would be too complex and the proper way of fulfilling them would again be too inept for guidance by rules to be reasonably governable by legal imperatives, let alone by judicial enforcement orders.

[26] 4. An awareness of this, but no readiness to draw the necessary conclusions, becomes apparent in that the Senate grows more cautious, or at least more conspicuously cautious, as it approaches the possible contents of its final decision. Already when the objective duties which in case of a qualified violation of sovereign rights following from the responsibilities concerning integration are presented (n. 49), no mention is made of exiting the European Union or the monetary union as an ultima ratio. Rather, the Senate refers to the option of legitimising the transgression by adapting the treaty, and states that if this solution is not wanted or not possible, Bundestag and Federal Government are "in principle" obliged to use legal "or" political means in order to get at a cancellation of the relevant act of the Union, and meanwhile to contain its domestic consequences as best they can. Later, where the Senate declares "these" duties actionable in abstracto and undertakes some specification (n. 50 et seq.), the only actionable claim brought up in concreto is the claim that a debate leading to some positive decision be conducted.

[27] Judicial competences do not (at least not de jure) depend on the greater or lesser courage of the judges. But where for reasons of law the judges' courage must dwindle when it comes to the substance, they ought not to go into the substance at all. It is therefore not an argument in favour of the present order that it leaves the Senate with many options to exercise talkative judicial restraint in its final decision. In constellations which foreseeably do not permit effective judicial intervention, judicial restraint ought to be displayed in silence.

[28] 5. As the Senate acknowledges, acts of EU institutions are not directly subject to the jurisdiction of the Federal Constitutional Court (cf. BVerfGE 22, 293 <295 et seq.>; 58, 1 <26 et seq.>; 118, 79 <95>; 129, 124 <175 and 176>) but come into play as an object of scrutiny only indirectly, i.e. insofar as trespasses may have consequences for the powers and duties of German institutions (n. 23 et seq.). Even the result of such indirect scrutiny may, however, have implications that stretch far beyond Germany. Apart from the above, the following ought therefore to be considered: A judicial decision from which the future of the euro may depend is per se an awkward matter, even if only consequences for the respective country are taken into account. In a perspective beyond the national box, the decision of a national court with such far-more-than-national implications appears particularly precarious. The democratic legitimacy which the decision of a national court may draw from the relevant standards of national law (if any) will not, or not without substantial detriment, extend beyond the national area. In a strictly national perspective, this may seem irrelevant on the assumption that as a consequence of the ECB's behaviour, the integrity of the national constitutional order is at stake, and if a blind eye is turned to the possible consequences of alternative scenarios. The question is, however, whether the national perspective which is properly held up against the Union perspective in certain cases of conflict (cf. BVerfGE 89, 155 <188>; 123, 267 <253 et seq.>; 126, 286 <302 et seq.>) is still the appropriate and the constitutional one where a decision may have legal and factual consequences of the magnitude and reach at issue here. That some few independent German judges – invoking the German interpretation of the principle of democracy, the limits of admissible competences of the ECB following from this interpretation, and our reading of Art. 123 et seq. TFEU – make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on it appears as an anomaly of questionable democratic character. No such anomaly would impend if the present decision were to be read as not envisaging any serious consequences. In that case: see 2. and 4.

Dissenting Opinion of Justice Gerhardt

[1] To my regret, I am unable to support the decision. I hold that the constitutional complaints and the application in the Organstreit proceedings, in so far as they relate to the OMT Decision, are inadmissible. Thus, the outcome of the Senate's decision does not depend on the answers to the questions that according to the Senate require clarification; this is the requirement for a referral to the Court of Justice of the European Union for a preliminary ruling.

[2] 1. The Federal Constitutional Court is not responsible for general constitutional supervision. Instead, its powers are enumerated, and comprehensively regulated, in Art. 93 GG and in the federal laws issued in connection with this provision. These provisions delimit the powers of the Federal Constitutional Court in particular against those of the other constitutional organs and specify the system of the separation of powers in this respect. The necessary legal certainty is achieved by strongly formalising the requirements for turning to the Federal Constitutional Court; the influence of the admissibility requirements on the system may not be underestimated. It thus requires increased justification if the Federal Constitutional Court further develops legal rules in a way that results in an expansion of its powers to review and decide.

[3] 2. a) One of the most noble obligations of the Federal Constitutional Court is to defend the holders of fundamental rights against violations of fundamental rights by public authority which are challenged through constitutional complaints. In accordance with this mandate, where interferences with fundamental rights arise from an act of the European Union, the Federal Constitutional Court must examine whether the Federal Republic of Germany has provided the European Union with the necessary legal basis (Art. 23 sec. 1 GG). In this review, the so-called ultra vires review, the assessment under European Union law by the Court of Justice of the European Union is of overriding importance; accordingly, the Federal Constitutional Court exercises ultra vires review in a manner that is open to European law, and only subject to strict requirements. Since according to the concept of the European Treaties, Kompetenz-Kompetenz with regard to the scope of permissible European Union acts

cannot rest with an institution of the European Union such as the Court of Justice, the last word, however, remains with the Federal Constitutional Court (cf. BVerfGE 126, 286 <300 et seq.>).

[4] b) A distinction must be drawn between cases in which a substantive fundamental right is affected, and constitutional complaints in which the complainant challenges a violation of the right to take part in the election of the Members of the German Bundestag under Art. 38 Abs. 1 GG, with the aim of preventing the erosion of the powers of Parliament, and thus the devaluation of the right to vote. In view of the dangers for the democratic process which such a right of challenge entails, the Senate found that citizens must have the opportunity of turning to the Constitutional Court to defend themselves against a Parliament that relinquishes its powers in a manner that is incompatible with Art. 23 sec. 1, Art. 79 sec. 3 GG (so-called identity review), and that the Basic Law does not provide a more extensive right of challenge (cf. BVerfGE 129, 124 <169 and 170, 177, 183>; 132, 195 <234 and 235, 238 et seq.>). While the Senate held that budgetary autonomy is one of the powers of Parliament which are inalienable pursuant to Art. 79 sec. 3 GG, it respected the primacy of assessment that is due to the legislature in this respect (cf. BVerfGE 129, 124 <182 ff.>; 132, 195 <239 and 240>).

[5] 3. Now the Senate extends the possibilities of the individual to initiate via Art. 38 sec. 1 GG a review of the acts of Union institutions by the Constitutional Court. First, the standards developed for ultra vires review with regard to acts of interference with substantive fundamental rights are transferred to this area. This means that the Senate, without there being a connection to a substantive fundamental right, claims the power to review whether an institution of the European Union has manifestly, and in a structurally significant manner, "usurped" powers not conferred upon it; it is not decisive here whether the constitutional identity pursuant to Art. 79 sec. 3 GG is affected. If such a transgression of powers exists, it is intended that the in individual can demand of the Bundestag and the Federal Government that they actively deal with the question of how the distribution of powers can be restored, and that they decide which options they want to use to pursue this goal. I cannot go along with this.

[6] a) Identity review is about the respect of ultimate limits, which cannot be shifted even through an amendment of the Constitution. It is plausible, not least with a view to the citizen's right to democracy, which is anchored in human dignity (cf. BVerfGE 123, 267 <341>), to grant every citizen an enforceable right to this effect, even if the ensuing promise of legal protection risks raising false expectations. By admitting, however, an ultra vires review that is based on the allegation of a violation of Art. 38 sec. 1 GG, the door is opened to a general right to have the laws enforced (allgemeiner Gesetzesvollziehungsanspruch), which the Basic Law does not contain (cf. BVerfGE 132, 195 <235> with further references).

[7] The actio popularis character of this action is not changed by the fact that only specifically qualified transgressions of powers can be challenged. Moreover, the relevant criteria (manifest nature; considerable weight and structural significance of the assumption of powers) strongly depend on how they are assessed, and they invite controversy, so that they will hardly be able to channel access to the Court effectively and in the interest of a clear delimitation of powers. Via the possibility of demanding preventive legal protection, which is provided as a consequence, individuals entitled to vote can "bring into play" the Federal Constitutional Court at a time when the political process is still ongoing. The ensuing danger of democratic responsibility becoming blurred can certainly be counteracted; I would, however, prefer such a danger not to arise in the first place. What must also be seen critically is the possible conflict with the values of the European system of legal protection, whose requirements regarding actions brought against acts of European institutions (Art. 263 TFEU) can be circumvented via an ultra vires popular action based on Art. 38 sec. 1 GG.

[8] b) The central question, however, is why the individual should have a judicially enforceable right to German constitutional organs becoming active vis-à-vis acts of the European Union that transgress their powers, or, to put it differently, why it is not sufficient to work via the means that democracy provides – through the formation of political opinions within and outside Parliament and through elections – towards the system of powers being respected, or to demand that the consequences of a transgression of powers be accepted.

[9] aa) The consideration that if the individual can challenge essential powers being relinquished by Parliament, a corresponding competence will exist all the more vis-à-vis the usurpation of powers by the European Union, is a consideration that could at most apply to the possibility of identity review, which, however,

is not what this decision is about. Even though ultra vires review has been largely assimilated to identity review, the Senate is not likely to see this differently; the difference of category between the two cannot be levelled out in any way.

[10] bb) Instead, the Senate's recognisable intention is to deal with the particular situation that the European Central bank has sufficient democratic legitimation only for its core obligations (Art. 88 sentence 2 GG), and that therefore, if it acts outside this area, this happens without connection to the democratic formation of opinions; the Senate holds that the curtailment of the citizen's right to democratic participation comes close to a violation of identity, and it must therefore be possible to be countered by the citizens with the help of the Federal Constitutional Court; according to the Senate, it cannot be conveyed to the citizens that given such a democratic deficit, and with a view to the possible significance of the OMT Decision, there is no legal protection. I do not find this convincing.

[11] (1) The decision on how the Federal Republic of Germany reacts to violations of its sovereignty is generally within the political discretion of the competent constitutional organs, particularly of the Federal Government and the German Bundestag. It is exclusively for them to decide first whether there is a violation of international law, and which weight it has to be accorded if there is one. Nothing different applies to the further decision about which measure are expedient. In this respect, there exist no rights of individuals which can be derived from Art. 38 sec. 1 GG, and clearly, they are not claimed either.

[12] (2) The European Union is a legal community by virtue of the transfer of sovereign powers of the Member States (cf. Art. 23 sec. 1 GG, Art. 4, 5 TEU). Accordingly, the German constitutional organs are obliged, inter alia, to work towards the revocation of acts of the European Union if they are not covered by the integration programme, and to limit domestic consequences entailed by such acts.

[13] (a) This responsibility with respect to integration exists vis-à-vis the general public, and yields nothing for the construction of a subjective right of any person entitled to vote to have constitutional organs take action.

[14] (b) The Senate demands of the Federal Government and/or the Bundestag to (publicly) establish a massive transgression of competences by an institution of the European Union – here, by the European Central Bank –, from which ensues a general obligation to eliminate it. Here, in the view of the Senate, the decisive factor is not the assessment of the constitutional organs but whether such a violation of powers objectively exists. Under such a perspective, political acts and omissions are subjected to an inappropriate legal standard.

[15] (aa) With regard to the question of whether there exists a qualified ultra vires act, the Federal Government and the Bundestag must have a margin of appreciation and discretion, which the citizen needs to accept. Such a margin is indispensable if only because legal clarification will often require considerable time, whereas political need for action can arise soon – the present case, in which the announcement of acts anticipates an essential effect of such acts, which makes it possible to influence the, so to speak, stretched enforcement, is probably atypical. In contrast to conventional obligations to act, whose violation can be judicially established ex post, what is at issue here can only be acts by the Federal Government and theBundestag which are specific to certain situations and certain findings. For such acts, an (objectivised) ex ante perspective must apply, the legal structure of which is comparable to a risk assessment. If the ultra vires violation is not obvious, but if – as probably in most cases, and here as well – the action of the institution of the European Union is situated at the margin of the powers assigned to it, the Federal Government and the Bundestag must act in recognition of this and are not compelled to assume an assumption of powers that is manifest and shifts established structures.

[16] (bb) The objection that only "manifest" transgressions of powers establish an obligation to act would only be correct if this meant violations of the distribution of powers which are obvious from the outset and which suggest themselves without further legal analysis. This, however, is not the view of the Senate. Instead, it is also considered possible that a transgression of powers can be manifest if it is preceded by a lengthy clarification process.

[17] (cc) This case shows in abundant clarity how difficult it is to handle the criterion "manifest". The Senate's assessment that the OMT programme manifestly, and with a shift of structures, transgresses the powers assigned to the European Central Bank, can be objected to with good reasons. Monetary and economic policies relate to each other and cannot be strictly separated. The delimitation of the objectives and duties of the European System of

Central Banks in Art. 127 TFEU corresponds to this. A review with regard to whether the principle of conferral has been adhered to must take into account that, in consideration of the nature of independent central banks, the delimitation of their assigned powers has only been made with a view to their functions; this assignment of powers must, to a certain extent, include the authorisation to define one's own limits of action. As regards the design of purchases according to the OMT programme, and the effects that can be expected of them, it seems very likely that, due to its selectivity, it can lead to an impermissible monetary financing of the budget. However, not least due to a lack of sufficient understanding of how the programme is embedded in the overall acts of the European Central Bank – for instance with regard to the determination of the key interest rate – it seems to me that the claim, that the objective of the OMT Decision is first and foremost the re-establishment of the monetary transmission mechanism, cannot be contradicted, at least not with the necessary unequivocalness.

[18] (c) I also consider the Senate's restriction of the political options to react to ultra vires acts of European institutions and agencies inappropriate and incompatible with the distribution of powers under the Basic Law. It is obvious that assumptions of powers must be opposed. How this effectively happens, however, depends on various circumstances. It can be considerably more effective, and wise, to first wait and to intervene only at a point that appears favourable, be it via negotiations at a promising level, be it via proceedings for annulment (Art. 263 TFEU). This also, and particularly, applies in the context of European integration, since the German constitutional organs must exercise responsibility with respect to integration according to the principle of sincere cooperation (Art. 4 sec. 3 TEU). I find that the argument that the room for manoeuvre of the German constitutional organs is reduced in the case of manifest and serious violations of powers is simply incorrect, because especially in such a situation, particular political skilfulness is required.

[19] cc) The Senate does not ignore that the individual citizen cannot claim a right under Art. 38 sec. 1 GG to particular acts of the Federal Government and of the Bundestag. The Senate therefore derives from the claim to political participation a claim to have the Federal Government and the Bundestag deal in a qualified manner with certain subject-matters. However, when the decision says that a citizen can demand that the Bundestag and the Federal Government actively deal with the question of how the distribution of powers can be restored and that they actively decide which options they want to use to pursue this goal, this claim is, in fact, nothing else but a claim of the citizen on the merits.

[20] The Senate recognisably intends to secure the public nature of the parliamentary process in cases of severe assumptions of powers by institutions of the European Union, and to thus prevent that essential losses of competence of the German Bundestag are tacitly tolerated, disregarding the formal requirements set out in Art. 23 sec. 1 GG, or even brought about by way of collusion.

[21] (1) Indisputably, it is a central element of the democratic development of opinions that essential issues of the European distribution of powers are dealt with by the plenary session of the Bundestag. However, a justiciable right of the individual that the involvement of Parliament take place in a specific manner appears neither required nor at all compatible with the special character of the democratic process. The citizens can influence the way and objectives of the political process through petitions, the political parties and Members of Parliament, and in particular through the media. That, with the help of the Federal Constitutional Court, an individual may steer the Bundestag's right of initiative into a specific direction, does not fit into the constitutional framework of parliamentary work. In particular, Parliament does not owe the citizens an express reasoning to the effect that it makes its political decision (even) in view of competence-related concerns about European acts – in this case, the OMT Decision –; still less does Parliament owe the citizens a promise to proceed in a specific manner for the case that such an act constitutes a qualified ultra vires act.

[22] (2) The constitutional requirement, which has been repeatedly emphasised in the Senate's case-law in recent years, that the German Bundestag may not relinquish its powers to a significant extent, does not contain any statements concerning the manner in which the Bundestag deals with a matter; this requirement is also not violated here.

[23] If – to keep to the present case – the Federal Government approves the OMT programme and makes it one of the foundations of its own acts, and if the German Bundestag accepts all this with open eyes – against the backdrop of an intensive public debate, after having heard the President of the European Central Bank, and, according to the information

provided by a member of the Budget Committee in the oral hearing, on the basis of the Bundestag's observation and assessment of the acts of the European Central Bank – this is the exercise of its democratic responsibility. The Bundestag could readily have criticised the OMT Decision by political means, threatened, if necessary, to bring proceedings for annulment before the Court of Justice of the European Union, waited for the reactions of the European Central Bank and the financial markets and then taken further steps. The fact that it did none of this does not indicate a democratic deficit, but is an expression of its majority decision for a certain policy when handling the sovereign debt crisis in the euro currency area.

[24] 4. The application in the Organstreit proceedings is inadmissible for corresponding reasons. It is the very own obligation of the political groups of the German Bundestag to involve theBundestag with controversial issues, and to press for these issues to be dealt with in a manner that is appropriate to the respective problem. If this approach is pursued not at all, insufficiently or unsuccessfully, this cannot be compensated by constructing a right for Parliament to be involved that goes beyond adherence to the law regulating Parliament's internal organisation.

§72. March 2014, German Constitutional Court, March 18th ,2014 http://www.bverfg.de/en/decisions/rs20140318_2bvr139012en.html

Judgment:

The proceedings are combined for joint decision.

The constitutional complaints are dismissed to the extent mentioned under B.II.

The remainder of the constitutional complaints is rejected as unfounded.

The application in the Organstreit proceedings of applicant VII. is dismissed, to the extent that the applicant request the declaration that the Act on the European Council Decision of 25 March 2011 to Amend 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 of 13 September 2012 (Bundesgesetzblatt (Federal Law Gazette) II 2012 p. 978) violates rights of applicant VII., because the European Council Decision of 25 March 2011 to Amend Article 136 of the Treaty on the Functioning of the European Union was decided pursuant to the simplified treaty revision procedure, and that the Act on Financial Participation in the European Stability Mechanism of 13 September 2012 (Bundesgesetzblatt I p. 1918) violates rights of applicant VII., because it assigns responsibilities to the German Bundestag's budget committee which are to be fulfilled by the German Bundestag in plenary session, and because it lets simple majorities suffice for decisions which require a majority large enough to change the Constitution.

The remainder of the application is rejected as unfounded.

Reasons:

A.

[1] The Organstreit proceedings [proceedings relating to disputes between constitutional organs] and the constitutional complaints challenge German and European legislation dealing with the establishment of the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, measures of the European Central Bank, and, in this context, certain omissions of the federal legislature and the Federal Government.

I.

[2] 1. At its meeting of 28/29 October 2010, the European Council agreed to establish a "permanent crisis mechanism to safeguard the financial stability of the euro area as a whole" in order to deal with the financial and sovereign debt crisis (EUCO 25/1/10 REV 1, Conclusions, p. 2). On 28 November 2010, the finance ministers of the Member States of the euro currency area agreed on its general characteristics.

[3] a) On 16/17 December 2010, the European Council in principle agreed on an amendment of the Treaty on the Functioning of the European

Union, according to which a new section 3 was to be added to Art. 136. On 17 March 2011, the German Bundestag adopted the motion of the CDU/CSU and FDP parliamentary groups for the German Bundestag and the Federal Government to agree to the amendment of Art. 136 TFEU (Bundestag Document, Bundestagsdrucksache – BTDrucks 17/4880; Bundestag Minutes of Plenary Proceedings, Bundestagsplenarprotokoll – BTPlenprot no. 17/96, p. 11015 C). On 25 March 2011, the European Council adopted the (final) draft of a future Art. 136 sec. 3 TFEU with the following wording (EUCO 10/11, Conclusions, Annex II, p. 21 et seq.):

(3) 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 granting of any required financial assistance under the mechanism will be made subject to strict conditionality.

[4] Following the ratification by all Member States of the European Union, this provision entered into force on 1 May 2013 (cf. BGBl II p. 1047).

[5] b) Following this, a – first – draft of a Treaty establishing the European Stability Mechanism (TESM) was prepared and then signed by the ministers of economics and finance of the Member States of the euro currency area on 11 July 2011. On 21 July 2011, the heads of state and government of the euro currency area agreed to furnish the European Financial Stability Facility and the future European Stability Mechanism (ESM) with further instruments. The corresponding renegotiations of the Treaty were completed on 2 February 2012 by signing the – second – draft of the Treaty establishing the European Stability Mechanism (cf. BTDrucks 17/9045, p. 29).

[6] By the Treaty establishing the European Stability Mechanism, the Contracting Parties (ESM Members) create the "European Stability Mechanism" as an international financial institution (Art. 1 TESM). If it is considered indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen (Art. 12 TESM); this may include "precautionary financial assistance" in the form of a precautionary conditioned credit line or an enhanced conditions credit line (Art. 14 TESM), financial assistance granted through loans for the purpose of re-capitalising financial institutions (Art. 15 TESM) or generally to an ESM Member (Art. 16 TESM) and the purchase of government bonds of an ESM Member on the primary or secondary market (Art. 17 and 18 TESM). With regard to the procedure, Art. 13 TESM provides that on receipt of the request for stability support, the European Commission in liaison with the European Central Bank is to assess the existence of a risk to the financial stability of the euro area as a whole or of its Member States, to assess whether public debt is sustainable and to assess the actual or potential financing needs of the ESM Member concerned. On the basis of the request and the assessment, the Board of Governors (cf. Art. 5 TESM) then decides whether the ESM Member concerned is to be granted stability support. If the decision is positive, the European Commission – in liaison with the European Central Bank and, wherever possible, together with the International Monetary Fund – negotiates with the ESM Member concerned a memorandum of understanding (MoU) detailing the conditionality attached to the financial assistance facility. The European Commission signs the MoU on behalf of the European Stability Mechanism, subject to approval by the Board of Governors. The European Commission – in liaison with the European Central Bank and, wherever possible, together with the International Monetary Fund – is entrusted with monitoring compliance with the economic conditionality attached to the financial assistance facility. The provisions relevant to the present proceedings are as follows (cf. BGBl II 2012 p. 981 et seq.):

Article 3

Purpose

The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties.

Article 4

Structure and voting rules

(1) The ESM shall have a Board of Governors and a Board of Directors, as well as a Managing Director [...].

(2) The decisions of the Board of Governors and the Board of Directors shall be taken by mutual agreement, qualified majority or simple majority as specified in this Treaty. [...]

(3) The adoption of a decision by mutual agreement requires the unanimity of the members participating in the vote. […]

(4) By way of derogation from paragraph 3, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance, as defined in Articles 13 to 18, would threaten the economic and financial sustainability of the euro area. The adoption of a decision by mutual agreement by the Board of Governors referred to in points (f) and (g) of Article 5(6) and the Board of Directors under that emergency procedure requires a qualified majority of 85% of the votes cast.

Where the emergency procedure referred to in the first subparagraph is used, a transfer from the reserve fund and/or the paid-in capital to an emergency reserve fund is made in order to constitute a dedicated buffer to cover the risks arising from the financial support granted under that emergency procedure. The Board of Governors may decide to cancel the emergency reserve fund and transfer its content back to the reserve fund and/or paid-in capital.

(5) The adoption of a decision by qualified majority requires 80% of the votes cast.

(6) The adoption of a decision by simple majority requires a majority of the votes cast.

(7) The voting rights of each ESM Member, as exercised by its appointee or by the latter's representative on the Board of Governors or Board of Directors, shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM as set out in Annex II. (Under Annex II, the Federal Republic of Germany was allocated 1,900,248 shares of the authorised capital stock of the ESM out of a total of 7,000,000 shares (= 27.1464%).)

(8) If any ESM Member fails to pay any part of the amount due in respect of its obligations in relation to paid-in shares or calls of capital under Articles 8, 9 and 10, or in relation to the reimbursement of the financial assistance under Article 16 or 17, such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights. The voting thresholds shall be recalculated accordingly.

Article 5

Board of Governors

(1) Each ESM Member shall appoint a Governor and an alternate Governor. [...] The Governor shall be a member of the government of that ESM Member who has responsibility for finance. [...]

(6) The Board of Governors shall take the following decisions by mutual agreement: [...]

b) to issue new shares on terms other than at par, in accordance with Article 8 (2); [...]

f) to provide stability support by the ESM, including the economic policy conditionality as stated in the memorandum of understanding referred to in Article 13 (3), and to establish the choice of instruments and the financial terms and conditions, in accordance with Articles 12 to 18; [...]

i) to change the list of financial assistance instruments that may be used by the ESM, in accordance with Article 19; [...]

l) to make adaptations to this Treaty as a direct consequence of the accession of new members, including changes to be made to the distribution of capital among ESM Members and the calculation of such a distribution as a direct consequence of the accession of a new member to the ESM, in accordance with Article 44; and

m) to delegate to the Board of Directors the tasks listed in this Article.

Article 6

Board of Directors

(1) Each Governor shall appoint one Director and one alternate Director from among people of high competence in economic and financial matters. [...]

(5) The Board of Directors shall take decisions by qualified majority, unless otherwise stated in this Treaty. Decisions to be taken on the basis of powers delegated by the Board of Governors shall be adopted in accordance with the relevant voting rules set in Article 5 (6) and (7). [...]

Article 7

Managing Director

(1) The Managing Director shall be appointed by the Board of Governors from among candidates having the nationality of an ESM Member, relevant international experience and a high level of competence in economic and financial matters. Whilst holding office, the Managing Director may not be a Governor or Director or an alternate of either. [...]

Article 8

Authorised capital stock

(1) The authorised capital stock shall be EUR 700 000 million. [...]

(2) The authorised capital stock shall be divided into paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares shall be EUR 80 000 million. Shares of authorised capital stock initially subscribed shall be issued at par. Other shares shall be issued at par, unless the Board of Governors decides to issue them in special circumstances on other terms. [...]

(4) ESM Members hereby irrevocably and unconditionally undertake to provide their contribution to the authorised capital stock, in accordance with their contribution key in Annex I. They shall meet all capital calls on a timely basis in accordance with the terms set out in this Treaty.

(5) The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised capital stock at its issue price. No ESM Member shall be liable, by reason of its membership, for obligations of the ESM. The obligations of ESM Members to contribute to the authorised capital stock in accordance with this Treaty are not affected if any such ESM Member becomes eligible for, or is receiving, financial assistance from the ESM.

Article 9

Capital calls

(1) The Board of Governors may call in authorised unpaid capital at any time and set an appropriate period of time for its payment by the ESM Members.

(2) The Board of Directors may call in authorised unpaid capital by simple majority decision to restore the level of paid-in capital if the amount of the latter is reduced by the absorption of losses below the level established in Article 8 (2), as may be amended by the Board of Governors following the procedure provided for in Article 10, and set an appropriate period of time for its payment by the ESM Members.

(3) The Managing Director shall call authorised unpaid capital in a timely manner if needed to avoid the ESM being in default of any scheduled or other payment obligation due to ESM creditors. The Managing Director shall inform the Board of Directors and the Board of Governors of any such call. When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt. [...]

Article 10

Changes in authorised capital stock

(1) The Board of Governors shall review regularly and at least every five years the maximum lending volume and the adequacy of the authorised capital stock of the ESM. It may decide to change the authorised capital stock and amend Article 8 and Annex II accordingly. Such decision shall enter into force after the ESM Members have notified the Depositary of the completion of their applicable national procedures. The new shares shall be allocated to the ESM Members according to the contribution key provided for in Article 11 and in Annex I. […]

Article 12

Principles

(1) If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support to an ESM Member subject to strict conditionality, appropriate to the financial assistance instrument chosen. Such conditionality may range from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions.

(2) Without prejudice to Article 19, ESM stability support may be granted through the instruments provided for in Articles 14 to 18.

(3) Collective action clauses shall be included, as of 1 January 2013, in all new euro area government securities, with maturity above one

year, in a way which ensures that their legal impact is identical.

Article 23

Dividend policy

(1) The Board of Directors may decide, by simple majority, to distribute a dividend to the ESM Members where the amount of paid-in capital and the reserve fund exceed the level required for the ESM to maintain its lending capacity and where proceeds from the investment are not required to avoid a payment shortfall to creditors. […]

Article 25

Coverage of losses

(1) Losses arising in the ESM operations shall be charged:

a) firstly, against the reserve fund;

b) secondly, against the paid-in capital; and

c) lastly, against an appropriate amount of the authorised unpaid capital, which shall be called in accordance with Article 9 (3).

(2) If an ESM Member fails to meet the required payment under a capital call made pursuant to Article 9 (2) or (3), a revised increased capital call shall be made to all ESM Members with a view to ensuring that the ESM receives the total amount of paid-in capital needed. The Board of Governors shall decide an appropriate course of action for ensuring that the ESM Member concerned settles its debt to the ESM within a reasonable period of time. The Board of Governors shall be entitled to require the payment of default interest on the overdue amount.

(3) When an ESM Member settles its debt to the ESM, as referred to in paragraph 2, the excess capital shall be returned to the other ESM Members in accordance with rules to be adopted by the Board of Governors. [...]

Article 32

Legal status, privileges and immunities

[...] (5) The archives of the ESM, and all documents belonging to the ESM or held by it, shall be inviolable.

(6) The premises of the ESM shall be inviolable. [...]

(9) The ESM shall be exempted from any requirement to be authorised or licensed as a credit institution, investment services provider or other authorised licensed or regulated entity under the laws of each ESM Member. [...]

Article 34

Professional secrecy

The Members or former Members of the Board of Governors and of the Board of Directors and any other persons who work or have worked for or in connection with the ESM shall not disclose information that is subject to professional secrecy. They shall be required, even after their duties have ceased, not to disclose information of the kind covered by the obligation of professional secrecy.

Article 35

Immunities of persons

(1) In the interest of the ESM, the Chairperson of the Board of Governors, Governors, alternate Governors, Directors, alternate Directors, as well as the Managing Director and other staff members shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents.

(2) The Board of Governors may waive to such extent and upon such conditions as it determines any of the immunities conferred under this Article in respect of the Chairperson of the Board of Governors, a Governor, an alternate Governor, a Director, an alternate Director or the Managing Director.

(3) The Managing Director may waive any such immunity in respect of any member of the staff of the ESM other than himself or herself.

(4) Each ESM Member shall promptly take the action necessary for the purposes of giving effect to this Article in the terms of its own law and shall inform the ESM accordingly. [...]

Article 37

Interpretation and dispute settlement

(1) Any question of interpretation or application of the provisions of this Treaty and the by-laws of the ESM arising between any ESM Member and the ESM, or between ESM Members, shall be submitted to the Board of Directors for its decision.

(2) The Board of Governors shall decide on any dispute arising between an ESM Member and the ESM, or between ESM Members, in connection with the interpretation and application of this Treaty, including any dispute about the compatibility of the decisions adopted by the ESM with this Treaty. The votes of the member(s) of the Board of Governors of the ESM Member(s) concerned shall be suspended when the Board of Governors votes on such decision and the voting threshold needed for the adoption of that decision shall be recalculated accordingly.

(3) If an ESM Member contests the decision referred to in paragraph 2, the dispute shall be submitted to the Court of Justice of the European Union. The judgement of the Court of Justice of the European Union shall be binding on the parties in the procedure, which shall take the necessary measures to comply with the judgment within a period to be decided by said Court.

Article 44

Accession

This Treaty shall be open for accession by other Member States of the European Union in accordance with Article 2 upon application for membership that any such Member State of the European Union shall file with the ESM after the adoption by the Council of the European Union of the decision to abrogate its derogation from adopting the euro in accordance with Article 140(2) TFEU. The Board of Governors shall approve the application for accession of the new ESM Member and the detailed technical terms related thereto, as well as the adaptations to be made to this Treaty as a direct consequence of the accession. Following the approval of the application for membership by the Board of Governors, new ESM Members shall accede upon the deposit of the instruments of accession with the Depositary, who shall notify other ESM Members thereof.

[7] The Treaty establishing the European Stability Mechanism does not contain an explicit right of resignation or termination.

[8] The Treaty on the ESM entered into force on 27 September 2012 (BGBl II p. 1086); the European Stability Mechanism started its operational work with the first meeting of the ESM's Board of Governors on 8 October 2012.

[9] 2. As a further measure to end the European financial and sovereign debt crisis, the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) was signed on 2 March 2012; its wording is (in part) as follows (BGBl II p. 1006 et seq.):

Article 1

(1) By this Treaty, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a fiscal compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion. [...]

Article 2

(1) This Treaty shall be applied and interpreted by the Contracting Parties in conformity with the Treaties on which the European Union is founded, in particular Article 4 (3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

(2) This Treaty shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union.

Article 3

(1) The Contracting Parties shall apply the rules set out in this paragraph in addition and without prejudice to their obligations under European Union law:

a) the budgetary position of the general government of a Contracting Party shall be balanced or in surplus;

b) the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific medium-term objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0.5% of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a

reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;

c) the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;

d) where the ratio of the general government debt to gross domestic product at market prices is significantly below 60% and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1.0% of the gross domestic product at market prices;

e) in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

(2) The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1 (e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national parliaments.

(3) For the purposes of this Article, the definitions set out in Article 2 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, shall apply.

The following definitions shall also apply for the purposes of this Article:

a) "annual structural balance of the general government" refers to the annual cyclically-adjusted balance net of one-off and temporary measures;

b) "exceptional circumstances" refers to the case of an unusual event outside the control of the Contracting Party concerned which has a major impact on the financial position of the general government or to periods of severe economic downturn as set out in the revised Stability and Growth Pact, provided that the temporary deviation of the Contracting Party concerned does not endanger fiscal sustainability in the medium-term.

Article 4

When the ratio of a Contracting Party's general government debt to gross domestic product exceeds the 60% reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU) No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union.

Article 5

(1) A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact.

(2) The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission. [...]

Article 7

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

Article 8

(1) The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3 (2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its report that such Contracting Party has failed to comply with Article 3 (2), the matter will be brought to the Court of Justice of the European Union by one or more Contracting Parties. Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3 (2), it may also bring the matter to the Court of Justice. In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

(2) Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0.1% of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.

(3) This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union. [...]

Article 16

Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union.

[10] The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union contains no explicit right of termination or resignation either. It entered into force on 1 January 2013 (cf. BGBl II p. 162).

[11] After the German Bundestag had passed a decision on 31 January 2013 (BT-Plenarprotokoll 17/219, pp. 27216 and 27217), after the participation of the Vermittlungsausschuss (BRDrucks 71/13 <B>), and after the Bundesrat had approved the Act on the National Implementation of the Fiscal Compact (BTDrucks 17/12058) on 5 July 2013 (BRDrucks 540/13, BR-Plenarprotokoll 912, pp. 369 and 370), which includes, inter alia, changes to the Haushaltsgrundsätzegesetz (Budgetary Principles Act) and to the Stabilitätsratsgesetz (Act on the Stability Council), the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union entered into force on 19 July 2013 (BGBl I p. 2398).

[12] 3. On 29 June 2012, the German Bundestag and the Bundesrat adopted the draft bill of an Act on the European Council Decision of 25 March 2011 to Amend 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 (BTDrucks 17/9047), the draft bill of an Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism (Gesetz zu dem Vertrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus) as amended by the Recommendation for a

Decision of the budget committee (BTDrucks 17/9045; 17/10126; 17/10172) and the draft bill of an Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion) as amended to include the proposed amendments approved by the budget committee on 27 June 2012 (BTDrucks 17/9046; 17/10125; 17/10171); in each case these Acts were adopted by a two-thirds majority. Art. 1 of each of these Acts contains the approval of the relevant treaty or decision. In addition, the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism in essence provides as follows (BGBl II p. 981):

Article 2

(1) Increases of the authorised capital stock under Art. 10 sec. 1 of the Treaty may enter into effect only subject to authorisation of the provision of further capital by a federal law.

(2) The German Governor in the Board of Governors of the European Stability Mechanism, and in the case of a delegation of the decision under Art. 5 sec. 6 letter m of the Treaty, the German Director on the Board of Directors of the European Stability Mechanism, may only approve a resolution proposal for the amendment of the financial assistance instruments under Art. 19 of the Treaty or abstain from voting on such a resolution proposal, if this has been authorised in advance by a federal statute.

(3) Changes in the authorised capital stock under Art. 10 sec. 3 of the Treaty and adjustments to the contribution key under Art. 11 sec. 3 and sec. 4 in conjunction with Art. 11 sec. 6 and Annex I of the Treaty shall be published in the Federal Law Gazette (Bundesgesetzblatt).

[13] 4. On 20 March 2012, the CDU/CSU and FDP parliamentary groups submitted the draft bill of an Act for Financial Participation in the European Stability Mechanism (ESMFinG), which was to regulate the financial overall framework of the German participation in the European Stability Mechanism and the parliamentary rights of participation during the day-to-day operations of the European Stability Mechanism (cf. BTDrucks 17/9048, p. 4). The draft consisted of four paragraphs; § 3 of the draft with the heading "rights of participation" did not yet contain any text, but only a blank ("(1) […]"). According to the explanatory statement, the rights of participation were to be designed in the course of the parliamentary proceedings. An amendment suggested by the working group "Budget" of the CDU/CSU and FDP parliamentary groups of 30 April 2012 contained provisions on the participation of parliament (cf. Haushaltsausschuss des Deutschen Bundestages, Ausschussdrucksache 4410). In this version, the draft bill was the subject of a public hearing on 7 May 2012 (cf. BTDrucks 17/10172, p. 5) and of the second and third reading in the German Bundestag sitting in plenary session (cf. BT-Plenarprotokoll 17/188, pp. 22743 and 22744).

[14] On 29 June 2012, the German Bundestag adopted the Act for Financial Participation in the European Stability Mechanism (ESMFinG) in the version of the budget committee's recommendation (BTDrucks 17/9048; 17/10126). On the same day, the Bundesrat gave its approval to this Act (BR-Plenarprotokoll 898, p. 312). Pursuant to § 1 ESMFinG, the Federal Republic of Germany participates in the total amount of the capital of the European Stability Mechanism to be paid in with EUR 21.71712 billion and in the total amount of callable capital with EUR 168.30768 billion. The Federal Ministry of Finance is authorised to give guarantees for the callable capital in the amount of EUR 168.30768 billion. The provisions of the Act for Financial Participation in the European Stability Mechanism read, in part, as follows (BGBl I 2012 p. 1918):

§ 1

Acquisition of the German share of the capital stock of the European Stability Mechanism; changing the consolidated lending volume of the European Stability Mechanism and of the European Financial Stability Facility

(1) In order to meet its obligations from the accession to the European Stability Mechanism, the Federal Republic of Germany participates in the total amount of the capital of the European Stability Mechanism to be paid in, which amounts to EUR 80 billion, with EUR 21.71712 billion, and in the total amount of callable capital of the European Stability Mechanism, which amounts to EUR 620 billion, with EUR 168.30768 billion.

(2) The Federal Ministry of Finance is authorised to provide guarantees for the callable capital in the amount of EUR 168.30768 billion. Payments on the callable capital are to be made with the means of the federal budget

1. pursuant to Art. 9 sec. 2 of the Treaty establishing the European Stability Mechanism, to restore the level of paid-in capital, if the amount of the latter is reduced by the balance of a defaulted payment below the agreed-upon level of EUR 80 billion;

2. pursuant to Art. 9 sec. 3 of the Treaty establishing the European Stability Mechanism, to avoid the European Stability Mechanism being in default of any of its payment obligations;

3. pursuant to Art. 25 sec. 2 of the Treaty establishing the European Stability Mechanism, in the context of a temporarily revised increased capital call;

4. pursuant to Art. 9 sec. 1 of the Treaty establishing the European Stability Mechanism, because of a unanimous decision of the Board of Governors of the European Stability Mechanism.

(3) The Federal Government is authorised to approve, through its representative in the Board of Governors, a decision pursuant to Art. 10 sec. 1 of the Treaty establishing the European Stability Mechanism on changing the consolidated lending volume of the European Stability Mechanism and the European Financial Stability Facility within the meaning of Art. 39 of the Treaty establishing the European Stability Mechanism, if financial means up to the amount of EUR 200 billion, which are necessary for the implementation of emergency measures that have been promised by the European Financial Stability Facility until 30 March 2012 will not be deducted in the calculation of the consolidated lending volume within the meaning of Art. 39 of the Treaty establishing the European Stability Mechanism.

§ 4

Requirement of parliamentary approval for decisions in the European Financial Stability Mechanism

(1) In matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German Bundestag, this responsibility shall be exercised by the plenary of the German Bundestag. The overall budgetary responsibility is affected in particular

1. in the decision under Art. 13 sec. 2 of the Treaty establishing the European Stability Mechanism to give a Contracting Party to the European Stability Mechanism, on that Contracting Party's request, stability support in the form of a financial assistance facility provided for in the Treaty,

2. in the acceptance of a financial assistance facility agreement under Art. 13 sec. 3 sentence 3 of the Treaty establishing the European Stability Mechanism and of consent to a corresponding Memorandum of Understanding under Art. 13 sec. 4 of the Treaty establishing the European Stability Mechanism,

3. in decisions in connection with the European Stability Mechanism to change the authorised capital stock and the maximum lending volume under Art. 10 sec. 1 of the Treaty establishing the European Stability Mechanism; Art. 2 sec. 1 of the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism is not affected.

(2) In the cases which relate to the overall budgetary responsibility, the Federal Government may through its representative only vote in favour of a proposed resolution in matters of the European Stability Mechanism or abstain from voting on a resolution when the plenary has passed a decision in favour of this. Without such a decision of the plenary, the German representative must vote against the proposed resolution. The representative of the Federal Government must participate in the passing of the resolution.

(3) If under Art. 5 sec. 6 letter m of the Treaty establishing the European Stability Mechanism tasks of the Board of Governors are delegated to the Board of Directors, §§ 3 to 6 shall apply with the necessary modifications.

§ 5

Participation of the budget committee of the German Bundestag

(1) In all other matters of the European Stability Mechanism which affect the budgetary responsibility of the German Bundestag and in which a decision of the plenary under § 4 is not provided for, the budget committee of the German Bundestag shall be involved. The budget committee shall supervise the preparation and enforcement of the agreements on stability support.

(2) The following require the prior approval of the budget committee:

1. Decisions on the provision of additional instruments without changing the total financing volume of an existing financial assistance

facility or material changes of the conditionality of the financial assistance facility,

2. decisions on calling in capital under Art. 9 sec. 1 of the Treaty establishing the European Stability Mechanism and accepting or materially changing the terms and conditions which apply to calls on capital under Art. 9 sec. 4 of the Treaty establishing the European Stability Mechanism,

3. the acceptance or material change of the guidelines on the modalities for implementing the individual financial assistance facilities under Art. 14 to 18, of the pricing guidelines under Art. 20 sec. 2, of the guidelines for borrowing operations under Art. 21 sec. 2, of the guidelines for investment policy under Art. 22 sec. 1, of the guidelines for dividend policy under Art. 23 sec. 3 and of the rules for the establishment, administration and use of other funds under Art. 24 sec. 4 of the Treaty establishing the European Stability Mechanism,

4. the detailed terms and conditions for capital changes under Art. 10 sec. 2 of the Treaty establishing the European Stability Mechanism,

5. the acceptance of provisions or interpretations on professional secrecy under Art. 34 of the Treaty establishing the European Stability Mechanism.

In these cases, the Federal Government may through its representative only vote in favour of, or abstain from voting on, a resolution proposal on matters of the European Stability Mechanism when the budget committee has passed a decision in favour of this. The Federal Government may also make an application to this effect in the budget committee. Without such a decision of the budget committee, the German representative must vote against the proposed resolution. The representative of the Federal Government must participate in the passing of the resolution.

(3) In the cases not covered by section 2 which affect the budgetary responsibility of the German Bundestag, the Federal Government shall involve the budget committee and take account of its opinions. This applies in particular to resolutions on the disbursement of individual tranches of the stability support granted.

(4) The Governor appointed by Germany under Art. 5 sec. 1 of the Treaty establishing the European Stability Mechanism and the alternate Governor shall, on the request of a minimum of one quarter of the members of the budget committee of the German Bundestag, which must be supported by a minimum of two parliamentary groups in the committee, inform the budget committee and provide details except where circumstances under § 6 of this Act are affected.

(5) The plenary of the German Bundestag may, by a decision passed by a simple majority, at any time assume and exercise by ordinary decision the powers of the budget committee.

(6) An application or a submission of the Federal Government shall be deemed to have been transferred to the budget committee within the meaning of the Rules of Procedure of the Bundestag. § 70 of the Rules of Procedure applies with the necessary modifications; the request of one quarter of the members of the budget committee must be supported by a minimum of two parliamentary groups in the committee.

§ 6

Involvement by way of a special committee

(1) If the purchase of government bonds on the secondary market under Art. 18 of the Treaty establishing the European Stability Mechanism is intended, the Federal Government may assert that the matter is particularly confidential. Particular confidentiality exists where the mere fact of consultation or passing of a resolution must be kept secret in order not to thwart the success of the measures. The Federal Government must give reasons for the assumption of particular confidentiality.

(2) In this case, the participation rights set out in §§ 4 and 5 may be exercised by members of the budget committee who are elected by the German Bundestag for the duration of one parliamentary term by secret ballot by the majority of the members of the German Bundestag (special committee). [...]

§ 7

Information by the Federal Government

(1) The Federal Government shall inform the German Bundestag and the Bundesrat in matters of this statute comprehensively, at the earliest possible date, continuously and as a general rule in writing. It shall give the German Bundestag an opportunity to express an opinion in matters which affect its competencies and shall take account of its opinions.

(2) The Federal Government shall communicate to the German Bundestag all documents

available to it for the exercise of the participation rights of the German Bundestag. It shall also communicate these documents to the Bundesrat. [...]

(9) The representatives in the ESM appointed by Germany or by the German Governor shall not be entitled to rely on professional secrecy under Art. 34 of the Treaty establishing the European Stability Mechanism vis-à-vis a request for information from the German Bundestag or its committees and members.

(10) The rights of the German Bundestag under the Act on Cooperation between the Federal Government and the German Bundestag in Matters concerning the European Union and the rights of the Bundesrat under the Act on Cooperation between the Federation and the Laender in Matters concerning the European Union are not affected.

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5. By judgment of 27 November 2012, the Court of Justice of the European Union decided that there were no concerns against the amendment of Art. 136 sec. 3 TFEU, neither with regard to the chosen simplified revision procedure pursuant to Art. 48 sec. 6 TEU, nor with regard to its compatibility with the other provisions governing the monetary union, particularly Art. 125 TFEU (cf. ECJ, Judgment of 27 November 2012, Case C-370/12, Pringle, ECR 2012, p. I-0000, n. 106 et seq.).

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6. On 15 and 24 March 2013, the euro group agreed on the basics of an assistance programme for the Republic of Cyprus. On 13 April 2013, the Ministry of Finance asked the German Bundestag for approval pursuant to § 4 sec. 1 no. 1 and no. 2 of the ESM Financing Act (ESMFinG) to granting stability support in the form of a financial assistance facility pursuant to Art. 13 sec. 2 TESM, to agreeing on a financial assistance facility pursuant to Art. 13 sec. 3 sentence 3 TESM, and to an already negotiated memorandum of understanding pursuant to Art. 13 sec. 4 TESM. The reasons given in the request state that "against the backdrop of the political agreement of the euro group of 24/25 March 2013 and the preliminary measures that were taken in the meantime to restructure the Cypriot banking sector", the Federal Government was of the opinion that "the conditions for granting financial aid to the Republic of Cyprus were met". The request further stated that the European Commission, in cooperation with the European Central Bank "had confirmed to the euro group that there was a threat to the financial stability of the euro zone" (BTDrucks 17/13060, pp. 3 and 4). The European Commission Communication of 12 April 2013, which was created in consultation with the European Central Bank and presented by the Federal Government as an attachment, states inter alia that an insolvency of Cyprus would have "indirect consequences for the euro currency area as a whole and could again cast doubt on the integrity of the euro currency area" (cf. BTDrucks 17/13060, p. 20); the German Bundestag approved the proposals of the Federal Government on 18 April 2013 (BT-Plenarprotokoll 17/234 p. 29179 et seq.). Prior to this, the Federal Constitutional Court had rejected an application by complainant VI. for a temporary injunction (cf. BVerfG, order of the First Chamber of the Second Senate of 17 April 2013 – 2 BvQ 17/13 –, NVwZ 2013, p. 858 et seq.).

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The Board of Governors of the European Stability Mechanism decided on 24 April 2013 to grant, in principle, to the Republic of Cyprus stability support in the form of a financial assistance facility (Art. 13 sec. 2 TESM). On 8 May 2013, pursuant to Art. 13 sec. 5 TESM, the Board of Directors of the European Stability Mechanism approved the agreement on the features of the financial assistance facility negotiated with Cyprus ("Financial Assistance Facility Agreement between European Stability Mechanism and the Republic of Cyprus and Central Bank of Cyprus" of 8 May 2013).

[18] 7. Already on 24/25 March 2011, the "Euro Plus Pact" had been adopted by the European Council (EUCO 10/1/11 REV 1, Annex I). Pursuant to the text of the treaty and its conclusions, it aims to strengthen the economic pillar of the monetary union, to achieve a new quality of economic policy coordination between the Member States of the euro currency area, to improve their competitiveness, and thereby to achieve a higher degree of convergence. The focus is to be placed primarily on the policy areas that fall within the competences of the Member States and which are crucial for increasing competitiveness and avoiding harmful imbalances (cf. in detail BVerfGE 131, 152 et seq.).

[19] 8. Furthermore, the European Union has also passed six acts of secondary legislation in November 2011 (the so-called Six-pack):

[20] Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16

November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ L 306 of 23 November 2011, p. 1) only applies to the Member States whose currency is the euro and sets out a system of sanctions for enhancing the enforcement of the preventive and corrective parts of the Stability and Growth Pact in the euro area (Art. 1).

[21] Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area (OJ L 306 of 23 November 2011, p. 8) only applies to the Member States whose currency is the euro and provides a system of sanctions for the effective correction of excessive macroeconomic imbalances in the euro area (Art. 1).

[22] Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies (OJ L 306 of 23 November 2011, p. 12) strengthens the preventive surveillance and coordination instruments of the Stability and Growth Pact.

[23] Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances (OJ L 306 of 23 November 2011, p. 25) sets out detailed rules for the detection of macroeconomic imbalances, as well as the prevention and correction of excessive macroeconomic imbalances within the Union (Art. 1 sec. 1). These provisions concern in particular the option that, in case of excessive imbalances, European Union institutions issue recommendations and thus influence the Member State concerned.

[24] Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (OJ L 306 of 23 November 2011, p. 33) aims to improve the effectiveness of the corrective measures in case of an excessive deficit by providing stricter requirements for the stages of the deficit procedure pursuant to Art. 126 TFEU.

[25] Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States (OJ L 306 of 23 November 2011, p. 41) aims to ensure transparency and availability of the necessary data, which are a requirement for compliance with and enforcement of the obligations under the Treaties regarding the avoidance of excessive budgetary deficits, with detailed requirements for, inter alia, public accounting systems, the use of numerical fiscal rules, medium-term budgetary forecasts and the implementation of independent analysis and monitoring.

[26] 9. In the course of the financial and sovereign debt crisis, particularly in the years 2011 and 2012, the Governing Council of the European Central Bank has repeatedly lowered the credit quality requirements of securities eligible as collateral for central bank lending (cf. for instance Decision of the European Central Bank of 6 May 2010 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Greek Government ECB/2010/3 <OJ L 117 of 11 May 2010, p. 102>; Decision of the European Central Bank of 31 March 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Irish Government ECB/2011/4 <OJ L 94 of 8 April 2011, p. 33>; Decision of the European Central Bank of 7 July 2011 on temporary measures relating to the eligibility of marketable debt instruments issued or guaranteed by the Portuguese Government ECB/2011/10 <OJ L 182 of 12 July 2011, p. 31>) and provided, at the same time, via two extensive longer-term refinancing operations, additionally about one trillion euros to commercial banks at favourable interest rates for three years (cf. ECB press release of 8 December 2011, online at www.ecb.europa.eu/press/pr/date/2011/html/pr111208_1.en.html; see also www.ecb.europa.eu/mopo/implement/omo/html/index.en.html). With the TARGET2 system, the European System of Central Banks operates a cross-border payment system, which most central banks of the Member States of the European Union and more than 4,000 commercial banks use for carrying out their payment transactions.

II.

[27] 1. By judgment of 12 September 2012, the Senate rejected the applications of complainants I. to V. and applicant VII. – who, in the temporary injunction proceedings, was applicant VI.– for a temporary injunction against the ratification of the Treaty establishing the European Stability Mechanism as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary

Union, and for preventing the Federal President from signing the national Acts approving and accompanying the Treaties stipulating that the Treaty establishing the European Stability Mechanism may only be ratified if, at the same time, it is ensured under international law that Art. 8 sec. 5 sentence 1 TESM limits the amount of all payment obligations of the Federal Republic of Germany under this Treaty to the amount stipulated in Annex II to the Treaty, in the sense that no provision of this Treaty may be interpreted in a way that establishes higher payment obligations for the Federal Republic of Germany without the agreement of the German representative, and that Art. 32 sec. 5, Art. 34 and Art. 35 sec. 1 TESM do not stand in the way of the comprehensive information of the Bundestag and of the Bundesrat (BVerfGE 132, 195 <196 and 197>).

[28] 2. Subsequently the ESM Members agreed on the basis of a draft by the Federal Ministry of Finance on a joint declaration, of which the German Bundestag was informed on 21 September 2012 (BTDrucks 17/10767, p. 3). The ESM Members made this declaration on 27 September 2012, the date the ESM Treaty came into force (BGBl II p. 1086). It was sent to the General Secretariat of the Council of the European Union, as the depositary of the Treaty (Art. 46 TESM), by the government of the Republic of Cyprus (cf. BGBl II p. 1086):

The representatives of the parties to the Treaty establishing the European Stability Mechanism (ESM) signed on 2 February 2012, meeting in Brussels on 26 September 2012, agree on the following interpretative declaration:

"Article 8(5) of the Treaty Establishing the European Stability Mechanism ("the Treaty") limits all payment liabilities of the ESM Members under the Treaty in the sense that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member's representative and due regard to national procedures.

Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.

The above mentioned elements constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty."

[29] At the same time, the Federal Republic of Germany also issued a unilateral declaration to the General Secretariat, which reads as follows (BGBl II p. 1087):

The Federal Republic of Germany refers to the declaration made by the parties to the Treaty of 2 February 2012 establishing the European Stability Mechanism and submitted by Cyprus in their name by Note Verbale of 27 September 2012 to the Council Secretariat as depositary, which reads as follows:

The representatives of the parties to the Treaty establishing the European Stability Mechanism (ESM) signed on 2 February 2012, meeting in Brussels on 26 September 2012, agree on the following interpretative declaration:

"Article 8(5) of the Treaty Establishing the European Stability Mechanism ("the Treaty") limits all payment liabilities of the ESM Members under the Treaty in the sense that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the ESM Treaty, without prior agreement of each Member's representative and due regard to national procedures.

Article 32(5), Article 34 and Article 35(1) of the Treaty do not prevent providing comprehensive information to the national parliaments, as foreseen by national regulation.

The above mentioned elements constitute an essential basis for the consent of the contracting States to be bound by the provisions of the Treaty."

The Federal Republic of Germany hereby confirms and explicitly repeats this declaration, which it issued jointly with the other parties to the Treaty.

30

The General Secretariat of the Council of the European Union, as the depositary of the Treaty, formally announced the notification of the unilateral declaration of the Federal Republic of Germany to the ESM Members by verbal note of 4 June 2013.

31

3. On 26 September 2012, the Senate rejected the adoption of an enforcement order which complainant I. had applied for, since it was not discernible that such an order was needed to

enforce the requirements contained in the Senate's judgment of 12 September 2012 (BVerfG, order of the Second Senate of 26 September 2012 – 2 BvR 1390/12 –, juris).

32

4. By order of 17 December 2013, the Senate separated the proceedings in so far as complainants I., II., III., and VI. challenge the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT), the continued purchases of government bonds by the European System of Central Banks on the secondary market, and the Federal Government's and the Bundestag's omission of reactions to this, and in so far as applicant VII. requests a declaration that the Bundestag has an obligation to take action with regard to the above-mentioned Decision (2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13 and 2 BvE 13/13).

III.

33

In essence, complainants I. to VI. submit that the challenged Acts violate their rights under Art. 38 sec. 1 sentence 1 read in conjunction with Art. 79 sec. 3 and Art. 20 sec. 1 and sec. 2 GG. In addition to this, complainant I. claims a violation of Art. 3 sec. 1 GG, and complainants II. claim a violation of Art. 14 sec. 1 and Art. 20 sec. 4 GG. Applicant VII. believes that the decision of the German Bundestag regarding the challenged Acts violates Art. 38 sec. 1 sentence 2 GG and Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1 and sec. 2 and Art. 79 sec. 3 GG, and thus challenges a violation of its own rights as well as of the rights of the German Bundestag. In addition to the arguments that have already been cited in the Senate's judgment on the applications for a temporary injunction of 12 September 2012 (cf. BVerfGE 132, 195 <216 et seq.>, n. 42 et seq.), the complainants and the applicant give, in essence, the following reasons:

34

1. Complainant I. claims that the challenged Acts – each of them on its own as well as through their interaction – violate his fundamental right under Art. 38 sec. 1 sentence 1 GG. Transformations of the Economic and Monetary Union must not result in a situation in which the European Union no longer complies with the requirements of Art. 23 sec. 1 sentence 1 GG, or in an interference with one of the unamendable principles of Art. 79 sec. 3 GG. To the extent that he expressly reiterates his arguments after the Court's judgment of 12 September, he states:

35

a) In the outcome, the insertion of the new Art. 136 sec. 3 TFEU eliminates the bail-out prohibition of Art. 125 TFEU and thus disposes of a mechanism which, according to the Federal Constitutional Court's jurisprudence, is vital for ensuring the Member States' parliamentary responsibility in budget-related matters. At least in connection with the ESM Treaty, the provision leads to a fundamental restructuring of the monetary union towards a community of comprehensive joint liability and stability, which is incompatible with Art. 79 sec. 3 GG. The provision is completely indeterminate with regard to the objective, requirements, and limits of the stability mechanism it mentions, and permits unlimited transfer payments.

36

b) Complainant I. further argues that the ESM Treaty could – in conjunction with the ESM Financing Act – lead to incalculable burdens on the federal budget that are not controlled and accounted for by the Bundestag, and is thus incompatible with the Bundestag's overall budgetary responsibility.

37

aa) The overall budgetary responsibility of the Bundestag is in particular violated by the fact that the ESM Treaty establishes an obligation under international law for the Contracting Parties to consent to possible capital increases and re-capitalisations, if they are necessary to preserve or restore the functioning of the European Stability Mechanism. If the authorised capital stock of EUR 700 billion were not (or no longer) sufficient to fulfil the tasks of the European Stability Mechanism – because, for instance, a large state like Italy has difficulties in meeting payments, or because the capital stock is used up – a systematic and teleological interpretation of the ESM Treaty would sustain a capital increase or a re-capitalisation, so that the European Stability Mechanism could continue to fulfil the tasks assigned to it by its Contracting Parties, especially, as emphasised in the preamble to the Treaty, the commitment to ensuring the financial stability of the euro area. In such a situation, the Bundestag would be bound by international law and, regardless of its formal participation rights, no longer be able to autonomously decide on the capital increase or

re-capitalisation. The ESM Treaty is therefore unconstitutional or has at least to be interpreted in conformity with the Constitution in such a way that an obligation of German authorities to agree to an unlimited amount of capital increases and re-capitalisations violates the principle of democracy.

38

bb) Another reason why the integration of the German Bundestag in the decision-making process of the European Stability Mechanism does not meet the constitutional requirements is that the ESM Financing Act, which, for the most part, stipulates the participation rights of parliament, is void due to its formal unconstitutionality. The draft bill that was submitted to the Bundestag's procedure and discussed in a first reading (BTDrucks 17/9048) had expressly left open the central issue of parliamentary participation rights. Thus, merely an empty shell of a law had been submitted to the Bundestag's procedure, which does not meet the requirements of Art. 76 GG. Since the ESM Financing Act is thus unconstitutional under a formal point of view, the participation rights it regulates do not exist legally. Without effective regulation of the necessary involvement of parliament, the Bundestag was not allowed to approve the ESM Treaty.

39

cc) The fact that capital calls pursuant to Art. 9 sec. 2 and sec. 3 TESM can be made without the Bundestag's approval violates its overall budgetary responsibility at least insofar as the Bundestag cannot control and, if necessary, prevent the accrual of the losses that underlie such capital calls. While, by approving individual assistance measures of the European Stability Mechanism, the Bundestag assumes the risk of the potentially ensuing losses and the costs for the federal budget, it has no opportunity to influence the loss risks which follow from the operations of the European Stability Mechanism. It can only indirectly influence policy matters via the guidelines which the Board of Directors adopts pursuant to Art. 21 sec. 2 and Art. 22 sec.1 TESM. However, such guidelines cannot, by their nature, exclude the risk of losses; in addition, the Bundestag has no means of enforcing a conduct of the ESM institutions that adheres to these guidelines. The Federal Government's blanket assessment that, with a view to the experiences with other international financial institutions, losses are not expected to arise from the operations of the European Stability Mechanism, is a mere assertion that is not backed by any proof. A comparison with the European Financial Stability Facility rather suggests that the European Stability Mechanism, too, will have to grant long-term loans to the participating states, but will have to refinance itself through medium and short-term loans. Should the interest level rise, this would immediately result in significant loss risks.

40

dd) With regard to the Director and alternate Director to be appointed by Germany under Art. 6 sec. 1 TESM, they are not bound by the decisions of the Bundestag in a sufficiently reliable manner, and their accountability to parliament is not sufficiently ensured. While the Federal Government has announced its intention to appoint a State Secretary with the function of member of the Board of Directors, a mere declaration of intent cannot permanently safeguard the necessary accountability to parliament. The members of the Board of Directors may be replaced at any time by other persons who are not bound by decisions of the Bundestag and who are not accountable to it either due to the comprehensive regulation of immunity under Art. 35 TESM. Precisely because the Board of Governors of the European Stability Mechanism can delegate most decision-making powers to the Board of Directors, an explicit legal guarantee of parliamentary accountability of the Director and alternate Director – for instance in the ESM Financing Act – is indispensable.

41

ee) In order to ensure the overall budgetary responsibility of the Bundestag, a permanent legal protection of Germany's veto position in the institutions of the European Stability Mechanism is required, so that decisions with potentially significant consequences for the federal budget cannot be taken against the vote of the German legal representatives. This is not yet adequately ensured because other states can join the euro area and the ESM Treaty any time. Germany does not have a veto position against such an accession. Thus, the ESM Treaty is only in conformity with the Constitution if the quorum necessary for approval of future accessions of new members is increased so that the veto position of the German representatives in the institutions of the European Stability Mechanism will be preserved.

42

ff) The participation of parliament is not sufficiently precisely regulated with regard to

the issue of shares of the capital stock of the European Stability Mechanism on terms other than at par pursuant to Art. 8 sec. 2 sentence 4 TESM. An interpretation of § 4 sec. 1 ESMFinG in conformity with the Constitution is needed at least to the effect that, without exception, any decision under Art. 8 sec. 2 sentence 4 TESM is subject to parliamentary approval.

43

gg) In order to exclude the possibility that Germany's voting rights are suspended pursuant to Art. 4 sec. 8 TESM, effective budgetary safeguards are needed. The guarantee authorisation that has been issued so far for the callable capital is insufficient because the case at hand is not about a guarantee, but about real payment obligations. Furthermore, it is not clear how a supplementary budget can be adopted and promulgated within the short period of seven days pursuant to Art. 9 sec. 3 TESM. Moreover, it is necessary to make provision in a way that reflects the risk in order to ensure that the capital that is to be transferred is actually available at any time and on time. The Federal Government must take sufficient precautions for capital calls through its own active risk management and must not rely on the risk management of the European Stability Mechanism. In an inquiry addressed to the Federal Government by complainant I., asking how a timely and full payment was to be ensured, the Parliamentary State Secretary in the Federal Ministry of Finance explained in a letter dated 11 October 2012 that they did not assume that capital calls would ever be needed; but otherwise they would adjust potential budgetary measures to the respective general framework such as the amount and the date of the capital call. With this approach, the Federal Government indeed does not take precautions for a deposit and misunderstands the explicit requirements in the Senate's judgment of 12 September 2012.

44

hh) The shift of decision-making powers from the plenary to the budget committee which the ESM Financing Act stipulates violates the principle of holding meetings in public, a vital element of representative democracy covered by Art. 79 sec. 3 GG. In order to control, understand and potentially influence the decisions of the elected representatives, the voters need an opportunity to follow the process of how opinions are formed in parliament. This is only guaranteed if the process takes place in the plenary. In view of this, a delegation of decision-making powers to the budget committee may only be considered to the extent that administrative decisions which do not affect the overall budgetary responsibility are concerned. At least with regard to § 5 sec. 2 no. 2 and no. 3 ESMFinG, this not the case.

45

ii) The provisions on immunity in Art. 35 sec. 1 TESM for the members of the ESM's bodies lead to arbitrary and thus, with regard to Art. 3 sec. 1 GG, unconstitutional unequal treatment. Art. 35 sec. 1 TESM transfers the functional immunity protection for diplomats and legal representatives of international organisations to the ESM system without sufficient justification. Since in particular the members of the Board of Governors are not independent of the governments of the respective Member State, there is no objective reason for them to be exempt from the justice of their sending states. At a minimum, this would require an interpretation in conformity with the Constitution to the effect that the immunity of the German board members would not extend beyond their leaving this body.

46

jj) Pursuant to Art. 3 sentence 1 and Art. 12 sec. 1 sentence 1 TESM, supported by Art. 136 sec. 3 TFEU, the European Stability Mechanism may explicitly only award financial assistance if this is "indispensable to safeguard the financial stability of the euro area as a whole", meaning if a bankruptcy of the requesting Member State would have "systemic" effects. The stability assistance to the Republic of Cyprus adopted in April 2013, however, showed that this requirement is consensually interpreted and applied by the ESM Members and Union institutions in such a way that it does not constitute an objective limit for awarding financial assistance and thus is, in effect, obsolete. According to all known indicators, it is absurd to assume that Cyprus is of systemic importance to the euro currency area as a whole; this could also not be demonstrated with the documents of the European Commission and European Central Bank, on which the Bundestag's Act of Assent of 18 April 2013 was based. Rather, the reasoning in these documents, which is not based on any verifiable data, boils down to the argument that, because of possible psychological consequences, the insolvency of a single ESM Member always affects the financial stability of the euro area as a whole. With this, the criterion of indispensability, which was meant to be restrictive, has lost its application and is replaced by a general policy

of the European Commission and the European Central Bank, which eludes legal review. In view of this, Art. 12 sec. 1 sentence 1 TESM proves to be a blanket empowerment which establishes a constitutionally impermissible automatic process of performance. In this respect, an interpretation in conformity with the Constitution is required to the effect that the Bundestag may only approve a stability support if the requirement of being indispensable to ensure the financial stability of the euro area as a whole is met and proven by specific and verifiable data on the integration of the financial systems.

47

kk) Pursuant to § 4 sec. 1 no. 1 and no. 2 ESMFinG in conjunction with Art. 13 sec. 2 to sec. 4 TESM, a two-stage approval procedure is envisaged for the approval of financial assistance: In a first step, the decision of principle, and in a second step, the adoption of a specific agreement with the ESM Member concerned and the approval of the negotiated memorandum of understanding (MoU). If, like when deciding on the stability support for Cyprus, one bypassed this two-stage system – agreed-upon in the Treaty – by taking the decision of principle only after negotiating a specific agreement with the Member State concerned and an MoU, and by linking the decision of principle to the approval of the specific assistance facility and the MoU, the Bundestag could no longer freely decide on the whether the stability support is granted. The negotiation of an MoU, which usually entails considerable efforts, creates a fait accompli with regard to foreign policy and massive, inescapable pressure to approve. The primary question, namely the systemic relevance of an ESM Member, thus completely stands back behind the Member State's specific financing needs and its debt sustainability. The justification for this approach put forward by the European Stability Mechanism and the Federal Government, namely to save time, would amount to a treaty practice that is incompatible with the wording and purpose of the Treaty. In this respect, and with regard to the actions of German authorities, an interpretation in conformity with the Constitution is needed which counteracts the binding solidification of such treaty practice under international law.

48

c) Complainant I. further submits that the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union ("fiscal compact" – TSCG) violates his right to participation in the constituent power of the people. Though the TSCG does not affect the content of budgetary autonomy more intensely than the rules already laid down in the Basic Law, the impact of the TSCG goes beyond this. Since this Treaty cannot be terminated under international law, Germany has committed itself with the Treaty to never remove the "debt brake" inserted into the Basic Law, as a result of which the "debt brake" is substantively integrated in the unchangeable core of the Constitution.

49

d) Furthermore, complainant I. alleges that the Federal Government violates his right to participate in the legitimation of state power under Art. 38 sec. 1 sentence 1 GG by failing to work towards a change of the TARGET2 system and of the framework for the creation of money. While the TARGET2 system was originally developed in accordance with primary law as a trans-European payment system, it has displayed significant constructional faults since 2007, and even more so since 2010. The constant growth of the TARGET2 balances shows that the system allows a Member State of the euro currency area to take out "overdraft loans" in unlimited amounts at the expense of other Member States to fund its own imports. This causes a high a risk to the federal budget which results solely from the behaviour of other states and which the Bundestag has never approved. It is therefore the Federal Government's duty to take all necessary measures to defend the Constitution and its identity-shaping core. While there is a certain margin of appreciation for this, the complete inaction of the Federal Government is unconstitutional.

50

2. Complainants II. submit that the challenged Acts violate the political freedom of the citizens and the right to democracy entrenched in Art. 38 sec. 1 GG.

51

a) They particularly emphasise in their substantiation that Art. 136 sec. 3 TFEU deepens the connectedness of the euro currency area to such a degree that a federal state is created and Germany's statehood and sovereignty are largely terminated. This violates the principle of democracy, the rule of law and the principle of a social state, as well as the guarantee of sovereign statehood, and at the same time violates Art. 146 GG, because it

paves the road to a further consolidation of the European Union, while the German people was not given an opportunity to approve this by voting on a new Constitution.

52

b) The ESM Treaty alters the foundations of the European Union. The stability principle applying to monetary policy (Art. 88 sentence 2 GG), which is based in the principle of a social state and laid down in the "debt brake" of Art. 109 sec. 3 and Art. 115 sec. 2 GG, is repealed. Germany shares liability for the debts of foreign countries for an unlimited period of time. The budgets of the Federation and the Laender are bound by the capital share of the European Stability Mechanism and the callable capital to a considerable extent and for an indefinite period of time; so financial and budgetary sovereignty are permanently limited. The Act of Assent to the ESM Treaty also violates the principle of a social state, which can be challenged pursuant to Art. 38 sec. 1 in conjunction with Art. 2 sec. 1 GG and Art. 1 sec. 1 GG, because the social benefits and pension payments for Germans have to be cut. It further violates the right to property under Art. 14 sec. 1 GG, because Germany's obligations will lead to inflationary developments. The European Stability Mechanism is turning into a financial institution with the tasks and powers of a bank, but is not subject to any banking supervision. The purchase of government bonds – directly or indirectly – is incompatible with Art. 123 TFEU and the principle of stability of the monetary union and of the Basic Law.

53

c) The Act of Assent to the TSCG also violates the fundamental right of all citizens to decide on the Constitution of Germany. Art. 4 TSCG obliges Germany to make an annual reduction of debt of EUR 26 billion. This is incompatible with Art. 109 sec. 3, Art. 115 sec. 2, and Art. 143d sec. 1 GG and requires a change of the Basic Law, because the budget law governs only the reduction of deficit, but not the reduction of public debt.

54

d) Likewise, the acts of secondary legislation contained in the so-called Six-pack and the Euro Plus Pact interfere with the complainants' rights under Art. 38 sec. 1 GG, because they introduce an economic government of the European Union over all Member States of the euro currency area. The Federal Republic of Germany thus becomes a constituent state of the federal Union State and loses at the same time its fiscal, financial and economic sovereignty, and thus its sovereignty as a whole. This is not compatible with the current Basic Law; a new Constitution as required by Art. 146 GG has not been passed.

55

e) Finally, the European System of Central Banks violates the sovereignty of the Member States, and thus also the individuals' right to vote, by expanding the money supply, in particular by granting loans at low interest rates while accepting insufficient collateral, and by the TARGET2 system. If necessary, the Federal Government is obliged to initiate proceedings for annulment against these acts at the Court of Justice of the European Union.

56

3. Complainants III. hold that their rights under Art. 38 sec. 1 sentence 1 GG are violated primarily because structural changes in the organisational set-up of the state were enacted with the challenged Acts without the necessary participation of the people.

57

a) Art. 136 sec. 3 TFEU devalues the bail-out prohibition of Art. 125 TFEU, which is vital for the monetary union. This changes the direction of monetary policy and alters the nature of the European Union towards a transfer and liability community without democratic legitimation. Art. 136 sec. 3 TFEU should not have been decided in the simplified revision procedure pursuant to Art. 48 sec. 6 TEU and is therefore contrary to European Union law.

58

b) By approving the ESM Treaty, the German Bundestag divests itself of its budgetary autonomy. The Treaty institutes an automatic liability from which future parliaments will not be able to escape. Art. 3 TESM authorises the European Stability Mechanism to perform acts with unpredictable consequences for the budgets of the Member States. Pursuant to Art. 21 TESM, the European Stability Mechanism is allowed to engage without a banking license in all banking transactions and may also, without any involvement of the parliaments, refinance itself at the European Central Bank. The ESM Treaty would remove from the "stability community" the prohibition of direct acquisition of debt instruments of public institutions by the

European Central Bank and the prohibition of the assumption of liability, which are essential cornerstones of the Economic and Monetary Union.

59

As part of the European Stability Mechanism, Germany engages risks that are not acceptable under the provisions of the Basic Law. Issuing shares above par could cause a leveraging of the funds of the European Stability Mechanism. Art. 8 sec. 5 TESM limits the liability of the Member States inadequately. The limitation of the liability risk is counteracted by the provisions on capital calls and the coverage of losses in Art. 9 and Art. 25 TESM; if a Member State becomes insolvent, the members which are still solvent will have to make higher payments in order to set off the default. In view of the likelihood of such payment shortfalls, the legislature has a margin of appreciation; however, even considering this margin of appreciation and leeway for forecasts, the legislature assumes an unjustifiable liability risk with the European Stability Mechanism. The problematic constitutional effects are reinforced by the fact that the ESM Treaty contains no termination clause. Thus, the Treaty is de facto impossible to terminate; the clausula rebus sic stantibus can only be applied under strict requirements. A unilateral termination by one of the parties to the Treaty does not readily release this party from its obligations under the Treaty; rather, one has to assume that the principle of state responsibility continues to apply.

60

c) The decisions on the acts of the European Stability Mechanism are made in a procedure that is not sufficiently democratically legitimised. The responsibility of the German representatives in the ESM bodies towards parliament, which is only indirect and questionable due to duties of loyalty under international law, is also not balanced by the – itself imperfectly structured – participation of the Bundestag in decisions of the European Stability Mechanism. The Treaty does not contain any valid reservations under international law in favour of the Bundestag. The participation rights regulated in §§ 4 et seq. ESMFinG are insufficient in particular because the specific form of participation depends solely on the Federal Government's assessment of whether in the individual case the overall budgetary responsibility is concerned. Ultimately, the participation rights of the Bundestag can only be imperfectly determined in the accompanying legislation because, given the almost unlimited powers of the European Stability Mechanism, it appears to be impossible from the outset to comprehensively regulate such rights of participation. The provisions on immunity of the ESM Treaty contribute to the fact that the European Stability Mechanism can largely act without democratic monitoring. This is incompatible with Art. 79 sec. 3 GG.

61

The fact that the participation rights of the Bundestag pursuant to the ESM Financing Act do not meet the requirements of the principle of democracy, and that the Bundestag is de facto largely limited to mere subsequent enforcement of decisions that were taken intergovernmentally, is also shown by the procedure on granting financial assistance to the Republic of Cyprus. Neither had the substantive requirements of Art. 12 TESM been proven, nor had the two-stage procedure of Art. 13 TESM been observed. Rather, the German Bundestag was presented at the same time with the findings of the competent institutions on the requirements of financial assistance, the decision on awarding financial assistance, and the memorandum of understanding. Under the prevailing political conditions, the Bundestag was not in a position to insist on compliance with the two-stage procedure. Since this treaty practice can be expected to become established, the Bundestag will end up being permanently confined to the role of subsequently enforcing decisions.

62

d) With a view to both procedure and content, the conclusion of the SCG Treaty violates democratic principles of the European Union. The fact that the Treaty allegedly contains no essential changes of the present state of law is irrelevant. The existing commitments under secondary Union law and under the "debt brake" which is already contained in the Basic Law will acquire a new legal quality as a result of being laid down in international law.

63

Moreover, the SCG Treaty also has constitutive effects. The 0.5% criterion in Art. 3 sec. 1 letter b sentence 1 TSCG creates a stricter requirement for the medium-term budget target than under secondary Union law. Furthermore, in the case of material deviations from the medium-term budget objective or from the adjustment path towards it, an automatic correction mechanism is envisaged which must be based on common principles proposed by the

European Commission with regard to the nature, scope and supervision of the corrective measures to be undertaken.

64

The SCG Treaty also changes the substantive situation under the Constitution, since there is no automatic correction mechanism under the Basic Law. In addition, the states whose total borrowing exceeds the Maastricht criterion of 60% of the gross domestic product will have to undertake cutback measures with the aim of reducing the part over 60% by an average of one-twentieth per year. The actual loss of budgetary sovereignty, however, lies in the fact that the parties that go through an excessive deficit procedure henceforth have to get their "budgetary and economic programs" approved by the European Union. This results in a lasting loss of the Bundestag's legislative discretion. The SKS Treaty is intended to be of a permanent nature and cannot easily be terminated. Democracy, however, means ruling for a limited period of time; whereas the SCG Treaty not only installs permanent mechanisms of supervision and sanction, but also irreversibly determines the economic policy of the contracting parties.

65

4. Complainants IV. believe that the challenged Acts violate their rights under Art. 38 sec. 1 sentence 1 GG in conjunction with Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1 and sec. 2, and Art. 79 sec. 3 GG. They claim that a financial equalisation system is created, with which the threshold to a European federal state is crossed.

66

a) The Act Amending Art. 136 TFEU violates the Constitution because the underlying decision of the European Council is invalid: The new Art. 136 sec. 3 TFEU could not have been decided in the simplified treaty revision procedure because, in effect, it expands the powers of the European Union; plus, its substance violates the bail-out prohibition of Art. 125 sec. 1 sentence 2 TFEU. Finally, in view of the purpose and scope of the authorisation it contains, it also does not meet the requirements of the constitutional principle of definiteness.

67

b) With the ESM Treaty, which is irreversible under international law, the Bundestag divests itself permanently of its responsibility for the budget. In connection with the ESM Financing Act, the Treaty establishes incalculable payment obligations towards a financial institution that is not adequately democratically legitimised, monitored, and linked to parliament. The Bundestag has no autonomy of decision with respect to individual payments anymore, and can in particular no longer invoke a lack of budget. The ESM Treaty also violates the prohibition of automatic liability, since the scope of payment obligations is not completely foreseeable and cannot be sufficiently answered for by the Bundestag. Thus, there is a high probability of obligations to make subsequent contributions pursuant to Art. 25 sec. 2 TESM, since several Member States will most likely not be able to make the payments expected of them. Also, it is not inconceivable that the European Stability Mechanism, which is freely operating on the financial markets, will generate losses through speculation, without the Bundestag being in a position to influence this. Moreover, the European Stability Mechanism as a "free-floating" financial organisation on an intergovernmental basis is not sufficiently democratically legitimised. Only the Finance Ministers as members of the Board of Governors possess – albeit weak – democratic legitimation With regard to acts of the European Stability Mechanism, the German Bundestag is assigned the mere subsequent enforcement of decisions that were taken elsewhere. Given this lack of legitimation, the lack of political and technical monitoring instruments aggravates the situation. It is not clear how the Federal Government can satisfy its duties to provide information pursuant to Art. 23 sec. 2 GG, given the duty of professional secrecy (Art. 34 TESM) imposed on the members of the bodies of the European Stability Mechanism.

68

c) The rules for the participation of the Bundestag under §§ 3 to 7 ESMFinG do not meet the constitutional requirements because the budget committee and not the plenary is involved in many matters important for the overall budgetary responsibility. Moreover, with a view to Art. 23 sec. 1 sentence 3 GG, particularly serious decisions, such as decisions on an increase of capital stock, would require not only a simple but a two-thirds majority in the Bundestag and Bundesrat.

69

d) The SCG Treaty violates the constituent power of the people which is guaranteed by Art. 146 GG. The obligation to never remove the "debt brake" from the Constitution, without,

however, including it in the eternity clause, violates the constitutional identity of the Basic Law. This commitment under international law in shaping the constitutional foundations of the state constitutes a loss of the so-called Kompetenz-Kompetenz (sovereign powers to decide on its own powers). In addition to this, the legislative obligations under the SCG Treaty go far beyond the "debt brake" under constitutional law: A borrowing limit for the state as a whole, including local authorities and social security organisations, an "automatic correction mechanism", the rights of the "independent institution" pursuant to Art. 3 sec. 2 SCG Treaty, and the lack of transitional periods all lead to significantly stricter requirements than those contained in the "debt brake", if the international obligations are complied with. In this respect, Art. 79 sec. 1 GG has been ignored as well.

70

The budgetary autonomy, which is rooted in the principle of democracy, is eroded by Art. 5 SCG Treaty. While this provision does not prescribe that the European Commission must approve budgets, it does require the European Commission to approve budgetary and economic partnership programmes which last for longer than one parliamentary term and are capable of restricting parliament's decision-making options. This goes beyond the existing requirements and possibilities of sanctions under secondary law. The automatic correction mechanism will also result in requirements of the European Commission eroding the structural principles of the state, which are protected under Art. 79 sec. 3 GG in conjunction with Art. 20 GG.

71

Finally, the irreversibility of the obligation violates Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 and Art. 79 sec. 3 GG. According to general rules of public international law, the Treaty cannot be terminated unilaterally.

72

5. To the extent that complainant V. holds on to his request, he contends that the establishment of the European Stability Mechanism endangers the overall budgetary responsibility of the Bundestag. In support of this he argues, inter alia, that there is a danger of Germany losing voting rights in the bodies of the European Stability Mechanism, since, under certain circumstances, callable capital might not be provided in time. Neither a supplementary budget nor an emergency budget pursuant to Art. 112 GG can avert this danger with sufficient certainty. Furthermore, not only changing or unstable majorities in the Bundestag, but also the "debt brake" under Art. 115 GG can stand in the way of a short-term provision of a large amount of capital. In view of the risk of a capital call, the Federal Government and the Bundestag need to make a fact-based analysis and base their budgetary planning on it. However, as far as the Federal Government points out that the provision of capital to reliably prevent an exclusion from voting is incompatible with the principle of efficiency and economy, the protection of the constitutional identity takes precedence. In the alternative, it has at least to be ensured that an effective risk management, the reasoning of which the German Bundestag can follow at any time, is instituted at the European Stability Mechanism, and that the annual financial statements essentially meet the criteria of the German Commercial Code or another well-respected accounting system.

73

The assignment of different decision-making powers to the budget committee pursuant to § 5 sec. 2 sentence 1 no. 1 to no. 4 ESMFinG is also incompatible with the complainant's rights under Art. 38 sec. 1 GG. The Bundestag's right to self-organisation, which is guaranteed by Art. 40 sec. 1 sentence 2 GG, does not allow for an allocation of tasks via a law requiring consent, if the delegated powers, as in this case, are of at least indirect budgetary relevance.

74

Complainant V. also questions the effectiveness under international law of the interpretative declarations on the scope of the Member States' liability that were made as a result of the judgment of 12 September 2012. He argues that in addition to the interpretative declarations – the legal nature and effect of which are unclear –, an amendment of the Treaty that is ratified by all signatories is required in order to ensure the effectiveness of the limitation of liability.

75

6. Complainants VI. claim a violation of their rights under Art. 38 sec. 1 sentence 1 in conjunction with Art. 20 sec. 1 and sec. 2 GG, and under Art. 14 GG.

76

They argue that the challenged Acts violate not only the normative foundations of the European Economic and Monetary Union, but also and in particular the overall budgetary responsibility of the Bundestag. In particular the raising of capital of the European Stability Mechanism is insufficiently regulated; realistically, one has to assume a substantial obligation of the financially stronger Member States to make additional contributions. The European Stability Mechanism creates substantial financial risks, which, in case they are called upon, are no longer eligible for refinancing, and which, together with the other obligations entered into under the sovereign debt crisis, render the budgetary autonomy of the Bundestag largely ineffective. In the long term, the risks that were taken on with the challenged Acts also further inflation.

77

The decision of the Bundestag on the assistance to Cyprus and its preparation by the Federal Government show an example of the limits of fencing in the European Stability Mechanism via constitutional law. With regard to the financial needs and the debt sustainability of the Republic of Cyprus, the Federal Government had, before the Bundestag, only referred to questionable, incomprehensibly reasoned and even contradictory estimates by the so-called "Troika" – a panel devoid of any democratic control – and without having checked these assessments itself. The Bundestag, who had only received the draft with a total of 26 attachments three days before passing the decision, had thus no chance to exercise its overall budgetary responsibility. In addition, it decided on the granting of stability assistance and the negotiated Memorandum of Understanding in a single session; the conditionality in the individual case called for by the Senate is thus threatened to be undermined in practice.

78

Regulation (EU) No 1176/2011 lacks an authorisation under primary law; moreover, it impermissibly affects the inviolable economic and budgetary competence of the Bundestag by establishing a European economic government.

79

7. Applicant VII. believes that the decision of the German Bundestag on the challenged Acts violates its rights under Art. 38 sec. 1 sentence 2 GG and Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1 and sec. 2, as well as Art. 79 sec. 3 GG; the German Bundestag, the applicant submits, is adversely affected in its right to participate in, and being informed about, matters concerning the European Union, which is enshrined in Art. 23 sec. 2 sentences 1 and 2 GG. Its submission corresponds essentially to the submissions of complainant IV. (cf. above n. 65).

80

In addition, applicant VII. inter alia argues that by adopting the resolution on the amendment of Art. 136 TFEU under the simplified procedure, the right of participation of the Bundestag pursuant to Art. 48 sec. 2 sentence 2 GG had been "cancelled".

81

Given the total amount of the guarantees, the establishment of the European Stability Mechanism practically abolishes the budgetary autonomy of the Bundestag for years, perhaps even decades. It should be borne in mind that the "debt brake" of Art. 115 sec. 2 GG prohibits the Bundestag from 2016 onwards to cover budget deficits by borrowing.

82

With regard to the acts of the European Stability Mechanism, the Bundestag ends up, because of the Treaty's structures, in the role of mere subsequent enforcement of decisions that have already been made elsewhere. Neither do the participation rights regulated under the ESM Financing Act meet the constitutional requirements. For instance, pursuant to § 5 sec. 3 ESMFinG, the budget committee is merely "involved" but does not have a veto right in case of capital calls pursuant to Art. 9 sec. 2 and sec. 3 shall TESM; however, considering the potential impact on the budgetary sovereignty of the Bundestag, in such cases a constitutive decision of the plenary is required. Furthermore, §§ 3 to 7 ESMFinG do not ensure that the Bundestag has sufficient influence on individual dispositions and on the way that authorised financial facilities are dealt with.

83

The SCG Treaty violates the institutional rights of applicant VII. under Art. 38 sec. 1 sentence 2 GG because the Bundestag – especially because of the automatic correction mechanism if the credit limit is exceeded – was divested of its overall budgetary responsibility with regard to the use of funds.

IV.

84

The Federal President, the German Bundestag, the Bundesrat, the Federal Government and all Laender governments had the opportunity to submit statements. In the course of the oral hearing, representatives of the European Stability Mechanism, the European Central Bank and the German Bundesbank were heard as expert third parties (§ 27a Federal Constitutional Court Act).

85

1. The Federal Government considers the constitutional complaints and the application in the Organstreit proceedings to be inadmissible, and in any event unfounded.

86

a) According to the Federal Government, Art. 136 sec. 3 TFEU merely clarifies that the assistance measures of the European Stability Mechanism are measures of economic policy, for which the Member States are competent. Art. 136 sec. 3 TFEU does not change the orientation of the monetary union. At the time the primary legislation on the Economic and Monetary Union was drafted, one had not anticipated the situation, or had at least not included it to the necessary extent, that the insolvency of a Member State could endanger the financial stability of the euro currency area as a whole and thus endanger the common currency. Furthermore, the financial assistance measures, which are subject to strict conditionality, are designed as a last resort to ensure the financial stability, and are thus compatible with Art. 125 TFEU.

87

b) The Treaty establishing the European Stability Mechanism meets the requirements set by the Federal Constitutional Court in its judgments of 7 September 2011 and 28 February 2012 for the German participation in international financial assistance mechanisms. The ESM Treaty does not constitute an entry into a transfer union in the sense of a European financial equalisation system; the overall budgetary responsibility of the German Bundestag remains intact and the amount of German liability is limited. This is clearly and bindingly expressed in the declarations under international law that were made following the Senate's judgment of 12 September 2012. The waiver of a veto right for Germany in cases of capital calls pursuant to Art. 9 sec. 2 and sec. 3 TESM is necessary because it safeguards the creditworthiness of the European Stability Mechanism. The domestic protection of the callable capital through "guarantee authorisations" pursuant to Art. 115 sec. 1 GG is consistent with state practice.

88

c) The Federal Government further states that the ESM Financing Act is neither formally nor substantively objectionable.

89

aa) Despite the initially existing placeholder for the participation rights of the Bundestag, the ESM Financing Act is in conformity with the formal requirements of the Constitution, because the draft was otherwise complete. The later addition of the participation rights remains within the limits of permissible amendments during the legislative procedure.

90

bb) The acts of the European Stability Mechanism are sufficiently democratically legitimised on the basis of the ESM Financing Act.

91

(1) In view of the non-definitive nature of § 4 sec. 1 ESMFinG, which subjects all matters of the European Stability Mechanism that relate to the overall budgetary responsibility of the German Bundestag to the consent of the Bundestag's plenary, it is not required to have an express provision regarding the Bundestag's participation for issuing new shares of capital stock of the European Stability Mechanism above par pursuant to Art. 8 sec. 2 sentence 4 TESMV. If, in case of an increase of capital stock pursuant to Art. 10 sec. 1 sentence 2 TESM, the Board of Governors decides to issue new shares above par, it is necessary to have the agreement of the German representative following the prior approval of the Bundestag pursuant to § 4 sec. 1 sentence 2 no. 3 ESMFinG. Moreover, pursuant to Art. 10 sec. 1 sentence 3 TESM, the decision of the Board of Governors itself would only become effective after the conclusion of the national notification procedure, which in Germany requires authorisation by a federal law (Art. 2 sec. 1 TESM). If, however, at the accession of a new member, which requires the approval of the Bundestag, shares of capital stock were issued higher than at par, pursuant to Art. 5 sec. 6 letter k, Art. 44 TESM, the Board of Governors would have to decide on the accession, which would,

pursuant to Art. 10 sec. 3 TESM, lead to an automatic increase in the authorised capital stock. The additional participation of the Bundestag would be unnecessary because the accession would not expand the existing liability of the "old" ESM Members. The issue of new shares at a sales price above par would be without consequences for Germany, since the shares of the former capital stock remained unchanged in terms of value. Thus, neither of the two cases affects the overall budgetary responsibility of the Bundestag, which alone could require an explicit regulation.

92

(2) Special budgetary measures to avoid the application of Art. 4 sec. 8 TESM on Germany and a withdrawal of voting rights due to a missing or delayed fulfilment of a capital call, as requested by the Senate in the decision of 12 September 2012, are not necessary.

93

(a) It is not necessary to have access to the total sum of about EUR 168.3 billion from the outset and permanently in order to ensure the payment of the callable capital. Rather, an amount which seems realistic considering potential losses and payment obligations is sufficient. The terms and conditions of capital calls ("terms and conditions of capital calls for ESM" of 9 October 2012) oblige the European Stability Mechanism to a prudent "risk policy" so as to reduce the risk of capital calls. Moreover, losses of the European Stability Mechanism can only arise if Member States fail to repay the financial assistance they received. Due to different repayment dates, only a partial amount can be affected at any time. It is therefore impossible that a capital call will reach the amount of EUR 168.3 billion. It is not necessary to take precautions for unrealistic scenarios.

94

(b) Even in cases of shorter-term capital calls, which do not allow for consideration under the regular budget preparation procedure pursuant to Art. 110 GG, a loss of voting rights does not need to be feared. Either a supplementary budget or the granting of expenditures in excess of budgetary appropriations or for purposes not contemplated by the budget within the meaning of Art. 112 GG and § 37 of the Federal Budget Code (Bundeshaushaltsordnung – BHO) would be possible. The unforeseen and unavoidable necessity required for such authorisation pursuant to Art. 112 GG would exist. A capital call is unpredictable in this sense, since during the regular budgetary procedure, it was not known that and in which amount it would arise. Due to the existing legal obligation to service the call, the need is also factually irrefutable. A supplementary budget is also not excluded under the requirements of the right to make emergency appropriations and could be approved at very short notice if all participants are willing to do so. In this context it should also be noted that the constitutional obligation to avoid an exclusion of voting rights applies to all constitutional organs involved. Together they are legally and factually in a position to avoid a loss of voting rights.

95

(c) A capital call cannot be expected at any time. In the context of the European Stability Mechanism's risk management, it is envisaged to provide early information on potential losses and the threat of capital calls. A capital call pursuant to Art. 9 sec. 3 TESM with a period of seven days is only envisaged to avert an immediate default; the paid-in capital cannot be "refilled" under this provision. Even in the unlikely event of the failure of several Member States, no subsequent claim in the full amount of all defaulted obligations is to be expected, but only claims in accordance with specific maturities of the European Stability Mechanism in relation to third parties.

96

(d) Art. 9 sec. 2 TESM confers on the Board of Directors discretion for a capital call ("may"), so that one may wait for a decrease in the paid-in capital. A capital call under Art. 9 sec. 3 TESM is extremely unlikely, since losses from operations of the European Stability Mechanism are primarily payable against the reserve fund and paid-in capital and only in the end against the authorised capital. Furthermore, the European Stability Mechanism is obliged to pursue a prudent "risk policy", the very aim of which is to prevent capital calls pursuant to Art. 9 sec. 2 and sec. 3 TESM. Finally, disputed payment obligations on the basis of Art. 9 sec. 2 TESM, possibly in conjunction with Art. 25 sec. 2 TESM, could be fulfilled with the reservation that they might be reclaimed.

97

(e) Theoretically, one cannot exclude the possibility that a call of extremely high amounts would lead to difficulties in the timely procurement of the necessary capital; however, this would then also apply to all other Member States. It is unthinkable and under the point of

view of the international law principle of good faith (Art. 31 VCLT) also inadmissible that such a situation would be exploited by other Member States used in the bodies of the European Stability Mechanism. Overall, one can therefore assume that a loss of voting rights for the Federal Republic of Germany pursuant to Art. 4 sec. 8 TESM is practically impossible.

98

(3) The constitutional complaints are inadmissible to the extent that they challenge the division of tasks between the plenary and the budget committee as envisaged in the ESM Financing Act. Based on Art. 38 sec. 1 GG, the Federal Constitutional Court granted the voters protection against the erosion of the right to vote in the form of a depletion of the Bundestag's responsibilities through the delegation of powers to international or supranational institutions, but it did not grant them the right to take action on behalf of the individual parliamentarians for their rights under Art. 38 sec. 1 sentence 2 GG.

99

These allegations are in any case unfounded. In the judgment of 12 September 2012, the Federal Constitutional Court did not show any fundamental objections to the assignment of less important decisions to the budget committee, especially since § 5 ESMFinG provides the plenary a right to revocation. Pursuant to § 4 sec. 1 sentence 1 ESMFinG, the plenary must act anyway when the overall budgetary responsibility of the Bundestag is affected. Thus it is guaranteed that all major decisions are taken by the plenary. Only in the exceptional constellation of a purchase of government bonds that has to be kept confidential, which has already been recognised by the Federal Constitutional Court in the decision of 28 February 2012 in the proceedings 2 BvE 8/11, the plenary's right of access is dispensed with and, pursuant to § 6 ESMFinG, the decision is transferred to a special committee consisting of members of the budget committee.

100

§ 5 sec. 2 sentence 1 no. 2 ESMFinG, according to which decisions on capital calls pursuant to Art. 9 sec. 1 TESM as well as decisions on the acceptance or material change of the terms and conditions of capital calls pursuant to Art. 9 sec. 4 TESM only require prior approval of the budget committee, but not the plenary, is also unproblematic. The implementing provisions provided for in the ESM Treaty do not constitute regulations with fundamental budgetary importance, because the implementing provisions cannot go beyond the regulations and stipulations of the ESM Treaty. To the extent that the implementation provisions contain, apart from purely technical regulations, also substantive rules, the ESM Financing Act takes this into account through differentiated participation rights: The implementation provisions mentioned in § 5 sec. 2 ESMFinG require approval of the budget committee, whereas the other provisions mentioned in § 5 sec. 3 ESMFinG entail a right to submit a statement and its consideration by the Federal Government, to the extent that the ("simple") budgetary responsibility of parliament is affected. Otherwise, a mere notification is sufficient. Finally, pursuant to § 5 sec. 5 ESMFinG, in case of a special interest or suspected importance for the overall budgetary responsibility, the plenary can assume an issue to itself at any time. Even if implementation provisions can affect the overall budgetary responsibility of the German Bundestag, this need not lead to the unconstitutionality of § 5 sec. 2 no. 2 ESMFinG, because an interpretation of § 4 sec. 1 ESMFinG in conformity with the Constitution would be possible and, in that case, also required.

101

(4) The implementation of the decisions of the Bundestag in the Board of Directors of the European Stability Mechanism is guaranteed by posting a State Secretary to the Board. This is compatible with the ESM Treaty, which does not call for the independence of the Directors. It is unrealistic to assume that a civil servant bound by the instructions of the Ministry of Finance will act contrary to a vote in the German Bundestag.

102

(5) The mere possibility that the German share could be reduced by future developments to the degree that Germany would lose its veto power does at least currently not lead to any interference with the principle of democracy. It is inconceivable that in particular the United Kingdom, whose accession could significantly change the ownership structure, would in the foreseeable future be ready to adopt the euro. Moreover, the introduction of the euro in another state, as well as its subsequent admission in the European Stability Mechanism, requires a unanimous decision of the states of the euro zone.

103

d) With regard to the SCG Treaty, the Federal Government essentially argues that this obliges the parties to engage in greater budgetary discipline and to prevent excessive debt. It does not restrict the budgetary autonomy in an impermissible way, it essentially complies with the constitutional requirements, and puts into specific terms provisions of Union law which already exist. The Treaty guards against excessive public debt and in this way prevents further future sovereign debt crises; in this way it also supplements the ESM Treaty substantively and functionally. The limitation of government borrowing is compatible with the Basic Law, since it only defines a framework to be filled by the Member States and this framework corresponds to the model of the German "debt brake". The proposals which Art. 3 sec. 2 TSCG requires the European Commission to make on common principles for national correction mechanisms and on the time-frame for convergence towards the medium-term budget objective under Art. 3 sec. 1 letter b sentence 3 TSCG are merely interpretation guides putting the provision in specific terms. The indefinite duration of the Treaty is not a violation of the Constitution. A treaty entered into for an indefinite period of time may be terminated at any time by all contracting parties by mutual agreement. In addition, in the case of fundamental changes of circumstances, a party may withdraw from the treaty on the basis of Art. 62 VCLT.

104

2. The German Bundestag considers the constitutional complaints and the application in the Organstreit proceedings to be partly inadmissible, and in any case unfounded.

105

a) The Act of Assent to the European Council decision to amend Art. 136 TFEU does not impair the position of the German Bundestag laid down in the Basic Law. In the unanimous agreement of the Member States of the European Union, Art. 125 TFEU does not prevent the voluntary granting of assistance. Art. 136 sec. 3 TFEU clarifies this once more and is also sufficiently specific. The provision serves to safeguard the stability of the monetary union and specifically does not make it possible to introduce a comprehensive liability and transfer union, but instead gives selective authorisation for assistance measures for a limited period of time in a situation which is sufficiently clearly defined; in addition, it contains strict conditionality. The objection that convention proceedings should have been conducted is mistaken, because Art. 136 sec. 3 TFEU does not expand the competence of the European Union.

106

b) The German Bundestag adds to its submission in the proceedings on a temporary injunction (cf. BVerfGE 132, 195 <227>, n. 73 et seq.) with a view to the European Stability Mechanism:

107

aa) With regard to the accompanying legislation to the European Stability Mechanism, in particular the division of competences between the plenary and the budget committee, the constitutional complaints are inadmissible. There can be no violation of the complainants' rights under Art. 38 sec. 1 in conjunction with Art. 20 sec. 1 and sec. 2 and Art. 79 sec. 3 GG in this context, which means that they are not entitled to lodge a constitutional complaint. Unlike the transfer of sovereign powers to the European Union, the division of responsibilities within the Bundestag cannot erode the substantive content of the right to vote under Art. 38 sec. 1 GG. The organisation of parliament's internal allocation of tasks does not exclude from the democratic process the ensuing decision on the merits. At issue is a process that is reversible at any time, which only concerns the internal workings of a constitutional organ, and which therefore cannot be challenged via a constitutional complaint. An individual right of complaint against the allocation of competences in parliament is also incompatible with the German Bundestag's right to self-organisation.

108

bb) The applications are in any case unfounded.

109

(1) The overall budgetary responsibility of the German Bundestag is not affected by the distribution of competences between the plenary and the budget committee regulated in the ESM Financing Act. For the most important decisions of the European Stability Mechanism, in particular for decisions pursuant to Art. 10 TESM (increase of capital stock) and Art. 13 sec. 2 TESM (decision on the award of grants), the involvement of the plenary is provided. The budget committee is only responsible for the less significant, more technical decisions below the threshold under the Wesentlichkeitsdoktrin (threshold relevant for the requirement of

parliamentary approval). For instance, pursuant to Art. 5 sec. 2 sentence 1 no. 2 ESMFinG, the budget committee has to decide on capital calls under Art. 9 sec. 1 TESM, since this does not create any new obligation, but only fulfils an obligation already created, which the plenary already approved with the Act of Assent to the ESM Treaty and the protection of all changes in capital stock. The same applies to the decision on the regulations and conditions for capital calls pursuant to Art. 9 sec. 4 TESM (§ 5 sec. 2 sentence 1 no. 2 ESMFinG), which are also assigned to the budget committee. These "terms and conditions" only regulate the internal procedures and the method of payment and do not create obligations of the Federal Republic of Germany which go beyond the ones already regulated under the ESM Treaty. Thus, the decision-making powers of the budget committee concern purely operational tasks.

110

The constitutionally recognised role of the budget committee in state practice can also be regarded as an argument in favour of the constitutionality of the allocation of competences under the ESM Financing Act. The tasks of the budget committee – at least in so far as it decides on specific blocking notes (qualifizierte Sperrvermerke) pursuant to § 22 sentence 3 and § 36 sentence 2 BHO – exceed a purely advisory and preparatory function. This is comparable to the present constellation, because in both cases, an expenditure that has already been approved by the plenary is assigned by the committee, but not changed in its democratically legitimised purpose.

111

Finally, as far as internal organisation and procedures are concerned, the margin of appreciation of the German Bundestag has to be respected. It is difficult to imagine how the items requiring approval could be made the subject of political debate in the plenary, since they are ultimately aimed at a monitored and efficient achievement of pre-defined political purposes.

112

Even if § 5 sec. 2 sentence 1 ESMFinG were not compatible with the plenary's responsibility for budgetary policy, the law at least permits an interpretation in conformity with the Constitution. In this respect, one could derive a duty of the plenary arising from Art. 5 sec. 5 ESMFinG to revocate matters, or derive the plenary's competence from the general clause of § 4 sec. 1 sentence 1 ESMFinG. The same ultimately applies to § 5 sec. 2 sentence 1 no. 3 ESMFinG. The decision-making powers referred to in this provision are the expression of a functionally appropriate division of workload between the plenary and the budget committee and do clearly not establish new commitments with regard to the European Stability Mechanism.

113

Overall, the involvement of a democratically legitimised organ in internal procedures of the European Stability Mechanism goes – albeit for good reasons – beyond the standards for parliamentary scrutiny of public financial institutions at the national level. In view of this, it is not convincing to develop this involvement of the experienced budget committee into a reservation for the plenary.

114

(2) The possibility of issuing new shares of the capital of the European Stability Mechanism above par under to Art. 8 sec. 2 sentence 4 TESM is unproblematic with regard to the overall budgetary responsibility, since this does not change the institutional position of the Federal Republic of Germany in the European Stability Mechanism. Pursuant to Art. 4 sec. 7 TESM, the voting rights in the Board of Governors and the Board of Directors are based on the number – and not the value – of the shares which have been allocated to each party to the Treaty pursuant to Annex II of the ESM Treaty. Thus, issuing shares above par cannot affect the weight of the votes. Due to its unequivocal wording, Art. 8 sec. 2 sentence 4 TESM does not apply to the issue of shares of the already authorised capital stock of EUR 700 billion. To the extent that this provision is applicable to subsequently authorised capital, both the decision to increase the authorised capital stock (Art. 10 sec. 1 TESM) and the decision on the value of the newly created shares are the responsibility of the plenary. This is neither an ancillary decision, nor has it been preceded by a decision that has already been discussed and pre-structured in the plenary. As a consequence, decisions on the issue price must be made under § 4 sec. 1 sentence 1 ESMFinG, which has intentionally been phrased by the legislature in such an open way as to make room for necessary plenary decisions. The same should apply to the issue of capital shares after accession of other ESM Members, since the decision on the issue price affects the relative value of the German capital shares and thus

indirectly the overall budgetary responsibility of the Bundestag.

115

(3) The possibility of suspending voting rights pursuant to Art. 4 sec. 8 TESM is also unobjectionable under constitutional law. It is true, though, that the legal implications of a suspension would be considerable, since far-reaching decisions could be taken without the participation of the state concerned.

116

However, Art. 4 sec. 8 TESM of course primarily serves to protect the Member States that meet their obligations under the ESM Treaty. The aim is to protect them from disproportionate burdens. In this respect, Art. 4, sec. 8 TESM protects, as a mechanism of sanctions, among other things especially the overall budgetary responsibility of the Bundestag.

117

Furthermore, it is virtually impossible that Art. 4 sec. 8 TESM will apply to the Federal Republic of Germany. The constitutional and legal framework enables the fulfilment in time of obligations under Art. 8, Art. 9, and Art. 10 TESM and the repayment of financial assistance under Art. 16 or Art. 17 TESM at any time. The measures necessary to raise the paid-in shares pursuant to Art. 8 sec. 2 TESM have already been partly executed or will in any case be carried out. Any further protection under budgetary law is currently not feasible and would also be impracticable. A (precautionary) appropriation in the budget of means that could become the subject of a capital call under Art. 9 TESM is neither intended by Art. 110 GG, nor possible. The uncertainty about when a Member State will get into serious financial problems or when a loss of the European Stability Mechanism that has to be balanced will take place, does not allow for anticipatory budgeting. The budget law allows, however, for responding quickly in case of a capital call, primarily via a supplementary budget pursuant to Art. 110 GG, or – if the deadline for payment is not sufficient for this purpose – on the basis of an authorisation by the Minister of Finance pursuant to Art. 112 GG. The Bundestag will be informed according to established practice. In view of this legislation, no special budgetary precautions are necessary to preclude the application of Art. 8 sec. 4 TESM. Moreover, the liquidity management of the Finance Agency of the Federal Republic of Germany (Finanzagentur GmbH) is so prudent and efficient that the necessary liquidity for capital contributions is available or could in any case be procured on time.

118

Even if a dispute arose between Germany and another Contracting Party or the European Stability Mechanism over whether the requirements of a revocation of voting rights pursuant to Art. 4 sec. 8 TESM exist, the overall budgetary responsibility of the German Bundestag would not be at risk. In case of disputes concerning the interpretation or application of the ESM Treaty, a decision of the Board of Directors is to be brought about first (Art. 37 sec. 1 TESM). Because of the veto position of the German Director, it can be avoided that the Board of Directors holds a violation of the Treaty. As part of a dispute settlement in the Board of Governors pursuant to Art. 37 sec. 2 TESM, a political and diplomatic solution is needed with regard to Art. 37 sec. 2 sentence 2 TESM.

119

c) The conditions of the SCG Treaty do not constitute a curtailment of budgetary sovereignty, but serve to restrict the German liability risk. The Treaty creates no direct legal effects on the budgets of the Member States; such effects are only indirectly created by way of the sanctions. A Budget Act which violates the SCG Treaty does not cease to be legally valid.

120

Due to the federal structure of the Federal Republic of Germany, the Treaty differs in some respects from the “debt brake” in the Basic Law, but these differences do not result in a substantially different legislative concept. The state as a whole, that is, the federal and Laender governments, local authorities and all other public budgets, are subject to this. Sanctions by the institutions of the European Union may be directed solely to the Federal Government; there is no scope for directly accessing Laender or local authorities. The path to debt reduction provided in the Basic Law is defined by Art. 143d sec. 1 GG, while the SCG Treaty leaves it to be put into specific terms by the European Commission. Admittedly, it is not certain that the European Commission will ultimately decide on an identical path to debt reduction to that provided in the Basic Law; however, the Commission has a duty to take into account country-specific risks and in this

respect may orient itself towards the legal position of the Member State in question.

[121] The substantive provisions of the SCG Treaty scarcely add to the number of substantive commitments. The Member States assume the obligations of their own accord and are not compelled to participate, not even de facto. The Treaty arranges for the autonomous enforcement of voluntary agreements entered into under the Treaty and complies with already existing provisions of Union law. It is true that Art. 7 TSCG with its "reverse" rule on a qualified majority is an innovation, but this has no constitutional relevance to the budgetary sovereignty of the national parliaments; the agreement on a particular voting behaviour does not modify the excessive deficit procedure in substance. Nor is there a transfer of substantive legislative powers to other bodies with sovereign power. Art. 8 TSCG merely grants the Court of Justice the power, with regard to compliance with Art. 3 sec. 2 TSCG, to decide legal actions of the Contracting Parties and in the case of a violation to impose a penalty payment on a Contracting Party. Admittedly, the Treaty contains no express provision for termination, but this does not exclude the application of the general rules of termination under international law.

B.

I.

[122] The constitutional complaints are admissible to the extent that the complainants submit that through the Act on the European Council Decision of 25 March 2011 to Amend 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, the Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism, the Act on Financial Participation in the European Stability Mechanism, and the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union, and through insufficient budgetary provision for the case of capital calls, incalculable risks are taken and democratic decision processes are shifted to the supranational or intergovernmental level, so that it is no longer possible for the German Bundestag to exercise its overall budgetary responsibility. They sufficiently substantiate that the German Bundestag's budgetary autonomy is impaired and that their rights under Art. 38 sec. 1, sentence 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG are violated (cf. BVerfGE 132, 195 <234>, n. 91; on the admissibility and requirements for substantiation of this challenge, cf. BVerfGE 129, 124 <167 et seq.>).

II.

[123] With regard to all other aspects, the constitutional complaints are inadmissible. This applies first to the extent that they challenge, with reference to Art. 38 sec. 1 sentence 1 GG, the unconstitutionality of the ESM Financing Act because of a violation of formal requirements for the legislative process, the functional allocation of competences between the plenary, the budget committee and other subsidiary bodies of the Bundestag, and the fact that no two-thirds majority is required; second, this applies to the other challenges of fundamental rights violations made against the Acts mentioned under B.I. (1.). Apart from this, the constitutional complaints are inadmissible to the extent that complainants I. and II. challenge acts and omissions in connection with the TARGET2 system (2.) and the refinancing of commercial banks (3.), and complainants II. and VI. challenge the applicability of certain instruments of secondary legislation of the European Union in the Federal Republic of Germany (4.). This also applies to the extent that complainant V. challenges that it is not precluded that the European Stability Mechanism and the European Central Bank coordinate their actions, and that sufficient risk management and corresponding accounting rules are lacking (5.).

[124] 1. The constitutional complaints are inadmissible to the extent that the complainants challenge, with reference to Art. 38 sec. 1 sentence 1 GG, the unconstitutionality of the ESM Financing Act because of a violation of formal requirements for the legislative process (a), the functional allocation of competences between the plenary of the Bundestag, its committees and other subsidiary bodies (b), and the fact that no two-thirds majority is required (c), and to the extent that they challenge a violation of other fundamental rights than Art. 38 sec. 1 sentence 1 GG by the Acts mentioned under B.I. (d-g).

[125] a) The submission of complainant I. that the ESM Financing Act is unconstitutional because it was not correctly submitted to the German Bundestag is inadmissible because in this respect, he has not set out in a substantiated manner that a fundamental rights position exists whose violation can be challenged with a constitutional complaint (cf. BVerfGE 132, 195 <235>, n. 94). The substantive content of the right to vote is protected by Art. 38 sec. 1

sentence 1 GG only to the extent that it is in danger of being rendered ineffective in an area that is essential for the political self-determination of the people, i.e. if the democratic self-government of the people is permanently restricted in such a way that vital political decisions can no longer be made independently (cf. BVerfGE 89, 155 <172>; 123, 267 <330>; 129, 124 <168>). This substantive protection afforded by Art. 38 sec. 1 sentence 1 GG mostly takes effect in situations in which the competences of the Bundestag are eroded in such a way, is made legally or de facto impossible (cf. BVerfGE 129, 124 <170>). Outside of ultra vires situations (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13 et al. –, juris, n. 53), Art. 38 sec. 1 sentence 1 GG grants a "right to democracy" only in cases in which democratic principles are affected which, pursuant to Art. 79 sec. 3 GG, even the constitution-amending legislature cannot change (cf. BVerfGE 123, 267 <340>; 129, 124 <177>; 132, 195 <238>, n. 104).

[126] b) Apart from this, the constitutional complaints are inadmissible to the extent that complainants I., III., IV., and V. argue that their right to vote is violated because certain acts of the European Stability Mechanism require merely the participation of the budget committee, and not to that of the plenary.

[127] Parliament's internal, functional allocation of responsibilities between the plenary of the Bundestag, its committees, and other subsidiary bodies cannot be challenged with a constitutional complaint.

[128] The allocation of competences within the Bundestag is not generally part of the core of Art. 38 sec. 1 sentence 1 GG, which can be challenged by a constitutional complaint. Democratic minimum requirements within the meaning of Art. 79 sec. 3 GG are also satisfied in case of majority decisions by the budget committee. In Art. 45, Art. 45c, Art. 45d and Art. 53a GG, the Basic Law itself provides for committee decisions in which the committee acts in place of the plenary. Moreover, the exceptional character of a constitutional complaint that is based on Art. 38 sec. 1 sentence 1 GG would be ignored, and the difference to Organstreit proceedings would be blurred, if the democratic core of the right to vote could be invoked to challenge parliament's internal allocation of competences.

[129] c) The constitutional complaint of complainants IV. is also inadmissible to the extent that they submit that in order to safeguard their overall budgetary responsibility, Bundestag and Bundesrat must, pursuant to Art. 79 sec. 2 GG, pass decisions on special measures of the European Stability Mechanism, for instance on an increase of capital stock, by qualified majority. The constitutional complaint gives no plausible reasons for the existence of such a right of the people entitled to vote. Art. 79 sec. 2 GG – also in conjunction with Art. 23 sec. 1 sentence 3 GG – is a provision of objective constitutional law which concerns the formation of opinion within the Bundestag and the Bundesrat (cf. BVerfGE 2, 143 <161>; 90, 286 <341>). Outside of ultra vires situations (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13 et al. –, juris, n. 25), the people entitled to vote, and thus also complainants IV., cannot derive rights from this provision, because the extent of the Bundestag's decision-making competences, thus, the substance of the right to vote, does not depend on the type of majority with which the Bundestag passes its decisions. Apart from this, no fundamental right to the requirement of a qualified majority can be derived from the Bundestag's overall budgetary responsibility. The overall budgetary responsibility of the German Bundestag is generally exercised by debating and passing decisions in the plenary, by the decision on the Budget Act, by statutes with financial effects or by other constitutive decisions of the Bundestag (cf. BVerfGE 130, 318 <347>). Pursuant to Art. 42 sec. 2 sentence 1 GG, this requires the majority of the votes cast, unless the Basic Law provides otherwise. There are no indications that the requirements placed on parliamentary legitimation differ according to the amount of obligations or liability commitments. An increase of the capital stock of the European Stability Mechanism would neither be an amendment of the Basic Law (cf. Art. 79 sec. 1 and sec. 2 GG) nor a transfer of sovereign powers to the European Union that would amend the content of the Basic Law (cf. Art. 23 sec. 1 sentences 2 and 3 in conjunction with Art. 79 sec. 2 GG).

[130] d) To the extent that complainants I., II., and VI. submit that Art. 35 sec. 1 TESM violates the general principle of equality before the law of Art. 3 sec. 1 GG because there is no objective justification for the personal immunity from jurisdiction which is granted to the office-holders of the European Stability Mechanism with regard to their official acts, the complainants themselves suffer no adverse effects from this provision. A violation of Art. 3 sec. 1 GG is impossible from the outset (cf. BVerfGE 63, 255 <265 and266>). In this respect, complainant I. substantively asserts a general right to have the laws enforced

(allgemeiner Gesetzesvollziehungsanspruch), which can be derived neither from the general principle of equality nor from Art. 19 sec. 4 GG or Art. 2 sec. 1 GG (cf. BVerfGE 132, 195 <235>, n. 95).

[131] e) To the extent that complainants II. and VI. claim a violation of their fundamental right under Art. 14 sec.1 GG with regard to inflationary developments as a result of the Treaty establishing the European Stability Mechanism and the accompanying legislation, they have not sufficiently substantiated their challenge. Monetary value is in a particular way related to, and dependent on, the community (BVerfGE 97, 350 <371>; 129, 124 <174>). As a general rule, it is not the Federal Constitutional Court's responsibility to review, in the context of constitutional complaint proceedings, economic and financial policy measures to determine whether there are negative consequences for monetary stability. Such a review may be considered at most in borderline cases of a clear reduction of monetary value through acts of a public authority (cf. BVerfGE 129, 124 <174>). Facts to justify such a review have not been submitted (§ 23 sec. 1 sentence 2, § 92 BVerfGG; cf. BVerfGE 132, 195 <236>; n. 96).

[132] f) Finally, the challenge of complainants II. that their right under Art. 20 sec. 4 GG, which is equivalent to a fundamental right, has been violated, is inadmissible because they are not entitled to make such a challenge. The right to resist any person seeking to abolish the constitutional order is a subsidiary, exceptional right which cannot be asserted in the very proceedings in which a judicial remedy against the alleged abolition of the constitutional order is sought (cf. BVerfGE 89, 155 <180>; 123, 267 <333>; 132, 195 <236>, n. 97).

[133] g) To the extent that the constitutional complaint of complainants IV. is inadmissible with regard to the functional allocation of competences within the German Bundestag and with regard to the majority requirements stipulated in the ESM Treaty Act and the ESM Financing Act, the complaint cannot be reinterpreted to constitute an application for Organstreit proceedings.

[134] Not only when interpreting unclear applications, the Federal Constitutional Court must understand the actual meaning of the relief sought, and bring it to bear as far as this is procedurally possible (cf. BVerfGE 54, 53 <64>; 68, 1 <64>). As a general rule, it is possible to reinterpret a constitutional complaint to constitute an application in Organstreit proceedings. For such a reinterpretation, it is required that the application would be admissible in Organstreit proceedings (cf. BVerfGE 13, 54 <94 and 95>). This is not the case here.

[135] As members of the German Bundestag, the complainants could have submitted in Organstreit proceedings that the challenged Acts violate their parliamentary rights of participation under Art. 38 sec. 1 sentence 2 GG (cf. BVerfGE 64, 301 <313>; 108, 251 <266 and 267>; 118, 277 <320>; 130, 318 <340>). In this respect, however, the application is not sufficiently substantiated. The complainants merely invoke their right to be elected under Art. 38 sec. 1 sentence 1 GG. However, Art. 38 sec. 1 sentence 1 GG is not a legal position that can be asserted in Organstreit proceedings. One cannot challenge the violation of fundamental rights and equivalent rights under these proceedings (cf. BVerfGE 94, 351 <365>; 99, 19 <29>; 118, 277 <320>).

[136] 2. Apart from this, the constitutional complaints are inadmissible to the extent that complainants II. challenge "the establishment of the TARGET2 system" (a) and – together with complainant I. – object to various omissions of German constitutional organs in this regard (b).

[137] a) Complainants II. challenge the "establishment of the TARGET2 system" because, as they argue, its implementation is not covered by Union law, and because it entails dangers to the overall budgetary responsibility of the Bundestag. It remains unclear, however, whether they object to the Guideline of the European Central Bank of 26 April 2007 on a Trans-European Automated Real-time Gross settlement Express Transfer system (TARGET2) ECB/2007/2 (OJ L 237 of 8 September 2007, p. 1), amended by the Guideline of the European Central Bank of 7 May 2009 ECB/2009/9 (OJ L 123 of 19 May 2009, p. 94) and by Guideline ECB/2009/21 of 17 September 2009 (OJ L 260 of 3 October 2009, p. 31) (aa), or whether the application is directed against the actual implementation of the system (bb). This, however, need not be decided because the constitutional complaint is inadmissible in both cases.

[138] aa) If the constitutional complaint is interpreted as being directed against Guideline ECB/2007/2, it has, at any rate, been filed too late (§ 93 sec. 3 BVerfGG). It is true that the Guideline from 2007 was most recently amended by the Guideline of the European Central Bank of 5 December 2012 on a Trans-European Automated Real-time Gross

settlement Express Transfer system (TARGET2) (recast) ECB/2012/27 (OJ L 30 of 30 January 2013, pp. 1 et seq.). According to the first recital of the Guideline, the amendments mainly concern information sharing in the System of European Central Banks and the possibility of sanctions against banks. Since it has neither been submitted nor is apparent that the amendment has established a cause of complaint for the complainants (cf. BVerfGE 79, 1 <14>; 122, 63 <74 et seq.>; 129, 208 <235>), the adoption of the amendment could not re-set the time-limit for lodging a constitutional complaint, which has expired since the last amendment in October 2010.

[139] bb) To the extent that the constitutional complaint is supposed to challenge the implementation of the TARGET2 Guideline, it is inadmissible as well because complainants II. have not sufficiently substantiated (§ 23 sec. 1 sentence 2, § 92 BVerfGG) that their own rights have been violated (cf. BVerfGE 123, 267 <329> with further references). The TARGET2 system serves as technical settlement of cross-border payment transactions. The German Bundesbank describes it as payment system of the central banks of the Eurosystem for the settlement of urgent transfers in real time, in which credit institutions settle their payment transactions for a fixed monthly fee via a single platform. TARGET2 balances arise when cross-border transactions are netted out every day. They constitute claims or liabilities vis-à-vis the European Central Bank. The complainants have not shown how and to what extent the implementation of the TARGET2 system could impair the overall budgetary responsibility of the German Bundestag, and thus their rights under Art. 38 sec. 1 sentence 1 GG.

[140] b) To the extent that complainant I., with regard to the TARGET2 system, objects to the Federal Government's failure to work towards the limitation of the TARGET2 balances with regard to their amount, their settlement at regular intervals and their reduction, and objects to the failure to work towards a change of the legal framework of the System of European Central Banks in the sense that the percentage of the money created by a national central bank may not exceed its share in the capital of the European Central Bank, he has not sufficiently substantiated a possible violation of Art. 38 sec. 1 sentence 1 GG by the inactivity he challenges. In this respect, he merely submits that the TARGET2 system, due to a constructional fault of the monetary union, has evolved into a mechanism which is tantamount to accepting liability for decisions made by foreign states, and which violates the principle of democracy because the existing TARGET2 balances considerably impair the Federal Republic of Germany's decision-making power, for instance with regard to exiting the euro currency area. He does not submit, however, why the formation of balances is tantamount to a liability mechanism within the meaning of the Federal Constitutional Court's case-law, and how and to what amount liability risks arise to the Federal Republic of Germany due to the alleged mechanism.

[141] This applies mutatis mutandis to the extent that complainants II. request a declaration that the Federal Government's failure to bring annulment proceedings pursuant to Art. 263 sec. 1 and sec. 2 TFEU before the Court of Justice of the European Union against the TARGET2 system violates Art. 38 sec. 1 in conjunction with Art. 20 sec. 1 and sec. 2, Art. 79 sec. 3 GG. However, complainants II. also submit that the uncorrected continuation of the TARGET2 system constitutes a legislative instrument that transgresses the limits conferred upon European agencies and institutions (ausbrechender Rechtsakt), an instrument which is incompatible with the principle of conferral of European Union law, and which therefore lacks democratic legitimation. In this context, however, there are no submissions as to what extent the European System of Central Banks, by allegedly not reducing or compensating, at regular intervals, excessive TARGET balances that result from some central banks' lending operations, acts outside its mandate in legal terms, and not only from a specific economic perspective. For this reason the submission does not give occasion to examine the question to what extent the obligations to act which were developed in the Senate decision of 14 January 2014 (2 BvR 2728/13 et al.) from the responsibility with respect to integration (Integrationsverantwortung) could in this context be significant.

[142] 3. The constitutional complaint of complainants II. is also inadmissible to the extent that it challenges measures of the European Central Bank in connection with the refinancing of commercial banks.

[143] The complainants' submission does not satisfy the minimum requirements of substantiation of a constitutional complaint (§ 23 sec. 1 sentence 2, § 92 BVerfGG). The complainants merely allege in general terms that the European Central Bank accepts unsuitable collaterals.

[144] 4. Finally, the constitutional complaints of complainants II. and VI. are inadmissible to the extent that they challenge the application of

certain secondary legislation of the European Union and of the Euro Plus Pact in the Federal Republic of Germany.

[145] a) Complainants II. submit that the legislative instruments of the so-called Six-pack (cf. n. 19 above) transgress the competences conferred upon European agencies and institutions, i.e. that they are ausbrechende Rechtsakte within the meaning of the Federal Constitutional Court's case-law, because they establish an economic government of the European Union and thus constitute an important element of a Federation. The complainants further argue that the measures erode at the same time the Germans' right to vote because the voters can no longer determine their economic fate.

[146] In this submission, complainants II. do not state that their right to vote pursuant to Art. 38 sec. 1 sentence 1 GG has been violated by an interference with the constitutional identity protected under Art. 79 sec. 3 GG or by a failure of German state organs to react to qualified ultra vires acts (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13, 2 BvR 2729/13, 2 BvR 2730/13, 2 BvR 2731/13, 2 BvE 13/13 –). The general allegation that the six acts of secondary legislation of the Six-pack establish an economic government of the European Union neither suffices to substantiate that the right to vote is eroded because the German Bundestag loses indispensable powers to decide, nor to substantiate a possible right to a declaration that the European Union acted ultra vires. Complainants II. neither address the details of the regulations which they challenge, nor do they deal with the fact that the regulations closely follow Art. 126 TFEU and corresponding state practice. Moreover, beyond the allegation that the European Union establishes an "economic dictatorship", they do not submit anything tangible with regard to consequences that can be expected of the acts that are combined in the Six-pack. In particular, it remains unclear why the implementation of the challenged regulations could prevent the German Bundestag from taking independent economic policy decisions.

[147] b) To the extent that complainants VI. challenge Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, they do not sufficiently substantiate a possible violation of Art. 38 sec. 1 sentence 1 GG either. The challenge that its legal basis (Art. 121 sec. 6 TFEU) is incorrectly chosen, which curtails essential rights of the German Bundestag, is not sufficient for this. In particular, they did not explain which of the German Bundestag's rights to participation and to being informed are allegedly violated.

[148] c) The application of complainants II. for a declaration that their rights have been violated by the Euro Plus Pact is just as unsubstantiated. They regard the Euro Plus Pact as an ausbrechender Rechtsakt which contributes, and is intended to contribute, to developing the European Union into a Federation. It cannot be inferred from the submission how the Euro Plus Pact, which provides no sanctions (cf. BVerfGE 131, 152 <224 and 225>), and which apart from this is referred to as "eyewash" by complainants II., might nevertheless take away competences from the German Bundestag to an extent that affects Art. 38 sec. 1 sentence 1 GG. By using mostly economic arguments, complainants II. merely substantiate why, in their view, the Euro Plus Pact is another step on the way to a "debt and financial union" that is incompatible with the sovereignty of the German people.

[149] 5. Apart from this, the constitutional complaint of complainant V. is inadmissible to the extent that he submits that a coordinated action of European Stability Mechanism and European Central Bank is not precluded (cf. on this BVerfG, decision of the Second Senate of 12 September 2012 – 2 BvR 1390/12 et al. –, juris), and that sufficient risk management, and corresponding accounting rules, have not been created for the European Stability Mechanism. It is not discernible how this alone could erode the complainant's right to vote under Art. 38 sec.1 sentence 1 GG.

III.

[150] 1. The application in Organstreit proceedings is only admissible to the extent that applicant VII. asserts that through the challenged Acts, the German Bundestag divests itself of its overall budgetary responsibility; as a parliamentary group of the German Bundestag, it is entitled to make such an application (Art. 20 sec. 1 and sec. 2, Art. 23 sec. 1, Art. 110 GG, cf. BVerfGE 123, 267 <338 and 339>; 132, 195 <237>, n. 102).

[151] 2. To the extent that applicant VII. submits that its right under Art. 38 sec. 1 sentence 2 GG to participate in a Convention pursuant to the regular treaty revision procedure under Art. 48 sec. 2 to 5 TEU was violated in connection with the Act on the European Council Decision of 25 March 2011 to Amend Article 136 of the TFEU, the application is inadmissible because the applicant did not

substantiate the violation of the right, as required by § 64 sec. 1 BVerfGG (cf. BVerfGE 132, 195 <237>, n. 101).

[152] 3. Neither has applicant VII. substantiated the possibility of the violation of a right to the extent that the applicant challenges the functional allocation of competences between budget committee and plenary, which is stipulated in the ESM Financing Act. Allocating decision-making powers to a committee of the German Bundestag can violate neither rights of a parliamentary group (a) nor rights of the German Bundestag which the parliamentary group could assert through representative action (b).

[153] a) Parliamentary groups in the German Bundestag are associations of parliamentarians; just as the status of the parliamentarians, their legal position can be derived from Art. 38 sec. 1 GG (cf. BVerfGE 70, 324 <362 and 363>; 112, 118 <135>). Accordingly, the parliamentary groups have a right to equal participation in the formation of political opinion, which derives from Art. 38 sec. 1 GG (cf. BVerfGE 84, 304 <325>; 96, 264 <278>; 112, 118 <133>); the principle of equal treatment of parliamentary groups applies (cf. BVerfGE 93, 195 <204>). Equal participation of the parliamentary groups in the formation of parliamentary opinion is secured, inter alia, by the constitutional principle of Spiegelbildlichkeit (mirror image). This principle takes effect when the Bundestag does not exercise its constitutional role as a representative organ by the participation of all its members (cf. BVerfGE 80, 188 <218>; 130, 318 <342>). According to the principle of Spiegelbildlichkeit, every subsidiary body of the Bundestag must be a microcosm of the plenary and its composition must mirror the composition of the plenary in its political distribution (cf. BVerfGE 80, 188 <222>; 112, 118 <133>; 130, 318 <354>).

[154] aa) With a view to the functional allocation of competences within parliament, the right of a parliamentary group to be treated equally to the other groups is, however, satisfied if, pursuant to § 12 of the Rules of Procedure of the Bundestag (Geschäftsordnung des Deutschen Bundestages – GOBT), the composition of a committee corresponds to the distribution of the groups represented in the plenary, and if the principle of the mirror image has been adhered to (cf. BVerfGE 112, 118 <133>; 130, 318 <353 and 354>). In this context, no further rights for the groups arise from Art. 38 sec. 1 GG. Allocating decision-making powers to the budget committee as stipulated in the ESM Financing Act does therefore not affect the constitutional rights of complainant VII.

[155] bb) Complainant VII. cannot enforce the rights of its members that are affected by this allocation via representative action either. Every delegation of obligations and powers to a subsidiary body of parliament affects the right of the parliamentarians who are not part of this body to equally participate in the legitimation and monitoring of public authority as representatives of the people as a whole (Art. 38 sec. 1 sentence 2 GG). This, however, can only be asserted by the very members of parliament who are affected. Moreover, representative action by the parliamentary group would contradict the principle of the free mandate. Such representative action would allow that exercising the rights of a member of parliament would not depend on the individual member's decision taken in accordance with his or her conscience, but on a majority decision of the political group, or even on a decision by the parliamentary group's leadership (cf. regarding the position of the members of parliament in relation to the parliamentary groups BVerfGE 10, 4 <14>; 114, 121 <150>; Badura, in: Bonner Kommentar, vol. 7, Art. 38 n. 89, 91 <February 2008>; Klein, in: Maunz/Dürig, GG; Art. 38 n. 201 <October 2010>; Magiera, in: Sachs, GG, 6th ed. 2011, Art. 38 n. 49; Trute, in: v. Münch/Kunig, GG, vol. 1, 6th ed. 2012, Art. 38 n. 89, each with further references).

[156] b) Neither does allocating a parliamentary obligation to a committee violate a right of the German Bundestag which the applicant could assert on its behalf via representative action, even if the allocation did not satisfy the constitutional requirements (cf. BVerfGE 130, 318 <350 et seq.>) and therefore violated the principle of democracy. The principle of democracy, which is protected by Art. 20 sec. 1 and sec. 2 GG, is not a right of the German Bundestag, not even to the extent that Art. 79 sec. 3 GG declares it inviolable (cf. BVerfGE 123, 267 <339>). There is no room for Organstreit proceedings in this context because the purpose of this type of proceedings is to interpret the Basic Law if disputes arise about the rights and obligations of constitutional organs. Organstreit proceedings serve the mutual delimitation of competences of the constitutional organs, or parts thereof, under constitutional law; they do not serve to review whether an organ's specific acts independent of this are in accordance with the Constitution (cf. BVerfGE 68, 1 <69 et seq.>; 73, 1 <30>; 104, 151 <193 and 194>; 123, 267 <339>).

[157] Finally, the application is inadmissible to the extent that applicant VII. asserts with regard to the ESM Financing Act, that particularly important measures of the European Stability Mechanism, such as increases of the capital stock, require, due to their importance for the overall budgetary responsibility, the approval of two thirds of the Members of Bundestag and Bundesrat pursuant to Art. 23 sec. 2 in conjunction with sec. 1 sentences 1 and 3 and Art. 79 sec. 2 GG. This allegation contains no claim that the applicant's own rights, or rights of the German Bundestag that can be asserted in Organstreit proceedings, have been violated. Art. 79 sec. 2 GG – also in conjunction with Art. 23 sec. 1 sentence 3 GG – is a provision of constitutional law that concerns the formation of opinion within the Bundestag and the Bundesrat and does not entail specific rights for constitutional organs (cf. BVerfGE 2, 143 <161>; 90, 286 <341>). Outside of ultra vires situations (cf. BVerfG, decision of the Second Senate of 14 January 2014 – 2 BvR 2728/13 et al. –, juris, n. 25), it therefore does not grant applicant VII. any rights of its own, or derived rights, because the extent of the rights of the parliamentary groups and of the Bundestag does not depend on the type of majority with which the Bundestag takes its decisions.

C.

[158] To the extent that they are admissible, the constitutional complaints and the Organstreit proceedings are unfounded. However, considering its assent to Art. 4 sec. 8 of the Treaty establishing the European Stability Mechanism, the legislature is obliged to make comprehensive arrangements under budgetary law to ensure that the Federal Republic of Germany can fully and in time meet capital calls that are made according to the Treaty establishing the European Stability Mechanism.

I.

[159] As a right that is equal to a fundamental right, the right to vote, which is protected by Art. 38 sec. 1 GG, guarantees the self-determination of the citizens and guarantees free and equal participation in the exercise of public power in Germany (cf. BVerfGE 37, 271 <279>; 73, 339 <375>; 123, 267 <340>). >). Its guarantees include the principles of the requirement of democracy within the meaning of Art. 20 sec. 1 and sec. 2 GG; Art. 79 sec. 3 GG protects these principles as the identity of the Constitution even against interference by the constitution-amending legislature (BVerfGE 132, 195 <238>, n. 104; cf. also BVerfGE 123, 267 <340>; 129, 124 <177>). In view of this, the legislature must take sufficient measures to be able to permanently meet its responsibility with respect to integration (1.). In particular, it may not relinquish its right to decide on the budget (2.).

[160] 1. The Basic Law not only prohibits the transfer of Kompetenz-Kompetenz to the European Union or to institutions created in connection with the European Union (cf. BVerfGE 89, 155 <187 and 188, 192, 199>; cf. also BVerfGE 58, 1 <37>; 104, 151 <210>; 123, 267 <349>; 132, 195 <238>, n. 205). The German constitutional organs may not grant blanket empowerments for the exercise of public authority either (cf. BVerfGE 58, 1 <37>; 89, 155 <183 and 184, 187>; 123, 267 <351>; 132, 195 <238>, n. 105). Dynamic treaty provisions therefore must be interpreted in a manner that respects the Integrationsverantwortung and must therefore be made contingent on suitable safeguards for the effective exercise of this responsibility. For borderline cases of what is still constitutionally permissible, the legislature must, where necessary, make effective arrangements in the legislation that accompanies the Act of Assent to ensure that there is enough room for its responsibility with respect to integration (BVerfGE 123, 267 <353>; 132, 195 <239>, n. 105).

[161] 2. Art. 38 sec. 1 GG is violated in particular if the German Bundestag relinquishes its budgetary responsibility with the effect that it or a future Bundestag can no longer exercise the right to decide on the budget on its own (BVerfGE 129, 124 <177>; 132, 195 <239>, n. 106). Deciding on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself (cf. BVerfGE 123, 267 <359>; 132, 195 <239>, n. 106). The German Bundestag must therefore make decisions on revenue and expenditure with responsibility to the people. In this context, the right to decide on the budget is a central element for shaping opinions in a democratic society (cf. BVerfGE 70, 324 <355 and 356>; 79, 311 <329>; 129, 124 <177>; 132, 195 <239>, n. 106), which must also be adhered to in a system of intergovernmental governing (a). The budget autonomy of the national parliaments is safeguarded through arrangements in European Union law (b), and is not questioned by the Member States' commitment to a particular fiscal policy (c). There might be a transgression of an ultimate limit of payment obligations and liability commitments that follows directly from the Basic Law's principle of democracy if the budget autonomy is not merely restricted but

suspended at least for a considerable period of time (d).

[162] a) As representatives of the people, the elected members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental governing. By being open to international cooperation and European integration, the Federal Republic of Germany binds itself not only legally, but also with regard to fiscal policy. Even if such commitments assume a substantial size, parliament's right to decide on the budget is not necessarily infringed in a way that could be challenged with reference to Art. 38 sec. 1 GG. However, the principle of democracy requires that the German Bundestag remains the place in which autonomous decisions on revenue and expenditure are made, including those with regard to international and European liabilities (cf. BVerfGE 129, 124 <177>; 130, 318 <344>; 131, 152 <205 and 206>; 132, 195 <239 and 240>, n. 107). If essential budget questions relating to revenue and expenditure were decided without the constitutive approval of the German Bundestag, or if supranational legal obligations were created without a corresponding decision of the Bundestag, parliament would find itself in a role of mere subsequent enforcement and could no longer exercise its overall budgetary responsibility as part of its right to decide on the budget (BVerfGE 129, 124 <178 and 179>; 130, 318 <344 and 345>; 132, 195 <240>, n. 107).

[163] aa) The German Bundestag may not transfer its budgetary responsibility to other entities through imprecise budgetary authorisations. The larger the financial amount of the liability commitments or of commitment appropriations, the more effectively structured the German Bundestag's rights to approve and to refuse and its right to monitor must be. In particular, the German Bundestag may not submit itself to financially significant mechanisms which – whether through their overall conception or an overall evaluation of the individual measures – can result in incalculable burdens on the budget, be they expenses or losses of revenue, without first having given its constitutive consent. This prohibition of the relinquishment of budgetary responsibility does not impermissibly restrict the budgetary competence of the legislature, but specifically aims to preserve it (cf. BVerfGE 129, 124 <179>; 132, 195 <240>, n. 108).

[164] bb) A necessary condition for safeguarding political autonomy within the identity core of the Constitution (Art. 20 sec. 1 and sec. 2, Art. 79 sec. 3 GG) is that the legislature makes its decisions on revenue and expenditure independent of Union institutions and of other Member States of the European Union, and that it remains permanently "the master of its decisions" (cf. BVerfGE 129, 124 <179 and 180.>; 132, 195 <240>, n. 109). Admittedly, it is primarily the duty of the Bundestag itself to decide up to which amount financial guarantees are justifiable, while balancing current needs against the risks of medium- and long-term guarantees (cf. BVerfGE 79, 311 <343>; 119, 96 <142 and 143>; 132, 195 <240 and 241>, n. 109). But it follows from the democratic basis of budget autonomy that the Bundestag may not consent to an intergovernmentally or supranationally agreed automatic guarantee or performance which is not subject to strict requirements and whose effects are not limited, and which – once it has been set in motion – is removed from the Bundestag's control and influence (BVerfGE 129, 124 <180>; 132, 195 <241>, n. 109).

[165] cc) Moreover, no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions of other states, above all if they entail consequences which are hard to calculate. The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level that was made in solidarity and results in expenditure. Insofar as supranational agreements are entered into, which due to their scale may be of structural significance for parliament's right to decide on the budget, for example by giving guarantees the honouring of which may endanger budget autonomy, or by participating in similar financial safeguarding systems, not only does every individual disposal require the Bundestag's approval; it must also be ensured that there is sufficient parliamentary influence on the way the funds provided are used (BVerfGE 132, 195 <241>, n. 110; cf. also BVerfGE 129, 124 <180 and 181>). The Integrationsverantwortung of the German Bundestag regarding the transfer of competences to the European Union (cf. BVerfGE 123, 267 <356 et seq.>) finds its counterpart in this reasoning for budget measures of equal weight (BVerfGE 129, 124 <181>; 132, 195 <241>, n. 110).

[166] dd) The German Bundestag cannot exercise its overall budgetary responsibility without receiving sufficient information concerning the decisions with budgetary implications for which it is accountable. The principle of democracy under Art. 20 sec. 1 and sec. 2 GG therefore requires that the German Bundestag is able to have access to the

information which it needs to assess the relevant background and consequences of its decision (cf. only Art. 43 sec. 1, Art. 44 GG as well as BVerfGE 67, 100 <130>; 77, 1 <48>; 110, 199 <225>; 124, 78 <114>; 131, 152 <202 and 203>; 132, 195 <241 and 242>, n. 111). This principle not only applies in national budget law (cf. for instance Art. 114 GG), but also in matters concerning the European Union (cf. Art. 23 sec. 2 sentence 2 GG; cf. BVerfGE 132, 195 <242>, n. 111).

[167] b) Since the third stage of the Economic and Monetary Union has started, the German Bundestag's overall budgetary responsibility is safeguarded by the provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union. These provisions do not conflict with national non-relinquishable budget autonomy as an essential competence of the parliaments of the Member States which enjoy direct democratic legitimation, but require it (cf. in detail BVerfGE 132, 195 <243>, n. 114 et seq.).

[168] c) Notwithstanding the principle of democracy under Art. 20 sec. 1 and sec. 2 GG, which aims at general legal reversibility, it is not from the outset anti-democratic for the budget-setting legislature to be bound by a particular budget and fiscal policy (cf. BVerfGE 79, 311 <331 et seq.>; 119, 96 <137 et seq.>; 132, 195 <244 and 245>, n. 119 and 120) (aa). This can, in general, also take place by transferring essential budgetary decisions to bodies of a supranational or international organisation, or by the assumption of corresponding obligations under international law (bb). It is primarily for the legislature to decide whether and to what extent this is sensible (cc).

[169] aa) By putting into specific terms and objectively tightening the rules for borrowing for federal and Laender governments (in particular Art. 109 sec. 3 and sec. 5, Art. 109a, Art. 115 GG (new), Art. 143d sec. 1 GG) the constitution-amending legislature made clear that a constitutional commitment on the part of the parliaments and thus a palpable restriction of their budgetary power to act may be necessary precisely in order to preserve the democratic power to shape affairs in the long term (cf. BVerfGE 129, 124 <170>). Even if such a commitment restricts democratic legislative discretion in the present, it guarantees it for the future. Admittedly, even a worrisome long-term development of the level of debt is not a constitutionally relevant impairment of the legislature's power to decide on fiscal policy at its discretion, and dependent on the situation. Nevertheless, this results in a de facto constriction of discretion (cf. BVerfGE 119, 96 <147>). To avoid such a constriction is a legitimate aim of the (constitutional) legislature (BVerfGE 132, 195 <245>, n. 120).

[170] bb) The commitment of the budget-setting legislature to a particular budget and fiscal policy may generally also be made under European Union or international law.

[171] (1) The requirements for sound budget management contained in the Treaty on the Functioning of the European Union (Art. 123 to Art. 126, Art. 136 TFEU) restrict the national legislature's discretion in exercising its overall budgetary responsibility. A similar situation – assuming that it complies with primary law, which is not the task of the present decision to examine – applies to secondary European Union legislation (cf. in detail BVerfGE 132, 195 <245 and 246>, n. 122).

[172] (2) Apart from this, the Member States are free to enter into further commitments beyond the existing fiscal and budgetary commitments of European Union law, to the extent that they do not conflict with the requirements of European Union law (cf. Art. 4 sec. 3 TEU). The Federal Republic of Germany may therefore introduce stricter domestic rules for its budget policy and enter into treaties to this effect (cf. BVerfGE 129, 124 <181 and 182>; 132, 195 <246>, n. 123).

[173] cc) In this context, it is primarily for the legislature to weigh whether and to what extent, in order to preserve some discretion for democratic management and decision-making, one should enter into commitments regarding future spending behaviour and therefore – correspondingly – accept a restriction of one's discretion for democratic management and decision-making in the present. In this context, the Federal Constitutional Court may not with its own expertise usurp the place of legislative bodies, which are first and foremost entrusted with this (BVerfGE 129, 124 <183>). However, it must ensure that the democratic process remains open and that legal re-evaluations may occur on the basis of other majority decisions (cf. BVerfGE 5, 85 <198 and 199>; 44, 125 <142>; 123, 267 <367>) and that an irreversible legal prejudice to future generations is avoided (BVerfGE 132, 195 <246 and 247>, n. 124).

[174] d) So far, the Senate has not had to decide whether and to what extent a limit of the assumption of payment obligations or of liability commitments can be derived directly from the principle of democracy. An ultimate

limit following directly from the principle of democracy could only be exceeded if payment obligations and liability commitments took effect in such a way that the budget autonomy was not merely restricted, but suspended for at least a considerable period of time. This could only happen in case of a manifest overstepping of ultimate limits (cf. BVerfGE 129, 124 <182 and 183>; 132, 195 <242>, n. 112).

[175] When examining whether the amount of payment obligations and liability commitments will result in the Bundestag relinquishing its budget autonomy, the legislature has a wide margin of appreciation, in particular with regard to the risk of the payment obligations and liability commitments being called upon, and with regard to the consequences that can be expected for the budget-setting legislature's legislative discretion; the Federal Constitutional Court must generally respect this. The same applies to assessing the future soundness of the federal budget and the Federal Republic of Germany's economic performance capacity (cf. BVerfGE 129, 124 <182 and 183>), including considering the consequences of alternative actions (BVerfGE 132, 195 <242 and 243>, n. 113).

II.

[176] According to these standards, the constitutional complaints and the Organstreit proceedings are unsuccessful. There are no objections under constitutional law against the Act on the European Council Decision of 25 March 2011 to Amend 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 (1.). However, the legislature is obliged to ensure comprehensively that the Federal Republic of Germany can fully and in time meet capital calls made pursuant to Art. 9 TESM, if necessary in conjunction with Art. 25 TESM. (2.). To the extent that they have been admissibly challenged in the present proceedings, the provisions on the integration of the German Bundestag in the decision processes of the European Stability Mechanism, which follow from the Act on the Treaty Establishing the European Stability Mechanism and the ESM Financing Act, are ultimately also compatible with the constitutional requirements. (3.). Finally, there are no constitutional objections against the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (4.).

[177] 1. The Act on the European Council Decision of 25 March 2011 to Amend 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 does not violate the rights of the complainants and of applicant VII. under Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG. In particular, Art. 136 sec. 3 TFEU does not lead to a loss of the German Bundestag's budget autonomy (a). Art. 136 sec. 3 TFEU is sufficiently precise (b).

[178] a) Art. 136 sec. 3 TFEU violates neither the principle of democracy (aa) nor other constitutional requirements regarding the design of the monetary union (bb).

[179] aa) Art. 136 sec. 3 TFEU neither starts a mechanism with financial effect, nor does it transfer budgetary authorisations to other actors. Art. 136 sec. 3 TFEU merely enables the Member States of the euro currency area to establish a stability mechanism to grant financial assistance on the basis of an international agreement; to this effect, Art. 136 sec. 3 TFEU confirms that the Member States remain the masters of the Treaties. How far the specific structure of the European Stability Mechanism itself, which was established on the basis of Art. 136 sec. 3 TFEU, satisfies constitutional requirements does not affect the relevant question whether the German Bundestag was entitled to consent to the introduction of Art.?136 sec. 3 TFEU, while preserving the core area protected by Art.?79 sec. 3 GG (cf. in detail BVerfGE 132, 195 <249 and 250>, n. 131 et seq.).

[180] bb) Though, compared to the understanding of the Treaties with which Germany had participated in the foundation of the Economic and Monetary Union, the introduction of Art. 136 sec. 3 TFEU and the establishment of the European Stability Mechanism constitute indeed a fundamental reshaping of the existing Economic and Monetary Union, because it detaches its concept, albeit to a limited extent, from the principle of independence of the national budgets which had characterised it before (cf. on this BVerfGE 129, 124 <181 and 182>; 132, 195 <248>, n. 128; cf. however ECJ, Judgment of 27 November 2012, Case C-370/12 – Pringle –, n. 73 et seq.), this does not mean that the stability-directed orientation of the Economic and Monetary Union is abandoned. Parts of the monetary union which are essential under constitutional law (cf. BVerfGE 89, 155 <205>; 97, 350 <369>; 129, 124 <181 and 182>; 132, 195 <248>, n. 129), such as the independence of the European Central Bank (cf. Art. 130 TFEU),

its commitment to the paramount goal of price stability (cf. Art. 127 TFEU), and the prohibition of monetary financing of the budget (Art. 123 TFEU), are unaffected. Art. 136 sec. 3 TFEU does not release the Member States from the obligation of budgetary discipline (cf. Art. 126, Art. 136 sec. 1 TFEU), and apart from this, it has clearly been designed as an exceptional provision (cf. BVerfGE 132, 195 <248 and 249>, n. 129).

[181] Considering the competent constitutional organs' margin of appreciation, the Federal Constitutional Court must, in general, respect the decision of the legislature to supplement the monetary union with the option of active stabilisation measures, and the associated prognosis that such acts can guarantee and further develop the stability of the monetary union (cf. BVerfGE 89, 155 <207>; 97, 350 <369>); it must also respected that on the basis of this decision, risks to price stability cannot be ruled out (cf. BVerfGE 132, 195 <249>, n. 130).

[182] b) Art. 136 sec. 3 TFEU is also sufficiently precise. The provision does not transfer any sovereign powers. It merely determines the use of the stability mechanism, imposes restrictive conditions on it, and taken by itself – from the perspective of Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG –, it does lead to additional specificity requirements for the provision, so that the legislative bodies' responsibility with respect to integration can be fulfilled (cf. BVerfGE 132, 195 <250 and 251>, n. 134).

[183] 2. The Act on the Treaty of 2 February 2012 establishing the European Stability Mechanism satisfies the requirements of Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG. The provisions of the ESM Treaty are compatible with the German Bundestag's overall budgetary responsibility. In particular, the amount of the payment obligations which Germany assumed when the European Stability Mechanism was established does not impair the Bundestag's overall budgetary responsibility. Their absolute amount does not exceed the ultimate limits which could, at most, be derived from the principle of democracy (a). To the extent that, according to the wording of the Treaty, a payment obligation whose amount is unlimited appears at least conceivable, the danger of such an interpretation was effectively precluded under international law by the joint declaration of the ESM Members of 27 September 2012, and by the unilateral declaration of the Federal Republic of Germany made on the same day (b). With regard to decisions that affect the German Bundestag's overall budgetary responsibility, it is ensured, at any rate at present, that they cannot be taken against the votes of the German representatives in the bodies of the European Stability Mechanism, i.e. that the legitimising relationship between parliament and the European Stability Mechanism is not interrupted (c). The provision on the suspension of voting rights pursuant to Art. 4 sec. 8 TESM is compatible with the Bundestag's overall budgetary responsibility. It must, however, be comprehensively ensured under budgetary law that the Federal Republic of Germany can meet capital calls made pursuant to Art. 9 TESM, if necessary in conjunction with Art. 25 sec. 2 TESM, fully and in a timely manner (d). Parliamentary monitoring of the activity of the European Stability Mechanism, which is required under constitutional law, is ensured (e). Taken by itself, the possibility of issuing shares of the European Stability Mechanism on terms other than at par pursuant to Art. 8 sec. 2 sentence 4 TESM does not endanger the overall budgetary responsibility (f), nor does the risk of financial losses arising from the operations of the European Stability Mechanism (g). It is possible to extend Germany's existing payment obligations through a capital increase; this, however, would require the assent of the legislative bodies. There is no obligation under international law to make such a capital increase (h). Finally, the ESM Treaty does not establish an indissoluble commitment of Germany (i).

[184] a) As has been stated, an upper limit for payment obligations and liability commitments following directly from the principle of democracy could at most be exceeded if the Bundestag's budget autonomy were for at least a considerable period of time effectively non-existent (cf. BVerfGE 129, 124 <183>; 132, 195 <242>, n. 112). Here, the legislature has a wide margin of appreciation, in particular with regard to the risk of the payment obligations and liability commitments being called upon, and with regard to the consequences to be expected for its legislative discretion; the Federal Constitutional Court must generally respect this.

[185] In light of this, no impairment of the Bundestag's overall budgetary responsibility can be inferred from the absolute amount of Germany's payment obligations of presently EUR 190.0248 billion, assumed upon the establishment of the European Stability Mechanism. The legislature's assessment that – even taking into account the German participation in the European Financial Stability Facility, the bilateral financial assistance granted to the Hellenic Republic, and the risks resulting from the participation in the European

System of Central Banks and in the International Monetary Fund – the payment obligations arising from the participation in the European Stability Mechanism do not lead to an effective failure of budget autonomy is at any rate not evidently erroneous and must therefore be accepted by the Federal Constitutional Court (BVerfGE 132, 195 <264>, n. 167).

[186] b) With its accession to the European Stability Mechanism, the Federal Republic of Germany did not assume payment obligations of an unlimited amount, or which are not sufficiently foreseeable.

[187] The explicit limitation of the liability of the ESM Members to their respective portions of the authorised capital stock, which is provided for in Art. 8 sec. 5 sentence 1 TESM, at present bindingly limits the Federal Republic of Germany's budget commitments undertaken in connection with the European Stability Mechanism to EUR 190.0248 billion (cf. BVerfGE 132, 195 <252 et seq.>, n. 138 et seq.).

[188] With regard to the provisions on revised increased capital calls (Art. 9 sec. 2 and sec. 3 sentence 1 in conjunction with Art. 25 sec. 2 TESM), it seemed possible at first to interpret the wording of the Treaty in a way from which a violation of the Bundestag's overall budgetary responsibility could have been inferred (cf. on this in detail BVerfGE 132, 195 <253 et seq.>, n. 142 et seq.; see also Constitutional Court of Austria, Österreichischer Verfassungsgerichtshof – ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 102); such an interpretation was, however, effectively precluded by the joint interpretative declaration of the parties to the Treaty establishing the European Stability Mechanism of 27 September 2012 (BGBl II p. 1086) and the identical unilateral declaration of the Federal Republic of Germany (BGBl II p. 1087) (regarding the necessity of such a preclusion under constitutional law cf. BVerfGE 132, 195 <256 and 256>, n. 147 et seq.). According to these declarations, Art. 8 sec. 5 of the Treaty Establishing the European Stability Mechanism limits all payment liabilities of the ESM Members under the Treaty to the effect that no provision of the Treaty may be interpreted as leading to payment obligations higher than the portion of the authorised capital stock corresponding to each ESM Member, as specified in Annex II of the Treaty, without prior agreement of each Member's representative and due regard to national procedures (cf. also ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 82 and 83, 104).

[189] To the extent that complainant V. doubts the effectiveness under international law of the unilateral declaration of the Federal Republic of Germany on the interpretation of the ESM Treaty of 27 September 2012, this is ultimately not relevant because the declaration was made with identical wording by all Members of the European Stability Mechanism.

[190] c) Moreover, the Bundestag's exercise of its overall budgetary responsibility requires that the legitimising relationship between the European Stability Mechanism and parliament is not interrupted under any circumstances (cf. BVerfGE 132, 195 <264>, n. 166).

[191] aa) To the extent that the decisions of the ESM bodies (can) concern the overall budgetary responsibility, which is at any rate conceivable with regard to the decisions mentioned under Art. 5 sec. 6 letters b, f, i, and l TESM, the necessary legitimation is ensured by the fact that these decisions cannot be taken against the vote of the German representative in the bodies of the European Stability Mechanism (cf. BVerfGE 132, 195 <251>, n. 136). Since pursuant to Art. 5 sec. 6 letters b, f, i, and l TESM, the decisions are adopted unanimously (Art. 4 sec. 3 TESM) and the so-called emergency voting procedure pursuant to Art. 4 sec. 4 sentence 2 TESM requires a qualified majority of 85% of the votes cast, a decision against the German representative, who at present has 27.1464% of voting rights (Art. 4 sec. 7 TESM in conjunction with Annex I), is impossible in these cases. This also applies to all other decisions of the ESM bodies should they, in individual cases, concern overall budgetary responsibility: With the exception of the cases under Art. 9 sec. 2 and Art. 23 sec. 1 sentence 1 TESM, the decisions of the ESM bodies require at least a qualified majority of 80% of voting rights (Art. 4 sec. 5 TESM), so that even decisions under Art. 5 sec. 7 letter n TESM, which are not explicitly mentioned in the ESM Treaty, and whose relevance to the overall budgetary responsibility cannot be foreseen, cannot be adopted against the vote of the German representative. At the level of domestic legislation, the Bundestag's overall budgetary responsibility can therefore be safeguarded by the respective German representative in the ESM bodies being bound by clear instructions; consequently, it is not impaired by the ESM Treaty (cf. BVerfGE 132, 195 <265, 273>, n. 169, 185).

[192] bb) Furthermore, the Bundestag's overall budgetary responsibility is not violated by the fact that the Republic of Germany might lose its blocking minority for decisions adopted by a

qualified majority (Art. 4 sec. 5 TESM) through the accession of other states to the European Stability Mechanism and the ensuing shift of voting weights in the ESM bodies (cf. Art. 2 sec. 3 TESM). The Federal Republic of Germany's veto position in the ESM bodies, which is established in the Treaties, can be safeguarded even in such a situation.

[193] Pursuant to Art. 5 sec. 6 letter l TESM, adaptations to the ESM Treaty are made as a direct consequence of the accession of new Members. In this context, the present majority requirements could be adapted in such a way that Germany's present veto position, which is required under constitutional law, will also be maintained under changed circumstances. Pursuant to Art. 44 TESM, accession to the European Stability Mechanism requires a unanimous decision by the Board of Governors (Art. 44 in conjunction with Art. 5 sec. 6 letter k TESM). This enables, and if necessary, obliges the Federal Government to make its approval of an application for membership contingent on an amendment of Art. 4 sec. 4 sentence 2 and sec. 5 TESM in order to safeguard the Bundestag's overall budgetary responsibility.

[194] d) The Bundestag's responsibility with respect to integration and the constitutional requirement that the Bundestag may not relinquish its overall budgetary responsibility (cf. BVerfGE 129, 124 <177 et seq.>; 132, 195 <260>, n. 157 et seq.), become particularly significant with a view to the suspension of voting rights stipulated in Art. 4 sec. 8 TESM (aa). In this context, it is required to ensure under budgetary law the ability to pay in a way that satisfies the requirements under constitutional law (bb). This is ensured at present (cc).

[195] aa) If an ESM Member does not fully and in time comply with its obligations under the Treaty, in particular with regard to capital calls as stipulated under Art. 8, Art. 9 and Art. 10 TESM, all voting rights of the defaulting ESM Member are suspended (Art. 4 sec. 8 TESM).

[196] (1) As a consequence of the suspension of voting rights under Art. 4 sec. 8 TESM, the Member concerned ipso iure loses all voting rights in all collegial bodies of the European Stability Mechanism until payment of all requested capital shares has been made; consequently, for so long as the default continues, the Member can no longer influence the decisions of the Board of Governors and of the Board of Directors, even if they bear no relation to the payment obligation at issue. The requirements that have been agreed under the Treaty which relate to the quorum of the ESM bodies (Art. 4 sec. 2 sentence 2 TESM) and to the majorities required in the respective case (Art. 4 sec. 4 to sec. 6 TESM) are recalculated accordingly pursuant to Art. 4 sec. 8 sentence 2 TESM for so long as the voting rights of one or several Members are suspended. Hence, as long as at least one Member retains voting rights, the suspension of voting rights will, irrespective of the number of voting rights suspended, under no circumstances result in the lack of a quorum or in the impossibility of reaching certain majorities in the bodies.

[197] While the voting rights of one or several ESM Members are suspended, all decisions of the European Stability Mechanism – with the exception of decisions regarding changes in the authorised capital stock (cf. Art. 10 sec. 1 sentence 2 and sentence 3 TESM) – can be taken without the participation of the Members concerned. This includes decisions on further capital calls (Art. 9 sec. 1 TESM), on the granting of stability support in individual cases and on its terms and conditions (Art. 13 et seq. TESM), and on a review of the list of financial assistance instruments (Art. 19 TESM).

[198] (2) The Treaty establishing the European Stability Mechanism does not provide for an effective legal remedy against the suspension of voting rights pursuant to Art. 4 sec. 8 sentence 1 TESM, in particular a remedy that suspends the effect of the suspension. To the extent that an objection made by an ESM Member against the suspension of its voting rights would be deemed a "dispute arising between an ESM Member and the ESM" within the meaning of Art. 37 sec. 2 TESM it would be decided on – again, however, with the votes of the Member affected being suspended (Art. 37 sec. 2 sentence 2 TESM) – by the Board of Governors by qualified majority; the decision of the Board of Governors can be contested before the Court of Justice of the European Union (Art. 37 sec. 3 TESM). Based on the wording and purpose of Art. 4 sec. 8 TESM and on the structure of the Treaty, it can be assumed that the suspension of voting rights continues during the entire duration of the proceedings.

[199] (3) If the voting rights of the Federal Republic of Germany were suspended pursuant to Art. 4 sec. 8 sentence 1 TESM, the German Bundestag's participation in the decisions of the bodies of the European Stability Mechanism, which is required under national law, would fail for so long as the voting rights are suspended. From the German perspective, this would mean that the decisions taken in this period would not be legitimised and monitored by the German

Bundestag, regardless of which voting rules the Treaty provides regarding the decisions to be made in the specific situation. This would possibly concern decisions which affect the German Bundestag's overall budgetary responsibility and which therefore generally require the participation of the German Bundestag (cf. BVerfGE 129, 124 <179 et seq.>; 132, 195 <262>, n. 162). This concerns for instance decisions on the issue of shares on terms other than at par (Art. 8 sec. 2 sentence 4 TESM), on further capital calls (Art. 9 sec. 1 and sec. 2 TESM), on the granting of stability support including the detailing of the conditionality attached to it in the Memorandum of Understanding under Art. 13 sec. 3 TESM, on the choice of the instruments and the detailing of the financial terms and conditions in accordance with Art. 12 to Art. 18 TESM, and on changes to the list of the financial assistance instruments which the European Stability Mechanism can use (Art. 19 TESM).

[200] bb) In order to avoid a suspension of voting rights, the Bundestag must not only include the Federal Republic of Germany's share in the initial capital, which is set out in Art. 8 sec. 2 sentence 2 TESM, in the budget, but it must also comprehensively ensure to the extent necessary that in the event of calls pursuant to Art. 9 TESM, if necessary in conjunction with Art. 25 sec. 2 TESM, it will be possible at any time to pay in Germany's further shares in the authorised capital stock pursuant to Art. 8 sec. 1 TESM fully and in a timely manner (BVerfGE 132, 195 <263>, n. 164). It is not relevant in this context whether a call for payment made by the European Stability Mechanism is justified. The only decisive issues are whether the Federal Republic of Germany can indeed make a payment called for in the amount and period of time required, and whether it is entitled under constitutional law to do so. The first issue is above all a question of liquidity. On this, the German Bundestag declared through its authorised representatives that the liquidity management of the Finanzagentur GmbH (Finance Agency of the Federal Republic of Germany) was sufficiently "prudent and efficient" to ensure timely payment; this factual assessment must be accepted by the Federal Constitutional Court. The second issue is a question regarding the compatibility of timely and complete payment with the budgetary provisions of the Basic Law.

[201] (1) Pursuant to Art. 110 sec. 1 GG, all expected expenditures and revenues of the Federation shall be included in the budget. The budget, which pursuant to Art. 110 sec. 2 sentence 1 GG is set forth in the Budget Act, is an economic plan and at the same time a sovereign act in the form of a statute (BVerfGE 45, 1 <32>; 70, 324 <355 et seq.>; 79, 311 <328 and 329>; 129, 124 <178>). It fulfils a function of democratic legitimation and monitoring with regard to all revenues and expenditures of the state, and at the same time serves to inform the public. In view of this, the right to decide on the budget is one of the most important rights of parliament and an essential instrument of parliamentary control of the government (cf. BVerfGE 49, 89 <125>; 55, 274 <303>; 70, 324 <356>; 110, 199 <225>). The specific requirement under Art. 110 sec. 2 sentence 1 GG to enact a statute obliges parliament to account to itself and to the public for revenues and expenditures of the state. Not least for this reason, the parliamentary debate on the budget, including the extent of public debt, is regarded as a general political debate (BVerfGE 123, 267 <361>; 129, 124 <178>). If in the course of the respective fiscal year; the existing budget allocations prove to be too low, or if factual needs arise which the Budget Act did not consider, the Federal Government is under the constitutional obligation to submit a bill to amend the Budget Act (supplementary budget) as stipulated in Art. 110 sec. 3 GG to ensure the completeness of the budget (cf. BVerfGE 45, 1 <34>; implicitly also BVerfGE 119, 96 <122 et seq.>).

[202] Since the budget must be set out in a law before the beginning of the respective fiscal year (Art. 110 sec. 2 sentence 1 GG), it necessarily has a prognostic element (cf. BVerfGE 30, 250 <263>; 113, 167 <234>; 119, 96 <130>), so that there will always be deviations from the budget in its execution. This is in the nature of things. However, deliberately incorrect or "fabricated" budget allocations, which lack a realistic, and therefore "valid", prognosis of the expected revenues or expenditures even though obvious possibilities of obtaining better information exist, are not compatible with the principle of Haushaltswahrheit (budget accuracy) (cf. BVerfGE 119, 96 <130>).

[203] (2) In the case of expenditures "in excess of budgetary appropriations or for purposes not contemplated by the budget", Art. 112 GG allows a deviation from the requirement that the budget is enacted by parliament, if there is an "unforeseen and unavoidable" necessity for this. If the requirements under Art. 112 GG are satisfied, the Federal Minister of Finance can in individual cases authorise expenditures which the budget does not provide at all (expenditures for purposes not contemplated by the budget) or not to a sufficient amount (expenditures in

excess of budgetary appropriations). This is a subsidiary emergency power of the executive branch for the case that parliamentary approval would come too late (cf. Kube, in: Maunz/Dürig, GG, Art. 112 n. 3 <December 2007>; Heintzen, in: v. Münch/Kunig, GG, Vol. 2, 6th ed. 2012, Art. 112 n. 1).

[204] cc) At present, budgetary law sufficiently ensures that the Federal Republic of Germany will be able to comply with all calls for payment by the European Stability Mechanism that are relevant for the application of Art. 4 sec. 8 TESM – up to its portion of the authorised capital stock (Art. 8 sec. 5 sentence 1 TESM) – so timely and comprehensively that a suspension of its voting rights is virtually impossible.

[205] (1) Since the Treaty establishing the European Stability Mechanism entered into force, the expenditures for the first four (out of a total of five) instalments of the German share in the paid-in capital of the European Stability Mechanism were included in the respective budget (cf. Act on the Adoption of a Supplementary Budget to the Federal Budget for the Financial Year 2012, Gesetz über die Feststellung eines Nachtrags zum Bundeshaushaltsplan für das Haushaltsjahr 2012, Supplementary Budget Act 2012 of 13 September 2012, BGBl. I p. 1902; Act on the Adoption of the Federal Budget for the Financial Year 2013, Gesetz über die Feststellung des Bundeshaushaltsplans für das Haushaltsjahr 2013, Budget Act 2013 of 20 December 2012, BGBl. I p. 2757). According to the Statement of the Federal Government, another expenditure is provided for in the budget for the year 2014.

[206] (2) Beyond this share in the paid-in capital, § 1 sec. 2 sentence 1 ESMFinG authorises the Federal Ministry of Finance – relying on Art. 115 sec. 1 GG (cf. BTDrucks 17/9048 p. 6) –, to provide "guarantees" for the callable capital of the European Stability Mechanism to the amount of EUR 168.30768 billion. This, however, does not entail a safeguarding under budget law (cf. also § 1 sec. 2 sentence 2 ESMFinG).

[207] (3) Neither the right to make emergency appropriations under Art. 112 GG (a) nor the preparation of a supplementary budget (b) can ensure in every case that the German payment obligations are complied with fully and in a timely manner.

[208] (a) Recourse to the right of the Federal Minister of Finance to make emergency appropriations pursuant to Art. 112 sentence 2 GG (cf. also § 37 sec. 1 sentence 2 BHO) requires that the expenditure to be appropriated, or its urgency, have indeed not been foreseen by the constitutional organs participating in the preparation of the budget. In this context, it has to be taken into account that the legal basis and the maximum amount of the payment obligations arising from Art. 9 TESM are certain. Apart from this, the Senate stated in its judgment of 12 September 2012 – explicitly making reference to Art. 110 sec. 1 GG, § 22 of the Budgetary Principles Act (Haushaltsgrundsätzegesetz – HGrG) and § 16 of the Federal Budget Code (Bundeshaushaltsordnung – BHO) – that it is necessary to ensure in the budget that the payment obligations can be met (cf. BVerfGE 132, 195 <263>, n. 164). In addition, because of the pre-eminent position of parliament under constitutional law with regard to the adoption of the Budget Act, the supplementary budget has precedence over the right to make emergency appropriations pursuant to Art. 112 GG, a right which excludes parliament from any, even subsequent, participation (cf. BVerfGE 45, 1 <32, 34 et seq.>).

[209] (b) Even the possibility of preparing a supplementary budget does not in all cases ensure that capital calls by the European Stability Mechanism are complied with fully and in a timely manner while adhering to the budgetary provisions of the Basic Law. If the possibility of a capital call pursuant to Art. 9 TESM can be seen to emerge, it is generally necessary to allocate funds for this in the budget. In spite of the simplified procedure for the adoption of a supplementary budget (cf. Art. 110 sec. 3 half-sentence 2 GG), the legislative procedure is time-consuming and depends on the balance of forces in Bundestag and Bundesrat. Pursuant to Art. 110 sec. 3 half-sentence 2 GG, the Bundesrat is entitled to comment within three weeks, a time-limit which it need not, but can, make full use of. In contrast, the period of time to be observed for payment in case of capital calls is "appropriate" at best (Art. 9 sec. 1 and sec. 2 TESM; according to the terms and conditions for capital calls adopted by the Board of Directors on 9 October 2012, implementing Art. 9 sec. 4 TESM, the periods of time for payment should not exceed four months in the cases under Art. 9 sec. 1 TESM and four months in the cases under Art. 9 sec. 2 TESM) and is only seven days in the most urgent case (Art. 9 sec. 3 sentence 4 TESM). It is not completely impossible that under favourable conditions, i.e. if all constitutional organs involved interact cooperatively and waive the applicable time-

limits, a supplementary budget can be adopted within seven days; from this, however, it does not follow that this will succeed in every case. This applies notwithstanding the constitutional obligation of all organs participating in the preparation of the budget to ensure under budgetary law that capital calls can be met at all times (cf. BVerfGE 132, 195 <263>, n. 164).

[210] (4) For foreseeable payment obligations pursuant to Art. 8 sec. 4 sentence 2 TESM in conjunction with Art. 9 TESM, allocations must be made in the budget. This follows from the principles of completeness and accuracy of the budget. In what amount the budget-setting legislature considers possible capital calls by an allocation in the federal budget depends on the respective circumstances and requires a "valid" prognosis about their probability, point in time, and amount.

[211] Uncertainties with regard to the assessment of future capital calls do not preclude a prognosis by the budget-setting legislature. Not only is the maximum amount of payment obligations certain (Art. 8 sec. 4 TESM); the probability and the point in time of the emergence of financing problems with individual Members can be assessed on the basis of various parameters, for instance the debt ratio and the term and maturity of the government bonds of an ESM Member (this was also held by the Supreme Court of Estonia <Riigikohus>, judgment of 12 July 2012 – 3-4-1-6-12 –, sec. no. 197). The same applies to the risks arising from the operations of the European Stability Mechanism, from its borrowing operations (Art. 21 TESM), and its investment policy (Art. 22 TESM).

[212] (5) The current prognosis of the legislature that the Federal Republic of Germany's obligations in connection with the financing of the European Stability Mechanism are limited to the paid-in capital within the meaning of Art. 8 sec. 2 sentence 2 TESM (cf. BTDrucks 17/9045, p. 2), is not objectionable under constitutional law.

[213] e) Art. 32 sec. 5, Art. 34 and Art. 35 sec. 1 TESM, which stipulate the inviolability of all official papers and documents of the European Stability Mechanism and the professional secrecy and immunity of the members of its bodies and its staff, ultimately do not violate Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG and the German Bundestag's right under Art. 23 sec. 2 sentence 2 GG, which can only be asserted in the Organstreit proceedings of applicant VII., to be informed comprehensively and at the earliest possible date (cf. BVerfGE 131, 152 <202 et seq.>). They are to be interpreted in such a way that they do not stand in the way of sufficient parliamentary control of the European Stability Mechanism by the German Bundestag (cf. on this BVerfGE 132, 195 <257 et seq.>, n. 150 et seq.).

[214] To the extent that the possibility of a different interpretation existed (cf. BVerfGE 132, 195 <259>, n. 154 and 155), such an interpretation has at any rate effectively been precluded under international law by the joint interpretative declaration of the ESM Members of 27 September 2012 (BGBl II p. 1086), and by the identical unilateral declaration of the Federal Republic of Germany (BGBl II p. 1087) (cf. also ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 95). The interpretative declarations clarify that Art. 32 sec. 5, Art. 34 and Art. 35 sec. 1 TESM do not stand in the way of the comprehensive information of the Bundestag.

[215] f) The possibility provided for in Art. 8 sec. 2 sentence 4 TESM of issuing shares of the European Stability Mechanism's authorised capital stock on terms other than at par also does not stand in the way of the limitation of the amount of payment obligations (cf. BVerfGE 132, 195 <253, 265>, n. 141, 169). The Bundestag's overall budgetary responsibility can be affected by decisions pursuant to Art. 8 sec. 2 sentence 4 TESM if the issue of shares in the capital stock higher than at par entails additional payment obligations. The Bundestag's overall budgetary responsibility, however, is at any rate ensured because a decision pursuant to Art. 8 sec. 2 sentence 4 TESM cannot be taken against the vote of the German representative in the responsible ESM body.

[216] g) The abstract possibility that the European Stability Mechanism might generate financial losses also does not impair the Bundestag's overall budgetary responsibility. With regard to the question whether and if so, to what extent, losses can be expected to arise from the operations of the European Stability Mechanism, the legislature has, as with every participation in an international financial institution, a margin of appreciation which the Federal Constitutional Court must generally respect (cf. BVerfGE 129, 124 <182 and 183>). It is not apparent that with its assent to the ESM Treaty, the legislature could have transgressed this margin of appreciation.

[217] aa) The Treaty is based on the assumption that the operations of the European Stability Mechanism can entail losses because in Art. 9

sec. 2 TESM, it authorises the ESM to make capital calls in such a case, if necessary in in conjunction with Art. 25 sec. 2 TESM. One must, however, take into account that not only the German overall involvement in the ESM Treaty (Art. 8 sec. 1, Annexes I and II) was approved by the Bundestag (§ 1 sec. 1 and sec. 2 ESMFinG), but that every single stability support measure taken pursuant to Art. 13 sec. 2 TESM, as well as the signing of the respective Memorandum of Understanding pursuant to Art. 13 sec. 4 TESM, require a decision by mutual agreement of the Board of Governors and are thus indirectly made contingent on the approval of the German Bundestag (cf. § 4 sec. 1 ESMFinG). Since the Bundestag can in this way participate in the decision on the amount, on the terms and conditions, and on the duration of stability support in favour of Members seeking help, it can decisively influence the probability and the amount of possible later capital calls pursuant to Art. 9 sec. 2 TESM (cf. BVerfGE 132, 195 <265 and 266>, n. 170).

[218] bb) Admittedly, there are no comparable possibilities for the Bundestag of exerting influence with regard to possible losses resulting from the other activities of the European Stability Mechanism, especially with regard to its borrowing operations pursuant to Art. 21 TESM. It can, however, exert sufficient influence on the activities of the European Stability Mechanism via the detailed guidelines for borrowing operations (Art. 21 sec. 2 TESM) and for investment policy (Art. 22 sec. 1 TESM), which oblige the European Stability Mechanism to pursue a sound financial and risk management (cf. BVerfGE 132, 195 <266>, n. 171).

[219] h) An extension of the payment obligations beyond the currently applicable amount of EUR 190.0248 billion is only possible via a capital increase pursuant to Art. 10 sec. 1 TESM, if necessary in conjunction with a decision pursuant to Art. 8 sec. 2 sentence 4 TESM. This, however, always requires a unanimous decision of the Board of Governors (Art. 5 sec. 6 letters b and d TESM) or of the Board of Directors, if these decisions area delegated under Art. 5 sec. 6 letter m TESM (Art. 6 sec. 5 sentence 2 in conjunction with Art. 5 sec. 6 letters b and d TESM). Thus, it is sufficiently ensured that the Bundestag's overall budgetary responsibility is safeguarded.

[220] Contrary to the view held by complainant I., it cannot be inferred from the ESM Treaty that the Federal Republic of Germany is obliged under international law to consent to a capital increase under Art. 10 TESM to preserve or restore the functioning of the European Stability Mechanism. Pursuant to Art. 10 sec. 1 sentence 1 TESM, the Board of Governors shall review regularly the adequacy of the authorised capital stock of the ESM. It may decide to further increase the authorised capital stock (Art. 10 sec. 1 sentence 2 TESM) of currently EUR 700 000 million (Art. 8 sec. 1 sentence 1 TESM). There are no indications to suggest the assumption that a legal obligation for the Member States to consent to a capital increase follows from Art. 10 TESM that goes beyond its wording; on the contrary, there is every indication that the wording is authoritative. Moreover, pursuant to Art. 5 sec. 6 letter d TESM, the decision on the capital increase must be taken unanimously, and pursuant to Art. 10 sec. 1 sentence 3 TESM, it requires a national notification procedure. Thus, the decision on a capital increase is not supposed to follow solely from the objective necessity of a capital increase in order to maintain the European Stability Mechanism's ability to function, but is supposed to be taken on the basis of new (political) decisions in the Member States. A substantive obligation to consent would eliminate this mechanism (this view is also held by the Supreme Court of Estonia <Riigikohus>, judgment of 12 July 2012 – 3-4-1-6-12 –, sec. no. 105 and 106, 144).

[221] Moreover, according to the declaration of the Federal Republic of Germany of 27 September 2012 and the identical joint declaration of the Member States (BGBl II pp. 1086 and 1087), the liability of the ESM Members is not supposed to be unlimited, not even for the purpose of stabilising the euro currency area; on the contrary, it is supposed to be limited at present to the portion of the authorised capital stock corresponding to each ESM Member (cf. also Art. 8 sec. 5 sentence 1 TESM; cf. on this BVerfGE 132, 195 <252>, n. 140; ÖstVfGH, decision of 16 March 2013 – SV 2/12-18 –, n. 83). This does not preclude a later capital increase. The declaration, however, expresses the unambiguous will of the Contracting Parties, which precludes invoking implicit obligations to the contrary, to decide autonomously, if necessary, about the payment of higher contributions than the ones set out in Annex II of the ESM Treaty.

[222] i) Finally, the fact that termination is not expressly provided for in the ESM Treaty does not violate the overall budgetary responsibility. The limitation of liability pursuant to Art. 8 sec. 5 TESM in conjunction with Annex II sufficiently ensures that the ESM Treaty does not establish an automatic and irreversible

procedure regarding payment obligations or liability commitments; therefore, it is not required to provide a special right of termination in the Treaty (cf. BVerfGE 132, 195 <268>, n. 175). Apart from this, it is possible for Members to resign even though there is no express regulation.

[223] 3. The provisions of the Act on the Treaty Establishing the European Stability Mechanism and the ESM Financing Act, at least if they are interpreted in conformity with the Constitution, meet the requirements under Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG regarding the way the German Bundestag's rights to participate and opportunities to exert influence need to be designed in order to ensure democratic governance of the European Stability Mechanism and in order to ensure its overall budgetary responsibility (BVerfGE 132, 195 <269>, n. 176 et seq.).

[224] The accompanying legislation has the function of modelling and putting into specific terms in national law the constitutionally required rights of the legislative bodies to participate in the work of the European Stability Mechanism (cf. BVerfGE 123, 267 <433>). This legislation must ensure that the Bundestag –through the Federal Government – has a determining influence on the actions of the European Stability Mechanism (cf. BVerfGE 123, 267 <356, 433 et seq.>) and is thus in a position to exercise its overall budgetary responsibility and its responsibility with respect to integration (cf. BVerfGE 129, 124 <177 et seq., 186>; 132, 195 <270>, n. 178). With regard to the consultation rights of the Bundestag, the requirements placed on ensuring democratic governance of the European Stability Mechanism and on safeguarding the overall budgetary responsibility of the Bundestag are fully satisfied, at any rate if the ESM Financing Act is interpreted in conformity with the Constitution (a), with regard to the Bundestag's rights to be informed (b), and with regard to the personal legitimation of the German representatives in the bodies of the European Stability Mechanism (c) (cf. in detail BVerfGE 132, 195 <269 et seq.>, n. 177 et seq.).

[225] a) For the decisions of the European Stability Mechanism which play a role for the overall budgetary responsibility, the legislature has created a connection to parliament by laying down in Art. 2 TESM, in § 4 sec. 2 sentences 1 and 2 and in § 5 sec. 2 sentences 2 and 3 ESMFinG that the German members of the Board of Governors and Board of Directors must attend the meetings of the bodies of the European Stability Mechanism and must implement the decisions of the German Bundestag when voting in these bodies. The fact that some of the decisions are subject to the vote of the plenary (cf. § 4 sec. 1 sentence 1 ESMFinG) and others merely to that of the budget committee (cf. § 5 sec. 2 sentence 1 ESMFinG) does not affect the basic question of the participation of the German Bundestag, which is the one to be decided here (BVerfGE 132, 195 <270>, n. 179).

[226] aa) The possibility of a development of further instruments (cf. Art. 19 TESM), provided for in the ESM Treaty, does not make it possible at this stage to determine in detail and legislate all cases in which a participation of parliament will be advisable. The participation rights must keep pace with the development of the Treaty – whether by statutory amendment, or by interpretation – so that the effective exercise of parliamentary budgetary responsibility and the Integrationsverantwortung is guaranteed in every eventuality (cf. BVerfGE 132, 195 <272>, n. 183). In view of this, the legislature has made a change of the financial assistance instruments under Art. 19 TESM contingent on the requirement of authorisation under federal legislation (Art. 2 sec. 2 ESMVertrG). Should it become apparent during the execution of the ESM Treaty that further essential participation requirements are not expressly provided for, § 4 sec. 1 ESMFinG, which names only three areas of decision of the European Stability Mechanism as examples ("in particular") in which the plenary is to decide, offers sufficient scope for a treatment which is in conformity with the Constitution. The same applies to the catch-all provision of § 5 sec. 3 ESMFinG, which obliges the Federal Government to involve the Bundestag budget committee and to take account of its opinion in all cases in which the Bundestag's budget responsibility is not affected and which are not provided for elsewhere (BVerfGE 132, 195 <271>, n. 180).

[227] bb) With regard to the possibility of issuing shares of the capital stock of the European Stability Mechanism on terms other than at par (Art. 8 sec. 2 sentence 4 TESM) which, taken by itself, is not objectionable under constitutional law (cf. above n. 215), the Bundestag is not expressly involved; the provisions of the ESM Financing Act, however, permit to proceed here in conformity with the Constitution in a manner that is compatible with Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG (cf. already BVerfGE 132, 195 <274>, n. 188).

[228] While the legislature expressly declared in § 4 sec. 1 sentence 2 no. 1 and no. 2 and sec. 2 ESMFinG that prior approval by the Bundestag is required for decisions in the European Stability Mechanism to grant stability support (Art. 13 sec. 2 TESM), for the acceptance of a financial assistance facility agreement (Art. 13 sec. 3 sentence 3 TESM), and for consent to a corresponding memorandum of understanding (Art. 13 sec. 4 TESM), no such provision has been made for the matter regulated in Art. 8 sec. 2 sentence 4 TESM and for the corresponding competence of the Board of Governors (Art. 5 sec. 6 letter b TESM). However, by taking recourse to the general provision of § 4 sec. 1 sentence 1 in conjunction with sec. 2 ESMFinG, pursuant to which decisions "in matters of the European Stability Mechanism which relate to the overall budgetary responsibility of the German Bundestag" require prior approval of the German Bundestag, the necessary participation of the Bundestag can be ensured with sufficient certainty (cf. BVerfGE 132, 195 <274>, n. 188).

[229] Such an interpretation of § 4 sec. 1 sentence 1 in conjunction with sec. 2 ESMFinG in conformity with the Constitution is covered by the wording of the Act and safeguards the basic objective of the legislature (cf. BVerfGE 49, 148 <157>; 54, 277 <300>; 86, 288 <320>). On the basis of such an interpretation, it is ensured that the Bundestag can in fact effectively exercise its overall budgetary responsibility (cf. BVerfGE 129, 124 <184 and 185>), and that in a given situation, the decision on whether and, if so, in what manner the Bundestag will be involved in decisions of the ESM bodies under Art. 8 sec. 2 sentence 4 TESM will not be left to the discretion of the executive branch alone.

[230] In so far as it is submitted that the participation of the German representative in decisions on the issue of shares higher than at par pursuant to Art. 8 sec. 2 sentence 4 TESM requires a special statutory authorisation, no constitutional reasons are apparent for this. Such a requirement is neither expressly provided in the Basic Law, as is, for instance, the case with Art. 110 sec. 2 sentence 1 GG, nor does it follow from the overall budgetary responsibility of the Bundestag. What is decisive for the latter is that the Bundestag is involved, and not that the involvement takes the shape of a law. The right to decide on the budget and the overall budgetary responsibility of the German Bundestag are exercised by debating and passing decisions in the plenary (cf. BVerfGE 70, 324 <356>; 129, 124 <178 and 179>), by the decision on the Budget Act, by statutes with financial effect or by a constitutive decision of the plenary of another kind (cf. BVerfGE 90, 286 <383 et seq.>; 130, 318 <347>). From the fact that Art. 2 sec. 1 TESM Act expressly requires a federal-law authorisation for increases of the authorised capital stock, it does not follow that the same must apply to decisions pursuant to Art. 8 sec. 2 sentence 4 TESM.

[231] b) The rights to information of the German Bundestag contained in the ESM Financing Act satisfy the requirements of Art. 23 sec. 2 sentence 2 GG, which is the standard of review in the Organstreit proceedings of applicant VII. (cf. BVerfGE 132, 195 <271>, n. 181). The provisions of the ESM Treaty, in particular Art. 34 TESM, do not stand in the way of an information of the Bundestag in accordance with the requirements of Art. 23 sec. 2 sentence 2 GG (cf. above n. 223).

[232] The work of the European Stability Mechanism is a matter concerning the European Union within the meaning of Art. 23 sec. 2 GG, and just like its establishment and set-up, it goes along with rights of participation and information of the Bundestag (cf. BVerfGE 131, 152 <215 et seq.>). § 7 sec. 1 to sec. 3 ESMFinG reproduces the relevant constitutional requirements under Art. 23 sec. 2 sentence 2 GG regarding the Federal Government's duties of information and thus guarantees the parliamentary right of information. In addition, § 7 sec. 10 ESMFinG leaves the more extensive rights under the Act on Cooperation between the Federal Government and the German Bundestag in Matters Concerning the European Union unaffected (cf. BVerfGE 132, 195 <271>, n. 182).

[233] c) Under the aspect of democratic legitimation of the activity of the European Stability Mechanism, which Art. 20 sec. 1 and sec. 2 GG requires, there are no reasons to criticise the structuring of Germany's representation in the bodies of the European Stability Mechanism either.

[234] aa) Art. 20 sec. 2 sentence 2 GG guarantees in conjunction with Art. 79 sec. 3 GG that the exercise of state duties and the exercise of state powers can be traced back to the people of the state (cf. BVerfGE 77, 1 <40>; 83, 60 <71 and 72>; 89, 155 <182>; 93, 37 <66>; 107, 59 <87>; 130, 76 <123>) and are accounted for vis-à-vis the people (cf. BVerfGE 83, 60 <72>). Every official act by which decisions are taken requires legitimation. This also applies to the exercise of participatory powers (cf. BVerfGE 47, 253 <273>; 83, 60 <73>) and of membership rights in international

organisations and the European Union. Here, democratic legitimation requires that the people can effectively influence a state's sovereign actions (cf. BVerfGE 83, 60 <71 and 72>; 89, 155 <182>; 93, 37 <67>; 107, 59 <87>; 119, 331 <366>; 130, 76 <123>).

[235] In personal terms, an office-holder is democratically legitimised if the office-holder's appointment can be traced back to the people in an uninterrupted chain of legitimation (cf. BVerfGE 52, 95 <130>; 68, 1 <88>; 77, 1 <40>; 83, 60 <72 and 73>; 130, 76 <124>). In substantive terms, the exercise of public authority is legitimised in particular by parliamentary requirements placed on administration, parliament's influence on government policy, and the administration being generally bound by instructions of the government (cf. BVerfGE 83, 60 <72>; 93, 37 <67>; 107, 59 <87 and 88>; 130, 76 <123>). The more intensively a given measure affects fundamental rights (cf. BVerfGE 93, 37 <73>; 130, 76 <124>) or the more vital its significance for the general public, the higher its level of democratic legitimation must be. What is decisive in this context is not the form of legitimation, but the effectiveness of the democratic governance of the decision-making processes (cf. BVerfGE 93, 37 <67>). Here, the interaction of the different foundations of legitimation is decisive (cf. BVerfGE 93, 37 <66 and 67>; 130, 76 <124>). Reduced legitimation via one track of legitimation can be compensated through increased legitimation via other tracks (cf. BVerfGE 83, 60 <72>; 93, 37 <66 and 67>; 107, 59 <87 and 88>; 130, 76 <124>).

[236] With regard to the work of the executive branch in the areas of foreign affairs and European integration, it must be taken into account that parliamentary requirements can only to a limited extent ensure substantive legitimation. Dealings with other states, representation in international organisations, international institutions and systems of mutual collective security (Art. 24 sec. 2 GG), and guaranteeing the responsibility of the country in the context of Germany's external representation, are generally the responsibility of the Federal Government (cf. BVerfGE 131, 152 <195>). The latitude which the Federal Government needs to perform its functions would conflict with strict parliamentary determination (cf. BVerfGE 49, 89 <124 et seq.>). The requirements placed on substantive democratic legitimation, which are less stringent in this respect, can be compensated by the respective office holder acting on behalf and on the instructions of the government, and thus enabling the government to assume responsibility vis-à-vis the parliament and the people (cf. BVerfGE 9, 268 <281 and 282>; 93, 37 <67>; 130, 76 <124>).

[237] bb) According to these standards, there are no objections to the German representation in the bodies of the European Stability Mechanism.

[238] To the extent that the participation of the German representatives in the ESM bodies affects the overall budgetary responsibility of the Bundestag, specific parliamentary instructions to the Federal Government are required to safeguard the Bundestag's decisive influence. Consequently, the ESM Financing Act clearly assumes that the German representatives are bound by the decisions of the Bundestag and are accountable to it (BVerfGE 132, 195 <272>, n. 183).

[239] The Constitution does not lay down in detail in what way the legislature ensures that the substantive decisions of the German Bundestag are correctly implemented in the ESM bodies.

[240] (1) The German member of the Board of Governors is the Federal Minister of Finance (Art. 5 sec. 1 sentence 3 TESM). Being appointed to the Federal Government by the Federal Chancellor, who is elected by parliament, the Minister of Finance is personally democratically legitimised and at least indirectly dependent on the confidence of the Bundestag (Art. 64 sec. 1, Art. 67 sec. 1 GG) and accountable to it (cf. Art. 114 sec. 1 GG).

[241] (2) The delegation of a State Secretary to the Board of Directors of the European Stability Mechanism and the appointment of a ministry official as the State Secretary's representatives are not objectionable. In personal terms, they are democratically legitimated through an uninterrupted chain of individual acts of appointment. In substantive terms, they are legitimised, with regard to the exercise of their function, by the European Stability Mechanism's requirements as stipulated in the Treaty, and by being bound by the decisions of the German Bundestag, which the ESM Financing Act stipulates. Due to their positions in the administrative structure within the meaning of Art. 33 sec. 4 GG, the State Secretary as well as the official representing the State Secretary sufficiently ensure that the way they exercise the sovereign powers connected with their functions under the European Stability Mechanism is subject to the special safeguards which are institutionally guaranteed

for the permanent civil service, namely the duty to perform their tasks in a qualified, loyal and law-abiding way (cf. BVerfGE 119, 247 <260 and 261>; 130, 76 <111 and 112>), and that possible requirements of the German Bundestag are implemented according to the instructions given.

[242] cc) The ESM Treaty does not conflict with the fact that the German representatives in the bodies of the ESM are bound by instructions, which the ESM Treaty presupposes and which is also required under constitutional law. The ESM Treaty assumes that the members of its bodies are responsible to their parliaments, which is based in particular on the interpretation of the provisions on professional secrecy (Art. 34 TESM) and personal immunity (Art. 35 TESM) under the joint declaration of the ESM Members and the identical declaration of Germany of 27 September 2012 (BGBl II pp. 1086 and 1087), which is binding under international law. This already follows from the fact that the Ministers of Finance of the ESM Members are represented on the Board of Governors (Art. 5 sec. 1 sentence 3 TESM), and from their authority – subject to no conditions – to appoint a Director and an alternate Director on the Board of Directors and to revoke the appointments (Art. 6 sec. 1 sentence 2, Art. 43 TESM). The provision makes it possible to enforce a commitment to instructions from the national government and to ensure the influence of parliament in this way (cf. BVerfGE 132, 195 <272>, n. 184).

[243] 4. Finally, the Act on the Treaty of 2 March 2012 on Stability, Coordination and Governance in the Economic and Monetary Union (SCG Treaty – TSCG) does not violate Art. 38 sec. 1, Art. 20 sec. 1 and sec. 2 in conjunction with Art. 79 sec. 3 GG. Its essential content conforms to requirements of constitutional law (cf. in particular Art. 109, Art. 109a, Art. 115 and Art. 143 GG) and of European Union law (cf. in particular Art. 126 TFEU) (cf. in particular BVerfGE 132, 195 <278 et seq.>, n. 197 et seq.; also ÖstVfGH, decision of 3 October 2013 – SV 1/2013-15 –, n. 47).

[244] The Treaty grants the bodies of the European Union no powers which affect the overall budgetary responsibility of the German Bundestag and does not force the Federal Republic of Germany to make a permanent commitment regarding its economic policy that can no longer be reversed (cf. on this in detail BVerfGE 132, 195 <278>, n. 196). It is true that pursuant to Art. 3 sec. 2 sentence 2 TSCG, in establishing the correction mechanism, the Contracting Parties rely on principles which are to be proposed by the European Commission and which concern in particular the nature, size and time-frame of the corrective action to be taken (including under exceptional circumstances), and the role and independence of the institutions responsible at the national level for monitoring compliance with the deficit and indebtedness criteria. This, however, does not grant the European Commission authority to impose specific substantive requirements for the structuring of the budgets (cf. also Conseil constitutionnel, Décision n°2012-653 DC of 9 August 2012, cons. 25). This follows in particular from the fact that the correction mechanism to be established pursuant to Art. 3 sec. 2 sentence 3 TSCG for the reduction of public deficit is subject to the reservation that the parliamentary prerogatives shall be respected. Nor can the Court of Justice of the European Union review the application of the correction mechanisms (cf. BVerfGE 132, 195 <284 and 285>, n. 211 et seq.).

[245] Due to the evaluation provision under Art. 16 TSCG and the general rules of international law concerning the possibilities of terminating a treaty, the lack of an explicit right of termination in the Treaty is at any rate not objectionable under constitutional law (cf. in detail BVerfGE 132, 195 <285 et seq.>, n. 214 et seq.).