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The Parliamentary Debate on the Reform of the European Stability Mechanism (ESM): A Comparative Analysis of National Parliamentary Ratification in Germany and Italy

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ANNO ACCADEMICO 2021/2022

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INTRODUCTION

Established in 2012 at the height of the sovereign debt crisis, the European Stability Mechanism is the Euro area's permanent financial assistance mechanism and as such, it has been instrumental in safeguarding the financial stability of the Euro area and its Member States. This research looks at the tumultuous process of reforming the ESM, until its most recent developments. It deals not only with the more properly institutional aspects of the ESM and the main changes that would be brought about by the revised ESM Treaty agreed upon in June 2019 and finalized in December 2020, but also and especially with the more controversial profiles concerning the relations with European Union law and the national debates and parliamentary ratification processes of the mechanism both in Germany and Italy.

Such an in-depth study has become necessary as a result of the continuous debates and controversies that have arisen on the subject, and are to this day of actuality, whose main players have not only been the specialized doctrine or national and European jurisprudences; indeed, the relevance of the subject under consideration appears even more evident if one takes into account the constant recalls that have emerged in the more generalist media, which reveal with great clarity the attention devoted also by the public opinion to the matter, as it has been increasingly attentive to the implications that the integration of the Union provokes with progressively greater force and of which the ESM Reform today represents one of the most significant profiles. The analysis will be divided into three chapters.

The first chapter, essentially introductory in nature, will begin with a brief examination of the roots of the financial crisis that started in 2008, as well as the ways that saw it subsequently result into a sovereign debt crisis in Europe. Next, it will give an account of the solutions provided by the Union to cope with and mitigate the negative consequences of the crisis. It will reveal how

the EU’s action was directed on one hand towards the creation of emergency financial support instruments, which however highlighted the complete inadequacy of the Union’s institutional system with respect to potential financial crises, on the other hand towards the strengthening of the EU’s framework of economic governance. The path taken by the European Council in creating the ESM will be shown, in specific the addition of a third paragraph to Article 136 TFEU, which was followed by the conclusion of an agreement of an international nature among the Eurozone states. Immediately afterwards, the more properly institutional profiles of the European Stability Mechanism will be analysed, starting with its legal nature and objectives; in particular, emphasis will be placed on the internal organization and the procedure for granting financial support.

The second chapter will focus on the most problematic aspects that the establishment of the ESM has entailed. First, an analysis on the compatibility of financial assistance mechanisms with European Union Treaty rules on economic policy will be provided as well as different scholarly theories regarding the compatibility of the ESM with Union law, particularly with the bailout ban in Article 125 TFEU. Next, the German jurisprudence on the ESM will be an important topic. In fact, in Germany, the ratification process had come to a standstill when, following parliamentary approval of the ESM ratification laws, constitutional complaints were raised claiming that the instrument was incompatible with German constitutional dictates. The resulting rulings of the Federal Constitutional Court will be summarized and analysed in depth in this part, especially the Court's decisions regarding the German *Bundestag's* role in the management of the ESM. The rulings of the German Court have been relevant not only for having marked a decisive step as to the legitimacy of the ESM, but also for having provided fundamental interpretive keys for the future legal framework of the Union. Passing to the Italian parliamentary ratification process of the ESM an extensive evaluation of it will be provided by examining the debates and proceedings in the Italian parliamentary Committees on the ESM and the relevant positions expressed by party representatives.

The third and final chapter, which constitutes the heart of this analysis, will focus on the Reform of the ESM and its national parliamentary ratification in Germany in Italy. In the first place, key staging posts in the tumultuous process of reforming the ESM will be summarized, which resulted in the signature by the Euro area Member States of the Agreement amending the ESM Treaty on 27 January and 8 February 2021 and gave way to the ratification procedures in each Euro area Member State in accordance with their respective constitutional requirements. The second section of this Chapter looks at the reform of the ESM with a view to mapping out the key changes made to its legal and institutional framework. Relevant aspects concern the introduction of the common backstop to the Single Resolution Fund, the cooperation between the European Commission and the ESM, precautionary financial assistance mechanisms and single-lamb collective action clauses. Next, the long-awaited judgement of the German Constitutional Court of 13 October 2022 dismissing as inadmissible the constitutional complaint challenging Germany's domestic acts of approval of the Agreement amending the ESM Treaty, will be examined. The Chapter will close with the in-depth analysis of the on-going political controversy in Italy on the ESM reform. In fact, at the time of writing of this thesis, Italy is the only country that hasn't ratified the ESM Treaty Reform yet. This is partly due to Italy's waiting for the German Constitutional Court's ruling, which was as well delayed, and also due to the ongoing divisions in the political majority on the issue, which we will be examined in this section. However, in line with the most recent political developments in Italy, the possibility of soon ratifying the reformed ESM Treaty seems to be gaining more momentum than in the previous years, during which the topic was always a cause of great tension and division.

CHAPTER I: THE CONTEXT

1. The Sovereign Debt Crisis and the pre-ESM financial assistance mechanisms

Prior to the sovereign debt crisis, the European fiscal framework was built on the idea of crisis prevention by adherence to fiscal regulations intended to maintain deficits and public debts within reasonable limits. It did not provide for a toolkit capable of handling the sovereign debt crisis. Thus, the tensions that started to arise on the European sovereign debt markets in late 2009, as a result of the global financial crisis and the significant imbalances in Greece's public accounts, strongly reinforced the need for adequate European economic governance, leading to the establishment of various assistance programmes and mechanisms for financial support.

1.1. The Sovereign Debt Crisis

The Eurozone crisis which began in late 2009 was triggered by the financial crisis of 2008, which originated in the United States with the so called "subprime[1] mortgage crisis". The granting of these mortgages, at variable or mixed interest rates, mostly relied on the ongoing "housing bubble" which peaked in the United States approximately between 2005 and 2006[2]. The subprime crisis erupted as a result of falling house prices and the consequent rise in interest rates, which had led to a dramatic increase in subprime loan defaults; the subprime meltdown continued to disrupt not only the United States, but also the global financial markets, due to the redistribution of property loans around the world through the "securitization"[3] procedure.

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[1] The adjective subprime refers to mortgages issued to borrowers with a low credit score who normally wouldn't qualify for loans at the competitive rate because their income prospects are uncertain or their credit histories unsatisfactory.

[2] Rosefielde, S., & Mills, D. (2013) "*Subprime Mortgage Crisis"*. In *Democracy and its Elected Enemies: American Political Capture and Economic Decline* (pp. 93-106).

[3] Britannica defines 'securitization' as *"the practice of pooling together various types of debt instruments (assets) such as mortgages and other consumer loans and selling them as bonds to investors."* https://www.britannica.com/topic/securitization.

In Europe, and especially in the Eurozone, the global financial crisis of 2008 was the catalyst for the "sovereign debt crisis"[4], as difficulties arose for several member states to refinance their public debt[5]. In addition to the fact that, even before the 2008 crisis, the public debt of some EU countries was already quite high, the situation worsened as a result of public interventions to support domestic economies, as well as a decrease in economic growth due to the effects of the crisis.

In this regard, it is worth recalling the stages that led the European countries to these circumstances. Already in 2009, the fear of European investors was reflected in a rise in the spreads[6] of government bonds, stemming primarily from a deterioration in public accounts prompted precisely by the aforementioned need to tackle the financial crisis. These imbalances did not affect all European countries equally; in fact, there were significant differences between them in terms of public finance conditions and growth rates. The Core countries, led by Germany, were characterised by low debt and solid economic activity. In contrast, the so-called "PIIGS"[7] countries, Portugal, Italy, Ireland, Greece and Spain, were characterised by a structural weakness, which had its roots in an increasingly less sustainable public debt. Moreover, the uncontrolled increase in the latter was not matched by satisfactory GDP growth rates.

The reasons for the speculative attack on the euro now remain to be further understood: the dramatic insolvency prospects concerning the states with the

[4] From a crisis in the banking sector, we moved on to the so-called sovereign debt crisis. Not surprisingly, in the literature, the phenomenon of the sovereign debt crisis has often been explained as a consequence of the measures taken by certain countries to "*safeguard their financial systems in the face of the subprime mortgage financial crisis*", a sort of inevitable negative implication to the attempt to cope with the financial crisis. Colombini, F., & Fabiano, A. (2011*). Crisi finanziarie: banche e stati: l'insostenibilità del rischio di credito* (pp. 69).

[5] In this regard, it is necessary to note that the financial crisis found, in some European countries, serious structural weaknesses that enabled it to target the budgets and finances of these states with less resistance: particularly the exponential and progressive growth of public expenditure, the lack or insufficiency of regulation on the management of resources and compliance with rules, non-cohesive political structures, followed by weak and immobile governments, and pressure from lobbies concerned only with their own interests.

[6] The yield differential between the ten-year government bonds of a euro area country and their German counterparts (used as a benchmark).

[7] See "*Europe's PIGS country by country*" *BBC News*", 11 February 2010 http://news.bbc.co.uk/2/hi/8510603.stm (accessed 28 November 2022).

largest stock of public debt only increased market distrust. This led to a decrease in the purchase of the government bonds of the most distressed countries, with a consequent increase in their interest rates. In addition, the financial operators' awareness of the Eurozone states' limited freedom of manoeuvre in dealing with such crises was also decisive: what have historically proved to be the most important tools for managing sovereign debt crises, such as inflation, currency devaluation and strong protectionist policies, are forbidden to Eurozone states[8]. Thus, in a Europe that had only recently been fully formed economically, under a single currency since only a few years, the emergence of such a crisis revealed shortcomings that stemmed precisely from fragmentary legislation.

In describing this latter aspect, the words of the Italian economist and former Minister of the Economy and Finance during the second Prodi government between 2006 and 2008 in Italy, Tommaso Padoa-Schioppa, resonate strongly. As a firm pro-European and one of the main advocates of the single currency he wrote in May 1998 in the Italian newspaper 'Corriere della Sera': "la capacità di politica macroeconomica [dell'unione economica e monetaria europea] è, salvo che per la moneta, embrionale e sbilanciata […] Per la Banca centrale europea la vera insidia non sarà la poca indipendenza, ma la troppa solitudine […] operare quasi nel vuoto, senza un potere politico, una politica di bilancio, una vigilanza bancaria, una funzione di controllo dei mercati finanziari. […] Ha dunque ragione non solo chi applaude il passaggio di ieri, ma anche chi ne rileva l'incompiutezza, i rischi, la temerarietà."[9]

Essentially, Tommaso Padoa-Schioppa wrote in the quoted passage that the macroeconomic policy capacity of the European Union was unbalanced and at the very early stage, and that, in his view, the difficulties of the European Central Bank were not so much to be found in its lack of independence, but

[8] On the one hand, monetary policy, with the related possibility of injecting new liquidity into the market, is part of the exclusive competence of the Union, as stipulated in Art. 3 TFEU; on the other hand, protectionist measures, such as the application of customs duties or the provision of quantitative restrictions on imports or exports, are expressly forbidden by Articles 30, 34, 35 TFEU, as they restrict freedom of competition, a fundamental principle of the single market guaranteed by Articles 3(3) TEU and 26 TFEU.

[9] Padoa-Schioppa, T., "*Il passo più lungo*", Corriere della Sera, May 3rd 1998, http://www.tommasopadoaschioppa.eu/europa/il-passo-piu-lungo.html (accessed 28 November 2022).

in the excessive solitude that this institution would encounter in its operating in an institutional void. Indeed, he agreed on one hand with those who positively welcomed the transition to a stronger Europe, but on the other hand he agreed with the ones that pointed out the incompleteness of the European project, the risk and the recklessness. From these few words we can understand what has been one of the factors that fuelled the European crisis, the incompleteness of the Eurozone system.

1.1.1 The absence of a bank of last resort during times of crisis

It is interesting for the development of this thesis to mention the analysis of Italian law professor Alessandro Mangia in Chapter 1 of his book "*MES: L'Europa e il Trattato Impossibile"*[10]. He points out how the creation of the ESM is an "*escamotage*" to try to fill a gap that originated in the Maastricht Treaty in 1992: a European Central Bank that can't be a lender of last resort. In times of growth, the EU system as a whole holds up, but in times of crisis, the flaw in its functioning emerges and destabilises the entire Eurosystem: a defect, as the author describes, that is not accidental, but intentional, since without it, it would have come to the creation of a Federal Union. Thus, the European institutional framework had to exclude - in order to function - available intervention instruments for managing economic crises. The self-regulating effect of state budgetary policies, on which the European economic constitution was supposed to be based, would not have existed if there had been a lender of last resort, willing to guarantee state bond issues. Hence the absence of a "bank of the banks", which would guarantee the private financial sector; hence the absence of a central bank that could intervene in distressed public budgets, always and in any case guaranteeing the solvency of the state debtor; hence the absence of a bank that could intervene in an equalising function between the different states of the Union in the event of asymmetrical crises.

1.2. The various pre-ESM financial assistance mechanisms

[10] Mangia, A., (2020). "*Mes: L'Europa e il Trattato impossibile*", Chapter 1 *"Il Trattato MES, la costituzione economica europea, le Costituzioni nazionali"*.

Before analysing the financial support instruments put in place by Europe to tackle the sovereign debt crisis, it is worth mentioning the EU legal framework on economic policy, which will be dealt with in more depth in later on. From the outset, in fact, the rescue operations set in motion by the Member States raised doubts as to their compatibility with EU law, in particular with the provisions contained in Articles 123, 124 and 125 TFEU which together aim to discipline individual member states through the markets to keep their budgets within acceptable parameters[11]. The risk feared was, in fact, that such assistance mechanisms could generate, in the benefitting countries, a phenomenon of moral hazard, meaning that Member States in financial distress, relying on the financing granted under the aforementioned assistance mechanisms, could renounce undertaking severe and distressing economic and budgetary policies, but necessary to restore public accounts.

The most relevant provision is certainly that of Article 125 TFEU, containing the prohibition of bailouts: it expressly states that neither the Union, nor the individual Member States, shall be liable or responsible for the commitments undertaken by the central governments or by other public authorities of another Member State[12]. In this vein, the no bailout clause prohibits financial assistance because it would undermine fiscal responsibility. This prohibition must, however, be read in combination with the provisions of the two preceding articles, 123 and 124 TFEU: the first prohibits the granting of overdrafts or any other type of credit facilities by the European Central Bank and national central banks to *"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"*[13]; it also prohibits the direct purchase of debt instruments. The second establishes that *"any measure, not based on prudential considerations, establishing privileged access by Union institutions, bodies, offices or agencies, central*

[11] René, S., (1997), The European Central Bank – Institutional aspects, p.77-78
[12] Article 125 TFUE
[13] Article 123 TFUE

governments [...] or public undertakings of Member States to financial institutions, shall be prohibited"[14].

In this context, therefore, the Eurozone suddenly found itself forced to make *ad hoc* rescue interventions and to introduce important innovations for the management of a Member State's financial crises. This process of strengthening EU economic governance, characterised by an incremental approach, began in May 2010, with the approval of the aid plan for Greece.

1.2.1. Greek case: the Intercreditor Agreement and the Loan Facility Agreement

Turning specifically to the Greek case, in October 2009, the newly elected Greek government informed Eurostat that its budget deficit would be 12.7% of its GDP[15], more than double the previously announced figure of 3.7% of GDP; at the same time, the Greek public debt amounted to 124.9 % of GDP[16], the highest ratio in the EU. The realisation that the Greek authorities had rigged the public accounts generated considerable doubt in the markets about Greece's solvency and it became clear that it was impossible for the country to continue financing its public debt at sustainable interest rates.

After much uncertainty and hesitation, especially on the German side[17], following Greece's official request for financial assistance on 23 April 2010, the Greek rescue package finally became operational in the first week of May 2010. In particular, on 2 May, the Eurogroup Ministers for Economic Affairs and Finance unanimously agreed to activate stability support to Greece via bilateral loans centrally pooled by the European Commission[18]. However, the activation of the support plan agreed upon within the Eurogroup could only

[14] Article 124 TFUE
[15] Report of the Commission of 8 Jan. 2010 on Greek Government deficit and debt statistics, COM (2010) 1 final.
[16] Reuters Staff. (February 2010) "*Timeline: Greece's economic crisis"*. Reuters. https://www.reuters.com/article/us-greece-economy-events-idUSTRE6124EL20100203 (accessed 28 November 2022).
[17] Hewitt, G. (June 2015) *"Greece and Germany and the weight of history*". BBC News. https://www.bbc.com/news/world-europe-33218251 (accessed 28 November 2022).
[18] European Commission. (May 2010) *"The Economic Adjustment Programme for Greece"*. Occasional Papers written by the Staff of the Directorate-General for Economic and Financial Affairs.

be implemented after parliamentary approval, which was necessary in some states parties. In this regard, while in Italy the authorisation of the loan took place without particular resistance[19], in Germany the Emergency Law passed to grant the financing to Greece was subject of appeal, later rejected[20], before the German Constitutional Court.

The total amount of the financing package consisted of 110 billion Euro over three years and supporting economic policies. The programme was based on two different agreements: the *Intercreditor Agreement* and the *Loan Facility Agreement*[21]. These were international agreements concluded outside the EU legal system. The first agreement, concluded on 7 May 2010, included the lending states, namely all the Eurozone states except Greece, and set the total amount of the financing, the respective contributions of each participating country, and the procedure for authorising the disbursement of the various loan instalments, to be agreed upon by unanimous agreement of the lenders, after verifying the Greek government's compliance with the conditionalities. The second, on the other hand, was reached on 8 May between the European Commission and the Greek authorities: it, first of all, assigned the Commission the function of coordinating the assistance plan; furthermore, it contained the terms and conditions of the loan pool from the Euro countries, as well as some provisions on the conditionality that Greece was subject to. The financing was, in fact, tied to a three-year austerity programme, signed, on the one hand, by the European Commission, representing the Euro countries, the ECB, and the IMF and, on the other hand, by the Greek authorities: this plan envisaged, for Greece, the reduction of the public debt

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[19] See "*Decreto-Legge*" of 19 May 2010, n. 67

[20] The Second Senate of the Federal Constitutional Court decided that the Monetary Union Financial Stabilisation Act (*Währungsunion-Finanzistabilisierungsgesetz),* which grants the authorisation to provide aid to Greece, and the Act Concerning the Giving of Guarantees in the Framework of a European Stabilisation Mechanism (*Gesetz zur Übernahme von Gewährungsleistungen im Rahmen eines europäischen Stabilisierungsmechanismus*), do not violate the right to elect the Bundestag under Article 38.1 of the Basic Law *(Grundgesetz-GG).* See BVerfG, Judgment of the Second Senate of 7 September 2011 – 2 BvR 987/10 -, paras. 1-142, http://www.bverfg.de/e/rs20110907_2bvr098710en.html

[21] See full text of both agreements, available at https://www.irishstatutebook.ie/eli/2010/act/7/enacted/en/print#sched1(accessed 30 November 2022).

below 3% of GDP by 2014 and major cuts in public spending to be achieved by 2012, in addition to a whole series of structural reforms[22].

1.2.2. The European Financial Stabilisation Mechanism (EFSM) and the European Financial Stabilisation Facility (EFSF)

Despite the financial aid plan for Greece, the threat that the sovereign debt crisis was not limited to the Greek state, but was spilling over to other Eurozone countries with large deficits and huge public debt, first and foremost Ireland and Portugal, was already becoming more and more apparent in 2010. This raised the issue of institutionalising the assistance mechanisms, in order to tackle the crisis in a more systematic manner: a so-called "rescue umbrella"[23], to protect all EU member states in economic and financial difficulty. Thus, in the Declaration of 7 May 2010[24], the Heads of State or Government agreed with the Commission's proposal to create a "European stabilisation mechanism" in order to preserve financial stability in Europe; this proposal would then be submitted for approval to an extraordinary meeting of the ECOFIN Council, to be held on 9 May 2010.

Thereby, Regulation (EU) No. 407/2010[25] established the "European Financial Stabilisation Mechanism" (EFSM) on 11 May 2010, ensuring its use in favour of all EU States and not only those in the Eurozone. In fact, the legal basis of the ESFM was found in Article 122(2) TFUE: "*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*

[22] The programme is the subject of the Council Decision 2010/320/UE of 10 May 2010 "addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit", found in OJEU L 145 of 11 June 2010, p.6-11.

[23] Ruffert, M., (2011) "The European Debt Crisis and European Union Law", in Common Market Law Review, pag. 1179.

[24] See the Statement of the Heads of State or Government of the Euro Area of 7 May 2010, available at https://ec.europa.eu/archives/commission_2010-2014/president/news/speeches-statements/pdf/114295.pdf

[25] See Council Regulation (EU) No. 407/2010 of 11 May establishing a European financial stabilisation mechanism, OJ L 118, 12.5.2010, p.1-4, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32010R0407

concerned. The President of the Council shall inform the European Parliament of the decision taken"[26]. A fundamental condition for the granting of financial assistance was that the exceptional circumstances, as referred to in Article 122(2) TFUE, were outside the control of the assisted Member States. Moreover, in order to balance, on the one hand, the spirit of solidarity and, on the other hand, the need to sanction the irresponsibility of Member States in the conduct of their economic and budgetary policies, the financial assistance was subject to strict conditionality, which was reflected in the EFSM's founding regulation.

When activated, the EFSM allowed the Commission to borrow on the financial markets on behalf of the Union with an implicit guarantee from the EU budget. It was therefore the Commission itself that assumed the role of lender to the requesting Member State first, and beneficiary of the interest and capital loaned later. In this case, this agreement did not provide for any service costs for the Union and, in the event of default by the borrower, it was the EU budget itself that guarantees repayment of the bonds. It is necessary to emphasise that the amount provided for the granting of loans under this mechanism was limited to 60 billion.
However, this amount seemed insufficient for a mechanism that should have been perceived by the markets as financial protection for the largest Eurozone economies. Precisely for this reason, the European Financial Stabilisation Facility (EFSF) was established on 7 June 2010, with a decision taken at the Eurogroup meeting, thus involving only the sixteen (then) Eurozone countries[27].

The terms of reference of the Eurogroup established the EFSF as a limited liability company under Luxembourg law, which had a limited duration of three years and which would provide loans of up to 440 billion in total; as well the Commission stated that the guarantee of this second instrument was

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[26] Article 122(2) TFUE
[27] Later on the EFSF Framework Agreement was signed. See *"EFSF FRAMEWORK AGREEMENT (as amended with effect from the Effective Date of the Amendments)"*, available at http://www.efsf.europa.eu/attachments/

to be given by the individual member states. In fact, the EFSF was a guarantee fund set up by the Eurozone states, which were entitled to issue bonds guaranteed by the states themselves - according to their share in the ECB's capital - for the purpose of providing financial support to countries that requested it and that were in a state of economic distress. The forms of subsidy envisaged therein, which could be activated upon unanimity precisely because of the risk-sharing, were subject to strict conditionality indicated in the Memorandum of Understanding which the authorities of the requesting state had to negotiate with the Commission, the European Central Bank and the International Monetary Fund[28]. In fact, the Commission was the body entrusted with the task of initiating the actual implementation of the EFSF, as well as ensuring "*consistency between EFSF operations and other operations of assistance by the EU*".

1.2.3 Article 122 TFUE

The temporary nature of the financial assistance through the EFSM and EFSF was determined by the fact that these interventions, in light of their incompatibility with the basic logic of the European economic constitution, could only by justified by the temporary and exceptional nature of the intervention itself. Indeed, the creation and use of these private-law entities (EFSF), or in any case operating according to the logic of private law (ESMF), and intended to temporarily replace the absence of a normal Central Bank, could only be justified, in the context of the Treaties, in consideration of Article 122(2) TFUE.

Moreover, if the above-mentioned Article 122(2) TFUE constituted the gateway for the realisation of the EFSM and the EFSF, it is precisely Articles 123 and Articles 125 TFUE that made the permanent institutionalisation of this kind of instrument inadmissible. According to these, in fact, any other intervention that was not temporary, limited and proportional, even when politically admitted by the Council, would have to be considered illegitimate

[28] See "Terms of reference of the Eurogroup – European Financial Stability Facility", available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/misc/114977.pdf

as infringing the Treaties and therefore sanctionable by the European Court of Justice.

It may be of interest to recall that this concept was clearly reiterated in the document drafted on 23 November 2011 by the Commission renamed "*Green Paper on the feasibility of introducing Stability Bonds"*[29], in which it was stated that the possible introduction of a form of continuous support to state finances, and therefore of mutualisation, even partial, of the debt, would have been incompatible with the Treaties mentioned in the previous paragraph, unless the Treaties themselves, and specifically Article 125, were amended. It is on the basis of this "*no bail out*"[30], clause that one can refer to the "*no taxation without representation*"[31] assumption, according to which mutualisation would not have been and still is not compatible with the constitutions of the Union. Indeed, to allow a common issue of securities on the bond market would in essence mean turning the Union into a Federal State. Moreover, the Commission's underlying message in the Green Paper was made all the clearer when it referred to the previously mentioned decision of the German Constitutional Court (BVerfG, 2 BvR 987/2010 of 7 September 2011), in which it stated that it would be contrary to the German Constitution to allow any form of mutualisation of public debts, on the basis of the principle that the German Parliament should remain in full control of the budgetary manoeuvre and taxation. This was asserted as an implication of the democratic principle generally enshrined in Article 38 of the *Grundgesetz*[32].

[29] European Commission Green Paper on the feasibility of introducing Stability Bonds, 23 November 2011, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_11_820

[30] Article 125 TFUE is colloquially called the 'no bailout clause' and is referred to as such on the ECB website (https://www.ecb.europa.eu/mopo/eaec/fiscal/html/index.en.html). However, Article 125 solely states that Member States cannot take on the debts of another Member State. It does not rule out Member States 'bailing out' other countries by lending to them. Neither is there any prohibition on loans being restructured. Moreover, the European Court of Justice in its Pringle decision of 2012 established that the European Stabilisation Mechanism bailout fund was consistent with Article 125.

[31] Referred to in this regard by Bergonzoni, C., (2019) "*Costituzione e bilancio*".

[32] See Art.38 GG *"Die Abgeordneten des Deutschen Bundestages werde in allgemeiner, unmittelbarer, freier, gleicher und geheimer Wahl gewählt. Sie sind Vertreter des ganzen Volkes, an Aufträge und Weisungen nicht gebunden und nur ihren Gewissen unterworfen".*

2. European Stability Mechanism: Institutional aspects

The European Stability Mechanism is the result of a lengthy and not untroubled process carried out as response to part of Europe's incomplete economic governance: already in the autumn of 2010[33], the need to develop a more efficient instrument than those in operation at the time[34] became evident. In particular, in December 2010[35], the European Council, building on what had already been stated in the conclusions of the previous summit of 28-29 October[36], agreed on the *"need to establish a permanent mechanism to safeguard the financial stability of the euro area as a whole":* it was stipulated that it would replace the EFSF[37] and the EFSM and would not have to be legally based on Art. 122 (2) TFEU. Thus, a two-step approach was chosen for the creation of this mechanism: an amendment of Art. 136 TFEU and the conclusion of an international treaty establishing the ESM, placed outside the institutional framework of the Union.

This sub-chapter will focus on the institutional aspects of the ESM, in order to devote Chapter 2 to a more specific in-depth examination of the more controversial and problematic aspects concerning the relationship of the ESM

[33] The first official indication of the willingness to set up such a mechanism can be found in the document "*Strenghtening Economic Governance in the EU – Report of the Task Force to the European Council*" of 21 October 2010. In this report, the task force on economic governance (which had been set up a few months earlier and which consisted of the Commissioner for Economic and Financial Affairs, representatives of the Member States, the Presidents of ECB and of the European Council) recommended the establishment of a new mechanism for macroeconomic surveillance. Available at https://www.consilium.europa.eu/media/27405/117236.pdf

[34] According to Nugnes, F., (2016) in *"L'unione europea di fronte alla crisi. L'impatto sulla disciplina fiscale e sull'assetto istituzionale"*, one of the reasons that led to the establishment of a permanent stability mechanism can be found in the growing awareness of the ineffectiveness of the previous bailout funds (EFSM and EFSF) in dealing with sovereign debt speculation. Available at https://www.federalismi.it/nv14/articolo-documento.cfm?Artid=33054

[35] See the European Council Conclusions of 16-17 December 2010, available at https://data.consilium.europa.eu/doc/document/ST-30-2010-INIT/en/pdf

[36] See the European Council Conclusions of 28-29 October 2010, available at https://data.consilium.europa.eu/doc/document/ST-25-2010-REV-1/en/pdf, which endorsed the need to establish a *"permanent crisis management mechanism [...] without amending Article 125 TFUE"*.

[37] It was also envisaged that the EFSF would continue to operate until all loans granted in favour of the Member States were repaid, and until all debts incurred in respect of the financial instruments issued and the related guarantees were settled. See the European Council Conclusions of 24-25 March 2011, available at https://data.consilium.europa.eu/doc/document/ST-10-2011-REV-1/en/pdf

with EU law and the national debates that took place in view of the ratification of the ESM treaty, particularly in Germany and Italy, the two case-studies that are compared in this thesis.

2.1 Legal sources and Founding process

According to the highly authoritative interpretation of French economist Jean Paul Fitoussi, the ESM is an international financial institution intended to duplicate at the European level the role and functions of the IMF and which performs some functions which are typical of normal central banks, such as the purchase of government bonds on the primary and secondary markets, the refinancing of the national banking system and the granting of precautionary credit[38]. This is in essence the logic of the ESM, which was established with the purpose to *"mobilise funding and provide stability support under strict conditionality [...] 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 of by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties."*[39]

The ESM was first welcomed within the European institutions on 11 July 2011, with the signing by the (then) seventeen states of the Eurozone of an original version of its founding treaty, which was later amended by the Eurozone heads of state and government by two decisions during the same

[38] Fitoussi, J.,P., (2013) *"Le Théorème du lampadaire – Les liens qui liberent"* ("The Lamp Post Theorem").
[39] Treaty Establishing the European Stability Mechanism, consolidated version, signed on 2 February 2012, Chapter 1 "Membership and Purpose", Article 3 "Purpose", T/ESM 2012-LT/en 10, available at https://www.esm.europa.eu/sites/default/files/migration_files/20150203_-_esm_treaty_-_en.pdf.

year: one on 21 July[40] and the other on 9 December[41]. The ESM Treaty was signed and approved in its final version on 2nd February 2012, and then entered into force the following 27 September 2012[42]. The rules of this institution, can be found partly in the Treaty on the Functioning of the European Union (Art.136 (3)), partly in the final ESM Treaty of 2012, and partly in some EU Regulations that go by the name of "Two Pack"[43].
To these official sources must then be added a normative production internal to the institution itself, ranging from the "Guideline on Precautionary Financial Assistance"[44], to the "Rules of Procedure for the Board of Auditors"[45] and the "Rules of Procedure of the Administrative Tribunal of the ESM"[46].

Despite this dispersion of sources, the connecting discipline of the ESM Treaty to the Union's legal system is to be found in Article 136 TFEU, in particular in its third paragraph added by Decision 2011/199/EU[47] on 25 March 2011, approved unanimously by the European Council, after

[40] See the Statement by the Heads of State or Government of the Euro Area and EU Institutions of 21 July 2011, available at https://www.consilium.europa.eu/media/21426/20110721-statement-by-the-heads-of-state-or-government-of-the-euro-area-and-eu-institutions-en.pdf.
[41] See the Statement by the Euro Area Heads of State or Government on 9 December 2011, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf.
[42] Council of the European Union, Ratification Details, available at https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2012002.
[43] The 'Two-Pack', which entered into force on 30th May 2013, introduced additional coordination and surveillance of budgetary processes for all Eurozone members. See Regulation 472/2013 and Regulation 473/2013, Document 52014DC0905, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52014DC0905.
[44] European Stability Mechanism Guideline on Precautionary Financial Assistance, available at https://www.esm.europa.eu/system/files?file=document/esm_guideline_on_precautionary_financial_assistance.pdf.
[45] European Stability Mechanism Rules of Procedure of the Board of Auditors, available at https://www.esm.europa.eu/system/files?file=document/2022-03/Rules_of_Procedure-for_the_Board_of_Auditors.pdf.
[46] Administrative Tribunal of the European Stability Mechanism – Rules of Procedure, available at https://www.esm.europa.eu/system/files?file=document/esmatrulesofproceduredecember2014.pdf.
[47] 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, Official Journal of the European Union, in OJ L 91 of 6th April 2011, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011D0199.

consultation with the European Parliament, European Commission and the ECB. This amendment was being adopted through the simplified revision procedure of Article 48 par. 6 TEU[48]. Thus, the addition to Art.136 TFEU of a new, decisive paragraph enabled the creation of a permanent mechanism: *"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"*[49].

Returning to the legal nature of the ESM, its founding Treaty expressly defines the ESM as an "*international financial institution*,"[50] headquartered in Luxembourg. There has been no failure to note the ambiguity of this formulation, since even though the ESM is placed outside the institutional framework of the EU, it is nevertheless linked by Article 136 (3) TFUE to the Union's legal system. This was also reiterated by the previously quoted Alessandro Mangia in his book *"MES – L'Europa e il Trattato Impossibile"*: the ESM, an institution of international law for jurists and a "*financial vehicle*" for economists, is supposed to be a "*multi-purposed vehicle*". Indeed, in Article 32 of its Treaty (Chapter 6, under the "General Provisions"), in addition to granting it by virtue of law the license to carry out banking activities in all States where the Treaty itself is ratified, it grants the institution, that has "*full legal personality*", a series of immunities and privileges. Particularly, the "property, funding and assets" of the ESM, wherever located, *"enjoy immunity from every form of judicial process"* (unless the ESM expressly waives it) and cannot be subjected to search, seizure, confiscation, expropriation or requisition. Likewise, the facilities and documents of the ESM are defined as inviolable.

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[48] Consolidated version of the Treaty on European Union – Title VI: Final provisions – Article 48 (ex Article 48 TEU), in OJ 115 of 9th May 2008, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12008M048.

[49] Consolidated version of the Treaty on the Functioning of the European Union Part Three - Union Policies and Internal Actions Title VIII – Economic and monetary policy Chapter 4 – Provisions specific to member states whose currency is the euro, Article 136, Official Journal of the European Union, C202/106 of 7 July 2016, available at https://eur-lex.europa.eu/eli/treaty/tfeu_2016/art_136/oj.

[50] Article 1 T/ESM (T/ESM 2012-LT/en 9).

This discipline also applies to ESM staff, as laid out in Article 35 of the Treaty ("*Immunities of persons*") including governance bodies, who are covered by full functional guarantee with regard to any aspect pertaining to the institutional activity of the ESM[51]. In addition, Article 34 of the Treaty ("Professional secrecy") provides, again for the above-mentioned subjects, 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".*[52]

2.2 The Internal Organisation and Financial Assistance

The intergovernmental nature of the ESM is also reflected in its internal structure. The structural and functional aspects of the ESM are essentially related to governance and initial capital, to which the founding Treaty devotes Chapters 2 and 3, respectively. In regards to the Financial Assistance provided by the ESM to Member States, different instruments are available on the basis of a strict conditionality which may vary greatly in its forms.

2.2.1 Governance and capital

The ESM consists of various bodies, which are laid out in Chapter 2: the Board of Governors, the Board of Directors, and the Managing Director; in

[51] Art.35 (1) T/ESM: "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".
[52] Art.34 T/ESM

addition, there is the possibility of appointing any other staff deemed necessary for the accomplishment of ESM activities.
The Board of Governors[53] is composed of the 19 Euro Area finance ministers and its decides whether to be chaired by the President of the Eurogroup or whether to elect a Chairperson from among its members for a two-year term which may be renewed[54]. As a highest decision-making body of the ESM, the essential task of the Board of Governors is to adopt by "mutual agreement", meaning unanimously[55], the most important decisions, including capital increases, granting of financial assistance and approving the Memorandum of Understanding[56]. Moreover, the European Commission, the ECB and the President of the Eurogroup may participate in the meetings of the Board of Governors as observers, while others, including representatives of international financial organizations such as the IMF, can be invited by the Board of Governors to attend meetings as observers on an *ad hoc* basis. The voting rights of each ESM Member of the Board of Governors correspond to the number of shares allocated to the respective countries in ESM's capital stock[57], as laid out in Article 11 of the ESM Treaty.

Article 6 of the ESM Treaty describes the functions of the executive body of the ESM, the Board of Directors, which is defined by Gregorio Gitti as a body with "fluid powers in the governance structure of the ESM"[58]. The 19 Directors are each appointed by the Governors who also appoint alternate

[53] Art. 5 T/ESM
[54] The current Chair of the ESM Board of Governors is the President of the Eurogroup, Paschal Donohoe (elected Eurogroup President on 9 July 2020 and has served as Chairperson of the ESM Board of Governors since 17 July 2020).
[55] Art. 4 (3) T/ESM. The T/ESM also includes an emergency voting procedure, whereby financial assistance can be granted if supported by a qualified majority of 85% of the votes, which confers upon Germany, France and Italy a veto right (see Art.4 (4) T/SM).
[56] Defined by ESM Glossary as a document negotiated and signed on behalf of the ESM by the European Commission, in liaison with the ECB, the IMF (where applicable) and programme countries, detailing the policy conditions to be implemented in exchange for financial assistance.
[57] See "Adjustment of ESM capital contribution keys due to the end of the temporary correction period for Slovakia". The table shows the capital contribution keys of ESM Members prior to the end of Slovakia's temporary correction and the adjusted values, effective from 1 January 2021, available at https://www.esm.europa.eu/content/adjustment-esm-capital-contribution-keys-due-end-temporary-correction-period-slovakia.
[58] Gitti., G., (2020) *"Il Meccanismo Europeo di Stabilità. Profili di diritto bancario" in "MES – L'Europa e il Trattato impossibile"*. Gitti definisce il Consiglio di Amministrazione come un organo *"con competenze fluide nella struttura di governance del MES"*.

Directors which "shall have full power to act on behalf of the Director when the latter is not present"[59].

The choice of its members generally falls on particularly technically qualified people with high competence in economic and financial matters. As stated in paragraph 6 of Article 6, the general and specific competence of this body is to verify that the ESM "*is managed in accordance with*" the Treaty itself and *"the by-laws of the ESM adopted by the Board of Governors"*. Moreover, the *Direktorium*[60] takes decisions which are delegated to it by the Board of Governors or as provided for in the ESM Treaty (such as the approval of loan disbursements). It takes decisions within its competence according to qualified majority, unless otherwise provided for in the Treaty itself[61], while for decisions delegated by the Board of Governors the voting method is the same as the one adopted by the latter[62]. Additionally, the Board of Directors is assisted by two internal committees: the Risk Committee[63], which evaluates and monitors the ESM risk strategy and its implementation, and the Budget Review and Compensation Committee that mostly deals with staff compensation, including the total annual salary mass and the evolution of the salary band boundaries[64]. Other Committees assist the Board of Directors in decisions relating to the recapitalisation of financial institutions (the Banking Committee), corporate affairs (Corporate Projects Committee) and business continuity (Incident Management Team), among others[65].

Completing the governance structure is the Managing Director, who is appointed by the Board of Governors by a qualified majority vote of 80 % of those voting and who has high expertise in economic and financial matters[66]; his term of office lasts five years and is renewable once[67]. In addition to

[59] Art. 6 (1) T/ESM
[60] German expression for the Board of Directors
[61] Art 6 (5) T/ESM
[62] See Art. 5 (6) and (7) T/ESM
[63] See ESM website, available at https://www.esm.europa.eu/esm-governance/risk-committee-board-directors.
[64] See ESM website, available at https://www.esm.europa.eu/esm-governance/budget-review-compensation-committee-board-directors.
[65] See the In-Depth Analysis of the Economic Governance Support Unit of the European Parliament (October 2019): "*The European Stability Mechanism: Main Features, Instruments and Accountability*".
[66] Art. 7 (1) T/ESM
[67] Pierre Gramegna, former Luxembourg Finance Minister, is the current ESM Managing Director. He has been appointed by the Board of Governors on 25 November 2022.

chairing the Board of Directors, he is the legal representative of the institution and the ESM's top executive. He concurs in the management of day-to-day affairs, dealing expressly with the personnel of the ESM. In fact, according to paragraph 4 of Art. 7 of the Treaty, he *"shall be responsible for organising, appointing and dismissing staff in accordance with staff rules to be adopted by the Board of Directors".* Moreover, the Managing Director is empowered to appoint a Management Board[68], which is composed of additional six members and conducts the ongoing business of the ESM.

In addition to its management bodies, the ESM has three bodies for audit oversight which are established in Articles 28, 29 and 30 of the ESM Treaty: the Board of Auditors, the Internal Audit and the External audit. The Board of Auditors, composed of five members appointed by the Board of Governors, is in charge of auditing the regularity, compliance, performance and risk management of the ESM. The Internal audit is an independent and objective assurance function which reports directly to the ESM Managing Director. It brings a systemic approach to evaluating and improving the ESM's risk management, internal control and governance processes, in order to increase the ESM's efficiency. Lastly, the External audit of ESM accounts is conducted by independent auditors approved by the Board of Governors to examine the ESM Financial Statements in accordance with generally accepted auditing standards. The audit findings are reflected in the external auditor's report on the Financial Statements, contained in the ESM Annual Report[69].

In order to carry out its financial assistance activities, the ESM has a subscribed authorised capital of 704.8 billion euro[70], of which 80.5 billion has been paid-in capital[71] (by the Member States), and 624.3 billion euro is in the

[68] See Organisation of the ESM, Management Board on ESM website, available at https://www.esm.europa.eu/about-us#headline-organisation.
[69] "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" (Article 30 (5) T/ESM). The ESM published its latest Annual Report 2021 in June 2022.
[70] Art.8 (1) T/ESM.
[71] Art.8 (2) T/ESM.

form of committed callable capital and guarantees[72]. The ESM's lending capacity is capped at 500 billion euro[73]. According to Article 11 of the ESM Treaty and as mentioned earlier, the financial contribution of each ESM Member State is based on the capital key of the ECB, which reflects the respective country's participation share in the total population and gross domestic product of the Euro Area, and Members receive ESM shares corresponding to their subscribed capital. In addition, it should be noted that each Member State is directly responsible exclusively for the contracted capital share and thus can't be held accountable for any obligations contracted by other Member States[74]. Accordingly, the Managing Directors *"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*"[75]. This is reiterated under the loss coverage procedure in Article 25 of the ESM Treaty, in which the Board of Governors, following a new request for payment which was not met, can take appropriate measures to ensure that the defaulting Member settles its debt within a reasonable period, increased by any interest.

2.2.2 Instruments of financial assistance and Conditionality

The financial assistance of the ESM is subject to a procedure that is initiated by a request for stability support from the Member State in need, directed to the Chairman of the Board of Governors. The latter delegates to the European Commission, together with the ECB, the task of carrying out a series of evaluations concerning: the existence of a risk to the financial stability of the Eurozone as a whole or to the one of an individual Member State; the sustainability of the public debt, in the assessment of which the IMF must also participate; and the soundness of the actual or potential needs of the requesting state.

[72] The part of the ESM capital that is subscribed but not paid is 'callable' at any time, in case of need.
[73] As indicated in recital n.6 T/ESM.
[74] Art. 8 (4) and (5) T/ESM.
[75] Art.9 (3) T/ESM.

On the basis of these assessments, it is up to the Board of Governors itself to decide on the granting of financial support; if it inclines toward financing, it will entrust the Commission, jointly with the ECB and, where possible, the IMF, with the negotiation of a Memorandum of Understanding containing the conditions of the support program, which are set in accordance to two parameters: the severity of the financial shortfalls to be addressed and the financial support instrument actually chosen. In accordance with Article 7 of EU Regulation 472/2013[76], the Commission signs, following the approval of the Board of Governors, the Memorandum of Understanding on behalf of the ESM[77], observing Article 152 TFUE ("role of social partners)[78] and taking into account Article 28 of the Charter of Fundamental Rights of the European Union ("right of collective bargaining and action"); subsequently it is also approved by the Board of Directors[79].

Thus, in the event that the assessment of the economic situation of the requesting state yields a positive result and the negotiation and signing of the aforementioned Memorandum of Understanding takes place, this leads to the issue regarding the conditionality to which the financial assistance is to be subjected and which varies according to the nature of the financial instrument used: in fact, in the Memorandum, a series of objectives are set, to be achieved through macroeconomic adjustment measures to overcome the problems that led them to seek financial aid. In any case, fiscal and economic policy measures are included aimed at eliminating or reducing weaknesses in the beneficiary state's economy, as well as structural reforms on the labour market to restore competitiveness and, in extreme cases, a complete revision of the financial system of the state under consideration. The conditionality is less stringent with precautionary credit lines, which will be further explained,

[76] Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strenghtening 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, 27.5.2013, p.1-10.

[77] The revised T/ESM foresees that the Managing Director will also sign the Memorandum of Understanding with the Commission (Article 13 (4) of the revised T/ESM).

[78] Art. 152 TFUE: "The Union recognises and promotes the role of social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy", available at https://lexparency.org/eu/TFEU/ART_152/.

[79] Art. 13 T/ESM.

to countries with fundamentally solid economic and financial conditions that are suffering the effects of an adverse shock.
The Commission, together with the ECB and the IMF, is responsible for monitoring the compliance with the stipulated conditionality[80] and the agreed reforms; the results of these assessments are included in a report that the Commission submits to the Board of Directors, whereupon the same Board deliberates, by common agreement, on the maintenance of the support program and the disbursement of loan instalments succeeding the first.

As anticipated, there are several tools provided by the ESM to protect the financial stability of the Eurozone. Six different financial instruments are available in the ESM toolbox.

Firstly, there is the possibility of issuing loans to requesting member states in significant need of financing and which have lost access to the markets. The Stability support loan[81] is conditional upon the implementation of a macroeconomic adjustment programme and the ESM is obliged to cooperate with the monitoring compliance carried out by the European Commission, in liaison with the ECB and the IMF. Such support loan has been granted to Cyprus in 2013, to Greece in 2015, to Ireland in 2010 and to Portugal in 2011[82].
Another instrument is the financial assistance for the recapitalisation of financial institutions ("indirect recapitalisation"), which is to be used to preserve the financial stability of the Euro Area by addressing those cases where the financial sector is at the root of the crisis, rather than related to fiscal or structural policies. Thus Article 15 of the ESM Treaty lays out that "*the Board of Governors may decide to grant financial assistance through loans to an ESM Member for the specific purpose of re-capitalising the*

[80] Under the multilateral surveillance procedure contained in Articles 121 and 136 TFUE; thus, within the EU framework, See Recital n.17 of T/ESM.
[81] Art. 13 T/ESM.
[82] See Dossier n.15 of 29 November 2019 by Camera dei deputati Ufficio Rapporto con l'Unione Europea (Italian Chamber of Deputies, European Union Relations Office) : "*La revisione del Meccanismo europeo di stabilità (MES)",* Documentazione per l'Assemblea Esame di Atti e Documenti dell'UE, available at http://documenti.camera.it/leg18/dossier/Testi/AS015.htm.

financial institutions of an ESM Member". Such instrument was used for Spain in 2012, when the ESM provided a total amount of 41.3 billion euros.

Next, the ESM can act through the purchase of bonds and other securities on the primary and secondary markets: these are the instruments of the primary market support facility and the secondary market support facility, respectively contained in Articles 17 and 18 of the ESM Treaty, which haven't been used yet however. The ESM may engage in primary market purchases of bonds or other debt securities issues by ESM Members at market prices to allow them to maintain or restore their relationship with the investment community and therefore reduce the risk of a failed auction[83]. Such instrument was designed to be used primarily towards the end of an adjustment programme, to facilitate a country's return to the market. On the other hand, the secondary market support facility aims to support the functioning of the government debts markets when lacking market liquidity threatens financial stability in the context of a loan, either with a macroeconomic adjustment programme or without it, if the Member State's economic and financial situation is sound[84].

In addition, the ESM can act on a precautionary basis through the Precautionary credit line, outlined in Article 14 of the Treaty. Such instrument allows member states to secure ESM assistance before they face major difficulties when raising funds in the capital markets. There are two types of credit lines, which both have an initial availability period of one year and are renewable: the Precautionary Conditioned Credit Line (PCCL), which is available to a Member State whose economic and financial situation is sound and complies with specific eligibility criteria, including compliance with the Stability and Growth Pact; and the Enhanced Conditions Credit Line (ECCL), whose access is open to Member States whose economic and financial situation remains sound but that don't comply with the eligibility criteria for

[83] See ESM Lending Toolkit on ESM website, available at https://www.esm.europa.eu/financial-assistance/lending-toolkit.
[84] See ESM Lending Toolkit on ESM website, available at https://www.esm.europa.eu/financial-assistance/lending-toolkit.

the PCCL. The member state is thus obliged to adopt corrective measures addressing such weaknesses and to avoid future problems concerning the access to market financing[85].

The most recently added instrument of the Direct recapitalisation instrument (DRI), which was introduced in December 2014[86], may be used to recapitalise financial institutions directly under specific circumstances as a last resort measure. In fact, the ESM can recapitalise banks directly only if private investors have been bailed-in[87], in accordance with the EU Bank Recovery and Resolution Directive and after the Single Resolution Fund has been used[88]. The total amount available for this instrument is limited to 60 billion euro. The DRI, however, will be replaced by an ESM credit line to be used as a common backstop to the Single Resolution Fund.

Lastly, it should be pointed out that the ESM Treaty establishes in recital n. 13 that *"the ESM loans will enjoy preferred creditor status in a similar fashion to those of the IMF",* while nevertheless acquiring a position subordinate to that of the Fund itself. It is established, therefore, that in the case of financial assistance programs put in place by the Mechanism, the Mechanism itself shall have priority in the repayment of loans made, over the other creditors. It has been pointed out[89] that this rule ends up constituting a sort of warning addressed to private creditors and how it risks to increase the difficulty to finance countries with unstable and weak economies.

[85] See ESM Lending Toolkit on ESM website, available at https://www.esm.europa.eu/financial-assistance/lending-toolkit.
[86] *"ESM direct bank recapitalisation instrument adopted*" (08/12/2014), ESM website, Press release available at https://www.esm.europa.eu/press-releases/esm-direct-bank-recapitalisation-instrument-adopted.
[87] As laid out in the October 2019 in-depth analysis by the European Parliament on the ESM, in order to be eligible for the implementation of the DRI, the member state should be unable to provide financial assistance to the beneficiary institution without serious effects on its own fiscal sustainability. It should also be unable to obtain sufficient capital from private sources, including bail-in.
[88] The Bank Recovery and Resolution Directive (Directive 2014/59/EU) harmonized rules to prevent and manage crises at banks and investment firms throughout Europe. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0059.
[89] Louis, J-V., (2012) *"The unexpected revision of the Lisbon Treaty and the establishment of a European Stability Mechanism"*, in "*The European Union after the Treaty of Lisbon*", p. 35, available at https://www.cambridge.org/core/books/european-union-after-the-treaty-of-lisbon/unexpected-revision-of-the-lisbon-treaty-and-the-establishment-of-a-european-stability-mechanism/6F706B2A9570AC461382620DF252AA0C.

CHAPTER 2: CONFLICT WITH EU LAW AND NATIONAL DEBATES ON THE RATIFICATION OF THE ESM

1. The compatibility of financial assistance mechanisms with Treaty rules on economic policy

Since 2010, the member state's rescuing activity, in particular the legitimacy of the ESM, has been under close legal scrutiny by European legal scholars: in fact, the opinions of the doctrine regarding the issue of the compatibility of the various crisis management tools with the TFEU rules on economic policy, have been different and at times contrasting. Particularly, it appeared that there were two main points of view: on the one hand, those who made a strong case for compatibility, and on the other, those who claimed that the financial support measures taken by the Union and its member states in response to the crisis constituted a violation of the rules on economic policy, particularly the no bailout clause contained in Article 125 TFEU. While in the literature the debate has been diverse and at times contrasting, on the level of the highest jurisprudence the controversy has been settled with the judgement of the European Court of Justice in the Pringle Case of 2012, which provided guidelines on the legitimacy of the ESM with respect to EU law. Moreover, both the judgement of the German Federal Constitutional Court of 7 September 2011 on the participation of Germany in the Greek loan facility and in the EFSF and the Court's ruling of 12 September 2012 on applications for the issue of temporary injunctions to prevent the ratification of the ESM Treaty and the Fiscal Compact, have been fundamental in providing interpretive keys for the future legal framework of the Union in regards to the ESM.

1.1 Scholarly debate

One of the strongest opinions in favour of compatibility with EU law is certainly that of De Gregorio Merino[90], who focused both on the compatibility of the mechanisms of assistance with Article 125 TFEU and on the use of Article 122 (2) TFEU as a legal basis to provide financial assistance to Member States suffering a debt crisis.

In regards to compatibility with Article 125 TFEU, De Gregorio Merino explains his interpretation of the no bailout clause, which is addressed to both the Union and to the Member States. Thus, the Greek Loan Facility clearly falls *"within the personal scope of Article 125 TFEU*", consisting of a group of bilateral loans disbursed directly by the Member States. Moreover, he argues that also the EFSF and ESM, constituting *"no more than an emanation of the participating Member States"*, are to be placed within the personal scope of said Article, notwithstanding their regulatory autonomy. As for the applicability, De Gregorio Merino, after acknowledging that at first sight one could misleadingly interpret Article 125 TFEU as prohibiting of any kind of financial assistance, argued that for a more in-depth analysis of the provision it was necessary to focus on its purpose, which, as we know, is to ensure budgetary discipline, anchoring national policies to market reactions. Accordingly, he points out that while Article 125 TFEU prohibits the Union or a Member State to guarantee the debt of any other Member State, on the other hand the prohibition does not extend to types of financial assistance interventions, such as loans or credits, that would impose a duty of repayment on the recipient country. In support of his thesis, he finds the difference in terminology between Article 125 and 123 TFEU, which expressly and in stricter terms prohibits "overdraft facilities or any other type of credit facility" being guaranteed by the ECB or by central banks of the Member States. And indeed, De Gregorio Merino himself makes it clear that not all forms of financial support would be compatible with the bailout ban, namely loans that could establish a moral hazard mechanism; however, according to him, the best indication that the crisis management instruments adopted by the Union

[90] De Gregorio Merino, A. (2012). *Legal Developments in the Economic and Monetary Union During the Debt Crisis: The Mechanisms of Financial Assistance,* Volume 49, Issue 5, Common Law Review, p.1613-1646.

were compatible with Article 125 TFEU consisted in the conditionality to which they were subordinated.

In his remarks on Article 122 (2) TFEU, De Gregorio Merino noted how a historical, contextual and literal interpretation allowed him to conclude that such Article legitimately empowers the legislator to assist Member States suffering a debt crisis. From a historical perspective, he noted that the adoption of Article 122 (2) TFUE represents a compromise dating back to the Maastricht Treaty negotiations of 1992 between those Member States that feared that the establishment of financial assistance mechanisms would lead to a transfer union, and the Commission, who advocated during precisely for the introduction of a scheme of financial assistance for Member States. As for a contextual interpretation, since the reading of Article 122 (2) TFEU can't be dissociated from Article 125 TFEU, this only implies the necessary its compatibility with financial assistance mechanisms; furthermore, the crucial element of conditionality, which enables the maintenance of Member State's fiscal discipline in exchange for assistance, unites both Articles. Finally, a purely literal reading of Article 122 (2) TFEU, seems to preclude its application even in the case of a sovereign debt crisis. Closing his observations concerning specifically Article 122 (2) TFEU, De Gregorio Merino pointed out, however, that the simple occurrence of excessive deficit in a Member State could not legitimize the granting of financial support, as this would end up undermining the effectiveness of Article 126 TFEU, which lays out the member state's obligation to avoid excessive deficits.

Turning to the other point of view of the scholarly debate on the issue, it's particularly German scholars[91] who have expressed doubts on the compatibility with the Union's economic policy. Among these, one approach that considerably stood out is the one of Matthias Ruffert, German lawyer

[91] See, for instance, Siekmann, H., (2012) *„Missachtung rechtlicher Vorgaben des AEUV durch die Mitgliedstaaten und die EZB in der Schuldenkrise"*, Institute for Monetary and Financial Stability, Working Paper Series No. 65; Kube, H. and Reimer, E., (2010) „*Grenzen des Europäischen Stabilisierungsmechanismus*" Neue Juristische Wochenschrift No.63. For a full discussion with further references see Heun, W., and Thiele, A., (2012) *„Verfassungs – und europarechtliche Zulässigkeit von Eurobonds"*, Juristenzeitung No.67.

who argued in his research on *"The European Debt Crisis and European Union Law"*[92], dated in 2011, that the establishment of the ESM is in breach of substantive provisions of the Monetary Union. Ruffert asserted the illegitimacy of both the Eurogroup's decision of 2nd May 2010, which authorized the activation of a bilateral loan plan in favour of Greece and the creation of the EFSF, as well as the intervention decided by the Eurogroup in favour of Ireland and Portugal[93]. To use his own words, these actions were "*in breach of European Union Law*". As such, the German lawyer sought to counter the numerous counter-arguments advanced for the compatibility of these instruments.

Firstly, he rejected the interpretation that Article 125 TFUE only applied to a duty of responsibility or assumption of commitment, thereby opening up the possibility of intentional and deliberate forms of support. For Ruffert, even this conclusion would have been in conflict with the logic of the bailout ban. In fact, the latter, when taken in conjunction with the other economic policy guidelines in Articles 123 and 124 TFUE, would express an absolutely imperative objective: it would seek to condition the financing needed by Member States solely on the market's responses, with governments being forced to act prudently in order to prove their economic stability. Thus, such an interpretation would render even purely voluntary support incompatible with the objectives of the aforementioned TFUE rules.

Ruffert once more rejected the idea that Article 125 TFUE could not be interpreted as posing an obstacle to the measures put in place to end the crisis, due to its purpose: *"a rule designed to stabilize the euro could not be put into place against measures aiming at the same stabilisation – such as the rescue packages for the Member States in trouble"*. Ruffert asserted that such an interpretative solution, particularly in the case of the interventions made in favour of Ireland and Portugal, was not acceptable: it was rather clear that it was impossible to accentuate the mutualistic connotation of the Monetary

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[92] Ruffert, M. (2011). *The European debt crisis and European Union law*. In *Common Market Law Review*, Issue 6, 1777–1805, p.1179, available at https://doi.org/10.54648/cola2011070.
[93] Assistance to Ireland started in December 2010 and ended in December 2013, while assistance to Portugal started in June 2011 and ended in May 2014.

Union, either through a "*mere reinterpretation of a core article of the Treaties*" on economic policy or through an "*implicit modification*", this even considering a certain margin of discretion in favour of Member States, to be used in emergency situations. On the other hand, the German rationalizes that the solution adopted with reference to the case of the Greek crisis "*did not demand a breach of the law*", as this case was distinguished by a more serious domestic economic situation, as well as by its lesser impact on the entire financial system of the Union.

Moving on to analyse the use of the emergency clause contained in Article 122(2) TFUE as the foundation of the EFSM and the interventions carried out within its framework, Ruffert expressed doubts as to the Article's applicability in the Greek crisis. Assuming that the fulfilment of the conditions set by that norm should be subject to a case-by-case verification, he noted difficulties in tracing especially the causes of the Irish crisis[94] to the exceptional circumstances mentioned in Article 122(2) TFEU[95].

At the conclusion of his analysis, Ruffert focused on the principle of solidarity and its configurability as a source of legitimacy of the crisis management tools adopted by the Union since 2010. Although he didn't doubt the relevance of the spirit of solidarity as a principle of the EU, including within the economic field, which assures the operation of the already existing Transfer Union for the mutual benefit for all member states, in contrast, the EMU lacked, and still does, an express provision and legal basis for legitimizing the transfer of capital. While Article 122(2) TFUE does invoke the spirit of solidarity, it is equally clear that it frames it within a framework of conditions and constraints that undermines its effectiveness.

1.2 Jurisprudence on the controversy: the Pringle case

[94] For an in-depth look at the economic crisis in Ireland in 2011 see Elliott, J., and Treanor, J., (2011) *"Ireland forced into new £21bn bailout by debt crisis"*, available at https://www.theguardian.com/world/2011/mar/31/ireland-new-bailout-euro-crisis.

[95] As we have already seen, the emergency clause provides an exception allowing bailout activity of the EU via financial assistance *"where a Member state is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control…"*.

On the compatibility of the ESM with Article 125 TFEU, and also on the legitimacy of the amendment made to Article 136 TFEU which allowed the establishment of financial assistance mechanisms, the European Court of Justice gave a preliminary ruling in the Pringle case (C-370/12 of 27 November 2012)[96]. The case stemmed from the initiative of an Irish parliamentarian named Thomas Pringle, who appealed on 13 April 2012 to the Irish Supreme Court to have his country's adherence to the ESM declared illegitimate. In fact, at that time, the Irish government had decided to proceed simultaneously with both the approval of the amendment to Article 136 TFEU and the ratification of the ESM Treaty, without subjecting the relevant acts to a referendum, which was instead a mandatory requirement in case an amendment to the Irish Constitution would have been necessary. Pringle's intention was to block the aforementioned ratification and approval processes: this could be done by virtue of Ireland's permissive rules that entitled him to apply to the Court for an injunction that, if granted, would prevent the government from proceeding with the disputed ratification. Hence, the Irish Supreme Court decided to refer the case to the ECJ for a preliminary ruling.

There is first to mention that this case was brought immediately after the establishment of the new stability mechanism, so the judgment provided by the Court dealt with purely theoretical aspects, without any concrete case regarding the operation of the ESM and the European institutions cooperating with it. However, the case was of a ground breaking political and legal importance as it raised a number of legal issues, including in relation to the constitutional impact of the ESM Treaty on the Economic and Monetary Union[97].

[96] Judgement of the Court (Full Court), 27 November 2012. Thomas Pringle v. Government of Ireland and Others. Reference for a preliminary ruling from the Supreme Court. Stability mechanism for the Member States whose currency is the euro – Decision 2011/199/EU – Amendment of Article 136 TFEU – Validity – Article 48 (6) TEU – Simplified revision procedure – ESM Treaty – Economic and monetary policy – Competence of the Member States. Case C-370/12, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0370.

[97] See generally for example T. Beukers and B. de Witte, "The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle", Common

The ECJ upheld the validity of the European Council Decision 199/2011, which amended, through the simplified revision procedure under Article 48 paragraph 6 TEU, Article 136 TFEU, introducing a third paragraph concerning the establishment of a permanent stability mechanism. The Court also found in this judgment that the Eurozone Member States had not violated EU law by negotiating and ratifying the Treaty Establishing the European Stability Mechanism. The Court based the latter finding on the long-awaited clarification of the scope and content of the TFEU's "no bailout clause" contained in Article 125, which as previously analysed, had been the subject of intense controversies among legal scholars, in particular in Germany. In the following paragraph the Court's judgment upon these two questions will be analysed more in depth.

In regards to the validity of Decision 199/2011, the ECJ determines whether the implications of the TFEU amendment expanded the competences granted to the Union in the Treaties. The Court came to the conclusion that the Union's monetary policy targets price stability, whereas the ESM pursues the purpose of maintaining the stability of the euro area as a whole. Given the clear difference in goals, it is apparent that the establishment of the ESM does not interfere with the Union's exclusive competence of monetary policy[98]. It also clarifies that the ESM does, in fact, complement the regulatory framework for improved economic governance of the Union, with its major objective being the management of potential financial crises. Consequently, in light of the fact that the Treaty amendment does not provide the Union with any new legal foundation, the Court comes to the conclusion that Decision 199/2011 does not establish any new competence on the Union.

Market Law Rev (2013) 50: 805-848, P. Craig, 'Pringle: Legal Reasoning, Text, Purpose and Teleology', Maastricht J of European and Comparative L (2013) 20: 3-11, and G. Beck, 'The Court of Justice, legal reasoning, and the Pringle case- law as the continuation of politics by other means', European L Rev (2014) 39: 234-250.

[98] Lo Schiavo, G., (2013) *"The Judicial 'Bail Out' of the European Stability Mechanism: Comment on the Pringle Case"*. Research Paper in Law, Department of European Legal Studies, Collège d'Europe, available at http://aei.pitt.edu/47514/1/researchpaper_9_2013_loschiavo.pdf.

Subsequently, the Court focused on the question whether the power to conclude and ratify the Treaty establishing the ESM is compatible with specific European Treaty articles (Articles 2, 3, 4 (3) TEU, Articles 2(3) TFEU, 3(1)(c) and (2) TFEU, 119 TFEU - 123 TFEU and 125 TFEU - 127 TFEU). In essence, the Court examined the clauses relating to the Union's sole authority over monetary policy and its authority to reach international agreements. It looked more closely at the spirit of Article 125 TFEU's provision: the Court stresses that "*the ESM will not act as guarantor of the debts of the recipient Member State by referring to the spirit of the article inserted by the Treaty of Maastricht. In fact, the latter will remain responsible to its creditors for its financial commitments*"[99]. The purpose of the article itself, which is to ensure that the Member States adopt sound budgetary policy by ensuring that they are subject to the market's logic when they incur debt, explains the nature of that rule. As a result, the ECJ determines that the no bail out clause is not infringed by "*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"*[100].

2. National debates on the ratification of the ESM Treaty

As anticipated, both the ESM Treaty and the modification of Article 136 TFEU had to be submitted to the Member States for ratification and approval, before becoming fully operative. Such agreements, frequently seem to involve more than just formalities; instead they face several challenges, occasionally of constitutional nature. In order to prevent governments from adopting obligations or consenting to transfers of sovereignty on behalf of their respective states[101] by avoiding the legislative powers and controls of national parliaments, the majority of constitutional charters in Europe call for parliamentary approval and, in some cases, even a referendum.

[99] Pringle judgmenet, paragraph 138.
[100] Pringle judgement, paragraph 137.
[101] De Witte B., Beukers T. p.814

Returning to the case at hand, it was evident how the routes that should have led to the implementation of the third paragraph of Article 136 TFEU and the Treaty establishing the ESM encountered rather different difficulties: in fact, whereas the Treaty amendment required the consent of all twenty-seven (then) EU members, the entry into force of the ESM had milder requirements and was characterized by greater flexibility: the Treaty specifically stated that it would become only effective once the ratification of as many states as together constituted 90% of the capital commitments[102] had been achieved; in practice, this gave the four largest members[103] who contributed more than 10% of the total capital an implicit veto ratification.

In light of these considerations, a jurisprudential excursus will be done to address the doubts and responses that have arisen within national legal systems regarding the compatibility with their respective constitutional charters with the Treaty establishing the ESM and the amendment of Article 136 TFEU.

2.1 German jurisprudence

It has been appropriately stated[104] that no national court's rulings have ever so clearly conditioned the implementation of EU laws or agreements, as those of the *Bundesverfassungsgericht*. This view emphasizes well the influence that German jurisprudence has had, particularly in recent years, on EU law. In fact, Germany has indisputably taken the lead in the negotiation and establishment of the financial assistance mechanisms, both for financial and political reasons. However, German public opinion has largely opposed the country's participation in those mechanisms, fearing that assistance would become a transfer Union, in betrayal of the principles of monetary and price stability that define the German collective understanding of public finance[105]. However, the participation of Germany in those mechanisms has been

[102] Article 48 T/ESM
[103] Germany, France, Italy and Spain.
[104] Pinelli C., "Le Corti europee", in Amato, G., and Gualtieri, R., (2013) "Prove di Europa unita – Le istituzioni europee di fronte alla crisi", p. 325.
[105] De Gregorio merino, p. 1641

fiercely contested by German public opinion which feared assistance turning into a transfer Union, in betrayal of the principles of monetary and price stability that shape the German collective understanding of public finance. Legal questions about whether Germany's involvement is at all compatible with the EU Treaties and the German Constitution have frequently been raised in public criticism.

In this context, the judgment of the German Constitutional Court of 7 September 2011 concerning the participation of Germany both in the Greek loan facility agreement and in the EFSF, and the judgment of 12 September 2012 in which the German constitutional judges ruled on four constitutional complaints that arose over the approval of the ESM and Germany's participation in it, are of special relevance. As such, the purpose of this section is to set out the relevant aspects of the judgment in a preferably comprehensive manner in order to make it directly accessible to non-German speakers.

2.1.1 The German Federal Constitutional Court: composition and functions

The Federal Constitutional Court (*Bundesverfassungsgericht*) is a constitutional organ created in 1949, and designed to be a "final arbitrer"[106] in all matters relating to the interpretation and application of the Basic Law of Germany, the *Grundgesetz*. It consists of two Senates *(Zwillingsgericht),* each composed of eight judges. The First Senate is, in principle, competent to adjudicate disputes involving citizens and the state; the Second Senate deals essentially with constitutional conflicts between state organs[107]. This division of competences is, however, only tendential, as since 1956, the Second Senate has also taken charge of appeals relating to judgements judicial proceedings brought directly by citizens to protect their fundamental rights[108]. Thus, each Senate has its own, precisely defined competences and they are independent of each other, but officially, the decisions of each Senate

[106] Kay, R., S., (2002) "Standing to raise constitutional issues: comparative perspectives".
[107] Article 14 of the Law on the Federal Constitutional Court.
[108] Di Salvatore, E., (2021) "Sistemi Costituzionali Europei".

are always decisions of the Federal Constitutional Court[109]. In rare cases, in which one Senate intends to deviate from the other Senate's interpretation of a specific legal matter, the Plenum itself, composed of all the sixteen judges, decides on the case.

The *Bundesrat* and *Bundestag* each elect one-half of the judges of the Federal Constitutional Court. To be elected as a judge, one must be at least 40 years of age, and three members of each Senate are necessarily elected from among the judges of the Supreme Federal Courts who have served for at least three years. All judges serve for twelve years, but in any case not beyond the age of sixty-eighth, are not eligible for re-election, and their term of office is incompatible with the exercise of any other profession (except the one of teaching law at a university).

The powers of the Federal Constitutional Court, expressly identified by the *Grundgesetz* (GG) in Article 93[110], are listed in Article 13 of the Federal Constitutional Court Act, which governs the composition and operation of the Court itself and which will be referred to as the BVerfGG in the following[111]. In fact, it shall decide in the cases determined by the Basic Law, among these: on the forfeiture of the basic rights[112], on the ban of political parties that either threaten the existence of Germany or seek to undermine the democratic order[113], on complaints against decisions of the Bundestag relating to the validity of an election[114]. The main functions, however, pertain to the decisions on constitutional complaints (*Verfassungsbeschwerde*) brought directly by anyone who complains about the infringement of a fundamental right by a public authority[115] and to the resolution of *"disputes concerning*

[109] The Federal Constitutional Court: Court and Constitutional organ, available at https://www.bundesverfassungsgericht.de/EN/Das-Gericht/Gericht-undVerfassungsorgan/gericht-und verfassungsorgan_node.html.
[110] Article 93 GG [Jurisdiction of the Federal Constitutional Court]
[111] Law on the Federal Constitutional Court (Bundesverfassungsgerichtsgesetz – BVerfGG), in the version published on 12 March 1951 (Federal Law Gazette I p.243), as published on 11 August 1993 (Federal Law Gazette I p.1473), as last amended by the Act of 16 July 1998 (Federal Law Gazette I p.1823).
[112] Article 18 GG.
[113] Article 21 (2) GG.
[114] Article 41 (2) GG.
[115] Article 93 (1) (4a) and (4b) GG.

the extent of the rights and duties of a supreme Federal organ or of other parties concerned who have been vested with rights of their own by the Basic Law or by rules of procedure of a supreme Federal organ[116], also known as *Organstreit* proceedings, which will be examined in more depth in paragraph 2.1.2.

The primary difference between the Federal Constitutional Court and the other regular German courts concerns the potential consequences of its decisions. The rulings of the Federal Constitutional Court are binding on all courts and authorities of the Federal Republic, in contrast to all other courts, which can only resolve the individual cases that are presented before them and thus issue judgements with effect only for the parties[117]. This far-reaching power accorded to the Federal Constitutional Court is laid out in Section 95 BVerfGG[118]. Moreover, the decisions of the Federal Constitutional Court may lead to the annulment of the challenged act; in the case where it concerns a law, to a declaration of constitutional illegitimacy. Even though the work of the Federal Constitutional Court can have also political effects, it is however not a political body as it can only be called upon insofar as provisions of the Basic Law are involved. It must not take into consideration issues of political expediency in its decisions, thus it only determines the constitutional framework within which policies may develop.

2.1.2 Standing to raise constitutional issues in Germany: Constitutional complaints and *Organstreit* proceedings

[116] Article 93 (1) (1) GG.
[117] Kay, R., S., (2002) Standing to raise constitutional issues: comparative perspectives.
[118] Section 95 BVerfGG states that: *"(1) If the constitutional complaint is upheld, the decision shall state which provision of the Basic Law has been infringed by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the act or omission against which the complaint was directed will infringe the Basic Law. (3) If a complaint against a law is upheld, the law shall be declared null and void (...)".*

There is no general assignment of jurisdiction to the Federal Constitutional Court with regard to the issue of standing to raise constitutional issues. Instead, a catalogue of possible proceedings through which a decision of the Federal Constitutional Court can be reached is_contained in Article 93 GG and Section 13 BVerfGG. Each of these proceedings has been specifically designed to deal with a particular type of constitutional issue that may be raised before the court. Because of this, the related standing requirements vary and need to be examined separately for each of the main procedural options. That being said, the constitutional complaints (*Verfassungsbeschwerde*) and the standing of constitutional organs (*Organstreitverfahren* procedure) will now be discussed.

The Constitutional complaint (*Verfassungsbeschwerde*) filed by individuals who claim that an action by a state authority has infringed their basic rights, is the most common type of proceeding decided by the Federal Constitutional Court. It is derived from Article 93 (1) (4a) GG together with Section 13 (8a) BVerfGG. The constitutional complaint broadens the range of available legal remedies even if it is not an appeal that provides a claimant with an additional opportunity for judicial review. A claimant can still receive an "extraordinary"[119] and thus constrained review of the final court decision with regard to constitutional grounds even after a regular resort to the courts has been exhausted. Furthermore, the Federal Constitutional Court will only assess whether the ordinary court's interpretation and implementation of the relevant legislation is consistent with the GG, rather than determining whether the laws have been correctly applied by them. According to the logic used by the Federal Constitutional Court in this case, "specific"[120] constitutional violations must be established before the Court can overturn an ordinary court ruling. However, the Federal Constitutional Court is not intended to serve as an additional instance of appeal on a regular instance[121]. Therefore, a citizen must allege a breach of some "specific"[122] right in order to file a constitutional complaint; this violation must go beyond an unlawful

[119] Kay. R., S., (2002) "Standing to raise constitutional issues: comparative perspectives".
[120] Ibid.
[121] Ibid.
[122] Ibid.

treatment by a public authority. Once a complainant has proved to the Court that a potential infringement of their fundamental rights has occurred, making their complaint thus admissible, the Court will thoroughly scrutinize the contested decision as regards its constitutionality.

In regards to the specific standing requirements, as stated by the *Bundesverfassungsgericht's information sheet on Constitutional complaints*[123] and in the Fifteenth Section of the BVerfGG (*Procedure in cases pursuant to Section 13 (8a*), ranging from Section 90 to Section 95), any person may lodge a constitutional complaint claiming that one of his or her fundamental rights (Art.1 to Art. 19 GG) or one of the rights that are equivalent to fundamental rights (Art. 20 (4), Art. 33, Art.38, Art.101, Art.103 and Art.104 GG) have been violated by an act of German public authority (Art.91 (1) no.4a GG). Thus, the constitutional complaint is separate from the appeals process before the ordinary courts as it is an extraordinary legal remedy that only examines whether specific constitutional law has been violated.

To ensure that the Federal Constitutional Court will only consider complaints that present a genuine constitutional issue that can't be resolved by any other institution, an additional procedural criterion has been developed on the basis of Article 94 (2) GG[124]. This specific procedural requirement, contained in Section 90 BVerfGG, lays out that *"if legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted*". Also known as the principle of subsidiarity[125], this requirement makes the filing of a constitutional complaint inadmissible as long as a recourse to an ordinary court is still possible. However, the Article also specifies that the Federal Constitutional Court may immediately decide,

[123] Information sheet of the Bundesverfassungsgericht: „How to lodge a constitutional complaint", version of August 2022, available at https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/merkblatt.pdf?__blob=publicationFile&v=17.

[124] *Article 94 (2) GG: "The law may require that all other legal remedies be exhausted before a constitutional complaint may be filed and may provide for a separate proceeding to determine whether the complaint will be accepted for adjudication".*

[125] Kay, R., S., (2002) "Standing to raise constitutional issues: comparative perspectives".

in cases of general relevance, on a constitutional complaint lodged before all remedies have been exhausted.

Turning to the case of the standing of constitutional organs (*Organstreitverfahren*), the procedure is laid down in Article 93 (1) (1) GG: *"The Federal Constitutional Court shall rule on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parts vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body"*.

The introduction of such a procedure was deemed necessary from the beginning of Germany's constitutional development following World War II due to the underlying idea that flows directly from the fundamental structural elements in the newly created constitutional order: the founders of the GG decided to establish a strong system of checks and balances[126]; consequently, despite the *Bundestag's* central role under the GG, there is no hierarchy of constitutional organs in Germany. All five of the country's highest constitutional organs – the *Bundestag*, the *Bundesrat* (the representative organ for the sixteen states), the Government (*Bundesregierung*), the Head of State (*Bundespräsident*) and the Federal Constitutional Court – are, in principle, all on equal footing under the Germany's constitutional system. Theoretically, this calls for us to recognize the various constitutional organs as distinct organizational units of the state and to treat them as right-holders in terms of their constitutional authority[127]. Thus, whenever their competences are contested, they can also file a case against one another before the Federal Constitutional Court.

The Section 63 BVerfGG states that the subjects legitimized to promote *Organstreit* proceedings (or resist it) are: the *Bundespräsident*, the *Bundestag*, the Bundesrat, the *Bundesregierung*, and *"sections of these*

[126] Kay, R., S., (2022) "Standing to raise constitutional issues: comparative perspectives", p. 178-180.
[127] Ibid.

organs which have been vested with rights of their own by the Basic Law or the rules of procedure of the Bundestag or Bundesrat". This includes the presidents of the *Bundestag* and *Bundesrat*, the committees, the parliamentary groups, single members of Parliament, and the members of the federal government. Additionally, the Federal Constitutional Court has ruled that political parties can bring to it all disputes regarding their particular constitutional status under Article 21 GG because Article 91 (1) (1) GG does not limit, contrary to what Section 63 BVerfGG incorrectly states[128], the circle of potential complainants to segments of the highest constitutional organs. Instead, it refers to all parties with constitutional rights of their own. Regarding the standing of all these potential complainants, Section 64 (1) BVerfGG mandates that the applicant asserts, within six months[129], *"that an act or omission on the part of the respondent violated or directly threatened to violate the rights and obligations conferred on the applicant or on the applicant's organ by the Basic Law".* In this type of dispute the issue to determine is twofold: firstly, it must be ascertained whether a norm of the GG or rule of procedure of a supreme federal body exists that grants the right claimed by the applicant; and_in the second place, it must be determined whether it is possible that this norm has been violated by the defendant. Usually, the norm in question deals with competences of the various organs, but there may be also cases in which the unwritten rule of "inter-organ comity"[130] is violated or put in jeopardy.

If the judgement determines that the constitutional order has been violated, the Federal Constitutional Court will declare so, as laid out in Section 67 BVerfGG. Contrary to the case of constitutional complaints previously analysed, the court is unable to issue any specific orders regarding the execution of its decision; instead, all constitutional organs are expected to acknowledge the Federal Constitutional Court's rulings and take the necessary actions on their own initiative.

[128] Ibid.

[129] Section 64 (3) BVerfGG: *"The application must be filed within six months of the applicant gaining knowledge of the contested act or omission."*

[130] Kay, R., S., (2022) "Standing to raise constitutional issues: comparative perspectives", p. 181

2.1.3 The judgment of the German constitutional Court of 7 September 2011 on the compatibility of the participation of Germany in the Greek loan facility and in the EFSF

In its ruling of 7 September 2011[131], the Federal Constitutional Court rejected as unfounded the constitutional complaints (*Verfassungsbeschwerden*) filed[132] against acts and measures taken by Germany and the European Union concerning financial aid to Greece and the euro rescue package. Initially, and for a long time, Germany opposed European aid to Greece, even proposing its expulsion from the Eurozone, backed by a public opinion strongly opposed to economically supporting countries responsible of unsound financial management. At the end of April 2010, also because of the repercussions of the crisis on the German banking system, Chancellor Merkel had to agree to the bilateral aid plan, provided that the intervention was aimed at preserving the financial stability of the monetary union, and that Greece would commit to a tough recovery plan. The Greece package was converted in Germany into 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 Republic"),* the so-called Act on Financial Stability within the Monetary Union *("Währungsunion-Finanzstabilisierungsgesetz - WFStG"*[133]) of May 7, 2010. A little later followed the decision on the EFSF when the German Parliament passed the Act Concerning the Giving of Guarantees in Connection with a European Stabilisation Mechanism *("Gesetz zur Übernahme von Gewährleistungen im Rahmen eines europäischen*

[131] BVerfG, Judgement of the Second Senate of 7 September 2011 – 2 BvR 987/10-, paras.1-142, available at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/09/rs20110907_2bvr098710en.html.

[132] The constitutional complaints have been filed by German individuals: Prof. Dr. Wilhelm Hankel, Prof. Dr. Wilhelm Nölling, Prof. Dr. Karl Albrech Schachtschneider, Prof. Dr. Dieter Spethmann, Prof. Dr. Joachim Starbatty.

[133] Federal Law Gazette (Bundesgesetzblatt – BGBI.) I p.537, *"Währungsunion-Finanzstabilitätsgesetz vom 7. Mai 2010"*, available at https://www.gesetze-im-internet.de/wfstg/BJNR053700010.html.

Stabilisierungsmechanismus"), so-called Euro Stabilisation Mechanism Act (*"Euro-Stabilisierungsmechanismusgesetz – StabMechG*[134]*)* of 22 May 2010. By adopting these Acts, the German Bundestag *"did not impair in a constitutionally impermissible manner its right to adopt the budget and control its implementation by the government or the budget autonomy for future Parliaments"*[135].

In examining the complaints filed, the Federal Constitutional Court assessed the compatibility of the above-mentioned acts with specific constitutional provisions: the right to vote enshrined in Article 38 (1) GG[136] and the democratic principles in Article 20 (1)[137] and (2) GG[138] in conjunction with Article 79 (3) GG[139]. Already in the well-known ruling on the Lisbon Treaty[140] (BVerfG, 2BvE 2/08 of 30 June 2009) the Federal Constitutional Court held that the appeals based on Article 38 (1) GG had been held admissible, insofar as the rights of participation of the German Parliament had been weakened. In fact, after complaints raised by the parliamentary group *"Die Linke"* through the *Organstreitverfahren* procedure, the Federal

[134] Federal Law Gazette (Bundesgesetzblatt BGBI) I p.627, *"Stabilisierungsmechanismusgesetz vom 22.Mai 2010, das zuletzt durch Artikel 1 des Gesetzes vom 23.Mai 2012 (BGBI. S. 1166) geändert worden ist"*, available at https://www.gesetze-im-internet.de/stabmechg/BJNR062700010.html.

[135] Press Release No.55/2011 of 7 September 2011, *"Constitutional complaints lodged against aid measures for Greece and against the euro rescue package unsuccessful – No violation of the Bundestag's budget autonomy"*, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2011/bvg11-055.html.

[136] Article 38 (1) GG: *"Members of the German Bundestag shall be elected in general, direct, free, equal, secret elections. They shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience."*

[137] Article 20 (1) GG: *"The Federal Republic of Germany is a democratic and social federal state."*

[138] Article 20 (2) GG: *"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."*

[139] Article 79 (3) GG: "*Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principle laid down in Articles 1 and 20 shall be inadmissible."*

[140] BVerfG, Judgement of the Second Senate of 30 June 2009 – 2 be 2/08-, paras.1-421 (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html). The 2009 *Lissabon Urteil*, serves as a prelude to the two cases examined in this section. Consideration should be given to one aspect in particular: despite the fact that Article 93 GG limited this option to the federal government, the governments of each Land, or one-third of the German members of parliament, individual members of parliament had also been given the opportunity to appeal to Court through an Organstreitverfahren procedure on the basis of the constitutional principle of political representation.

Constitutional Court decided in its judgement of 30 June 2009, on the one hand that the Act Approving the Treaty of Lisbon[141] ("*Zustimmungsgesetz zum Vertrag von Lissabon*") was compatible with the GG; on the other hand it decided that the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters[142] *("Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*"), was in violation of Article 38 (1) GG in conjunction with Article 23 (1) GG[143] *"insofar as the Bundestag and the Bundesrat have not been accorded sufficient rights of participation in European law-making procedures and treaty amendment procedures"*[144].

In its sentence of 7 September 2011, the Constitutional Court expands the protected scope of electoral right to the intergovernmental sphere, in which the aid to Greece and the European financial stabilization mechanism are to be placed. The Constitutional Court holds that the legislature, the *Bundestag*, must remain "master of its own decisions" ("*Herr seiner Entschlüsse*"), including those relating to budget revenues and expenditures, without external constraints from EU bodies or other member states. Indeed, as elected representatives of the people, it is up to the members of the Bundestag to control fundamental budgetary decisions even in a system of intergovernmental governance. As in its ruling on the Lisbon Treaty[145] the Court once again emphasizes the *Bundestag's* responsibility for the process of European integration, which also applies to measures that have budgetary impact. Concretely, the Court stipulates that financial support measures that are large in scale, and thus strongly affect the federal budget, and have been adopted by the Federation out of a spirit of solidarity at the international or European level, must be specifically approved by the *Bundestag*.

[141] Ibid.
[142] Ibid.
[143] Article 23 GG on the European Union, the Protection of basic rights and the Principle of subsidiarity.
[144] para. 406 of the judgement

The Federal Court then concludes that neither the Act on Financial Stability within the Monetary Union (WFStG), neither the Euro Stabilisation Mechanism Act (StabMechG) are in conflict with the right to vote enshrined in Article 38 (1) GG. However, the Court clarifies the interpretation, in accordance with the GG, that must be given to the Euro Stabilisation Mechanism Act, which provides for an "understanding" ("*Einvernehmen*") to be reached between the Federal Government and the Budget Committee of the *Bundestag* ("*Haushaltsausschuss")*: the consent ("*Zustimmung*") of said Budget Committee must in principle be expressed before the Federal Government assumes the financial guarantees; only in this way a continuous influence of the *Bundestag* on decisions on financial guarantees can be guaranteed.

2.1.3.1 Amendments to the assumption of guarantees following the constitutional judgement of 7 September 2011

Following the Federal Constitutional Court's judgment in its ruling of 7 September 2011, amendments to the Euro Stabilization Mechanism Act ("StabMechG") were introduced in order to bring the law in line with said judgment and with the altered institutional framework of the rescue fund. In fact, with the expansion of the Stability Fund's competencies[146], the Parliament's powers of cooperation and control were also strengthened, in line with what has been repeatedly emphasized in the German constitutional jurisprudence.

Moreover, on the same day that the Federal Constitutional Court dismissed appeals against acts and measures concerning aid to Greece and the Eurozone bailout, the German parliamentary groups of the governing majority (CDU/CSU and FDP) submitted a motion on the safeguarding of the rights of parliament within future European stabilization measures, entitled

[146] Reuters (28 September 2011) *"Finnish parliament approves stronger EFSF"*, available at https://www.reuters.com/article/finland-efsf-idINL5E7KS17N20110928.

“Parlamentsrechte im Rahmen zukünftiger europäischer Stabilisierungsmaßnahmen sichern und stärken”.[147]

The motion outlines the guiding principles for the *Bundestag’s* involvement in decisions regarding the Eurozone’s financial stability: prior parliamentary approval of decisions made within the Stability Fund’s framework that alter legal guarantees; Budget Commission’s approval of the Fund’s operational standards; Budget Commission’s approval of changes to the terms of ongoing programs; current and complete information of the Budget Commission regarding all operational decisions made by the Fund. Thus, since October 2011, parliamentary participation in the decisions and acts of the European Rescue Fund was placed at a higher level: indeed, § 3 of the *StabMechG* law[148] provides for a parliamentary reservation ("*Parlamentsvorbehalt*") for decisions concerning the European Stability Fund, which makes all key decisions affecting the Parliament's overall budgetary responsibility dependent on prior approval of the *Bundestag*. The parliamentary reservation, as described in detail in the law, takes the form of a graded approval procedure: in cases of urgency ("*Eilbedürftigkeit*") or confidentiality ("*Vertraulichkeit*"), the *Bundestag's* participation rights are exercised by members of the Budget Committee, elected by the Bundestag itself for the duration of a legislative term. All other measures taken in favour of troubled Eurozone member states, which are in a special way neither urgent nor confidential, necessarily require the interest and consent of the *Bundestag* plenum. Finally, the federal government’s responsibilities to inform the Parliament and transmit acts and documents related to the Eurozone financial stabilization measures are governed under Section 5 of the *StabMechG* law[149].

2.1.4 The Federal Constitutional Court’s judgement of 12 September 2012: the role of the Bundestag

[147] "Antrag der Fraktionen der CDU/CSU und FDP (07.09.2011)“, available at https://dserver.bundestag.de/btd/17/069/1706945.pdf.

[148] See "§ 3 Parlamentsvorbehalt für Entscheidungen in der Europäischen Finanzstabilisierungsfazilität“, StabMechG, available at https://www.gesetze-im-internet.de/stabmechg/__3.html.

[149] See “§ 5 Unterrichtung durch die Bundesregierung”, StabMechG.

In its judgement of 12 September 2012[150], the Second Senate of the Federal Constitutional Court refused under certain conditions to issue a temporary injunction against the ratification of the ESM Treaty and the Fiscal Compact and against the national Acts approving and accompanying the Treaties. In particular, the Federal Constitutional Court dismissed the constitutional complaints filed by the "*Mehr Demokratie e.V*" Association[151], which was joined by dozens of thousands of German citizens and a number of renowed economic experts, and the appeals raised through *Organstreit* proceeding by the parliamentary group of the Left ("*Die Linke*"), aimed at preventing the enactment of the law ratifying the ESM Treaty ("*Gesetz zu dem Vetrag vom 2. Februar 2012 zur Einrichtung des Europäischen Stabilitätsmechanismus*"[152]) and the law ratifying the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, the so-called Fiscal Compact[153] ("*Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*"), which had been approved by the Bundestag[154] during the session of 29 June 2012, the law ratifying the decision adopted by the European Council on 25 March 2011 to amend Article 136 TFEU ("*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*

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[150] BVerfG, 2 BvR 1390/12; 2 BvR 1421/12; 2 BvR 1438/12; 2 BvR 1439/12; 2 BvR 1440/12; 2 BvE 6/12, of 12 September 2012.

[151] Mehr Demokratie e.V (14.09.2012)"Bündnis Europa braucht mehr Demokratie, Stellungnahmen zum Urteil des Bundesverfassungsgerichts vom 12. September 2012", available at https://www.mehr-demokratie.de/fileadmin/pdf/2012-09-14_Presse-Information_Statements_EU-Urteil.pdf.

[152] Available on DIP (*Dokumentations-und Informationssystem für Parlamentsmaterialien*), https://dip.bundestag.de/vorgang/.../43455.

[153] The Fiscal Compact, signed on 2 March 2012 by all member states of the European Union, except Czech Republic and United Kingdom, represents a fiscal agreement intended to establish a set of binding rules for the preservation of the principle of a balanced budget, with a lower limit of structural deficit of 0.5% of GDP to be enshrined in national law. It includes provisions to foster economic policy coordination and convergence and to strengthen the governance of the euro area. In addition, financial assistance from the ESM is only provided to Member States that have signed the Fiscal Compact. More information in regards can be found in the Fact Sheets on the EU framework for fiscal policies.

[154] The ratifying laws, for which the consent of both chambers is required, since they are "Zustimmungsgesetze", were also passed on the same day by the Bundesrat, again with a two-thirds majority according to the requirements laid out in Article 59 (2) GG and Article 79 (2) GG.

Währung der Euro ist") and the law on the financial participation of Germany in the ESM ("*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz-ESMFinG*"[155]). Thus, the subjects of the complaints argued that the two financial instruments were incompatible with German constitutional law.

The Court's ruling, which was moreover highly anticipated took on - as it did with the ruling on assistance to Greece and the EFSF - a particular relevance for the developments of the European integration process. On this occasion, as well, the constitutional judges affirmed the centrality of the principle of parliamentary democracy enshrined in Article 38 GG and the defence of the prerogatives of the *Bundestag*. The Court's arguments stem from the fact that even in an intergovernmental system with little democratic-representative legitimacy, as the European Union is to be considered according to the German constitutional judges, the Members of Parliament, as direct representatives of the people, must retain control over fundamental budgetary policy decisions.
Hence, as previously stated, the Second Senate of the Federal Constitutional Court dismissed the appeals filed, declaring the ratification of the Fiscal Compact and of the Treaty establishing the ESM to be in compliance with the dictate of the GG, provided that the two following conditions are respected: the first condition is the compliance with the limit of economic liability for each ESM member country, as explicitly spelled out in Article 8 (5) of the ESM founding treaty according to which *"the liability of each ESM Member shall be limited, to its portion of the authorised capital stock at its issue price."* Consequently, the limit of Germany's economic involvement in the ESM, whose subscribed capital share in said fund amounts to €190.024.800.000 (equal to about 27% of the €700 billion), must be considered absolute and insurmountable as long as the German representatives within the fund's constituent bodies do not approve the subscribing of additional ESM shares; the second condition to be met dictates that the inviolability of the documents belonging to the ESM, enshrined in

[155] ESM Financing Act of 13 September 2012 (Federal Law Gazette I, p. 1918)

Articles 32 (5) and 35 (1) of the founding Treaty, and the obligation of professional secrecy provided for all members of the constituent bodies of the ESM, enshrined in Article 34 of the Treaty, do not prevent comprehensive information of the *Bundestag* and *Bundesrat*.

Analyzing the 2012 ruling in more detail, with regard to the eligibility criteria of the appeals, the *Organstreit* proceeding was declared admissible insofar as the appellant parliamentary group *Die Linke* asserted the rights of the Bundestag and the related responsibility of Parliament in budgetary matters. In addition, the Court is in line with previous case law, under which constitutional complaints brought by individual citizens for violations of Article 38 (1) GG, which recognizes and guarantees the right to vote, have been deemed admissible. Indeed, one element of continuity with the previously analysed rulings on the Lisbon Treaty in 2009 and on aid to Greece in 2011 is the emphasis on the integration responsibility and the budgetary responsibility or overall responsibility for budgetary policies of the *Bundestag*. In line with the ruling on the Lisbon Treaty, where it was specified that decisions on revenues and expenditures belong to the fundamental sphere of democratic choices of a constitutional state, the Court's new pronouncement takes up almost literally some passages from the ruling on aid to Greece, such as the prohibition of the emptying ("*Entleerung*") of budgetary autonomy and of the reduction of the Parliament to a "mere executor" of decisions made elsewhere.

Concerning the enhancement of the *Bundestag's* fundamental rights to information, the Court first refers to a previous ruling of 19 June 2012[156], which extended the applicability of the Federal Government's information obligations to the *Bundestag* to acts that do not constitute Union law, but are nonetheless attributable to "*affairs of the European Union*" within the

[156] See BverfG 2 be 4/11 of 19 June 2012. In its judgement, the Federal Constitutional Court considered well-founded the applications made by the parliamentary group of the Alliance 90/The Greens; the applicant asserts that the German Bundestag's rights to be informed by the Federal Government have been infringed in connection with the European Stability Mechanism and the Euro Plus Pact (https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/06/es20120619_2bve000411en.html).

meaning of Article 23 (2) GG[157]. Moreover, a reserve in the process of ratification of the Treaty is also necessary with reference to the duty of professional secrecy of a member of the ESM bodies and all persons acting on behalf of the ESM (Art. 34 T/ESM). There is much evidence to suggest that these rules are primarily aimed at preventing information flows to unauthorized third Parties, such as capital market participants, but not to the Parliaments of the member states, which are accountable to their citizens for TMES-related constraints even in the later stages of Treaty implementation[158].

On the ratification law for the introduction of paragraph 3 to Article 136 TFEU, the constitutional judges concluded that this amendment does not undermine the democratic principle. In fact, Article 136 (3) TFEU simply provides the possibility for member states to establish a permanent mechanism of mutual aid. Consequently, this does not undermine the organization of the monetary union, which is aimed at stability, as the foundational parts of the framework of that stability-especially the independence of the European Central Bank, the obligation of member states to respect budgetary discipline, and the autonomous powers of national budgets-remain intact. Hence, there is no transfer of budgetary and financial powers to EU bodies.

According to the Court, the provisions stemming from the law ratifying the ESM Treaty, also sufficiently met the requirements for the protection of the democratic nature of the internal states' order. This applies both to the definition of the Bundestag's rights to participate in the decision-making process[159] and in relation to the Bundestag's right to be adequately informed

[157] The Federal government shall keep the German Bundestag informed, comprehensively and at the earliest possible time, *"in matters concerning the European Union"*.

[158] See the analysis by De Petris, A., (15 September 2012) on the Sentence of 12 September 2012: *"La Sentenza del Bundesverfassungsgericht sul Meccanismo Euopeo di Stabilità e sul Fiscal Compact. Guida alla lettura.",* available on federalismi.it

[159] Indeed, it appears doubtful, whether the participation of the Bundestag, prescribed by the constitutional dictate, also in connection with the issuance of shares of the initial capital of the ESM in excess of the nominal value (Art.8 (2) T/MES), is sufficiently regulated at the domestic state level, or whether in connection with the possible significant consequences for the federal budget - as well as for the increase of the initial capital of the ESM - require explicit authorization by law of the Bundestag. Given that, according to the interpretation in conformity with Article 4 (1) *EMSFinG*, the authorization to acquire capital shares of the

and the personal legitimacy of German representatives in the constituent bodies of the ESM.

2.1.5 The involvement of the Bundestag in the ESM

In the aftermath of the Federal Constitutional Court's ruling that gave the green light for Germany's participation in the ESM and the Fiscal Compact, the new law on financial participation in the ESM, the so-called *Gesetz zur finanziellen Beteiliung am Europäischen Stabilitätsmechanismus,* or more shortly, the *ESM-Finanzierungsgesetz – ESMFinG*, of 13 September 2012, which had been approved by the *Bundestag* on 29 June 2012, was also enacted. In line with the recent positions expressed by the constitutional judges, the new law ESMFinG explicates in detail the involvement of the German parliament in the ESM, namely the competences of the *Bundestag* and its bodies, such as Budget Committee ("*Haushaltsausschuss*") and Special Committee ("*Sondergremium*"). Indeed, the *Bundestag* is expressly granted budgetary and stability responsibility ("*Haushalts- und Stabilitätsverantwortung"*) in ESM matters[160]. In this context, the *Bundestag* discusses and decides on proposals submitted under the *ESMFinG* within a certain time-frame in view of the ESM's operational requirements.

Section 1 (1) of the *ESMFinG* regulates the financial competences of the ESM for Germany. The ESM Treaty obligates Germany to deposit 21,7 billion to the ESM and to have approximately 168,3 billion available as authorised unpaid capital. Moreover, the Federal Government shall be authorised through its representative on the Board of Governors, to approve a decision pursuant to Article 10 (1) of the Treaty establishing the ESM to change the consolidated lending capacity of the ESM.

ESM in excess of the initially established nominal value remains reserved for the Bundestag, the need for an intermediate provision in this regard is not apparent.

[160] ESM Financing Act of 13 September 2012 (Federal Law Gazette I, p.1918), Section 3 (1) [Budgetary responsibility and responsibility for stability]: "In matters concerning the European Stability Mechanism, the German Bundestag shall exercise its budgetary responsibility and its responsibility for the existence and continued development of the stability of the Economic and Monetary Union in particular with respect to the following provisions".

Section 3 ESMFinG outlines the budgetary responsibility and responsibility for stability of the German Bundestag: it shall deliberate and vote in matters concerning the ESM within a reasonable time frame and also take into account the relevant time limits for decision-making at European Union level.

Section 4 *ESMFinG* contains the Bundestag's right of prior approval for decisions in the ESM; it establishes a parliamentary reservation ("*Parlamentsvorbehalt*") by specifying that in ESM-related matters concerning the *Bundestag's* overall budget responsibility, such matters need to be discussed in the *Bundestag* plenum, particularly those that require more binding and financially demanding decisions, namely: (1) the event of a decision to grant a requesting state aid by the ESM on the basis of its request, (2) the event of the adoption of a financial assistance facility agreement and the agreement of a corresponding Memorandum of Understanding, (3) the event of decisions made within the framework of the ESM to change authorised capital stock or maximum lending capacity. As the Constitutional Court itself has repeatedly emphasized, in all cases involving the *Bundestag's* budget and stability responsibility, the Federal Government's representative in the ESM may adhere to or abstain from a proposal for a decision ("*Beschlussvorschlag*") only after the Federal Government has obtained the express consent of the Bundestag plenum. It is specified that in "*the absence of such a plenary decision, the German representative must reject the proposal for a decision".*

The competences vested in the Budget Committee are governed by Section 5 *ESMFinG* ("Participation of the Budget Committee of the German Bundestag"*)*: "*in all other matters concerning the European Stability Mechanism affecting the budgetary responsibility of the German Bundestag where a decision by the plenary is not provided (...), the Budget Committee of the German Bundestag shall be involved."* The Budget Committee, is primarily responsible for overseeing the preparation and execution of agreements on the granting of financial aid for the stability of the Eurozone.

The approval of the Budget Committee is required for (1) decisions regarding the provision of additional instruments without changing the total funding

volume of an existing financial assistance facility, (2) decisions regarding capital calls, (3) the adoption or amendment of guidelines on the modalities for implementing individual financial assistance facilities, pricing guidelines, guidelines for borrowing operations, investment policy guidelines, dividend policy guidelines and the administration of other funds, (4) the decisions on terms and conditions for capital changes, and (5) the adoption of rules governing professional secrecy. In all the mentioned cases, the Federal Government may, through its representative, approve or abstain from voting a proposal for a decision in matters concerning the ESM only after the Budget Committee has taken a decision to that effect. Furthermore, section 5 (4) places an obligation on the Governor, appointed by Germany under Article 5(1) of the ESM Treaty, to provide the necessary information to the Budget Committee upon request[161] by at least a quarter of its members, with the support of at least two parliamentary groups represented in it. Section 5 (5) further contains an assembly reservation, according to which the plenary may revoke at any time the powers vested in the Budget Committee by a simple majority decision.
Section 6 regulates the participation of the Special Panel. In fact, in cases where the purchase of government bonds on the secondary market (Article 18 T/ESM) is planned, the Federal Government shall invoke the "particular confidentiality" of the matter, which is established when deliberations or decision-making processes must be kept secret to not jeopardise the success of the measures. Thus, "*in such circumstances, the participation rights specified in sections 4 and 5 may be exercised by members of the Budget Committee who are elected by the German Bundestag for one legislative term by secret vote and by a majority of its members (Special Panel)".* As well, the Special Panel has to report to the German Bundestag about the content and the outcome of its deliberations.

Lastly, the information and communication obligations, which must be observed by the Federal Government, are listed and described in Section 7. In matters covered by ESMFinG, the Federal Government is in fact obliged

[161] Except in cases of confidentiality in which information rights and decision-making powers are vested in the Special Committee.

to continuously inform in writing and in a timely manner both the *Bundestag* and *Bundesrat*. In cases where the *Bundestag's* competences are affected, the Government is obliged to offer to it the opportunity to express its position, which it has to take into consideration. Further, the Federal Government shall provide the Bundestag and the Bundesrat all documents at its disposal to enable them to exercise their participation rights (Section 7 (2)); in the event of request for stability support by a requesting state, the Federal Government has to transmit to the Bundestag and Bundesrat within seven days an initial appraisal of the content and scope of the requested support and also an opinion on the European Commission's assessment and an estimate of the financial assistance in case it intends to approve the granting of stability support. There is also provision (Section 7 (5)) that lays out the obligation of the Federal Government to transmit regular written reports on the financial management of the ESM to the Budget Committee of the Bundestag.

2.1.5.1 German *Bundestag* approves mandate to negotiate third Greek aid package in August 2015

Among all national parliaments in the Euro area, Germany's Bundestag was one of the national parliaments substantially involved in relation to the third rescue package for Greece of August 2015. Substantial parliamentary involvement means that the national parliament voted at least once in plenary or committee related to financial assistance for Greece in July 2015.

As has been analysed the Federal Constitutional Court ruled in 2012 that the national representative in the ESM Board of Governors was not allowed to vote in favour of a financial assistance package without prior parliamentary approval. Thus, the plenary debate on the third rescue package for Greece in the German Bundestag on 17 July 2015, had on its agenda the obtaining of a consenting resolution of the Bundestag pursuant to Section 4 (1) of the *ESMFinG* to grant stability assistance to Greece in the form of an ESM loan in accordance with Article 13 (2) of the ESM Treaty ("*Einholung eines zustimmenden Beschlusses des Deutschen Bundestages nach § 4 Absatz 1 Nummer 1 des ESM-Finanzierungsgesetzes (ESMFinG), der Hellenischen Republik nach Artikel 13 Absatz 2 des ESM-Vertrages grundsätzlich Stabilitätshilfe in Form eines ESM-Darlehens zu gewähren*").

Chancellor Angela Merkel framed the debate and vote in the following way: "*The question is: Can I ask the German Bundestag to give the Federal government a mandate to start negotiations on an ESM programme for Greece on the basis of all that I have presented to you?"*[162]. As such, the German Bundestag acted within the logic of a "*Direct legal enabling clause*"[163], under which the national parliament has to issue a mandate for the national representative in the Board of Governors of the ESM, after obligatory voting on the ESM-related mandate.

Both Chancellor Angela Merkel and Finance Minister Wolfgang Schäuble appealed to the parlamentarians to vote in favour of the bailout for Greece, arguing that it would be irresponsible not to use this opportunity for a new start in Greece. Consequently, Germany's *Bundestag* backed the finance assistance programme for Greece following a heated debate in the Bundestag, during which the expression of doubts among MPs over the sustainability of the deal where expressed. Following three hours of lively debate, 453 voted in favour of the rescue package, while 113 voted against and 18 abstained.

2.2 Italian parliamentary ratification of the ESM

In Italy, the Council of Ministers, under the chairmanship of President Berlusconi, approved on 3 August 2011[164], at the proposal of Minister of Foreign Affairs Frattini, the legislative draft for the ratification and implementation of the European Council Decision 2011/199/EU amending Article 136 of the TFEU with regard to the European Stability Mechanism.

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[162] Stenographic report of the Bundestag of 17 July 2015 - Deutscher Bundestag, Plenarprotokoll 18/117, Stenografischer Bericht der 117. Sitzung vom 17.Juli 2015, Tagesordnungpunkt 1 „Antrag des Bundesministeriums der Finanzen: Stabilitätshilfe zugunsten Griechenlands", 11354B-C. Translated by author.
Kann ich auf der Grundlage all dessen, was ich Ihnen vorgetragen habe, den Deutschen Bundestag darum bitten, der Bundesregierung ein Mandat zur Aufnahme von Verhandlungen über ein ESM-Programm für Griechenland zu geben sehe ich die Voraussetzungen dafür, überwiegen also die Vorteile des Ergebnisses vom Montag die Nachteile? Meine Antwort lautet aus voller Überzeugung: Ja.

[163] Kreillinger, V. (2019), „*National parliaments in the European Stability Mechanism: The third rescue package for Greece in 2015*", available at https://www.sciencespo.fr/centre-etudes-europeennes/sites/sciencespo.fr.centre-etudes-europeennes/files/Kreilinger%20ESM%20Paper%202.2019%20(1).pdf.

[164] See Governo Italiano - Comunicati stampa del Consiglio dei Ministri n.149 of 3 August 2011.

The draft ("*Disegno di legge*") entitled *"Ratifica ed esecuzione del Trattato che istituisce il Meccanismo europeo di stabilità (MES)"*[165] was then presented in the Senate on 3 April 2012 (*Atto Senato n.3240*[166], *Sessione n.704*) through government initiative by Minister of European affairs Moavero, Minister of economy and finance Monti and Minister of Foreign Affairs di Sant'Agata.
The draft document was referred to the Foreign Affairs Committee of the Senate for examination *("3ª Commissione permanente Affari esteri, emigrazione in sede referente")* on 11 April 2012 (*Seduta n.707*).

During the first reading at the Senate ("*Prima lettura*") of the legislative draft on 17 April 2012 (*Seduta n.174*), during which the Foreign Affairs Committee convened in order to discuss the Treaty establishing the ESM, the intervention of Minister of European affairs Moavero, stood out. Since the ratification of the Fiscal Compact Treaty was also being discussed during the same session, Moavero emphasized, with reference to the interconnection between the Fiscal compact and the ESM, how the ratification of the first treaty constitutes a necessary condition for being able to benefit of the support of the ESM, which is why, he stated, the ratification of the ESM without ratifying the Fiscal Compact treaty would not be sufficient. Moreover, he pointed out that the two Treaties have different membership thresholds for entry into force: for the Fiscal Compact the number of contracting parties must be at least 12, while for the ESM ratifications are "*weighed*," not counted. He highlighted how the choices that would be made by individual countries when ratifying said Treaties will in any case have a strong political value, beyond the technicalities of accessions and thresholds for entry into force. Precisely because of its political significance, the fiscal compact represented, in his view, a decisive step towards a more cohesive European Union. He pointed out that in this context the Italian government had been promoter of a more cohesive European Union and had been strengthening its

[165] See A.S. 3240: *"Ratifica ed esecuzione del Trattato che istituisce il Meccanismo europeo di stabilità (MES), con Allegati, fatto a Bruxelles il 2 febbraio 2012",* April 2012, n. 125, available at https://www.senato.it/service/PDF/PDFServer/BGT/00737490.pdf.
[166] Ratifica ed esecuzione del Trattato che istituisce il Meccanismo europeo di stabilità (MES), con Allegati, fatto a Bruxelles il 2 febbraio 2012.

confrontation with Germany by hypothesizing a parallel itinerary in the processes of ratification of the treaties in question, while respecting the autonomy of the respective Parliaments.

The debate on the draft document was resumed in the session of 18 April 2012 (*Seduta n.175*). First of all, Chairman-rapporteur Dini (PdL) recalled the need to clarify technical aspects such as the amount of the authorized capital stock of the ESM, the content of Article 12 of the ESM Treaty in regards to the collective action clauses and the payment of the capital instalments to the ESM which is not made sufficiently clear in the technical reports attached to the draft No. 3240. Moreover, he deemed it necessary to clarify the impact that the issuance of government bonds, which are intended for capital subscription for ESM participation, would have on the Italian public debt.

In regards to the issues raised, Vice Minister for Economy and Finance Grilli provided the requested clarifications and gave a briefing on the evolution of the rearrangement process of the Economic governance in Italy. He first addressed the issue of the scope of the ESM: referring to Article 8 of the founding Treaty, he explained that the authorized capital stock of the ESM would amount to 700€ billion, consisting of paid-in shares and callable shares. The initial total aggregate nominal value of paid-in shares would amount to 80€ billion, while the remaining 620€ billion would constitute the authorized and unpaid capital which could be called up any time by the Board of Governors. Furthermore, he pointed out that in the matter of economic support for euro area countries in financial difficulty, there had been an evolution of discipline aimed at reducing the immediate burden on member states' public finances. With the onset of the Greek crisis, the first interventions consisted of bilateral loans from individual countries to Greece itself, financed by the issuance of public debt securities; the subsequent EFSF instrument, which was an autonomous entity, worked only through guarantees of the individual Eurozone states, with no paid-up capital. He argued that, precisely to overcome such burdensome effect on public budgets, the ESM had been constructed in such a way that the operations it would undertake wouldn't have any effect on public debts. Specifically, with the

permanent ESM mechanism, the increase in public debt stock would be limited to the issuances necessary to raise the capital to be used for the capital injection. To a request for clarification from Chairman Rapporteur DINI (PdL), Grilli replied by confirming that the financial impact for participation in the ESM would be limited to the initial capital (paid in), unlike the EFSF where all operations had been accounted for in public debt. As for how the installments would have to be paid, he pointed out that the initial assumption in the text of the ESM agreement, in Article 41, that the first installment would have had to be paid by each state within 15 days of the date of entry into force of the Treaty and the remaining four annually, had been revised by subsequent intergovernmental agreements. In fact, the agreement on the entry into force of the ESM on 1 July 2012, had forced an acceleration of payments so that two installments would already have to be be paid in 2012, two installments in 2013 and the last installment in 2014. Moreover, he highlighted that the effective entry into force of the ESM in July 2012 presupposed in any case that the ratification process would be completed by signatories whose initial subscriptions represented no less than 90 % of the total subscriptions.

As well, with reference to Chairman Rapporteur Dini's remark on the relationship of the ESM with the entry into force of Decision 2011/199/EU to amend Article 136 TFEU, Grilli noted that this Decision was taken prior to the holding of the Eurosummits that were held to deal with the development of the financial crisis and that established a more accelerated timeline. On this issue, Minister Moavero intervened pointing out that the timeline for an amendment to the TFEU had to be necessarily broader than that for the entry into force of an international treaty; moreover, the European Decision on the amendment of Article 136, in his view, provided the simple possibility for the Union to have a Financial Stability Mechanism by including it in the Treaty system. Political decisions on bringing forward the entry into force of the ESM would not stand in contradiction to the path of "*communitarization*" of the matter. Moaveri also emphasized that, as to the above-mentioned relationship between the entry into force of the amendment to Article 136 TFEU and the ESM Treaty, the latter Treaty constituted a true international treaty among the euro area states. Therefore, the planned date of entry into

force of the amendments to the TFEU should not be conditioned by the earlier entry into force of an agreement between states in a smaller format than the 27 European members.
Concluding the session, Senator Livi Bacci (PD) asked the government representatives for a political, as well as technical, assessment of the adequacy of the authorized capital stock of the ESM. In response, Deputy Minister Grilli pointed out that the political profile could not be separated from the technical analysis of the market phenomena in which the financial assistance provided by the ESM was framed. He reiterated how the lending capacity of 500€ billion was identified as a compromise solution in the face of the distant initial positions among European states. Lastly, he viewed of fundamental importance the fact that a consensus on the creation of the ESM and it structure had been reached.

The consideration of the legislative proposal in the referral procedure *("sede referente*") on the ESM was concluded in the session (*seduta n.188*) of the Foreign Affairs Committee of the Senate on 3 July 2012, during which both Chairman Rapporteur Dini and Vice Minister Moavero expressed their hope in a quick ratification of the ESM Treaty by the Italian Parliament, considering the positive progresses made at the Eurosummit of 28-29 June 2012. In his last regard during said session, Moavero also argued that the debate that the process of ratification of the Treaty under consideration had initiated among the public opinions and Parliaments of many countries of the Union was a visible sign of a greater involvement of European citizens in the definition of decisive political choices made at the Union level.
Consequently, the draft proposal was discussed in the Senate Plenary on 11 July 2012 and it was approved on 12 July 2012 by an almost unanimous majority (*Atto Senato n.3240*): out of 229 senators present, there were 191 in favour, belonging to the parliamentary group "*Popolo della Libertà"*, "*Unione di Centro"* and "*Partito Democratico*". Only the parliamentary group "*La Lega*", voted against the draft, while the "*Italia dei Valori*" party abstained itself.

Next, the draft proposal was transmitted to the Chamber of Deputies on 13 July 2012 and assigned to the Foreign Affairs Committee *("in sede referente*") on 16 July 2012 during the session n.666. During the sessions of 17 July ("*prima lettura camera*") and 18 July 2012, Minister of European affairs Moavero reiterated on the ESM noting that its legal nature makes it possible to prevent Member state's disbursements from burdening their public debt. Moreover he stated that the measures relating to the amendment of Article 136 TFEU would not pose any issues for the ESM Treaty, and he expressed his appreciation in regards to the rigorous work done over the previous months in both branches of Parliament. As for the ESM itself, he wished for Italy to not ever get to the drastic point of having to make use of it, however he pertained that its adoption as a form of caution to protect stability and the resilience of the banking system would only be positive.

In view of proceeding to the final approval of the draft proposal forwarded by the Senate, a parliamentary hearing ("*Audizione"*) was held on 18 July 2012 in the combined Committees Foreign Affairs, Budget and European Union of the Chamber of Deputies by Economy and Finance Minister Grilli on recent developments within the Eurozone in relation to the ESM ratification process[167].

Firstly he stressed how the ESM Treaty represents a crucial step on the path to greater and deeper European integration, and that in the debate that has taken place in national parliaments and the European Parliament on the ESM, a possibility of effective enforcement of fiscal discipline has emerged as the indispensable prerequisite for the introduction of solidarity mechanisms between countries. The signing of such a specific intergovernmental agreement subject to ratification by national parliaments made it possible, in his view, to give maximum political visibility to the progress done in the development of the ESM structure and governance, while at the same time

[167] See Camera Dei Deputati, Resoconto Stenografico, XVI Legislatura, *Audizione del Ministero dell'economia e delle finanze, Vittorio Grilli, sui recenti sviluppi nell'ambito dell'eurozona in relazione al processo di ratifica del Fiscal Compact e del Meccanismo europeo di stabilità*, Commissioni riunite III (Affari esteri e comunitari), V (Bilancio) e XIV (Unione Europea*), seduta del 18 luglio 2012*.

strengthening the involvement of national parliaments. Moreover, Grilli stated that Italy's government had always been very supportive of the ESM and its gradual evolution and that the country had made a decisive contribution to the negotiation of the ESM Treaty, considering the difficulties faced by the nature of the crisis and the growing risk of contagion between the euro area countries. As well, he pointed out that Italy's government has always been in favour of strengthening fiscal discipline, in the consciousness that it would have to follow a compulsory path of fiscal consolidation. Precisely for these reasons, Grilli argued, emphasis should be placed not so much in terms of ceding sovereignty of fiscal policies in exchange for greater solidarity, as the issue has often been presented and oversimplified, but rather in exchange of more effective and efficient instruments of common governance of the economy and public finances which can be built progressively to ensure the financial stability of the euro area, while respecting the prerogatives of national parliaments. In order to achieve said objectives, Grilli continued, the ESM Treaty should be made fully operational.

Shortly after, the final approval[168] was then given by the Plenary of the Chamber of Deputies (*Atto Camera n.5359*) on 19 July 2012 (*seduta n.669*), with 325 votes in favour, 53 against, 36 abstentions and 214 absent. All 168 members of the "*Partito Democratico*" who were present voted in favour, as did 83 MPs from the "*Popolo della Libertà*", 30 from the "*Unione di Centro*" and 14 from "*Futuro e Libertà*". The "*Lega*" (with Roberto maroni as secretary) was the only one to vote against (51 no), along with two rebel votes within the "*Popolo della Libertà*" (Guido Crosetto and Lino Miserotti).

Consequently, the Chamber of Deputies and the Senate enacted the ratification of the ESM Treaty with the law n.116 on 23 July 2012 (*LEGGE 23 Luglio 2012 n.116*[169]), which entered into force on 29 July 2012.

[168] See the voting index for the vote of 19 July 2012: https://leg16.camera.it/410?idSeduta=669&tipo=votazioni.
[169] See Lavori preparatori dei progetti di legge: https://leg16.camera.it/126?pdl=5359.

CHAPTER 3: THE REFORM OF THE EUROPEAN STABILITY MECHANISM AND ITS NATIONAL PARLIAMENTARY RATIFICATION IN GERMANY AND ITALY

The following chapter will focus on the Reform of the ESM and its national parliamentary ratification in Germany in Italy.

After laying out the key stages in the tumultuous process of reforming the ESM which led to the signature by the Euro area Member States of the Agreement amending the ESM Treaty on 27 January and 8 February 2021 the key changes made to the ESM's legal and institutional framework will be mapped. Next, the long-awaited judgement of the German Constitutional Court of 13 October 2022 which dismissed as inadmissible the constitutional complaint challenging Germany's domestic acts of approval of the Agreement amending the ESM Treaty, will be examined. An in-depth analysis of the on-going political controversy in Italy on the ESM reform will follow. In fact, at the time of writing of this thesis, Italy is the only country that hasn't ratified the ESM Treaty Reform yet. This is partly due to Italy's waiting for the German Constitutional Court's ruling, which was as well delayed, and also due to the ongoing divisions in the political majority on the issue, which we will be examined.

1. The Reform of the ESM: a timeline

Already in 2017, the Eurogroup discussed the possible future roles and tasks of the ESM in the context of the ongoing broader debate on the deepening of the Economic and Monetary Union. This initial discussion of 9 October 2017[170] focused on the ESM's possible function in crisis management and how the mechanism could evolve to further strengthen the economic resilience of the euro, on the role of the ESM in completion of the banking union, as well as on how this possible new role would affect the ESM's governance structure and its place within the EU legal framework. As Jeroen Dijsselbloem, the Dutch Minister of Finance at that time, stated in his remarks[171] following the Eurogroup meeting, there was a quite strong support among the member state's ministers on the ESM's effectiveness in providing

[170] Council of the European Union, "*Eurogroup, 9 October 2017*", Main results, available at https://www.consilium.europa.eu/en/meetings/eurogroup/2017/10/09/.
[171] Council of the European Union, Press releases: *"Remarks by Jeroen Dijsselbloem following the Eurogroup meeting of 9 October 2017",* available at https://www.consilium.europa.eu/en/press/press-releases/2017/10/09/eg-remarks-dijsselbloem/.

financial assistance to member states so far and a shared recognition on continuing and deepening the discussion on the ESM's future development. Furthermore, building on the vision set out in the "*Five President's Report*"[172] of June 2015, which had proposed the integration of the ESM in the EU law framework by 2025, and the "*Reflection Paper on the Deepening of the Economic and Monetary Union"*[173] of May 2017 and the "*Future of EU Finances"*[174] of June 2017, the European Commission set out in December 2017 a Roadmap for deepening the Economic and Monetary Union[175], including a legal proposal for a Council Regulation[176] establishing a European Monetary Fund (EMF). According to the proposed Council Regulation, the EMF would have been based on the institutional and financial structure of the ESM but it would have been set up as a unique legal entity under EU law, based on Article 352 TFEU[177]. The EMF would have taken on the role of the ESM[178] and would have continued to provide the financial stability support to Member States in need with the same overall lending capacity of €500 billion. Moreover, the proposed EMF would have provided

[172] European Commission, *"The Five Presidents' Report: Completing Europe's Economic and Monetary Union"* of 22 June 2015, available at https://commission.europa.eu/system/files/2016-03/5-presidents-report_en.pdf.
[173] European Commission, *"Reflection paper on the deepening of the economic and monetary union*" of 31 May 2017, available at https://commission.europa.eu/publications/reflection-paper-deepening-economic-and-monetary-union_en.
[174] European Commission, "Reflection paper on the Future of EU finances" of 28 June 2017, COM/2017/0358 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:358:FIN.
[175] European Commission (6 December 2017*), "Commission sets out a roadmap for deepening Europe's Economic and Monetary Union"*, available at https://commission.europa.eu/publications/commission-sets-out-roadmap-deepening-europes-economic-and-monetary-union_en.
[176] European Commission, "*Proposal for a COUNCIL REGULATION on the establishment of the European Monetary Fund"* of 6 December 2017, COM (2017) 827 final.
[177] The Commission proposed a Council Regulation, which was subject to the consent of the European Parliament, under Article 352 TFEU. Article 352 TFEU would have allowed for the integration of the ESM into the Union framework, as this action was deemed necessary for the financial stability of the euro area. It also would have foreseen a specific role for national Parliaments. Specifically, Article 352 TFEU states: *"If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament"*.
[178] *Completing Europe's Economic and Monetary Union – The Commission's Contribution to the Leaders' Agenda: A European Monetary Fund*, available at https://commission.europa.eu/system/files/2017-12/european-monetary-fund_en.pdf.

as last resort the common backstop to the Single Resolution Fund as part of the banking union, with the aim of instilling confidence in the banking system. The proposal also envisaged greater democratic accountability by increasing the powers of oversight on the management of the EU's economic governance of both the national parliaments and the European Parliament.

However, during its meeting on 3 December 2018[179], while the Eurogroup agreed on several initiatives relating to the deepening of the EMU, it did not refer to the proposal for a Council Regulation on the EMF as presented by the European Commission, but it envisaged changes made through specific amendments to the original ESM Treaty[180]. In fact, on 4 December 2018, the ministers agreed on a "*Term sheet on the European Stability Mechanism reform*"[181], which stated that "*the ESM will notably take a stronger role in the design, negotiation and monitoring of financial assistance programmes*". The term sheet on the ESM reform referred to four main aspects, which will be briefly mentioned now and analysed in more depth later on: the terms of reference of the common backstop to the Single Resolution Fund, which would be provided by the ESM in the form of a revolving credit line; the debt sustainability issues and the intention of introducing single limb collective action clauses (CACs) in the new ESM Treaty; the enhancement of the effectiveness of precautionary instruments; and the agreement reached by the European Commission and the ESM on future cooperation within and outside financial assistance programmes. In the following Euro Summit of 14 December 2018[182], the EU leaders endorsed the term sheet on the ESM reform and asked the Eurogroup to prepare the necessary amendments to the ESM Treaty by June 2019. Thus, following this mandate received by EU leaders, on 14 June 2019 the Eurogroup agreed on a first revised ESM treaty

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[179] Council of the European Union, *"Eurogroup 3 December 2018",* Main results available at https://www.consilium.europa.eu/en/meetings/eurogroup/2018/12/03/.

[180] See the Press release of the Council of the European Union of 4 December 2018: *"Eurogroup report to Leaders on EMU deepening",* available at https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/eurogroup-report-to-leaders-on-emu-deepening/.

[181] Council of the European Union: *"Term sheet on the European Stability Mechanism reform" of 4 December 2018"*, available at https://www.consilium.europa.eu/media/37267/esm-term-sheet-041218_final_clean.pdf.

[182] Euro Summit meeting of 14 December 2018, EURO 503/18, available at https://www.consilium.europa.eu/media/37563/20181214-euro-summit-statement.pdf.

draft[183], including its annexes on the Precautionary Conditioned Credit line and on the backstop facility to the Single Resolution Fund. The Euro Summit of 21 June 2019[184] further invited the Eurogroup to continue working on all elements of the ESM reform package in order to reach a final agreement by December 2019.

At this moment in time, the initial idea of a European Monetary Fund under EU legal framework had been completely overcome and replaced by a concrete reform of the ESM Treaty. In fact, on 12 June 2019 the European Commission published its Communication on *"Deepening Europe's Economic and Monetary Union: Taking stock four years after the Five President's Report"*[185], where it recognizes that there is no political will to integrate the ESM into the EU legal framework at this stage: *"The ongoing revision of the Treaty establishing the European Stability Mechanism, as an intermediate solution, is meant to further strengthen crisis prevention and resolution in the euro area. It should neither duplicate tasks with EU institutions nor add to the complexity of the economic surveillance framework*". Moreover, the Commission highlighted that, in regard to the Treaty reform of the ESM, it is important that the functions of the mechanism are clearly defined and don't overlap with the EU institutions that have been given the role to supervise banks, and don't create obstacles to future amendments of EU legislation, which would affect the autonomy of the EU legal order.

On 4 December 2019, the Eurogroup agreed, in principle, on all elements related to the ESM reform package, namely the "*Draft Pricing Guideline*"[186],

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[183] DRAFT revised text of the Treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019, available at https://www.consilium.europa.eu/media/39772/revised-esm-treaty-2.pdf.

[184] Euro Summit meeting of 21 June 2019 – Statement, EURO 502/19, available at https://www.consilium.europa.eu/media/39968/20190621-euro-summit-statement.pdf.

[185] European Commission: *"Deepening Europe's Monetary Union: Taking stock four years after the Five President's Report"*, Communication from the Commission to the European Parliament, the European Council, the Council and the European Central Bank, available at https://economy-finance.ec.europa.eu/system/files/2019-06/emu_communication_en.pdf.

[186] European Stability Mechanism: "Draft Pricing Guideline", available at https://www.consilium.europa.eu/media/41673/20191206-draft-pricing-guideline.pdf.

the "*Draft Guideline on Precautionary Financial Assistance"*[187], the *"Draft Board of Governors Resolution to grant the Backstop Facility*"[188] and the "*Draft Guideline on the Backstop Facility to the SRB for the SRF*"[189]. All of these documents could be adopted by the relevant ESM decision-making body only after the entry into force of the ESM Treaty, as amended by the "*Draft Amending Agreement"*[190].

The political agreement on completing the Treaty reform process was reached by the Member State's finance ministers during the Eurogroup's video conference on 30 November 2020, where they agreed to proceed with the ESM reform[191], thus to sign the revised ESM Treaty and to launch its ratification process in national parliaments. In fact, President of the Eurogroup at that time, Paschal Donohoe, stated: *"The adjustments we have agreed today will further develop the ESM's toolkit. We will now proceed to the signature of the Treaty in January and launch the procedures for ratification at national level*"[192].

Finally, on 27 January and on 8 February 2021 the Members of the ESM signed in Brussels the *"Agreement Amending the Treaty Establishing the*

[187] European Stability Mechanism: "Draft Guideline on Precautionary Financial Assistance", available at https://www.consilium.europa.eu/media/41672/20191206-draft-precautionary-guideline.pdf.

[188] European Stability Mechanism: *"Draft Board of Governors Resolution to grant the Backstop Facility"*, available at https://www.consilium.europa.eu/media/41670/20191206-draft-bog-resolution-2-key-financial-terms.pdf.

[189] European Stability Mechanism: *"Draft Guideline on the Backstop Facility to the SRB for the SRF"*, available at https://www.consilium.europa.eu/media/41668/20191206-draft-backstop-guideline.pdf.

[190] *Agreement Amending the Treaty establishing the European Stability Mechanism*. This draft document forms a part of the ESM reform package agreed in principle at the Euro Group meeting of 30 November 2020, whose entry into force and application is subject to signature and ratification in accordance with national procedures, available at https://www.consilium.europa.eu/media/47294/sn04244-en19.pdf.

[191] See the "*Statement of the Eurogroup in inclusive format on the ESM reform and the early introduction of the backstop to the Single Resolution Fund*", available at https://www.consilium.europa.eu/en/press/press-releases/2020/11/30/statement-of-the-eurogroup-in-inclusive-format-on-the-esm-reform-and-the-early-introduction-of-the-backstop-to-the-single-resolution-fund/.

[192] See "*Remarks by Paschal Donohoe following the Eurogroup video conference of 30 November 2020*", available at https://www.consilium.europa.eu/en/press/press-releases/2020/11/30/remarks-by-paschal-donohoe-following-the-eurogroup-video-conference-of-30-november-2020/.

European Stability Mechanism”[193], which provides the legal basis for a set of new tasks assigned to the ESM. The reformed Treaty will come into force when ratified by the national parliaments of all 19 ESM Member States in accordance with their respective constitutional requirements.

2. The Amendments to the ESM Founding Treaty

Klaus Regling, Managing Director of the ESM at that time, addressed the Institute of International and European Affairs (IIEA) on 3 February 2021[194] in regards to the reforms of the ESM Treaty and their implications for financial stability and resilience across the euro area. He provided an outline of the changing role of the ESM since the global financial crisis, highlighted how the reform is regarded as a crucial step in strengthening the Economic and Monetary Union, and laid out the amendments included in the new ESM Treaty and their intended policy objectives. Against this backdrop, the following paragraphs present the amendments to the ESM Founding Treaty on which an agreement was reached.

2.1 The Backstop Facility to the Single Resolution Fund

The first major amendment to the ESM founding Treaty will allow the ESM to act as a common backstop to the Single Resolution Fund (SRF)[195],

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[193] Agreement Amending the Treaty Establishing the European Stability Mechanism, signed on 27 January and 8 February 2021 (to enter into force on the date when instruments of ratification, approval or acceptance have been deposited by all Signatories), available at https://www.esm.europa.eu/sites/default/files/migration_files/esm-treaty-amending-agreement-21_en.pdf.

[194]https://www.esm.europa.eu/speeches-and-presentations/reforming-esm-implications-european-financial-stability-and-resilience

[195] The in-depth analysis by the European Parliament on the European Stability Mechanism states that: *“The Direct Recapitalisation Instrument will be replaced by the ESM backstopping the Single Resolution Fund (SRF), as decided at the 14 December 2018 Euro Summit. The Eurogroup worked on a common backstop for the SRF for some time, as part of its work on completing the Banking Union. The main elements of such new ESM function were outlined in the Eurogroup President’s letter to the President of the European Council of June 2018. The 4 December 2018 Eurogroup agreed on terms of reference detailing the main elements of the SFR backstop. The 14 December 2018 Euro Summit endorsed the terms of reference and mandated the Eurogroup to finalise the necessary ESM Treaty amendments by June 2019. Leaders also agreed that the backstop can be anticipated provided sufficient progress has been made in risk reduction, to be assessed in 2020. The June 2019 Eurogroup agreed on a revised draft ESM Treaty detailing the terms under which the ESM may provide a backstop to the SRB. Article 18A referring to the submissions to the European Court of Justice, and Annex IV of the revised ESM Treaty further detail the terms of ESM granting*

instituted by Regulation EU No.806/2014, in the form of a revolving credit line (new Article 18A (2) T/ESM). Under the current European bank crisis management framework, the main function of the SRF, managed by the Single Resolution Board (SRB), is to finance the application of resolution tools while minimizing the use of public resources. *"The reform of the ESM goes in the direction of bolstering the credibility of the SRF and its effective ability to intervene and, in doing so, reduces the risk of a disorderly management of a crisis at a large bank, which could impact overall financial stability*"[196].

The cardinal provision on the backstop facility is the new Article 18A T/ESM. Specifically, Article 18A (1) T/ESM provides that, on the basis of a request of activation of the support mechanism by the Single Resolution Board (SRB) and of a proposal by the Manging Director, the Board of Governors may decide to grant a backstop facility to the SRB covering all possible uses of the SRF as enshrined in EU law. The amendment will allow the ESM to support bank crisis resolution with respect to both the public finances of Member States, and with respect to their banking and financial institutions, by being integrated into the framework of the Single Resolution Mechanism (SRM) for banks and security firms providing services involving own risk-taking. The backstop facility may be activated for a specific resolution on the basis of a decision by the Board of Directors, following a two-step procedure where the Board of Governors first decides to award the backstop facility to the SRB. More specifically, the revised ESM Treaty envisages that the Board of Governors may decide to grant a backstop facility to the SRB (Article 18A (1) T/ESM) and is further entrusted with making the main decisions regarding the backstop: it will establish the essential financial terms and conditions of

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loans to backstop the SRF. In particular, the revised ESM Treaty foresees the ESM backstop being available only insofar the current resolution framework remains in place".
For further information on the Single Resolution Fund common backstop, see EGOV paper on "*Completing the Banking Union*", Section 7 of the EGOV Briefing prepared ahead of the 22 July 2019 hearing of Elke König, Chair of the Single Resolution Board and EGOV specific briefing on the ESMT 2019 amendments.
[196] Markakis, M. (12 December 2020) *"The Reform of the European Stability Mechanism: Process, Substance and Pandemic*", Legal Issues of Economic Integration, n.47 (4) 359-384, available at http://dx.doi.org/10.2139/ssrn.3817815.

the backstop facility, the nominal cap and any revisions to it, as well as the process for determining whether the legislative framework for bank resolution's requirement of permanence has been met. (third subparagraph of Article 18A (1) T/ESM). Such requirements include the adherence to the principles of the legal framework for bank resolution, budget neutrality in the medium term, and the principle of *"last resort"*, whereby the backstop facility may be used only if the SRB still has sufficient repayment capacity to fully repay in the medium term the loans obtained through the support mechanism. The specific financial terms and conditions of the backstop facility for the SRF shall be specified in a backstop facility agreement concluded with the SRB, which is to be approved by the Board of Directors by mutual agreement and signed by the Managing Director (Article 18 A (3) T/ESM).

The backstop facility could be called on for a specific resolution as long as it has first been approved to the SRB. According to Article 18A(5) T/ESM, the Board of Directors shall decide by mutual agreement, guided by the criteria provided for in Annex IV, on loans and respective disbursements under the backstop facility based on a request for a loan by the SRB, a proposal from the Managing Director, and an assessment of the SRB's repayment capacity. Additionally, there is a provision for an emergency voting process when the European Commission and the ECB determine independently that failure to swiftly adopt a Board of Directors decision regarding loans and respective disbursements under the backstop facility would jeopardize the economic and financial sustainability of the euro area (Article 18A (6) T/ESM).

The fact that the device was created to be used only in times of exceptional urgency is also evidenced by the new Rectial 15b T/ESM, according to which, as a rule, the ESM should decide on the use of the support facility within 12 hours of the SRB's request, a deadline that the Managing Director may exceptionally extend to 24 hours, particularly in the case of a distinctively complex resolution operation, always in compliance with national constitutional obligations.

2.2 Precautionary Financial Assistance Instruments

The second component of the ESM Reform deals with its precautionary financial assistance instruments as it establishes new rules for accessing them. The two existing credit lines, precautionary conditioned credit line (PCCL) and enhanced conditions credit line (ECCL), will be maintained, but a simplified procedure is being introduced for countries that can guarantee compliance with specific requirements, set out in Annex III of the amended Treaty.

Overall, the conditions for accessing the PCCL are rendered stricter, but on the other hand no Memorandum of Understanding (MoU) would be anymore required. More precisely, the PCCL would be limited to those countries able to meet a set of criteria that, unlike in the original treaty, are identified more in detail. For eligible countries, the conditionality foresees the need to sign a "*Letter of Intent*" (Article 14 (2)) instead of the MoU by which they would commit to continue to comply with the criteria. The Chairperson of the Board of Governors shall, upon receipt of such a Letter of Intent, tasks the European Commission with determining whether the stated policy intentions are fully compliant with EU legislation. Thus, to access the PCCL, the applicant state would have to meet the following criteria: it shouldn't' be subject to an Excessive Deficit Procedure; it should meet certain quantitative fiscal benchmarks regarding the general government deficit, structural budget balance and debt in the preceding two years (a deficit below 3 % of GDP, a structural budget balance at or above the country-specific minimum benchmark, and a debt-to-GDP ratio below 60 % of GDP); the requesting state should not show excessive imbalances in the framework of EU macroeconomic surveillance; it must present a sustainable external position; and lastly it must not show severe financial sector vulnerabilities that endanger the ESM Member's financial stability.

On the other hand, the ECCL will be open to those ESM members who are ineligible for the PCCL due to non-compliance with the aforementioned eligibility criteria, as long as their economic and financial situation nevertheless remains strong and has public debt that is considered sustainable. For such countries, access to the ECCL and other support instruments would

result in the need to sign a MoU. In fact, pursuant to the reform of the ESM (new Articles 13 and 14 of the Treaty), in the event that a Member country requests the granting of support through an instrument other than the PCCL, the Board of Governors would have to instruct the Managing Director of the ESM and the European Commission, in consultation with the ECB, to negotiate with the Member concerned (together with and where possible also with the IMF) a Memorandum of Understanding (MoU) specifying the conditions under which the granting of the support instrument is associated, reflecting the severity of the shortcomings to be addressed. The Managing Director would be responsible for preparing a proposed agreement on a financial assistance facility, including financial terms and conditions and choice of instruments, to be adopted by the Board of Governors.

Thus, while the PCCL would be based on the essentially non-discretionary and predictable definition of conditionality, leaving it up to the Member State to unilaterally define the interventions to be put in place, the ECCL and the other support instruments would be based on the negotiation of conditionality, to be weighted according to the intensity of the intervention, with substantial involvement of the Commission, the ESM and the ECB in defining the interventions to be implemented for the purpose of the crisis resolution.

2.3 Single Limb Collective Action Clauses

With the reform of Article 12 of the Treaty, Collective Action Clauses will be modified with the introduction, as of January 1, 2022, for newly issued euro area government bonds with maturities of more than one year, also of Collective Action Clauses with single majority approval (*single limb CACs*). In general, collective action clauses allow a qualified majority of creditors to enforce debt restructuring on all creditors. Compared to the dual limb collective action clauses (*dual limb CACs*) in the original treaty, single limb CACs allow a simultaneous decision to be made for all series of a given security, without the need to vote for each individual series issued. Therefore, with one creditor holding the necessary majority over the other holders of a

Member State's public debt, such changes will allow for a simplification of debt restructuring procedures.

2.4 Cooperation between the European Commission and the ESM

The fourth reform will see the ESM have a greater role in the design, negotiation and monitoring of euro area support programmes in cooperation with the European Commission. In fact, with the amendment of the founding treaty, the distribution of competences between the actors charged with ensuring the implementation of the treaty will be redefined. In particular, a common position will establish the new modalities of cooperation between the ESM and the European Commission in the context of financial assistance programmes. The European Commission and the ESM share common objectives and will thus exercise specific tasks related to crisis management for the euro area on the basis of European Union law and the ESM Treaty. Therefore, the two institutions will work closely together on ESM crisis management measures with an efficient governance in pursuit of financial stability by complementing expertise.

In November 2018, the ESM and the European Commission signed a Joint position on *"Future cooperation between the European Commission and the European Stability Mechanism"*[197], in which it was envisaged that the actual division of tasks would result from the exact scope of eligibility criteria and conditionality associated with specific support actions.

The Joint position addresses firstly the cooperation outside financial assistance programmes, according to which the European Commission and the ESM will hold regular meetings and exchange information in relation to their specific competences and assess macro-financial risks: *"the European Commission and the ESM will share data, analysis and assessments while respecting applicable Union law and confidentiality obligations and the*

[197] See the Joint position on the *"Future cooperation between the European Commission and the European Stability Mechanism"* of 14 November 2018, available at https://www.consilium.europa.eu/media/37324/20181203-eg-1b-20181115-esm-ec-cooperation.pdf.

ESM's funding activities"[198]. Further, the Join position addresses the cooperation in the context of designing, implementing and monitoring financial assistance: In arranging financial assistance, the European Commission will ensure consistency between the measures taken and the European economic policy coordination framework, working on the basis of its own growth assumptions and further estimates made, while the ESM should assess, from the perspective of a lender, the potential for market access by Member States and the associated risks. Should the collaboration fail to lead to a common position, then the European Commission would be responsible for the overall assessment of public debt sustainability, while the ESM would be responsible for the assessment of the ability of the Member State concerned to repay the loan. Regarding the negotiation of policy conditionality and the subsequent monitoring, the European Commission will collaborate with the ESM in the definition and negotiation of policy conditionality, preserving the European Commission's role and competences under the Treaties. The Commission and the Managing Director of the ESM will sign a MoU detailing the conditionality and containing the economic and budgetary goals. Moreover, the European Commission will have a well-defined role in post-programme surveillance as laid out in Article 14 of Regulation (EU) 472/2013[199], while the ESM, in the context of post-programme monitoring, will safeguard its balance sheets by assessing the ability of a beneficiary Member State to repay.

The most significant change to the procedure for granting support under Article 13 T/ESM appears to be that the Managing Director will work alongside the European Commission and the ECB in evaluating an application for support submitted by an ESM member state. On the basis of these assessments, it would always be the responsibility of the Managing

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[198] In Depth-Analysis by the European Parliament: *"The European Stability Mechanism: Main Features, Instruments and Accountability*", p. 19-20.

[199] Article 14 [Post-programme surveillance] of the "*Regulation (EU) No472/2013 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 without serious difficulties with respect to their financial stability"*. OJ L 140, 27.5.2013, p.1-10, available at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX%3A32013R0472.

Director to draft a proposal for approval by the Board of Governors regarding the outcome of the request and to prepare a proposal for agreement on a financial assistance facility, including financial terms and conditions and choice of instruments, to be then adopted by the Board of Governors. The Managing Director should also support the European Commission and the ECB in monitoring the conditions with which the financial assistance facility is associated.

3. Germany's ratification of the ESM Reform Treaty: the constitutional complaint challenging the acts of approval of amendments to the ESM (2BvR 1111/21)

In May 2021, following Germany's signing of the reformed ESM Treaty in Brussels on 27 January 2021 and pawing thus the way for the national ratification process, the Federal Government proposed to the *Bundestag* a draft act of approval of the Amending Agreement of the ESM Treaty and a draft act of approval of the Amending Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund (Intergovernmental Agreement). Consequently, on 11 June 2021, the *Bundestag* adopted both acts of approval without any changes and the *Bundesrat* gave its consent to the act of approval on 25 June 2021. However, following a request by the Federal Constitutional Court, due to the formulation of constitutional complaints, the Federal President suspended the certification of the act of approval of the Agreement Amending the ESM Treaty pending a decision in the case.

In their constitutional complaint, the complainants, six members of the 19th German Bundestag, invoked their right to democratic self-determination as citizens and essentially argued that the legislature's approval of the Treaties was formally flawed because, in substance, these amend the European Union's integration program.

In particular, the complainants sought a review of the formal lawfulness of a transfer of sovereign powers ("*formelle Übertragungskontrolle*"). They asserted that both acts, which were adopted by simple majority in the

Bundestag and *Bundesrat*, violated their rights under Article 38 (1) GG and Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG. The complainants contended that instead of a simple majority, a two-thirds majority was required in the *Bundestag* and *Bundesrat* because the emergency procedure established by the Agreement Amending the ESM Treaty in the context of the common back-stop would lead to a transfer of sovereign powers and consequently the amendment would result in an actual amendment of the EU legal framework in a structurally significant manner.

After a long anticipation, in an order published on 13 December 2022 (2BvR 1111/21), and released to the press on 9 December 2022[200], the Second Senate of the Federal Constitution dismissed as inadmissible the constitutional complaint challenging Germany's domestic acts of approval of the Agreement of 27 January 2021 Amending the Treaty Establishing the European Stability Mechanism and the Agreement of 27 January 2021 Amending the Agreement on the Transfer and Mutualisation of Contributions to the Single Resolution Fund.
As such, the purpose of the following paragraphs is to set out the key contributions of the Second Senate of the Federal Constitutional Court in a preferably comprehensive manner in order to make it directly accessible to non-German speakers.

According to the Federal Constitutional Court, the constitutional complaint is inadmissible, as the complainants have failed to sufficiently demonstrate and substantiate the possibility of a violation of their right to democratic self-determination derived from Article 38 (1) GG. In light of this, it is important to keep in mind that a constitutional complaint must specify which constitutional requirements the contested law violates, in accordance with Section 92 BVerfGG (see Chapter 2, Sub-chapter 2.1.2). The extent to which a measure is thought to violate the basic rights or rights that are equal to the

[200] Bundesverfassungsgericht, Press Release No. 105/2022 of 9 December 2022: *"Constitutional complaints challenging the acts of approval of amendments to the European Stability Mechanism and to the Intergovernmental Agreement unsuccessful"*, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-105.html.

fundamental rights listed in the complaint must therefore be stated by the complainants. Additionally, a constitutional complaint may only be raised against a domestic act of approval of an international treaty, including international treaties for the expansion of the European Union and for the creation or modification of intergovernmental institutions that support the European Union, if the Treaty contains provisions that directly impact the subject matter of the specific complaint. Additionally, those who object to an act of approval may file a constitutional complaint on the grounds that the right to democratic self-determination guaranteed by Article 38 (1) GG may have been violated. *"However, the Federal Constitutional Court only reviews as an act of approval of an international treaty on the basis of Article 23 (1) GG, if a transfer of sovereign powers to the European Union or to an intergovernmental institution that supplements or is otherwise closely aligned with the European Union is at stake. This is the case when the European Union or an intergovernmental institution is authorised to implement measures with direct consequences for the legal subjects in Germany. By contrast, mere de facto changes of the EU integration agenda or its legal framework brought about by the conclusion of international treaties that do not involve changes of primary law generally do not amount to a transfer of sovereign powers."*[201]

As the Federal Constitutional Court took into consideration the above-mentioned, it determined that the complainants did not demonstrate that both the Agreement Amending the ESM Treaty and the Agreement Amending the Intergovernmental Agreement might lead to a transfer of sovereign powers to the ESM or to the EU, or that a concrete amendment in the framework of the EU integration agenda that might violate their rights under Article 38 (1) GG is at issue.

[201] Bundesverfassungsgericht, Press Release No.105/2022 of 9 December 2022. Order of 13 October 2022,2 BvR 1111/21, available at https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2022/bvg22-105.html.

As was laid out in the Press Release of the Bundesverfassungsgericht on 9 December 2022, with regard to the revision of the emergency voting procedure applicable to the common backstop (new Article 18a (6) T/ESM), the complainants contended that the structure of this procedure transfers political ownership of the activation of the common backstop to the European Commission and the European Central Bank. However, according to the Federal Constitutional Court argued that the decision-making procedure in the ESM's bodies regarding the granting of financial aid, does not represent an exercise of sovereign powers. Rather, it only relates to financial transactions that take place between the ESM, the Single Resolution Board and specific ESM members and do not directly impact individuals' access to the legal system.

Next, since the complainants held that the Agreement Amending the ESM Treaty increases the scope of functions to be carried out by the European Commission and the European Central Bank on the part of the ESM, the Court clarified that the new functions of the European Commission serve to ensure that the measures taken by the ESM are in line with EU law, in particular, with the framework for coordinating economic policy, and thus it argued that the complainants have failed to demonstrate that this could amount to a further transfer of sovereign powers. *"The functions conferred on the European Commission and on the European Central Bank as 'commissioned administrative agents' are limited to property and supporting activities"*[202].

Additionally, the Federal Constitutional Court reiterated that the complainants were unable to show how the Agreement Amending the ESM Treaty alters the EU integration agenda in practice and that the accord only makes minimal adjustments to the ESM's current integration plan.

As well, there Court ruled that there are no modifications to Article 125 TFEU as a result of the PCCL adjustments in the reform and the addition of a common backstop. In the Court's view it is unclear why the PCCL's

[202] Ibid.

realignment should be less effective than before in encouraging Member States to implement appropriate fiscal measures, as well the idea of a national budget's independence remains unaffected.

Lastly, we note that the Court remarked that the common backstop does as well not affect the prohibition of monetary financing of Member State budgets. In fact, *"following the adoption of the Agreement Amending the ESM Treaty, the ESM will still fall within the category of institutions set out in Article 123 (1) TFEU as to which lending by the European Central Bank is prohibited"*[203].

In light of the "green-light" given by the Second Senate of the Federal Constitutional Court on 13 October 2022, Germany proceeded to ratify the reformed ESM Treaty in Brussels on 19 December 2022, leaving Italy as the only country among the ESM Member States to not have yet ratified.

4. Political debate in Italy on the signature of the ESM Treaty Reform

To the point of writing, 15 February 2023, Italy is the only ESM Member State that hasn't ratified the ESM Treaty Reform yet. The approval of the amendments to the ESM Treaty by the Italian Parliament was until recently conditional on the decision of the German Constitutional Court on the constitutionality of the Reform, which has been published on 9 December 2022. However, the reason of the delay of the ratification lies also in the ongoing heated national debate, as the Reform has been, and still is to date one of the most divisive issue among the parties in Italy.

In the present sub-chapter a discussion and analysis will be carried out on the positions of the different Italian parties in regards to the ESM Reform and in regards to Italy's signature of the ESM Treaty Reform on 27 January 2021 in

[203] Ibid.

Brussels. The most relevant aspects of the parliamentary debates on the issue will be laid out, as well as the most recent developments which seem to indicate that a possible ratification is in view and that Italy will fulfil its commitments towards its European partners.

4.1 Italy's political context on the ESM and its Reform

The detractors of the ESM believe the ESM to be an expression of the European establishment which is ready to impose its austerity policies on struggling states and therefore have advanced fears about the excessive constraints associated with any activation of the ESM. In fact, the European Stability Mechanism has been predominantly associated by right-wing parties "*Lega*" and "*Fratelli d'Italia*" with the case of Greece, which benefited from loans from the ESM during the financial crisis on the condition that it would submit to harsh conditions for the recovery of the national economy. The conflicting positions[204] also rested on an independent report[205] edited by former Economic Affairs Commissioner Joaquin Almunia and presented to the board of the same ESM in June 2020, which analysed the controversial effects of the ESM on the Greek economy. According to this report, the aid program for Greece *"failed to systematically and vigorously pursue long-term macroeconomic sustainability"*. In other words, it allowed the Greeks to not exit the euro, but on a negative side it stifled their economic growth.

In view of the parliamentary debate on Italy's involvement in the ESM Reform that has taken place in Italy since 2018, we will analyse in the next paragraph firstly how the first Conte government (in charge from 1 June 2018 to 20 August 2019) composed of a coalition between the two populist parties "*Movimento 5 Stelle (M5S)"* and "*Lega*", led by Matteo Salvini, openly sided against the ESM reform (especially within the right-wing, the parties of

[204] See Mattera, S. (22 February 2022*), "Mes divide ancora i partiti: maggioranza in difficoltà. E il governo prende tempo"*, available at https://www.repubblica.it/politica/2022/02/23/news/mes_europa_in_pressing_sul_governo_italiano-338876866/.

[205] See Almunia, J. (2020), Independent Evaluation Report: *"Lessons from Financial Assistance to Greece"*, available at https://www.esm.europa.eu/system/files/document/lessons-financial-assistance-greece.pdf.

"*Forza Italia*" and "*Fratelli d'Italia*" have always strongly criticized the ESM and its reform), while on the opposite side, the more pro-European parties such as "*PD*", "*Azione*" and "*Italia Viva*" supported the ESM; secondly it will be discussed how the second Conte government (in charge from 5 September 2019 to 13 February 2021), formed by the "*PD-M5S*" alliance, participated in the debates on amending the ESM, reaching an first revised Treaty draft in June 2019 on the new rules[206]. Subsequently, the Draghi government (in charge from 13 February 2021 to 22 October 2022) failed to ratify the amended ESM Treaty due to delays caused by the Pandemic crisis, the continuing division in the majority and Italy's wait for the German Constitutional Court's expected ruling on the ESM.

The current Prime Minister Giorgia Meloni (in charge since 22 October 2022), who is leading a right-wing coalition composed of "*Fratelli d'Italia*", "*Lega*" and "*Forza Italia*", didn't consider the ESM Reform a priority at the beginning of her mandate; however, since the judgement of the Federal Constitutional Court has been made public and Germany has proceeded to the ratification in December 2022, she has recently opened up more to the possibility of Italy's ratification of the ESM, being conscious of the fact that the Italy can't be the only one to stay out of it[207].

4.2 The ESM in the Italian Parliament: the political controversy over the ESM Reform

On 24 January 2018 (government Gentiloni was in charge), the Senate's Economic planning and Budget Committee ("*Commissione Programmazione economica, bilancio*") adopted a resolution, which had been drafted by senator Guerrieri Paleotti[208] (Document XVIII, No. 232 of the 17th

[206] See Draft revised text of the Treaty establishing the European Stability Mechanism as agreed by the Eurogroup on 14 June 2019.
[207] Lauria, E. (23 December 2022): "*Meloni boccia il MES: Non lo prenderemo firmo col sangue. Ma apre alla ratifica*", available at https://www.repubblica.it/politica/2022/12/23/news/meloni_mes_ratifica_governo_manovra-380334260/.
[208] Member of the parliamentary group "Partito Democratico" from 19 March 2013 to 22 March 2018 and member of the Budget Committee of the Senate from 8 May 2013 to 22 March 2018.

Legislature[209]), on the proposal to transform the European Stability Mechanism into a European Monetary Fund.

In its resolution, the Economic planning and Budget Committe of the Senate stated that the proposal on the European Monetary Fund, contributes to consolidating the unity of Union law and improving the coherence, transparency and effectiveness of its decision-making process as well as strengthening democratic and judicial control in the Economic and Monetary Union; a revision of the TFEU did not appear necessary for this purpose, since Article 136 (3) TFEU already constituted an appropriate legal basis for the proposal on the establishment of the European Monetary Fund. In addition, the Commission assessed that the principles of subsidiarity and proportionality appeared to be respected insofar, and therefore pronounced itself in favour of the proposal, formulating the following observations: as a matter of principle, the provision to incorporate agreements and mechanisms established outside the European Union into European Union law is to be judged positively when it makes it possible to simplify and rationalize European Union law and increase the operational efficiency of its institutions; it is so in the case of the proposed transformation of the ESM Treaty into the European Monetary Fund. At the same time, the Commission pointed out in its resolution how such forced insertion into existing Union law could be a source of confusion and duplication. To counter such potential negative effects one could take this opportunity to implement what is desired by many countries and so far (at that time) is only generically envisioned by the Commission, namely, a review of the existing rules on budget discipline in order to make them more efficient, simpler and transparent. The approach to be followed could be to maintain margins of institutional discretion in the interpretation and application of common budget rules while strengthening the responsibility of individual countries in adopting and complying with the same rules.

[209] Senato della Repubblica, "*Documento XVIII n.232*", available at https://www.senato.it/leg/17/BGT/Schede/docnonleg/35653.htm.

4.2.1 The Italian Parliament's participation in the formation of European policies: the Prime Minister's Communications ahead of European Council meetings in the context of the ESM Reform

The reform of the ESM Treaty has been addressed during several Prime Ministers' Communications ahead of European Council meetings ("*Comunicazioni del Presidente del Consiglio in vista del vertice Euro*").
The modalities of Italy's participation in the formation of decisions and the preparation of acts of the European Union, as well as the fulfilment of obligations and the exercise of powers deriving from membership in the European Union, consistent with Articles 11 and 117 of the Italian Constitution, on the basis of the principles of subsidiarity and proportionality, are mainly regulated by Law No. 234 of 24 December 2012 (*Legge n.234*[210]), on the general rules of Italy's participation in the formation and implementation of European Union legislation and policies ("*Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*"). The measure introduces an organic reform of the rules governing Italy's participation in the formation and implementation of European legislation, taking into account the significant changes that have occurred in the Union's structure following the entry into force of the Lisbon Treaty, especially with regard to national parliaments' control of compliance with the principles of subsidiarity and proportionality.

The Law No.234 aims to increase the involvement of the Italian Parliament in participating in the formation of European Union law (the so-called *"fase ascendente"*).
In particular, Article 3 of Law No. 234 expressly provides that the Parliament participates in the Union's decision-making process, intervening, in coordination with the Government, in the formation phase of European

[210] *Legge 24 Dicembre 2012, n. 234: Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea*, *Entrata in vigore il 19 Gennaio 2013*, available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2012-12-24;234!vig=2022-10-19.

legislation and policies, in accordance with the provisions of the Treaty on European Union and the Treaty on the Functioning of the European Union.

Article 4 of Law No. 234 reaffirms the information and consultation obligations *("obblighi di informazione e consultazione"*) of the Government, which must present and outline to the Parliament the position it intends to take before European Council meetings are held. Law No. 238 of 23 December 2021 (European Law 2019-2020)[211] extended this obligation to include Eurogroup meetings and informal meetings in their various formations. According to Article 4, the Government shall inform the relevant parliamentary bodies of the outcomes of the meetings of the European Council and the Council of the European Union. The 2019-2020 European Law included the possibility for the competent parliamentary Committees, prior to each meeting of the Council of the European Union and in accordance with the provisions of the Regulations of the Chambers, to adopt acts of guidance ("*atti di indirizzo*") aimed at outlining the principles and lines of the Government's action in the preparatory activity for the adoption of acts of the European Union. The Government will have to take into account any guidelines issued and also report back to the meetings of the Council of the European Union.

Furthermore, the Chambers must also be informed and consulted periodically by the Government on the coordination of economic and budgetary policies and the operation of financial stabilization mechanisms. As well, the Government is also required to inform the Chambers in a timely manner of any initiative aimed at the conclusion of agreements between the member states of the European Union that provide for the introduction or strengthening of rules in financial or monetary matters or otherwise produce significant consequences on public finance, ensuring that the position represented by Italy in the negotiation phase of the agreements takes into

[211] *Legge 23 Dicembre 2021, n.238: Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia all'Unione europea – Legge europea 2019-2020", entrata in vigore il 1 Febbraio 2022*, available at https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2021-12-23;238!vig=2022-10-19.

account the acts of guidance adopted by the Chambers (Art. 5 of Law No. 234).

On such EU regulatory acts, as well as on any other matter brought to their attention under Law No.234, the relevant parliamentary bodies may adopt acts of guidance ("*atti di indirizzo*") to the government (Article 7). The position represented by Italy in the Council of the European Union and other institutions or bodies of the Union must be consistent with such guidelines (the reference to "*compliance*" was introduced by the European Law 2019-2020, which replaced the previous wording limited to "*consistency*" with such guidelines). If this is not the case, the President of the Council of Ministers or the relevant minister will report promptly to the Commissions, giving appropriate reasons for the position taken.

Additionally, Law No. 234/2012 maintains the institution of parliamentary reservation ("*riserva parlamentare*") in Article 10, providing that, if the Chambers have begun the examination of a draft Union legislation or other acts sent by the Government, the latter may proceed with the acts within its competence in the ascending phase only at the conclusion of such examination or in any case after thirty days have elapsed without the Chambers having expressed an opinion. This period shall run from the date of communication to the Chambers, by the Government, about the placing of the parliamentary scrutiny reservation in the Council of the European Union. Such reservation may also be placed by the Government for draft legislation or acts of special political, economic and social importance.

In regards to the specific rule of procedure in the context of the formation of European policies, Chapter XVIII of the Senate Rules of Procedure, last amended on 27 July 2022, is dedicated to the procedures for connections with the European Union and international bodies *("procedure di collegamento con l'Unione europea e con organismi internazionali").* The main provision relating to the ascending phase is Article 144 ("Esame degli atti normative e di altri atti di interesse dell'Unione europea"), which provides that the Committees, in matters within their competence, shall examine preparatory

acts of European Union legislation, communicated by the Government or published in the Official Journal of the European Union, as well as the Government's information reports on the relevant procedures and on the state of compliance of the rules in force in the domestic legal system with the requirements contained in European legislation, acquiring the opinion of the Committee on European Union Policies ("*Commissione Politiche dell'Unione europea"*). It is the competence of the latter to examine draft EU legislative acts in order to verify compliance with the principles of subsidiarity and proportionality, in accordance with the European Treaties. Also within its competence are acts affecting the institutions or general policy of the European Union. The Commissions may vote on resolutions designed to indicate the principles and lines that should characterize Italian policy, expressing an opinion on the general guidelines manifested by the Government on each policy of the European Union, on groups of legislative acts being enacted concerning the same subject matter, or on individual legislative acts of particular general policy significance.

In the Chamber of Deputies, acts and drafts of EU regulatory acts and their preparatory acts - handed down by the Government or the EU institutions - are assigned for examination and consideration to the parliamentary committee responsible for the subject matter, and generally for opinion to the Committee on European Union Policies. The relevant committees may adopt a final document, which is forwarded to the Government as well as to the European Parliament, the Council, and the Commission as part of the political dialogue. Moreover, the opinion of the Regulatory Council *("Giunta parlamentare"*) of 6 October 2009, stipulated that for examinations under Article 127 by the relevant committees, the provisions of Rule 79 (4), (5) and (6) on legislative preparatory work ("*istruttoria legislative"*), under which the parliamentary committees may conduct hearings and fact-finding investigations ("*audizioni e indagini conoscitive*"), shall apply.

During the Prime Minister's Communications of 27 June 2018[212], ahead of the European Council meetings of 28 and 29 June 2018, Prime Minister Conte addressed before the Senate Assembly the Treaty amendments of the European Stability Mechanism. In his speech he mentioned that the objective of the Italian government is and remains the elimination of the growth gap between Italy and the European Union. He emphasized how the country must certainly aim to reduce its public debt, but within a perspective of economic growth and it must orient the fiscal and public spending policy to the pursuit of stable and sustainable growth objectives. He reported that this concept would be the key message of Italy’s contribution for the upcoming Euro summit. Moreover, he said that he intended to clearly represent Italy's position at the next Eurosummit: “*if we want to prevent the decline of the Union and achieve a Union in the economic field that is perceived as truly close to our citizens, it is time to advance risk sharing that has so far been left too far behind*”. However, he stressed that these risk-sharing mechanisms must not include conditionalities that, for the sake of the purpose of risk reduction, end up leading, instead of risk reduction, to increased banking and financial instability in Member States that are characterized by more exposed economic systems. He made it clear that Italy won’t support the project of a European Monetary Fund that ends up forcing some countries into predefined restructuring paths with substantial disempowerment to develop effective economic policies independently. In light of this perspective, which was supported also by members of the parties “*M5S*” and “*Lega*”, the president made again Italy’s position clear as being against any inflexibility in the reform of the European Stability Mechanism and any “*dangerous duplication of tasks”* of the European Commission for the fiscal surveillance, as this would risk to delegitimize the democratic basis of the essential functions for financial stability.

[212] See Comunicazioni del Presidente del Consiglio dei ministri in vista del Consiglio europeo del 28 e 29 giugno 2018 in Resoconto stenografico dell’Assemblea, Seduta n.20 di mercoledì 27 giugno 2018 https://www.camera.it/leg18/410?idSeduta=0020&tipo=stenografico#sed0020.stenografico.tit00020.

Again, during the Communications made on 11 December 2018[213] ahead of the Eurosummit of 13 and 14 December 2018, Prime minister Conte spoke about the reform of the ESM. He stressed on Italy's vision which called for risk reduction to be finally accompanied by corresponding measures to mutualize risk. He appreciated that the ESM Member States had been moving forward with the establishment of a risk-sharing measure, such as the common backstop for the Single Resolution Fund. Nevertheless, as for the governance reform of the ESM, Italy maintained its reservations about an intergovernmental approach and reiterated that the roles assigned to the ESM should not irreversibly undermine the prerogatives of the European Commission, particularly in the area of fiscal surveillance.

During the session of the Chamber of Deputies of 19 June 2019[214] held for the Communications of the Prime Minister in view of the Eurosummit of 20 and 21 June 2019, the Resolution 6-00065 "*Patuanelli*" was approved, which contained guidelines by the Italian government in reference to the reform of the ESM. In the following, the prime ministers considerations during the above-mentioned session will be laid out, then some of the opinions on the ESM reform expressed by MPs of different parties analysed, and finally the content of the adopted resolution will be exposed.

As Conte expressed in the Communications of 19 June 2010, Italy's government didn't consider it appropriate for the Heads of State and Government of the ESM Member States at the Eurosummit of 13-14 June 2019 to decide on medium and long-term measures to be taken in view of the reform of the ESM, without a proper technical basis and a consensual approach. He mentions that the Eurogroup reached on 14 June 2019 a broad consensus on the draft text of the revised ESM Treaty and that at the request of Italy and Germany, the procedures of national ratifications would be

[213] Resoconto stenografico dell'Assemblea, Seduta n.99 di martedì 11 dicembre 2018, https://www.camera.it/leg18/410?idSeduta=0099&tipo=stenografico#sed0099.stenografico.tit00020.sub00010.

[214] Comunicazioni del Presidente del Consiglio dei ministri in via del Consiglio europeo del 20 e 21 giugno 2019 e conseguente discussione. https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=Resaula&leg=18&id=1113860&part=doc_dc-ressten_rs-gentit_cdpdcdmivdced20e21g2019ec.

initiated only when the complete documentation has been agreed upon and finalised, preferably within December 2019.

Even though the consensus on the draft text of the revised ESM agreed upon at the Euro Summit of June 2019, was given by the Prime Minister of the Conte I government, there were still critical views on the issue.

In particular, Francesco D'Uva, member of the political party "*M5S*", expressed his view: endorsing the ESM Treaty reform in its current draft form (namely the version of June 2019) would mean to legitimize the very same fiscal rules Italy has been criticizing for years. Specifically, he explained that the draft of the Treaty reform stipulates that access to the precautionary credit lines for requesting states would be conditional on meeting strict fiscal benchmarks and this that would exclude Italy and other members from the possibility of requesting assistance to the ESM. The deputy addressed the Prime Minister, representing the interests of his party "M5S", he could not *"accept that a line is drawn that distinguishes between A and B states on the basis of the usual fiscal policy parameters that are holding Europe hostage*".

Additionally, member of the "M5S" group, Filippo Scerra also expressed his views on behalf of the party, asking the government to oppose any reform of the ESM that would be detrimental to Italy. He expressed his concerns on the idea that seems to prevail, namely the ESM gaining greater powers of oversight over the public finances of Member States asking for financial assistance. For the M5S this is not the direction that the European Union should be taking and therefore it must be strongly reiterated at the European summit that *"there can be no reform of the ESM of this sign and no dialogue on the matter can be opened*".

Another MP who spoke critically against the ESM reform was Riccardo Molinari of the "*Lega*" party: he said that his party has always strenuously opposed the vote on the ESM since 2012 and thus can speak with the consistency that comes from the history of his party. From his point of view the proposed reform is a dangerous one that would bind Italy to unfavourable measures and which would lead to the monitoring of the public accounts by the ESM itself and not the Commission. Moreover he criticized the fact that this latter aspect would entail less political control and that only countries with accounts in place would be helped, yet also making use of Italy's money.

The MP Stefano Fassina of the party "Liberi e Uguali" criticized Germany for being politically responsible for the "*mercantilist extremism*" which would be brought about by the ESM Reform and which would go against Italy's national interests and hope; he also openly blamed the prime minister Conte for wrongly agreeing to the reform in December 2018 and hopes that there will still be the terms to block the reform from being implemented. Lastly, MP Lia Quartapelle Procopio of the "*Partito Democratico*" criticized more generally the fact that to that point Italy still didn't' have a clear and unified opinion on the reform of the ESM Treaty.

Despite the heavy critics on the ESM Reform, the resolution 6-00065[215]presented by senators Patuanelli and Romeo (M5S) was approved with 142 favourable votes out of the 245 voting MP's. With the resolution, the government pledges to oppose regulatory frameworks that end up forcing some countries towards predefined and automatic restructuring paths, with substantial disempowerment of the power to independently develop effective economic policies. More specifically, with regard to the reform of the European Stability Mechanism, the Italian Government undertook the commitment to not approve changes that would provide for conditionalities that end up penalizing those member states most in need of structural reforms and investment, and that undermine the prerogatives of the European Commission in the area of fiscal surveillance, and to make known to the Chambers the proposals for amendments to the ESM Treaty, drawn up in the European forum, in order to allow Parliament to express itself with an act of

[215] Risoluzione in Assemblea 6/00065, presentate dai senatori Patuanelli Stefano (M5S), Romeo Massimiliano
Presidente del Consiglio Conte (Gov Conte I) ha votato a favore.
Senatrice De Petris Loreadana (Misto) a votato contrario sulla proposta a nome del gruppo
Senatore Urso Adolfo (FdI) – astenuto a nome del gruppo
Senatore marcucchi Andrea (PD) – contrario a nome del gruppo
Senatore Romeo Massimiliano (L-SP-PSd'Az) – favorevole a nome del gruppo
Senatore Pichetto Fratin Gilberto (FI-BP) – contrario
Senatore Patuanelli Stefano (M5S) – favorevole a nome del gruppo.
Esito: approvato
Votazione**:** presenti: 246, votanti: 245, favorevoli: 142, astenuti: 15, contrari: 88
https://aic.camera.it/aic/scheda.html?core=aic&numero=6/00065&ramo=SENATO&leg=18.

address and, consequently, to suspend any final determination until Parliament has pronounced itself.

Further we also note the debate that took place in the Chamber of Deputies on 31 July 2019[216] when an interrogation ("*interrogazione a risposta immediata*") was held regarding the ESM Treaty reform process, for the purpose of involving the relevant parliamentary bodies. MP Claudio Borghi ("*Lega*") criticized the fact that, having noted continuous progress in the European approval of the ESM reform, the members of his political group had not been sufficiently informed about this progress and his party's interests, essentially to block the ratification of the ESM reform, had not been appropriately represented at the Eurosummit. The Minister of Economy and Finance, Giovanni Tria, replied that since the conclusion of the agreement on the overall package related to the ESM is scheduled for December 2019, only from that time can the ratification process be started, which will have to be preceded by an authorization law of the Parliament under Article 80 of the Constitution. Thus, at the Eurogroup meeting on July 8, following up on the leaders' indications, it was simply confirmed that work on the package of documents related to the revision of the ESM Treaty should continue, hoping for possible significant progress by November 2019. Likewise, a continuation of work was requested on the so-called Eurozone budget and banking union.

The political controversy deepened further in November 2019, when the second Conte government was in office. An informal parliamentary hearing ("*audizione informale*") was held on 6 November 2019[217] on the ratification of the reformed ESM Treaty in Italy, by the Budget Committee of the Chamber of Deputies (*Commissione V – Commissione Bilancio, Tesoro e*

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[216] Resoconto stenografico dell'Assemblea Seduta n.219 di mercoledì 31 luglio 2019, available at https://www.camera.it/leg18/410?idSeduta=0219&tipo=stenografico#sed0219.stenografico.tit00060.sub00030.

[217] See Chamber of Deputies: *"Audizione presso le Commissioni riunite V e XIV della Camera dei Deputati. Il Meccanismo Europeo di Stabilità: funzionamento e prospettive di riforma"*. Report by Giampaolo Galli (Observatory on Italian Public Accounts of the Catholic University of the Sacred Heart), available on https://www.camera.it/leg18/1347?shadow_organo_parlamentare=2805&hx0026;id_tipografico=05.

Programmazione) and the European Union Policy Committee of the Chamber of Deputies (*Commissione XIV – Commissione Politiche dell'Unione Europea*). The Parliamentary Committees jointly invited economist Giampaolo Galli, who is since 2018 the Vice-Director of the Observatory of Public accounts at the University of the Sacred Heart, as an external independent expert to present and discuss his opinions on the ESM Reform and some aspects of the reform that they deemed harmful for Italy.

The instrument of informal hearings deserves a closer look. These are meetings organized between the Commissions and other parties external to parliamentary activity aimed at providing the Commissioners with useful elements of knowledge in an area of expertise. In fact, Parliament is endowed with a number of cognitive tools ("*strumenti conoscitivi*") to exercise its functions, and hearings ("*audizioni*") are precisely part of the legislature's policy, control and cognitive activity, such as acts of policy and control over the government ("*atti di indirizzo e controllo*"), fact-finding investigations ("*indagini conoscitive*"), and inquiries ("*inchieste*") defined by Article 82 of the Constitution[218].

So, the Parliamentary Standing Committees, in matters within their competence for their legislative, policy-making and control activities, can avail themselves of a number of inspection instruments: hearing of ministers on sectoral policy directions, hearing of executives of ministerial administrations or public bodies, acquisition of news, data or documents (Article 47 of the Senate Regulations), examination of reports periodically submitted by the Government on the progress of certain administrative activities[219]. Through the informal hearings ("*audizioni informali*"), which we are talking about in the case of Giampaolo Galli's hearing, the parliamentarians which meet in the various Commissions have the opportunity to invite experts, academics, independent authorities, and a variety of stakeholders. These hearings are called "*informal*" because they are not provided for in any legal text and have never been codified, although they

[218] See Gianniti, L. and Lupo, N (2018): "*Procedimenti Conoscitivi e Ispettivi*" (Chapter 8) in "*Corso di diritto parlamentare*", p. 213-216, il Mulino.
[219] Ibid.

are now a widespread practice. Moreover, for informal hearings there is no redaction of a stenographic report, but only the indication of the times when they are held. However, in this case it was Professor Giampaolo Galli himself who published a summary of the hearing.

Essentially, in the hearing the following arguments were made. Firstly, the professor defined the ESM as being overall a very useful tool and a major contributor to resolving the crisis of countries that had lost market access. He also praised the ESM as being remarkable proof of solidarity of the core European countries towards others, highlighting Germany's important role as first contributor to the ESM, and stressed that Italy must continue to fully support the ESM. Then, in regards to the Reform of the ESM Treaty, he points out that a positive aspect for Italy is certainly the introduction of the backstop for the Single Resolution Fund.
However, the reformed Treaty also presented some critical issues for a country like Italy: the professor raised concerns in regards to the idea that, under certain circumstances, the restructuring of the public debt could become a precondition for accessing ESM resources. More specifically, he criticizes the idea contained in the reformed treaty that a country seeking financial assistance through the ESM must restructure its debt in advance if it is judged unsustainable by the ESM itself. He notes that the critical change lies not so much in the possibility of the sovereign debt being restructured, which has already happened in the case of Greece during the financial crisis, but in the idea that restructuring becomes a precondition, almost automatic, for obtaining financing. Moreover, he reports that the concept that a rule should be established to force debt restructuring on a country that applies for ESM funds and has a debt that is deemed unsustainable, has been repeatedly expressed by leading figures in the German establishment and other northern European countries, such as *Bundesbank* Governor Jens Weidemann in his speech of 20 September 2018 on "*Prospects for Europe and the euro area"*[220].

[220] Jens Weidmann, *Prospects for Europe and the euro area,* speech held at the Centre for European Policy, Freiburg im Breisgau, 20 September 2018.

Giampaolo Galli understood that this amendment to the Treaty stems fundamentally from the consideration that formal rules (Stability and Growth Pact, Fiscal Compact) have not worked, such that some countries have continued to accumulate debts whose sustainability over time has been increasingly doubtful. Hence, the idea of making market discipline work better: aid is provided, but by making it conditional on debt restructuring the moral hazard effect is avoided, which, according to some, is the underlying reason why politicians in some countries have not made fiscal adjustment. The idea, then, is that before doing operations that involve risk-sharing, deviant countries must be induced to reduce risk. Giampolo Galli continues by saying that an essential step in this strategy is to shift the axis of power in economic matters from the European Commission, which is considered too politicized, to an intergovernmental and theoretically more technical body such as the ESM. However, Giampaolo Galli sees this latter aspect as critical, and according to him there is indeed a need to strengthen the role of the European Commission with respect to the ESM.
Moreover, according to the Parliamentary Committees of the Chamber of Deputies and the professor, the idea of early debt restructuring would not make sense in today's Italy. In particular, it should be considered that Italy has mass savings and that 70 % of the debt is held by residents, through banks and investment funds. Under these conditions, a restructuring would be an immense calamity, generating destruction of savings, bank and business failures, mass unemployment and impoverishment of the population unprecedented in the postwar period. A preemptive restructuring would be a *"cold-blooded gunshot to the temple of savers",* a kind of bail-in applied to millions of people who put their trust in the state by buying government debt securities.
The issue of public debt restructuring is connected to the analysis of another aspect of the ESM reform that entails critical issues for Italy, according to the opinions of the professor and the Parliamentary Committees: the introduction of single limb clauses. In the abstract, these can be considered more efficient than the collective action clauses previously in force, but there is no doubt that their introduction, albeit starting in 2022, leads to negative repercussions on Italy's market. The introduction of the single limb collective action

clauses, would likely produce an increase in the cost of public financing, particularly for the most indebted countries, such as Italy. Moreover, it would lead to further segment the market by worsening its liquidity, it would lead to a higher probability of incurring a restructuring, raising the perception of risk for European sovereign bonds, especially of those countries with higher debt-to-GDP ratios[221]. Thus, according to the Italian professor, it should be avoided that single limb CACs make debt restructuring too accessible, in order to avoid this risk of a vicious circle. Moreover, public debt restructuring should not be decided on the basis of "*mechanical assessments*", but should be evaluated very carefully, with the full involvement of national authorities, because otherwise it risks aggravating the economic and social condition of a nation, as well as having very negative contagion effects on the entire Eurozone.

Other relevant developments in the context of Italy's process of ratification of the Reform of the ESM concern the presentation on 19 November 2019 of the Draft Reform of the Treaty establishing the ESM *("Bozza di riforma del Trattato istitutivo del MES", Atto 322-bis*[222]) by the Finance and Treasury Committee of the Senate (the Committee then announced the draft in the session n.146 on 4 December 2019[223]), and the approval on 11 December 2019 by the Chamber of Deputies and the Senate of the Republic, with the favourable opinion of the Government, of Resolution 6-00091 *"Delrio, Francesco Silvestri, Boschi, Fornaro"* and Resolution 6-00087 *"Perilli, Marcucci, Faraone and De Petris"*, of identical content. In these Resolutions the Government specifically commits itself to: exclude any mechanism that implies an automatic restructuring of public debt[224]; ensure the consistency

[221] Cannata, M. (6 July 2018): *"Nuove clausole per le crisi del debito: rischio circolo vizioso"*, available at https://www.lavoce.info/archives/54036/nuove-clausole-per-le-crisi-del-debito-si-rischia-il-circolo-vizioso/.
[222] https://www.senato.it/service/PDF/PDFServer/BGT/01185779.pdf.
[223] https://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=18&id=1132768.
[224] Economy and Finance Minister Gualtieri had ruled out the possibility that the ESM reform could introduce the need to restructure debt in advance in order to access financial support, as had been feared by several parties with particular reference to the risk that the provision of different regimes for countries with high public debt, such as Italy, could trigger a spiral of negative expectations such as to translate into greater difficulties in debt placement and an aggravation of critical conditions. He had also recalled that at the beginning of the

of the government's position with the guidelines defined by the Chambers, and the full involvement of Parliament in all steps of the negotiation on the future of the Economic and Monetary Union and on the conclusion of the reform of the ESM, and to provide for the full involvement of Parliament in a possible request for activation of the European Stability Mechanism with a clear procedure of coordination and approval.

4.3 Most recent developments: towards a ratification of the ESM Treaty in Italy?

By December 2020, the ESM debate continued to be divisive in the majority, even in view of the pandemic crisis. On 30 November 2020, Economy Minister Roberto Gualtieri (Pd) stressed in a hearing before the joint committees of the House and Senate that the decisions of the European Council in December 2019 "*only concern the reform of the ESM and the anticipated introduction on the common backstop and risk assessment, and these in no way affect the use of the ESM, it is a separate thing from the choice of whether to use it or not*."[225] The M5S party did not yet have a unified position on the reform. Formally, political chief Vito Crimi wrote in a press note on 30 November 2010 that "*the reform of the MES and its use, the possibility of its recourse, are two totally distinct elements*," and therefore the Five Star Movement would not adopt "*an obstructionist approach*" and would not prevent "*the approval of the amendments to the treaty, with respect to which there is no shortage of criticism, so as to allow other countries the possible use of the instrument*."[226] However, in practical matters, this rhetoric proved to be contradicted on 2 December 2020 by the letter signed by more than forty "*dissident*" deputies and senators, who asked the Movement's top leadership to come out with a clear “*no*” on the ESM reform. In the letter[227]

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negotiations some countries had demanded that debt restructuring become a condition for access to financial assistance but that, thanks in part to the firm position taken by Italy, these positions were rejected and the rules remained identical to those already in place.

[225] https://webtv.camera.it/evento/17192

[226] https://www.askanews.it/politica/2020/11/30/crimi-non-impediremo-la-riforma-del-mes-ma-non-lo-useremo-pn_20201130_00148/.

[227] *Lettera dei grillini dissidenti sul MES*, available at https://www.ilfoglio.it/politica/2020/12/02/news/ecco-la-lettera-dei-dissidenti-del-m5s-contro-il-mes-la-maggioranza-ora-e-a-rischio-davvero-1499110/.

(published by "Il Foglio"), the signatory MPs judged the reform of the ESM to be insufficient *("there is no progress on the completion of the Banking Union")* and considered this to be particularly risky in the face of the "*willingness of almost half of Parliament to access the ESM by making this instrument de facto closer to our country*."

Decisive was the approval of Resolution 6-00157 (Bonino, Richetti, De Falco)[228] on 9 December 2020 in which the President of the Council committed to express Italy's support for the reform of the ESM as deliberated by the Eurogroup, but on the condition to avoid a punitive clause for Italy: the mandatory restructuring of the public debt. In fact, the restructuring was originally compulsory in the event of an application for ESM aid, and now thanks to the Italian intervention the obligation has been dropped[229]. The text of the reform now clarifies that the preliminary checks on the debt sustainability of the country requesting assistance are in no way automatic reiterates that private sector involvement in debt restructuring must remain limited to exceptional circumstances. The architect of this providential change was Alessandro Rivera[230], director general of the Treasury, who successfully advocated for it in Brussels with the then ministers Giovanni Tria and Roberto Gualtieri then.

Consequently, on 27 January 2021 Italy signed in Brussels the Agreement Amending the Treaty Establishing the ESM, opening the way for the ESM Member State's parliaments to start the national ratification processes. However, since that moment, there have been major delays in Italy's national ratification of the ESM reform.

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[228] https://www.senato.it/japp/bgt/showdoc/18/Resaula/0/1186369/index.html?part=doc_dc-allegatoa_aa-sezionetit_cdpdcdmivdced10e11d2020-oggetto_pdrn123456e7600156n1t600157n2600157n2t600158n3600159n4600160n5600161n6e600162n7.

[229] See Risoluzione 6-00157 Bonino, Richetti, De Falco: *"la riforma non incentiva processi di ristrutturazione del debito pubblico, per cui non è previsto alcun automatismo in caso di assistenza finanziaria, ma rende il MES una sorta di polizza assicurativa a fronte di possibili crisi di liquidità e dunque rappresenta un meccanismo di stabilizzazione dei mercati".*

[230] Occorsio, E. (8 January 2023): "*Con il Mes è un'altra cosa*", in "L'Espresso", p.25-27, Edizione N.1 – anno LXVIII.

Since February 2022, there has been an increasing drive toward the long-awaited ratification of the reformed ESM Treaty. Economy Minister Daniele Franco, in charge at that time, announced how the ratification of the ESM would allow Italy to fulfill its commitments to the European partners; thus the government confirmed its intention to submit the ratification bill to Parliament as soon as possible. Further, the Undersecretary for Foreign Affairs at that time, Benedetto della Vedova, stated[231] in February 2022 that the ratification of the reform would be the best interest of Italy, being the one with the highest public debt and thus the one most interested in the implementation of the common European financial instruments. Luigi Marattin, chairman of the Finance Committee and deputy of party "*Italia Viva*" highlighted as well as the importance of ratifying the reformed ESM Treaty as soon as possible because this would represent better than anything else the end of the populist season "*that has done so much damage to this country"*[232].

To the point of writing, 15 February 2023, while all the other ESM Member States have so far ratified in their national parliaments the Agreement, Italy is the only country whose ratification is still pending[233]. Partly the delay has been due to Italy's waiting for the German Constitutional Court's ruling, which was as well delayed, and also due to the ongoing divisions in the political majority on the issue, which we have analysed in this section. In particular, the argument of the ESM Reform has been especially divisive and causing tensions during the Draghi government (13 February 2021 to 22 October 2022) which was made up of a coalition that included almost all the political parties, ranging from *M5S*, right-wing ("*Lega per Salvini"*) to center-right ("*Forza Italia*", "*Noi con l'Italia*") center ("*Italia Viva*", "*Centro Democratico", "+ Europa*"), center-left wing ones ("*Articolo Uno – Movimento Democratico Progressista*", "*PD"*, "*Ipf*"). The unique

[231] RaiNews (23 February 2022*), "Riforma Mes, Franco: "Il governo presenterà un disegno di legge per la ratifica"*, available at https://www.rainews.it/articoli/2022/02/riforma-mes-franco-il-governo-presenter-un-disegno-di-legge-per-la-ratifica-be5326bf-32e2-4c59-8cb9-fd715c40cd38.html.
[232] Ibid.
[233] https://www.repubblica.it/politica/2022/02/23/news/mes_europa_in_pressing_sul_governo_italiano-338876866/.

composition of this government was due to the historical particular period of the Covid-crisis and it was thus impossible to find a common agreement in parliament on the ESM Reform with such differing political forces. Moreover, the current Prime Minister Giorgia Meloni has been downgrading the ESM reform to a "*secondary issue*"[234] since the beginning of her Mandate and the majority in her government, especially "*FdI*" and "*Lega*", has been critical on the Reform. However, as of December 2022, the party of "*Forza Italia*", led by Berlusconi, has announced[235] that, despite still reserving critics in regards to the ESM, it would be ready for a ratification. The Vice-president of the Chamber of Deputies said on 18 December 2022 that it is in Italy's interest, like the rest of Europe, to have the mechanism and he opened up to the possibility of a parliamentary debate. As well, Foreign Affairs Minister Antonio Tajani stated that they "will find a way for those (member states) who want to use it to be able to do so" ("*troveremo il modo per far sì che chi lo voglia utilizzare possa farlo*"[236]). Moreover, he expressed his perspective, in his view a pro-european constructive critic, that the instrument should be under the control of the European Parliament.

In this context, economist Innocenzo Cipolletta's opinion[237] on Italy's complex negotiation process of the ESM Reform stands out. According to him, the ESM is an integral piece of the European crisis response framework and thus it necessarily has to be ratified by Italy in order to not remain isolated in Europe. In fact, there is an underlying issue that induces a more enabling attitude on the ESM: the new Fiscal Compact will take effect on 1 January 2024[238], this time with heavy economic penalties for violators. The parameters to be maintained will be decided on a case-by-case basis by the

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[234] Occorsio, E. (8 January 2023): "*Con il Mes è un'altra cosa*", in "L'Espresso", p.25-27, Edizione N.1 – anno LXVIII.
[235] Lauria, E. (18 December 2022), *"Forza Italia si smarca sul MES e apre una crepa a destra: 'Strumento che sarà approvato'",* available at https://www.repubblica.it/economia/2022/12/18/news/mes_italia_ratifica_governo-379717563/.
[236] Ibid.
[237] See Occorsio, E. (8 January 2023), from political journal *L'Espresso*, "*Con il Mes è un'altra cosa",* 8 January 2023, p. 24-26
[238] See "*Dossier n.5 Camera*" (27 January 2023) on the Reform of fiscal rules: *"Gli orientamenti della Commissione europea per la riforma della governance economica dell'UE*", available at http://documenti.camera.it/leg19/dossier/pdf/ES005.pdf.

European Commission on the basis of objective benchmarks such as the primary balance, but above all on the basis of the degree of the country's cooperation with the European framework. Thus, for Italy to stay out of this process would be devastating, also in view of future upcoming challenges. Approving the ESM Reform as it currently is and making sure that Italy won't need it would be the signal to send to the market. Moreover, the critical position of right-wing parties could entail the risk of a more subtle political issue: the German, French, and Spanish governments are keeping their guard up against seemingly technical affairs, because if the Meloni line of adversity against Europe and the ESM Reform pertains, it would strengthen the far-right groups also in their respective countries: the *AfD* (*Alternative für Deutschland*), Marine Le Pen's *Rassemblement National*, and the Spanish *Vox*.

In conclusion of this chapter, the most recent development in the progress of the negotiations of the ratification of the ESM reform in Italy is signaled: on 16 December 2022, the law proposal (*Atto Camera n.722*[239]) on Ratification and Execution of the Agreement amending the Treaty establishing the ESM, done at Brussels on January 27 and February 8, 2021 ("*Proposta di Legge sulla Ratifica ed edecuzione dell'Accordo recante modifica del Trattato che istituisce il Meccanismo europeo di stabilità, fatto a Bruxelles il 27 gennaio e l'8 febbraio 2021"*) was presented at the Chamber of Deputies by MP Luigi Marattin, member of the parliamentary group "*Azione-Italia Viva-Renew Europe*" and member of the Budget, Treasury and Planning Committee of the Chamber of Deputies. The law proposal was then referred on 27 January 2023 to the Foreign Affairs Committee of the Chamber of Deputies for further examination (*sede referente*).

The proposal reiterates how following the ratification, the ESM will work alongside, but by no means replace, the European Commission, and the modalities of cooperation between the two institutions will be defined in an agreement that will be signed when the amendments finally enter into force;

[239] http://documenti.camera.it/leg19/pdl/pdf/leg.19.pdl.camera.722.19PDL0016910.pdf.

it should be recalled that the ESM itself will not have any fiscal surveillance tasks as defined in the Stability and Growth Pact, and its activity will be bound by compliance with the European Union legislation; moreover, the overall assessment of the economic situation of countries and their financial position, the procedure for macroeconomic imbalances will remain the exclusive responsibility of the Commission. Furthermore, it is reaffirmed in the proposal that the Reformed ESM Treaty has not yet entered into force because as things stand, i.e. 16 December 2022, Italy's and Germany's are still pending (however at the time of writing[240] Germany has ratified the reformed ESM Treaty on 19 December 2022 after the Federal Constitutional Court dismissed on 9 December 2022 the constitutional complaint filed against the ratification).

The law proposal is therefore aimed at the ratification of the Agreement amending the Treaty establishing the ESM signed by Italy on 27 January 2021, and therefore finally following up on a commitment made internationally almost two years ago and enabling thus the entry into force of the ESM reform, also in order to avoid possible disputes with other countries that have already completed completion of their respective ratification processes.

In this view, the doctrine specifies in detail the process of a legislative initiative ("*iniziativa legislativa*"), that is the drafting of a bill composed of articles and accompanied by an explanatory report. A legislative initiative can be presented by the subjects identified by Article 71 of the Constitution: the Government, individual parliamentarians, 50,000 voters, each regional council, as well as the National Council of Economy and Labor (CNEL). In this case, parliamentarian Marattin and others have presented a legislative initiative and thus we speak of a draft proposal, namely "*proposta di legge*". The existence of the prerequisites for a legislative initiative by a parliamentarian must be verified by the Speaker of the branch of Parliament to which the initiative is submitted (in this case the Chamber of Deputies)

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who must carry out a general assessment of the detectability of the proposal. The verification should be limited to ascertaining the existence of the act and its formal regularity and to certifying that the proposal consists of an explanatory statement and is preceded by an explanatory report. The draft proposal is then assigned to a parliamentary committee (Art. 32 (2) of the Senate rules) or to a special committee (Art.22 (2) Chamber of Deputies rules and Art 24 Senate rules). In the normal procedure, i.e., in the "*sede referente*" session, a preliminary examination is then carried out in the Committee as opposed to the deliberative phase, which takes place later on in the Assembly, meaning in the plenum of each chamber. It is therefore the Committee's responsibility to carry out an adequate preliminary investigation. As highlighted by Giannit and Lupo in the Manual on parliamentary law ("*Corso di diritto parlamentare"*, 2018), choosing the subject matter and thus the proposals on which to begin to work is not a compulsory act for the Committee, but a political option. In fact, most legislative initiatives, especially those submitted by a parliamentarian, are never examined and are only put on the Committees' agenda by memory. Only for very few legislative initiatives is there a real obligation of examination: the bills that as a whole constitute the budget maneuver and bills converting decree-laws, European and European delegation bills, and even those authorizing the ratification of treaties.

As such, the examination in the Committee begins with a preliminary illustration carried out by the President or entrusted by him to a rapporteur, who is appointed by him (Art.41 (2) Senate rules.) At this point, the stage of the proper inquiry ("*fase istruttoria*") takes place: that is, the acquisition of elements of knowledge necessary to verify the quality and effectiveness of the proposed regulatory intervention. In order to assess these elements, the Committee may use the entire set of information procedures made available by the regulations: hearing ministers and public officials, having fact-finding investigations ("*indagini conoscitive*"), and may also request the preparation of technical reports to the government.

Once this stage is completed, the Committee may prepare a unified text ("*testo unificato*"), and with reference to this a deadline is set for the submission of amendments, which will then be subject to discussion and vote

in the Committee. On the texts resulting from the consideration of the amendments, the opinions of the other parliamentary committees concerned are solicited in the House and concretely acquired. Among these opinions, the most important are those of the budget committee, the constitutional affairs committee, and the policies of the European Union committee. Lastly, in the referral stage ("sede referente"), the Committee procedure is completed with the vote on the mandate for the rapporteur to report to the Plenary.

CONCLUSIONS

The aim of this research was to analyse the Parliamentary Debate on the reform of the European Stability Mechanism by carrying out an analysis of national parliamentary ratification in Germany in Italy of the reformed ESM Treaty.

Germany has been delayed in its ratification of the ESM Treaty due to the formulation of a constitutional complaint challenging the acts of approval of the amendments to the ESM. In their constitutional complaint, the complainants, six members of the 19th German Bundestag, invoked their right to democratic self-determination as citizens and essentially argued that the legislature's approval of the Treaties was formally flawed. In particular, the complainants sought a review of the formal lawfulness of a transfer of sovereign powers. They asserted that both acts, which were adopted by simple majority in the *Bundestag* and *Bundesrat*, violated their rights under Article

38 (1) GG and Article 20 (1) and (2) GG in conjunction with Article 79 (3) GG. Moreover, the complainants contended that instead of a simple majority, a two-thirds majority was required in the *Bundestag* and *Bundesrat* because the emergency procedure established by the Agreement Amending the ESM Treaty in the context of the common back-stop would lead to a transfer of sovereign powers and consequently the amendment would result in an actual amendment of the EU legal framework in a structurally significant manner.

After a long anticipation, in an order published on 13 December 2022 (2BvR 1111/21), and released to the press on 9 December 2022, the Second Senate of the Federal Constitution dismissed as inadmissible such constitutional complaint. The constitutional complaint is inadmissible, as the complainants have failed to sufficiently demonstrate and substantiate the possibility of a violation of their right to democratic self-determination derived from Article 38 (1) GG. Consequently, in light of the "green-light" given by the Second Senate of the Federal Constitutional Court on 13 October 2022, Germany proceeded to ratify the reformed ESM Treaty in Brussels on 19 December 2022, leaving Italy as the only country among the ESM Member States to not have yet ratified.

The rulings of the German Federal Constitutional Court on matters related to the ESM have been relevant also in the past, not only for having marked a decisive step as to the legitimacy of the ESM, but also for having provided fundamental interpretive keys for the future legal framework of the Union. In particular. In particular, in its judgement of 12 September 2012, the Second Senate of the Federal Constitutional Court refused under certain conditions to issue a temporary injunction against the ratification of the ESM Treaty and it held that the legislature, the *Bundestag,* must remain master of its own decisions ("*Herr seiner Entschlüsse*"), including those relating to budget revenues and expenditures, without external constraints from EU bodies or other member states.

Different than the German case, we have seen that in Italy, the reason why the Treaty amending the ESM hasn't been ratified yet is due to political

reasons. Until recently, the approval of the amendments to the ESM Treaty by the Italian Parliament was conditional on the decision of the German Constitutional Court on the constitutionality of the Reform, which has been however published on 9 December 2022, leaving Italy as the only ESM Member State whose provision is still pending. As well, the motives of the delay of the ratification lie in the ongoing heated national debate, as the Reform has been, and still is to date one of the most divisive issue among the parties in Italy, and thus the parliamentary majority hasn't been able to reach an agreement to this date. Moreover, the current Prime Minister Giorgia Meloni (in charge since 22 October 2022), who is leading a right-wing coalition composed of "*Fratelli d'Italia*", "*Lega*" and "*Forza Italia*", didn't consider the ESM Reform a priority at the beginning of her mandate; however, since the judgement of the Federal Constitutional Court has been made public and Germany has proceeded to the ratification in December 2022, she has recently opened up more to the possibility of Italy's ratification of the ESM, being conscious of the fact that the Italy can't be the only one to stay out of it. The most recent law proposal on the Ratification and Execution of the Agreement amending the Treaty establishing the ESM, presented in 16 December by the parliamentarian Luigi Marattin and referred to the Foreign Affairs Committee of the Chamber of Deputies on 27 January 2023, could represent a sign of Italy's long-attended follow up on its commitment made internationally after having signing the ESM Treaty Reform on 27 January 2021.

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SUMMARY (IN ITALIAN LANGUAGE)

Istituito nel 2012 al culmine della crisi del debito sovrano, il Meccanismo europeo di stabilità (MES) è il meccanismo permanente di assistenza finanziaria dell'Eurozona e, in quanto tale, è stato fondamentale per salvaguardare la stabilità finanziaria dell'Eurozona e dei suoi Stati membri. Questa ricerca analizza il tumultuoso processo di riforma del MES, fino ai suoi più recenti sviluppi. Si occupa non solo degli aspetti più propriamente istituzionali del MES e dei principali cambiamenti che verrebbero apportati dalla revisione del Trattato MES concordata nel Giugno 2019 e finalizzata nel Dicembre 2020, ma anche e soprattutto dei profili più controversi riguardanti i rapporti con il diritto dell'Unione Europea, i dibattiti nazionali e i processi di ratifica parlamentare del Meccanismo sia in Germania che in Italia. Tale approfondimento si è reso necessario a seguito delle continue controversie che sono sorte sul tema, e che sono a tutt'oggi di attualità, i cui protagonisti non sono stati solamente la dottrina specializzata o le giurisprudenze nazionali ed europee; anzi, la rilevanza del tema in esame appare ancora più evidente se si tiene conto dei continui richiami emersi sui

media generalisti, che rivelano con grande chiarezza l'attenzione dedicata anche dall'opinione pubblica al tema, sempre più attenta alle implicazioni che l'integrazione dell'Unione provoca con forza progressivamente maggiore e di cui la Riforma del MES rappresenta oggi uno dei profili più significativi. L'analisi è stata suddivisa in tre capitoli.

Il primo capitolo, di natura essenzialmente introduttivo, inizia con un breve esame delle radici della crisi finanziaria iniziata nel 2008 e delle modalità che l'hanno vista successivamente sfociare in una crisi del debito sovrano in Europa. La crisi della Zona euro ha rafforzato fortemente la necessità di un'adeguata governance economica europea, portando all'istituzione di vari programmi di assistenza e meccanismi di sostegno finanziario. Questo processo di rafforzamento della governance economica dell'UE, caratterizzato da un approccio incrementale, è iniziato nel maggio 2010, con l'approvazione del piano di aiuti alla Grecia. Tuttavia la minaccia che la crisi del debito sovrano non si limitasse allo Stato greco, ma si estendesse ad altri Paesi dell'Eurozona con ampi deficit e ingenti debiti pubblici, primi fra tutti Irlanda e Portogallo, era sempre più evidente. Ciò ha sollevato la questione dell'istituzionalizzazione dei meccanismi di assistenza, al fine di affrontare la crisi in modo più sistematico: un cosiddetto "*ombrello di salvataggio*", per proteggere tutti gli Stati membri dell'UE in difficoltà economica e finanziaria. Furono così istituiti il MESF e il FESF, che ebbero però una natura temporanea ed eccezionale. Infatti, già nell'autunno del 2010, è emersa la necessità di sviluppare uno strumento più efficiente di quelli allora in funzione e così il 2 febbraio 2012 è stato firmato e approvato nella sua versione definitiva il Trattato MES, entrato poi in vigore il 27 settembre successivo. Le regole di questa istituzione si trovano in parte nel Trattato sul funzionamento dell'Unione europea (Art. 136, paragrafo 3), in parte nel Trattato MES definitivo del 2012 e in parte in alcuni regolamenti dell'UE che vanno sotto il nome di "*Two Pack*". Nonostante questa dispersione di fonti, la disciplina di raccordo del Trattato MES con l'ordinamento giuridico dell'Unione si trova nell'art. 136 TFUE, in particolare nel suo terzo paragrafo aggiunto dalla Decisione 2011/199/UE del 25 marzo 2011, approvata all'unanimità dal Consiglio europeo, previa consultazione del Parlamento

europeo, della Commissione europea e della BCE. Tale modifica è stata adottata attraverso la procedura di revisione semplificata di cui all'articolo 48, paragrafo 6, del TUE.
Il primo capitolo procede quindi a delineare i profili istituzionali del MES, a partire dalla sua natura giuridica e dai suoi obiettivi; in particolare, è stato posto l'accento sull'organizzazione interna, sulla procedura di concessione del sostegno finanziario e sulla condizionalità.

Il secondo capitolo si concentra sugli aspetti più problematici che l'istituzione del MES ha comportato. Dal 2010, infatti, l'attività di salvataggio degli Stati membri, in particolare la legittimità del MES, è stata sottoposta a un attento esame giuridico da parte dei giuristi europei: le opinioni della dottrina in merito alla questione della compatibilità dei vari strumenti di gestione delle crisi con le norme del TFUE sulla politica economica, infatti, sono state diverse e a volte contrastanti. In particolare, sembravano esistere due punti di vista principali: da un lato, coloro che sostenevano con forza la compatibilità e, dall'altro, coloro che sostenevano che le misure di sostegno finanziario adottate dall'Unione e dai suoi Stati membri in risposta alla crisi costituissero una violazione delle regole di politica economica, in particolare della clausola di non salvataggio, "*no-bailout clause*" contenuta nell'articolo 125 del TFUE. Mentre in letteratura il dibattito è stato vario e a volte contrastante, a livello di massima giurisprudenza la controversia è stata risolta con la sentenza della Corte di giustizia europea nel caso Pringle del 2012, che ha fornito le linee guida sulla legittimità del MES rispetto al diritto dell'UE. In particolare, sulla compatibilità del MES con l'articolo 125 del TFUE, nonché sulla legittimità della modifica apportata all'articolo 136 del TFUE che ha consentito l'istituzione di meccanismi di assistenza finanziaria, la Corte di giustizia europea ha emesso una sentenza pregiudiziale nel caso Pringle (C-370/12 del 27 novembre 2012). Il caso è nato dall'iniziativa di un parlamentare irlandese di nome Thomas Pringle, che il 13 aprile 2012 ha presentato un ricorso alla Corte Suprema irlandese per far dichiarare illegittima l'adesione del suo Paese al MES. All'epoca, infatti, il governo irlandese aveva deciso di procedere contemporaneamente sia all'approvazione dell'emendamento all'articolo 136 del TFUE sia alla ratifica del Trattato MES, senza sottoporre i relativi atti a

referendum, che era invece un requisito obbligatorio nel caso in cui fosse stata necessaria una modifica della Costituzione irlandese. L'intento di Pringle era quello di bloccare i suddetti processi di ratifica e approvazione. La Corte di giustizia ha confermato la validità della decisione 199/2011 del Consiglio europeo, che ha modificato, attraverso la procedura di revisione semplificata ai sensi dell'articolo 48, paragrafo 6, del TUE, l'articolo 136 del TFUE, introducendo un terzo paragrafo relativo all'istituzione di un meccanismo permanente di stabilità. In questa sentenza la Corte ha anche stabilito che gli Stati membri dell'Eurozona non hanno violato il diritto dell'UE negoziando e ratificando il Trattato che istituisce il meccanismo europeo di stabilità. La Corte ha basato quest'ultima conclusione sul tanto atteso chiarimento della portata e del contenuto della clausola di non salvataggio del TFUE contenuta nell'articolo 125, che, come analizzato in precedenza, era stata oggetto di intense controversie tra gli studiosi di diritto, in particolare in Germania.
Inoltre, sia la sentenza della Corte Costituzionale Federale tedesca del 7 settembre 2011 sulla partecipazione della Germania allo strumento di prestito alla Grecia e all'EFSF, sia la sentenza della Corte del 12 settembre 2012 sulle richieste di emissione di ingiunzioni temporanee per impedire la ratifica del Trattato ESM e del Fiscal Compact, sono state fondamentali nel fornire chiavi interpretative per il futuro quadro giuridico dell'Unione in merito all'ESM.

Per quanto riguarda la sentenza del 7 settembre 2011, la Corte costituzionale federale ha respinto come infondati i ricorsi costituzionali ("*Verfassungsbeschwerden*") presentati contro gli atti e le misure adottate dalla Germania e dall'Unione europea in merito agli aiuti finanziari alla Grecia e al pacchetto di salvataggio dell'euro. Nell'esaminare i reclami presentati, la Corte costituzionale federale ha valutato la compatibilità dei suddetti atti con specifiche disposizioni costituzionali: il diritto di voto sancito dall'articolo 38 (1) GG e i principi democratici di cui all'articolo 20 (1) e (2) GG in combinato disposto con l'articolo 79 (3) GG. Nella sentenza del 7 settembre 2011, la Corte costituzionale ha esteso l'ambito di tutela del diritto elettorale alla sfera intergovernativa, in cui vanno collocati gli aiuti alla Grecia e il meccanismo europeo di stabilizzazione finanziaria. La Corte Costituzionale ha ritenuto che il legislatore, il *Bundestag*, debba rimanere

padrone delle proprie decisioni ("*Herr seiner Entschlüsse*"), comprese quelle relative alle entrate e alle uscite di bilancio, senza vincoli esterni da parte degli organi dell'UE o di altri Stati membri.
A seguito della sentenza della Corte Costituzionale Federale del 7 settembre 2011, sono stati introdotti emendamenti alla Legge sul Meccanismo di Stabilizzazione dell'Euro ("*StabMechG*") al fine di allineare la legge a tale sentenza e al mutato quadro istituzionale del fondo di salvataggio. Infatti, con l'ampliamento delle competenze del MES sono stati rafforzati anche i poteri di cooperazione e controllo del Parlamento, in linea con quanto più volte sottolineato dalla giurisprudenza costituzionale tedesca.

In merito alla sentenza del 12 settembre 2012, il Secondo Senato della Corte Costituzionale Federale ha rifiutato, a determinate condizioni, di emettere un'ingiunzione temporanea contro la ratifica del Trattato MES e del Fiscal Compact e contro le leggi nazionali che approvano e accompagnano i Trattati. In particolare, la Corte Costituzionale Federale ha respinto i ricorsi costituzionali presentati dall'Associazione "*Mehr Demokratie e.V*", a cui hanno aderito decine di migliaia di cittadini tedeschi e numerosi esperti economici, e i ricorsi sollevati tramite procedura di "*Organstreit*" dal gruppo parlamentare della Sinistra ("*Die Linke*"), volti a impedire la promulgazione della legge di ratifica del Trattato ESM ("*Gesetz zu dem Vetrag vom 2. Februar 2012 zur Einrichtung"*), della legge di ratifica del Trattato sulla stabilità, il coordinamento e la governance nell'Unione economica e monetaria, il cosiddetto Fiscal Compact ("*Gesetz zu dem Vertrag vom 2. März 2012 über Stabilität, Koordinierung und Steuerung in der Wirtschafts- und Währungsunion*"), approvate dal *Bundestag* nella seduta del 29 giugno 2012, della legge di ratifica della decisione adottata dal Consiglio europeo il 25 marzo 2011 per modificare l'articolo 136 del TFUE ("*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*") e la legge sulla partecipazione finanziaria della Germania al MES ("*Gesetz zur finanziellen Beteiligung am Europäischen Stabilitätsmechanismus, ESM-Finanzierungsgesetz-ESMFinG*"). In questo

modo, i ricorrenti sostenevano che i due strumenti finanziari erano incompatibili con il diritto costituzionale tedesco.
La sentenza della Corte del 12 settembre 2012, peraltro molto attesa, ha assunto - come quella sugli aiuti alla Grecia e sull'EFSF - una particolare rilevanza per gli sviluppi del processo di integrazione europea. Anche in questa occasione, i giudici costituzionali hanno affermato la centralità del principio di democrazia parlamentare sancito dall'articolo 38 GG e la difesa delle prerogative del *Bundestag*. Le argomentazioni della Corte derivano dal fatto che anche in un sistema intergovernativo con scarsa legittimità democratico-rappresentativa, come deve essere considerata l'Unione Europea secondo i giudici costituzionali tedeschi, i deputati, in quanto diretti rappresentanti del popolo, devono mantenere il controllo sulle decisioni fondamentali di politica di bilancio.

Pertanto, il Secondo Senato della Corte Costituzionale Federale ha respinto i ricorsi presentati, dichiarando la ratifica del Fiscal Compact e del Trattato istitutivo del MES conforme al dettato della GG, a condizione che siano rispettate le due seguenti condizioni: la prima condizione è il rispetto del limite di responsabilità economica per ciascun Paese membro del MES, come esplicitamente indicato nell'articolo 8 (5) del Trattato istitutivo del MES, secondo il quale "la responsabilità di ciascun membro del MES sarà limitata alla sua quota di capitale autorizzato al prezzo di emissione". Di conseguenza, il limite del coinvolgimento economico della Germania nel MES, la cui quota di capitale sottoscritto in tale fondo ammonta a 190.024.800.000 euro. (pari a circa il 27% dei 700 miliardi di euro), deve essere considerato assoluto e insormontabile fino a quando i rappresentanti tedeschi in seno agli organi costituenti il fondo non approveranno la sottoscrizione di ulteriori quote del MES; la seconda condizione da soddisfare prevede che l'inviolabilità dei documenti appartenenti al MES, sancita dagli articoli 32 (5) e 35 (1) del Trattato istitutivo, e l'obbligo di segreto professionale previsto per tutti i membri degli organi costitutivi del MES, sancito dall'articolo 34 del Trattato, non impediscano una completa informazione del *Bundestag* e del *Bundesrat*.

All'indomani della sentenza della Corte costituzionale federale che ha dato il via libera alla partecipazione della Germania al MES e al Fiscal Compact, è stata promulgata anche la nuova legge sulla partecipazione finanziaria della Germania al MES, la cosiddetta "*Gesetz zur finanziellen Beteiliung am Europäischen Stabilitätsmechanismus*", o più brevemente "*ESM-Finanzierungsgesetz – ESMFinG"*, del 13 settembre 2012, approvata dal Bundestag il 29 giugno 2012. In linea con le recenti posizioni espresse dai giudici costituzionali, la nuova legge *ESMFinG* illustra nel dettaglio il coinvolgimento del Parlamento tedesco nel MES, ovvero le competenze del *Bundestag* e dei suoi organi, come la Commissione di bilancio ("*Haushaltsausschuss*") e la Commissione speciale ("*Sondergremium*"). In effetti, al Bundestag è stata espressamente attribuita la responsabilità di bilancio e di stabilità ("*Haushalts- und Stabilitätsverantwortung*") in materia di MES.

Infine, il Capitolo 2 analizza la ratifica parlamentare italiana del MES. In Italia, il 3 agosto 2011 il Consiglio dei Ministri, sotto la presidenza di Berlusconi, ha approvato, su proposta del Ministro degli Affari Esteri Frattini, il disegno di legge per la ratifica e l'attuazione della decisione 2011/199/UE del Consiglio europeo che modifica l'articolo 136 del TFUE in relazione al MES. Il Disegno di legge intitolato "Ratifica ed esecuzione della Decisione del Consiglio Europeo 2011/1997/UE che modifica l'articolo 136 del TFUE in relazione al Meccanismo Europeo di Stabilità" è stato poi presentato al Senato il 3 aprile 2012 (Atto Senato n.3240, Sessione n.704) su iniziativa del Governo dal Ministro degli Affari Europei Moavero, dal Ministro dell'Economia e delle Finanze Monti e dal Ministro degli Affari Esteri Di Sant'Agata. Il disegno di legge è stato trasmesso alla Commissione Affari esteri del Senato in sede referente l'11 aprile 2012 (Seduta n. 707). Durante la prima lettura al Senato del progetto di legge, il 17 aprile 2012 (Seduta n. 174), durante la quale la Commissione Esteri si è riunita per discutere il Trattato istitutivo del MES, si è distinto l'intervento del Ministro degli Affari Europei Moavero. Egli ha sottolineato come nel contesto del MES il Governo italiano si sia fatto promotore di un'Unione Europea più coesa e abbia rafforzato il confronto con la Germania ipotizzando un percorso parallelo nei

processi di ratifica del trattato in questione, pur nel rispetto dell'autonomia dei rispettivi Parlamenti.
Il dibattito sulla proposta di legge è stato poi ripreso nella seduta del 18 aprile 2012 (Seduta n. 175), durante la quale il Vice Ministro dell'Economia e delle Finanze Grilli ha fornito i chiarimenti richiesti sul MES e un'informativa sull'evoluzione del processo di riassetto della governance economica in Italia. Successivamente, la bozza di proposta è stata trasmessa, dopo aver superato il voto al Senato, alla Camera dei Deputati il 13 luglio 2012 e assegnata alla Commissione Affari Esteri in sede referente il 16 luglio 2012 durante la seduta n.666. Nelle sedute del 17 luglio (prima lettura camera) e del 18 luglio 2012, il Ministro per gli Affari Europei Moavero ha ribadito che la natura giuridica del MES consente di evitare che le erogazioni degli Stati membri gravino sul loro debito pubblico. Poco dopo, l'approvazione definitiva è stata data dalla Plenaria della Camera dei Deputati (Atto Camera n.5359) il 19 luglio 2012 (seduta n.669), con 325 voti a favore, 53 contrari, 36 astenuti e 214 assenti. Di conseguenza, la Camera dei Deputati e il Senato hanno promulgato la ratifica del Trattato MES con la Legge n. 116 del 23 luglio 2012, entrata in vigore il 29 luglio 2012.

Il terzo e ultimo capitolo è incentrato sulla riforma del MES e sulla sua ratifica parlamentare in Germania e in Italia. In primo luogo, sono state tracciate le tappe principali del tumultuoso processo di riforma del MES a livello europeo che ha portato alla firma da parte degli Stati membri della Zona euro dell'Accordo di modifica del Trattato MES il 27 gennaio e l'8 febbraio 2021. In secondo luogo, sono state presentate le modifiche al Trattato istitutivo del MES, in particolare sono stati esaminati il meccanismo di backstop al Fondo di risoluzione unico, gli strumenti di assistenza finanziaria precauzionale, le clausole di azione collettiva *single-limb* e la cooperazione tra la Commissione europea e il MES.

Successivamente, è stata esaminata la tanto attesa sentenza della Corte Costituzionale tedesca del 13 ottobre 2022 che ha dichiarato inammissibile il ricorso costituzionale che contestava gli atti interni di approvazione della Germania dell'Accordo che modifica il Trattato ESM. Infatti, nel maggio

2021, a seguito della firma da parte della Germania del Trattato MES riformato a Bruxelles il 27 gennaio 2021 e aprendo così la strada al processo di ratifica nazionale, il Governo federale ha proposto al *Bundestag* un progetto di atto di approvazione dell'Accordo di modifica del Trattato ESM e un progetto di atto di approvazione dell'Accordo di modifica sul trasferimento e la mutualizzazione dei contributi al Fondo di risoluzione unico (Accordo intergovernativo). Di conseguenza, l'11 giugno 2021 il *Bundestag* ha adottato entrambi gli atti di approvazione senza alcuna modifica e il *Bundesrat* ha dato il suo consenso all'atto di approvazione il 25 giugno 2021. Tuttavia, a seguito di una richiesta della Corte Costituzionale federale, a causa della formulazione di ricorsi costituzionali ("*Verfassungsbeschwerde*"), il Presidente federale ha sospeso la certificazione dell'atto di approvazione dell'Accordo che modifica il Trattato MES in attesa di una decisione sul caso. Nel loro ricorso costituzionale, i ricorrenti, sei membri del 19° *Bundestag* tedesco, hanno invocato il loro diritto all'autodeterminazione democratica in quanto cittadini e hanno sostanzialmente sostenuto che l'approvazione dei Trattati da parte del legislatore era formalmente viziata perché, in sostanza, questi modificano il programma di integrazione dell'Unione Europea. In particolare, i ricorrenti hanno chiesto un riesame della legittimità formale di un trasferimento di poteri sovrani ("*formelle Übertragungskontrolle*"). Essi sostenevano che entrambi gli atti, adottati a maggioranza semplice dal *Bundestag* e dal *Bundesrat*, violavano i loro diritti ai sensi dell'articolo 38 (1) GG e dell'articolo 20 (1) e (2) GG in combinato disposto con l'articolo 79 (3) GG. I ricorrenti sostenevano che, invece della maggioranza semplice, era necessaria una maggioranza di due terzi nel *Bundestag* e nel *Bundesrat*, poiché la procedura d'emergenza stabilita dall'Accordo che modifica il Trattato MES nel contesto del back-stop comune avrebbe portato a un trasferimento di poteri sovrani e di conseguenza la modifica avrebbe comportato un'effettiva modifica del quadro giuridico dell'UE in modo strutturalmente significativo. Dopo una lunga attesa, in un'ordinanza pubblicata il 13 dicembre 2022 (2BvR 1111/21) e resa nota alla stampa il 9 dicembre 2022, il Secondo Senato della Costituzione federale ha respinto come inammissibile il ricorso costituzionale che contestava gli atti interni di approvazione della Germania dell'Accordo del 27 gennaio 2021 che modifica

il Trattato che istituisce il Meccanismo europeo di stabilità e dell'Accordo del 27 gennaio 2021 che modifica l'Accordo sul trasferimento e la mutualizzazione dei contributi al Fondo di risoluzione unico.

Infine, in chiusura del Capitolo 3, è seguita un'analisi approfondita della controversia politica in corso in Italia sulla riforma del MES. Infatti, al momento della stesura di questa tesi, l'Italia è l'unico Paese che non ha ancora ratificato la riforma del MES. Ciò è dovuto in parte all'attesa della sentenza della Corte Costituzionale tedesca, che ha anch'essa subito ritardi, e anche alle continue divisioni nella maggioranza politica sulla questione, che è stata esaminata. Alla luce del dibattito parlamentare sul coinvolgimento dell'Italia nella riforma del MES che si è svolto in Italia dal 2018, abbiamo analizzato come il primo governo Conte (in carica dal 1° giugno 2018 al 20 agosto 2019), composto da una coalizione tra i due partiti Movimento 5 Stelle (M5S) e Lega che si è schierata apertamente contro la riforma del MES (soprattutto all'interno della destra, i partiti di Forza Italia e Fratelli d'Italia hanno sempre criticato fortemente il MES e la sua riforma), mentre sul fronte opposto i partiti più europeisti come PD, Azione e Italia Viva hanno sostenuto il MES; in secondo luogo si discuterà di come il secondo governo Conte (in carica dal 5 settembre 2019 al 13 febbraio 2021), formato dall'alleanza PD-M5S, abbia partecipato ai dibattiti sulla riforma del MES, giungendo nel giugno 2019 a una prima bozza di Trattato rivisto sulle nuove regole. Successivamente, il governo Draghi (in carica dal 13 febbraio 2021 al 22 ottobre 2022) non ha ratificato il Trattato MES modificato a causa dei ritardi causati dalla crisi pandemica, della continua divisione nella maggioranza (il governo Draghi era composto da una coalizione che comprendeva quasi tutti i partiti politici, a causa del particolare periodo storico della crisi di Covid e quindi era impossibile trovare un accordo comune in parlamento sulla riforma del MES con forze politiche così diverse) e dell'attesa dell'Italia della la sentenza della Corte Costituzionale tedesca sul MES.

Si segnala che la riforma del trattato MES è stata affrontata in diverse Comunicazioni del Comunicazioni del Presidente del Consiglio in vista del vertice Euro. Le modalità di partecipazione dell'Italia alla formazione delle

decisioni e alla predisposizione degli atti dell'Unione europea, nonché l'adempimento degli obblighi e l'esercizio delle competenze derivanti dall'appartenenza all'Unione europea, in coerenza con gli articoli 11 e 117 della Costituzione italiana, sulla base dei principi di sussidiarietà e proporzionalità, sono disciplinate principalmente dalla Legge 24 dicembre 2012, n. 234 sulle norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea. Il provvedimento introduce una riforma organica delle norme che regolano la partecipazione dell'Italia alla formazione e all'attuazione della legislazione europea, tenendo conto dei significativi cambiamenti intervenuti nell'assetto dell'Unione a seguito dell'entrata in vigore del Trattato di Lisbona, in particolare per quanto riguarda il controllo dei Parlamenti nazionali sul rispetto dei principi di sussidiarietà e proporzionalità. In particolare, la legge n. 234 mira ad aumentare il coinvolgimento del Parlamento italiano nella partecipazione alla formazione del diritto dell'Unione europea (la cosiddetta fase ascendente). Inoltre, l'articolo 4 della legge n. 234 ribadisce gli obblighi di informazione e di consultazione del Governo, che deve presentare e illustrare al Parlamento la posizione che intende assumere prima dello svolgimento delle riunioni del Consiglio europeo. La legge 23 dicembre 2021, n. 238 (Legge europea 2019-2020) ha esteso tale obbligo anche alle riunioni dell'Eurogruppo e alle riunioni informali nelle loro diverse formazioni. Secondo l'articolo 4, il Governo informa gli organi parlamentari competenti degli esiti delle riunioni del Consiglio europeo e del Consiglio dell'Unione europea. La Legge europea 2019-2020 ha anche previsto la possibilità per le Commissioni parlamentari competenti, prima di ogni riunione del Consiglio dell'Unione europea e secondo quanto previsto dai Regolamenti delle Camere, di adottare atti di indirizzo volti a delineare i principi e le linee dell'azione del Governo nell'attività preparatoria all'adozione degli atti dell'Unione europea. Il Governo dovrà tenere conto degli atti di indirizzo emanati e riferire anche alle riunioni del Consiglio dell'Unione europea. Su atti normativi dell'Unione europea, così come su ogni altra questione sottoposta alla loro attenzione ai sensi della legge n. 234, gli organi parlamentari competenti possono adottare atti di indirizzo al Governo (articolo 7 della legge n.234). La posizione rappresentata dall'Italia nel

Consiglio dell'Unione europea e in altre istituzioni o organi dell'Unione deve essere coerente con tali indirizzi (il riferimento alla "conformità" è stato introdotto dalla Legge europea 2019-2020, che ha sostituito la precedente formulazione limitata alla "coerenza" con tali indirizzi). In caso contrario, il Presidente del Consiglio dei Ministri o il Ministro competente riferirà tempestivamente alle Commissioni, motivando adeguatamente la posizione assunta.

Decisiva per il processo negoziale in Italia è stata l'approvazione della Risoluzione 6-00157 (Bonino, Richetti, De Falco) del 9 dicembre 2020 con la quale il Presidente del Consiglio si è impegnato ad esprimere il sostegno dell'Italia alla riforma del MES deliberata dall'Eurogruppo, ma a condizione di evitare una clausola punitiva per l'Italia: la ristrutturazione obbligatoria del debito pubblico. Infatti, la ristrutturazione era originariamente obbligatoria in caso di richiesta di aiuti al MES, e ora grazie all'intervento italiano l'obbligo è stato eliminato. Inoltre, il 27 gennaio 2021, l'Italia ha firmato a Bruxelles l'Accordo che modifica il Trattato che istituisce il MES, aprendo la strada ai parlamenti degli Stati membri del MES per avviare i processi di ratifica nazionali. Da quel momento in poi, tuttavia, si sono verificati forti ritardi nella ratifica nazionale della riforma del MES da parte dell'Italia, tanto che al momento della stesura di questa tesi, il 15 febbraio 2023, mentre tutti gli altri Stati membri del MES hanno finora ratificato l'Accordo nei rispettivi parlamenti nazionali, l'Italia è l'unico Paese la cui ratifica è ancora in sospeso. Il ritardo è dovuto in parte all'attesa della sentenza della Corte Costituzionale tedesca, come già accennato, e anche alle divisioni in corso nella maggioranza politica sulla questione, che sono state analizzate in questa sezione. Inoltre, l'attuale Presidente del Consiglio Giorgia Meloni (in carica dal 22 ottobre 2022), che guida una coalizione di destra composta da Fratelli d'Italia, Lega e Forza Italia, non considerava la riforma del MES una priorità all'inizio del suo mandato; tuttavia, da quando la sentenza della Corte Costituzionale Federale è stata resa pubblica e la Germania ha proceduto alla ratifica nel dicembre 2022, ha recentemente aperto maggiormente alla possibilità di una ratifica del MES da parte dell'Italia, consapevole del fatto che l'Italia non può essere l'unica a restarne fuori. In conclusione di questo capitolo, si segnala

l'ultimo sviluppo nell'avanzamento dei negoziati di ratifica della riforma del MES in Italia: il 16 dicembre 2022, la proposta di legge (Atto Camera n.722) sulla Ratifica ed esecuzione dell'Accordo recante modifica del Trattato che istituisce il MES, fatto a Bruxelles il 27 gennaio e l'8 febbraio 2021 (Proposta di Legge sulla Ratifica ed esecuzione dell'Accordo recante modifica del Trattato che istituisce il Meccanismo europeo di stabilità, fatto a Bruxelles il 27 gennaio e l'8 febbraio 2021) è stata presentata alla Camera dei Deputati dal deputato Luigi Marattin, membro del gruppo parlamentare Azione-Italia Viva-Rinnovare l'Europa e membro della Commissione Bilancio, Tesoro e Programmazione della Camera dei Deputati. La proposta di legge è stata poi rinviata il 27 gennaio 2023 alla Commissione Affari Esteri della Camera dei Deputati in sede referente.

La proposta ribadisce come, a seguito della ratifica, il MES lavorerà a fianco della Commissione europea, ma non la sostituirà in alcun modo, e le modalità di cooperazione tra le due istituzioni saranno definite in un accordo che sarà firmato quando le modifiche entreranno definitivamente in vigore; si ricorda che il MES stesso non avrà compiti di sorveglianza fiscale, come definito nel Patto di Stabilità e Crescita, e la sua attività sarà vincolata al rispetto della legislazione dell'Unione Europea; inoltre, la valutazione complessiva della situazione economica dei Paesi e la loro posizione rispetto alle regole del Patto di Stabilità e crescita e della procedura per gli squilibri macroeconomici rimarrà di esclusiva competenza della Commissione. Inoltre, nella proposta si ribadisce che il Trattato MES riformato non è ancora entrato in vigore perché allo stato attuale, cioè il 16 dicembre 2022, la ratifica dell'Italia e della Germania sono ancora in sospeso (tuttavia, al momento in cui scriviamo, la Germania ha ratificato il Trattato MES riformato il 19 dicembre 2022).
La proposta di legge è quindi finalizzata alla ratifica dell'Accordo di modifica del Trattato istitutivo del MES firmato dall'Italia il 27 gennaio 2021, dando così finalmente seguito a un impegno assunto a livello internazionale due anni fa e consentendo così l'entrata in vigore della riforma del MES, anche al fine di evitare possibili contenziosi con altri Paesi che hanno già completato i rispettivi processi di ratifica.