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### Insurance-type Cooperation Mechanisms under EU law

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#### Abstract

In the economic policy domain, calls for insurance-type cooperation within the European Monetary Union (EMU) have frequently been made. Insurance-type cooperation relates to the debate about macroeconomic stabilization tools helping to absorb asymmetric shocks within EMU. Adopting a legal perspective, this article aims to explore the scope offered under the current EU treaties in establishing such cooperation mechanisms. Among the broad variety of policy proposals, we focus particularly on both a permanent EU unemployment scheme and a shock-based insurance. We identify the potential legal basis for these insurance schemes highlighting differences in legal feasibility given their specific design. We also discuss the endowment of insurance funds setting out four different funding modes under the EU treaties or on intergovernmental basis. We show that legal scope for insurance schemes is limited. Fully-fledged unemployment insurance schemes are likely to overstretch the boundaries of the EU treaties. More narrowly designed, however, such schemes are rather likely to be feasible if set up as shock-based mechanisms, where the gravity of the economic shocks is significant.

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## I. Introduction

Future modes of EU economic coordination can be analysed by reference to two models.<sup>1</sup> First, the “surveillance model”, which corresponds to the transgression of the status quo under which Member States continue to have full fiscal competence and retain competence to conduct economic policy.<sup>2</sup> In this scenario, the EU continues to be the “discipline enforcer”, applying numerical fiscal rules and the existing budgetary and economic surveillance system. Importantly, under this model instruments are applied largely in a corrective fashion in the sense that fiscal and macroeconomic developments are identified and then removed.

By contrast, the “fiscal federalism model”<sup>3</sup> would imply a higher degree of centralized steering rather than surveillance. In this scenario, the EU would have the necessary resources to address structural inequalities and prevent asymmetric shocks – through intergovernmental grants or transfers. Both the surveillance model and the fiscal model are part of the “vision” for the European Monetary Union (EMU), as continuously expressed by the EU institutions. Starting with the Four Presidents’ report,<sup>4</sup> the European Parliament’s resolution on the Four Presidents’ report,<sup>5</sup> the Commission’s

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<sup>1</sup> KENNETH ARMSTRONG, «The Character of EU Law and Governance: From ‘Community Method’ to New Modes of Governance», 63 *Current Legal Problems* (2011), 179-214, at 179; more generally on the impact of various coordination forms on EU law: MATTHIAS RUFFERT, «The European Debt Crisis and European Union Law», 48 *Common Market L. R.* (2011), 1777-1806, at 1777; there is also a wide political science literature adopting a governance perspective. See, e.g., MARKUS JACHTENFUCHS, «The Governance Approach to European Integration», 39 *Journal of Common Market Studies* (2001), 245-264, at 245; BEATE KOHLER-KOCH & BERTHOLD RITTBERGER, «Review Article: The ‘Governance Turn’ in EU Studies», 44 *Journal of Common Market Studies* (2006), 27-49, at 27.

<sup>2</sup> ALICIA HINAREJOS, *The Euro Area Crisis in Constitutional Perspective*, Oxford 2015, p. 181; TANJA BÖRZEL, «European Governance: Negotiation and Competition in the Shadow of Hierarchy», 48 *Journal of Common Market Studies* (2010), 191-219, at 191; De Streeel, «EU Fiscal Governance and the Effectiveness of its Reform», in: M. Adams, F. Fabbrini & P. Larouche (eds.), *The Constitutionalization of European Budgetary Constraints*, Oxford 2014, 85-104, at 87.

<sup>3</sup> ALICIA HINAREJOS, «Fiscal Federalism in the European Union: Evolution and Future Choices for EMU», 50 *Common Market L. R.* (2013), 1621-1642; MIGUEL POIARES MADURO, «A New Governance for the European Union and the Euro: Democracy and Justice», 2012/11 RSCAS Policy Paper (2012); SHAHIN VALLÉE, «From mutual insurance to fiscal federalism: Rebuilding the Economic and Monetary Union after the demise of the Maastricht architecture», 138 *International Economics* (2014), 49-62.

<sup>4</sup> HERMAN VAN ROMPUY, “Towards a genuine economic and monetary union”, Final Report, 5. December 2012, <[http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/en/ec/134069.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/134069.pdf)>.

<sup>5</sup> EUROPEAN PARLIAMENT, Report with recommendations to the Commission on the report of the Presidents of the European Council, the European Commission, the ECB and the Eurogroup, “Towards a genuine Economic and Monetary Union”, 24. October 2012 (2012/2151/INI).

Blueprint for a deep and genuine EMU<sup>6</sup> and up to the most recent Five Presidents' Report<sup>7</sup> – all of these documents take recourse to the two models viewing a rather short-term dominance of the surveillance model and the long-term goal of the fiscal federalism model.<sup>8</sup>

Insurance-type cooperation is at the core of fiscal federalism. It relates to the debate about stabilization tools counteracting asymmetric shocks within EMU.<sup>9</sup> A standard argument in favour of a fiscal union states that a monetary union should be complemented by a fiscal equalisation<sup>10</sup> scheme to help absorb asymmetric macroeconomic shocks.<sup>11</sup> The underlying idea is that, in a monetary union, member countries do not have access to monetary policy to react to a downturn; they can only use fiscal policy. In such a situation, a fiscal equalisation scheme may provide insurance through financial transfers to countries affected by asymmetric negative shocks. Building on the fiscal capacity, an EMU-level stabilization tool to support adjustment to asymmetric shocks, facilitating stronger economic integration and convergence and avoiding the setting up of long-term transfer flows, could become a

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<sup>6</sup> EUROPEAN COMMISSION, Communication, "A blueprint for a deep and genuine economic and monetary union Launching a European Debate", COM(2012) 777 final/2, 28. November 2012.

<sup>7</sup> JEAN-CLAUDE JUNCKER, "Completing Europe's Economic and Monetary Union", Five Presidents' Report, 2015, <[http://www.ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report\\_en.pdf](http://www.ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report_en.pdf)>, (hereinafter "Five Presidents' Report").

<sup>8</sup> In this vein, the most recent Five Presidents' Report, supra n. 7 foresees a "deepening by doing" for the first stage (1 July 2015 - 30 June 2017) and a Fiscal Union in the second stage after 2017.

<sup>9</sup> ÁRPRÁD ÁBRAHÁM ET AL., «On the Optimal Design of a Financial Stability Fund», Working Paper May 19 (2016); MIROSLAV BEBLAVÝ, DANIEL GROS & ILARIA MASELLI, "Reinsurance of National Unemployment Benefit Schemes", 2015, <<http://www.ceps.eu/system/files/wd401.pdf>>; MATHIAS DOLLS ET AL., «An Unemployment Insurance Scheme for the Euro Area», ZEW Discussion Paper No 14-095 (2014); SEBASTIAN DULLIEN, "A European Unemployment Insurance as a stabilization device - Selected issues", Paper prepared for brainstorming workshop on July 2, 2012 at the DG EMPL, <<http://www.ec.europa.eu/social/BlobServlet?docId=10437&langId=en>>; HENRIK ENDERLEIN, LUCAS GUTTENBERG, & JANN SPIESS, «Making One Size Fits All. Designing a Cyclical Adjustment Insurance Fund for the Euro-zone», Notre Europe, Policy Paper 61 (2013); DAVIDE FURCERI & ALEKSANDRA ZDZIENICKA, «The euro area crisis: need for a supranational fiscal risk-sharing mechanism?», IMF Working Paper N°13/198 (2013); JÜRGEN VON HAGEN & CHARLES WYPLOSZ, «EMU's Decentralised System of Fiscal Policy», European Economy Economic Papers N°306 (2010).

<sup>10</sup> HANSJÖRG BLÖCHLIGER & CLAIRE CHARBIT, "Fiscal Equalisation", OECD Economic Studies No 44, 2008, <<http://www.oecd.org/eo/growth/42506135.pdf>>.

<sup>11</sup> LORETA PORO, «Fiscal Union v Individual National Sovereignty of EU Members States: A Conceptual Battle», 30 Journal International Banking Law and Regulations (2015), 68-81, at 77; CLEMENS FUEST & ANDREAS PEICHL, «European Fiscal Union: What is it? Does it Work? And are there really no alternatives?», IZA Policy Paper No 39 (March 2012), at 6; TIGRAN POGHOSYAN, ABDELHAK SENHADJI & CARLO COTTARELLI, «The Role of Fiscal Transfers in Smoothing Regional Shocks», IMF Working Paper No. 16/141 (21 July 2016); a good overview is offered by NICOLAS CARNOT, PHIL EVANS, SERENA FATICA & GILLES MOURRE, «Income insurance: a theoretical exercise with empirical application for the euro area», Economic Papers 546 (March 2015).

component for a genuine EMU. However, given the existing reservations and obstacles to further deepening coordination mechanisms, ambitious treaty amendments appear (politically) unlikely and underscore the significance of effective application of the existing legal framework.

Against this background, the purpose of this article is to discuss the legal feasibility of insurance-type cooperation within the current framework of EU Treaties as one central element of the fiscal federalism model. More specifically, we shed light on insurance-type cooperation mechanisms that cushion large macroeconomic shocks and make the EMU more resilient overall. Section II briefly sets out the policy proposals surrounding insurance mechanisms and draws an analytical distinction between a permanent EU unemployment scheme and a shock-based insurance. Section III identifies the potential legal basis for these insurance schemes highlighting differences in legal feasibility given the specific design of the insurance. On that basis, Section IV discusses the endowment of insurance funds setting out four different funding modes under the EU treaties or on intergovernmental basis. Section V concludes.

## **II. Basic functioning of insurance models**

Among the multiple potential designs of insurance-type cooperation,<sup>12</sup> we representatively explore the legal feasibility of two concrete modes of insurances. The main difference between them is that one is permanent in nature, that is, setting up a re-curent flow of financial transfer based on a set of criteria even though – in some models – the financial transfers are intended to even out over a certain period of time. The alternative model is shock-based, that is, transfers occur only (and rarely) if certain thresholds reflecting a severe economic shock are met.

The first model is represented by an unemployment scheme, as suggested by EU Commissioner Laszlo Andor,<sup>13</sup> which has the following features: The unemployment

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<sup>12</sup> For a good overview on the various proposals, see EUROPEAN COMMISSION, Paper on Automatic Stabilisers, 4 October 2013.

<sup>13</sup> LÁSZLÓ ANDOR, “Social dimension of the Economic and Monetary Union: what lessons to draw from the European elections?”, Lecture at Hertie School of Governance, Berlin, 13. June 2014,

insurance would replace the corresponding part of national schemes. The levels of the contribution and of the benefit should represent a relatively low common denominator between the rules of the various national schemes. The insurance would focus on short-term unemployment and would, for example, be paid only for the first six months of unemployment; and the amount would represent 40% of the previous reference wage. Each Member State would be free to pay out a higher or longer unemployment benefit on top of this European unemployment insurance. Crucially, this basic European unemployment insurance would help EMU Member States to share part of the financial risk associated with cyclical unemployment. Every month national authorities would send to the European fund the basic contribution from all their employed workers. Likewise, every month the European fund would pay to the national authorities an amount corresponding to the sum of all the basic European unemployment benefit payments to be made that month in the country. The overall volume of such a basic European unemployment insurance scheme would be around 1% of GDP, mainly depending on the exact parameters such as duration and level of the benefit or the eligibility conditions. This model stands for an unconditional, permanent insurance – variations can particularly modify the eligibility criteria.<sup>14</sup> An alternative key variable, even though maintaining the idea of creating permanent financial flows, would be the output gap, i.e. the deviation between actual and potential output. It considers developments in the whole economy and its evolution is not directly influenced by the Member State's labour market institutions. However, potential output cannot be measured directly and must be estimated through sophisticated methods. As a result, output gap estimations undergo a continuous revision process and the revision bias is considerable.<sup>15</sup>

The second insurance model is distinct from the above mainly in that payments from the insurance depend on the occurrence of an economic shock. These models vary in the underlying threshold criteria. Payments could be bound to deviation of actual from natural unemployment rate, deviations of short-term unemployment rate or the ten-

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[http://europa.eu/rapid/press-release\\_SPEECH-14-455\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-455_en.htm); a more sophisticated economic modelling of EU unemployment schemes is explored by ÁBRAHÁM ET AL., supra n. 9.

<sup>14</sup> For a discussion of the effects of different designs of unemployment schemes see ÁBRAHÁM ET AL., supra n. 9.

<sup>15</sup> EUROPEAN COMMISSION, supra n. 12, at 7-8.

year average and deviations from the average output gap.<sup>16</sup> If the threshold is met, national unemployment insurances receive payments from the EU fund. The distinct feature to the above insurance schemes is its exceptional rather than permanent character. Thus, this design of unemployment insurance seems suitable for large shocks rather than small national shocks. Deductibles are proposed as a balancing tool, that is, deductibles are being based on actual long-term average spending on benefits for the short-term unemployed. Finally, country premiums should be differentiated according to risk in order to ensure a rough long-term balance between contributions and benefits for each country.

### **III. Legal basis for macroeconomic insurance schemes**

There is a discrepancy in analytical depth between the economic policy debate and the legal analysis of insurance models. While the discussion of macroeconomic desirability of an insurance scheme has been active for quite some time, producing a variety of different proposals,<sup>17</sup> no comprehensive legal analysis has been undertaken yet.<sup>18</sup> In the following, we will identify potential legal basis and constraints for the above models of insurance highlighting differences in legal feasibility of the various designs of insurance schemes.

#### **A. Social policy issue**

In principle, the applicable legal basis for EU measures depends on the subject area in which the EU intends to become active. In the case of an unemployment scheme aiming primarily at performing a macroeconomic function as discussed here, this does not seem to be a straightforward issue, as it relates to both governance of national EU unemployment schemes and a macroeconomic instrument to smooth business cycles. Generally, in a case where the Union's legislative intention allows for more than one legal basis to be applicable, the choice of the appropriate legal basis depends on where

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<sup>16</sup> See, in particular, BEBLAVÝ, GROS & MASELLI, supra n. 9; for the various concepts, see EUROPEAN COMMISSION, supra n. 12.

<sup>17</sup> See supra n. 9 above. See also the assessment provided by EUROPEAN COMMISSION, supra n. 12.

<sup>18</sup> There are, however, some valuable analyses, e.g., MATTHIAS KULLAS & KLAUS-DIETER SOHN, «Europäische Arbeitslosenversicherung Ein wirkungsvoller Stabilisator für den Euroraum?», Cep-Study (April 2015).

the focus of the measure lies.<sup>19</sup> Without prejudice to the ultimate design of an unemployment scheme, one may argue that the establishment of a fully-fledged insurance scheme that replaces national schemes and creates direct entitlements of unemployed individuals against the EU scheme would have the predominant features of a social policy measure. By contrast, an unemployment scheme dominated by features fulfilling a macroeconomic performance function could be assessed rather on different legal grounds, notably on basis of Article 122 TFEU if designed as shock-based rather than permanent insurance.

In the absence of harmonization at EU level, it is in principle for each Member State to determine the conditions for insurances under a social security scheme and the entitlement to benefits under that scheme. As regards EU legislation on unemployment schemes, so far and apart from the issues of establishment, services and, in that context, supervision, the Union's two main approaches have been coordination (rather than harmonization) and negative integration (prohibition of various types of discrimination), based on Article 48 TFEU (which allows notably for coordination) and Articles 19 and 352 TFEU (for the non-discrimination legislation). More specifically, Member States have to respect Article 48 TFEU, which aims at ensuring that the exercise of the freedom of movement does not result in depriving a worker of social security protection to which he would have been entitled if he had spent his working life in only one Member State.<sup>20</sup> The unemployment scheme discussed here does not aim at removing discrimination, nor does it ensure coordination for the purpose of Article 48 TFEU. Rather, the envisaged changes to the unemployment regimes are necessarily tied to social policy concerns – the first model presented above setting out a fully-fledged EU-wide unemployment insurance scheme would thus have to be compatible with the relevant EU competences set out in Article 153 TFEU.

According to Article 153 (1) TFEU, the EU shall “support and complement the activities of the Member States”. Further, Article 153 (2b) TFEU allows the EU to set minimum

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<sup>19</sup> Case C-155/91, *Commission v Council*, ECLI:EU:C:1993:98, at I-939 para. 19, 21; Case C-42/97, *Parliament v Council*, [1999] ECR I-869, paras. 39 f.

<sup>20</sup> In particular, Regulation No. 883/2004 implements the objective of Article 48 TFEU by providing for general rules securing that all relevant periods of insurance, (self-)employment or residence are taken into account for the purpose of acquiring and determining the length of social security benefits.

requirements by means of directives, among others in the area of social security and social protection of workers (Article 153 (1c)). While EU competences in social affairs have been gradually expanded over last Treaty changes,<sup>21</sup> a number of hurdles limit the EU's scope of manoeuvre in implementing an EU-wide unemployment scheme.

First, Article 153 (4) TFEU imposes a general restriction in the EU's exercise of its competences under this provision by requiring that any measure taken by the EU must not affect the Member States' freedom to determine the fundamental principles of their social security systems.<sup>22</sup> Such measures must not affect these systems' financial equilibrium either. Considering that unemployment rules are at the core of social security policy, any measure in this field would concern a fundamental pillar of national social policy. Further, the harmonization of the replacement, duration and conditions of eligibility possibly has significant financial implications for national security systems.<sup>23</sup> Thus, the design of the insurance scheme matters. In particular, the EU would need to introduce the scheme on the basis of the smallest common denominator of national insurance schemes and avoid harmonization and minimize financial impact rather than requiring substantial changes to national schemes.

Second, Article 153 (2) b TFEU only allows the adoption of measures by means of directives. Again, it appears hard to establish an effective fiscal anticyclical instrument that is intended to work along identical parameters and thresholds across the eurozone by a directive that, in theory, leaves Member States room for manoeuvre in the national implementation.<sup>24</sup> Given the mechanics and financial flows occurring under the unemployment scheme presented above, heterogeneity in national implementation is likely to produce disruptions in the functioning of an insurance scheme rendering harmonization by means of regulation necessary.

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<sup>21</sup> EBERHARD EICHENHOFER, Art. 153 AEUV, in: Rudolf Streinz (ed.), EUV/AEUV-Kommentar, 2nd ed., München 2012, para. 2.

<sup>22</sup> MARTINA BENECKE, Art. 153 AEUV, in: Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim (eds.), Das Recht der Europäischen Union: EUV/AEUV, München 2016, para. 8.

<sup>23</sup> EICHENHOFER, supra n. 21, at para. 30; BENECKE, supra n. 22, at para. 8.

<sup>24</sup> RENÉ REPASI, "A study on the legal feasibility of perspectives of reforms towards a genuine European economic and monetary union", 10 September 2012, 75.

Third, Article 153 (2) b TFEU only allows the setting of “minimum requirements” and must be interpreted in conjunction with the supporting and complementing functions referred to in Article 153 (1) TFEU, which implies an overall restriction on EU harmonizing activity.<sup>25</sup> Any attempt to replace national unemployment schemes in their entirety must run counter to this norm. In turn, partial replacement of national systems may be compatible to the extent that the overall level of protection for the unemployed remains the same, while the EU would finance part of the replacement rate (which then still has to comply with the “financial equilibrium requirement” mentioned above).

In sum, a genuine unemployment insurance implemented on the EU level is not likely to be grounded on Article 153 TFEU given the high degree of the Member States’ room for manoeuvre in the area of social security. After all, even if the ultimate and specific design and purpose of the insurance scheme matters, some general conflicts of such instruments with this provision can be identified. Given obvious incompatibilities with Article 153 TFEU minimizing the harmonizing elements may be an alternative with a view to complying with Article 153 TFEU. In turn, reducing the insurance scheme to the smallest common denominator of national insurance schemes would necessarily lower the desired macroeconomic effect. Finally, designing the insurance as shock-based rather than permanent might shift the legal basis and could trigger an application of Article 122 TFEU rather than Article 153 TFEU. This would then be in line with the second basic insurance model scheme described above. Designed as unemployment scheme, only fulfilment of significant employment threshold (e.g. large rise in short-term unemployment) could then trigger financial transfers.

## **B. Emergency clause**

In order for Article 122 (2) TFEU to serve as a legal basis for an insurance scheme, the entitlement to receive payments under the scheme would need to be tantamount to “severe difficulties caused by natural disasters or exceptional occurrences beyond its control”. The relevance of this norm during the euro crisis gave rise to a controversial

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<sup>25</sup> BENECKE, *supra* n. 22, at para. 7.

interpretation of its terms as well as its relationship to the no-bailout clause in Article 125 TFEU.<sup>26</sup>

First, in relation to the requirement of “exceptional occurrences”, there is considerable debate on whether this term not only covers obvious cases such as social unrest or foreign policy turbulences, but also extends to solvency issues due to public debt resulting from a financial crisis.<sup>27</sup> During the crisis, the controversy extended to whether the difficulties of Greece, Ireland, Portugal and Spain were caused by such occurrences.<sup>28</sup> According to a narrow interpretation of the norm, public debt does not qualify as “exceptional occurrences”, even if it has also been caused by a global financial crisis. Also, given that “natural disasters” and “exceptional occurrences” are mentioned in the same breath, some conclude that Article 122(2) TFEU only covers situations in which these difficulties have not been caused by the respective Member State itself.<sup>29</sup> By contrast, an opposed interpretation of Article 122 (2) TFEU focuses on this norm not requiring explicitly that the Member State must not have caused the situation. Accordingly, financial assistance cannot be made contingent on whether the Member State is responsible for the situation or not.<sup>30</sup> The predominant and

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<sup>26</sup> JEAN-VICTOR LOUIS, «Guest editorial: The no-bail out clause and rescue package», 47 CML Rev. (2010), 971-986, at 971; PHOEBUS ATHANASSIOU, «Of Past Measures and Future Plans for Europe's Exit from the Sovereign Debt Crisis: What is Legally Possible (and What is Not)», 36 EL Rev. (2011), 558-575, at 558.

<sup>27</sup> Council Regulation No 407/2010 legally grounded the EFSM in Article 122(2). In the Council's view, this implied that the debt crises in Greece, Ireland and other eurozone states, which the EFSM was designed to alleviate, were entirely or largely caused by the 2008 recession. Thus, the deterioration that the regulation mentions must presumably have been unforeseen and sudden. The Council considers the states' debt problems to be a direct byproduct of the 2008 downturn. Critics counter-argued that there were no unforeseen circumstances. Fiscal management and chronically high deficits were a prominent feature of the Greek economy for several decades.

<sup>28</sup> RAINER PALMSTORFER, «To Bail Out or Not to Bail Out? The Current Framework of Financial Assistance for Euro Area Member States Measured against the Requirements of EU Primary Law», 37 EL Rev. (2012), 771-784, at 781; STANISLAS ADAM & FRANCISCO JAVIER MENA PARRAS, «The European Stability Mechanism through the Legal Meanderings of the Union's Constitutionalism: Comment on Pringle», 38 EL Rev. (2013), 848-865, at 860; VESTERT BORGER, «How the Debt Crisis Exposes the Development of Solidarity in the Euro Area», 9 EuConst (2013), 16-34; BARRY EICHENGREEN, «The Euro's Never-Ending Crisis», 110 Current History (2011), 91-96, at 91.

<sup>29</sup> BORIS RYVKIN, «Saving the Euro: Tensions with European Treaty Law in the European Union's Efforts to Protect the Common Currency», 45 Cornell International Law Journal (2012), 227-255, at 238 ff.; MARTIN SEIDEL, «Der Euro - Schutzschild oder Falle?», ZEI Working Paper B01/2010 (2010), at 8; THIEMO JECK & BERT VAN ROOSEBEKE, «Rechtsbruch durch Bail-out-Darlehen», Cep-Analyse (April 2010), at 7.

<sup>30</sup> RÜDIGER BANDILLA, Art. 122 AEUV, in: Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim (eds.), Das Recht der Europäischen Union: EUV/AEUV, München 2016, para. 18; ULRICH HÄDE, Art. 122 TFEU,

compromising view, however, distinguishes between the debt being either the result of an unsustainable budgetary policy or the result of the impact of a general financial crisis.<sup>31</sup> Considering the degree of flexibility granted by Article 122 (2) TFEU, and considering that every situation requires a case-by-case examination, a country's own responsibility in critical circumstances can be taken into account when determining the conditionality necessarily tied to financial assistance.<sup>32</sup>

From these legal standards, one can infer guidance on how the insurance schemes considered above should be considered in light of Article 122 (2) TFEU. The exceptional nature of the situation in which financial assistance may be granted disqualifies any scheme that establishes a permanent transfer system, irrespective of the exceptionality of the economic situation. Unemployment schemes falling within the first model described above do not meet the standards of Article 122 (2), for they simply replace recurring elements of an insurance scheme that is responsive to usual business cycle fluctuations. Variations in business cycles cannot be considered exceptional within the meaning of Article 122(2) TFEU. By contrast, shock-based adjustment mechanisms may be designed in a way that would reflect the requirements of the norm. Most importantly, both the characteristics of the criteria and the applicable threshold would need to be chosen with a view to reducing potential payments under the insurance to a level that can arguably be considered as exceptional. The frequency by which support is triggered must plausibly be due to significant crisis effects. Unlike under the ESM, the exceptional impact triggering payments under the insurance can be limited to the country concerned and must not necessarily be of a euro-wide dimension. By way of economic assessment, the representative character of the respective criteria to measure the severity of economic shocks (e.g. short-term unemployment, output gaps) must be determined. For example, one study calibrates the trigger of the insurance to a "tornado scenario" (alluding to the "natural disaster" referred to in Article 122 (2) TFEU) at a level where 40 such tornados would have

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in: Christian Calliess & Matthias Ruffert (eds.), EUV/AUEV-Kommentar, 5th ed., München 2016, para. 9.

<sup>31</sup> WALTER FRENZ & CHRISTIAN EHLENZ, «Der Euro ist gefährdet: Hilfsmöglichkeiten bei drohendem Staatsbankrott?», 3 EWS (2010), 65-70, at 68; ULRICH HÄDE, «Haushaltsdisziplin und Solidarität im Zeichen der Finanzkrise», EuZW (2009), 399-403, at 401.

<sup>32</sup> FRENZ & EHLENZ, supra n. 31, at 68.

occurred in the period 2000-2012.<sup>33</sup> Without prejudice to a case-by-case analysis, three to four annual incidents leading to insurance payments hardly appear to be exceptional. However, the study highlights that ultimately it is a question of designing the insurance scheme and calibrating the thresholds in a way that is compatible with the standards of Article 122 (2) TFEU.

Further, it must be assured that the payments have not been caused in a foreseeable fashion by the recipient country in order to remain within the wide definition of exceptional occurrences referred to above. Reference can be made to criteria related to the foreseeability of the consequences. Generally, one may infer guidance from past applications of this norm related to fiscal conduct. While a permanently high deficit will almost automatically lead to increased market pressures, given the (more or less) causal relationship between deficits, debt and interest rates, the elements causing a short-term unemployment rate or output gaps are much less clear. They may be influenced by multiple factors that blur clear-cut causal relationships. Thus, in the previous cases where the fiscal misconduct of Member States may have contributed to the subsequent exceptionality of the situation, it seemed rather justified to question the applicability of Article 122 TFEU. By contrast, crisis situations caused by asymmetric shocks within the EMU, and without being obviously caused by deliberate state decisions, should rather be accepted as exceptional occurrences. Also, given that the proposed policy instruments intend to focus on business cycle effects rather than on structural reasons, the lasting influence of public authorities on the relevant criteria may be further weakened. In any case, even a narrow interpretation of Article 122 (2) TFEU, excluding events potentially caused by the Member State, does not appear generally to prevent the implementation of such a mechanism.

This finding can also be brought into line with the Court's reasoning on the ESM in *Pringle*. The Court identified two obstacles to the use of that provision as a legal basis for an EU-based ESM. A first problem was that the ESM establishes a permanent mechanism, whereas the Court found the requirement of "exceptional occurrences" to

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<sup>33</sup> BEBLAVÝ, GROS & MASELLI, *supra* n. 9, at 27; they use as criteria the deviation of short-term unemployment from its long-term average.

imply assistance on an ad hoc basis only.<sup>34</sup> Under the ESM, the ad hoc nature of the support was ensured through a formal decision of the Council rather than automatically triggering financial support. Similarly, the trigger of the shock adjustment mechanism could be made dependent not only on the threshold criteria, but also on a subsequent affirmative decision by the Council, accounting for the explicit ad hoc character required by the Court in *Pringle*. That such assistance is organized via a permanent (but shock-dependent) mechanism is irrelevant so long as assistance is granted in specific (emergency) instances and only for the duration of the (threat of) serious difficulties.<sup>35</sup>

### **C. Compatibility with the no-bailout principle**

Any financial assistance must be assessed in respect of the no-bailout clause set out in Article 125 TFEU. There has been a long-standing debate about how this norm should be interpreted.<sup>36</sup> In *Pringle*, the ECJ substantiated the terms of this norm by finding that this clause was “not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State.”<sup>37</sup> This reading was supported by both a systematic interpretation of the treaty – given that among others Article 122 TFEU did provide for forms of assistance – and an analysis of the original intent of the treaty drafters. According to the ECJ, from the preparatory work of the Maastricht Treaty it emerged that “[t]he prohibition laid down in Article 125 TFEU [was designed to] ensure that the Member States remain subject to the logic of the market when they enter into financial assistance “as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy

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<sup>34</sup> See also CHRISTIAN CALLIESS, «Das europäische Solidaritätsprinzip und die Krise des Euro - Von der Rechtsgemeinschaft zur Solidaritätsgemeinschaft?», Walter Hallstein-Institut für Europäisches Verfassungsrecht, FCE 01/11 (2011), at 29.

<sup>35</sup> See also VESTERT BORGER, «The ESM and the European Court's Predicament in *Pringle*», 14 *German Law Journal* (2013), 113-140, at 128; BRUNO DE WITTE & THOMAS BEUKERS, «The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*», 50 *CML Rev.* (2013), 805-848, at 833; ADAM & MENA PARRAS, *supra* n. 28, at 858.

<sup>36</sup> See only ARMIN STEINBACH, «The compatibility of the ECB's sovereign bond purchases with EU law and German constitutional law», 39 *Yale Journal of International Law Online* (2013), 15-31; LOUIS, *supra* n. 26, at 971; ATHANASSIOU, *supra* n. 26, at 558.

<sup>37</sup> Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, at I-756, para. 130; see also BORGER, *supra* n. 28, at 117.

[would] diminish.”<sup>38</sup> This was not the case of the ESM, as such stability support may be granted “only when such support is indispensable to safeguard the financial stability of the euro area as a whole and of its Member States and the grant of the support is subject to strict conditionality appropriate to the financial assistance instrument chosen.”<sup>39</sup> At the core of Article 125 TFEU, as interpreted by the Court, lies the encouragement of Member States to conduct sound budgetary policies, ideally incentivized by market pressure, but under certain circumstances also through conditionality if financial support for the sake of financial stability is required.

How should payments under the insurance models be considered in light of the no-bailout clause? Given the various financial support mechanisms established in the EU legal framework over the last decades, a distinction has to be made that takes account of the purposes of the respective mechanism. Payments to Member States under the European Regional Development Fund, the European Social Fund and the Cohesion Fund have been integral part of EU financial assistance, fostering social and economic cohesion in the EU over several decades. Similarly, the European Union Solidarity Fund enables the EU to provide effective support to Member States in its efforts to deal with the effects of a major natural disaster. Formally, such a support mechanism falls under the broad array of possible support measures under Article 125 TFEU. However, the compatibility of these financial support mechanisms with Article 125 TFEU has virtually never been questioned, even though they provide financial support, not as a repayable loan, but as a grant.

This suggests that an assessment of Article 125 TFEU requires both an analysis of intention and effect of the respective financial support mechanism. The most recent financial support crisis mechanisms have been put in place to address solvency issues by an individual state (which at the same time constituted a threat to the financial stability of the eurozone as a whole). They were designed to offer debt relief and to counter exorbitantly high refinancing costs (while maintaining budgetary discipline through conditionality). By contrast, the intention and effect of the other funds of the

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<sup>38</sup> Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, at I-756, para. 136; PAUL CRAIG, «Pringle: Legal Reasoning, Text, Purpose and Teleology», 20 *Maastricht Journal of European and Comparative Law* (2013), 3-11, at 3 ff.

<sup>39</sup> Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, at I-756, para. 142.

EU are fundamentally different. They aim primarily at social and economic cohesion or compensation for particular losses. They are not dispersed in times of acute financial market pressure, nor do they aim at ensuring financial stability in the euro area. These instruments do not intend to address the financial problems and stability of a Member State. Likewise, payments made under an EU unemployment scheme serve preventive rather than corrective purposes,<sup>40</sup> seeking to smooth business cycles rather than improving a budgetary position or reducing market pressure. Rather, an insurance scheme adds to the cohesion and solidarity purposes of the current EU funding system, an economic policy instrument aiming at smoothing business cycles. As such, the fund differs significantly from financial support mechanisms like the ESM and should – just as other structural funds – not be captured by Article 125 TFEU in light of its purpose and effect.

#### **D. Flexibility clause**

Finally, Article 352 TFEU could offer the legal basis for the establishment of such scheme and of an agency implementing it.<sup>41</sup> According to the flexibility clause, the EU can take appropriate measures 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. In *Pringle*, the Court left the question whether a stability mechanism such as the ESM could be based on Article 352 TFEU unanswered.<sup>42</sup> In principle, establishing an insurance fund that promotes structural reforms under Article 352 TFEU appears to be feasible if the fund serves the objectives mentioned in Article 3 TEU, notably to attain a “sustainable development of Europe based on balanced economic growth” and to safeguard the “economic and monetary union whose currency is the Euro”. However, actions under the flexibility clause must observe

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<sup>40</sup> LÁSZLÓ ANDOR, “Basic European unemployment insurance: Countering divergences within the Economic and Monetary Union”, Speech at Vienna University of Economics and Business, Vienna, 29 September 2014, [http://europa.eu/rapid/press-release\\_SPEECH-14-635\\_de.htm](http://europa.eu/rapid/press-release_SPEECH-14-635_de.htm) (last visited 27 September 2016).

<sup>41</sup> On the limitations in using Article 352 TFEU as legal basis, see HINAREJOS, *supra* n. 2, at 107; ANTHONY ARNULL, «Left to its Own Devices? Opinion 2/94 and the Protection of Fundamental Rights in the European Union», in: A. Dashwood & C. Hillion (eds.), *The General Law of EC External Relations*, London 2000, ch. 5.

<sup>42</sup> Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, at I-756, para. 67; see also ADAM & MENA PARRAS, *supra* n. 28, at 852, 859.

limitations imposed by the EU treaties, that is, they must not alter the institutional setting established by primary law. For example, Article 153 (4) TFEU must be observed – as discussed above, this rule restricts the EU to support the Member States' social and labour policies, excluding any harmonization of the laws and regulations of the Member States. Also, given the unanimity requirement under Article 352 TFEU, and as the Court has made clear in the *Single European Patent*<sup>43</sup> case (namely that it is possible to make use of legal bases requiring unanimity through enhanced cooperation), resorting to enhanced cooperation might be the more realistic option, provided the above legal bases should not suffice given the specific design of the insurance scheme.<sup>44</sup>

#### **IV. Fiscal capacity for insurance scheme**

Endowing the insurance fund raises the question on EU fiscal capacity.<sup>45</sup> We identify four different options to set up the fund: first, the (politically unfeasible) introduction of an EU tax; second, the use of existing funds as a nucleus of a future stabilization fund; third, the justification of a loan facility under Article 122 TFEU; and fourth, financing of the fund through Member State contributions on an intergovernmental basis.

##### **A. Revenues through EU tax**

The current treaty may offer a legal basis for the introduction of certain taxes.<sup>46</sup> In specific fields, the treaty provides for tax measures, such as Article 194(3) TFEU

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<sup>43</sup> Joined Cases C-274/11 and C-295/11, *Spain and Italy v Council*, ECLI:EU:C:2013:240, at I-000.

<sup>44</sup> There are, however, obvious legal and political restrictions associated with actions within enhanced cooperation, which cannot be discussed here. See MICHAEL SCHWARTZ, «A Memorandum of Misunderstanding - The Doomed Road of the European Stability Mechanism and a Possible Way Out: Enhanced Cooperation», 51 CML Rev. (2014), 389-423.

<sup>45</sup> INGOLF PERNICE ET AL., «Challenges of Multi-Tier Governance in the European Union, Report commissioned by the European Parliament Constitutional Affairs Committee», PE 474.438, 2013; from an economic perspective, OLIVIER BARGAIN ET AL., «Fiscal Union in Europe? Redistributive and Stabilizing Effects of an EU Tax-Benefit System», IZA Discussion Paper No. 6585 (May 2012), <<http://ssrn.com/abstract=2085092>> (last visited 27 September 2016); JEAN PISANI-FERRY, ERKKI VIHRIÄLÄ & GUNTRAM B. WOLFF, «Options for a Euro-area fiscal capacity», Bruegel Policy Contribution No 2013/01 (2013); ÁBRAHÁM ET AL., supra n. 9.

<sup>46</sup> ISABEL RODRIGUEZ-TEJEDO & JOHN JOSEPH WALLIS, «Fiscal Institutions and Fiscal Crises», in: Peter Conti-Brown & David A. Skeel Jr. (eds.), *When States Go Broke*, Cambridge 2012, 9-39; FEDERICO FABBRINI, «Taxing and Spending in the Eurozone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax (March 15, 2015)», 39 *European Law Review* (2014), 155-175, at 171; SYLVAIN PLASSCHAERT, «Towards an Own Resource for the European Union? Why? How?

concerning energy taxes and Article 192(2) 1a TFEU regarding environmental taxes. Article 113 TFEU allows for the harmonization of tax laws in order to ensure the establishment and functioning of the internal market. Further, according to Article 311 TFEU, the Union shall provide itself with the means necessary to attain its objectives and carry through its policies. Both Articles 311 TFEU and 113 TFEU have been invoked in the proposed creation of a Financial Transaction Tax (FTT).<sup>47</sup>

While introduction of an EU tax through enhanced cooperation appears possible, there are general concerns of a eurozone-wide tax in relation to non-euro countries.<sup>48</sup> In light of the existing problems impeding the smooth introduction of the FTT,<sup>49</sup> there is virtually no indication that an EU tax funding insurance would be successful under enhanced cooperation. In balance, the Treaty provides for taxation opportunities only in specific fields, while in all other fields of taxation it provides only for harmonization of the Member States' legislation and the adoption of directives.<sup>50</sup> Also, considering that a centralized treasury and corresponding powers would most likely be necessary as a complement to the introduction of an EU tax,<sup>51</sup> it seems that a treaty amendment would be unavoidable in implementing this.<sup>52</sup>

## **B. Existing funds as a nucleus of a future stabilization fund**

A more practical scenario would be to employ the existing funding scheme and scope for establishing new funding mechanisms provided under Article 175 (3) TFEU. Under this norm, specific measures serving the goals of Article 174 TFEU (promotion of overall harmonious development and strengthening of its economic, social and territorial cohesion) can be adopted, including the use of the EU funds specified in

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And When?», 44 *European Taxation* (2004), 470-479, at 476; See also BRUCE ACKERMAN, «Taxation and the Constitution», 99 *Columbia Law Rev.* (1999), 1-58, at 1.

<sup>47</sup> After the European Parliament had given its consent in December 2012, the Council adopted Council Decision 2013/52/EU authorizing enhanced cooperation in the area of financial transaction tax [2013], OJ L 22/11; see also FABBRINI, *supra* n. 46, at 162.

<sup>48</sup> FABBRINI, *supra* n. 46, at 171.

<sup>49</sup> HINAREJOS, *supra* n. 2, at 107 f.

<sup>50</sup> EUROPEAN PARLIAMENT, *Legal options for an additional EMU fiscal capacity*, 2013, 25; Mayer & Heidfeld, «Europarechtliche Aspekte einer Finanztransaktionsteuer», *EuZW* (2011), 373-378, at 373.

<sup>51</sup> See in this regard Five Presidents' Report, *supra* n. 7, at 18.

<sup>52</sup> HINAREJOS, *supra* n. 2, at 188.

Article 175 (1) TFEU. Article 175 (3) provides the basis to adopt further measures, and the phrase “specific actions [...] outside the Funds” indicates that this provision could be used to establish new financial support instruments.<sup>53</sup> Accordingly, the European Union Solidarity Fund (EUSF) was set up in response to major natural disasters and expressed European solidarity to disaster-stricken regions within Europe.<sup>54</sup> Also, the European Globalization Adjustment Fund, which provides support to people who have lost their jobs as a result of major structural changes in world trade patterns due to globalization, had been based on this provision.<sup>55</sup> The degree of flexibility under this norm is further highlighted by the establishment of the European grouping of territorial cooperation (EGTC), the objective of which is to facilitate and promote cross-border, transnational and interregional cooperation between its members. The EGTC enjoys the legal capacity accorded to legal entities by national law and may be entrusted with implementing programmes co-financed by the Community or any other cross-border cooperation project with or without Community funding.<sup>56</sup>

Most recently, the EU Commission has setup a European Fund for Strategic Investments on the basis of Articles 172, 173, Article 175(3) and Article 182(1) TFEU.<sup>57</sup> Indeed, the EU Five Presidents’ Report proposes to build such fund as a first step towards an overall stabilization mechanism, by identifying a pool of financing sources and investment projects specific to the euro area, to be tapped into according to the business cycle.<sup>58</sup> It is unclear to what extent (and when) the focus on EU area projects would be sufficient to generate the necessary macroeconomic stabilization, but such a funding scheme could become the nucleus of a future stabilization mechanism. By

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<sup>53</sup> ADELHEID PUTTLER, Art. 175 AEUV, in: Rudolf Streinz (ed.), EUV/AEUV-Kommentar, 2nd ed., München 2012, para. 6; BARBARA EGGERS, Art. 175 AEUV, in: Eberhard Grabitz, Meinhard Hilf & Martin Nettesheim (eds.), Das Recht der Europäischen Union: EUV/AEUV, München 2016, paras. 21ff. On the scope of this provision see CJEU, C-166/07, Parliament v Council, ECLI:EU:C:2009:499.

<sup>54</sup> Council Regulation (EC) no. 2012/2002 of 11 November 2002, which established the European Union Solidarity Fund.

<sup>55</sup> Regulation (EC) no. 1927/2006 of the European Parliament and of the Council of 20 December 2006 on establishing the European Globalisation Adjustment Fund.

<sup>56</sup> Regulation (EC) no. 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation (EGTC), 31 July 2006, OJ L 210.

<sup>57</sup> Regulation (EU) no. 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the European Fund for Strategic Investments, the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 — the European Fund for Strategic Investments, 01 July 2015, OJ L 169/1.

<sup>58</sup> Five Presidents’ Report, supra n. 7, at 15.

resting on Article 175 (3) TFEU and strengthening economic, social and territorial cohesion, this could be an elegant avenue to establish an insurance fund in line with the ordinary legislative procedure (based on a qualified majority voting) pursuant to Article 172 TFEU.

### **C. Loan facility under Article 122 TFEU**

In light of a lacking basis for an EU tax, and given the (initially) limited effectiveness of the EU Structural Funds, there may be scope for a genuine EU borrowing-and-lending facility. This would require the insurance scheme to be designed as a shock-based mechanism in line with Article 122 TFEU. In principle, the Union may not raise loans within the framework of the budget.<sup>59</sup> However, there have been exceptions to this rule. Article 143 (1) subpara. 2 TFEU provides that, acting on a recommendation from the Commission, the Council can grant mutual assistance where a Member State is in difficulties or is seriously threatened with difficulties as regards its balance of payments. This provision thus generally recognizes a situation under which the EU may exceptionally enter into a lending operation vis-à-vis another country if a certain situation of economic distress occurs. On the basis of Articles 143 and 352 TFEU,<sup>60</sup> Regulation no. 332/2002<sup>61</sup> has set up a mechanism of mutual assistance if a Member State is in “difficulties or is seriously threatened with difficulties as regards its balance of payments”. Indeed, Article 143 TFEU does not define the instrument to be used for granting the mutual assistance envisaged.<sup>62</sup> The application of Article 143 TFEU illustrates the leeway granted to EU institutions where the EU Treaty recognizes the possibility of a financial support mechanism. More specifically, while Article 143 TFEU only recognizes the requirements under which mutual assistance may be provided, it is silent on how the EU may raise the funds it provides to Member States that are in

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<sup>59</sup> Article 17(2) of the 2012 financial rules regulation (EU, Euratom) no. 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) no. 1605/2002.

<sup>60</sup> RUDOLF STREINZ, Art. 352 AEUV, in: Rudolf Streinz (ed.), EUV/AEUV-Kommentar, 2nd ed., München 2012, para. 61.

<sup>61</sup> Regulation (EC) 332/2002. Moreover, the Union raised loans with regard to balancing payment difficulties caused by the increase in the price of petroleum products (Regulation (EC) no. 397/75).

<sup>62</sup> Regulation (EC) 332/2002, Recital 1.

difficulties.<sup>63</sup> However, this norm has been applied in a manner acknowledging that “it is for the Council to decide whether to grant a loan or appropriate financing facility, its average duration, its total amount and the amounts of the successive instalments”.<sup>64</sup> Thus, there is ample scope for manoeuvre for the Council to determine the appropriate method of support. This flexibility led the Council under Articles 143 and 352 TFEU to establish a medium-term financial assistance facility, enabling loans to be granted to Member States.

Interpreting Article 122 TFEU by contextual reference to Article 143 TFEU, one may infer for the design of an insurance scheme that similar leeway exists under Article 122 TFEU if the requirements of this norm are fulfilled. That is, if a situation tantamount an “exceptional occurrence”, as discussed above, exists, and given the silence of the norm on which form of financial assistance may be granted to the Member States,<sup>65</sup> the EU institutions may avail of their discretionary manoeuvre in deciding on the preferred assistance scheme. Consequently, if the insurance scheme is designed as a shock-based scheme in line with Article 122 TFEU, the EU may consider granting loans to the Member State suffering a shock. Taking recourse to Article 143 TFEU as a point of orientation for the interpretation of Article 122 TFEU is further supported by the fact that the latter provision has replaced the applicability of Article 143 TFEU in relation to eurozone members. Financial assistance due to balance of payment problems is precluded for countries entering the euro; Article 122 TFEU has replaced Article 143 TFEU as the norm allowing financial assistance.<sup>66</sup> This systematic connection between the two norms justifies applying similar standards.

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<sup>63</sup> Article 143 (2) TFEU mentions potential forms of financial assistance, but given the wording (“such as”) and the broad nature of supporting mechanisms mentioned in this norm, the enumeration of Article 143 (2) TFEU is not exhaustive.

<sup>64</sup> Regulation (EC) no. 332/2002, Recital 11; there is, however, some controversy on whether the EU should be able to issue bonds on the basis of Article 143 TFEU; see ULRICH HÄDE, *Finanzausgleich: die Verteilung der Aufgaben, Ausgaben und Einnahmen im Recht der Bundesrepublik Deutschland und der Europäischen Union*, Tübingen 1996, pp. 463 ff.

<sup>65</sup> In principle, given the silence of Article 122 TFEU on the kind of support, all possible means of financial support fall under this provision. HÄDE, *supra* n. 30, at para. 11.

<sup>66</sup> HÄDE, *supra* n. 30, at para. 11; Doris HATTENBERGER, Art. 122 AEUV, in: Jürgen Schwarze (ed.), *EU-Kommentar*, 3rd ed., Baden-Baden 2012, para. 5gro.

Furthermore, in light of the conditionality requirement referred to in Article 143 (2) TFEU<sup>67</sup> and the significance of conditionality as a requirement for financial support under Article 125 TFEU,<sup>68</sup> one might impose conditionality to loans under the insurance scheme as well. In practice, this would imply that shock-induced recipient countries would be subject to conditionality, which would set out the policy measures for which payments should be used, with a view to maximizing the macroeconomic smoothing effect of the support. However, financial assistance granted under Article 122 TFEU is not necessarily limited to loans. Similar to the overall mechanism of EU funds, financial assistance can be dispersed as non-repayable grants.

#### **D. Contributions on intergovernmental basis**

Considering (political) obstacles in extending the EU's scope of fiscal activities, it seems possible that an enhanced fiscal capacity could be funded more easily through direct national transfers. An enactment based on Article 136 (3) TFEU does not appear feasible, as the insurance primarily aims at balancing asymmetric business cycle shocks that do not seem to be "indispensable to safeguard the stability of the euro area as a whole". However, the crisis context has given sufficient examples of how Member States might put in place a mechanism providing financial support.<sup>69</sup> Establishing a fund providing the means for an insurance scheme could be made, in line with experience, with the European Financial Stability Facility (EFSF), the temporary loan vehicle created on an intergovernmental basis. Similarly, the European Stability Mechanism (ESM) was created as an intergovernmental fund, the Member States remaining liable funders.

Indeed, economic policy still remains within the competence of the Member States (Article 4(1), 5(2) TEU).<sup>70</sup> Member States can adopt measures in this field, as long as

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<sup>67</sup> Under Article 143(2) TFEU, the Council "shall adopt directives or decisions laying down the conditions and details of such assistance".

<sup>68</sup> Case C-370/12, *Pringle*, ECLI:EU:C:2012:756, at I-756, paras. 68-69.

<sup>69</sup> See only CHRISTOPHER J. BICKERTON, DERMOT HODSON, & UWE PUETTER, «The New Intergovernmentalism: European Integration in the Post-Maastricht Era», 53 *Journal of Common Market Studies* (2014), 703-722; Kenneth A. Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination*, Oxford 2010, pp. 72 ff.

<sup>70</sup> HINAREJOS, *supra* n. 2, at 73; DAMIAN CHALMERS, GARETH DAVIES, & GIORGIO MONTI, *European Union Law*, 2nd ed., Cambridge 2010, p. 210; DE WITTE & BEUKERS, *supra* n. 35, at 832.

the competences of the Union are not infringed.<sup>71</sup> The conduct of economic policy inherently enshrines the right to identify and implement specific measures and priorities according to a Member State's preference, and given the country-specific state of the economy. If an insurance scheme were based on economic policy as genuine Member State competence, there would be no conflict with competences assigned to the EU – a conflict that would prevent Member States from establishing a fund outside the EU legal framework. If Member States are allowed to act outside of the EU framework, then Member States can also spend outside of the EU budget.<sup>72</sup> This strategy would be consistent with an intergovernmental model for the management of the Euro crisis, which has stressed the centrality of national governments (in the European Council) and their freedom to act through agreements outside EU law, rather than the centrality of the EU institutional machinery and the potentials of EU law to address the crisis.<sup>73</sup> Thus, an insurance created as an economic policy instrument on intergovernmental basis could generally be funded by Member States that would also regulate and govern its operational setup. Inconsistencies of such a fund with Article 125 TFEU, as had been at stake both with the ESM and the EFSF,<sup>74</sup> can be avoided if the specific design of the scheme complies with the requirements under this rule discussed above.

## V. Conclusion

The current “surveillance model” of European economic policy coordination is likely to persist over the next years. Given the lack of political impetus in pursuing deeper integration towards the “fiscal federalism model”, Member States will continue to have full fiscal competence and retain competence to conduct economic policy. In this scenario, the EU continues to be the “discipline enforcer” applying a number of fiscal rules and the existing budgetary and economic surveillance system.

While introduction of fiscal federalism generally requires treaty amendments overcoming the current surveillance model, certain types of fiscal federalism may be

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<sup>71</sup> PALMSTORFER, *supra* n. 28, at 773.

<sup>72</sup> EUROPEAN PARLIAMENT, *supra* n. 50, at 15.

<sup>73</sup> FEDERICO FABBRINI, «The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective», 32 *Berkeley Journal International Law* (2014), 64-123, at 110; see also MICHELE MESSINA, «Strengthening Economic Governance of the European Union through Enhanced Cooperation: A Still Possible, but Already Missed, Opportunity», 39 *EL Rev.* (2014), 404-417, at 404; SCHWARTZ, *supra* n. 44, at 389.

<sup>74</sup> See only LOUIS, *supra* n. 26, at 971.

feasible under the current legal framework. This analysis demonstrated this for an instrument that has been debated widely in the economic policy arena – insurance-type cooperation that responds to the frequent calls to strengthen the shock absorption capacities within EMU. It aims at stronger resilience within the EMU through shock absorption mechanisms requiring (at least some) fiscal capacities on the EU level and thus alluding to the logic of fiscal federalism.

Adopting a legal perspective, this analysis sought to highlight the space of manoeuvre offered by the current legal framework. While it is acknowledged that the absence of a clearly defined and institutionalized insurance scheme makes a (hypothetical) legal analysis more difficult, we identified some key legal requirements that any potential future insurance cooperation would need to take into account. In fact, the legal scope for insurance schemes is narrow and establishes a number of conditions on their design. Fully-fledged unemployment insurance schemes (even if limited to a kind of basic insurance) are likely to overstretch the boundaries of the EU treaties. In particular, the limited scope for EU competence in the field of employment policy would prevent any harmonization going beyond the smallest common denominator of national unemployment systems, which in turn would reduce the desired macroeconomic effect of such insurance scheme. More narrowly designed, however, such a scheme is rather likely to be feasible if designed as a shock-based mechanism where the gravity of the economic shock must be significant to bring financial transfers under the ambit of Article 122 TFEU. If properly designed as shock-dependent insurance, the requirements of Article 153 TFEU (for an unemployment insurance) would still have to be observed, while scope for an insurance tied to other key variables (e.g. output gap) would be wider albeit subject to the exceptionality requirement of Article 122 TFEU (let alone the economic disadvantages of output gaps as criterion<sup>75</sup>). The ban on bailouts imposed by Article 125 TFEU does not restrict the kind of transfers at stake, as they are not dispersed in times of acute financial market pressure, nor do they aim at ensuring financial stability in the euro area. Rather, such transfers would be another element in the array of historically grown financial assistance tools fostering social and economic cohesion in the EU. Regarding the establishment of the fund necessarily sidelining the insurance scheme, a practical first step would be the use of existing EU funds which could then be used as a nucleus for an extended funding

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<sup>75</sup> EUROPEAN COMMISSION, *supra* n. 12, at 7-8.

scheme. Article 175 (3) TFEU has provided ample examples for funds in the past and served most recently as legal basis for the recently established European Fund for Strategic Investments – the Commission seems to view this instrument as a first step towards an overall stabilization mechanism. Alternatively, intergovernmental initiatives for funding scheme may be a lawful alternative albeit fuelling the general tendency of establishing economic cooperation outside the EU legal framework.

What are the implications for the further trajectory of economic policy cooperation efforts within the EU? The surveillance model is likely to be the short-term avenue pursued by the EU institutions. In this vein, the recent Five Presidents' Report has stressed the use of existing instruments in implementing structural reforms.<sup>76</sup> On a subsequent stage, the Five Presidents' Report proposes the introduction of a fiscal treasury.<sup>77</sup> While such a far-reaching institutional novelty would certainly require treaty amendments and is realistically confined to the eurozone, this analysis has sought to highlight more limited models of introducing fiscal transfers aiming at macroeconomic stabilization, which may be more likely to be implemented within the existing rules.

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<sup>76</sup> Five Presidents' Report, supra n. 7, at 8.

<sup>77</sup> Five Presidents' Report, supra n. 7, at 18.