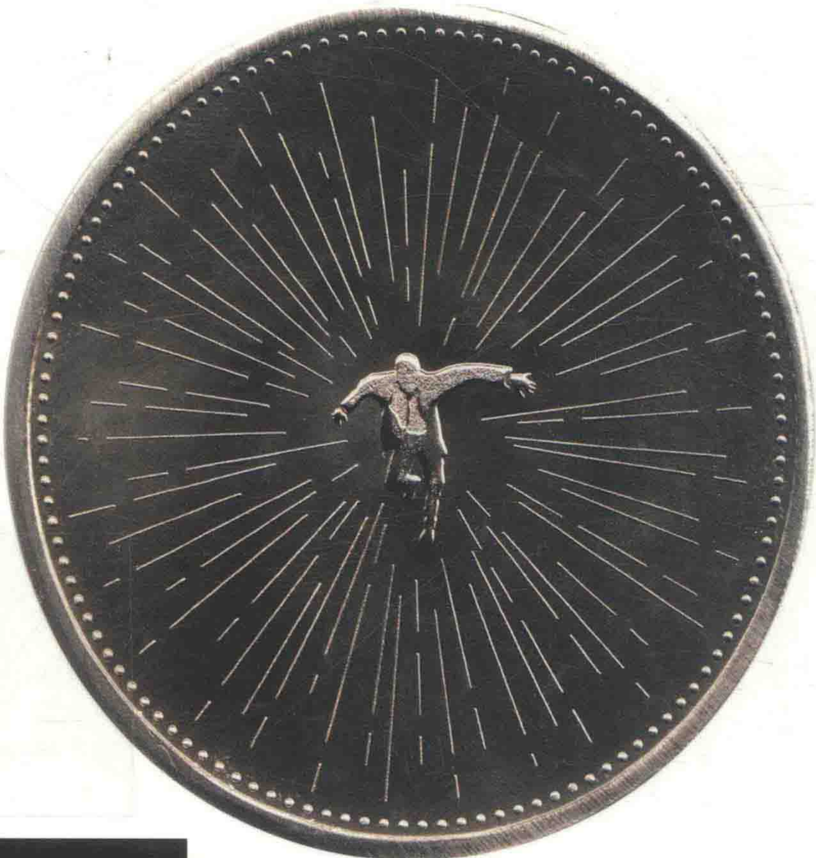
Constitutional Change through Euro-Crisis Law

Edited by Thomas Beukers, Bruno de Witte and Claire Kilpatrick



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PREFACE

This book is one of the fruits of a larger research project of the European University Institute (EUI) Law Department and funded by the EUI Research Council from January 2013 to December 2015. As such, it has benefited from the work of a large number of people, most of whom are researchers, Max Weber Fellows or professors in the law department of the EUI. We are extremely grateful to the EUI Research Council for their support, which has helped create not just the project but also a new generation of European Monetary Union (EMU) law scholars at the EUI.

The funded project entailed a study of the impact of euro-crisis law (by which we mean the legal instruments adopted at European or international level in reaction to the Eurozone crisis) on the national legal and constitutional structures of the 28 Member States of the European Union. Scholarly debate on euro-crisis law has mainly focused on the European legal dimension, and on normative issues of democratic legitimacy, legality and the balance between austerity and growth policies. Contributions also exist on the impact of euro-crisis law on specific national constitutional orders, but a comprehensive study is so far lacking. The project set out to fill this gap. Its goal was to provide an open-access research tool, based on a set of reports for each Member State that would constitute an excellent basis for further, especially comparative, studies of the legal status and implementation of euro-crisis law at the national level, the interactions between national legal systems and euro-crisis law and the constitutional challenges that have been faced. That open-access tool is available at http://eurocrisislaw.eui.eu/. This edited volume draws on the project's findings to develop further, especially comparative studies, of euro-crisis law.

Key to the project's success were its three co-ordinators: Thomas Beukers (2013–present), Cristina Fasone (2014–15) and Marijn van der Sluis (2013–14). The reports were based on a detailed questionnaire and on a wider range of sources, including minutes of parliamentary debates, national laws ratifying and implementing euro-crisis law and case law of national constitutional or supreme courts. Thomas Beukers and Marijn van der Sluis were the main authors of the original questionnaire and played an important role in co-ordinating the large team of researchers, many based at the EUI, who authored the country reports. Those reports were then subject to editing and updating. Cristina Fasone, alongside Thomas Beukers, played a central role in editing the reports. Central to the project is the quality of the country reports. We wish to thank, in order of country: Daniela Jaros (Austria); Werner Vandenbruwaene (Belgium); Mihail Vatsov (Bulgaria); Mateja Djurovic (Croatia); Ekaterina Pantazatou (Cyprus); Tomas Dumbrovsky (Czech Republic); Marja-Liisa Laatsit (Estonia); Päivi Leino-Sandberg and Janne Salminen (Finland); Robin Gadbled and Diane Fromage (France); Sabine Mair and Malte Koeger (Germany); Afroditi Marketou and Michail Dekastros (Greece); Dalma Dojcsák (Hungary); Stephen Coutts (Ireland); Leonardo Pierdominici (Italy); Zane Rasnača (Latvia); Loreta Šaltinytė (Lithuania); Malte Kroeger (Luxembourg); Malte Kroeger (Malta); Jotte Mulder (Netherlands); Katarzyna Granat (Poland); Rita Gião Hanek and Daniele Gallo (Portugal); Viorica Viţă (Romania); Tomas Dumbrovsky (Slovakia); Urska Petrovcic (Slovenia); Mireia Estrada Cañamares, Germán Gomez Ventura and Leticia Díez Sánchez (Spain); Anna Södersten (Sweden) and Emily Hancox (UK).

The website design involved displaying a map of Europe in which each report was coded according to a traffic light system so that users could search by country which euro-crisis instruments had been controversial. We wish to thank Lorenzo Giuntini for his help with website design and maintenance. Project dissemination and updates via newsletters and the news section of the project's website were in the capable and proactive hands of Viorica Viţă and Thomas Beukers.

Cristina Fasone helped Marise Cremona and Claire Kilpatrick to organize a conference at the EUI in October 2014 out of which many of the contributions to this volume developed. Nick Lee played an invaluable role in meticulous editing of both the language and the substance of submitted chapters. His comments and suggestions significantly improved the quality of the volume.

Giorgio Monti, currently Head of Department at the EUI, played a central role throughout the entire life of the project. Loïc Azoulai, Marise Cremona, Stefan Grundmann and Hans Micklitz, professors in the EUI Law Department, all played important roles at various stages.

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Constitutional Change through Euro-Crisis Law: Taking Stock, New Perspectives and Looking Ahead

THOMAS BEUKERS, BRUNO DE WITTE
AND CLAIRE KILPATRICK

This chapter serves as a general introduction to the theme of this book. We will do this in two parts followed by a conclusion. In Section 1, we offer a succinct reconstruction of what has happened at the European Union (EU) level in euro-crisis law. After over half a decade of legal measures and prolific commentary on those measures, it is helpful to stand back and take stock. In Section 2, we present the particular perspective adopted by this book. Its core argument is that an overall and ongoing assessment of euro-crisis measures, especially by including the national level, is an important and distinctive contribution to euro-crisis legal scholarship. In the conclusion, we will consider whether euro-crisis law, although a fitting label to capture the conditions of its production and some parts of its application, has by now mainly become simply the macroeconomic law of the EU.

1 Taking Stock: The Staging-Posts of Euro-Crisis Law

In certain respects, the peaks of production of euro-crisis law by the EU and its Member States acting intergovernmentally are likely to be over. By euro-crisis law we mean the wide-ranging overhaul of macroeconomic law, institutions and governance triggered when the banking and financial crisis from 2007 onwards became interlinked with sovereign debt crises in euro area states. In this regard, it is somewhat poignant to note that the European Council Conclusions of December 2009 strike a note of optimism by welcoming the entry into force of the Lisbon Treaty and noting that 'the economic situation is now showing signs of stabilization and confidence is increasing'. Moreover, the European

Council's agreement on Europe 2020 in March 2010, while linked to the severe downturn caused by the banking crisis of 2007 onwards, was not yet connected to a developed euro-crisis agenda, although it asked for a Task Force to be set up, the recommendations of which proved highly influential in the first phase of euro-crisis law.[1] We can accordingly trace the euro-crisis measures as they emerge from this date.

Three key strands, with different staging posts, of euro-crisis law production can be identified.[2] Two were seen by the EU institutions and the Member States as part of a linked package: first, sovereign debt loan assistance and the accompanying conditionality; and second, an overhaul of the macroeconomic governance regime in the Economic and Monetary Union (EMU). Europe's initial action on sovereign debt loans for Greece in May 2010 was followed by an intense period of EU action on a package of measures to deal with what were seen as the causes and consequences of the euro crisis. The third strand concerns new actions by, and institutional competences for, the European Central Bank (ECB).

With regard to the first two strands, two pivotal drivers of that euro-crisis action can be identified. The first is the follow-up given from June 2010 to December 2011 by the European Council and the EU legislature to the suggestions and recommendations of the Task Force set up in March 2010.[3] This led to the Six-Pack of EU legislation, the Euro-Plus Pact and a first version of the ESM Treaty, which was signed on 11 July 2011.[4] The second is the package agreed at the Euro Summit[5] of 9 December 2011, which led to the Fiscal Compact, the enhanced second version

[1] This is unsurprising when its composition is considered. Headed by Mr Van Rompuy, European Council President, it comprised Mr Olli Rehn, European Commission, Mr Juncker as Eurogroup President, Mr Trichet as ECB President and (mainly) the finance ministers of all EU Member States.

[2] Rather separately and with a different time frame a further strand of actions to reform banks and the financial sector in Europe was developed both for the EU as a whole and for the euro area specifically. While there are important links between this strand and those examined in this volume, we do not consider it here.

[3] So already before the final report of the Task Force appeared in October 2010: 'Strengthening Economic Governance in the EU', Report of the Task Force to the European Council, Brussels, 21 October 2010.

[4] This first version of the ESM Treaty can no longer be traced on the Internet, as it was erased from the websites of the Council and of the EFSF following the signature and the entry into force of the second version of the ESM Treaty. There is a reference to that first treaty in point A.2 of the Frequently Asked Questions page of the ESM website.

[5] The Euro Summit itself is an institutional innovation born out of the banking crisis upon the initiative of French President Sarkozy with its first meeting taking place in 2008. It entails meetings of euro area Heads of State or Government and the Commission

of the ESM Treaty and the further endorsement and outlining of the plans for what became the Two-Pack of legislation of 2013.

A. *Euro-Crisis Strand One: Sovereign Debt Loan Assistance and Conditionality*

Although sovereign debt loan assistance was provided to both non-euro and euro area states, there were significant differences in its provision. The banking crisis beginning in 2007–8 provoked balance of payments difficulties in a number of non-euro area Eastern EU Member States. These were resolved through sovereign debt loan assistance to Hungary, Latvia and Romania, mainly from the International Monetary Fund (IMF), but with a relatively modest EU contribution provided by an existing mechanism with a clear EU Treaty basis.[6] However, the EU went into the crisis with little money available, and no existing EU fund, to grant sovereign debt loans to euro area states. Moreover, the loans needed were on an entirely different scale to those required by the Eastern EU Member States. Through a series of different actions setting out various loan assistance mechanisms, this issue has been addressed. It was resolved, first, by agreeing on 2 May 2010 to loan Greece 80 billion EUR on the basis of bilateral agreements with other euro area states alongside 30 billion EUR from the IMF (known as the Greek Loan Facility). Immediately thereafter (Sunday, 9 May 2010), an EU fund was established relying on the relatively small amounts available in the EU budget, the European Financial Stability Mechanism (EFSM)[7] and a larger sum was made available through the European Financial Stability Fund (EFSF), contemporaneously established by an immediately effective

President. Its status was made 'official' in the Fiscal Compact Treaty of March 2012, Article 12.

[6] Article 143 TFEU fleshed out in Regulation 333/2002 establishing a facility providing medium-term financial assistance for Member States' balance of payments. Pre-crisis, the latter made the maximum total available 12 billion EUR. Post-crisis this was increased to 50 billion EUR. The Treaty explicitly envisions such EU assistance being accompanied by IMF assistance as well as bilateral assistance from other States: Article 143(2) TFEU.

[7] Article 122(2) TFEU is the legal basis for Council Regulation 407/2010 of 11 May 2010 establishing a European Financial Stability Mechanism: 'Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned.'

international agreement between the euro area states.[8] This much larger fund, initially 440 billion euros and later extended, operated as a private company established in Luxembourg under the control of the euro area states.[9] Parallel to these unprecedented political initiatives, the ECB Governing Council decided on 10 May 2010 on a number of unconventional monetary policy measures to address the tensions in the financial markets (see Strand Three).

One part of the package finalised at a central European Council meeting of 25 March 2011, following the broad suggestion of the 2010 Task Force to consider this in the medium term, concerned setting up a new more permanent financial assistance mechanism. While the European Council decided, at that meeting, to amend the Treaties so as to include an explicit authorisation in Article 136(3) of the Treaty on the Functioning of the European Union (TFEU) for the euro area Member States to set up such an assistance mechanism,[10] the assistance mechanism itself, the European Stability Mechanism, was agreed only one year later.[11] As noted above, a first version of the ESM Treaty had in fact been agreed already in July 2011 but the unfolding crisis in the financial markets in the summer of 2011 led the euro area governments to

[8] Decision of the Representatives of the Governments of the Euro Area Member States Meeting Within the Council of the European Union, Council Document 9614/10 of 10 May 2010. The EFSF was incorporated on 7 June 2010.

[9] The bulk of Ireland's support scheme, 85 billion EUR (November 2010–December 2013), and Portugal's 78 billion EUR (May 2011–May 2014), came from these two sources. Greece's second loan programme (Greece II) was exclusively EFSF-based: in March 2012 a 130 billion EUR loan was agreed (initially planned to last until December 2014, later extended until the end of June 2015 as a result of the elections bringing Syriza to power in January 2015).

[10] 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 OJ 2011, L 91/1 of 6 April 2011. The amendment provides: '3. The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality'. It required the approval by all 27 Member States to enter into force which, after a late Czech approval, finally occurred in April 2013.

[11] ESM Treaty signed on 2 February 2012. Containing a special rule for its entry into force (Article 48), it came into effect on 27 September 2012 after only 16 parties had completed ratification. For details of its lending to date see www.esm.europa.eu. For an unsuccessful legal challenge to the compatibility of the Article 136(3) TFEU amendment and the creation of the ESM with the EMU Treaty provisions, see *Thomas Pringle* v. *Government of Ireland, Ireland and the Attorney General*, Case C-370/12 (27 November 2012).

re-open the negotiations and to enhance the ESM's functions,[12] allowing it not only to lend to states in sovereign debt programmes (Article 16) and purchase their bonds (Article 17) but also to finance recapitalisation of financial institutions through loans to governments even in non-programme countries (Article 15), act on the basis of a precautionary programme (Article 14) and intervene in the secondary bond markets to avoid contagion and safeguard financial stability (Article 18). Designed to have an effective lending capacity of 700 billion EUR, the ESM's first use in full bailout mode was in relation to Cyprus' programme which made up to 9 billion EUR loan assistance available from the ESM (May 2013–March 2016).[13] On 8 July 2015 Greece requested a third round of financial assistance, this time from the ESM. After difficult negotiations, Greece III was agreed and makes up to 85 billion EUR available under the ESM between August 2015–2018.

Although the ESM was said to have superseded both the EFSM and the EFSF,[14] in the passage to Greece III in the summer of 2015, recourse was again made to the EU-based EFSM. While the ESM request which became Greece III was under examination, on 17 July 2015, Greece was granted just over 7 billion EUR in short-term financial assistance under the EFSM in order to meet July 2015 repayment obligations to the ECB (the redemption of bonds) and to settle its arrears with the IMF.[15] The assistance was disbursed in one instalment on 20 July 2015, and was linked to economic policy conditionality. The ESM assistance was, inter alia, to repay that short-term EFSM bridge loan. This EFSM assistance was controversial. Among the non-euro area Member States, the UK and the Czech Republic were most strongly opposed to using an EU, rather than a euro area only, financial instrument to grant the bridging loan to Greece. As the EFSM is an EU-wide fund, backed by the EU budget, disbursements from it need the approval of all of the EU's

[12] Statement by the Heads of State or Government of the Euro Area and EU Institutions of 21 July 2011, http://europa.eu/rapid/press-release_DOC-11-5_en.htm

[13] Between December 2012 and December 2013, 41.3 billion EUR was disbursed from the ESM as a sovereign debt loan to Spain to recapitalise and restructure its banks. As this loan was directed only at a particular sector of the economy, it could not be accompanied by IMF assistance and did not entail, as the other sovereign debt loans did, suspension of the normal EU macroeconomic regime under EMU during the loan assistance period.

[14] See, for example, the European Council Conclusions of 16/17 December 2010 making this assertion. See also Preamble (1) of the ESM Treaty which provides that the ESM 'will assume the tasks currently fulfilled by the EFSF and the EFSM'.

[15] Council Implementing Decision 2015/1181 of 17 July 2015 on granting short-term financial assistance to Greece OJ 2015 L192/15.

28 governments, rather than just the 19 of the euro area. However, decisions in the EFSM are taken by qualified majority voting,[16] which means the UK and the Czech Republic, and even all non-euro states, could be outvoted. The different situations of euro area and non-euro area states were however taken into account in both the Council Decision granting the bridging loan under the EFSM to Greece, and in an amendment to the EFSM regulation itself by providing that 'Union financial assistance under this Decision shall not be made available unless liquid collateral amounting to their exposure has been provided to those Member States whose currency is not the euro under legally binding arrangements such that it is immediately payable to them to the extent required to cover any liability they may incur as a result of any failure by Greece to repay the financial assistance in accordance with its terms.'[17]

Sovereign debt loan assistance to euro area states has since 2010 consistently been accompanied by strict macroeconomic conditionality. While the EFSF and ESM are non-EU Treaties, the loan conditions and disbursements are managed by EU institutions, with the Commission being given the task of negotiator and monitor, in liaison with the ECB. The IMF completes the troika. Political decisions on conditions and disbursements have regularly been taken in the Eurogroup, and occasionally in a Euro Summit, only to be formally adopted by the relevant institutions of the EFSF and ESM (notably the same people). In addition, from 2013, the conditions attached to sovereign debt loan assistance to euro states were given a stronger EU law basis by introduction in one of the Two-Pack Regulations (on which see now Strand Two) of a requirement that they should also be stated in EU law Macro-Economic Adjustment Programmes.[18]

B. Euro-Crisis Strand Two: Reinforcing Fiscal Stability and Macroeconomic Governance

A second strand consisted of reinforcing fiscal stability and macroeconomic governance, especially in the euro area states. The Europe 2020

[16] Article 3(2) EFSM Regulation.

[17] Article 1(2) Council Implementing Decision (EU) 2015/1181 of 17 July 2015 on granting short-term financial assistance to Greece; new Article 3(2a) EFSM Regulation.

[18] Regulation No 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability.

strategy, the successor to the Lisbon strategy of 2000–2010, was launched in March 2010. Aimed at smart, sustainable and inclusive growth, it set targets on employment rates, R&D investment, climate and energy, educational attainment of the young and poverty reduction. This strategy rapidly got caught in the slipstream of the broader overhaul of macroeconomic governance. The recommendations of the Task Force set up in March 2010 provided a blueprint for the design of a new EMU based on increasing fiscal discipline, deepening co-ordination and widening surveillance, which led to the Six-Pack of legislation at the end of 2011. Hence, in June 2010 the European Council first refers to the new nomenclature of the 'European Semester' suggested by the Task Force. The European Semester grouped together each spring, from 1 January 2011, EU review of the broadened macroeconomic regime to allow Member States to fully take these into account in their national budgets and macroeconomic decision-making in the second half of each calendar year. Initially operated with no legislative basis, it was given such a basis in the Six-Pack at the end of 2011. Other changes made stemming from the Task Force report include the Macro-Economic Imbalance Procedure; operationalising debt, rather than just deficits, in the Excessive Deficit Procedure; a shift to Reverse Qualified Majority Voting in making economic governance decisions; additional sanctions for euro area states, including macroeconomic conditionalities in the next iteration of the EU structural and investment funds; and the establishment of independent national fiscal bodies. The Task Force also recommended a fast track to introduce legislation on these matters. These changes were rendered in legislative form in the so-called Six-Pack of five Regulations and one Directive in November 2011.[19]

The central European Council meeting of 25 March 2011 which agreed the Treaty amendment relating to the ESM also agreed the Euro-Plus Pact and its text is annexed to the Conclusions of the European Council. A soft law intergovernmental measure, it was agreed by the euro area

[19] Directive 2011/85 on requirements for budgetary frameworks of the Member States; Regulation 1173/2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation 1174/2011 on the prevention and correction of macroeconomic imbalances; Regulation 1175/2011 amending Council Regulation 1466/97 on the strengthening of the surveillance of budgetary policies and the surveillance and co-ordination of economic policies; Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances; Regulation 1177/2011 amending Regulation 1467/97 on speeding up and clarifying the implementation of the Excessive Deficit Procedure. The Six-Pack is available in OJ 2011 L 301/1-47.