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## Law and Economics of the Monetary Union

Institute for Monetary and Financial Stability  
JOHANN WOLFGANG GOETHE-UNIVERSITÄT FRANKFURT AM MAIN

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## A. HISTORY

Since the end of World War II the international monetary system was based on the agreement signed at Bretton Woods on 22 July 1944 which basically encompassed a system of fixed exchange rates with an adjustment procedure and the obligation of the United States of America to redeem dollars into gold. It was combined with the establishment of the International Bank for Reconstruction and Development - the World Bank, and the International Monetary Fund (IMF). It became the legal basis for the supremacy of the U.S. dollar.

The tensions within the system of fixed exchange rates grew rapidly throughout most of the 1960s partly because of domestic spending programs in the U.S. ("Great Society") and the cost of the war in Vietnam. The dollar was considered overvalued but the envisaged adjustment procedure could not work as the system depended crucially on the fixed convertibility rate between the dollar and gold. As a result the system was dissolved between 1968 and 1973. The final turning point was the "temporary" suspension of the dollar's convertibility into gold in August 1971, declared *unilaterally* by U.S. President *Richard Nixon*. All attempts to re-establish fixed exchange rates in the following months failed, so by March 1973 all major currencies floated against each other.

Although the World Bank and the International Monetary Fund had been created specifically to make the system of Bretton Woods function smoothly, especially to prevent and to mitigate current account imbalances, both institutions survived until the present. Their growing weight and the assumed new functions, e.g. in the context of the European stabilization facilities and

mechanisms,<sup>1</sup> raise serious concerns about the proper legal basis of this practice.

As the system of Bretton Woods provided relatively stable monetary conditions and the European communities had very limited tasks to perform, the Member states saw no need to establish a closer monetary cooperation in the treaties of 1951 and 1957. Nonetheless, just a few years later the idea of a common currency for the EEC Member States was put on the agenda of the European Commission and was first addressed in its Memorandum of 24 October 1962 (the Marjolin Memorandum). Herein the Commission proposed that the customs union should evolve into an economic union by the end of the 1960s with irrevocably fixed exchange rates between the currencies of the Member States.<sup>2</sup> But still, there was no consensus about the economic need of such a common currency.

With the increasing strains on the system of Bretton Woods the question became more urgent. The complex system of fixed prices set up under the common agricultural policy was jeopardized by the balance of payments and currency crises inside the European communities. The dragging discussions about a devaluation of the French franc and the revaluation of the German mark<sup>3</sup> added to the insecurities.

The incompatibility of frequent exchange rate adjustments or even floating exchange rates within the European Communities (Union) should be kept in mind when deliberating the exit of Greece from the Monetary Union and the re-introduction of the Greek drachme which could then be devalued. These ideas, frequently suggested by economists, might be plausible in a scholarly

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<sup>1</sup> Infra p. 62.

<sup>2</sup> Scheller (2006), p. 17.

seminar, but are aloof from the real world and neglect the texture of the European Union.

In February 1969, a report of the French member of the Commission and later Prime Minister *Raymond Barre*, proposed greater coordination of economic policies and closer monetary cooperation.<sup>4</sup> The two fields he addressed were eventually introduced by the Treaty of Maastricht<sup>5</sup> in the legal framework of the Community and have become the cornerstones of the European Economic and Monetary Union.<sup>6</sup> But until today, it has remained an open question, whether common economic policies are an essential prerequisite for the functioning of a monetary union, or whether a monetary union (automatically) leads to a common economic policy.<sup>7</sup>

## I. Werner plan

The Barre-report inspired the Heads of State or Government to make the economic and monetary union (EMU) an official goal for further integration at their meeting on 1 und 2 December 1969 at The Hague. They agreed that the Council of Ministers should develop a plan to introduce step by step such a union but emphasizing that “the development of monetary cooperation should be based on the harmonization of economic policies”.<sup>8</sup> Hence, the

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<sup>3</sup> See *Siekmann* (1985), p. 36 et seq.

<sup>4</sup> Commission Memorandum to the Council on the co-ordination of economic policies and monetary co-operation within the Community, submitted on 12 February 1969, Bulletin of the EC no. 1, 1971.

<sup>5</sup> Signed 7 February 1992, Official Journal, 29 July 1992, C 191/1.

<sup>6</sup> Now Part three, Title VIII of the Treaty on the Functioning of the European Union (TFEU), consolidates version, Official Journal, 30 March 2010, C 83/1 (96).

<sup>7</sup> For details see *infra*, p. 40.

<sup>8</sup> Final communiqué at no. 8: „... a plan by stages should be drawn up by the Council during 1970 with a view to the creation of an economic and monetary union“, Compendium



Council set up a group of experts, chaired by the then Prime Minister of Luxembourg, *Pierre Werner*, to draw up a report on how this goal might be reached by the end of the decade.<sup>9</sup> The group presented its final report in October 1970.<sup>10</sup> In fulfilment of the expressed expectations a three-stage plan was devised realizable within the time frame of ten years.<sup>11</sup> Its key elements were:

- Total and irreversible convertibility of currencies;
- Elimination of margins of fluctuation in rates of exchange;
- Irrevocable fixing of parity ratios;
- Total liberation of movements of capital;
- Adoption of a single currency which would guarantee the irreversibility to the undertaking;
- Setup of two Community organs: a centre of decision for economic policy and a Community system for the central banks.<sup>12</sup>

In addition to these institutional provisions, it was recommended that “principal decisions of economic policy will be taken at Community level” and that the “budgetary policy of the Member States will be conducted in accordance with Community objectives”. To achieve this, a “Community survey” was to be effected “before the Governments draw up their budget proposal on a definitive basis”.<sup>13</sup> The plan added a third element added to the main goals of the Barre-report (greater coordination of economic policies and closer mone-

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of Community Monetary Texts (register no. P 5/88), p. 13 (15); published also in: *Krägenau/Wetter* (1993), p. 97.

<sup>9</sup> Decision of the Council of 6 March 1970 regarding the procedure in the matter of economic and monetary cooperation, Compendium of Community Monetary Texts (register no. P 5/88), p. 17.

<sup>10</sup> „Report to the Council and the Commission on the realization by stages of economic and monetary union in the Community“, Luxembourg 8 October 1970. An interim report had been presented to the Council on 20 May 1970.

<sup>11</sup> Report, p. 14, 26.

<sup>12</sup> Report, p. 26.

<sup>13</sup> Report, p. 27.

tary cooperation): control of budgetary policy of the Member States, which would later become a major field of dispute and an alleged source of instability.

Thus the fundamental points which dominate the debate until present were clearly envisaged:

- a *common economic policy* conducted by the Community
- *harmonization of the budgetary policy* of the Member States.

A political union was not considered to be a necessary prerequisite for the monetary union and the single currency. Instead the economic and monetary union appeared “as a leaven for the development of political union”. Only in the long run it appeared “to be unable to do without.”<sup>14</sup>

With the collapse of the system of Bretton Woods and the ensuing wave of instability on the foreign exchanges no further measures were taken to implement the plan.

## **II. Delors plan**

After various attempts to bring the free floating currencies to a closer alignment within the European Community, the drive for a monetary union gained new momentum more than fifteen years later. At the summit meeting on 27 and 28 June 1988 in Hannover it was agreed to form (again) a group of experts and central bank governors to promote the envisaged monetary union. It was chaired by the then president of the Commission, *Jacques Delors*. The report of the group was presented April 17, 1989 and proposed the introduction of an economic and monetary union in three stages. In a first step, all obstacles to the free flow of capital within the Community should be abol-

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<sup>14</sup> Report, p. 26.

ished. The beginning of the second step should be marked by the foundation of a European Monetary Institute. With the third step all monetary competences of the member states should be transferred to the new European Central Bank.<sup>15</sup> The report emphasized again the need for

- a greater coordination of economic policies,
- Rules on the size and financing of national budgets deficits,
- Creation of a completely independent institution for the conduction of the monetary policy of the Union, the European Central Bank (ECB).

Even though there was a lot of criticism of the plan, its major elements were accepted in the intense negotiations prior to the Treaty of Maastricht.<sup>16</sup>

### **III. Maastricht Treaty**

The Monetary Union and the provisions about the European System of Central Banks (ESCB) were finally introduced by the Treaty of Maastricht in 1992.<sup>17</sup> Its organic law, the Statute of the European System of Central Banks and of the European Central Bank, was not left to ensuing legislation. It was also not left to the new institutions itself. It was in total formulated by the signing parties and added to the Treaty as a protocol. A protocol is legally an integral part of the primary law of the EU<sup>18</sup> even though certain very small parts

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<sup>15</sup> Description of the development by *Issing* (2008a), p. 4 seq.

<sup>16</sup> *Supra* note 5.

<sup>17</sup> *Supra* note 5.

<sup>18</sup> Article 51 TEU.

of the statute can be amended in a procedure outside of a revision of the Treaty.<sup>19</sup>

All Member States are expected to join the EMU at one point in the future once they fulfill the convergence criteria. In the course of the negotiations the United Kingdom obtained a provision which allowed it to refrain from entering the third stage of the EMU even if it fulfilled the convergence criteria (opt-out clause).<sup>20</sup> As the Treaty was rejected by a referendum in Denmark, the country was granted an exemption as well.<sup>21</sup>

#### **IV. Introduction of the euro**

With the beginning of the year 1999, the last, irrevocable step towards the implementation of the monetary union had been taken.<sup>22</sup> The exchange rates of the old currencies towards the euro were irrevocably fixed and the euro was officially introduced in the eleven Member States which had been admitted to the euro. The participating countries were Belgium, Germany, Spain, France, Ireland, Italy, Luxemburg, The Netherlands, Austria, Portugal and

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<sup>19</sup> This clause has been used in 2008 to change Article 10.2. of the Statute to introduce a rotation system in the Governing Council.

<sup>20</sup> „1. Unless the United Kingdom notifies the Council that it intends to adopt the euro, it shall be under no obligation to do so. (...) 3. The United Kingdom shall retain its powers in the field of monetary policy according to national law“, Protocol (no 15) on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, Official Journal C 83, 30 March 2010, p. 284.

<sup>21</sup> The exemption had the effect that all Articles and provisions of the Treaty and the Statute of the ECSB referring to a „derogation“ should be applicable to Denmark. The admission procedure of Article 140 TFEU should only be initiated at the request of Denmark, No. 1 and 2 of the Protocol (No 16) on certain provisions relating to Denmark, Official Journal C83, 30 March 2010, p. 287

<sup>22</sup> It was criticized as too early by 155 German professors of economics, Wim Kösters, Manfred Neumann, Renate Ohr, Manfred Vaubel, et al. in: Frankfurter Allgemeine of 9 February 1998, p. 15.

Finland.<sup>23</sup> For a limited period of time it was only used for interbank business parallel with the old currencies. On January 1, 2002 euro notes and coins were introduced; also in Greece which had been admitted in the meantime.<sup>24</sup> Cyprus, Malta, Slovenia, and Slovakia followed. Estonia was the last one to join on 1 January 2011.

The United Kingdom and Denmark did not adopt the euro according to the exemptions granted to them.<sup>25</sup> Sweden did not continue the process of introducing the euro<sup>26</sup> although it fulfilled all requirements to do so. As a result, Bulgaria, Czech Republic, Denmark, Latvia, Lithuania, Hungary, Poland, Romania, Sweden and the United Kingdom are EU Member States but do not use the single European currency so far.

The term “euro area” describes the Member States in which the euro is legal tender. In addition to the Member States, the euro is used as legal tender in three other European countries on the basis of a formal agreement following Article 219 para. 3 TFEU, which also allows them to issue euro coins: San Marino,<sup>27</sup> Monaco<sup>28</sup>, and the Vatican<sup>29</sup>. Andorra introduced the euro on a unilateral basis but is negotiating a treaty with the European Union. The euro is

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<sup>23</sup> Regulation (EC) No 974/98 of the Council, 3/5/1998, Official Journal. 11 May 1998, L 139/1; judged as no infringement of fundamental rights in Germany, Federal Constitutional Court, BVerfGE 97, 350 (370 f.); confirmed BVerfG (K), Neue Juristische Wochenschrift 1998, 3187.

<sup>24</sup> The questionable actions of the Greek government preceding it are described by the Commission in its official „Report on Greek Government Deficit and Debt Statistics“ of 8. 1. 2010, COM(2010) 1 final.

<sup>25</sup> Supra note 20 and 21.

<sup>26</sup> Automatic consequence of the decision of the EU Council of 3 Mai 1998 and Article 121 para. 1 phrase 3 TEC.

<sup>27</sup> Official Journal, 27 July 2001, C 209, p. 1.

<sup>28</sup> Official Journal, 31 Mai 2002, L 142, p. 59.

<sup>29</sup> Official Journal, 25 October 2001, C 299, p. 1; amended by Council decision 2003/738/EC of 7 October 2003.

also used in a number of third countries without a formal agreement and in overseas departments, territories and islands which are either part of or associated with euro area Member States. Furthermore, there are a number of countries, regions and territories which have pegged their currency to the euro. The euro is, however, not legal tender there.<sup>30</sup>

The agreements with Monaco, San Marino and the Vatican to use the euro are being renegotiated. This will correct some shortcomings in their implementation and possibly increase the maximum volume of coins these countries are entitled to issue, which in turn will increase their revenue from minting them. The new agreement with the Vatican came into effect 1 January 2010,<sup>31</sup> while negotiations with San Marino are still ongoing. Discussions with Monaco were scheduled to be launched in 2010.

## B. FORMATION

### I. No close political union

According to the Werner Plan a common currency for all members of the European Community was to be set up to foster further integration. It was treated as a tool for further integration and not so much a result of the integration, even though in the long run a closer political union appeared to be indispensable.<sup>32</sup> The Maastricht Treaty introduced the economic and monetary union in fact without a full fledged political integration. The euro was created as a

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<sup>30</sup> For more details see: Monetary and exchange rate arrangements of the euro area with selected third countries and territories, European Central Bank, Monthly Bulletin, April 2006, p. 87; *European Commission* (2008), p. 122.

<sup>31</sup> Official Journal, 4 February 2010, C 28, p. 13.

<sup>32</sup> *Supra* p. 7.

*currency without a state*.<sup>33</sup> This was done fully aware of the fact that many critics, namely economists, considered this procedure as taking the second step before the first.<sup>34</sup> Even if this closer political union was not realized from the beginning on, the single currency extends and completes the “single market”. To this extent, it worked as “integration via the Economy”.<sup>35</sup>

## II. No fiscal federalism or equalization system

Great care was taken by the framers of the Maastricht Treaty that the monetary union did not include any trait of a federal equalization system. All Member States were supposed to remain fully responsible of their finances and absolutely no expectations should be nourished that outside help would come in case of budgetary problems.<sup>36</sup> The capital markets were to provide the appropriate sanctions for an unsound fiscal policy. Permanent instruments to *prevent* an irresponsible fiscal policy were included in the legal framework besides the screening at admission time. Both safeguards<sup>37</sup> allegedly did not fulfill its tasks properly.<sup>38</sup>

In the past, many governments had habitually tried to solve budgetary problems by lowering the internal or external value of the currency or both: inflation and/or devaluation. Both mechanisms usually did not raise the economic strength of a country and helped only for a very limited amount of time to

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<sup>33</sup> A topic which was treated intensively by one of the leading framers from the German side and later member of the Executive Board of the ECB *Otmar Issing*, see e.g. *Issing* (2008b).

<sup>34</sup> See more *infra* p. 53.

<sup>35</sup> Described by *Issing* (2008c), p. 299 et seq.

<sup>36</sup> *Smits* (1997), p. 77.

<sup>37</sup> More on the safeguards to guarantee permanent stability of the EMU *infra* at part D.

<sup>38</sup> *Louis* (2010), p. 979; for the Stability and Growth Pact see *infra* p. 56.

overcome the underlying structural problems. In the EMU they should – legally – not be any more at the disposition of countries whose currency is the euro.

On the EU level it was envisioned that the root causes of the problems should be approached by developing greater economic strength which eventually leads to the necessary convergence. This is also the reason for the existence of the many (coherence) programs of the EU to improve the infrastructure of defined areas or to solve structural economic deficits. They are definitely different from an equalization system as the funds are earmarked and are not at the general disposition of a government. The crucial point is improving the competitiveness of the Member State(s) which are in need.

### **III. The single currency as legal tender of the Union**

The single currency was designed to be the official currency of the European Union; the only official currency in the Union. For this purpose the single currency had to become legal tender in all member states; the only legal tender.<sup>39</sup> All other currencies or means of payment had to cease to fulfil this function. In other words, the member states had to give up a substantial part of their sovereign powers:<sup>40</sup> the power to create and maintain a currency as legal tender and to conduct monetary policy.

The power to create money in the legal sense of the word had been widely considered to be a sovereign right of a ruler but it is not indispensable as history shows. There have always been realms without a single currency or a currency of the central state. In any case, the general decision to transfer this

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<sup>39</sup> Article 128 para. 1 TFEU.

<sup>40</sup> *Issing* (2008c), p. 301.



sovereign right to the EU has been taken and the judiciary did not object.<sup>41</sup>  
Only the scope of this transfer is debateable.

## C. THE EUROPEAN SYSTEM OF CENTRAL BANKS AND THE EUROSYSTEM

The Treaty of Maastricht has added monetary policy to the competences of the European Union and provided the necessary institutional setup. This was done by installing the complete legal framework for the European System of Central Banks (ESCB). All EU Member States, even those that have *not* adopted the euro because of a special status or because of derogation, are part of the ESCB. It is the system as a whole and not only a subset of it which is charged by the Treaty to “conduct the monetary policy of the Union”.<sup>42</sup> This is a consequence of the original idea that the euro shall become the – single – currency of the Union. Despite all disputes and difficulties monetary policy has become one of the major fields of common power and coherence of the Union.

### I. Institutional setup

#### 1. The general outlay

The European System of Central Banks (ESCB) is made up of the European Central Bank (ECB) and the national central banks (NCBs) of all 27 EU member states.<sup>43</sup> The Governing Council of the ECB decided in November 1998 to adopt the term “Eurosystem” for the ECB and the national central banks of the Member States whose currency is the euro. This step was taken

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<sup>41</sup> BVerfGE 89, 155; 97, 350; *Siekmann* (2009), Article 88 no 33.

<sup>42</sup> Article 127 para. 2 first indent, Article 282 para. 1 phrase 2 TFEU

in order to help the public understand the complex nature of the ESCB and to underscore that these are the instruments by which the ESCB carries out its tasks. The Treaty of Lisbon introduced the term in the primary law of the Union.<sup>44</sup>

The ESCB as such has no legal personality and no organs of its own. It is governed by the decision-making bodies of the ECB<sup>45</sup>: the Governing Council and the Executive Board of the ECB and temporarily by the General Council, as long as this body exists.

## 2. The European Central Bank

As the euro was designed to be the official currency of the EU, the ECB is an institution of the EU<sup>46</sup> and not a separate autonomous entity under European Law,<sup>47</sup> not a “community” of its own.<sup>48</sup> Whether it is an “organ” of the EU is of secondary importance<sup>49</sup> even if the use of the term “organ” in the German version of the Lisbon treaty raised quite a bit of concern, namely at the Bun-

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<sup>43</sup> Article 282 para. 1 TFEU.

<sup>44</sup> Article 282 para. 1 phrase 2 TFEU.

<sup>45</sup> Article 129 para. 1, Article 282 para. 2 phrase 1 TFEU.

<sup>46</sup> ECJ of 10 July 2003 C-11/00, in: *Europarecht* 2003, p. 847 (870); *Dutzler* (2003), p. 86: „It [the ECB] is hence, in spite of its separate legal personality and its independence, not a third party to the Community, but an instrument of the Community set up to achieve one of its objectives“; *Kempen* (2003), Article 107 no. 4; *Gaitanides* (2005), p. 52; *Häde* (2011), Article 282 TFEU no. 38; implicitly: *Torrent* (1999), p. 1230; *Amttenbrink/de Haan* (2002), p. 73 et seq.

<sup>47</sup> Favouring the classification as an independent and separate entity under European law, however: *Weber* (1998), p. 1465 et seq.; *Zilioli/Selmayr* (1999), p. 285; *Zilioli/Selmayr* (2000), p. 621, 643; *Zilioli/Selmayr* (2001), p. 19; critical: *Häde* (2002), p. 921; *Häde* (2006), p. 1605 et seq.

<sup>48</sup> This is the wording of *Selmayr* (1999), p. 2433 et Seq.

<sup>49</sup> See *Fang* (2006), p. 95 after extensively discussing the question.

desbank.<sup>50</sup> It is, however, only a misleading translation<sup>51</sup> as both the English and the French version use the word “institution”.<sup>52</sup>

The ECB has legal personality<sup>53</sup> and enjoys the most extensive legal capacity accorded to legal persons under the respective national laws of each Member State. It has been awarded all privileges and immunities that are necessary to carry out its tasks. The powers and authorities of the ECB are not delegated. They are directly derived from the Treaty. So the system is not simply one of the many *European agencies* set up by secondary law of the Union which are eventually responsibly to the commission.<sup>54</sup>

At its installation, the ECB was not mentioned in the former Art. 7 TEC which contained a list of the institutions of the Community. Instead it had a separate legal basis in the Treaty. The Lisbon Treaty changed this and lists the ECB now among other institutions in Article 13 TEU. The ESCB as a whole has retained, however, a separate legal basis.<sup>55</sup>

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<sup>50</sup> *Deutsche Bundesbank* (2003); less sceptical the ECB: *Stellungnahme der Europäischen Zentralbank vom 19. September 2003*, Official Journal C 229, 25 September 2003, p. 7-11.

<sup>51</sup> *Siekmann* (2005), p. 50 et seq.

<sup>52</sup> Article 13 para. 1 TEU, part 6, title I, chapter 1 TFEU.

<sup>53</sup> Article 282 para. 3 phrase 1 TFEU.

<sup>54</sup> A comprehensive list is given by *Callies* (2011), Article 13 TEU, no. 38; see extensively *Fischer-Appelt* (1999), *Görisch* (2009). There are in fact growing legal concerns about agencies which shall be granted independence solely on the basis of secondary law like regulatory bodies for the energy market, Article 35 sec.4 Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 Official Journal L 211, 14 August 2009, p. 55 - electricity; Article 39 sec.4 Directive 2009/73/EC of the European Parliament and the Council of 13 July 2009 Official Journal L 211, 14 August 2009, p. 94 – natural gas; Regulation (EC) 714/2009 of the European Parliament and of the Council of 13 July 2009 Official Journal L 211, 14 August 2009, p. 15.

<sup>55</sup> Article 282 (1) TFEU

The ECB was originally endowed with a capital of 5.000 million euro.<sup>56</sup> Sole subscribers and holders of the capital are the national central banks and not the Member States.<sup>57</sup> The capital can be augmented by the bank up to a sum authorized in advance by the EU-Council. Already in 2000 the Council has granted authority to increase the capital by up to 5.000 million euro.<sup>58</sup> This authorization has been used on 15 December, 2010. The capital of the bank does, however, not serve the same function as equity in commercial banks as the ECB is basically a government entity, although with a special status, and has the privilege to produce the money needed to pay back its (internal) debt. Capital adequacy rules are not applicable.

The internal structure of the ECB is in principle formed by three bodies:

- (1) the Governing Council
- (2) the Executive Board
- (3) the General Council

(1) The *Governing Council* of the ECB is made up of the members of the Executive Board of the ECB and the governors of the national central banks of the Eurosystem. It has to meet at least ten times a year. The current frequency is twice a month; usually on the first and third Thursday of each month. The President of the EU Council and a member of the EU Commission are entitled to attend the meetings but without right to vote.

The Governing Council's tasks are of utmost importance to the ESCB. The Statute empowers it inter alia to formulate the monetary policy, adopt guidelines and take decisions necessary to ensure the performance of the ESCB's

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<sup>56</sup> Article 28.1. of the Statute.

<sup>57</sup> Article 28.2. of the Statute.

<sup>58</sup> Regulation 1009/2000 of 8 may 2000.

responsibilities. The Governing Council takes into account the implications for the euro area as a whole when it makes decisions.

(2) The *Executive Board* is composed of the President and the Vice-President of the ECB and four other members. They are selected “from among persons of recognised standing and professional experience in monetary and banking matters” and are appointed by the European Council, acting by a qualified majority, on a recommendation from the Council, after it has consulted the European Parliament and the Governing Council of the European Central Bank.<sup>59</sup> The board generally meets once a week.

(3) The Treaty on the Functioning of the European Union (TFEU) refers only to two decision making bodies of the ESCB, the Governing Council and the Executive Board. Nonetheless, the General Council is the third decision making body of the ECB. It had been constituted only as temporary body, until all EU member states have adopted the euro. It consists of the President and the Vice-President of the ECB and the governors of the national central banks of all EU member states. The other members of the Executive Board, the President of the EU Council and a member of the EU Commission, are also allowed to attend the meetings but do not have voting rights.

### **3. The national central banks**

Within this framework the national central banks are of a double nature. They are created by national law and are subject to national law. Simultaneously they are integral parts of the ESCB.<sup>60</sup> In this capacity they are (parts of) a European institution as well. They are instruments in the hands of the ECB to discharge its duties and have to follow its instructions. In this capacity they

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<sup>59</sup> Article 11.2. subpara. 1 Statute.

<sup>60</sup> Art. 14.3. Statute; to their status and integration in the ECSB: *Zimmermann* (2000), p. 5 et seq.; *Dziechciarz* (2009).

participate in all immunities and privileges the law of the Union provides for the ESCB. But – on the other hand – they exert substantial influence over the ECB as the heads or governors of the national central banks are members of the governing council of the ECB.

The national central banks of the countries which have not introduced the euro are also members of the ESCB, but, in comparison to the countries that have adopted the euro, they have a special status. These national central banks have retained their monetary sovereignty. This means that they are still responsible for the national monetary policy and are excluded from taking part in the core activities of the Eurosystem. Even though they do not carry out the primary functions of the Eurosystem, they are committed to the principles of price stability-oriented monetary policy. In addition, they are bound to work closely with the Eurosystem in several fields, like statistics. The institutional forum for this cooperation is the General Council.

## **II. Price stability as primary objective**

The Monetary Union was designed to be a community of stability. Stability was initially understood as price stability and only price stability. Price stability was set as superior goal for the new monetary system in all legal documents. Financial stability in a wider sense played only a marginal role.<sup>61</sup>

Price stability is laid down as one of the governing principles of the Union in Art. 3 para. 3 subpara. 1 of the Treaty on the European Union (TEU). For the Monetary Union it is reiterated in various places in the Treaty on the Functioning of the European Union (TFEU); there not only as one among other

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<sup>61</sup> It is mentioned in Article 127 para. 5 TFEU as an objective the ESCB shall contribute to: “The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system”.

goals but as its primary objective. To underline the importance and priority of this objective the chapter on monetary policy begins with the phrase: “The primary objective of the European System of Central Banks ... shall be to maintain price stability.”<sup>62</sup>

Only without prejudice to this primary objective, the ESCB shall also support the general economic policies in the Union with regard to contributing to the achievements of the Union as laid down in Article 3 of the Treaty on European Union.<sup>63</sup> In addition, it shall act in line with the principle of an open market economy with free competition.

The term price stability in the legal documents is generally interpreted in the sense of consumer price stability.<sup>64</sup> This is explicitly done by the protocol on the convergence criteria.<sup>65</sup> Consumer price stability is generally measured by the harmonized index of consumer prices (HICP) calculated by the European office of statistics (ESTAT)<sup>66</sup>. Asset prices and their tendency to form bubbles were not envisaged by the framers of the Treaty.

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<sup>62</sup> Article 127 para 1 phrase 1 TFEU, restated in Article 282 para. 2 phrase 2 TFEU.

<sup>63</sup> Article 127 para 1 phrase 2 TFEU, restated in Article 282 para. 2 phrase 3 TFEU.

<sup>64</sup> *Endler* (1999), p. 65 et seq. with comprehensive discussion of the various alternatives and concepts; *Gaitanides* (2005), p. 20; *Siekmann* (2009), Article 88 no.29; *Blanke* (2010), Article 88 no. 67; *Häde* (2011), Article 127 TFEU no. 3; too vague *Herdegen* (2010), Article 88 no. 30.

<sup>65</sup> Protocol (No 13) on the convergence criteria, Official Journal C83, 30 March 2010, p. 281.

<sup>66</sup> The office has the rank of general direction of the Commission and is attributed to the Commissioner for administration, audit and fraud prevention. It is not entrenched in the primary law of the Union and has not been awarded a guaranteed independence. Solely in a „practical arrangement“ on the „working relations“ between the office and the members of the Commission, cabinets and services have been acknowledged certain freedoms (agreement between the competent commissioner, *Olli Rehn*, and the director general – DG ESTAT – *Walter Radermacher* of 11 may 2010).

### III. Tasks and Powers

The ECB is entrusted with carrying out the central banking functions for the euro. It commands all powers necessary to fulfil this task. The banknotes issued by the Eurosystem are the only such notes to have the status of legal tender within the Union.<sup>67</sup> Member States may, however, issue euro coins. They may be considered as a modified “national” means of payment.<sup>68</sup> The right of governments to issue coins has been an old tradition even in countries with a central bank which is granted guaranteed independence and centralized money creating power. There is no material justification to continue with this tradition.<sup>69</sup> The profit for the treasury from minting coins is not a sufficient reason. However, prior approval by the ECB is necessary to prevent undue interference with its monetary policy.<sup>70</sup>

Moreover, the ESCB has to carry out four main tasks. They are:

- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations (that have to be consistent with an international foreign exchange system in case this has been set up),
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.<sup>71</sup>

Although the tasks have been assigned explicitly to the ESCB, at least the monetary policy is performed as a task of the Union. This can be easily derived from the superscription of this part of the treaty “union policies and in-

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<sup>67</sup> Article 128 para. 1 phrase 1 and 2 TFEU; repeated in Article 282 para. 3 phrase 3 TFEU with no additional meaning, see *Häde* (2011), Article 282 TFEU no. 43.

<sup>68</sup> *Seiler* (2004), p. 67.

<sup>69</sup> *Siekmann* (2009), Article 88 no. 20.

<sup>70</sup> Article 128 para. 1 phrase 2 TFEU.

<sup>71</sup> Article 127 para 2 TFEU.



ternal actions” and the wording in Article 127 para. 2 first indent TFEU.<sup>72</sup> It should, however, be considered that in effect not the complete ESCB is carrying out these tasks but mainly the Eurosystem.<sup>73</sup> The monetary policy is adopted by the Governing Council of the ECB. The Executive Board of the ECB gives instructions to the national central banks in order to implement the monetary policy of the Governing Board. The authority to define and implement the monetary policy of the Union allows the ECB to exert a dominant influence on money market conditions and money market interest rates.

The ECB does not have to fulfil all its duties with own personnel. It can use the national central banks as its “executive arm”.<sup>74</sup> As a result some of the day to day work is performed by the national central banks. This comprises also the purchase of “sovereign” bonds and private debt instruments, like in the covered bond program. The legal ownership of these instruments might be essential in case of a default. Also the respective liabilities in this case are an open and not sufficiently scrutinized issue. The primary law explicitly approves that both the ECB and the national central banks may in fact issue euro banknotes<sup>75</sup>, but the exclusive responsibility for the material decisions stays with the ECB.

To carry out the tasks entrusted to the ESCB the European Central Bank has been granted the power to:

- adopt regulations
- take decisions.

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<sup>72</sup> Häde (2011), Article 127 no. 11.

<sup>73</sup> The Article was designed on the premise that eventually all Member States would introduce the euro and that there would be no significant difference between the Eurosystem and the EU.

<sup>74</sup> Siekmann (2009), Article 88 no. 44.

<sup>75</sup> Article 128 para. 1 phrase 2 TFEU.

- make recommendations and deliver opinions.<sup>76</sup>

## D. SAFEGUARDS FOR PROCURING STABILITY OF THE EURO

Looking at the overall picture, a host of safeguards can be highlighted which were included in the Maastricht Treaty to ensure that the Monetary Union would not only be a space of stability at its beginning, but in permanence. To ensure this lasting stability several carefully designed measures were implemented:

- high admission standards (I.)
- far reaching and absolute independence of the monetary institutions (II.)
- no financing of the public sector by the ECB (III.)
- no privileged access of the public sector to financing (IV.)
- no liability for the public sector of a Member State (V.)
- strict fiscal discipline (VI.).

The design of the monetary union as a permanent community of stability (“Stabilitätsgemeinschaft”) was a major aspect for the Federal Constitutional Court of Germany to accept the Maastricht-Treaty and the introduction of the euro as constitutional.<sup>77</sup>

### I. High admission standards

Although the single currency was originally designed to become the currency of the European Union, it was soon realized that this could not be achieved in one step as the number of members of the Union had rapidly grown. With the

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<sup>76</sup> Article 132 para. 1 TFEU.

<sup>77</sup> BVerfGE 89, 155 (200, 204): „The Treaty on the Union regulates the Monetary Union as a community lastingly committed to stability and specifically guaranteeing monetary stability.“ „This concept of the Monetary Union as a community of stability („Stabilitätsgemein-

growing number, the Union had become increasingly heterogeneous. To achieve the desired minimum homogeneity among the participants of the single currency restrictive admission standards were set up. A high degree of “sustainable convergence” is required. This convergence is assessed by four criteria:

- the achievement of a high degree of price stability
- the sustainability of the government financial position
- normal fluctuation of exchange rates within the European Monetary System
- the convergence of long-term interest-rate levels.<sup>78</sup>

These criteria were specified in a protocol to the Maastricht Treaty<sup>79</sup> which is part of the Treaty and belongs to the primary law of the Union.<sup>80</sup> They were (later) often referred to as the “Maastricht criteria”. To avoid confusion with the criteria for an admissible budget deficit, they should be referred to as “convergence criteria” as the official wording does.<sup>81</sup> The convergence criteria are, however, only reference values.<sup>82</sup> The primary law leaves some space for discretion on the side of the deciding bodies. This discretion was used namely in the case of Italy, Belgium, and later also Greece.

All Member States were originally expected to adopt the euro at one point in the future once they fulfil the convergence criteria. Even though the Treaty of

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schaft“) is foundation and object of the German act of assent“ (p. 205); confirmed by BVerfGE 97, 350 (370).

<sup>78</sup> Article 140 para. 1 phrase 3 TFEU.

<sup>79</sup> Protocol (No 13) on the convergence criteria, Official Journal C83, 30 March 2010, p. 281.

<sup>80</sup> Article 51 TFEU: The Protocols and Annexes to the Treaties shall form an integral part thereof.

<sup>81</sup> See footnote 79.

<sup>82</sup> The German Federal Constitutional Court, however, judges them as binding basis for the consent of Germany to the Treaty, BVerfGE 89, 155 (202 f.); see also *Hartmann* (1996), p. 135 et seq.

Lisbon has watered down this requirement to a certain extent as it has led to the “official” recognition of two groups of Member States<sup>83</sup>, the initial expectation is still valid.

## II. Independence of monetary institutions

An important feature of the ESCB is its independence.<sup>84</sup> The ECB and the national central banks must not seek or take instructions from EU institutions or bodies, from any government of an EU country or from any other body when exercising powers or carrying out tasks conferred upon them by the Treaties and the Statute of the ESCB.<sup>85</sup> This independence is not only granted to the respective bodies but to all members of them. This has been explicitly stated also for the members of the decision making bodies of the national central banks.<sup>86</sup> Especially the last aspect is crucial for judging the legality of the pressure put recently on a member of the board of the Bundesbank by the president of the Republic and its chancellor. It is an open question, however, whether the guarantee also covers activities by the ECB or the national central banks in banking supervision.

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<sup>83</sup> Part three, Title VIII. Chapter 4: Provisions specific to Member States whose currency is the euro; Article 139: “Member States in respect of which the Council has not decided that they fulfil the necessary conditions for the adoption of the euro shall hereinafter be referred to as ‘Member States with a derogation’”.

<sup>84</sup> Accepted by the German Federal Constitutional Court as in accordance with the democratic principle, BVerfGE 89, 155 (172, 181, 208); see in depth: *Dutzler* (2003), p. 88-109; *Gaitanides* (2005), p. 199-279; *Siekmann* (2005), p. 40 et seq.

<sup>85</sup> Article 130 phrase 1 TFEU.

<sup>86</sup> Article 130 phrase 1 TFEU: “... nor any member of their decision-making bodies ...”.

The independence is usually broken down into personal independence and material independence.<sup>87</sup> Personal independence denotes fixed tenure for governors of the national central banks and members of the Executive Board of the ECB. A minimum term of five years for governors<sup>88</sup> and a non-renewable term of office of eight years for members of the Executive Board<sup>89</sup> are demanded by EU-law to strengthen their position.

In respect to the members of the Executive Board the Treaty allows a removal from office only if a member “no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct”. This can, however, not be done as a type of “actus contrarius” by the EU-Council. Only the European Court of Justice may - on application of the Governing Council or the Executive Board - „retire“ such a member „compulsorily“.<sup>90</sup> A removal from office or any pressure in this direction is illegal like in the present case of the Italian member of the Board, *Lorenzo Bini Smaghi*. A voluntary resignation may be in compliance with this rule. When a resignation at halftime is, however, agreed on in advance, like in the case of the first president of the ECB, Willem Duisenberg, legal doubts remain. In any case, it is not binding.<sup>91</sup>

The law of the European Union provides no respective general clause for the members of the governing bodies of the national central banks as they are basically governed by the respective national law. It provides, however, as a

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<sup>87</sup> More subdivisions of various kinds are explicated by scholars; see the overview at *Siekmann* (2005), p. 8-15; *Gaitanides* (2005), p. 45-135; *Gaitanides* (2007), Article 88 no. 59 et seq.

<sup>88</sup> Article 14.2. subpara. 1 Statute.

<sup>89</sup> Article 283 para. 2 subpara. 3 TFEU.

<sup>90</sup> Article 11.4. Statute.

<sup>91</sup> *Heun* (1998), p. 874; *Kempen* (2003), Article 108 TEC no. 11; *Häde* (2011), Article 130 TFEU no. 27.

minimum standard that a Governor may be relieved from office only if he “no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct”.<sup>92</sup> An action of the national judiciary is not a prerequisite of the EU-law. However, “a decision of this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council.”<sup>93</sup> No rules were set up for other members of the governing bodies.

This reluctance in regulating the interior composition of the National Central Banks is plausible but raises serious concerns in view of the independence of the Governing Council of the ECB, which takes crucial decisions on monetary policy and decides far reaching questions like the legally and economically highly problematic purchase of sovereign debt; euphemistically named „quantitative easing“. At least in some Member States, like Germany, all tenured civil servants can be removed from office by court action and on very limited grounds only; not to speak of judges or members of courts of audits which enjoy a constitutionally guaranteed independence like all parts of the ESCB. This was widely ignored during the recent excitement about a member of the board of the Bundesbank and some years ago about an alleged misconduct of a president of the Bundesbank. Neither the president of the Republic nor the government in Germany has the right to remove an official from office, no matter what he has committed; also not on the proposal of the Bundesbank. A court action is indispensable.

*Material independence* indicates that the ECB and the national central banks can employ all competences and instruments that are necessary for the conduct of their duties freely and undisturbed. They shall be free to perform the monetary policy in a way they deem suitable. They are authorized to decide how and when to use their instruments without any undue influence from the

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<sup>92</sup> Article 14.2. subpara. 2 phrase 1 Statute.

<sup>93</sup> Article 14.2. subpara. 2 phrase 2 Statute.

EU institutions, national government bodies or private institutions. Any kind of pressure is a breach of that guarantee.<sup>94</sup> Even the mere attempt to exert pressure is illegal,<sup>95</sup> no matter whether from a governmental or private body.<sup>96</sup>

### **III. No financing of public sector by the ECB**

Any type of credit financing of the Union or the Member States by the ECB or by a central bank of a Member State is strictly prohibited. This prohibition is absolutely comprehensive. It holds not only for the Union and central governments but for all other bodies, offices or agencies, regional, local or other public authorities. It includes all other bodies governed by public law and public enterprises.<sup>97</sup> An exception is only made for those publicly owned credit institutions which can be given the same access as other commercial banks.<sup>98</sup>

To secure this interdiction the ECB and the national central banks may not purchase any debt instruments issued from the public sector. This covers especially government bonds. However, only the “direct” purchase is forbidden. This way the Eurosystem should be enabled to intervene in the markets to procure their proper functioning. In no way it was intended to open a back door for an (indirect) financing of governments. The secondary law puts it plainly and unambiguously: “purchases made on the secondary market must

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<sup>94</sup> ECJ, C-11/00, margin number 134.

<sup>95</sup> Article 130 phrase 2 TFEU. The English version of the Treaty is in this point, however, not as clear as the German version which explicitly bans the attempt (“... nicht zu versuchen...”); see also *Endler* (1998), p. 410 et seq.; *Kempfen* (2003), Art. 108 no. 5; *Kämmerer* (2003), Article 88 no. 27; *Siekmann* (2009), Article 88 no. 54.

<sup>96</sup> *Louis* (1998), p. 43.

<sup>97</sup> Article 123 para. 1 TFEU.

<sup>98</sup> Article 123 para. 2 TFEU.

not be used to circumvent the objectives of that Article”.<sup>99</sup> It is only allowed “in the context of monetary policy operations”.<sup>100</sup> As a result, what is euphemistically and misleadingly called “monetizing” of public debt might be allowable for the Federal Reserve System of the U.S. but is clearly *illegal* for the ECB.

Keeping this in mind, the purchase of government bonds that the ESCB has started in early summer 2010 was from the beginning on not without a legal risk. The longer it lasts the more it becomes legally questionable as the proper functioning of the markets can hardly be used any more as a justification. So it is *not* a question of the structure of the balance sheet of the ECB when it demands that the support of some of the Member States with debt problems have to be supported with other tools and its purchases have to be terminated immediately.

#### **IV. No privileged access of public sector to financing**

In a similar manner any privileged access to financial institutions by Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law or public enterprises is strictly prohibited as well.<sup>101</sup> This prohibition is necessary as experience tells that governments like to put pressure on the banking system of its country to finance their budgetary deficits, as in the case of Greece. This might be especially true when banks are owned or controlled by government entities. Such a practice increases the danger of contagion and puts addi-

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<sup>99</sup> Regulation no 3603 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, Official Journal L 332, 31 December 1993, p. 1, recital p. 1.

<sup>100</sup> *Hahn* (1991), p. 807, from the time of drafting the clause; *Heun* (1998), p. 875: „unlimited and compulsory interdiction of central bank credits“; *Kempen* (2003), Article 101 EGV no. 5: only for purposes of open market policy.

<sup>101</sup> Article 124 TFEU.



tional pressure on the ECB to assist as “lender of last resort” for banks, thus financing indirectly governments and government entities.

## V. Strict fiscal discipline

### 1. Primary law

The primary law requires the “sustainability” of the fiscal policy and offers this at least as a rudimentary guideline for the long term budgetary policy. It declares “the sustainability of the government financial position” to be the essential criterion for sustainable convergence in the framework of the economic and monetary union.<sup>102</sup> Even if this clause belongs to the transitional provisions it can be used as a basis for interpretation of the permanent requirement that “Member States shall avoid excessive government debts”.<sup>103</sup> The United Kingdom watered this clause somewhat down as it promised only to “endeavor to avoid an excessive government deficit”<sup>104</sup>.

The compliance with budgetary discipline has to be monitored by the Commission and the Council on the basis of two reference values: the ratio of the planned or actual government deficit to gross domestic product and the ratio of government debt to gross domestic product.<sup>105</sup> The reference values are specified in the protocol (No. 12) on the excessive deficit procedure added to the Maastricht Treaty and pertained in the Treaty on the Functioning of the European Union.<sup>106</sup> They read as follows:

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<sup>102</sup> Article 140 para. 1 indent 2 TFEU.

<sup>103</sup> Article 126 para. 1 TFEU.

<sup>104</sup> Nr. 5 of Protocol (No. 15) (supra note 20).

<sup>105</sup> Article 126 para. 2 TFEU.

<sup>106</sup> Protocol (No 12) on the excessive deficit procedure, Official Journal C83, 30 March 2010, p. 279.

- 3% for the ratio of the planned or actual government deficit to gross domestic product at market prices;
- 60% for the ratio of government debt to gross domestic product at market prices.<sup>107</sup>

These reference values are part of the primary law of the Union.<sup>108</sup> They are quite frequently referred to as “Maastricht Criteria”. This might cause confusion as the admission criteria mentioned above are also called “Maastricht Criteria”. For this reason it should always be made clear which criteria are meant and the latter be called “convergence criteria”.

The monitoring and enforcement of the rules has to be achieved in a complex interaction of the Commission and the Council.<sup>109</sup> They may result in admonition and recommendations.<sup>110</sup> If a Member State persistently fails to implement the recommendations, sanctions may be imposed which may eventually entail a non-interest-bearing deposit with the Union or a “fine of an appropriate size”.<sup>111</sup> In essence, both the procedural and the substantial rules for enforcing the requirement of permanent budgetary discipline are laid down in the primary law of the Union. However, really effective sanctions have not been embodied. Specifically an *exclusion* of a Member State from the Eurozone is not foreseen and would be *illegal*.<sup>112</sup> In addition, substantial *discretionary power* remained with the political bodies.

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<sup>107</sup> Article 1 of the protocol.

<sup>108</sup> Article 51 TEU.

<sup>109</sup> Article 126 para. 2 – 13 TFEU.

<sup>110</sup> Article 126 para. 7-9 TFEU.

<sup>111</sup> Article 126 para. 11 subpara. 1.

<sup>112</sup> *Kirchhof* (1994), p. 72; probably also *Herrmann* (2010), p. 417.

## 2. Stability and growth pact

Already at the initiation of the monetary union serious concerns were raised that the procedure provided in the primary law would be too tedious and – above all – the political determination would be lacking to impose appropriate sanctions.<sup>113</sup> Definitions and specifications of the rules on government debt and deficits and the deficit procedure had been undertaken by the secondary law of the Union but no reduction of the scope of discretion for imposing sanctions.<sup>114</sup> It was mainly Germany which demanded a “stability pact” preferably with *automatic* sanctions.<sup>115</sup> This would, however, have been barely compatible with the discretionary powers granted to the Commission and the Council in the primary law. A separate treaty – complementing the provisions in the TEC on the monetary union - would have been questionable from a legal point of view as well.<sup>116</sup> Changing clauses of the primary law of the Union would not be possible; supplementing them only in fields which do not yet fall into its competences or which have been explicitly left open to further accords.<sup>117</sup> As a result the somewhat awkward type of pact that we have at present was finally realized.

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<sup>113</sup> *Zeitler* (1995), p. 1611.

<sup>114</sup> Council Regulation (EC) No 3605/93 of 22 November 1993 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, Official Journal L 332, 31 December 1993, p. 7; amended several times, codified version: Council Regulation (EC) No 479/93 of 25 May 2009, on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community, Official Journal L 145, 10 June 2009, p. 1; Council Regulation (EC) No 3603/93 of 13 December 1993 specifying definitions for the application of the prohibitions referred to in Articles 104 and 104b (1) of the Treaty, Official Journal L 332, 31 December 1993, p. 1.

<sup>115</sup> A „Stabilitätspakt für Europa“ was presented by the German Minister of Finance on 10 November 1995; see for details *Palm* (2000), p. 44 et seq., 142; *Häde* (2006), p. 139; extensively to this and the origins of the Stability and Growth Pact *Hentschelmann* (2009), p. 205-285.

<sup>116</sup> *Smits* (1997), p. 85; *Häde* (1996), p. 140.

<sup>117</sup> *Häde* (1996), p. 142.

That is why finally the so-called Stability and Growth Pact (SGP) has been set up by secondary law of the Union. The stability and growth pact is not a contract in the common understanding of the word. The term “pact” was retained to emphasize the underlying political consensus.<sup>118</sup> It can be taken as a reminiscence of the initially discussed separate treaty. This has been the cause of some confusion in the not so well informed public. Technically the pact consists of one resolution of the European Council,<sup>119</sup> which is not binding, and two – binding – regulations of the Council. One contains mainly substantive provisions<sup>120</sup> and the other mainly procedural rules<sup>121</sup>. The resolution contains a multilateral promise to achieve an almost balanced budget in the medium range.

The regulations are part of the secondary law of the Union. Regulation 1466/97 was based on Article 99 para. 5 TEC and contains an early warning system and the obligation of the Member States to provide a stability program. It is now often named the “preventive part” of the pact. Regulation 1467/97 was based on Article 104 para. 4 TEC and attempts to speed up the procedure and to clarify it in case of an unsustainable deficit. It is called the “dissuasive” or „corrective“ part of the Pact. It governs the *excessive deficit procedure* (EDP).

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<sup>118</sup> Explicitly expressed in recital no. 2 of both regulations, *infra* notes 120 and 121.

<sup>119</sup> Resolution of the European Council on the Stability und Growth Pact Amsterdam of 17 June 1997, Official Journal C 236, 2 August 1997, p. 1.

<sup>120</sup> Council Regulation (EC) no 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, Official Journal L 209, 2 August 1997, p. 1; amended by Council Regulation (EC) no 1055/2005 of 27 June 2005, Official Journal L 174, 7 July 2005, p. 1.

<sup>121</sup> Council Regulation (EC) no 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, Official Journal L 209, 2 August 1997, p. 6; amended by the Council Regulation (EC) no 1056/2005 of 27 June 2005, Official Journal L 174, 7 July 2005, p. 5.

Mainly on behalf of France and – ironically – Germany, these regulations were amended in 2005<sup>122</sup>, when France and Germany failed to comply with the reference values. The amendments left the reference criteria untouched, since they are part of the primary law of the Union,<sup>123</sup> but allowed to take more circumstances into account to excuse from a failure to meet them. Discretionary powers were extended. Procedural provisions were also changed to make it more difficult to adopt sanctions against non-compliant Member States. In addition to that, the deadlines for imposing sanctions were prolonged.<sup>124</sup> These amendments were preceded by a Council decision not to continue with the deficit-procedure against France and Germany which was later declared not to be in accordance with the European Union law by the Court of Justice.<sup>125</sup>

Whereas the „convergence criteria“<sup>126</sup> were set up to warrant that only such Member States could introduce the euro which are sufficiently homogeneous with respect to the rest of the euro area, the rules on economic stability and on budgetary deficits should guarantee the required „community of lasting

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<sup>122</sup> Council Regulation (EC) no. 1055/2005 of 27 June 2005, Official Journal L 174, 7 July 2005, p. 1; Council Regulation (EC) no. 1056/2005 of 27 June 2005, Official Journal L 174, 7 July 2005, p. 5. On 20 March 2005 the ECOFIN Council adopted a report entitled “Improving the implementation of the Stability and Growth Pact”. This report was endorsed by the European Council in its conclusions of 22 March 2005 and is now considered by the ECOFIN Council as an “integral part” of the Pact, see the consolidated version of the “Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes”, endorsed by the ECOFIN Council on 7 September 2010, p. 3.

<sup>123</sup> Art. 51 TEU. It might be argued, however, that they could be modified by acts of the secondary law on the basis of Article 126 para. 14 subparagraph 2 TFEU. The protocol could have been replaced on this basis but remained untouched. The legal validity of the regulation was not affected by this, see *Hentschelmann* (2009), p. 1207.

<sup>124</sup> Severe criticism: *Deutsche Bundesbank*, Monatsberichte, April 2005, p. 15 (20); *Stark* (2005), p. 64; *Zeitler* (2006), p. 235; more reserved: *Hatje* (2006), p. 604.

<sup>125</sup> ECJ, Judgement of 13/7/2004 – C-27/04 (Commission vs. Council), *Europäische Zeitschrift für Wirtschaftsrecht*, 2004, p. 465; *Juristen-Zeitung*, 2004, p. 1069 with comment *Kotzur*; see also *Dutzler/Hable* (2004); *Nicolaysen* (2004).

<sup>126</sup> *Supra* p. 24.

stability“ as the Federal Constitutional Court of Germany had demanded.<sup>127</sup> Beyond the deficit criteria it remained the goal of the goal of the EU in the framework of the Monetary Union that the public sector in the medium term should have an „almost“ balanced budget or even a surplus to have sufficient leeway for built-in stabilizers.<sup>128</sup>

## VI. No liability for the public sector of a Member State

In scholarly debates and in the media the existence of a so-called “no bail-out” clause is regularly assumed. This is premature as a complete interdiction of “bail-outs” is *not* clearly expressed in the Treaties. Article 125 para. 1 TFEU only states that the Union and the Member States shall not be liable for the commitments of central governments, regional, local or other bodies governed by public law, or public undertakings of any Member State. Moreover, at least some type of voluntary support is prohibited as neither the Union or Member States shall “assume” such commitments. The assumption of debt is, however, not identical with financial support of a Member State in need. There is room for interpretation as bilateral payments or credit guarantees must not necessarily be judged as “assuming” a commitment.

These rules do, however, not apply to Member States of the European Union whose currency is not the euro. In case a “Member States with a derogation”<sup>129</sup> is in “difficulties or seriously threatened with difficulties as regards its balance of payments” the Council can eventually grant “mutual assistance” and “appropriate methods” therefore.<sup>130</sup> In case a “sudden crisis” in the bal-

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<sup>127</sup> Supra p. 23.

<sup>128</sup> Council resolution (supra note 119 **Fehler! Textmarke nicht definiert.**), S. 1; Regulation 1466/97 (supra note 120), recital (2); Regulation 1467/97 (supra note 121), recital (3).

<sup>129</sup> Terminology introduced by the Treaty of Lisbon, Article 139 para. 1 TFEU.

<sup>130</sup> Article 143 para. 1 subpara. 2, para. 2 TFEU.

ance of payments occurs the Member State may take the necessary protective actions as well.<sup>131</sup>

To complete the reasoning, another clause has to be taken into account. Article 122 para. 2 TFEU allows (voluntary) financial assistance under certain, very restrictive conditions: “Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control” such an aid may be provided. The clause and the wording result from a compromise. By using this phraseology the framers of the Treaty still show that they keenly intended to limit support payments to specific, extraordinary situations. Also the term “occurrences beyond its control” might be interpreted in different ways. It was inserted later in the course of the framing process of the Treaty as the original version wanted to restrict the aid only to a situation of natural disasters. This way any incentive for circumventing the rules should be excluded. The question that remains is whether this is an exclusive provision banning all other types of aid which do not fulfil its prerequisites.

A complete interdiction of support apart from that could therefore only be the result of careful legal reasoning considering the totality of Articles 122 para. 2, 143 para. 1, and 144 para. 1 TFEU. The purpose of the clauses is clear: The determination of the Member States to comply with the required budgetary discipline was to be strengthened and lenders were to receive a clear signal that there could be a (potential) risk. In effect, the opinion of legal scholars in Germany on the “constitutionality” of financial support by the Union or its Member States is split.<sup>132</sup>

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<sup>131</sup> Article 144 para. 1 TFEU.

<sup>132</sup> See for references *Herrmann* (2010), 414 footnote 19, who is – with some reservations – in favour of constitutionality.

## E. MACROECONOMIC SURVEILLANCE AND COMMON FISCAL POLICY

Partially as a consequence of its report on intra-euro-area imbalances<sup>133</sup> the Commission submitted a comprehensive “economic governance package” on 29 September 2010, covering three main subjects:

- reinforcement of Member States’ compliance with the Stability and Growth Pact
- broadening of economic surveillance to prevent, detect and correct macroeconomic imbalances and divergences in competitiveness
- strengthening of the enforcement mechanisms.<sup>134</sup>

The measures to prevent and correct macroeconomic imbalances contain

1. an alert mechanism through a scoreboard
2. a preventive surveillance based on discussions with the Member States and in-depth reviews
3. an excessive imbalance procedure (EIP) applying to EU Member States
4. an enforcement mechanism for the euro area members.<sup>135</sup>

Altogether six legislative proposals for concrete legal instruments were submitted. Two proposals deal with the amendment of the regulations which constitute in essence the stability and growth pact.<sup>136</sup> The first is based on

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<sup>133</sup> *European Commission* (2010).

<sup>134</sup> MEMO/10/455, 29 September 2010.

<sup>135</sup> MEMO/10/454, 29 September 2010

<sup>136</sup> Proposal for a Council Regulation (EU) amending Regulation (EC) No. 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, COM(2010) 526 final, 2010/0280 (COD); proposal for a



Article 121 TFEU, the second on Article 126 TFEU. The regulation on the prevention and correction of macroeconomic imbalances is completely new. It is set up to detect imbalances and to establish a corrective procedure (“excessive imbalance procedure” – EIP).<sup>137</sup> Also new is the regulation that aims to establish national budgetary frameworks of quality.<sup>138</sup> These requirements for the budgetary frameworks of all Member States are based on Article 126 para. 14 TFEU. In particular, they aim to specify the obligations of national authorities to comply with the provisions of Article 2 of the Protocol (No. 12) on the excessive deficit procedure.

Two regulations deal specifically with enforcement of rules: one provides enforcement mechanism for the budgetary surveillance of euro area Member States<sup>139</sup> and the other one deals with the enforcement of actions to correct macroeconomic imbalances in general.<sup>140</sup> The effective enforcement of budgetary surveillance is based on Article 136 in combination with Article 121 para. 6 TFEU. Both regulations allow fines not only for excessive deficits but also for exceeding the debt level of the reference values. The discretionary power of the Council is reduced significantly.<sup>141</sup>

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Council Regulation (EU) amending Regulation (EC) No 1466/97 on speeding up and clarifying the implementation of the excessive deficit procedure, COM(2010) 522 final, 2010/0276 (COD).

<sup>137</sup> Proposal for a Regulation of the European Parliament and of the Council on the prevention and correction of macroeconomic imbalances, COM (2010) 527 final, 2010/0281 (COD).

<sup>138</sup> Proposal for a Council Directive on requirements for budgetary frameworks of the Member States, COM (2010) 523 final, 2010/0277 (NLE).

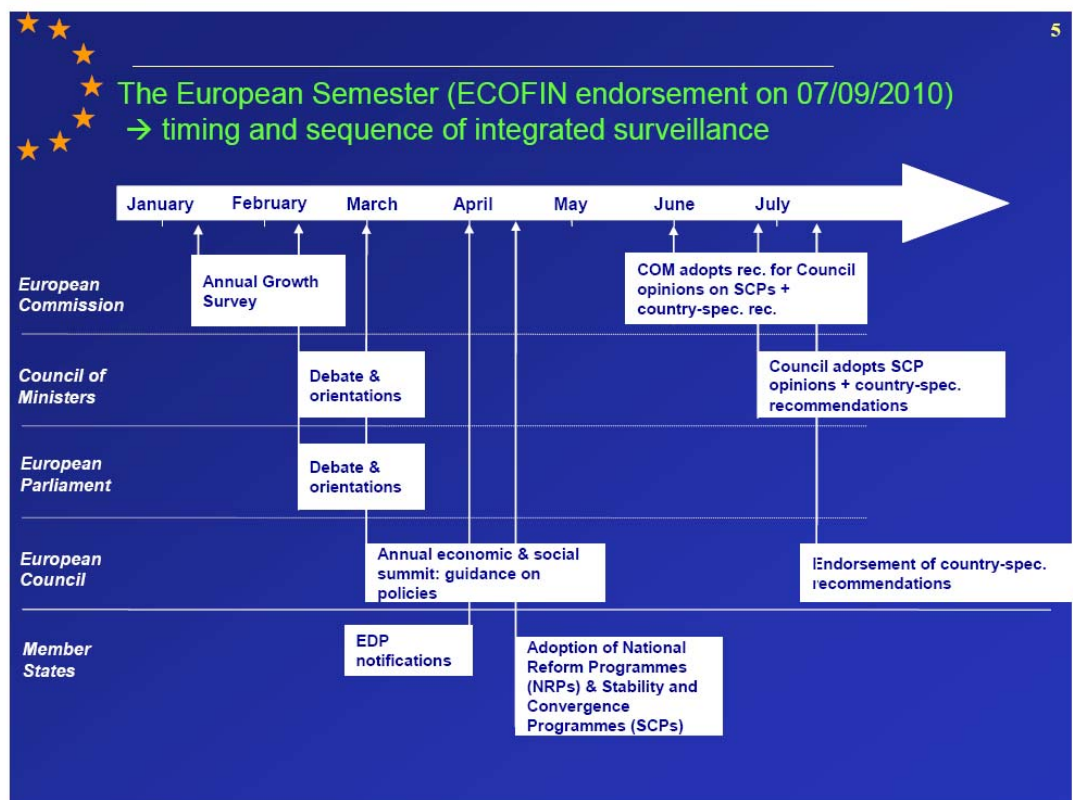
<sup>139</sup> Proposal for a Regulation of the European Parliament and of the Council on the effective enforcement of budgetary surveillance in the euro area, COM (2010) 524 final, 2010/0278 (COD).

<sup>140</sup> Proposal for a Regulation of the European Parliament and of the Council on enforcement measures to correct excessive macroeconomic imbalances in the euro area, COM (2010) 525 final, 2010/0279 (COD).

<sup>141</sup> Proposals 522 and 526 final, p. 3.

The requested automatism might be realized indirectly by introducing a “reverse” decision making mechanism (“reverse QMV”). It leads to *semi-automatic sanctions*, as they are derived directly from the normative rule and can only be stopped by a (“reverse”) decision with a qualified majority. It is assumed that such a majority will be difficult to rally support, so that sanctions will be the normal case.

The package will in the end also contain a “European Semester” to integrate the multitude of provisions into the national decision making process.



Source: European Commission, MEMO/10/456 of 29 September 2010.

The package clearly contains elements of a common fiscal policy for the Member States and a first step towards a macroeconomic guidance. It reminds in some respects of the “planification” in France and the “global steering” of the economy (“Globalsteuerung”) which had been attempted in Ger-

many from 1966 on but largely failed. On the other hand it will provide the demanded increase of transparency in the budgetary process of the Member States.<sup>142</sup>

## F. OVERALL ANALYSIS

From the beginning on, it was an almost relentless mantra of economists that it was not a question *if* the single currency would fail but only *when*. To their surprise, the technical procedure of introducing the euro went smoothly even though that had been judged as challenging. But that did not keep them from continuing their criticism. Each of the following movements of the dollar-euro exchange rates was accompanied by critical comments and the inevitable prediction of the imminent end of the common currency - no matter whether it went up or down. It was never at a level that satisfied economic analysts.

### I. The “instrumental” view of the currency

At the various stages of the introduction of the monetary union, economists and politicians had debated extensively, what would be the “right” path to take.<sup>143</sup> The “economist” view, which included the majority of German economists, considered the removal of all obstacles to a truly integrated single market as essential.<sup>144</sup> The introduction of the common currency would follow almost automatically and was seen as a kind of “coronation” of the economic

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<sup>142</sup> *Burda/Gerlach* (2010), p. 66.

<sup>143</sup> For an early discussion see *Mundell* (1961), p. 662, who reduces the analysis finally to the question whether Western Europe can be considered to be a „single region“, defined by internal factor mobility and external factor immobility which is in his view essentially „an empirical problem“.

<sup>144</sup> It was mainly the Bundesbank seconded by the Dutch central bank which insisted that economic union had to precede monetary union, see for details and references including internal papers *Marsh* (2009), p. 54 et seq.

integration. In contrast, the “monetarist” approach considered the introduction of the single currency as a tool to enhance (economic) integration. The underlying economic facts and prerequisites for the functioning of a monetary union play a minor role in this way of thinking.<sup>145</sup> For many economists this is “highly questionable”.<sup>146</sup>

In the end, the “monetarist” approach seems to have prevailed, especially as fixed dates were set for the start of the single currency. However, economic facts played a strong role in the process. No common economic policy was prescribed in the Treaty, but at least strong coordination mechanisms. No truly common fiscal policy was installed, but numerical goals for budget deficits were set up, however arbitrary they might be. The vast majority of federal states – with one currency - did not have anything close to this at that time. This is too often suppressed in public debates. The admission criteria were almost purely based on economic coherence even if there was room for discretion.

The majority of the framers of the Monetary Union, especially political leaders, assigned the Monetary Union and the single currency the “role of a pacemaker towards political union”. Objections were expressed, but mainly from sources which opposed the goal of an evolvement of the European Communities into a federal state anyhow.<sup>147</sup> Others thought more in the categories of the Werner plan: development towards a political union *parallel* to the introduction of the single currency.<sup>148</sup> However, the question remains

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<sup>145</sup> For details see: *Issing* (2008c), p. 302; *Marsh* (2009), p. 39-41, 53-57.

<sup>146</sup> *Issing* (2008c), p. 302; for an early opposite view see *Scitkovsky* (1958), chapter 2.

<sup>147</sup> Mainly the then Prime Minister *Margret Thatcher*, see *Issing* (2008), p. 304.

<sup>148</sup> *Issing* (2008c), p. 303 et seq. with many details.

whether “integration via the Economy”<sup>149</sup> is a viable approach. Especially using the project of a single currency to foster political objectives raises concerns. From an economist’s point of view, it seems hard to perceive how the common currency can promote political unification. Doubts are also expressed that a strong single currency could work as a political prestige project reducing the “might” of the U.S. dollar.<sup>150</sup> On the other hand, the modern “fiat” money is always based on political decisions and is tied closely to legal rules enacted by a sovereign.<sup>151</sup> It is a creation of the legal system, at least the monetary basis of central bank money.<sup>152</sup> As a result, the act of creating a common currency constitutes *in itself* the formation of a closer political union. Another question is the hope or expectation that *additional* political objectives may be achieved by using it and by the work of its institutions.

## II. The performance of the euro

Judging from the overall performance of the euro and the ESCB, it has been a *great success*, economically and politically. It did extremely well during the present financial crisis and the sovereign debt problems of some Member States are predominantly a problem of the Union and of the other Member States, who feel obliged to help, but *not* of the monetary system.<sup>153</sup> The U.S. dollar is not endangered because the states of California and Illinois are de facto insolvent and have no legal claim on support by the federal government. An indicator of the success is also the increase of the number of Member States which have been admitted to the euro from 11 to 17. Of course,

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<sup>149</sup> Described by *Issing* (2008c), p. 299 et seq.

<sup>150</sup> Skeptical *Issing* (2008c), p. 303.

<sup>151</sup> *Mishkin* (2004), p. 48.

<sup>152</sup> Groundbreaking despite all criticism, *Knapp* (1905), p. 53 et seq., 123, 131, 145

<sup>153</sup> *Heun* (1998), p. 873 et seq.

part of this might be the result of strategic behavior, but costs and benefits for the single member have to be analysed more in depth. Even among sceptical economists there is little doubt on the performance of the euro as a strong and stable currency, worldwide accepted and increasingly used as a reserve.<sup>154</sup>

The primary objective of *price stability* has been fully achieved. The average annual rate of inflation has been below 2%. Accordingly, the officially publicized goal of the ECB has been fulfilled. In effect the euro has been performing better in this respect than the German Mark which serves as an unofficial benchmark.

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<sup>154</sup> Baldwin/Gros (2010), p. 3; comprehensive coverage by the *European Commission* (2008); see also the contributions in: *Bishop/Buiter/Donnelly/Hutton* (2008).

## Overall consumer price inflation



European Central Bank, Monthly Bulletin, June 2011, p. 12.

## Consumer price inflation excluding energy and food

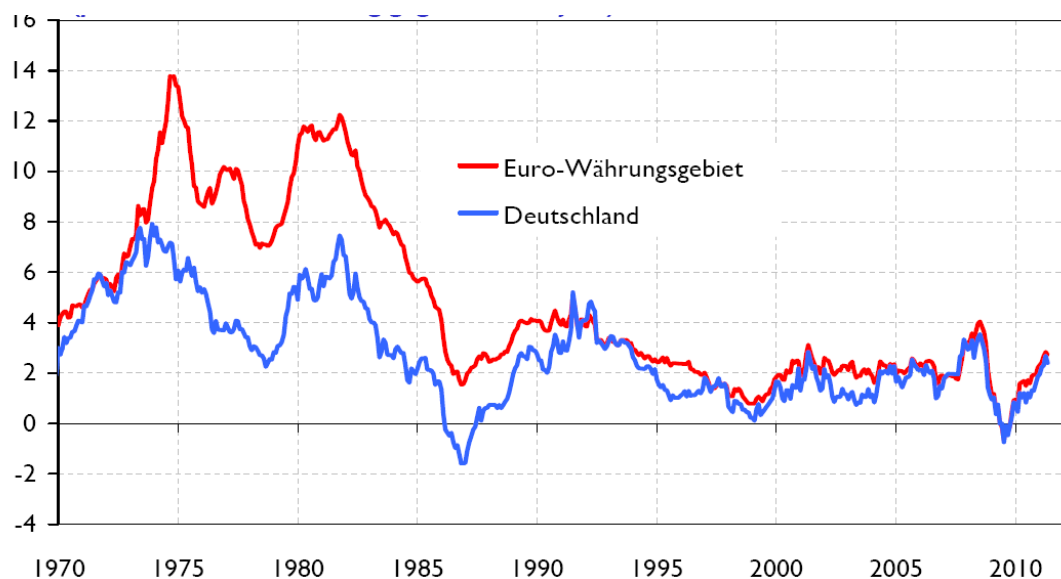


European Central Bank, Monthly Bulletin, June 2011, p. 12.



## Harmonized index of consumer prices

Annual percentage change



Monatliche Angaben bis Mai 2011. Euro-Währungsgebiet in jeweiliger Zusammensetzung. Angaben für Deutschland vor 1995 beziehen sich auf Westdeutschland.  
Quellen: BIZ, Eurostat und EZB-Berechnungen.

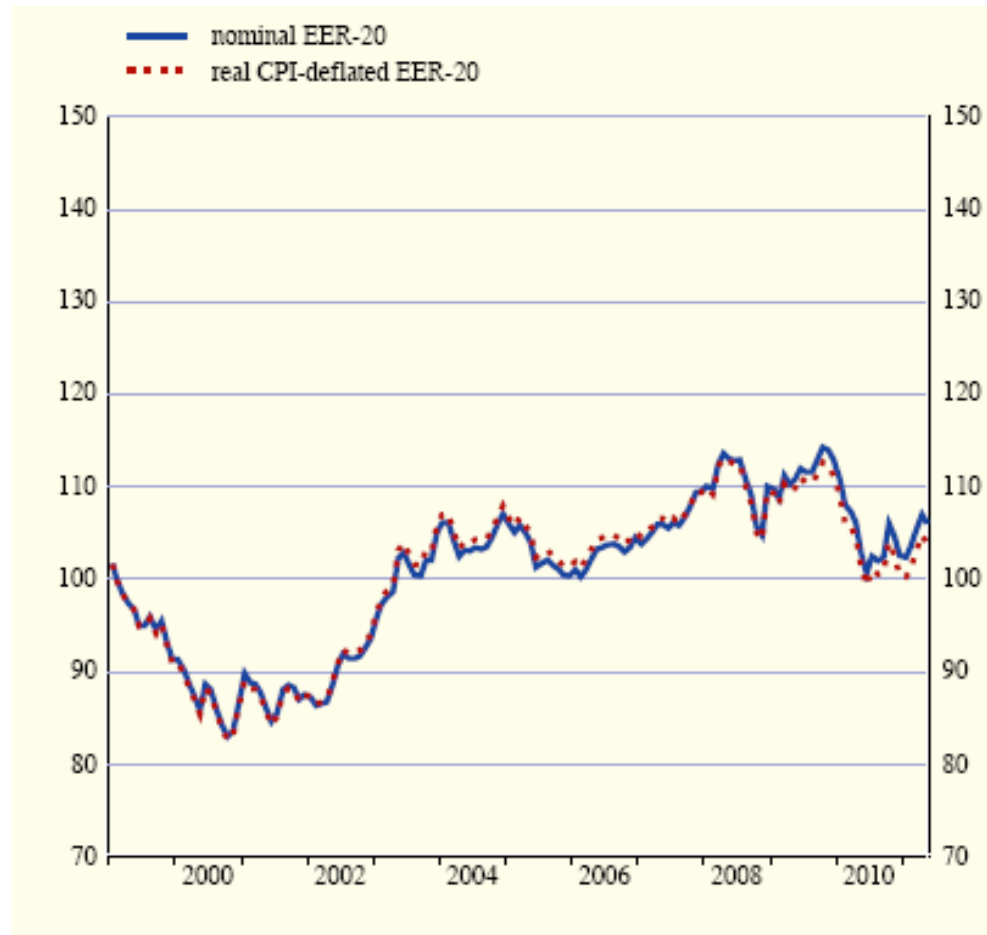
Jürgen Stark, Staatsschuld und Geldpolitik: Lehren aus der globalen Finanzkrise, Rede, Münchner Seminare: CES ifo Group Munich & Süddeutsche Zeitung, München 20 Juni 2011, slide 2 (European Central Bank).

The *external value* of the euro has increased for over ten years. Few currencies have appreciated against the euro during recent years. The exchange rate against the U.S. dollar remains at an almost all-time high, despite the alleged “euro-crisis”. It is of secondary importance whether this outcome (partially) reflects only the weakness of the dollar. The euro has been stable and above its fundamental value which is widely seen between 1.10 to 1.20 USD per euro.

This should be kept in mind despite the constant criticism from “experts”. When the exchange rate approaches 1.60, it is allegedly far too high and hurts the export. When it falls below 1.30, the end of the euro is close and the monetary union has to be dissolved soon.

## Euro effective exchange rates (EER-20)

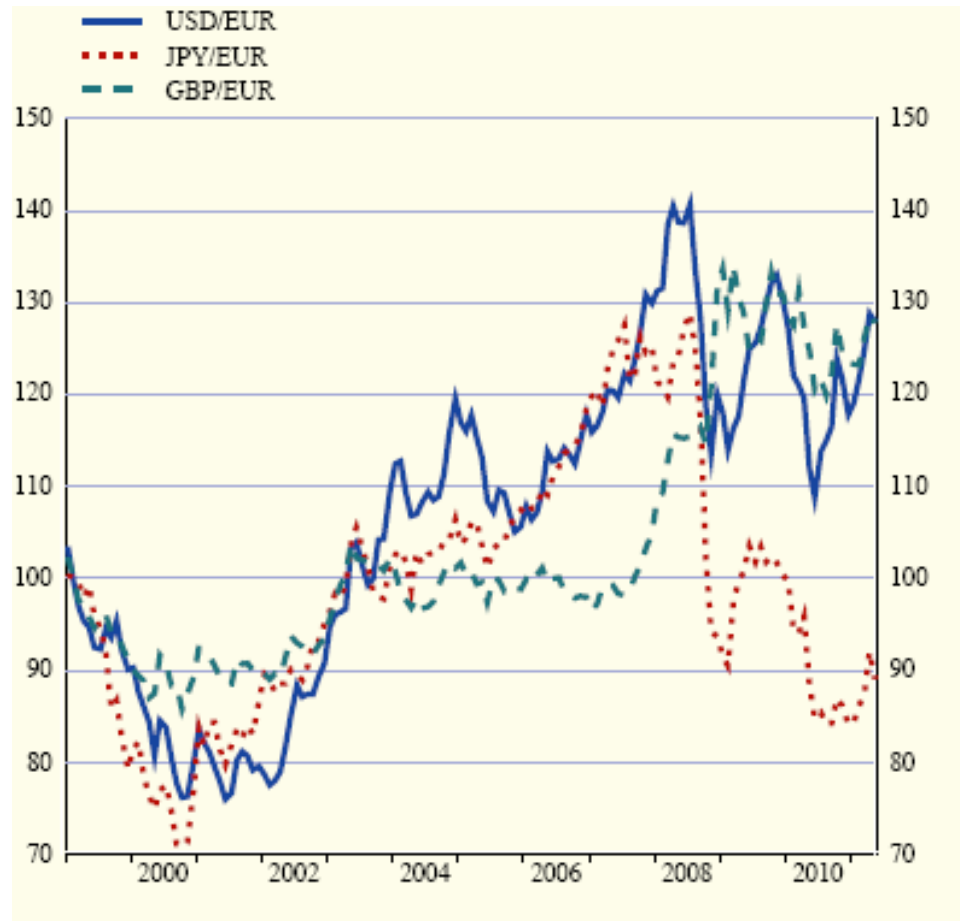
(monthly averages, 1999 Q1=100)



European Central Bank, Monthly Bulletin, June 2011, S 73.

## Bilateral exchange rates

(monthly averages, 1999 Q1=100)



European Central Bank, Monthly Bulletin, June 2011, S 73.

The envisaged *reduction of transaction costs* has been achieved as well. Such costs stem basically from the following sources: transformation of prices into a former currency, procuring and keeping foreign currency, and the risk of exchange rate changes. The latter can, of course, be hedged against by modern financial instruments, but only at a premium. Estimates of the positive effects of the reduced transaction costs run up to 0.5% p.a. additional average growth for the euro-zone as a whole. In addition to that, a plethora of non-monetary benefits were created for consumers.

*Long term interest rates* have been kept low, for some Members of the euro-zone far below the level they had to pay before the introduction of the euro. This is not only due to the introduction of the single currency but it is part of it. Low real long term interest rates lead in general to a reduction in financing costs and may induce (additional) investments. The low interest rates in the euro-zone have, however, partially proven to be a “Danaers gift”. They contributed to the rise of a real estate bubble in Ireland and Spain. More detrimental, they induced several southern European states to increase their consumptive government spending, financed by credits, to a level which is not sustainable. This is, however, not a flaw of the Monetary Union but of autonomous political and economic decisions, partially in disregard of EU law.

## Macroeconomic performance indicators

		Period averages					
		Euro area		Denmark, Sweden, UK		United States	
		1989-1998	1999-2008	1989-1998	1999-2008	1989-1998	1999-2008
Real GDP	% rate of change	2,2	2,1	2,0	2,7	3,0	2,6
Real GDP per capita	% rate of change	1,9	1,6	1,7	2,2	1,8	1,6
Real GDP per capita	index, US = 100	73	72	74	76	100	100
Employment	% rate of change	0,6	1,3	0,1	0,9	1,5	1,0
Labour productivity	% rate of change	1,6	0,8	1,9	1,8	1,5	1,6
Unemployment	% of labour force	9,3	8,3	7,9	5,2	5,8	5,0
Inflation	%	3,3	2,2	3,4	1,7	3,3	2,8
Fiscal balance	% of GDP	-4,3	-1,7	-3,6	-0,9	-3,3	-2,5
Gross public debt	% of GDP	68,6	68,6	48,7	43,0	67,8	60,7
Long term interest rate	%	8,1	4,4	8,6	4,9	7,1	4,8
Real long term interest rate	%	4,7	2,4	4,2	3,3	4,3	2,4

Source: European Commission, OECD

European Commission, EMU@10, 2008, p. 19.

The mere existence of the Monetary Union has been a stabilizing factor in the *present crisis*. An almost certain run for devaluation with severe destabilizing effects could be avoided. A speculative attack on a small currency is also easier than against a big currency which is widely used. Massive intervention by central banks would not have prevented the collapse of the ex-

change rate system,<sup>155</sup> like in 1969 or 1992 when the dimension of economic and political strains on currencies was far smaller.

### **III. The alleged structural flaws of the monetary union**

Economists had been critical of the monetary union from the beginning on. In their view the European Monetary Union simply could not work, or maybe it should not work.<sup>156</sup> Several fundamental structural flaws are emphasized:

1. unsuitable area for a common currency
2. lack of a state backing the currency
3. insufficient political integration
4. lack of a truly common fiscal policy

#### **1. Unsuitable currency area**

In the past, governments had quite often tried to solve budgetary problems by lowering the internal or external value of the currency or both: inflation and/or depreciation. Both mechanisms had regularly not improved the internal economic strength of a country in the long run. The often deep rooted structural problems could only have been solved by a combined effort of the government and the economic agents. It is usually a painful und long-lasting endeavor and that was lacking. In a monetary union depreciation of the currency is not available any more and inflation is substantially limited as long as monetary policy follows the primary goal of price stability as prescribed by the primary law of the Union.

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<sup>155</sup> *Issing* (2008c), p. 301.

<sup>156</sup> Informative is the comprehensive review of the American economic publications on the topic by *Jonung/Drea* (2009) with the title: „The euro: It can't happen. It's a bad idea. It won't last.“

Due to this reduction of freedom of choice for governments in the area of a single currency it can be asked whether the area has been and is suitable for a single currency.<sup>157</sup> The theory of optimal currency areas concentrates on regions.<sup>158</sup> It defines as an optimal area for a currency a region, defined by internal factor mobility and external factor immobility.<sup>159</sup> Later the degree of openness of an economy, the product diversity and the stability of real exchange rates were added. The stability of the real exchange rates became eventually the dominant indicator for the convergence of an area necessary for a common currency.<sup>160</sup> Altogether the emphasis was on the cost side. The benefits of a common currency were taken into account later. They are difficult to assess but can – even in theory – turn the evaluation positive. Altogether it boils down to an empirical assessment<sup>161</sup> but there is no predefined borderline as it is mainly a dimensional instead of a categorical difference.

When evaluating the different factors, it must not be forgotten that the introduction of the Monetary Union was primarily a political decision and not an economic development.<sup>162</sup> The economic calculation has to be added to the political benefits derived from such a decision. So a *mere* economic view is

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<sup>157</sup> American economists were almost exclusively focussed on the optimal currency area theory, and that in a static way. They mainly did a cost – benefit analysis comparing fully flexible exchange rates with a permanently fixed rate aloof from the real (institutional) setup in Europe. In addition to that, they did not take sufficiently into account the existing factors of political economy in favor of a closer European integration; see *Jonung/Drea* (2009), p. 28-30; see also *Wilms* (1998); *Seiter* (2002), p. 176-196 who judges the theory as little helpful.

<sup>158</sup> *Mundell* (1961), p. 660.

<sup>159</sup> *Mundell* (1961), p. 661.

<sup>160</sup> See the overview at *Wilms* (1998), p. 42-46. It is also considered to be the best indicator for both banking crises and currency crises, see *Reinhart/Rogoff*, p. 381 et seq.

<sup>161</sup> *Mundell* (1961), p. 662.

<sup>162</sup> *Supra* p. 11; acknowledged by *Mishkin* (2004), p. 49.

too narrow.<sup>163</sup> This does not, however, imply that economic *facts* can or should be neglected in a political project with an economic objective or on “economic rails”. A political project of this kind comes at a cost. The political decision making bodies have to realize – and some did from the beginning on<sup>164</sup> - that such a project might lead to financing wants which have to be distributed.

As a result, the introduction of the single currency and the acceptance of new members have to be judged by the marginal net benefit or net cost of the whole project including all political aspects. Although, once a decision has been taken, the cost-benefit structure changes dramatically compared to the situation *ex ante*.

## **2. A currency without a state**

A common criticism had been that it would not be possible – or at least not suitable - to form a monetary union without a political union. As a minimum, a well coordinated economic policy and a common fiscal policy of the members of the monetary union was considered to be indispensable. In effect, it was also contended that a strong central bank needed a counterpart which speaks with one voice. In addition it was argued that in times of crisis a monetary system needed a clear governmental unit to bear the financial burdens of rescue operations – both for private financial institutions and for governments.

This assessment is partially due to the outdated understanding of a central bank as a commercial unit which has to keep its balance sheet balanced and might need fresh capital when its equity is eaten up. For a public law entity

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<sup>163</sup> See *Jonung/Drea* (2009), p. 30. *Wilms* (1998), p. 49 considers only an import of credibility and of the efficiency of the monetary policy as a benefit at the macro level.

<sup>164</sup> E.g. former German President *Richard von Weizsäcker*, see *Issing* (2008c), p. 303.

which has the right to produce the money with which it can pay its bills, this is not true. There is no need – other than monetary policy reasons – to reduce or even discharge its debt with the consequence of a financial burden to distribute. Partially this view is based on an economic theory of the role of a central bank which might be true in the U.S. but is definitely false in the EU: The ECB is by no means allowed to finance any public sector entity. Even exceptional circumstances do not justify such a serious breach of law. Otherwise common robbery could be justified too.

From a legal point of view, it was stipulated that only a state could have a currency and not a supranational organization like the European Union.<sup>165</sup> For this reason attempts were undertaken to construe the euro not as the currency of the EU but of a group of sovereign states united to form the currency. However, if the appropriate sovereign powers are transferred to a body governing the currency, no convincing legal reasons exist why a currency cannot exist without a state backing it.<sup>166</sup> Even if the ECB is considered not to be a pillar of the Union but an independent specialized organization of Community law,<sup>167</sup> the ECB within the framework of the ESCB can act as a governing body set up by public law based on a treaty. Historically, even full fledged states have been established by contract, e.g. the Norddeutsche Bund and its successor, the German Reich of 1870, which is often not realized.

### **3. Deficits in political integration**

As early as 1957 *J.E. Meade* stated that a monetary union even with the then only six members of the EEC would require a “single European government”. In his view “such a government would have to be able to control central-bank

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<sup>165</sup> See *Torrent* (1999), p. 1229.

<sup>166</sup> Implicitly accepted by *Zilioli/Selmayr* (2000), p. 643.

<sup>167</sup> *Zilioli/Selmayr* (2000), p. 621, 643.



monetary policy and governmental budgetary policy throughout Europe”<sup>168</sup> A closer look reveals, that a monetary system is not necessarily tied to a (centralized) political system as long as the free flow of goods, labor, and capital is guaranteed, the monetary institutions are granted sufficient powers and independence from politics, and structural discrepancies are being taken care of.<sup>169</sup> This is especially true under the assumption that the monetary system has as its primary objective price stability and not other goals of economic policy like growth or employment. It has to be kept in mind that the institutional setup of the Federal Reserve System of the U.S. differs considerably in this respect from the Monetary Union of the EU.<sup>170</sup>

However there is a strong call for a political union.<sup>171</sup> The deficit of political integration can be specified as an unfulfilled want of an economic and fiscal government. It is a strongly debated question whether the rules of the primary law (Articles 119-126 TFEU) and of the Stability and Growth Pact have to be expanded to create a body which could be called an *economic government of the EU*. This entity would outline a common economic and fiscal policy and could decide specific questions of common concern. The proposed economic governance package is a step in this direction.<sup>172</sup>

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<sup>168</sup> Meade (1957), p. 388.

<sup>169</sup> These are in principle the preconditions Meade (1957) is requiring too and which did not exist in 1957 for the EEC. Only his requirement of one central government is not met but it did not exist with the described powers in federal states. His focus is too much on England which cannot serve as a role model for federal systems.

<sup>170</sup> Mishkin (2004), p. 350 et seq., 413.

<sup>171</sup> See e.g. de Grauwe (2010), p. 31.

<sup>172</sup> Supra p. 37.

Such a development could also be seen as creating a threat to the stability of the currency and the independence of the ECB. Instead of changing the rules, the existing rules ought to be obeyed more closely.<sup>173</sup>

#### 4. Lack of a common fiscal policy

A common fiscal policy is *not* indispensable for the functioning of a monetary union. Unsustainable budget deficits and debt levels do not destabilize a currency by itself. Contrary to a widespread belief, there is no direct link between an irresponsible fiscal policy and the *monetary system* as long as the financing of a fiscal deficit by the central bank is *effectively inhibited* and an obligation for support does not exist. Effective independence is decisive in this circumstance.<sup>174</sup> The empirical studies about a contagion between deficit crises and currency crises are usually based on the existence of a national currency which does not exist in the European Monetary Union.<sup>175</sup> It is an open question whether the EU, (not the Monetary Union) could withstand the aggregate pressure of media, politicians, financial institutions and speculators when a Member State will not pay its debt, how small it may be in relation to the whole Union.

However, budget deficits and sovereign debt levels are definitely a good predictor for the solvency of a state in the medium range.<sup>176</sup> It is an open question whether the insolvency of a Member State would not be used to put pressure on the institutions of the monetary system; not only by politicians but also by the media which might be unwilling or unable to see the differ-

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<sup>173</sup> *Issing* (2008c), p. 306; strongly in favour of a new institutional framework for the euro area including an amendment of the Stability and Growth Pact, new stability rules for the financial markets, and a European crisis resolution mechanism *Sachverständigenrat* (2010), p. 89 et seq.

<sup>174</sup> See already *Heun* (1998), p. 873 et seq.

<sup>175</sup> See the overview at *Karb* (2006), p. 168 et seq.

<sup>176</sup> *Karb* (2006), p. 96, 267.

ence between a budget problem and a currency problem. Only because many governments in the past have tried to solve their budgetary problems by manipulating the monetary system, it cannot simply be assumed that the same would happen in the Monetary Union. Even though these manipulations have a long tradition, there is change. They are legally not possible in the European Monetary Union. It would be a *clear breach of the law*, even under extraordinary circumstances. But pressure on the ECB might be increased nevertheless.

It is prudent to *prevent* budget crises and the insolvency of a Member State. This could be done by market sanctions for an unsustainable deficit. Markets tend to react (too) late and not always in a rational manner.<sup>177</sup> Serious regulatory flaws have also contributed considerably to the malfunction of market forces.<sup>178</sup> The lack of a common fiscal policy might also reduce the ability to even out the upturns and downturns in the course of the cyclical movements of the economy.<sup>179</sup> Legal norms, effectively enforced, may constitute the only way to prevent the insolvency of a state.

The norms and the practice, especially the Stability and Growth Pact, allegedly did not fulfill their purpose.<sup>180</sup> Usually the debt criteria are used to demonstrate this point without taking into account that they are not strict limits but reference values.<sup>181</sup>

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<sup>177</sup> This was known already at the time of framing on the monetary union: Report on economic and monetary union in the European Community, OPOCE, 1989, p. 24; later *Besson*, in *L'euro dix ans après*, Colloque de la CEDECE, 18 juin 2010.

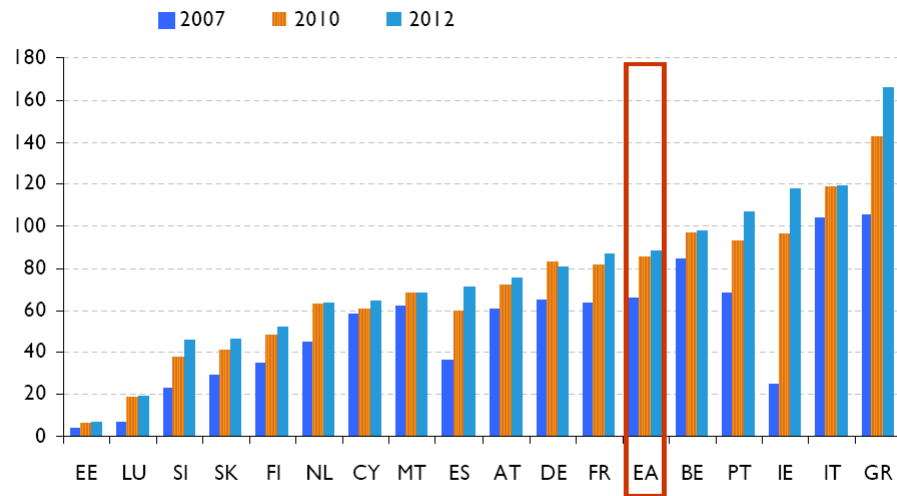
<sup>178</sup> *Infra* p. 74.

<sup>179</sup> *Eichengreen* (1994), p. 183 et seq.

<sup>180</sup> *Baldwin/Gros* (2010), p. 4; *Burda/Gerlach* (2010), p. 65; *Sachverständigenrat* (2010), p. 89 et seq.; earlier similarly *Feldmann* (2003).

<sup>181</sup> *Baldwin/Gros* (2010), p. 5.

## Debt of general government (percentage of GDP)



Quelle: Europäische Kommission, Frühjahrsprognose 2011.

*Jürgen Stark*, Staatsschuld und Geldpolitik: Lehren aus der globalen Finanzkrise, Rede, Münchner Seminare: CES ifo Group Munich & Süddeutsche Zeitung, München 20 Juni 2011, slide 12 (European Central Bank).

## Net lending / net borrowing of general governments (percentage of GDP)

	5-year averages							Spring 2011 forecast			Autumn 2010 forecast	
	1992-96	1997-01	2002-06	2006	2007	2008	2009	2010	2011	2012	2011	2012
Belgium	-5.4	-0.7	-0.6	0.1	-0.3	-1.3	-5.9	-4.1	-3.7	-4.2	-4.6	-4.7
Germany	-3.0	-1.6	-3.3	-1.6	0.3	0.1	-3.0	-3.3	-2.0	-1.2	-2.7	-1.8
Estonia	:	-0.5	1.5	2.4	2.5	-2.8	-1.7	0.1	-0.6	-2.4	-1.9	-2.7
Ireland	-1.7	2.4	1.2	2.9	0.1	-7.3	-14.3	-32.4	-10.5	-8.8	-10.3	-9.1
Greece	-9.6	-4.2	-5.8	-5.7	-6.4	-9.8	-15.4	-10.5	-9.5	-9.3	-7.4	-7.6
Spain	-5.6	-1.9	0.4	2.0	1.9	-4.2	-11.1	-9.2	-6.3	-5.3	-6.4	-5.5
France	-4.9	-2.1	-3.2	-2.3	-2.7	-3.3	-7.5	-7.0	-5.8	-5.3	-6.3	-5.8
Italy	-8.3	-2.2	-3.5	-3.4	-1.5	-2.7	-5.4	-4.6	-4.0	-3.2	-4.3	-3.5
Cyprus	:	-3.6	-3.7	-1.2	3.4	0.9	-6.0	-5.3	-5.1	-4.9	-5.7	-5.7
Luxembourg	1.6	4.5	0.6	1.4	3.7	3.0	-0.9	-1.7	-1.0	-1.1	-1.3	-1.2
Malta	:	-7.6	-5.2	-2.8	-2.4	-4.5	-3.7	-3.6	-3.0	-3.0	-3.0	-3.3
Netherlands	-3.3	0.0	-1.3	0.5	0.2	0.6	-5.5	-5.4	-3.7	-2.3	-3.9	-2.8
Austria	-4.1	-1.6	-2.0	-1.6	-0.9	-0.9	-4.1	-4.6	-3.7	-3.3	-3.6	-3.3
Portugal	-4.6	-3.3	-3.9	-4.1	-3.1	-3.5	-10.1	-9.1	-5.9	-4.5	-4.9	-5.1
Slovenia	:	-3.1	-2.0	-1.4	-0.1	-1.8	-6.0	-5.6	-5.8	-5.0	-5.3	-4.7
Slovakia	:	-7.6	-3.9	-3.2	-1.8	-2.1	-8.0	-7.9	-5.1	-4.6	-5.3	-5.0
Finland	-5.8	2.7	3.1	4.0	5.2	4.2	-2.6	-2.5	-1.0	-0.7	-1.6	-1.2
Euro area	-5.0	-1.6	-2.5	-1.4	-0.7	-2.0	-6.3	-6.0	-4.3	-3.5	-4.6	-3.9
Bulgaria	:	0.5	0.6	1.9	1.1	1.7	-4.7	-3.2	-2.7	-1.6	-2.9	-1.8
Czech Republic	:	-4.4	-4.5	-2.6	-0.7	-2.7	-5.9	-4.7	-4.4	-4.1	-4.6	-4.2
Denmark	-2.5	0.9	2.6	5.2	4.8	3.2	-2.7	-2.7	-4.1	-3.2	-4.3	-3.5
Latvia	:	-1.4	-1.2	-0.5	-0.3	-4.2	-9.7	-7.7	-4.5	-3.8	-7.9	-7.3
Lithuania	:	-4.9	-1.1	-0.4	-1.0	-3.3	-9.5	-7.1	-5.5	-4.8	-7.0	-6.9
Hungary	:	-5.2	-8.0	-9.3	-5.0	-3.7	-4.5	-4.2	1.6	3.3	-4.7	-6.2
Poland	:	-3.9	-4.9	-3.6	-1.9	-3.7	-7.3	-7.9	-5.8	-3.6	-6.6	-6.0
Romania	:	-4.0	-1.6	-2.2	-2.6	-5.7	-8.5	-6.4	-4.7	-3.6	-4.9	-3.5
Sweden	-7.7	1.0	0.6	2.3	3.6	2.2	-0.7	0.0	0.9	2.0	-0.1	1.0
United Kingdom	-6.1	0.5	-3.0	-2.7	-2.7	-5.0	-11.4	-10.4	-8.6	-7.0	-8.6	-6.4
EU	:	-1.4	-2.5	-1.5	-0.9	-2.4	-6.8	-6.4	-4.7	-3.8	-5.1	-4.2
USA	-4.2	0.3	-3.7	-2.0	-2.8	-6.2	-11.2	-11.2	-10.0	-8.6	-8.9	-7.9
Japan	-2.5	-7.3	-6.1	-1.6	-2.4	-2.2	-8.7	-9.3	-9.7	-9.8	-6.4	-6.3

<sup>1</sup> ESA 79 up to 1994, ESA 95 from 1995 onwards.

European Commission, European Economic Forecast, Spring 2011, p. 221

## Gross debt general governments

(percentage of GDP)

								Spring 2011 forecast			Autumn 2010 forecast	
	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2011	2012
Belgium	98.5	94.2	92.1	88.1	84.2	89.6	96.2	96.8	97.0	97.5	100.5	102.1
Germany	63.9	65.8	68.0	67.6	64.9	66.3	73.5	83.2	82.4	81.1	75.9	75.2
Estonia	5.6	5.0	4.6	4.4	3.7	4.6	7.2	6.6	6.1	6.9	9.5	11.7
Ireland	30.9	29.6	27.4	24.8	25.0	44.4	65.6	96.2	112.0	117.9	107.0	114.3
Greece	97.4	98.9	100.3	106.1	105.4	110.7	127.1	142.8	157.7	166.1	150.2	156.0
Spain	48.7	46.2	43.0	39.6	36.1	39.8	53.3	60.1	68.1	71.0	69.7	73.0
France	62.9	64.9	66.4	63.7	63.9	67.7	78.3	81.7	84.7	86.8	86.8	89.8
Italy	104.4	103.9	105.9	106.6	103.6	106.3	116.1	119.0	120.3	119.8	120.2	119.9
Cyprus	68.9	70.2	69.1	64.6	58.3	48.3	58.0	60.8	62.3	64.3	65.2	68.4
Luxembourg	6.1	6.3	6.1	6.7	6.7	13.6	14.6	18.4	17.2	19.0	19.6	20.9
Malta	69.3	72.4	69.6	64.2	62.0	61.5	67.6	68.0	68.0	67.9	70.8	70.9
Netherlands	52.0	52.4	51.8	47.4	45.3	58.2	60.8	62.7	63.9	64.0	66.6	67.3
Austria	65.5	64.8	63.9	62.1	60.7	63.8	69.6	72.3	73.8	75.4	72.0	73.3
Portugal	55.9	57.6	62.8	63.9	68.3	71.6	83.0	93.0	101.7	107.4	88.8	92.4
Slovenia	27.3	27.4	26.7	26.4	23.1	21.9	35.2	38.0	42.8	46.0	44.8	47.6
Slovakia	42.4	41.5	34.2	30.5	29.6	27.8	35.4	41.0	44.8	46.8	45.1	47.4
Finland	44.5	44.4	41.7	39.7	35.2	34.1	43.8	48.4	50.6	52.2	51.1	53.0
Euro area (a)	69.0	69.4	70.0	68.4	66.2	69.9	79.3	85.4	87.7	88.5	86.5	87.8
Bulgaria	44.4	37.0	27.5	21.6	17.2	13.7	14.6	16.2	18.0	18.6	20.2	20.8
Czech Republic	29.8	30.1	29.7	29.4	29.0	30.0	35.3	38.5	41.3	42.9	43.1	45.2
Denmark	47.2	45.1	37.8	32.1	27.5	34.5	41.8	43.6	45.3	47.1	47.5	49.2
Latvia	14.6	14.9	12.4	10.7	9.0	19.7	36.7	44.7	48.2	49.4	51.9	55.6
Lithuania	21.1	19.4	18.4	18.0	16.9	15.6	29.5	38.2	40.7	43.6	42.8	48.3
Hungary	58.3	59.1	61.8	65.7	66.1	72.3	78.4	80.2	75.2	72.7	80.1	81.6
Poland	47.1	45.7	47.1	47.7	45.0	47.1	50.9	55.0	55.4	55.1	57.2	59.6
Romania	21.5	18.7	15.8	12.4	12.6	13.4	23.6	30.8	33.7	34.8	33.4	34.1
Sweden	51.7	50.3	50.4	45.0	40.2	38.8	42.8	39.8	36.5	33.4	38.9	37.5
United Kingdom	39.0	40.9	42.5	43.4	44.5	54.4	69.6	80.0	84.2	87.9	83.5	86.6
EU (a)	61.8	62.2	62.8	61.5	59.0	62.3	74.4	80.2	82.3	83.3	81.8	83.3

(a) Unconsolidated general government debt. For 2010, this implies a debt ratio, which is 0.3 pp. higher for the euro area (0.2 pp. higher for the EU) than the consolidated general government debt ratio (i.e. corrected for the intergovernmental loans) published by Eurostat on April 26, 2011.

European Commission, European Economic Forecast, Spring 2011, p. 223

The numbers demonstrate why it was prudent of the Maastricht Treaty to establish rules on a sustainable fiscal policy of the participating states to prevent a situation where sanctions of the market (high interest rates, denial of loans) would need to remind a member of the Eurozone of its (legal) obligations.<sup>182</sup> The problem is how to force Member States to follow the rules, especially big ones.<sup>183</sup> But this is not a specific problem of the Monetary Union and Germany has faced similar problems inside the German federation for decades.

<sup>182</sup> The governments ought to be exposed to the reactions of the markets on their fiscal policy, see Häde (2009), p. 402.

<sup>183</sup> Buti (2007), p. 177; doubting the effectiveness of such rules in general Eichengreen (1994), p. 176; Wyplosz (2010), p. 35: „sanctions cannot be really imposed on democratically elected governments“ citing a former work written together with Eichengreen (in: Economic Policy, vol. 26 [1997], p. 65-114).

The widespread complaint about the lack of a common fiscal policy reveals some ignorance of the design and working of federal systems. The constitution of the United States of America does not provide for a common fiscal policy of the members of the federation. In contrast to Germany, it does also not interdict grants of the federal government to the states; conditional or unconditional. Often strings are attached to the grants which allow the federal government to exert considerable influence on the policy but this is far from a federal equalization system or even a common taxation.<sup>184</sup> So far there is no clear evidence that the great autonomy of the states in the U.S. has adversely affected the functioning of the currency used there. Even the long run discrepancies inside the U.S. have not threatened the stability of the whole system.

In essence, the EU appears to have more rules to secure a sound fiscal policy of its members than the U.S. has for its states, at least on a constitutional level; and there is no fundamental criticism that the U.S. dollar cannot work in a federation with so little common economic and fiscal policy. Especially rules on (balanced) budgets are definitely state law and requests for financial aid are also turned down by the federal government.

Until the year 2009, the constitution of the Federal Republic of Germany also did *not* contain a clause restricting debt or deficit of the members of the federation. In the German constitution only a weak clause had been introduced in 1969 that both the central state (“Bund”) and its members (“Länder”) should align their fiscal policy to the requirements of the macro-economic balance and that for *this* reason restrictions on borrowing could be imposed by the federation. In addition to that, it could be decreed that reserves were

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<sup>184</sup> See *Nicholson-Crotty* (2008) investigating the impact of fiscal federalism in the U.S. on state taxation.

to be built up during an economic upswing which could be spent during a downturn to stimulate the economy. These rules were strictly reserved to fight business cycles and not to cope with structural deficits; and in effect they had little practical impact. An adverse effect on the stability of the currency could not be noticed.

It took until 2009 for the federal constitution of Germany to be amended and to introduce for the first time binding rules on deficits for the states (“Länder”) by the central state (“Schuldenbremse”).<sup>185</sup> Until then, the European Union had - also compared with the central government of Germany - more legal rules directing the fiscal policy of its Member States than the Federal Republic of Germany. This led to the awkward result – and it was one of the reasons for the fundamental changes of the fiscal federalism in Germany in 2009 – that the federal government could not legally force the Länder to avoid “excessive deficits” in order to fulfill Germany’s obligations towards the European Union!

The amendments to the German constitution imposing stiffer rules on the member states of the federation abolishing basically the right of the “Länder” to run a structural deficit from fiscal year 2020 on, raise some constitutional concerns. It had been an undisputed right of the members of any kind of federation to finance part of their budget by borrowing money. Interdicting any structural deficit except in times of disaster might have taken away too much “sovereignty” from the “Länder”. They might have lost an essential part of their “statehood” or “sovereignty”. This would be a breach of the federal constitution since the amending power is limited in Germany, Article 79 para. 3 of

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<sup>185</sup> Article 1 No. 4 Gesetz zur Änderung des Grundgesetzes of 29 September 2009, BGBl I 2248, amending Article 109 of the federal constitution.



the federal constitution.<sup>186</sup> A case on this question is pending in the Federal Constitutional Court of Germany.

A similar problem might arise in case the EU is transformed into a federation with similar rules on budgets. In a somewhat enigmatic phrase the Federal Constitutional Court had pointed out that the constitution would not empower the representatives of Germany to enter a federation and thus “give up the right to self-determination of the German people and its ‘Souveränität’ according to the law of nations”.<sup>187</sup> It added that changing the “identity” of the union and acting “ultra-vires” could render those acts of the union inapplicable in Germany.

## **IV. Support of Member States**

### **1. Preliminary support mechanisms**

The lack of general support mechanisms that had been considered a structural flaw of the Monetary Union, has been partially mitigated. A support specifically for Greece was organized ad hoc within a few days followed by an unspecified (general) mechanism a few days later, based on Article 122 para. 2 TFEU. The legality of this procedure is not beyond any doubt, particularly the question whether the prerequisites of that provision are fulfilled. The duration of that mechanism has been limited to two years – for good reasons. Now a permanent mechanism is being set up including an amendment of the Treaty.

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<sup>186</sup> New rules imposing rigid limits on the “Länder” to run a budget deficit are considered to be incompatible with Article 79 para. 3 of the federal constitution, see e.g. *Hancke* (2009), p. 626.

<sup>187</sup> BVerfGE 123, 267 (347 f.) – Lisbon Treaty.

(1) In May 2010 financial support was given to Greece because of the imminent danger that the country could not refinance its outstanding debt and because its budget deficit, which after some corrections of the statistics reached a two-digit percentage of GDP. The aid was basically granted as credit guarantees on a bilateral basis. Greece has promised to solve its budgetary problems by a rigorous austerity program with spending cuts, tax rises and an overall reduction in social security benefits.<sup>188</sup>

Whether the aid is in conformity with the principal provisions of the Treaty is questionable. The wording “assume the commitments” in Article 125 para. 1 TFEU would have to be interpreted in a way that new voluntary guarantees by Member States would not be covered. Article 122 para. 2 TFEU could be a basis when the situation of the Greek finances would be considered an “exceptional occurrence beyond the control” of Greece.

(2) Only a few days after the rescue operations for Greece the heads of states and government of the Member States agreed to set up a support mechanism on a much larger scale for future financing problems of Member States. It was designed to have an accumulated volume of 750 billion euro, distributed on three pillars:

- European Financial Stability Mechanism (EFSM) (60 billions)
- European Financial Stability Facility (EFSF) (440 billions)
- Credits by the International Monetary Fund (IMF) (250 billions).

The lion’s share of the aid should be granted in form of guarantees and not as direct payments. The good credit ratings of most Member States were to be used to refinance the outstanding debt at much lower costs than the failing countries could have attained. The whole support mechanism is designed to be only of temporary nature and to terminate by 2013.

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<sup>188</sup> See for details *Louis* (2010), p. 971.

The *European Financial Stability Mechanism* (EFSM) is an instrument of the European Union. It is financed from general funds of the Union and administered by the Commission.

The *European Financial Stability Facility* (EFSF) is a separate entity set up by the Member States which have introduced the euro. It is designed as a special purpose vehicle to borrow money on the capital markets by issuing debt instruments guaranteed by the Member States not in need. The proceeds are passed on to the member in distress. This way there is no direct aid from Member States or the Union to other members. The volume of guarantees was distributed according to the share each member's central bank holds of the capital of the ECB. The liability is limited to that fraction. Technically a corporation under the law of Luxembourg with seat in Luxembourg City was set up. The state of Luxembourg was the only shareholder in order to speed up its creation. This corporation issues bonds which are guaranteed by the various Member States. The corporation was given the desired top rating by the rating agencies.<sup>189</sup>

The support mechanism is completed by loans from the *International Monetary Fund* (IMF). For some time there was strong resistance against the participation of the Fund in rescue operations within the EU or more precisely in the euro area as it is designed to give support in the case of imbalances due to the lack of foreign currencies. The fund, however, possesses a lot of experience in this area and is neutral with respect to many special interests within the Union. In addition, there are few alternatives as long as the EU has not set up a fund of its own and still wants to provide aid.

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<sup>189</sup> See for details *Louis* (2010), p. 973.

## **2. The support by the ECB**

In addition to this three-pronged mechanism, the purchase of debt instruments issued by Member States of the ESCB since early summer 2010 played a considerable and growing role. The result is that a major share of the sovereign debt of the supported members or its banks is already held by the ECB. Only a fraction of it is actually bought and held by the ECB. The rest is carefully distributed among the national central banks. A “restructuring” of sovereign debt would hit the ESCB to a great extent, although the potential size of that loss is hard to gauge as it is unknown at which discount the instruments were purchased.

The ECB has also accepted government bonds of countries with budgetary problems as corollary – partially in conjunction with handing out credits to banks from countries in need. They in turn hold a large fraction of the sovereign debt of their home country. This could also be considered as an “indirect” financing of sovereign debt by the ECB. The size of the loss in case of a default is hard to assess as well. It can be assumed that the corollary includes a sizeable safety margin.

As the legality of this procedure has become increasingly doubtful with time passing, the ECB has rightfully demanded that this task has to be fulfilled by the rescue mechanism set up by the EU. According to the fundamentals of the Monetary Union, resolving budgetary problems of Member States is in no way a task of the ECB or the ESCB as a whole.

The recent augmentation of the capital of the ECB has not been necessary in view of the purchase of the “sovereign” debt instruments even if the ECB takes into account a certain risk that they may fail. A central bank does not have to follow any kind of capital adequacy rules since it cannot become insolvent. It can even carry on a loss on its balance sheets indefinitely. It is unclear whether the taxpayer eventually will have to bear a loss, as it is every-

thing else but sure that the Member State whose central bank finally shows a loss in consequence of capital requirements of the ECS will be liable for those losses. The same holds true for direct losses of the national central banks.

As a summary it can be stated that the purchase of sovereign debt instruments by the ECB is not simply a matter of policy or the breach of a taboo, but simply illegal.

### **3. Creation of a permanent support mechanism**

The heads of states and government agreed on 17 December 2010 to lay the basis for a permanent support mechanism.<sup>190</sup> It was recognized that it would be legally prudent to structure it as a (multilateral) support of the members of the euro zone and *not* of the EU.<sup>191</sup> As a consequence, a new paragraph 3 of Article 136 TFEU was created following the procedure set up by Article 48 TFEU to serve as a sound legal basis for this mechanism. This provision allows Member States, not the EU, to grant support on a voluntary basis under strict conditionality.<sup>192</sup> The details of the new European Stabilization Mechanism (ESM) are still being negotiated.

A support system might have to be installed for regions in need like in some, but by no means all, federally organized states. There are federations with great disparities that do not know an equalization system, e.g. the USA. However, a fiscal equalization system is partially considered to be essential

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<sup>190</sup> Draft European Council Document EUCO 30/10 of 17.12.2010.

<sup>191</sup> *Thym* (2011), p. 167.

<sup>192</sup> Attachment to Bundesrat-document 872/10.

for the functioning of a Monetary Union but focused on stability and allocation excluding redistribution.<sup>193</sup>

To avoid moral hazard and rent seeking when introducing such a mechanism it has to be ensured that

- aid is provided only under strict conditions and controls
- the necessary structural improvements are not evaded
- lenders will have to compensate for enjoying a debtor who will be helped by the public
- risk adjusted interest will be charged in the future for sovereign debt.

All this is, however, not the task of the monetary system but of the general setup of an interconnected system, be it a state or not.

#### **4. Beneficiaries**

In effect, a large portion of the default-risk has been transferred already from private creditors to the public sector without proper compensation. Therefore the purchase of sovereign debt instruments by the ECB has to come to an end not only for legal reasons but also because of the economically not justifiable risk transfer. The speculation on an illegal “bail-out” of the debtors would be honored for free.

Moreover, another sizable portion of the sovereign debt of the Member States needing support is held by banks or institutions owned, taken over in the course of the crisis or guaranteed by the governments of Germany and France. This way another part of the risk of default has already been taken over tacitly by the tax-payers of these countries.

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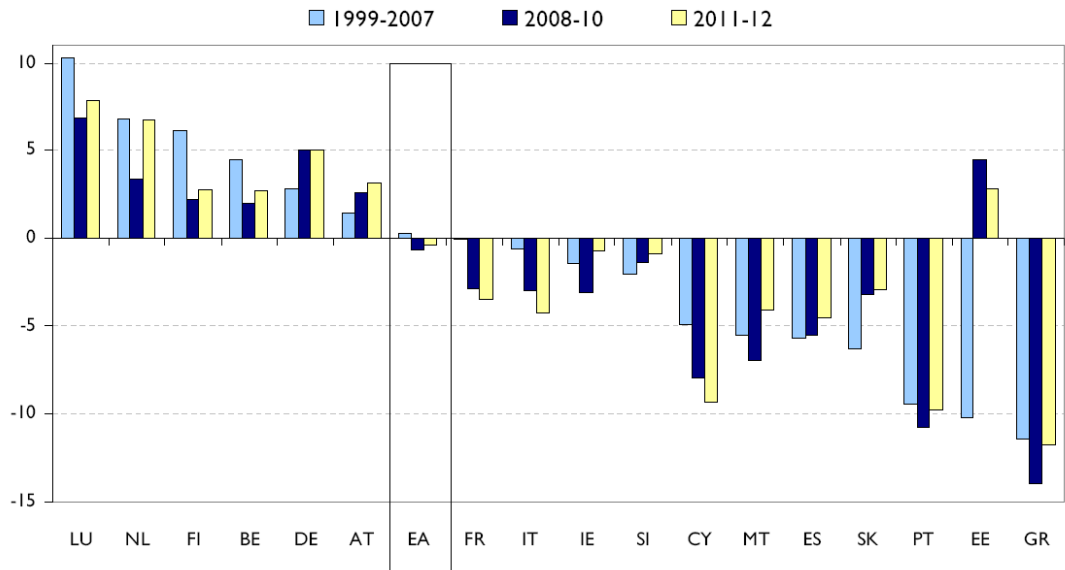
<sup>193</sup> Francke (1998); broader Inman/Rubinfeld (1992), p. 659.

As it is unknown at which discount governmental entities including the ECB have acquired sovereign debt instruments or with which safety margin they accepted these instruments as corollary, the size of the transfer is hard to judge. In any case, it is realistic to assume that the profits from lending without an appropriate risk premium to the Member States needing now support, considerably surmount the losses when selling them. A *substantial subsidy* is being handed out to the crediting financial institutions *by supporting the debtors*. That is the reason why a contribution of the creditors is essential.

## V. The coherence problem

There are signs that internal coherence in the Monetary Union is eroding.

### Current account balance as percentage of nominal GDP

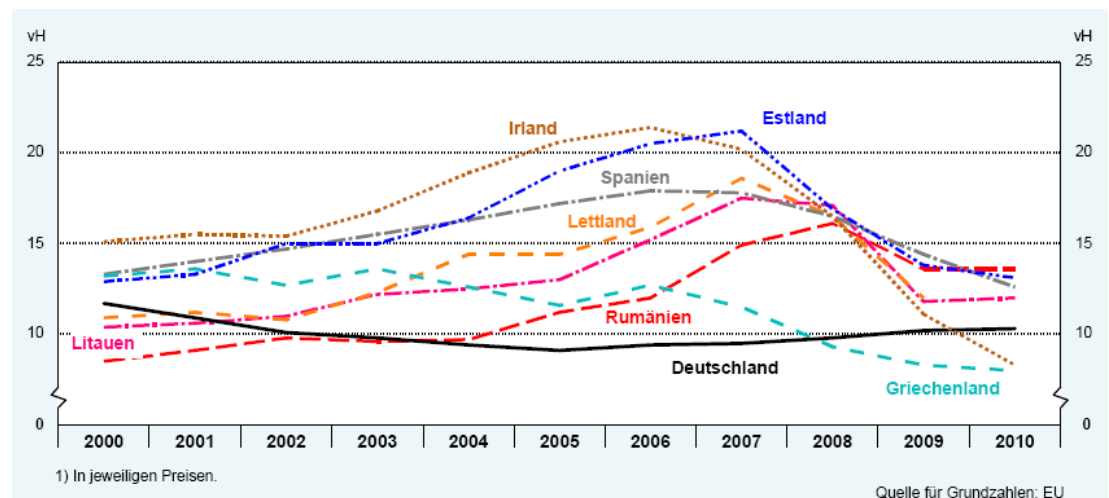


Jürgen Stark, Staatsschuld und Geldpolitik: Lehren aus der globalen Finanzkrise, Rede, Münchner Seminare: CES ifo Group Munich & Süddeutsche Zeitung, München 20 Juni 2011, slide 10 (European Central Bank).

Imbalances in the current accounts are not the cause for a weak coherence but a gut indicator. Further details are significant like the appropriation of the financial influx from abroad.

## Weight of investments in real estate

(percentage of GDP)



*Sachverständigenrat* (2010), p. 86.

Such kinds of developments cannot be mitigated by just any sort of fiscal federalism, as the examples of the U.S. or German fiscal federalism vividly demonstrate. To which extent these disparities might have been induced by a common currency is another question and remains to be analysed.

Internal coherence of the members of a monetary union may be considered as an important factor for its viability. But even in a single currency area basically three adjustment mechanisms remain in case of disparities, mainly with constant and excessive current account imbalances:

- enhancing competitiveness
- movement of labor to a more efficient allocation



- economic growth

If discrepancies are too great at the beginning or even increasing, this might lead to high additional overall costs in the form of support in time of crisis and programs to foster structural adjustments. But this is a political and not primarily an economic decision. Also the EU would have the option to let a region turn into the Mississippi of Europe.

In general the EU has decided against that option and attempts to increase coherence by regional development programs. It has collected comprehensive information on the development of coherence in the euro area.<sup>194</sup>

## **VI. A “euro-crisis”?**

### **1. Foundations**

Although many analysts and some politicians have been referring to the crisis as a crisis of the euro<sup>195</sup> or even worse of the European Union, it is in essence not a problem of the currency when a sovereign is not able or not willing to pay its debt. There is no stringent link between fiscal problems of a state and the currency used in this country as legal tender. Only if a government has the power to print the money it needs to pay back its debt the currency might be in danger. This is also why the ECB is not allowed to lend money to the EU or its Member States, Article 123 TFEU.

In addition to an almost complete failure of financial markets and of economic sciences, the crisis has also demonstrated a total failure of the supervisory system – both of its rules and of their enforcement.

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<sup>194</sup> *European Commission* (2010).

The present *turmoil with sovereign debt* is primarily not a problem of the currency but of the discrepancies between the Member States. It occurs in any type of interconnected system no matter if it uses one or more currencies. When a government has problems to finance its budget deficit this has no direct link to the currency used in this country. However, it is a consequence of the financial market crisis and the ensuing depression of the “real” economy. Serious flaws in re-designing financial markets and financial institutions are the major contributing factors. On the side of the lenders, ill-conceived capital adequacy rules and laxness towards unsustainable, but individually profitable leverage ratios are of major significance. The absence of a national currency only forces a government to think about measures which are not popular at home to solve its structural problems. Not having the questionable exit with inflation and devaluation of the currency might be very healthy in the medium run. It is not a flaw of the Monetary Union that the historically low interest rates for some of the Member States were not used in a more prudent manner.

## **2. A Banking crisis**

It is still too early to deliver a comprehensive and final analysis of the crisis. Keeping in mind the complexity of what has happened it is also problematic to come to simple and clear-cut judgements. But with this “caveat” a few facts appear to be clear:

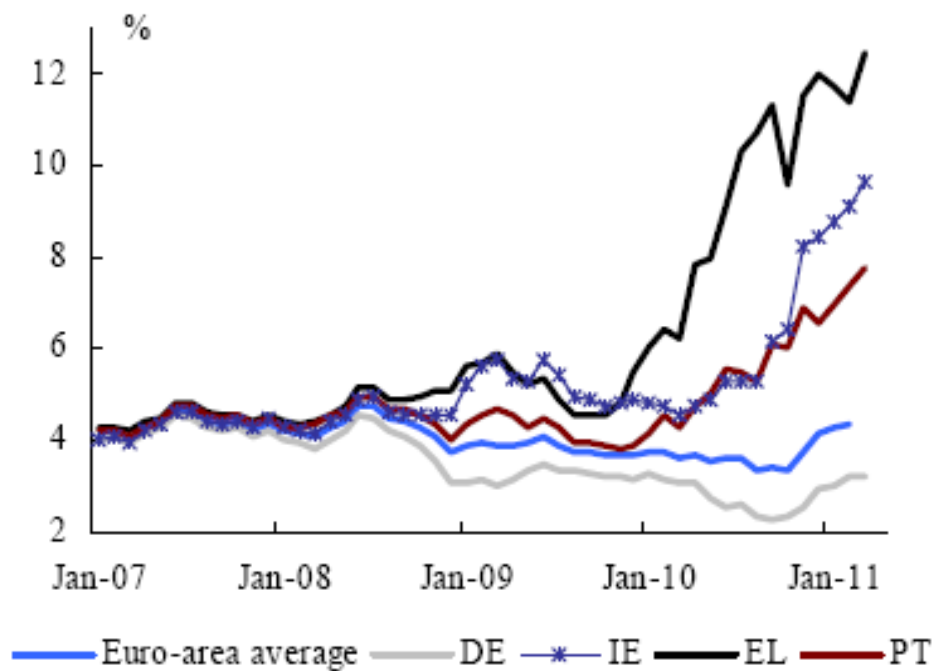
1. From the beginning on and also now with the turn to a „sovereign debt crisis“, the crisis is and has been at the core a crisis of financial institutions, mainly of some big banks, but by no means all banks.
2. In second place, it has now become a crisis of sovereign states and other governmental institutions. They have amassed debt in a scale which is not sustainable.

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<sup>195</sup> Paradigmatic: *Sachverständigenrat* (2010), p. 71 et seq.; *Baldwin/Grow* (2010), p. 1. *Baldwin/Gros/Laeven* (2010) deliberate even about completing the “Eurozone”.

3. But it should not be forgotten that there always has to be someone who lends the money; and to a large extent it was again banks and other financial institutions.
4. The risk of write-offs of sovereign debt has increasingly been transferred from the market players to the central banks as they bought or accepted sovereign debt as corollary. This is augmented by the implicit subsidies handed out to creditors of sovereign debt.<sup>196</sup>

### Sovereign bond yields



*European Commission (2011), p. 41.*

Despite all the turns and twists the crisis has taken so far and might take in the future, it is and was in essence a crisis of banks which expand credit and

lend too much money and do not charge a risk adjusted prize (interest). This is consistent with the findings of *Reinhart* and *Rogoff* who consider the crises in the developed countries during the last two decades as predominantly caused by banks.

### 3. The neglected side of the lenders

So it is worthwhile to focus the analysis more on the side of the lenders. The bank rescue operations that took place directly increased government debt to GDP ratios. Private debt was turned into public debt,<sup>197</sup> especially in Ireland but also in Germany. But things are too complex to simply blame the financial institutions. The legal system contributed substantially to the emergence of the unsustainable sovereign debt situation which has to be resolved now. The *risk weight* was set at *zero* for basically all sovereign debt in the legal rules on capital adequacy.<sup>198</sup> In other statutes governing financial instruments<sup>199</sup> or institutions, like insurance laws, it is similar. This made the *irresponsible lending* so attractive aside from the gambling on a “bail-out” in case of need. As a result, market mechanisms were hindered to impose the necessary sanctions on countries carrying out an unsustainable and irresponsible fiscal policy also from this side. Fatal mistakes were made in the course of deregulation as the *necessary differences* had been made in the previous statutory rules.

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<sup>196</sup> Supra p. 68.

<sup>197</sup> *Baldwin/Gros* (2010), p. 11.

<sup>198</sup> E.g. Annex VI part 1 no 1.2.4. Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relative to the taking up and pursuit of credit institutions (recast), Official Journal L 177, 30 June 2006, p. 1 (81). This annex contains several other fatal errors like treating exposures to a central government equally to an exposure to the ECB or relying for the risk weight of any sovereign debt on the ratings of rating agencies (no. 1.1.2.).

<sup>199</sup> Section 20 para. 1 b and c of the German statute on „Pfandbriefe“.

Leverage ratios, maturity transformation, and general risk reduction by banks and other financial institutions are at the core of the problem besides waning competitiveness of some Member States and both are not yet addressed sufficiently despite all efforts undertaken so far. Improving competitiveness is often identified with lowering real wages. This helps of course but the non-economic element might be more important and is often overlooked: superior engineering, good science and reliable workers and an efficient legal system. All of these are hard to achieve.

#### 4. Solutions

It is an open question whether the EU could tolerate the financial failure of one of its Member States, namely one whose currency is the euro. Originally it was clearly intended that there should not be any support. These rules were also intended as a signal to markets that there might be a higher risk with certain “sovereigns” debts. Until recently, markets ignored that signal completely. Then they overshot in the last months for a while with high fluctuation of spreads. It is hard to blame markets for this, even if there might be a strong speculative element. In effect markets were right since so far a creditor has not suffered any losses with “sovereign” debt from parts of the Eurosystem.

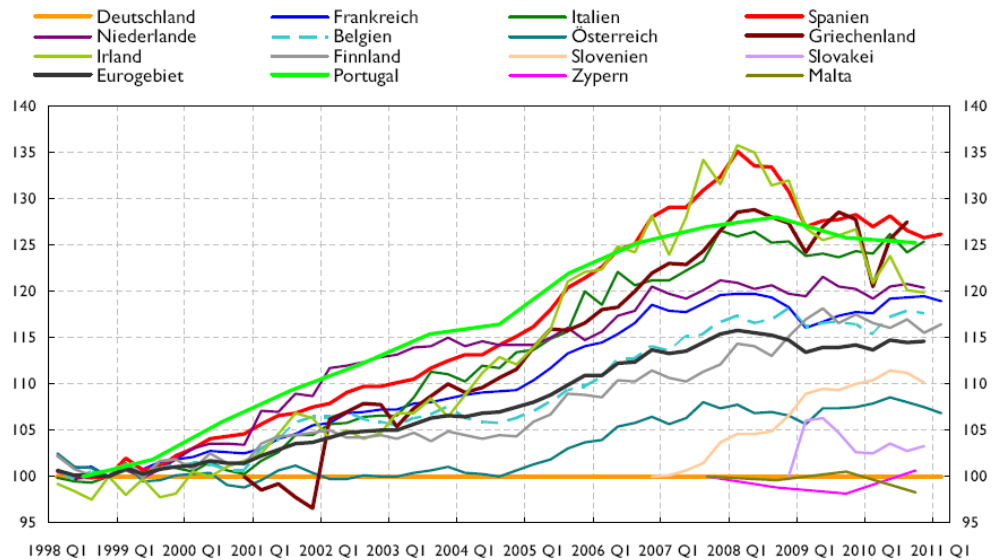
Leaving the Eurosystem or expelling a Member State whose currency is the euro is no viable solution for two simple reasons: It is economically harmful and it is illegal.<sup>200</sup> The membership in the monetary union is irrevocable for good reasons. Monetary systems that provide an exit option are inherently

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<sup>200</sup> Despite the fact that the treaty of Lisbon opened the door for a *voluntary* exit, Article 50 TFEU; for references see note 112.

instable.<sup>201</sup> It is the *structural problems that have to be solved*: weak economic growth and *weak competitiveness*.

### Development of the unit labor cost in the euro area relative to Germany (1998 Q4 = 100)



Jürgen Stark, Staatsschuld und Geldpolitik: Lehren aus der globalen Finanzkrise, Rede, Münchner Seminare: CES ifo Group Munich & Süddeutsche Zeitung, München 20 Juni 2011, slide 8 (European Central Bank).

The immediate crisis resolution necessities might demand a different short term approach, but that is in essence not a task of the monetary system. Finally an increasing lack of obedience to strict legal norms and contracts has been observed, and this is – in the medium range - the most frightening aspect of the recent development. That should be kept in mind before keenly designing new rules.

<sup>201</sup> Weder di Mauro, in: Sachverständigenrat (2010), p. 99 et seq. The majority will accept it, however, as an „ultima ratio“.



## CONCLUSION

The European Monetary Union euro has done very well since its initiation. Price stability has been secured and the external value of the new currency is more than satisfactory. The confidence in it is also shown by its increasing use as a global reserve currency. It has been a stabilizing factor in the current crisis.

The recent budgetary problems of some Member States are principally not a problem of the Monetary Union. It is therefore in no way justified to speak of a “euro-crisis”. It is true, however, that the Monetary Union restricts the number of possibilities for Member States to solve their financial problems but it does not eliminate them entirely that outside help would have become indispensable. .

The purchase of debt instruments of Member States in financial distress by the ECB is questionable from an economic, and more important, from a legal point of view. The longer the duration, the less legally justifiable is it.

Financial support for Member States in severe financial distress might be acceptable as a temporary crisis resolution mechanism. A permanent support mechanism needs a basis in the primary law of the EU.

The treatment of the risk of “sovereign” debt in the legal framework for financial institutions urgently needs improvement. Especially the capital requirements for credit institutions have to be adjusted.



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