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Legal Strategies at the Governance Precipice: Transnational Lawyers in the European Union's Sovereign Debt Crisis (2010–2012)

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How do transnational lawyers valorize their expertise in a political and economic crisis? This article argues that knowing how transnational lawyers valorize their expertise is critical to understanding how transnational law evolves and affects society, especially when existing legal frameworks prove to be inadequate and novel practices must pave new paths. Using the acute phase of the Eurozone crisis between 2010 and 2012 as an empirical case, I examine how European Union (EU) legal agents constructed a framework that accommodated the uncertainty of governing a crisis while also mediating the contentious politics between EU Member States. The analysis shows that as intergovernmental bargaining dominates Eurozone crisis governance, EU legal advisors intervene to reconcile these bargains with the EU legal order using novel practices that simultaneously valorize their legal expertise. These practices in effect engender a high degree of interdependence and interconnection between the EU legal order and several intergovernmental arrangements—especially the European Stability Mechanism—leading to the creation of a unique form of EU governance: semi-intergovernmentalism. This article contributes to debates on legal globalization by empirically examining how transnational legal agents valorize their expertise through strategies directed at defending their autonomy while protecting the normative coherence of their transnational legal order: the EU.

INTRODUCTION

The role of legal agents in transnational governance has shifted from "the local/national level"—where powerful legal elites project their preferred national legal system onto the global domain—to "the global/transnational one" (Editors of *Law & Society Review* 2021)—where legal agents are located at the *intersection* between national and transnational legal systems. Whereas the former take central positions, for example, in the "palace wars" of their national contexts (Dezalay and Garth 2002) or in the promotion of their own national legal cultures in globalizing law (Dezalay and Garth 1996), the latter are located at the interface of national and international legal systems.

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Transnational lawyers operating at this interface have been conceptualized in various ways, for example, as "interpretive mediators" (Pavone 2019), "secant marginals" (Grisel 2017), as "Euro-lawyers" in the EU (Vauchez 2015), or as "interlocutors" that broker legitimacy claims across different national and international spaces (Conti 2016). In this way, transnational lawyers have been central to constructing different forms of justice in transnational and international legal frameworks (Dezalay and Garth 2012), thereby driving processes of globalization, as exhibited in international commercial business (Block-Lieb and Halliday 2017), international criminal justice (Hagan and Levi 2004), European human rights (Madsen 2007), or regional regulatory regimes such as the EU (Kelemen 2011).

A critical aspect in the construction of these transnational legal frameworks is that legal agents possess valorized forms of knowledge and expertise, which are connected to their specific transnational contexts. This means that the process of valorizing legal expertise can occur via different transnational paths. For example, the valorization of legal expertise can occur through decentralized lawmaking for commercial transnational markets (Quack 2007); through the transformation of regional political issues into technical legal questions (Burley and Mattli 1993); through the fashioning of symbols of state-legitimacy, such as constitutionality, into transnational versions, as seen with the constitutionalization of the EU treaties (Vauchez 2015); or through the competitive struggles between incumbents and challengers in transnational markets for commercial arbitrators (Dezalay and Garth 1995).

Yet despite this valorization of legal expertise as an authoritative resource in transnational governance, recent years have seen a series of crises of transnational frameworks and global governance, for example, the 2008 global financial crisis, the EU's sovereign debt crisis in 2010, the European migrant/refugee crisis in 2015, Brexit in 2016, and now the current EU rule-of-law crisis involving Poland and Hungary. These crises disrupt legal processes and are connected to a contentious politics that is both inter- and intrastate. More problematic however is that such crises often reveal critical inadequacies of existing legal frameworks, which not only threaten to undermine their legitimacy but also prompt political leaders to look elsewhere for solutions, leading to expert struggles over the control of crisis-related tasks and problems.

For transnational legal agents, such crises therefore entail not only a sociolegal problematization focused on accommodating the tension between maintaining the normative coherence of transnational legal orders on one hand and reconciling it with contentious interstate politics on the other but *also* a professional problem of losing influence by not gaining control over new expert tasks and problems engendered by the crisis itself. This raises the question of how legal agents navigate a context that is characterized by not only crisis but also a lack of demand for their expertise. This article argues that in balancing the tension between law and politics that is inherent in transnational crises, transnational legal agents valorize their expertise through strategic interventions in the interstate bargaining process. It is further argued that such interventions expand and further differentiate transnational law through the legal agents' expert practices and strategies, albeit with indeterminate outcomes.

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To examine this argument, I use the EU's sovereign debt crisis (from here Eurozone crisis) that erupted in 2010 in the Eurozone,[1] the collection of EU member states that shares the euro currency. This crisis entails an empirical puzzle with which to explore my theoretical argument: a politically contentious crisis that threatens to disrupt a seemingly coherent transnational legal order on one hand and a lack of existing EU legal tools with which to accommodate such a crisis on the other. Initially, this inadequacy meant that intergovernmental bargaining dominated the governance of the crisis, and yet the subsequent solutions took highly legalized forms, ranging from private international law to public international law to EU law. This raises the question of how the intergovernmental bargaining was intercepted by legal agents.

While extant research has indicated the significant role that European legal agents have played in the construction of Europe as a transnational legal order (Cohen and Vauchez 2007; Cohen 2010; Madsen 2011; Mudge and Vauchez 2012), little is known about their role in fast-moving political and economic crises. This matters for understanding the Eurozone crisis empirically, as a prominent strand of the EU literature asserts that crisis decision making was dominated by the intergovernmental arrangements where political bargaining could be achieved through deliberation and consensus, giving rise to "deliberative intergovernmentalism" (Puetter 2012), or the "new intergovernmentalism" (Bickerton, Hodson, and Puetter 2015). Nevertheless, when studying the role of legal agents, this article finds that the political bargains were far from accepted by the various agents of EU law, and in fact, through the interventions of these legal agents, a new form of EU governance became articulated and institutionalized: "semi-intergovernmentalism" (Keppenne 2014). My approach seeks to shed light on this outcome and entails taking a synchronic view of expert perceptions and practices *in action* as a "particular way of rationalizing power and authority" (Kauppi and Madsen 2014, 326). Of particular focus are the strategies used by the legal agents in their interventions in the political bargaining process, which leads to "the fabrication of new legal expertise" (Dezalay and Madsen 2012). Theoretically, this article conceives of expert practices and strategies of valorization in terms of the notion of *boundary work* (Gieryn 1983; Liu 2015): the degree to which actors make symbolic and social distinctions more or less explicit to enhance their influence. In this way, the analysis demonstrates how EU legal agents at times *make* boundaries between the EU legal order and national or international law and at other times *blur* these boundaries. In summary, this article develops a theory of expertise valorization whereby EU legal agents engage in a series of boundary-making and boundary-blurring strategies to valorize their expertise, which leads to the creation of a particular form of governance, called semi-intergovernmentalism (see Keppenne 2014; Lenaerts 2014).

For this piece, semi-intergovernmentalism can be grasped most clearly in the form of the European Stability Mechanism (ESM)—the international financial institution created to provide finance to struggling Euro member states. Semi-intergovernmentalism denotes the high degree of interconnection and interdependence between the EU legal order and the ESM, which is an external entity based on international law. This interconnection and interdependence suggest a new hybrid form of governance where an *external* non-EU legal framework that delivers financial assistance—the

1. At the time of the crisis, the Eurozone comprised 16 EU member states who share the Euro currency.

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ESM—is dependent on EU law and the European Commission for the policy conditionality needed to secure the funds. In this way, it will be argued that the legal construction of semi-intergovernmentalism is an outcome of the process of valorization of EU legal expertise by the legal agents. Empirically, I show how the crisis events inform changes in the legal agents' perceptions, which in turn shape their interventions in the intergovernmental political bargains made during the Eurozone crisis, thereby pulling the intergovernmental form of governance so close to the orbit of the EU legal order that it blurs the boundaries between the two domains. Methodologically, this article used an interpretivist approach to process tracing (Pouliot 2014; Norman 2021), first to analyze the constitutive elements of the institutional and social context, second, to trace how change in this context engenders a change in the legal agents' perceptions, and third, how this change in perceptions shapes their practices. From here, the process of valorization is presented as the causal process that leads to semi-intergovernmentalism. This article primarily contributes to the sociolegal literature by demonstrating how transnational legal agents valorize their expertise in a politically contentious bargaining process. It also contributes to the EU studies literature by introducing the construction of semi-intergovernmentalism as a substantive hybrid form of European governance.

In the next section, I present the theoretical framework for analyzing the process of valorization. Following this, I lay out the methods and data, which entails specifying the interpretivist approach to process tracing and the data collection process. Subsequently, the analysis is presented. Finally, I conclude by discussing the findings and their implications, as well as mentioning the limitations of this study.

THEORIZING THE VALORIZATION OF LEGAL EXPERTISE

In what follows, I present a theory of valorization that will be used in the analysis and that attempts to elaborate the relations between my main concepts by putting them into three hypotheses at the end of the section. The objective is to set down some expectations for how the process of valorizing legal expertise unfolds, with a view to make sense of the complexity of the empirical case and draw conclusions about it. The basic theoretical purpose is establishing the conditions and processes through which the valorization of legal expertise occurs. What is meant by valorization in this case is how meaning and value are attributed to what the EU legal agents do—their actions and strategies—to make EU legal expertise relevant in the governance of a debt crisis, such as the Eurozone crisis. This can be done in multiple ways, as Seabrooke and Wigan (2016) assert: "[e]xpertise is not simply a claim to superior knowledge about how things work, but also a claim about how things should be, which relies on moral authority" (360). In this way, in the process of valorization, the EU legal agents can be expected to make technical legal claims about how to deal with the crisis and at other times make moral claims about why their expertise is the most appropriate. Moreover, it is expected that EU legal agents will at times make distinctions that enhance their expertise through explicit boundary making and at other times enhance the utility of their expertise by using it to blur boundaries. I will argue that the engagement of one or more of these elements will depend on the type of social situation in which the EU legal

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agents are more assertive or more defensive in their position vis-à-vis the actors they interact with. In other words, distinguishing between whether an expert claim is based more on moral authority or more on technical authority will require discerning the strategy being deployed—boundary making or boundary blurring—by the legal agents in a given social and temporal context in which they are either asserting control over a new task or problem or defending their autonomy. Finally, the expected goal of the EU legal agents is to maintain the coherence of the EU legal order. In what follows, I account for three dimensions of valorization to develop a theory of valorization of legal expertise: (1) the influence of the social space, (2) the types of strategies they use, and (3) the epistemic basis of their expertise.

First, I consider how we can understand valorization through the social interactions of legal agents with other actors, such as other professions or politicians, in terms of competition and/or cooperation. In the sociology of professions, we see professional competition as jurisdictional conflicts between professions seeking to control a set of tasks and problems (Abbott 1988, 2005). Here the production of professional knowledge occurs through these competitive dynamics. A critical factor of success in controlling a set of tasks and problems is strategic and relates to the types of alliances—that is, cooperation—a profession forms with its institutional and social context—for example, regulators and universities (Abbott 2005). In this way, the context of the actors shapes their strategies to control professional and expert tasks. A similar point comes from Bourdieusian sociology, where the concept of field is used to demonstrate competitive dynamics, whether it be in a professional field or otherwise. However, there are important differences—for example, the role of inequality and power is more pronounced in field theory (Liu and Emirbayer 2016), which in the case of legal expertise can be seen in "the role of social hierarchy in the production and reproduction of lawyers and law" (Dezalay and Garth 2011, 49). Here valorization is conceptualized as the result of competitive struggles where differently positioned actors compete over the stakes of a field. In this process, "a field constructs its own particular symbolic economy in terms of the valorization of specific combinations and forms of capital (social, economic, political, legal, etc.)" (Dezalay and Madsen 2012, 441). Moreover objects, practices, and symbols will be valorized differently depending on the field, for example, human rights as a symbolic device is valorized differently in the academic legal field than it is in the political-diplomatic field (Madsen 2007). It is through field-specific strategies to change the relative exchange rate of different forms of capital that agents can discredit "the form of capital upon which the force of their opponents rests (for example, economic capital) and to valorize the species of capital they preferentially possess (for example, juridical capital)" (Bourdieu and Wacquant 1992, 99).

From these two theoretical strands, a main point is therefore to focus on the position of the actors vis-à-vis other actors in the social space as well as the strategies that can be used to valorize professional and expert knowledge. In this article, the positions that EU legal agents take vis-à-vis other actors will be construed as either *assertive* or *defensive* and will shape their strategy of valorization. Although field theory is largely focused on the structural aspects of the institutional and social setting, the ecological approach in the sociology of professions is more processual (Liu and Emirbayer 2016, 62). For the purposes of this article, a processual concept is needed to analyze an empirical process that unfolds sequentially—in other words, valorization *in*

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action. To conceptualize the types of strategies mobilized by the EU legal agents in this article, the framework of *boundary work* will be used.

Originally, Gieryn (1983) used *boundary work* to describe "an ideological style found in scientists' attempts to create a public image for science by contrasting it favorably to non-scientific intellectual or technical activities" (1983, 781). In other words, doing boundary work indicates "credibility contests"—that is, drawing and redrawing boundaries to establish "epistemic authority" (Lamont and Molnár 2002, 179) and "to defend professional autonomy" (Gieryn 1983, 782). This further substantiates Seabrooke and Wigan's (2016) point about how a claim to expertise can also be a claim to moral authority. Following Gieryn (1983) and Abbott (1988, 2005), Liu (2015) develops a typology of boundary work to explain emergence and change in the social structures of the Chinese legal profession. In terms of Abbott (2005), Liu (2015) points out that conflict over jurisdictions between professions is a particular form of boundary work that resonates with Gieryn's version. Liu calls this *boundary making*: "a social actor's self-distinction from other social actors" (2015, 3). As a strategy, this can be understood as the intentional activity of distinguishing a boundary. Liu (2015) also presents the notion of *boundary blurring*, which is considered the opposite of boundary making—that is, obscuring the distinction between two social objects or professional domains.[2] Boundary blurring seems to further indicate that it occurs when a distinction has already been made—that is, after a boundary is settled. Thus, actors may try to blur a distinction to influence another professional domain. In this way, "[p]rofessions engage in boundary making and boundary blurring to fight for jurisdictions over professional tasks" (Liu 2015, 4). For the purposes of this article, boundary making and boundary blurring offer conceptual traction to capture the dynamics of valorization in action. Specifically, these concepts can aid in examining how the EU legal agents engage in strategies to valorize their expertise at the boundaries between EU law and the intergovernmental realm.

The next point relates to the nature of legal knowledge and expertise because a primary point of this article is to establish the basis of how an expertise is endowed with meaning, and based on the theoretical literature cited above, different types of expertise will be valorized differently. For example, administrative legal expertise will be endowed with a different meaning than will financial legal expertise. One way to theorize this is to look at the cognitive core of the expertise, as proposed by Halliday (1985), who conceives of the influence of a profession's expertise by conceptualizing a distinction in a profession's epistemic bases. Put simply, this is "whether the cognitive core of the profession is primarily descriptive or prescriptive" (425). The former distinction refers to scientific professions, whereas the latter refers to normative professions, such as the legal profession. This distinction further relates to whether a profession wields technical or moral authority, where the scientific profession wields a higher degree of technical authority and the normative professions a higher degree of moral authority. Essentially, *technical authority* concerns a high level of "facility in the manipulation of professional knowledge; but it is manipulation of a quite restrictive nature" (Halliday 1985, 429),

2. Liu introduces a third concept, boundary maintenance, which entails the intervention of a third party "to maintain an elastic balance of the boundary work between conflicting actors" (Liu 2015, 4). This concept will not be used in the article.

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whereas *moral authority* is demonstrated when "a profession exceeds narrow technical activities to intervene in more general ethical areas" (429). Generally, legal experts fall into the latter category given that law is normative and touches a large number of domains. However, professions with higher levels of moral authority still have "areas of narrow technical authority" (429), for example, legal experts can engage in highly technical areas of the law without taking a clear position on what the legal rules should state substantively. In terms of professional influence, Halliday explains that it "varies in scope and intensity," where the "former refers to the breadth of action,[. . .]; the latter concerns the force of its action in a given area" (422). This is further connected to the two types of authority, whereby professions with technical authority have a higher degree of influence but in a narrow area and professions with moral authority have a lower degree of influence but in a broader range of areas. Nevertheless, even though these distinctions "may be disentangled analytically, values and technique are intertwined in practice" (Halliday 1985, 429).

The dynamic between projecting technical authority versus moral authority has particular implications in terms of the context of EU law. With legal expertise, an essential practice is interpretation, and in EU law this means interpreting the Treaties to find a legal basis for action, which is referred to as the question of EU competence. When trying to assert EU competence over a new task or problem, we can expect EU legal agents to engage in boundary-making claims of technical and moral authority. However, in political contexts, projecting neutrality and technicality is often critical to masking political contestation. This relates to how legal knowledge is produced and projected through "a rhetoric of universality and neutrality" that gives symbolic power to the law "as a tool for ordering politics without necessarily doing politics" (Dezalay and Madsen 2012, 438). In the EU, this matters, as "law functions both as mask and shield. It hides and protects the promotion of one particular set of political objectives against contending objectives in the purely political sphere" (Burley and Mattli 1993, 72). This is because the law has been central to enabling European integration by reprojecting political issues, which may have a moral dimension, as technical legal questions, especially when political intransigence has been a hurdle to integration. In contrast, instances of projecting moral authority are less obvious; however, it can be expected that EU legal agents will project moral authority in certain circumstances—for example, when their claims to technical authority fail. Establishing these circumstances will be of particular empirical focus in the analysis. In summary, having outlined the three aspects of valorization—social spaces of the actors, strategies of the actors, and the epistemic basis of their expertise, I propose three hypotheses that put these theoretical aspects into a process based on my empirical case.

(1) If a Eurozone Member State has a debt crisis, then EU legal advisors will attempt to establish EU competence and construct a legal framework by engaging in boundary making that projects their expertise in technical terms, as this grants them more influence in a specific area and is presented as less political.
(2) If the EU legal advisors' attempts to establish an EU legal framework in the context of a debt crisis are contested, they will engage in boundary making that projects their expertise in moral terms to highlight the ideological meaning of their expertise and boost their technical claims with moral authority.

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(3) If EU political leaders settle on an intergovernmental solution in the context of a debt crisis, then the EU legal advisors will engage in technical boundary blurring to contaminate the external legal framework with EU law, with a view to maintaining the coherence of the EU legal order.

In the next section, the interpretivist approach to process tracing is described. Here the theory will be connected to the methodological approach to clarify how the concepts work with the contextual empirics and the notion of causality.

METHOD AND DATA COLLECTION

This article follows the process-tracing approach, defined as "the use of evidence from within a case to make inferences about causal explanations of that case" (Bennett and Checkel 2014, 4). Although process tracing generally tests hypothesized causal links using empirical data—a deductive model (George and Bennett 2005)—this article follows a more abductive approach—moving back and forth between theory and empirics—and draws on an interpretivist conceptual framework that relies on the perceptions and practices of the agents involved. Therefore, I use an interpretivist approach to process tracing (Pouliot 2014; Norman 2021) to trace the causal process of change in the social and institutional setting. To that end, this article seeks to analytically generalize the process of valorization as playing a causal role.

Interpretivist Process Tracing

Following Norman (2021), when using interpretivist process tracing (IPT), one can distinguish between constitutive explanation and causal explanation, each of which has an essential place in the IPT framework. Constitutive explanation refers to the first stage of the analysis where the structural conditions or "constitutive elements" of the social system are mapped out. Here the focus is on "the social institutions in which agents find themselves, whether understood as dominating cultures, social practices, identities, norms, or systems of meaning" (947). In terms of the theoretical framework, the constitutive part of the analysis maps out the social practices, perceptions and norms of EU legal agents, and the role of their expertise in economic policy *prior* to the Eurozone crisis. Such an analysis aids the scholar in grasping how socially embedded agents interpret events and act on them as well as how "causal processes are triggered and unfold in particular ways" (947). In this article, the events to be interpreted by the legal advisors are the series of critical points, when decisions needed to be made on how to enable financial assistance to Eurozone member states. By mapping the constitutive elements, we can more fully understand how the legal agents then proceeded to valorize their expertise—the positions they take and the strategies they use—in terms of their interpretations of the critical events.

Once these constitutive elements are mapped out, the causal process can be examined, where the focus is on "tracking the relations between broadly defined events" and the causal process (Norman 2021, 937). Essentially, the causal analysis is nested within the constitutive analysis. Here, the process of valorization is traced by capturing

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the relations between the crisis events and the role of the EU legal advisors' perceptions, practices, and strategies in terms of these events. Finally, although cause and constitution are different modes of analysis, they both share a counterfactual structure. Therefore, each analytical phase will include "contrasts with some specified alternative" (945). To that end, the analysis introduces an initial constitutive explanation, laying out the social and structural conditions in which the EU legal agents are embedded, together with contrastive points that allude to alternative outcomes if the specified conditions were not present. Following this, the causal process is presented, which specifies the relations between events and the role of the EU legal advisors therein.

Connecting Theory to Method

In summary, depending on the conditions—the constitutive elements—of the transnational context, the process of valorization is expected to unfold through patterns of boundary making and boundary blurring. By following the sequence of the crisis in relation to these patterns, the causal process of valorization can be discerned by analyzing how expertise is endowed with meaning based on how the legal advisors perceive the institutional and social context, which in turn informs their interventions and leads to the outcome: the legal construction of semi-intergovernmentalism. Finally, in terms of generalization, valorization as patterns of boundary making and boundary blurring can be abstracted away from this specific context; however, the process of valorization must be understood as a theoretical construct that enables analytical generality for cross-case comparisons (Pouliot 2014). The analysis will proceed following Norman's (2021) analytical procedure, which is divided into two parts:

(1) *Tracing change in the social context and institutional setting through contrast*. The first step in the analysis is to look at the social and institutional setting of the EU legal agents just prior to the outbreak of the crisis. This is to map the configuration of conditions and causal capacities, which go on to shape how the causal process of valorization unfolds along with the crisis events. Empirically, this will entail analyzing the institutional organization, as well as the practices and perceptions of the EU legal advisors, regarding the lack of EU law tools to deal with a debt crisis in the Eurozone. We can thereby establish a structural gap in the EU legal framework prior to the crisis that becomes a constitutive capacity for action because it induces the legal actors to fill this gap, as well as to try and prevent this gap being constructed in alternative ways.

(2) *Exploring how change reconstitutes actor perceptions and gives rise to particular practices and strategies*. This focuses on how changes in the social and structural conditions shape the perceptions of the actors. For an interpretivist approach this is an essential part of demonstrating how the perceptions of the EU legal advisors endow events with particular meanings and, as events unfold over time, how these changes continue to shape perceptions. Empirically, this will entail showing how the changed perceptions of the EU legal advisors shape their actions and strategies throughout the process of valorization. This will be the causal part of the analysis and demonstrate how valorization of EU legal expertise unfolds as patterns of boundary making and boundary blurring. Below is a theoretical version of what the causal chain is expected to look like (see Figure 1).

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	Valorization of EU legal expertise			
Trigger	*Technical boundary making*	*Moral boundary making*	*Technical boundary blurring*	**Outcome**
Lack of existing EU policy and legal tools to deal with a debt crisis in the Eurozone.	Activity 1 Engage in *technical boundary making* to establish EU competence to *assert* control over debt crisis solutions.	Activity 2 If activity 1 is contested, then the EU legal actors will engage in *moral boundary making* to enhance their claims with moral authority.	Activity 3 If they still do not fully control a novel task or problem, they will engage in *technical boundary blurring* to contaminate non-EU law arrangements to protect EU law and the EU legal order.	Obstensible coherence of the EU legal order secured through contamination of non-EU law framework.

Figure 1.
Theoretical expectation of causal path.

Data Collection

The data collection is based on elite interviews and legal and policy documents that shed light on the social and institutional settings in which the legal advisors are embedded as well as capture their perceptions and practices. Given that this article follows an interpretivist process-tracing approach, I have used a nonprobability sampling technique when tracing elite interview subjects (Tansey 2007). Moreover, a snowball-sampling technique was used, which entailed interviewing relevant subjects and then seeking referrals from them to other actors involved, who then similarly directed me to other actors and so on and so forth until a data-saturation point was reached (Wasserman and Faust 1994; Carroll and Sapinski 2016). Thus, the first stage of this approach was to locate legal advisors who had been involved in the Eurozone crisis policy response and were visible in professional fora and/or considered by peers as being sufficiently involved in a professional capacity. The data were collected by (1) locating relevant documents relating to the Eurozone crisis—for example, policy texts, legislation, and court case judgements; (2) locating legal advisors involved in high-profile court cases before the Court of Justice of the EU (CJEU) on issues related to the Eurozone crisis; (3) interviewing these respondents; and (4) asking for referrals to other legal and policy advisors involved. The initial process started by locating several legal advisors who appeared in court cases[3] related to the Eurozone crisis and whose names also appeared in connection with the EU institutions (specifically, in the EU Directory). At the same time, referrals to economic policy advisors in line with the snowball-sampling technique were followed as well, and thus the perceptions of nonlegal advisors involved in the crisis policy response were also captured. This was done to capture the scope of influence of the legal advisors' practices in the area of economic governance more accurately. These economic policy advisors were located in the European Commission's Directorate General of Economic Financial Affairs (DG ECFIN). It should be noted that nonprobability sampling has the disadvantage that

3. For the sake of anonymity, I have chosen not to specify which court cases.

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scope for selection bias increases (Tansey 2007). Moreover, a notable drawback of snowball sampling is that when getting referrals "respondents often suggest others who share similar characteristics, or the same outlook" (770). Thus, to triangulate the claims of the legal and economic policy advisors gathered through the referral interview process and correct for bias of nonprobability sampling, other economic policy advisors were located and were interviewed based on their acknowledged involvement from alternative sources, such as official documents; for example, a senior economic advisor from the Eurogroup Working Group (the preparatory body for the Eurogroup, which comprises the Eurozone's finance and economic ministers) was interviewed as well as a senior commission economic policy advisor involved in Greece's adjustment programs. Given the nature of the crisis and fast pace at which situations unfolded, comparatively few actors were directly involved in critical crisis events, which is a limitation of this study. Nevertheless, following Davies (2001) and Eftimiades (1994), I have used at least two interview sources where possible to increase the confidence of certain claims.

In total twenty-three legal and policy advisors directly involved in the policy response and the court cases were interviewed over the period 2018–2019. The interviews are semistructured and range between thirty minutes to over two hours. Six lawyers from the legal services of the European Commission, three from the legal services of the Council of the EU, two from the legal services of the ECB, one from the European Parliament, two legal advisors from the Directorate General for Economic and Financial Affairs (DG ECFIN), five lawyers in private practice, and a finance professional from a large European bank. In terms of the economic policy advisors, there are two from the European Commission and one from the Eurogroup Working Group. All in all, seventeen of the twenty-three interviews were recorded and fully transcribed and six interviews were limited to note taking.

The relevant documents analyzed include the legal and policy documents produced by the EU during the crisis (regulations for new instruments as well as new treaty documents); the legal judgements of the CJEU for all the major court cases; legal scholarship written by legal advisors of the EU institutions; and legal analysis written by lawyers for their professional associations, including the 2014 FIDE Congress (Fédération Internationale Pour Le Droit Européen), which offers a comprehensive overview of the perceptions of both EU and national lawyers on the Eurozone crisis.

ANALYSIS

A. Constitutive Analysis: The Lack of EU Law in Economic Policy

In this section, an analysis of the constitutive components of the institutional and social context of the EU legal advisors is undertaken to map the causal capacities. Moreover, to draw out the causal process, I first map the conditions under normal circumstances—that is, before the outbreak of the crisis—so that we are in a position to locate the abnormal as a way to pin-point cause.

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Institutional Organization

Despite their ubiquity in EU governance generally (Vauchez and de Witte 2013), EU legal advisors were scarce in economic policy prior to the crisis; in other words, the 'normal' functioning of economic policymaking was characterized by very little legal activity. An institutional reason being that EU economic policy is based on the concept of coordination, meaning that the Economic & Monetary Union (EMU) section of the treaty included very narrow provisions regarding economic governance and limited the power transferred to the EU, leaving the member states to coordinate their economic policies in a decentralized fashion. Thus, EU competence in this area refers "directly to the Member States themselves as being responsible for the coordination, albeit 'within the Union' (Article 5(1) TFEU), more precisely 'within the Council' (Article 121(1) TFEU)" (Keppenne 2020, 790).

This gives the EMU an asymmetrical institutional structure whereby monetary policy moved to the supranational level—centralized at the European Central Bank—and fiscal and economic policy stayed at the national level (Hinarejos 2015). This asymmetry meant fiscal integration would be substituted by financial integration (Rey 2013), whereby financial markets would discipline member states' fiscal behavior (De Grauwe and Ji 2012). To make the disciplining function of the market legally credible, the EMU has provisions prohibiting any form of bail-out (Article 125 TFEU) and monetary financing—that is, the central bank buying government debt directly from the state (Article 123 TFEU). These rules are said to be critical for preventing "moral hazard"'—that is, countries taking on massive debt to pay their costs in the hope that they will be bailed out by other member states or the central bank.

While there is a provision that foresees financial assistance to a Eurozone member state, namely Article 122(2), this form of assistance conventionally speaking is based on issues beyond the control of a member state, such as a natural disaster, therefore budgetary issues are the sole responsibility of the member states (Middleton 2012). This means that there were no concrete EU-based policy tools to help a Eurozone member state in a sovereign debt crisis. In sum, member states should conduct their fiscal and economic policy with a few to being perceived as credit worthy in the eyes of financial markets. In 1997, clear excessive deficit procedures were created to bolster the member states' fiscal discipline with the Stability and Growth Pact. In sum, with all these rules on debts and deficits, a sovereign debt crisis in the Eurozone was considered close to impossible.

This indicates that not only were there no policy tools to deal with a Eurozone debt crisis, but the very idea of it was seen as an impossibility, which meant that solutions would take on a highly novel form. It also indicates the possibility that other professionals could be hired to solve the issues, for example, private law firms and financial consultants who have expertise in creating complex financial arrangements. It is common for international organizations to use outside expertise (see, for example, Seabrooke and Nilsson 2015), and the European Commission often uses external experts for various tasks.[4] Introducing new professionals into an existing institutional

4. According to a recent report, the European Court of Auditors found that the European Commission used €1 billion on external consultants annually from 2017 to 2020. See "Special Report: External Consultants at the European Commission" at https://www.eca.europa.eu/en/publications?did=61461.

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and social setting however can trigger competitive dynamics between possible incumbents—the few EU legal advisors that have economic policy tasks—and the newcomers. Moreover, given that such dynamics are implicated in the valorization of expertise, as noted in the theoretical section, this lack of policy tools can be deemed a causal capacity for the process of valorization. In contrastive terms, if the scope of economic policy in EU law was broader and included tools aimed at handling sovereign debt crises, then the intergovernmental route may not have been taken, which in turn would not require the EU legal agents to intervene in the political bargaining process.

Practices and Perceptions

An economic policy maker from the European Commission's economic and financial unit (DG ECFIN) stated that before the crisis, they did not need lawyers because they had primarily been issuing recommendations on economic policy to member states, and had only issued two pieces of legislation in 1999, with an adjustment in 2005.[5] Thus, the economics and finance officials had little experience with the EU legislative process: "DG ECFIN was not used to negotiating legislation, drafting legislation, proposing it, negotiating it in the council and the parliament, they were simply not."[6] Similarly, the legal services of the commission and the council had little to do in terms of economic policy and EMU. The responsibilities of the commission lawyer who dealt with EMU prior to the crisis were explained thus: "In 2008, [name] was alone dealing with these issues [. . .] in a team which was doing ten different things. And [name] was doing four or five different files and EMU issues were supposed to be one/tenth of the time of one lawyer."[7] This illustrates how EMU issues were a very narrow area for the commission's legal service, mainly because it was more intergovernmental in nature. This meant that commission lawyers perceived economic policy as being relatively insignificant for EU law and legal issues: "EMU law was for [the] economics' side [. . .] nearly nothing before [the crisis]. I mean ECFIN was a big think tank producing reports."[8] Similarly for the council's legal service, there was little legal activity in the area, as one of them explains regarding the Economic and Financial Affairs configuration of the Council (ECOFIN) and the Eurogroup: "In the early years of that period there were very few legal questions in the ECOFIN, and we didn't even go, we weren't even full-time participants in the Eurogroup, [. . .] because I think the Eurogroup didn't feel they needed fulltime legal service support, and we didn't think that it was—it wasn't a formal part of the council at the time, and we went—I went to the Eurogroup meetings from time to time when needed."[9]

Of course, EMU procedures are stipulated in the EU treaties, so there is a legal dimension, but it had not been the substance of any legal issues for the most part. The one significant case that came up in the area of economic governance prior to the crisis

5. Interview with C4, ECFIN policy advisor in Brussels, July 18, 2018 (in person).
6. Interview with A5, commission legal advisor in Brussels, August 28, 2018 (in person).
7. Interview with A1, commission legal advisor in Brussels, May 25, 2018 (in person).
8. Interview with A1, commission legal advisor.
9. Interview with E3, council legal advisor in Brussels, November 22, 2018 (in person).

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concerned budgetary discipline and went before the CJEU.[10] In the early 2000s, Germany and France had run excessive deficits and they took a rather relaxed position, as did other member states. This issue put the commission and council in conflict in a 2004 legal case.[11] The council was essentially in the wrong in their attempt to be flexible regarding France and Germany, as they disregarded the formal procedure: "At council level, ministers don't normally want to be involved in legal discussions. They are there for the politics, but here I had to advise them that what they were proposing to do was in conflict with the treaty. The treaty laid down a procedure for member states that were in an excessive deficit, and if there's a treaty procedure, you have to follow it. And so it was wrong to adopt conclusions, and they adopted conclusions."[12]

This quotation not only tells us how the council ignored their lawyers' advice but also how the ministers were not particularly interested in legal discussions. From the council lawyers' point of view, this was simply an example of how enforcing debt and deficit rules was politicized early on, and when countries did not display budgetary discipline, they simply helped each other out by relaxing the rules.[13] In many ways, this shows the lack of authority that legal expertise had in the area of EU economic policy prior to the crisis, and further demonstrates that, with a lack of legal activity and experience, the perceptions of what was possible in this policy area remained politically oriented.

In terms of practices, this means that EU treaty terms and provisions for economic policy had not been interpreted substantially. This is significant because, given the ambiguity of treaty terms and provisions (Leino 2017), it means that there would be a high degree of uncertainty as to what was permitted and what was prohibited, but more importantly it can be seen as a constitutive element of the causal field, as it would offer one way for EU legal agents to valorize their expertise given that they are still in a position to make authoritative interpretations of EU law. Moreover, given that there were very few EU legal agents who had responsibility for economic policy, they could wield an unusually high degree of influence and become repeat players in this area. Nevertheless, the uncertainty lends itself to struggles over the 'right' interpretation, both between member states and EU institutions, but also between national courts and EU courts. This constitutive element can therefore induce contestation between actors and groups over the 'valid' interpretation of permitted and prohibited action, and in line with the theoretical framework, we can expect the outcome of such contestation to be implicated in the valorization of their expertise. The precise nature of how the interpretive practices of the EU legal advisors unfolds during the crisis will be expected to play a role in the causal process of valorization. Of course, how exactly they engage in it will be shaped by crisis-induced changes to the context and their perceptions. In contrastive terms, it is arguable that if there had been more substantial legal activity in economic policy, with a larger common store of EU legal knowledge regarding economic policy issues and more legal agents, then it is unlikely that the few legal agents implicated would have taken a defensive stance, as there would be more certainty as to what could be done. In other words, the defensive perception taken by the EU legal

10. Case C-27/04, Commission of the European Communities v. Council of the European Union, ECLI:EU:C:2004:436.

11. Case C-27/04.

12. Interview with E3, council legal advisor.

13. Interview with E1, council legal advisor in Brussels, September 4, 2018 (in person).

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		Valorization of EU legal expertise						
	Constitutive capacities (trigger)	**Part 1**	**Part 2**	**Part 3**	**Part 4**	**Part 5**	**Part 6**	**Outcome**
	Lack of EU policy and legal tools to deal with debt crisis starting in Greece.	Activity 1 Persuade member states that EU law does not prohibit helping Greece with financial assistance; leads to agreement between member states on *Greek Loan Facility* (GLF). Initial concerns emerge about GLF being outside EU legal order.	Activity 2 Commission attempt to create new systemic tool purely within EU law: *European Financial Stability Mechanism* (EFSM).	Activity 3 Dispute over the scope of EFSM and pivot to inter governmental with settlement over immediate solution: *European Financial Stability Facility* (EFSF)	Activity 4 Enable the Commission to operate outside EU legal order to set up EFSF.	Activity 5 EFSF deemed unfit in the long-term, leads to agreement on permanent mechanism by Member States: *European Stability Mechanism* (ESM).	Activity 6.1 Ensure policy conditionality controlled by Commission by controlling initial drafting process of ESM. Activity 6.2 Construct EU legal framework (Two-Pack legislation) to protect EU legal order from threat posed by ESM system.	In trying to maintain coherence of EU legal order, the ESM and EU legal order become interdependent and interconnected through contamination by EU legal advisors, leading to the notion of: semi-intergovernmentalism.
Time	Start 2010	April 2010	May 2010	May 2010	May 2010	October 2010	Dec. 2010-2012	
Legal agents involved	-	Commission legal advisors	Commission legal advisors	Council legal advisors, Commission economic policy makers	Commission and Council legal advisors	Commission legal advisors	Commission legal advisors and economic policy makers	
Strategies of EU legal advisors	-	Boundary making (technical and moral).	Boundary making (technical)	Boundary making (technical)	Boundary blurring (technical)	Boundary making (technical)	Boundary-making (moral) and boundary blurring (technical). Boundary making (technical	

Figure 2.
Process of valorization of legal expertise during Eurozone debt crisis.

agents, as detailed below, is as much related to the uncertainty about how to deal with the crisis, as it is to the intergovernmental path. This is exemplified in how the defensive stance intensifies as events unfold.

Having outlined the constitutive elements of the analysis, I will now present the elaboration of the causal process: the valorization of EU legal expertise. First, the process is presented in diagram form (Figure 2) and shows the temporal sequence of the Eurozone crisis in terms of the legal practices and strategies of the EU legal agents and the construction of the various legal instruments. The figure shows the strategic interventions of the EU legal advisors and conceptualizes them as boundary making or boundary blurring. In the next section, each part—Parts 1 to 6—portrayed in Figure 2 of the process of valorization is analyzed in depth to elaborate how the causal sequence unfolds in relation to the perceptions, strategies, and actions of the EU legal advisors.

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B. Causal Analysis: Process of Valorization

Part 1

Once it was decided that Greece needed help, the Greek Loan Facility (GLF) was decided on in April 2010 and would be outside the EU framework, comprising pooled bilateral loans of the Eurozone member states and set up by the commission. At this early stage, the EU legal advisors had two main perceptions that informed their initial approach to the crisis enveloping Greece. The first perception was about what could be done legally and focused on what exactly was meant by the provision on no-bailouts (Article 125 TFEU). As an EU legal advisor from the parliament explains, "what do really Articles 123 and 125 mean? And many would have taken a categorical position earlier on, and then when the needs became evident, then people would start being more creative and looking at what was really said."[14] This was crucial, as a legal advisor from ECFIN described, "We had a large group of member states around Germany which [were] making a weird reading of the treaty, they were reading article 125 of the treaty as prohibiting the possibility to give financial assistance."[15]

These issues over interpretation were specifically related to how the German Constitutional Court had interpreted Article 125 as a constitutive component of the EMU as a stability community in its 1992 judgement on the Maastricht Treaty,[16] thereby validating Germany's participation. Thus the fear of the German government was that the German Constitutional Court would invalidate anything that violated its own interpretation of Article 125.[17] Nevertheless, the commission legal advisors had to convince the member states that "this article says that member states cannot assume the liability of another member state, but if you make a loan to someone then you're not assuming his liability, it's just adding liability on top of other ones."[18] I asked a commission legal advisor about whether they take into consideration the interpretations from the member states, and he stated, "We have our own logic, which is based on EU law, and we try not to be bullied by the national perspectives, because if we do that, then we have 28 contradictory positions possibly."[19] Thus, the boundary making here was about using technical interpretations that distinguished the "real" meaning of Article 125, which would allow financial assistance, from alternative interpretations that would not allow it. Thus, we see how the EU legal advisors engage in boundary making in a technical way to assert their jurisdiction over authoritative interpretations of EU law and defend their autonomy in doing so.

Despite this practical approach, the second main perception was the concern of what any external construct would mean for EU law: "the concern of union law, of protecting union law, I had it day one, from the first moment, it has been my first discussion when we created the Greek Loan Facility with my own director general,

14. Interview with B1, European Parliament legal advisor in Brussels, June 15, 2018 (in person).
15. Interview with C1, ECFIN legal advisor in Brussels, June 18, 2018 (in person).
16. Bundesverfassungsgericht [Bverfg–Federal Constitutional Court], Bverfge 89, 155, (October 12, 1993) (*Maastricht Decision*).
17. Interview with A5, commission legal advisor.
18. Interview with C1, ECFIN legal advisor.
19. Interview with A1, commission legal advisor.

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and my colleagues, and I told them that the policy conditions, we need to put them in a council decision."[20] This initial concern related to EU competence in economic policy, and at this point the legal advisors wanted the content of the policy conditionality—which was just a Memorandum of Understanding negotiated between a member state and the commission—replicated in a council decision to ensure conformity with EU law. Thus, we see boundary making in a moral sense—that is, the concern about protecting EU law. Nevertheless, the commission would manage the GLF (Smeets, Jaschke, and Beach 2019), which meant a certain amount of supranational control. However, as the crisis progressed, the EU legal advisors would construct a legal framework in EU law to assert more control over the process of policy conditionality, which will be detailed in Part 6.

Part 2

By early May 2010, the Eurozone member states had committed to the GLF. The capacity of these loans amounted to €110 billion; however, this was not enough to calm financial markets, which started to panic over contagion effects,[21] leading to an intensive policy-making weekend on May 7, as a commission legal advisor recalls, "On a Friday evening, I came back home, I got a call at 21:00, 'you have to come back, the situation is really getting weird.'"[22]

According to official documents, "the commission will propose a European stabilization mechanism" that would "be submitted for decision to an extraordinary ECOFIN meeting" (European Council 2011, 29) on Sunday May 9, 2010. However, the commission legal advisors had preempted this situation. According to two commission lawyers involved in drafting the proposal, a legal advisor from the commission's DG ECFIN "had drafts already in his pockets [inaudible] because he had sort of anticipated a couple of days ahead that this might come."[23] With a draft already outlined, the DG ECFIN and the commission legal service quickly articulated the regulation on the evening of Friday May 7 from midnight to 04:00 am.[24] The draft regulation was sent to President Barroso of the commission, who gave permission for it to be sent to the Economic and Financial Committee (EFC), which contributes to the preparation of the ECOFIN Council's work. On Sunday, there was an extraordinary meeting of the College of Commissioners, who voted on it, and finally it went to the intergovernmental ECOFIN Council. When drafting the original regulation, the commission legal advisors were aware that the EU budget ceiling would only allow for €60 billion, which, as one of them said "would be too limited to impress the markets,"[25] so they proposed that the commission would make back-to-back loans on the market but guaranteed by the member states, which would have been theoretically unlimited,

20. Interview with C1, ECFIN legal advisor. See also Merino (2012) explaining that the practice of using council decisions started with the loans for Greece.

21. Interview with C3, ECFIN policy advisor in Brussels, July 12, 2018 (in person).

22. Interview with A1, commission legal advisor.

23. Interview with A2, commission legal adviser in Brussels, June 20, 2018 (in person). Interview with A5, commission legal advisor.

24. Interview with C1, ECFIN legal advisor.

25. Interview with C1. This point was confirmed by A1. commission legal advisor.

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but their idea was €500 billion.[26] In other words, the commission legal advisors engaged in technical boundary making by attempting to render the financial mechanism entirely within EU jurisdiction, which would keep the whole system at the supranational level—that is, both the financial assistance *and* the policy conditionality. This intention also reflects their initial concern that if left outside the EU framework, external policy conditionality would undermine the competence of EU law.

The technical boundary making is about extending their jurisdiction to take control of the task of financial assistance. It starts with finding a legal basis in the EU treaties and interpreting the scope of the provision broadly. Specifically, the commission legal advisors wanted to make use of Article 122(2) TFEU, which reads as follows: "Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken" (European Union 2016, 98).

As a commission lawyer points out, a textual interpretation of Article 122(2) is hampered by several ambiguities. First, the provision does not specify the nature of "severe difficulties," but that they must "logically be of an economic nature: budgetary problems, liquidity crisis [. . .], severe macro-economic problems, etc." (Keppenne 2014, 185); second, the reference to "exceptional occurrences" in the paragraph is not defined; and third, the question of making a general legal framework based on the provision is not present, "but nothing in the wording of this Article prevents it. It should be considered as justified taking into account the prevailing market conditions at the time" (Keppenne 2014, 187). This initial textual interpretation seeks to deduce the precision and clarity of the meaning of the words, thereby following the principle of legal certainty (Lenaerts and Gutierrez-Fons 2014), however, the meaning of the words has been purposefully left ambiguous, which is related to it being a result of political negotiations back when the Maastricht Treaty was negotiated. This raises an opportunity to bring other forms of EU legal interpretation to bear on the issue.

In terms of the normative context of the provision, a council lawyer (Middleton 2012) asserts that based on Articles 120, 121, and 123-126 TFEU, the member states are solely responsible for their budgets and thus "budgetary difficulties in a Member State are regarded by the Treaty as matters within, not beyond, the control of the Member State" (6). The issue here was how the meaning of this norm could change under the financial and economic crisis conditions. Thus, the severity of the crisis could be used to leverage the ambiguity of the meaning of the words, as shown above, and thereby interpret Article 122(2) as providing a legal basis for giving financial assistance because of the seriously deteriorating conditions in the Eurozone. Thus, by using a blend of historical (the Maastricht negotiations), contextual (normative context), and textual interpretation (the phrases "severe difficulties" and "beyond its control"), Article 122(2) can be seen as empowering "the legislator to assist Member States suffering budgetary problem" (Merino 2012, 1633).

26. Interview with E1, council legal advisor; interview with C1, ECFIN legal advisor.

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Part 3

On Sunday May 9, when the ECOFIN meeting commenced, the council legal service immediately shot down the commission proposal, as a council lawyer recalls, "[t]he perception of the commission [was] that it was a neutral—budgetary neutral—operation, because it's back-to-back, I go to the markets, I give the money to Portugal, to Ireland, and they will pay me back so there is no consequence whatsoever. Whereas we say, no. What happens if Portugal does not pay back? It's the liability of the budget of the union which will have to be filled in by the contributions of the member states [. . .], we say openly in the meeting, this is completely illegal."[27]

The commission's draft regulation was seen by the council legal services as circumventing the EU's budget "by creating a direct obligation on the [member] states' budget in an EU text."[28] Thus, it was decided that the EFSM would have to be capped at €60 billion, in line with the EU budget and that another €440 billion would have to be set up outside the EU framework.[29] It was at this point that a pivot to the intergovernmental occurred.

At first the idea of doing bilateral loans, as they had done with the Greek loan, was pushed by Germany, but many of the other countries refused this because bilateral loans would negatively affect their own borrowing conditions.[30] According to an economic policy advisor,[31] as well as Gocaj and Meunier (2013), German officials were initially pushing for a bilateral-loan setup because it was wary of the commission being responsible for a guarantee mechanism, and in fact the member states' lack of trust in the commission was repeated by multiple respondents.[32] The issue was that the institutional balance would be too much toward the commission—the supranational—and away from the council—the intergovernmental. Other member states, such as France, were willing to accept that the commission would not be responsible for controlling the new instrument, as long as it was based on a system of financial guarantees and not bilateral loans.[33] Once it was realized that it was not the idea of guarantees that the Germans were against but rather the commission having responsibility for the guarantees, a national finance official proposed the idea of a Special Purpose Vehicle[34]—a separate legal entity established as a corporation that can be used for funding purposes.[35] Agreement was reached on the Special Purpose Vehicle, which would be dubbed the European Financial Stability Facility (EFSF) and would be an intergovernmental private law entity setup by the commission but managed by an external team.

27. Interview with E1, council legal advisor.
28. Interview with C1, ECFIN legal advisor.
29. There is a possibility that a solution under the EU framework could have been made but this would have to involve the European Parliament, as it shares budget responsibility with the council, but under the time constraint that weekend, it would not have been feasible to assemble the Parliament (Interview with "E3," council legal advisor).
30. Interview with C3, ECFIN policy advisor.
31. Interview with C3, ECFIN policy advisor.
32. Interview with A5, commission legal advisor.
33. Interview with C3, ECFIN policy advisor.
34. "A Special Purpose Vehicle is a subsidiary of a company that is protected from the parent company's financial risk. It is a legal entity created for a limited business acquisition or transaction, or it can be used as a funding structure" (see https://www.upcounsel.com/special-purpose-vehicle).
35. Interview with C3, ECFIN policy advisor.

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What is of analytical interest here is how the legal and policy advisors have to take the political and financial preferences of the member states and encapsulate them in a novel legal arrangement such as the EFSF. This process, from an EU law perspective, raises many questions, as it is very much informed by political and financial imperatives and not administrative law such as legal liability vis-à-vis a constitutional system. In this way, it poses a challenge to the EU lawyers' perspective.

Part 4

Once there was a settlement on the EFSF, the EU legal advisors had to enable the commission to operate extensively outside the EU framework to set up the EFSF as well as negotiate policy conditionality on behalf of the EFSF, which also meant that the commission could ensure that it was in conformity with EU law. The question was could the member states "entrust EU institutions such as the commission [. . .] to perform functions for their behalf, on their behalf, on their name; rather than exercising treaty powers."[36] The EU lawyers were pondering this question on the margins of the meeting regarding the EFSF:

> The commission is an institution of the union, it doesn't belong to the member states as such, it belongs to the member states of the European Union, not as individual sovereign states, and we remembered, I don't how we remembered this in the pressures of the day, but we remembered that there had been a court case, a judgement where [. . .] the power of the commission to manage a fund that was not a union fund had been challenged, somebody had taken them to court [. . .] and the court found that the member states could do that, acting together they could confer powers on the commission that are not strictly under the treaty, but of course there are conditions.[37]

There was therefore CJEU legal doctrine,[38] called the Bangladesh mandate (Keppenne 2014), enabling the member states to act outside the EU framework in an area that is not the exclusive competence of the EU—economic policy—and the commission could thereby undertake tasks in that area. However, this legal doctrine did not cover them entirely because the arrangement in question that weekend encompassed the *Eurozone* member states, and not all the EU member states. Thus, a legal question could be raised: Could 16 of the 27 member states (Croatia had not joined at the time) entrust tasks to the commission, using "the commission's time and resources and people whose salaries are paid by the 27 [member states]?"[39] Under the pressure of the weekend when this decision was made, the council lawyers came up with a quick solution: "So we said well this has got to be formalized and we got the council to adopt that, what they adopted was written out by hand [. . .] a declaration from the council authorizing the Euro-area

36. Interview with A5, commission legal advisor.
37. Interview with E3, council legal advisor.
38. Joined Cases C-181/91 and C-248/91, European Parliament v. Council of the European Communities and Commission of the European Communities, Judgment of the Court of 30 June 1993.
39. Interview with E3 council legal advisor.

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member states to entrust tasks to the commission in connection with [inaudible], so that's perhaps one of the little bit more quirky or esoteric things we dealt with, but in a way hugely important."[40]

This was of course highly unconventional given that acts that are under adoption before the council take months of negotiation and drafting; in this instance, we have an act written out in hand and adopted over a weekend, which read (in its final printed form), "[t]he 27 Member States agree that the Commission will be allowed to be tasked by the euro area [Eurozone] Member States in this context [setting up EFSF]."[41] The ceremonial aspect of writing it down quickly and getting the council to agree shows the authority of such a legal practice to authorize an agreement that would have otherwise been on much less stable ground if legally challenged.

In terms of the political dimension to this legal construction, one of the council lawyers offered a reflection on why this adoption mattered: to stop a possible challenge by a hesitant member state. There were fears that the incoming 2010 British government, led by David Cameron as a coalition between the Conservatives—who have a powerful Eurosceptic faction—and the Liberal Democrats, could have challenged it: "They'd [have] discovered a week later that the union was being used for the Euro area without the participation of the other member states; they could've challenged it! We could've ended up before the court to defend it, and the fact that we had this little piece of paper, [. . .] to help us to defend a challenge, put us in a stronger position than if it didn't exist."[42]

Here we see how once a settlement on the EFSF was reached, the EU legal advisors move from the boundary-making position in terms of trying to create a purely EU legal framework for the EFSM, which is about differentiating a position and defending autonomy, to then engage in boundary blurring—that is, blurring the boundaries between the EU legal order and the intergovernmental system by enabling the commission to operate in both systems,[43] which is not foreseen in the treaties.

Part 5

By autumn 2010, the perception that the intergovernmental route would be problematic from an EU legal point of view persisted, for example, a council legal advisor said that a major concern was that the intergovernmental method would deconstruct EU law,[44] while another legal advisor was more explicit: "to go intergovernmental [. . .] has been probably one of the biggest mistake[s] strategically of the whole crisis. But so be it, so we operated in the intergovernmental format, and it appeared very clearly, very quickly that the EFSF had major flaws."[45] Here we see boundary making by connecting the flaws of the EFSF with intergovernmental

40. Interview with E3 council legal advisor.
41. Council of the European Union, Decisions Taken in Brussels, 10 May 2010, 9614/10.
42. Interview with E3 Council legal advisor.
43. The legal validity of this was eventually challenged in court in the *Pringle* case but was accepted based on the Bangladesh mandate and the Council adoption. See Case C-370/12, Thomas Pringle v. Government of Ireland and Others, ECLI:EU:C:2012:756.
44. Interview with E1, council legal advisor.
45. Interview With C1, ECFIN legal advisor in Brussels.

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governance. An ECFIN policy advisor confirmed this view that there was in fact critical issues with the EFSF that had not been foreseen.[46]

The flaws being referred to here are related to the costs for the member states. Even though the very point of the EFSF's status as an independent entity was to transfer risk from the member states, the EFSF could not be seen as autonomous from the Eurozone member states by Eurostat, the statistical unit of the commission (Eurostat 2014). When they agreed on the EFSF, the member states did not know that providing guarantees for financial assistance would mean their own debt levels increasing, which was a big drawback given that the Eurozone was in a debt crisis. Similarly, the member states did not realize that to get a triple-A rating from the credit-rating agencies for the EFSF—which was critical in order for the EFSF to raise funding on the markets—they would have to provide almost double the amount in guarantees.[47] In sum, the EFSF as a policy solution had become much more expensive than anticipated and highly technical. This was further noted by the ECFIN legal advisor when asked about the Framework Agreement of the EFSF that Clifford Chance, a global private law firm, had drafted: "The result is that Clifford Chance is very gifted in ensuring that no one else but themselves understand the text [laughs], which is a masterpiece of obscurity."[48] From an administrative or public law point of view, the EFSF construction was overly technical and esoteric. However, from the perspective of the economic policy makers, the EFSF had to serve the market purpose of selling bonds to investors.[49] This exemplifies the conflicting perceptions of how the solutions should be constructed, which would shape how the commission would draft the next mechanism—namely, the European Stability Mechanism (ESM).

In autumn 2010, Germany and France struck a unilateral deal outlining the broad strokes of a permanent mechanism: "[t]he establishment of a permanent and robust framework to ensure orderly crisis management in the future."[50] This would become the ESM. The EU legal advisors, as well as the economic policy advisors, saw an opportunity with the announcement of the ESM. Given the above-mentioned issues with the EFSF in terms of its complex financial structure giving member states more national debt, the EU legal advisors could now improve on the financial setup of a permanent mechanism and more importantly, go further in ensuring the superiority of EU law.

Part 6

6.1 Creating the European Stability Mechanism

With the creation of the ESM, the commission legal advisors wanted to legally articulate policy conditionality in both EU law and in the ESM Treaty so that it would be absolutely clear that conditionality was in conformity with EU law *and* protected EU

46. Interview with C3, ECFIN policy advisor.
47. Interview with C3, ECFIN policy advisor.
48. Interview with C1, ECFIN legal advisor.
49. Interview with C3. ECFIN policy advisor.
50. Franco-German Declaration Statement for The France-Germany-Russia Summit Deauville—Monday, October 18, 2010.

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competence in the area of economic policy because "it was a very dangerous threat for us to have the creation of a permanent body under international public law, if it was not properly articulated within union law under the treaty."[51] The DG ECFIN of the commission was in charge of making the first draft of the ESM Treaty (see Smeets, Jaschke, and Beach 2019), and an ECFIN legal advisor explained their approach: "So, since the commission was holding the pen of the ESM, obviously I made sure that the ESM is constructed in such a way that it does not harm the competences of the European Union or of the commission. So, I constructed as a mere funding arm, nothing more; everything that is related to, that is even remotely political within the hand of the commission, [. . .] even the ESM MoU [Memorandum of Understanding] is signed by the commission, and I enshrined in the ESM Treaty very clearly the superiority of union law."[52]

The role of this legal advisor as the initial drafter of the ESM Treaty was confirmed by an economic policy advisor from the commission[53] as well as a commission legal advisor.[54] Once the commission's DG ECFIN made the initial draft, then it would be presented within a technical task force set up to deal with the crisis, after which it would go to the more political groupings, such as the Eurogroup Working Group, then the Eurogroup, and finally the European Council (Smeets, Jaschke, and Beach 2019). What is notable is how the role of the commission is outlined in the ESM Treaty, specifically to negotiate the MoU and to monitor compliance. Once the decision for the ESM was taken, the legal advisors engaged in boundary blurring with respect to how the commission is given technical and political tasks, most notably, in terms of the procedure for granting stability support. First, the commission, in liaison with the ECB, is entrusted with assessing the existence of a risk to the Eurozone if a member state asks for assistance, then the commission assesses debt sustainability of that member state and its financial needs.[55] Then if a decision is taken to grant assistance, "the Board of Governors shall entrust the European Commission—in liaison with the ECB and, wherever possible, together with the IMF—with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an "MoU") detailing the conditionality attached to the financial assistance facility. [. . .] The MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned."[56]

"4. The European Commission shall sign the MoU on behalf of the ESM."[57]

In this way, the commission has very much infiltrated the ESM's structure, to a degree that suggests that the boundaries between the EU and the ESM are very much blurred. A council legal advisor commented on the commission's position: "They don't like it [intergovernmental] that much, but they've come to live with it with some, I say, tranquility, because actually the intergovernmental, my view on it is that [. . .] it has

51. Interview with C1.
52. Interview with C1.
53. Interview with C3.
54. Interview with A5, commission legal advisor.
55. See Article 13(1) of Treaty Establishing the European Stability Mechanism, 2012.
56. See Article 13(3) of Treaty Establishing the European Stability Mechanism, 2012.
57. See Article 13(4) of Treaty Establishing the European Stability Mechanism. 2012.

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given a lot of importance to the commission."[58] In other words, the intergovernmental structure of the ESM has ended up empowering the commission. In the next section, the level of intrusiveness into national policy enabled by the policy conditionality modality is detailed.

6.2 Constructing the Two-Pack legislation

As mentioned, once the approach to the creation of financial mechanisms pivoted to intergovernmental arrangements, it fostered a concern among EU legal advisors that relying on purely intergovernmental constructs in the area of economic policy could undermine the EU legal order, as shown above regarding the fear of EU law being deconstructed by the intergovernmental method.[59] There were two primary concerns here. The first relates to the moral/normative authority of EU law as a more normatively appropriate governance framework for economic policy than a purely intergovernmental one. The second concern relates to how an intergovernmental method could undermine the technical jurisdiction of the EU legal order. We therefore see two perceptions of how the EU legal advisors valorize their own expertise: the first is in terms of its normative authority and the second in terms of its technical authority.

In terms of the aspect of normative authority and fit for purpose, the issue relates to the difference in the logic of an intergovernmental arrangement, which would usually be based on international law, versus EU law. Public international law, the legal basis of the ESM, is founded on principles of reciprocity and unanimity, which operationally translates into the efficiency of a legal act depending on a member state's acceptance of that act.[60] With an EU legal act legislated through the Ordinary Legislative Procedure, the acceptance of all member states is not needed, just its approval in Brussels via the council and Parliament. Then it technically has direct effect in the member states and primacy over national law. Indeed, there is an almost religious deference toward these EU legal principles: "That [EU] logic is completely different to the logic of international law, so one of the fears of EU lawyers was that the birth of this method could lead to a new paradigm, which deconstructed some of the most sacrosanct principles of EU law, which is not international law, it is an EU law, which is autonomous with its own sources and effects, and that's not dependent on the will of member states."[61]

The last point is vital to understanding the significance of this boundary making between EU law and international law: EU law not being dependent on the will of member states means that crucially the most powerful member states and their interests do not necessarily dominate in negotiations. Thus, the commission lawyers talked about "the beauty of the Community method."[62] A primary issue in this distinction relates to the modality of policy conditionality—the practice of demanding national policy changes from a state that needs financial assistance. This practice became well known and harshly criticized in the 1980s and 1990s when developing countries were requested to liberalize and privatize state-regulated policy areas and impose austerity on their citizens in exchange for financial assistance from the International Monetary Fund

58. Interview with E1 Council legal advisor.
59. Interview with E1, council legal advisor.
60. Interview with E1.
61. Interview with E1.
62. Interview With A1, commission legal advisor.

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(IMF), leading to a crisis of legitimacy for the IMF (Seabrooke 2007). Now this practice would be implemented in the EU, but there were serious concerns about this. With an intergovernmental arrangement, decision making is based on unanimity between the member states, which in the context of an economic crisis can operationally lead to the economically weaker member states simply accepting what the economically powerful member states desire, as a commission lawyer stated, "We don't want these guys in Luxembourg [location of EFSF and ESM]—pure technocrats—controlled by the Bundestag [German Parliament] and no one else, with the rich member states having the power. We prefer the community method, which in the long term we consider more fit."[63]

The quotation indicates the concerns of the commission legal advisors that Germany, together with wealthier member states such as Finland and the Netherlands, will have more power in such an intergovernmental arrangement, whereas with the "community method"—that is, the supranational setup—the power differences between the member states is mediated by the inclusion of the European Commission, the Council of the EU, and the European Parliament. And indeed, a commission economic policy advisor explained that there was a discernible lack of empathy around the intergovernmental table when a debtor member state was on the receiving end of the creditor members states and their ever-growing list of conditions,[64] a claim confirmed by a commission legal advisor.[65] Regarding valorization, the EU legal advisors engage in boundary making that emphasizes the moral authority of the EU's supranational governance as being more appropriate as opposed to a purely intergovernmental approach, thereby reflecting the ideological form of boundary work and showing how they try to defend the autonomy of EU law against intergovernmental arrangements.

The second concern relates to the actual competences of the EU framework in the area of economic policy. Given that the commission would not be in charge of operating the EFSF or the ESM, the issue was stated thus: "Imagine the EFSF, the EFSF was a private company; can you imagine a private company adopting policy conditions [laughs] on a member state! It would've been crazy!"[66] Although this was an outlandish notion, the intergovernmental arrangement would still entail a modality of economic policy conditionality attached to financial assistance. From the commission's point of view, having conditionality outside the EU framework would undermine the competences of the EU: "We do not want member states to start imposing policy—economic policy conditions—on other member states outside of the union law framework, which would have completely emptied the EMU chapter."[67] This is in reference to the provisions of the EU Treaty—namely, Articles 120 to 126 TFEU that regulate economic policy. The point here is that an intergovernmental arrangement where the member states decide how to impose economic policy conditionality alone would render the EU's role superfluous. The commission legal advisors therefore wanted to protect the EU's technical competence in this area.

63. Interview with A1.
64. Interview with C3.
65. Interview with A2.
66. Interview with C1.
67. Interview with C1.

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These perceptions would inform the next commission regulation, which was the "Two-Pack."[68] Initially, a commission legal advisor from ECFIN told his superiors and colleagues that to protect EU law, they should insist on putting the policy conditionality for financial disbursements into Council Implementing Decisions (CIDS). He recounts their reaction: "And they were saying, well, why do you want this? This is just bureaucracy. And I said, 'no no, it's not bureaucracy, it's about making sure that we anchor all this in the union framework.' I convince them, so we did it, and since then you have dozens and dozens of council decisions with the policy conditions on member states etc., so it has become standard regular practice."[69]

Conceptually, we can see this as boundary making, whereby policy conditionality becomes legally authorized through the EU framework and thus falls under the jurisdiction of the EU. The key move was putting it in council decisions initially and then later creating a legal framework with the Two-Pack regulation. Council Implementing Decisions were produced every time a MoU was negotiated between a member state and the commission. In other words, not only would the MoU—a non-EU law agreement—impose conditionality, but this conditionality would be mirrored and enshrined in EU law as well. This could be considered highly intrusive on the part of the EU into what was before considered entirely national sovereign policy space. The EU lawyers found a legal basis for policy conditionality in Article 136(1) TFEU, and this meant that, as one lawyer said, the use of EU law in the Economic and Monetary Union "exploded" in size.[70] Using Article 136(1) as a legal basis can be seen as one of the most expansive forms of lawmaking in economic policy.[71] Article 136(1) reads,

> [in] order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance
>
> (European Union 2016, 106).

Using it was highly controversial, as many EU legal scholars had interpreted it restrictively (Ruffert 2011; Ioannidis 2016, 1271) and did not believe its ambiguous

68. Council Regulation 473/2013 of May 21, 2013, On Common Provisions for Monitoring and Assessing Draft Budgetary Plans and Ensuring the Correction of Excessive Deficit of the Member States in the Euro Area" (EU); Council Regulation 472/2013 of the European Parliament and of the Council of May 21, 2013, On the Strengthening of Economic and Budgetary Surveillance of Member States in the Euro Area Experiencing or Threatened with Serious Difficulties with Respect to Their Financial Stability. (EU).

69. Interview with C1.

70. Interview with A1.

71. It has been used in the excessive deficit procedure as part of the framework of article 126, in the macroeconomic imbalances procedure as part of the framework of the "six-pack," and the medium-term budgetary objective procedure as part of the framework of Article 121 (Beukers 2013, 5).

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wording was a basis for expanding EU power: "Art. 136(1) [. . .] has been interpreted in a way which seems difficult to justify in the light of its wording and scope" (Tuori and Tuori 2014, 171). And indeed, lawyers from the commission have acknowledged that Art. 136(1) is not straightforward in what it permits: "It is drafted in a very tortuous and ambiguous way [. . .] does it confer more intrusive competences to the Union as regards the euro area Member States? In the affirmative, how far can the Union intrude into national sovereignty?" (Keppenne 2014, 189–90). The point here is that a literal interpretation renders the provision "without much added-value" (Keppenne 2014, 190), which, given the urgent circumstances of the crisis as well as the concerns of EU legal advisors regarding the creation of intergovernmental mechanisms, enables them to interpret it in a more dynamic way: a teleological interpretation that follows the provision's objective—to ensure that EMU functions properly—and the character of the proposed measures—to strengthen the budgetary discipline of the Eurozone member states (Keppenne 2014, 190). In other words, they interpreted it as giving the EU institutions at the supranational level the possibility of shaping policy conditionality in the Eurozone.

To articulate this in EU law, the Two-Pack regulation was proposed in 2011 (ratified in 2013), in which the EU legal advisors have articulated the relationship between the intergovernmental framework of the ESM (and the EFSF) and the EU legal framework, which was characterized as "a kind of a docking mechanism or interlocking mechanism between the systems."[72] The drafting of the Two-Pack regulation is very explicit on the relationship between the two systems[73] and seeks a very broad scope regarding the source of the financial assistance. This became a concern when some member states started receiving funding from third countries, for example, Russia provided financing to Cyprus,[74] and of course this could become problematic if Russia started to impose certain policy conditions on Cyprus that contravened EU law. Furthermore, Article 7(2) states that "[t]he Commission shall ensure that the memorandum of understanding [MoU] signed by the Commission on behalf of the ESM or of the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council."[75]

In other words, the MoU must be fully consistent with EU law.[76] This was a significant step in taking control over policy conditionality: very little financing was coming from the EU budget, and yet the EU "was giving itself the power to adopt by qualified majority the decision with 40, 50 binding requests on a member state, covering things ranging from reform of the hospitals, to opening up regulated professions."[77] These conditionality measures signaled a new form of interference and raised the question of how far "the Union could intrude into national sovereignty" (Keppenne

72. Interview with A4, commission legal advisor in Brussels, August 9, 2018 (in person).

73. For Example, Article 7(1) states, "[w]here a member state requests financial assistance from one or several other member states or third countries, the EFSM, the ESM, the EFSF or the IMF, it shall prepare, in agreement with the commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment programme."

74. Interview with C1.

75. Article 7(2) Regulation (EU) No 472/2013.

76. Interview with A4.

77. Interview with C1.

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2014, 189–90). Nevertheless, the EU legal advisors had successfully established policy conditionality in EU law to ensure its compliance. In summary, the ideological imperative of protecting the EU legal order becomes a highly technical boundary-making procedure where EU law has jurisdiction over all policy conditionality in all its forms through the mirroring of the MoU.

Moreover, when we look at how the commission has been authorized to operate extensively in the intergovernmental ESM system as well as how the superiority of EU law is enshrined in the ESM Treaty, it becomes clear that the two systems, while based on different types of law, are so interdependent and interconnected that the boundary between them is blurred. This interdependency and interconnectedness is considered semi-intergovernmentalism by some of the EU legal advisors. In theoretical terms of valorization, the process appears thus: when decisions have been settled—that is, the ESM is created in international law—then EU legal advisors will engage in boundary blurring to infiltrate—or as one commission legal advisor said, "contaminate"[78]—that legal system by linking it to EU law in order to exert control over it—for example, by enabling the commission to operate extensively in that system and articulating the relationship *between* the two systems in both systems. This indicates a more intrusive strategy for influencing settled decisions.

Although the EU legal advisors perceive this as semi-intergovernmentalism, there is a similar perspective from the economic policy side. When the commission made a proposal (which failed to gain traction) to officially bring the ESM into the EU legal order in 2017,[79] the idea was that the EU needed a proper European Monetary Fund based on EU law, with more democratic oversight. However, an economic policy advisor did not really see the point and asserted that functionally a European Monetary Fund already existed: it is the ESM Treaty plus the European Commission.[80] In this sense, the legal construction of semi-intergovernmentalism has enabled this hybrid structure of financial assistance (ESM) and policy conditionality (European Commission).

DISCUSSION AND CONCLUSION

Using the case of the Eurozone crisis, I have shown how, through the process of valorizing their legal expertise, the EU legal advisors strategically intervened in the intergovernmental bargaining during the Eurozone crisis. This led to an expansion of both the intergovernmental framework and EU law, ending with the blurring of the two areas. The EU lawyers specifically sought to secure the integrity of the EU legal order by ensuring that crisis issues, such as the policy conditionality imposed on Eurozone member states in exchange for financial assistance, would be compatible with EU law.

The strategies taken by the legal and policy advisors—through boundary making and boundary blurring—have led to the emergence of a highly peculiar form of

78. Interview with A1.

79. Proposal for a Council Regulation on the Establishment of the European Monetary Fund, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1245-proposal-for-the-establishment-of-a-european-monetary-fund_en.

80. Interview with C3.

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governance that blurs the boundaries between the intergovernmental and supranational systems: semi-intergovernmentalism. A question could be raised as to why this process is about valorization and not simply a strategic process of intervention. This is because it is the specificities of legal practice—for example, legal interpretation and drafting—and knowledge—that is, the recognized and established forms of legal constructions—that shape the strategic interventions. And for the interventions to have an effect, the nature of those interventions—as legal interventions—must become endowed with meaning that is specific to the situation and institutional and social context. Thus, the process of valorization in this case's institutional and social context of the Eurozone crisis emerges as a series of strategic legal interventions in the intergovernmental bargaining process.

The analytical shape the process takes as phases of boundary making and boundary blurring can be generalized and compared with other ways that legal expertise can become valorized. For example, the role that European legal agents have played in the construction of Europe as a transnational legal order (Cohen and Vauchez 2007; Cohen 2010; Madsen 2011). Here legal expertise has been valorized through its translation of symbols of state legitimacy such as constitutionality, into transnational versions, as seen with the constitutionalization of the EU treaties (Vauchez 2015), where this transnational form of constitutionalization has proven to be a robust strategy of "ideological neutralization" (Cohen 2007, 112). Moreover, this valorization of EU legal expertise has enabled European integration through increased litigation (Stone Sweet and Sandholtz 1997; Stone Sweet 2004) by reprojecting political issues, such as the superiority of EU law or gender equality, as technical legal questions, especially when political deadlock hindered further integration (Burley and Mattli 1993).

Although such studies capture the long-term processes of the emergence of social fields where legal actors valorize their expertise vis-à-vis European polity building (Mudge and Vauchez 2012), my approach has shown how the valorization of legal expertise can occur through much shorter periods, which demonstrates a nimbleness that is often not connected to law and legal processes, specifically in terms of the legal agents moving between strategies of technical or moral boundary making when asserting or defending autonomy and technical boundary blurring when trying to contaminate other legal systems.

In terms of contributing to debates about legal globalization, this article has shown how transnational lawyers use crises to expand and differentiate law through specific strategies that are directed at protecting the coherence of particular transnational legal orders. However, by enabling these bridging mechanisms, different legal domains can become so closely entangled that the boundaries between them become blurred. A limitation of this article is that it has focused a lot on the perspective of EU legal advisors as opposed to the private lawyers hired to work for the EFSF and the ESM. Further research could attend to the practices and strategies of these private transnational lawyers, to see whether they engage in assertive or defensive positioning vis-à-vis the EU legal system. Finally, more research needs to be done on the implications of making the boundary between EU law and other forms of transnational and international law increasingly blurry and what it means for the institutional balance of power in the EU. This article has shown that despite initially being perceived as a threat, the intergovernmental arrangements have given a certain power to the European Commission. The question is whether this works to the benefit of smaller member states or only benefits the commission.

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REFERENCES

Abbott, Andrew. 1988. *The System of Professions: An Essay on the Division of Expert Labor*. Chicago: The University of Chicago Press. Kindle.

——. 2005. "Linked Ecologies: States and Universities as Environments for Professions." *Sociological Theory* 23, no. 3: 245–74.

Bennett, Andrew, & Jeffrey T. Checkel. 2014. "Process Tracing. From Philosophical Roots to Best Practices." In *Process Tracing. From Metaphor to Analytic Tool*, edited by Andrew Bennett and Jeffrey T. Checkel, 3–38. Cambridge: Cambridge University Press.

Beukers, Thomas. 2013. "The Eurozone Crisis and the Legitimacy of Differentiated Integration." European University Institute Working Paper MWP 2013/36. San Domenico di Fiesole, Italy.

Bickerton, Christopher J., Dermot Hodson, and Uwe Puetter. 2015. "The New Intergovernmentalism and the Study of European Integration." In *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era*, edited by Christopher J. Bickerton, Dermot Hodson, and Uwe Puetter, 1–48. Oxford: Oxford University Press.

Block-Lieb, Susan, and Terence C. Halliday. 2017. *Global Lawmakers. International Organizations in the Crafting of World Markets*. Cambridge: Cambridge University Press.

Bourdieu, Pierre, and Loïc J. D. Wacquant. 1992. *An Invitation to reflexive sociology*. Chicago: The University of Chicago Press.

Burley, Anne-Marie, and Walter Mattli. 1993. "Europe Before the Court: A Political Theory of Legal Integration." *International Organization* 47, no. 1: 41–76.

Carroll, William K., and Jean P. Sapinski. 2016. "Corporate Elites and Intercorporate Networks." In *The SAGE Handbook of Social Network Analysis*, edited by John Scott & Peter J. Carrington, 180–95. London: SAGE Publications.

Cohen, Antonin. 2010. "Legal Professionals or Political Entrepreneurs? Constitution Making as a Process of Social Construction and Political Mobilization." *International Political Sociology* 4, no. 2: 107–23.

Cohen, Antonin, and Antoine Vauchez. 2007. "Introduction: Law, Lawyers, and Transnational Politics in the Production of Europe." *Law and Social Inquiry* 32, no. 1: 75–82.

Conti, Joseph A. 2016. "Legitimacy Chains: Legitimation of Compliance with International Courts Across Social Fields." *Law and Society Review* 50, no. 1: 154–88.

Davies, Philip H. J. 2001. "Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of the Intelligence and Security Services." *Politics* 21, no. 1: 73–80.

De Grauwe, Paul, and Yuemei Ji. 2012. "Mispricing of Sovereign Risk and Macroeconomic Stability in the Eurozone." *Journal of Common Market Studies* 50, no. 6: 866–80.

Dezalay, Yves, and Bryant G. Garth. 1995. "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes." *Law & Society Review* 29, no. 1: 27–64.

——. 1996. *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*. Chicago: The University of Chicago Press.

——. 2002. *The Internationalization of Palace Wars. Lawyers, Economists, and the Contest to Transform Latin American States*. Chicago: The University of Chicago Press. Kindle.

——. 2011. "State Politics and Legal Markets." *Comparative Sociology* 10, no. 1: 38–66.

——. 2012. "Constructing Transnational Justice." In *Lawyers and the Construction of Transnational Justice*, edited by Yves Dezalay and Bryant G. Garth. New York: Routledge.

Dezalay, Yves, and Mikael R. Madsen. 2012. "The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law." *Annual Review of Law and Social Science* 8, no. 1: 433–452.

Editors at Law and Society Review. 2021. "Globalization and the Rise of Transnational Lawyers." *Law & Society Review* Virtual Issue, https://onlinelibrary.wiley.com/doi/toc/10.1111/(ISSN)1540-5893.Globalization-and-the-Rise-of-Transnational-Lawyers.

Eftimiades, Nicholas. 1994. *Chinese Intelligence Operations*. London: Frank Cass.

European Council. 2011. *The European Council in 2010*. Luxembourg: Publications Office of the European Union.

https://doi.org/10.1017/lsi.2023.67 Published online by Cambridge University Press

European Union. 2016. "Consolidated Version of the Treaty on the Functioning of the European Union." *Official Journal of the European Union* 59, no. C 202: 1–366.
Eurostat. 2014. "Measuring Net Government Debt: Theory and Practice." Statistical Working Paper, Publications Office of the European Union, Luxembourg.
George, Alexander L., and Andrew Bennett. 2005. *Case Studies and Theory Development in the Social Sciences*. Cambridge, MA: The MIT Press.
Gieryn, Thomas F. 1983. "Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists." *American Sociological Review* 48, no. 6: 781–95.
Gocaj, Ledina, and Sophie Meunier. 2013. "Time Will Tell: The EFSF, the ESM, and the Euro Crisis." *Journal of European Integration* 35, no. 3: 239–53.
Grisel, Florian. 2017. "Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession." *Law and Society Review* 51, no. 4: 790–824.
Hagan, John, and Ron Levi. 2004. "Social Skill, the Milosevic Indictment, and the Rebirth of International Criminal Justice." *European Journal of Criminology* 1, no. 4: 445–75.
Halliday, Terence C. 1985. "Knowledge Mandates: Collective Influence by Scientific, Normative and Syncretic Professions." *The British Journal of Sociology* 36, no. 3: 421–47.
Hinarejos, Alicia. 2015. *The Euro Area Crisis in Constitutional Perspective*. Oxford: Oxford University Press.
Ioannidis, Michael. 2016. "Europe's New Transformations: How the EU Economic Constitution Changed during the Eurozone Crisis." *Common Market Law Review* 53, no. 5: 1237–82.
Kauppi, Niilo, and Mikael R. Madsen. 2014. "Fields of Global Governance: How Transnational Power Elites Can Make Global Governance Intelligible." *International Political Sociology* 8, no. 3: 324–30.
Kelemen, Roger D. 2011. *Eurolegalism*. Cambridge, MA: Harvard University Press.
Keppenne, Jean-Paul. 2014. "Institutional Report." In *The XXVI FIDE Congress in Copenhagen, 2014 Congress Publications Vol. 1*, edited by Ulla Neergaard, Catherine Jacqueson, and Jens H. Danielsen, 179–257. Copenhagen: DJØF Publishing.
—— 2020. "Economic Policy Coordination: Foundations, Structures, and Objectives." In *The EU Law of Economic and Monetary Union*, edited by Edited by Fabian Amtenbrink and Christoph Herrmann, 787–812. Oxford: Oxford University Press.
Lamont, Michèle, and Virág Molnár. 2002. "The Study of Boundaries in the Social Sciences." *Annual Review of Sociology* 28, no. 1: 167–95.
Leino, Päivi. 2017. "The Institutional Politics of Objective Choice: Competence as a Framework for Argumentation." In *The Division of Competences between the EU and the Member States. Reflections on the Past, the Present and the Future*, edited by Sacha Garben & Inge Govaere, 210–32. Oxford: Hart Publishing.
Lenaerts, Koen. 2014. "EMU and the EU's Constitutional Framework." *European Law Review* 39, no. 6: 753–69.
Lenaerts, Koen, and José A. Gutierrez-Fons. 2014. "To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice." *Columbia Journal of European Law* 20, no. 2: 3–61.
Liu, Sida. 2015. "Boundary Work and Exchange: The Formation of a Professional Service Market." *Symbolic Interaction* 38, no. 1: 1–21.
Liu, Sida, and Mustafa Emirbayer. 2016. "Field and Ecology." *Sociological Theory* 34, no. 1: 62–79.
Madsen, Mikael R. 2007. "From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics." *Law and Social Inquiry* 32, no. 1: 137–59.
—— 2011. "The Protracted Institutionalization of the Strasbourg Court : From Legal Diplomacy to Integrationist Jurisprudence." In *The European Court of Human Rights between Law and Politics*, edited by Jonas Christoffersen & Mikael R. Madsen, 43–60. New York: Oxford University Press.
Merino, Alberto. D. G. 2012. "Legal Developments in the Economic and Monetary Union during the Debt Crisis: The Mechanisms of Financial Assistance." *Common Market Law Review* 49, no. 5: 1613–45.

https://doi.org/10.1017/lsi.2023.67 Published online by Cambridge University Press

Middleton, Tim. 2012. "Not Bailing Out … Legal Aspects of the 2010 Sovereign Debt Crisis." In *A Man for All Treaties—Liber Amicorum en l'honneur de Jean-Claude Piris*, edited by Herman Van Rompuy, 421–39. Bruxelles: Bruylant.

Mudge, Stephanie L., and Antoine Vauchez. 2012. "Building Europe on a Weak Field: Law, Economics, and Scholarly Avatars in Transnational Politics." *American Jounrnal of Sociology118, no.* 2: 449–92.

Norman, Ludvig. 2021. "Rethinking Causal Explanation in Interpretive International Studies." *European Journal of International Relations* 27, no. 3: 936–59.

Pavone, Tommaso. 2019. "From Marx to Market: Lawyers, European Law, and the Contentious Transformation of the Port of Genoa." *Law and Society Review* 53, no. 3: 851–88.

Pouliot, Vincent. 2014. "Practice Tracing." In *Process Tracing. From Metaphor to Analytic Tool*, by Andrew Bennett and Jeffrey T. Checkel, 237–59. Cambridge: Cambridge University Press.

Puetter, Uwe. 2012. "Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance." *Journal of European Public Policy* 19, no. 2: 161–78.

Quack, Sigrid. 2007. "Legal Professionals and Transnational Law-Making: A Case of Distributed Agency." *Organization* 14, no. 5: 643–66.

Rey, Hélène. 2013. "Fiscal Union in the Eurozone?" In *Political, Fiscal and Banking Union in the Eurozone*, edited by Franklin Allen, Elena Carletti, & Joanna Gray, 107–16. Philadelphia: FIC Press.

Ruffert, Matthias. 2011. "The European Debt Crisis and European Union Law." *Common Market Law Review* 48, no. 6: 1777–1806.

Seabrooke, Leonard. 2007. "Legitimacy Gaps in the World Economy: Explaining the Sources of the IMF's Legitimacy Crisis." *International Politics* 44, no. 2: 250–68.

Seabrooke, Leonard, and Rebecca E. Nilsson. 2015. "Professional Skills in International Financial Surveillance: Assessing Change in IMF Policy Teams." *Governance* 28, no. 2: 237–54.

Seabrooke, Leonard, and Duncan Wigan. 2016. "Powering Ideas through Expertise: Professionals in Global Tax Battles." *Journal of European Public Policy* 23, no. 3: 357–74.

Smeets, Sandrino, Alenka Jaschke, and Derek Beach. 2019. "The Role of the EU Institutions in Establishing the European Stability Mechanism: Institutional Leadership under a Veil of Intergovernmentalism." *Journal of Common Market Studies* 57, no. 4: 675–91.

Stone Sweet, Alec. 2004. *The Judicial Construction of Europe*. Oxford: Oxford Univeristy Press. Kindle.

Stone Sweet, Alec, and Wayne Sandholtz. 1997. "European Integration and Supranational Governance." *Journal of European Public Policy* 4, no. 3: 297–317.

Tansey, Oisín. 2007. "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling." *PS: Political Science and Politics* 40, no. 4: 765–72.

Tuori, Kaarlo, and Klaus Tuori. 2014. *The Eurozone Crisis: A Constitutional Analysis*. Cambridge: Cambridge University Press.

Vauchez, Antoine. 2015. *Brokering Europe: Euro-Lawyers and the Making of a Transnational Polity*. Cambridge: Cambridge University Press.

Vauchez, Antoine, and Bruno de Witte, editors. 2013. *Lawyering Europe: European Law as a Transnational Social Field*. Oxford: Hart Publishing. Kindle.

Wasserman, Stanley, & Katherine Faust. 1994. *Social Network Analysis: Methods and Applications*. Cambridge: Cambridge University Press.

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