Special Issue – Preliminary References to the CJEU
Part Five

Constitutional Courts, Preliminary Rulings and the "New Form of Law": The Adjudication of the European Stability Mechanism

By Samo Bardutzky[*]

A. Introduction

In 2012 and 2013, we observed how the European Stability Mechanism (ESM) was adjudicated by "EU courts, plural": a number of high courts of the Member States (among them "Kelsenian" constitutional courts as well as representatives of a more hybrid model of judicial review of constitutionality) and the European Court of Justice (CJEU) were seized by challenges to the mechanism. What attracted attention was the fact that only one court, the Supreme Court of Ireland, decided to submit a preliminary reference to the CJEU, while the other courts, as would appear from their judgments, did not even consider the option. This was a suboptimal example of judicial dialogue in the case of ESM adjudication.[1]

There were three possible reasons for this course of events that could be identified. First, the courts of the Member States might have been protective of their own constitutional authority. Second, the time normally necessary for the delivery of a judgment of the CJEU in a preliminary ruling might have served as a deterrent. Third, the innovative legal character of the ESM might be too complex for the existing mechanism of judicial dialogue operating within the EU courts, plural.[2]

This Article takes into account the new developments in the adjudication of the financial crisis. First, the fact that two more constitutional courts ruled on the ESM: the Austrian *Verfassungsgerichtshof* and the Polish *Trybunal Konstytucyjny*. Second, the recent decision of the German Federal Constitutional Court that, for the first time in its history, submitted a reference for a preliminary ruling to the CJEU in a case connected to the adjudication of

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[1] Samo Bardutzky & Elaine Fahey, *Who Got to Adjudicate the EU's Financial Crisis and Why? Judicial Review of the Legal Instruments of the Eurozone*, *in* THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS 341, 352 (Maurice Adams, Federico Fabbrini & Pierre Larouche eds., 2014).

[2] *Id*. at 357.

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the ESM is taken into consideration. In addition, the paper takes into account a broader image of legal innovation in the law of the Economic and Monetary Union (EMU) more precisely, and looks at the increased importance of the "new form of law" in devising measures to reform the EMU.

These developments lead the paper to focus on the third possible reason for the suboptimality of the judicial dialogue in the ESM saga: the "new form of EU law" character of the ESM. However, the ESM adjudication represents a case study for how the national high courts might react to the new form of law. The story of the ESM adjudication corroborates the claim that the new form of law represents a challenge to the reference for a preliminary ruling as the existing mechanism of judicial dialogue within the EU courts, plural.

The article first looks at the new form of European Union (EU) law (B). Second, the arguments as to why a well-conducted judicial dialogue is desirable in cases of the new form of law are laid down (C). Third, a brief overview of the "ESM saga" is provided: the mechanism itself and the challenges it faced in EU courts, plural (D). Fourth, the recent events are taken into consideration to reject the more traditional explanation for suboptimal judicial dialogue when it comes to constitutional courts (E). Fifth, the paper briefly discusses the second possible explanation for the flaws of the judicial argument: the issue of urgency and time (F). Finally, a link is established between the new form of EU law and the issues of judicial review by EU courts, plural. In the concluding thoughts, some proposals for possible improvements are laid down (G).

B. New Form of EU Law

What struck an observer of the ESM and its adjudication was the complexity and novelty of the Mechanism's legal character. The positioning of the mechanism in the area between international and supranational law, via legal measures enacted for its creation and the use of EU institutions outside of EU law, lead to us to label the strikingly post-national, both exceptional as well as problematic character of the mechanism as esoteric.[3] But legal structures akin to the ESM are far from being obscure now; in fact, scholarship has suggested that it is becoming the new normal. Steve Peers' concept of "new form of EU law," inspired primarily by the Treaty on Stability, Coordination and Governance in the EMU (TSCG), the ESM, the ESM's predecessor, the European Financial Stability Facility, is defined as "treaties to which some (but not all) EU member states are parties, which are

[3] *See*, *infra* D.I.; Elaine Fahey & Samo Bardutzky, *Judicial Review of Eurozone Law: The Adjudication of Postnational Norms in the EU Courts, Plural: A Case Study of the European Stability Mechanism*, MICH. J. INT'L L. EMERGING SCHOLARSHIP PROJECT (2013), http://www.mjilonline.org/wordpress/wp-content/uploads/2013/07/FaheyBardutzky.pdf.

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closely linked to EU substantive law and which confer powers upon the EU institutions."[4] Gianni Lo Schiavo has explored the ESM as "a new form of intergovernmental differentiated integration."[5] The way these labels attempt to conceptualize the character of recent developments is also a manifestation of the fact that the constitutionally relevant changes in EU law and integration are happening within the elusive field of the Eurozone. As we will show below, the Eurozone appears to stay on the margins of EU law – or, for that matter, the EU institutional framework. As a consequence, the issues related to the operating of the Eurozone had, until recently, not been a matter for the courts. Until recently, the responses to the crisis in the form of legally innovative mechanisms have brought about a recalibrating of powers of sorts. The shift of European integration into the sphere of intergovernmentalism, vehicles of public international law, and even deployment of private (corporate) law arrangements, has given rise to questions of the compatibility of such ventures with EU law (e.g., the *Pringle* case). The prospect of financially vital decisions being made outside national decision-making mechanisms has stirred up the issue of sovereignty (e.g., in the Estonian ESM case).[6]

As the Member States seem to be increasingly relying on solutions from the canon of the new form of EU law, in reforming the EMU, we observe the adjudication of the ESM as a valuable case study. How then has the new form of law been proliferating in the field of the EMU? The ESM Treaty (ESMT) invests several tasks in, most notably, the European Commission (often in liaison with the European Central Bank) and foresees the CJEU as being a forum for dispute resolution. The treaty is *organically* linked to the EU (and the Eurozone), as is revealed from the rules on membership. The Memorandum of Understanding, the principal act upon the basis of which the ESM assists one of its members, "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…" (Article 13(III) ESMT).

The TSCG, in Article 8, designates the CJEU as its "enforcer" (to use the words of Damian Chalmers),[7] and contains a whole title (Title II) on the "Consistency and Relation with the

[4] Steve Peers, *Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework*, 9 EUR. CONST. L. REV. 37, 38 (2013).

[5] Gianni Lo Schiavo, *The ESM Treaty: A new form of intergovernmental differentiated integration to the benefit of the EMU?*, *in* EVOLVING EUROPE: VOICES OF THE FUTURE, 8–9 July 2013, http://uaces.org/documents/papers/1340/loschiavo.pdf. Beukers similarly speaks of new forms of differentiated integration. Thomas Beukers, *The Eurozone Crisis and the Legitimacy of Differentiated Integration*, *in* THE EURO CRISIS AND THE STATE OF EUROPEAN DEMOCRACY 8 (Bruno de Witte ed., 2013).

[6] *See*, *infra* at D.II.1.

[7] Damian Chalmers, *The European Court of Justice has taken on huge new powers as 'enforcer' of the Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinised*, *available at* http://blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer/.

Law of the European Union." The language it uses is defined in EU law, especially in Protocol 12 on excessive deficit procedures and the Stability and Growth Pact.

Federico Fabbrini discussed the setting up of the second pillar of the European Banking Union: the Single Resolution Mechanism (SRM), which is planned to be composed of two "interwoven legal measures": a regulation establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a single resolution mechanism, a single bank resolution fund, and an international agreement, that is to be concluded by Eurozone member states, on the functioning of the Single Resolution Fund (SRF).[8]

The international agreement in its draft version foresees dispute settlement by the CJEU (Article 11) and delegates the task of reimbursement co-ordination to the Commission (Article 13). It contains, like the TSCG, a title on consistency and relation with EU Law. EU law, in fact, constructs the entire mechanism; the international agreement is only there to create an obligation for State Parties to raise the contributions to the SRF.[9]

C. Why Judicial Review of the New Form of Law

The courts' exercise of constitutional oversight over the evolving area of the EMU has been met with criticism. The arguments supporting the critique invoke the traditional abstention of the judicial branch from economic affairs.[10] The claim here is that there are compelling reasons why economic governance through the new form of law is an area where judicial review performs a positive function.

R. Daniel Kelemen's finding that the legalization of governance through courts is a palpable feature of contemporary EU law can serve as a starting point for the positioning of judicial review and dialogue in the story of the new form of law.[11] Also, Rachel Cichowski has shown how courts can provide more legitimate fora for contestation of norms in certain circumstances.[12] The construction of the ESM, again, serves as a useful case study. EU institutions and national participation and contestation were limited, curtailed and—one

[8] Federico Fabbrini, *On Banks, Courts and International Law: a Critical Analysis of the Draft International Agreement on the Functioning of the Single Resolution Fund*, Centro Studi sul Federalismo Research Paper 4, http://www.csfederalismo.it/attachments/2579_CSF-RP_Fabbrini_Banks-Courts-InternationalLaw_Feb2014.pdf.

[9] *Id.*

[10] Federico Fabbrini, *The Euro-Crisis and the Courts: Judicial Review and the Political Process in Comparative Perspective*, 32 BERKELEY J. INT'L L. 64, 103 (2014).

[11] R. Daniel Kelemen, *Eurolegalism and Democracy* 50 J. COMMON MKT. STUDS. 55 (2012); R. DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EU (2012).

[12] RACHEL CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE (2007).

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might say—manipulated. Judicial review is practically the only avenue in which the character of the ESM can be checked.

Claims in favor of judicial review (albeit with regard to the *Pringle* case before the CJEU) have been made before, perceiving the review by the courts as a subsidiary option that was rightly availed of after the creators of the ESM avoided, to paraphrase Bruno de Witte and Thomas Beukers, the "cumbersome" involvement of national and European members of parliament.[13] In the critique of judicial involvement, Daniel Halberstam's triad of main considerations—expertise, voice, and rights—guiding the allocation of competences among alternative institutions has been applied: The courts, the argument goes, lack both the expertise as well as "voice" (the claim to represent political will), and fundamental rights do not play a fundamental role.[14]

The avoidance of parliamentary involvement in the creation of the ESM pushed the "voice" card onto the side of the courts. Through either massive citizens' participation in triggering judicial proceedings (see below the account of the procedure before the Federal Constitutional Court of Germany; hereafter FCC) or the activity of parliamentarians in search of a second forum of contestation (see, for example, the procedures before the Austrian or the Polish Constitutional Court), the political problematization of the ESM, if anything, was expressed in judicial fora. In the case of the German FCC, the judicial procedure was phrased in the language of fundamental *rights* as enshrined in the *Grundgesetz*, as the claim that a right has been violated is the primary procedural vehicle for citizens to access review of constitutionality.

Again, the ESM serves as a good example of how awkward the relationship of the new form of law is, on the one hand, with the nation state, and on the other hand, with supranational EU treaty law. At this point, we emphasize the concept of *EU courts, plural*. The new form of law is characterized by intertwined legal instruments that originate both inside and outside of EU law. With regard to the latter, the CJEU offers only limited possibilities of review, and it is the Member States' high courts that can operate as a forum for checks and balances. In this regard, the preliminary reference mechanism is thus not only an important device in the EU treaties linking legal orders, but it also provides a unique forum for the participation of interests.[15]

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[13] *See* Bruno de Witte & Thomas Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order:* Pringle, 50 COMMON MKT. L. REV. 805, 827 (2013).

[14] Fabbrini, *supra* note 11, at 116 (citing Daniel Halberstam, *Constitutional Heterarchy: the Centrality of Conflict in the European Union and the United States*, *in* RULING THE WORLD 326, 337 (Jeffrey Dunoff & Joel Trachtman eds., 2009)).

[15] A look at the complainants/applicants in national constitutional challenges reveals a broad spectrum of different actors, such as a regional government, an ordoliberal think tank, politicians, and academics affiliated with the new left movements and Eurosceptic members of the public.

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Our claim of EU courts, plural, being a unique participatory forum, may face relevant contestation in light of the fact that all the courts that have ruled on the ESM so far have validated it and thus have delivered "noise around zero"[16] through judicial review. As much as this is an argument that is difficult to prove, we can recognize how possible it is that the courts were reluctant to slow or even strike down the attempts of the Member States' governments to respond to the financial crisis. But we can just as much recognize that the courts exercised judicial control of the other branches of government. With the final outcome in favor of the ESM, the case law nevertheless drew boundaries for future law making. The (in)famous threat of the IMF's Christine Lagarde to "leave the room if she hears "Karlsruhe one more time"[17] can also be interpreted as meaning that the constitutional categories (alas, it seems, only from the German constitution) have entered the discourse of decision-makers in international financial institutions, thanks to the constitutional courts.

D. The ESM Saga

I. The ESM

The way the ESM was created was distinctive in a number of ways. The Mechanism itself, which is an international financial institution, was established by a parallel agreement of the Member States outside of the EU Treaties, using the vehicle of public international law: the ESMT.[18] At the same time, it was anchored in Article 136 TFEU, through the device of a European Council decision to amend the treaties. The European Council decision purported to use the simplified revision procedure to achieve the ESMT as the end result.[19]

The legal image of the ESM was made more complex as there were national legal measures adopted in order to give validity to the above-mentioned international and supranational legal norms, which, in some of the cases, exposed the ESM to constitutional challenges in the first place. For example, the ESM was subjected to review by the Constitutional Tribunal of Poland, a country which is not a Eurozone country (and hence not a party to

[16] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 153 (2000).

[17] Kay-Alexander Scholz, *Karlsruhe's constitutional monastery* (11 September 2012), Deutsche Welle, *available at* http://www.dw.de/karlsruhes-constitutional-monastery/a-16231161.

[18] The ESM treaty was signed by the 17 Member States of the Euro-zone on 2 February 2012 and entered into force on 27 September 2012. It is available at http://www.esm.europa.eu/pdf/esm_treaty_en.pdf.

[19] European Council Decision of 25 March 2011 Amending Article 136 of the Treaty on the Functioning of the European Union with Regard to a Stability Mechanism for Member States whose Currency is the Euro, 2011 O.J. (L91) 1. For a detailed account of the creation of the ESM, see de Witte & Beukers, *supra* note 13, at 812.

the ESMT), as the Polish parliament adopted a statute ratifying the European Council Decision that amended Article 136 TFEU.

The ESM is institutionally quite distinctive: it at once creates its own parallel governance structure and borrows EU institutions, most prominently the European Commission, but also the European Central Bank and the CJEU for certain tasks.[20] This triggered different scholarly responses, highlighting the questionability of the use of EU institutions.[21] At the same time, the institutional design of the ESM stayed clear of any control from the European Parliament, which reveals how different the direction of the ESM and similar instruments is from the path taken in the Treaty of Lisbon.[22]

The ESM was subject to constitutional challenges in a number of EU Member States: the validity of the different legal acts necessary for the existence of the ESM was adjudicated in the Supreme Court of Ireland (SCI),[23] the Supreme Court of Estonia (SCE),[24] the German Federal Constitutional Court (FCC),[25] the Austrian Constitutional Court (ACC),[26] and the Polish Constitutional Tribunal (PCT).[27]

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[20] The ESMT envisages, inter alia, that the Commission will "negotiate, in liaison with the European Central Bank (ECB), the economic policy conditionality attached to each financial assistance" under the mandate given by the ESM Board of Governors (Art. 5(6)(g)). The Commission shall be entrusted with assessment tasks in the process of granting stability support (Art. 13(1)) as well as with negotiating and signing the memoranda of understanding with the ESM member requesting stability support (Arts. 13(2) and (3)) and then take part in the monitoring of the compliance with the memorandum (Art. 13(7)). *See also* Case C–370/12, Thomas Pringle v. Gov't of Ireland, 2012 E.C.R. I–000, para. 56 (regarding the tasks allocated to the Commission), para. 157 (regarding the ECB). For a comment on the governance system as a curious hybrid, see de Witte & Beukers, *supra* note 13, at 814.

[21] *See* Peers, *supra* note 4, for a favorable assessment of the use of EU institutions outside the EU legal framework; *contra* Paul Craig, Pringle *and Use of EU Institutions Outside the EU Legal Framework: Foundations, Procedure and Substance*, 9 EUR. CONST. L. REV. 263 (2013).

[22] Matthias Ruffert, *The European Debt Crisis and EU Law*, 48 COMMON MKT. L. REV. 1777, 1790 (2011); Karlo Tuori, *The European Financial Crisis—Constitutional Aspects and Implications*, 36 EUI LAW WORKING PAPER NO. 28, 2012.

[23] *Pringle v. The Government of Ireland*, [2012] IESC 47. Before that, the procedure took place before the High Court. *See*, *infra* II. 1.

[24] Judgment of 12 July 2012, no. 3–4–1–6–12, Judgment of the Supreme Court (en banc).

[25] Case 2BvR 1390/12, Judgment of 12 September 2012.

[26] Case SV 2/12-18, Judgment of 16 March 2013, http://www.vfgh.gv.at/cms/vfgh-site/attachments/9/1/9/CH0006/CMS1370243386803/esm_sv2-18.12_endg.pdf.

[27] Case K 33/12, Judgment of 26 June 2013, http://trybunal.gov.pl/fileadmin/content/omowienia/K_33_12_en.pdf.

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II. The Procedures in National Constitutional Courts

This section will sketch the procedures that took place in the five jurisdictions where the ESM was challenged before the courts. As the timelines of the procedures overlap, the order in which they are presented only follows the chronology of the ESM saga to a limited extent. The Irish case, where a preliminary reference was requested on the 31 July 2012, is mentioned first. Second, we turn to the two "earlier" ESM cases (in Estonia, the procedure took place between March and July 2012, and in Germany, the first decision of the FCC was issued in September 2012). In the last part of the section, we look at the two 2013 judgments in the ESM saga, from Austria and Poland.

1. Irish Courts

The member of the lower chamber of the Irish parliament, Thomas Pringle, filed a suit before the High Court of Ireland challenging the validity of the European Council Decision and the ESMT from the perspectives of EU law and the Irish Constitution.[28] The plaintiff himself moved for a preliminary ruling to be requested from the CJEU; the High Court judge indicated that a reference would be in order but it was left to the Supreme Court to actually make a reference. The Supreme Court identified two distinct issues. The ruling on whether the ESMT amounts to a transfer of sovereignty incompatible with the Constitution was made by the Supreme Court. With regard to the questions of whether the European Council decision is valid and whether Ireland's participation in the ESMT is compatible with EU law, the Supreme Court requested a preliminary ruling.

2. Estonian Supreme Court

In the procedure before the SCE, the Chancellor of Justice, an independent public official charged with reviewing the constitutionality of legislation, sought from the SCE a declaration of the unconstitutionality of Article 4(IV) of the ESMT, under his powers to contest treaties that are to be ratified by Estonia.[29] Article 4(IV) envisages an emergency voting procedure in the ESM's own collegial organs of governance, the Board of Governors and the Board of Directors. A number of decisions that they adopt normally require a unanimous vote; however, in certain situations where the Commission and the ECB both think that the failure to adopt a decision would "threaten to a significant extent the economic and financial sustainability of the euro area," a qualified majority of eight-five percent votes cast will suffice. Given that the votes are proportionate to the state's capital share (Article 4(VII) ESMT), this effectively means that under the emergency voting procedure, Estonia's 0.186% vote alone can never overrule a decision.[30] The Court

[28] *Pringle v. The Government of Ireland* [2012] IEHC 296.

[29] Case no. 3–4–1–6–12 at para. 111 of the judgment.

[30] *Id*. at paras. 150, 184.

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recognized this as an infringement of Estonia's sovereignty and budgetary powers of the parliament, and in the next step, not without controversy, subjected this infringement to a proportionality test.[31] When juxtaposed with the legitimate aim of preserving the euro, the ESM's voting arrangement passed the test of constitutionality.[32]

The issue of the admissibility of the Chancellor's application (and hence the question of whether there would be judicial review at all) was directly linked to the esoteric character of the ESM. The Supreme Court exercises its jurisdiction over international treaties but does not review acts of EU law.[33] The Chancellor was adamant that the ESMT was an international treaty and was not EU law. Even the planned amendment to Article 136 TFEU would not change the fact that within the EU, economic policy is left to the Member States' field of competence, which is where the ESM belongs.[34] The position of the respondent government, as recanted (and explicitly rejected) by the dissenting judges, seems to have been that the nature of the ESMT is "dualistic." As the "content and nature" of the ESMT are strongly related to the Estonian membership of the EU and EU law, the Treaty must be assessed based on Estonia's EU membership.[35] The Court, in the end, confirmed that the Treaty was not EU law, but at the same time, it "concerns" EU law and Estonia's membership of the EU.[36] This was, in part, due to the Treaty's ability to support the stability of the Eurozone as a whole and the Union itself.[37]

Ginter noticed the disparities in judicial understanding of the Treaty between the ESC and the CJEU and remarked that the perspective on how it should be applied may be very different.[38] If the disparities in judicial understanding only apply to the functioning of the mechanism once it has been set in motion, there is probably little that can be illuminated

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[31] Para. 8 of the dissenting opinion of the Justices Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull and Lea Laarmaa; the dissenting opinion of Justice Tampuu; Carri Ginter, *Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty*, 9 EUR. CONST. L. REV. (2013).

[32] Case no. 3–4–1–6–12 at para. 202 of the Judgment.

[33] Merike Saarmann, *'A cup of financial stability, please!'—The ESM judgment of the Estonian Supreme Court*, TIJDSCHRIFTVOOR CONSTITUTIONEEL RECHT 163 (2013), http://www.tvcr.nl/tijdschriftvoorconstitutioneelrecht/download/162A_cup_of_financial_stability__please___The_ESM_judgment_of_the.pdf.

[34] Case no. 3–4–1–6–12 at paras. 7 and 8 of the Judgment.

[35] Dissenting opinion of the Justices of the Supreme Court Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Lea Kivi, Ants Kull, and Lea Laarmaa, para. 2. The dissent supports this conclusion by offering a comparative argument, the fact that the Finnish parliament treated the ESMT as an EU matter when assessing its constitutionality.

[36] Case no. 3–4–1–6–12 at paras. 220–21 of the Judgment.

[37] *Id*. at para. 218 of the Judgment.

[38] Ginter, *supra* note 30, at 353.

in *a priori* reviews by constitutional courts that are seized with questions of constitutionality, even if they engage in a perfect example of judicial dialogue. Nevertheless, the ESC's engagement with the esoteric nature of the ESM can be taken as an indicator of how the new form of EU law can lead different courts to different answers to the same question.

3. German Federal Constitutional Court

The FCC entertained an application lodged by the parliamentary caucus of the *Die Linke* party in a procedure known as *Organstreit* as well as a *massive* constitutional complaint against the statutes ratifying both the ESM as well as the Treaty on Stability, Coordination and Governance in the EMU, lodged, *inter alia,* by *Mehr Demokratie*, a civil association that collected power of attorney from twelve thousand citizens.[39] In September 2012, the Court delivered a judgment rejecting the motion for *interim* relief, which set out the bulk of the Court's grounds regarding the constitutionality of the German ratification statutes.[40]

In assessing the ESM, the central yardstick for the FCC was the concept of the "overall budgetary responsibility" of the *Bundestag*. One of the features of the ESM that was reviewed by the FCC and that is relevant to our account was the "possible interplay" between the ESM and the ECB. The Court addressed the concern of the parties that the ESM might become a vehicle of unconstitutional financing of the Member States through the ECB. Whether this would be the case does not depend so much on the interpretation of Article 21(I) ESMT, which may itself prohibit the ESM from borrowing from the ECB. In choosing an approach to the interpretation of the ESMT, the FCC found that the latter was an "internal agreement" between the EU Member States. And as follows from the CJEU case *Matteucci*,[41] an internal agreement needs to be interpreted in conformity with EU law. Hence, the FCC reached for Article 123 TFEU, finding it to prohibit such financing. As the ESMT can only be interpreted in conformity with EU law, the conclusion has to be that it cannot borrow from the ECB.[42]

The claim presented here is that at this point, when establishing a link to primary EU law and choosing to reach for the Treaty provisions to deal with the contestation of the ESMT, the *Bundesverfassungsgericht* should have referred the issue of interpretation of primary law to the CJEU for a preliminary ruling. Less than three months later, the CJEU presented its own interpretation of Article 123 TFEU in relation to the ESM, in *Pringle*.[43]

[39] See the initiative's website at http://verfassungsbeschwerde.eu/verfahrensstand.html.

[40] The final decision on the ESM of the FCC was delivered on 18 March 2014.

[41] Case C–235/87, Matteucci v Communauté française de Belgique, [1988] ECR 5589.

[42] Case 2BvR 1390/12 at para. 172 of the Judgment.

[43] Case C–370/12, Pringle v. Government of Ireland, 2012 E.C.R. I–000, para. 123.

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4. Austrian Constitutional Court

The ACC was seized by a suit filed by the regional government of Carinthia. The Carinthian Government, among others, advanced a claim that the ESMT "substantially modifies" Article 125(I) TFEU, which is why it would need to be subjected to a different ratification procedure than it was. This legal potential of the ESMT lies within the unusual structure of the mechanism. The argument goes: the amendment to Article 136 TFEU, once it enters into force, may well be interpreted as a *lex specialis* to the no bailout clause of Article 125 TFEU. However, at the time of the ratification of the ESMT, the amendment was not yet part of primary law. Instead, it was the ESMT that was characterized as "complementary to the integration programme of the Union" and at the same time as "public international law that supplements European Union law" (the Carinthian government here quoted the FCC's ESM judgment). This kind of characterization is substantiated by the way the ESMT resembles Title VIII TFEU, and in the intensive involvement of the EU institutions in the exercise of the Mechanism's powers. All of this, according to the Carinthian government, leads to the conclusion that the ESMT materially modifies the founding EU Treaties and should thus be subject to a qualified ratification procedure under Austrian constitutional law.[44]

The Court agreed with the Federal Government that the question of the relationship or conformity of the ESM with the no bailout clause was settled by the CJEU in *Pringle*.[45] As the CJEU had confirmed the conformity, this also deconstructed this particular argument of the Carinthian government. The fact that a ruling of the CJEU on the issue of the ESM was already available to the respondent Federal government and the ACC[46] meant that the Court was able to rely on the authoritative interpretation of the relationship between the EU and ESMT precisely at the point where the contesters were linking their constitutional challenge to the new form of law.

5. Polish Constitutional Tribunal

While the dominant focus of the proceeding before the PCT, triggered by members of the Polish *Sejm* (lower chamber of the parliament), was on the correct procedural avenue for the ratification of the European Council Decision, the Tribunal also undertook a scrutiny of the use of the Article 48(6) TEU simplified revision procedure in the case of the "ESM amendment" of the TFEU. In fact, even the operative part of the judgment of the PCT declares that the Polish statute ratifying the European Council Decision "is not inconsistent

[44] Case SV 2/12–18, position of the Carinthian regional government, at 11 of the Judgment.

[45] *Id*. at 33 (stating the position of the Federal government), para. 52 (for the reasons given by the Court).

[46] Not, however, to the Carinthians, who filed their suit on the 22 October 2012, before the CJEU's ruling in *Pringle* was pronounced on 27 November.

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with [the Constitution of Poland] *as well as with Article 48(6) of the Treaty on the European Union..."* (emphasis added). In laying down the reasons for this decision, the Tribunal relied, first, on its own position in earlier case law that *in abstracto* the simplified revision procedure does not infringe the Polish Constitution as its use does not constitute a transfer of competences to the EU: the text of the provision itself only allows for the use of the revision method if it does not increase the competences of the Union.[47] Second, the Tribunal held that "the [CJEU]'s statements [in *Pringle*] were *binding* as regards the fact that the addition of Paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union... as well as the validity and interpretation of the European Council Decision..."[48]

The Tribunal summarized the position of the FCC in its ESM judgment on the effects of the introduction of Paragraph 3 to Article 136 of the TFEU, remarking that the FCC "drew analogical conclusions to those presented by the [CJEU]." It added that the ACC had taken a similar stance in its ESM judgment.[49]

The PCT relied on the findings of the CJEU in another point that is important for our inquiry: the use of EU institutions by the ESM.[50] In our account, we recognized the use of the EU institutions as an essential characteristic of the emerging new form of EU law. In the particular Polish constitutional context, the CJEU's ruling that the deployment of the EU institutions in the ESM did not result in an increase in EU competences was of practical significance for the domestic constitutional challenge. And in resolving the question of conformity with the national Constitution, the Tribunal looked to the CJEU for an interpretation of the elements of the new form of EU law.

There were three categories of courts in the ESM saga. The SCI was the only court to request a preliminary ruling from the CJEU, which led to the judgment in the case of *Pringle*. The SCE and the FCC ruled without expressly considering the possibility of a preliminary reference. The ACC and the PCT were the courts that pronounced their rulings following the CJEU judgment in *Pringle*.

Our position is that the national courts, most prominently the courts that delivered their judgments before the *Pringle* case in the CJEU, could and should have requested a preliminary ruling. This would have improved the suboptimal judicial dialogue in the ESM saga. For the remainder of the article, we look at the possible reasons as to why they did not use the preliminary reference procedure.

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[47] Case K 33/12, para. 7.2 of the Judgment.

[48] *Id*. at para. 7.4.1 of the Judgment (emphasis added).

[49] *Id*. at para. 7.5 of the Judgment.

[50] *Id*. at para. 7.4.5 of the Judgment.

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E. The Demise of the "Protection of Constitutional Autonomy" Argument

The traditional explanation for the reluctant attitude of constitutional courts towards judicial dialogue with the CJEU is the claim that the constitutional courts are being protective of their constitutional autonomy. Sometimes described as sliding to the margin in the processes of integration[51] and the growing role of judges in Europe, they—the account goes—refuse to make their decision in a particular case dependent on the outcome of the procedure before the CJEU.[52] Instead, they contribute to the Europe-wide judicial dialogue in other ways, such as through enforcing lower courts' duty to submit requests for preliminary rulings.[53]

We reject the claim that the protection of the courts' constitutional autonomy is a valid explanation. We base the arguments for our rejection on two main factual observations. First, what we can observe is that the two courts that did not submit a reference for preliminary ruling, but delivered their judgment after the CJEU judgment in *Pringle*, referred not only to the CJEU judgment in laying out the grounds for their decision, but also to the judgment of the FCC on the ESM.

Second, the FCC, in a case connected to the issue of the ESM, recently did for the first time in its history refer a question to the CJEU.[54] This is highly relevant as the FCC was, after recent first submissions of questions for preliminary ruling by the Spanish and Italian constitutional courts—as well as the French Constitutional Council—the most visible constitutional court that had in the past contributed greatly to the development of constitutional dialogue in Europe, but had thus far avoided opening a direct channel of communication with the CJEU.[55] The abstention of the FCC was also in contrast not only with the recent references originating in constitutional courts of other Member States, but also with the very active participation of other German courts in the preliminary ruling mechanism. In Daniel Thym's words, "the Judges in Karlsruhe boldly go where almost 2000

[51] Jan Komárek, *The Place of Constitutional Courts in the EU*, EUR. CONST. L. REV. 420, 421 (2013).

[52] Marta Cartabia summarizes this position of "*superiorem non recognoscens*" very well in her account of this "implicit and conclusive reason." Marta Cartabia, *"Taking Dialogue Seriously" The Renewed Need for a Judicial Dialogue at the Time of Constitutional Activism in the European Union*, NYU JEAN MONNET WORKING PAPER 12/07, 1, 27–29 (2007), http://www.jeanmonnetprogram.org/papers/07/071201.html.

[53] KOMÁREK, *supra* note 51, at 422.

[54] We will address this further, *infra* E. II.

[55] The account of the constitutional courts, preliminary rulings, and the 'new form of EU law' that thus takes place is what Giuseppe Martinico refers to as the new era of cooperation between the CJEU and the constitutional courts. Giuseppe Martinico, *Preliminary References and Constitutional Courts: Are You in the Mood for Dialogue?*, *in* SHAPING RULE OF LAW THROUGH DIALOGUE: INTERNATIONAL AND SUPRANATIONAL EXPERIENCES 221 (Filippo Fontanelli, Guiseppe Martinico & Paolo Carrozza eds., 2010).

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German courts, the regional Constitutional Court of Hesse and highest courts from other Member States had gone before."[56]

I. Transjudicial Communication in the ESM Saga Post-Pringle

The decisions of the ACC and the PCT that were issued after the CJEU had pronounced its ruling in *Pringle* tempt speculation when discussing the judicial dialogue in the ESM saga. Would the courts have made preliminary references if they had been seized earlier? Were they deliberately waiting for the outcome of the procedure before the CJEU? We will refrain from entertaining these queries. Instead, we will evaluate the role of these two courts in the light of the references they made in their judgments to the judgment of the CJEU and the other constitutional court(s).

Drawing on the work of Anne-Marie Slaughter, there are two main points to be introduced to our discussion. First, a general observation is drawn from the growing trend of global communication between courts: the judges that participate in the "global community of courts" by referring to each other's judgments "see each other not only as servants and representatives of a particular polity, but also as fellow professionals in an endeavour that transcends national borders." This sense of belonging to a professional community stems, *inter alia*, from the fact that they are faced with common problems or issues.[57] The second point is that there are several different types of transjudicial communication, and one of the ways in which they differ is the extent to which engagement is reciprocal.[58] Looking at the ACC and the PCT in the ESM saga, we see courts that took the findings of other courts seriously and embedded them in their respective judicial decision-making process. Through this communication, the courts have recognized themselves as members of a community dealing with the same problems and approaching them on a similar set of parameters.[59] However, we can also observe that while communication existed, it did not take the avenue which would have ensure reciprocal engagement—the preliminary ruling mechanism. This means that the fact that the ACC and the PCT relied on the judgments of the CJEU and FCC supports our claim that the reason for the suboptimal character of the judicial dialogue in the ESM saga was not the protective attitude of the courts with regard to their constitutional autonomy.

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[56] Daniel Thym, *A Spring in the Desert: the German ECJ Reference on the ECB Bond Purchases*, *available at* http://eutopialaw.com/2014/02/13/a-spring-in-the-desert-the-german-CJEU-reference-on-the-ecb-bond-purchases/.

[57] Anne-Marie Slaughter, *Global Community of Courts*, 44 HARV. INT'L L. J. 191,193 (2003).

[58] Anne-Marie Slaughter, *Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99, 112 (1994).

[59] *Id.* at 125–26 (explaining that there can only be communication when there is a "modicum of common ground," courts need to recognize that they are operating on similar conceptions and share the commitment to rule of law.). This is a basic threshold; in the context of the EU, the common judicial identity of the courts, if anything, is much stronger.

II. The First Reference for a Preliminary Ruling from the FCC

On 7 February 2014, the FCC took the step of referring its first question for preliminary ruling to the CJEU.[60] The questions referred originated in the same procedure as the one where the ESM was adjudicated, one of the largest in the entire history of the Court and hence the source of a number of separate decisions (the *interim* and the final decision on the ESM and the TSCG, discussed above; the order for referral, discussed in this section; and the forthcoming decision that will follow the decision of the CJEU).[61] The referral stems from the challenges made by the mass constitutional complaint against the legality of the Decision of the Governing Council of the European Central Bank of 6 September 2012 concerning Outright Monetary Transactions (OMT), and the accusation that the German Federal Government and the *Bundestag* did not actively prevent the ECB Decision from entering into force. The Court subjected the ECB Decision to *ultra vires* review to assess whether the ECB had overstepped its mandate under the Treaties in adopting the decision. However, as the decision on whether the ECB was within its jurisdiction or not depends on the interpretation of EU law, the Court requested a preliminary ruling from the CJEU. This was based on the Court's jurisprudence in the *Honeywell* decision, where it had held that:

> According to the legal system of the Federal Republic of Germany, the primacy of application of Union law is to be recognised and it is to be guaranteed that the powers of control which are constitutionally reserved for the Federal Constitutional Court are only exercised in a manner that is cautious and friendly towards European law. This means for the *ultra vires* review at hand that the Federal Constitutional Court must in principle comply with the rulings of the Court of Justice as a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act by European bodies and institutions, the Court of Justice is therefore to be afforded the opportunity to interpret the Treaties, as well as to rule on the validity and interpretation of the legal acts in question, in the context of preliminary ruling proceedings according to Article 267 TFEU.[62]

[60] Case 2 BvR 2728/13 et al, Order of 14 January 2014 [hereinafter OMT Reference].

[61] Mattias Wendel, *Exceeding Judicial Competence in the Name of Democracy: The German Federal Constitutional Court's OMT Reference,* 10 EUR. CONST. L. REV. 263, 267 (2014).

[62] Case 2 BvR 2661/06 *Honeywell*, BVERFGE 126, 286, 303–04 (cited in the OMT reference of the FCC).

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The reference was received with mixed feeling among the scholars who contributed the first reactions. In the light of our inquiry, it is particularly relevant that the scholarship saw the OMT reference as being phrased assertively; this could, in turn, be destructive for dialogue. The core of this claim seems to be that the FCC only proceeded with the *ultra vires* review once it had found the decision to be *manifestly* overstepping the mandate. While the requirement of *manifest* breach is, on the hand, a limitation on the *ultra vires* control of acts of EU institutions by the FCC, it means, on the other hand, that the FCC presents the CJEU with anything but an open-ended question on the legality of the contested act.[63] The FCC is quite obviously convinced of the illegality of the ECB decision and has also quite vocally expounded the conditions under which OMT operations could nevertheless remain within the ECB's mandate. This earned the decision the label of "clear marching orders, dictated to the Luxembourg Court."[64]

The contrasting accounts of the FCC's assertiveness (or lack thereof) are probably reconcilable by recognizing that the Court has, in its reference, mentioned the possibility of interpreting the ECB Decision and thus accommodating OMT operations within the system of competences.[65] In this paper, we need not go any further in speculating as to the outcome of the CJEU judgment or even the chapters of the 'OMT saga' that are to follow. It suffices to establish that the language of the reference is open enough for a dialogue to be established between the CJEU and the FCC (and possibly other courts). Additionally, the approach of the FCC is to be interpreted in the context of judge-made law of *ultra vires* review: the FCC's own standards from *Honeywell* command it to respect "the Union's own methods of justice" and the "right to tolerate error."[66]

Given that the reference, as assertively as it may have been worded, is at the same time anticipatory of possible outcomes, we have a basis to conclude that the alleged concern for constitutional autonomy among the constitutional courts of the Member States is an unlikely explanation for the suboptimality of judicial dialogue in the ESM saga.

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[63] Wendel, *supra* note 51, at 277.

[64] Oliver Gerstenberg, *An End to European Multilateralism: A Comment on the German Bundesverfassungsgericht's OMT decision*, *available at* http://eutopialaw.com/2014/02/19/an-end-to-european-multilateralism-a-comment-on-the-german-bundesverfassungsgerichts-omt-decision/. This was in stark contrast with an initial response which saw the FCC's reference as a surrender of sovereignty, coupled with the conclusion that for the OMT, the FCC's decision to refer the question amounts to nothing less than "dodging a bullet." FINANCIAL TIMES, February 10, 2014.

[65] OMT Reference, para. 100; Wendel, *supra* note 51, at 271.

[66] Wendel, *supra* note 51, at 305.

F. Was the Judicial Dialogue in the ESM Saga Suboptimal on Account of Lack of Time?

Is it possible that the references for a preliminary ruling were not sent simply because the potential referring courts were reluctant to postpone the passing of their final decision until the CJEU had pronounced its ruling? This is an argument that is very practical in nature, yet dangerous to disregard. This is not least because firstly, it normally takes the CJEU up to 20 months to deliver a judgment in a preliminary ruling case, and secondly, the procedures in the ESM saga were characterized by urgency.[67]

This hypothetical explanation cannot, therefore, be easily discarded. There are, however, reasons for believing that while time was of great importance, it is precisely the ESM saga that can offer a lesson in management of time in constitutional justice.

The first part of the lesson is, of course, the SCI's successful motion for an accelerated procedure, pursuant to Article 104a of the Rules of Procedure of the CJEU on account of "exceptional urgency" and possible damage to the Eurozone from delayed ratification. The CJEU, after setting in motion the accelerated procedure, delivered its judgment after four months.[68]

The second part of the lesson is that the CJEU did so *as a full court,* which of course amounted to a vast mobilization of the Court's resources and was in fact done for the first time in a preliminary ruling case. As per AG Kokott, the Court felt it had to give everything that it had.[69] This was, for one, as the case dealt with a very specific constitutional question of EU primary law (related to the new form of law), and also because the Court was already facing judicial decisions regarding the ESM from Member States.[70] This serves as ample evidence of the readiness of the CJEU to mobilize its forces when the Member States' constitutional courts had already been seized by challenges.

The third part of the lesson is the course of the proceeding before the FCC. The judgment on the ESM which the Court delivered in September 2012—a judgment that was anxiously awaited by the press, that visibly assuaged the financial markets, and that received plenty of scholarly attention—was a decision on the *interim* measures on the ratification of the Treaty. The Court held public hearings in June 2013, and it was only in February 2014 that

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[67] Fahey & Bardutzky, *supra* note 3.

[68] Advocate General Juliane Kokott in her speech offered some insight into fast-track procedure that played out in *Pringle*. Juliane Kokott, *Perspectives on the Role of the Advocate General in the Eurozone Rescue Decision: Advocate General Kokott on* Pringle v. Ireland, http://www.mjilonline.org/wordpress/wp-content/uploads/2013/07/Kokott1.pdf.

[69] *Id*.

[70] *Id*.

the Court announced that it would deliver the main judgment in March 2014. Of course, whether a court can at all afford to pursue such a course of proceedings depends on a number of factors; and most importantly, it is also the parties that are to a certain extent in charge of the proceedings. Nevertheless, the procedure before the FCC speaks of a certain flexibility that courts sometimes enjoy and can deploy to serve different means; our claim is that this flexibility should also be deployed to facilitate judicial dialogue.

G. Concluding Thoughts

Moments of wide mobilization of constitutional courts around Europe on the same subject are relatively rare and are most often linked to a reform of the EU Treaties. With the development of the new form(s) of EU law, it is likely that courts exercising judicial review in several Member States will again be seized with challenges to processes of integration and cooperation. Litigants, of course, tend to adapt their challenges to the rules of access in their respective jurisdictions and challenge the legal acts that are subject to review in the formal sense. It will be for the courts to recognize the bigger picture - the fact that, for example, the international treaty under review is functionally linked to primary or secondary EU law - and accordingly, involve the CJEU in the interpretation of the mechanism as a whole. It is hard to deny that in the ESM saga, there was an element of chance, or rather, a lack of any kind of cooperation or coordination on this issue. The arguments as to why the review of the ESM should have featured a better judicial dialogue have already been presented in this account. In order for future reviews of the new form of law to follow a more dialogic course, certain suggestions that might steer the EU courts, plural, in that direction, should also be sketched.

It is the moments of wide mobilization that open up the question of how to conceptualize the parallel activity of the courts. In 2010, Andreas Voßkuhle, the president of the FCC, suggested the concept of *Verfassungsgerichtsverbund* to explain primarily the relationships between the German FCC and what he referred to as the two 'European constitutional courts' – the CJEU and the European Court of Human Rights. The *Verbund* concept leaves space open for constitutional courts of other Member States, remarking that the communication among national constitutional courts takes place either by means of personal contacts between the judges or by means of mutual reception of their case law.[71] The concept emphasizes cooperation among courts and transcends the 'spatial' logic of hierarchy. It downplays the commonly spread conflict rhetoric of the relationship between the FCC and the CJEU, highlighting that that relationship "is not about superiority or subordination but about appropriately sharing and assigning responsibilities."[72]

[71] Andreas Voßkuhle, *Multilevel cooperation of the European Constitutional Courts: Der Europäische Verfassungsgerichtsverbund*, 6 EUR. CONST. L. REV. 175, 197–98 (2010).

[72] *Id.* at 183–84. The author admits that the English translation of the word for the concept, "multilevel cooperation of European constitutional courts" is not ideal as it may not convey entirely the non-hierarchical character of the concept.

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What is probably missing, despite the presence of transjudicial communication, is the awareness of the individual constitutional courts that they are in moments of wide mobilization, constitutive elements of the Europe-wide *Verbund* of guardians of the constitutions. Perhaps an increased awareness of this role on the part of the courts and the judges would be a sufficient first step towards a better-coordinated approach to judicial dialogue.

The awareness of being part of a *Verbund* of constitutional courts could lead to any number of operationalizations of the concept. One could well argue for the establishment of a court, or court-like body with jurisdiction over competence disputes in Europe. Provided with a flexible enough procedural apparatus, this could well make sure that, in the words of Andreas Voßkuhle, *Multilevel cooperation of the European Constitutional Courts*, responsibilities are correctly assigned and shared. Similarly, the argument could be for legislative change, either in primary law or in national procedural orders (or both), to redefine or rephrase obligations to engage in judicial dialogue.

What strikes as both feasible and sufficient, besides advocating for a raised awareness with regard to the membership of the *Verbund*, is to plead for informal manifestations of the latter. Notably, the concept of network has recently been applied precisely to the horizontal dimensions of judicial dialogue in Europe.[73] The networks established between constitutional courts in Europe combine communication through judicial and extrajudicial writings, references to each other's case law, contacts between "people of flesh and blood", and court personnel who meet regularly at congresses. Most important, perhaps, are the triennial congresses of the Conference of European Constitutional Courts, which deal with a selected topic on the basis of a questionnaire and national reports.[74] It seems that the basic infrastructure is already in place. It would most likely only require smaller modifications, such as informal agreements and a net of liaison officers.[75] In this way, pertinent questions could reach all members of the *Verbund* and indicate that there is a need for an exchange of views and possibly coordination.

[73] Monica Claes & Maartje de Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks,* 8 UTRECHT L. REV. 100, 101 (2012).

[74] Maartje de Visser, CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS 393. The website of the Conference is at http://www.confeuconstco.org/.

[75] In what is perhaps the most institutionalized connection between European constitutional courts, there are in fact already liaison officers of the constitutional courts charged with horizontal communication via the Joint Council on Constitutional Justice that operates under the auspices of the Venice Commission. *Id.* at 396.

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