Special Section
The ESM Before the Courts

A Sense of *Déjà Vu*? The FCC's Preliminary European Stability Mechanism Verdict

By Susanne K. Schmidt[*]

A. Introduction

Over the summer of 2012, the pending verdict of the German Federal Constitutional Court (FCC) was a topic of much speculation not only in Germany and in the European Union (EU), but also on the international level. Christine Lagarde, the managing director of the International Monetary Fund (IMF) was quoted as threatening to leave a meeting, were she to hear again "Bundesverfassungsgericht."[1] That decisions of a German non-majoritarian institution have such transnational repercussions while being guided by German laws and national considerations is nothing new. The Bundesbank's D-Mark rule was comparable and effectively pushed the introduction of the euro along. But also previous landmark rulings of the FCC on European integration raised cross-border attention, given that the Constitutional Court has the final say on German politics, and the biggest member state and economy of the EU can hardly be ignored. Moreover, being one of the most powerful constitutional courts in Europe, and certainly the one whose judgments receive most attention, rulings of the FCC are not only often cited but may also serve as a role model for other constitutional courts. Protest coming from this angle may therefore multiply.

The FCC's major rulings on European integration thus have a flavor of anachronism. Assessing the merits of European integration with the help of a purely German benchmark cannot lead to acceptable results. After all, they reinforce a predicament European integration is set to overcome. With an integrated economy, political decisions directed at one member state are likely to carry externalities for other member states, not reflected in the decision-making process. Such externalities of nationally-oriented decisions, Christian Joerges argues, necessarily carry a legitimacy deficit.[2]

---

[*] BIGSSS, University of Bremen. I would like to thank Michael Blauberger, Philipp Genschel, Rike Krämer, and Waltraud Schelkle for comments and suggestions. Email: skschmidt@uni-bremen.de. Submitted Oct. 20, 2012.

[1] Veit Medick & Philipp Wittrock, *Karlsruhe lässt Kanzlerin zappeln*, DER SPIEGEL, July 16, 2012, *available at* http://www.spiegel.de/politik/deutschland/esm-und-fiskalpakt-bundesverfassungsgericht-laesst-sich-mit-euro-urteil-zeit-a-844573.html.

[2] Christian Joerges, *'Deliberative Political Processes' Revisited: What Have We Learnt About the Legitimacy of Supranational Decision-Making*, 44 J. COMMON MKT. STUDS. 779–802 (2006) (arguing that the CJEU can compensate for forcing member states to consider the effects of their policies on other member states).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

A perspective focusing on the cross-border implications of national decisions is particularly needed, given the multiple externalities involved in monetary integration. It has brought about a situation of diffuse reciprocity among the member states. In contrast to specific reciprocity, where "the benefits to be exchanged are precisely specified and no trust is required,"[3] diffuse reciprocity is more demanding, requiring mutual trust and obligation. For example, German government bonds are in high demand, despite the weakness of the southern euro. The German industry profited from its comparative undervaluation given that southern countries cannot devalue their currencies. But southern countries benefited from low interest rates right after the introduction of the euro, facilitating the financing of debt and fueling public and private indebtedness. Right after the introduction of the euro, Germany was still the "sick man of Europe," facing high interest rates during economic recession. Having restored its competitiveness through wage deflation, its trade surpluses were the Southerners' deficits. Now, Northerners are helping to finance Southerners' debts, profiting from the margin between the lower northern and higher southern interest rates. But are they covering southern debts or alleviating the losses of northern banks with risky southern investment? It is hardly possible to attempt a balance sheet in such a situation of diffuse reciprocity with a north-south dimension that is intertwined with a public-private one. Plus, within the crisis-stricken countries, some actors profit from the crisis.

The dramatic development of the euro crisis certainly put the FCC in a difficult situation. This resulted in an unusual summary examination of the case on the merits, even though the court had been expected to rule only on a temporary injunction. There would not have been the option to back out of the international treaties for the establishment of the European Stability Mechanism and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (fiscal compact) after ratification. At the same time, acceptance of the request for a temporary injunction would have thrown the markets into turmoil. The FCC thus carried an unusually heavy burden of responsibility in a situation where German economists were deeply split about the right policy reactions to the challenge and the public felt very insecure and frightened. In the following section, I will start by explaining the way political science conceptualizes courts. I will then go on to put the ruling in its context of the previous rulings of the FCC on European integration and the euro crisis. After discussing the major points the FCC makes in its preliminary European Stability Mechanism (ESM) judgment, I will conclude on the FCC's role in the current system of European governance, while taking into account the externalities of its rulings.

[3] Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 4f (1986).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

B. Courts as Political Actors

As is characteristic of the discipline, there are multiple political science perspectives on courts as political actors. Next to more interpretive approaches focusing on different judgments, the field is situated between the recognition, on the one hand, that constitutional courts can be veto players in political games and, on the other hand, their essential passiveness. They rely on being called upon and on being followed in their judgments. Given these two sides, the power of courts as veto players hinges on important preconditions. Focusing on these constraints, there are several crucial institutional provisions that need exploring. Among them is the question of how judges are appointed and possibly re-appointed; how broad their mandate is; who has standing at the court (and how that determines the case load and possible development of case law); how easy it is to ignore the court's judgments and change the underlying laws; and the extent to which the courts' rules of procedure and budgets can be altered to further rein in courts. Compared to the United States, where courts, and particularly the Supreme Court, are an important topic of research, European political science has neglected the subject of courts.[4] This is also true for the study of the German FCC.[5] It is less true, however, for research on the Court of Justice of the European Union (CJEU), whose influence is well documented.[6]

Just some results of the research on courts shall be summarized here. Legal texts are essentially incomplete contracts. Being the result of political compromises, they are being read by different parties in different ways—and they are therefore subject to judicial interpretation. The legislatively adopted laws are complemented by their judicial interpretation. Influential has been the theory of Alec Stone Sweet on judicialization, by which he analyzes the increasing importance of the judiciary compared to the legislature in the determination of collectively binding decisions.[7] There needs to be a sufficient case load to develop case law, precedent needs to be honored, and reasons given, allowing litigants to draw on case law to further their interests. But courts are dependent on the compliance with their rulings. For this reason, public opinion is important.[8] If courts are

[4] *See* Britta Rehder, *What is Political About Jurisprudence? Courts, Politics and Political Science in Europe and the United States* (Max Planck Inst. for the Study of Societies, Discussion Paper No. 07/5, 2006).

[5] *See* Christoph Hönnige & Thomas Gschwend, *Das Bundesverfassungsgericht im politischen System der BRD—ein unbekanntes Wesen?,* 51 Politische Vierteljahresschrift 507, 507–30 (2010).

[6] *See* Karen Alter, The European Court's Political Power: Selected Essays (2009); Alec Stone Sweet, *The European Court of Justice and the Judicialization of EU Governance*, 5 Living Revs. Eur. Governance 1, 1–50 (2010).

[7] Alec Stone Sweet, *Judicialization and the Construction of Governance*, 31 Comp. Pol. Studs. 147, 147–184 (1999).

[8] *See* Georg Vanberg, *Establishing and Maintaining Judicial Independence*, The Oxford Handbook of Law and Politics 99–119 (2008); Ulrich Sieberer, *Strategische Zurückhaltung von Verfassungsgerichten: Gewaltenteilungsvorstellungen und die Grenzen der Justizialisierung*, 16 Zeitschrift für Politikwissenschaft 1299, 1299–1323 (2006).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

held in great esteem by the public, and if voters can also estimate whether their judgments are being implemented, courts are strong. Otherwise, they are in a more volatile position. Some of the experience with newly founded courts in Eastern Europe, particularly in Russia (and recently in Hungary and Romania), shows that for courts to be powerful, mere formal prerequisites do not suffice.[9] Generally, it can be assumed that courts pursue the institutional self-interest of guarding their autonomy, maintaining their influence, and possibly extending their mandate.

Rational-choice approaches emphasize the dependence of courts, whose judgments they believe to correspond to the preferences of powerful political actors.[10] With regard to the CJEU, this argument is unconvincing, given the many times that the court has ruled against submitted opinions of powerful member states. Moreover, rational-choice approaches have the shortcoming of assuming a perfect malleability of law, which judges can interpret according to political need.[11] Though there is interpretative scope, if laws were setting no limits, there would be little reason why political and private actors should try to influence the policy process at all. On this basis, an interesting argument is made by R. Daniel Kelemen.[12] Analyzing decisions at the European and the WTO level, he argues that courts are susceptible to political pressure but need to take account of the determinations resulting from legal stipulations and their own case law. Only if the latter is indeterminate can courts follow political pressure. But this is much more difficult if precedent and legal texts are more determinate. In one of the rare works analyzing its internal decision-making, Uwe Kranenpohl interviewed judges of the FCC as to the relevance of precedent. It is striking how much they emphasize the constraints that precedent imposes on their successors—even in the German tradition of legal positivism, leading to a perception of the Basic Law consisting not only of 146 Articles but also all of the FCC's decisions.[13]

With these remarks on the importance of precedent next to generalized political support, I now turn to the background of the case at hand, the FCC's earlier European rulings.

---

[9] *See* Silvia von Steinsdorff, *Verfassungsgerichte als Demokratie-Versicherung? Ursachen und Grenzen der wachsenden Bedeutung juristischer Politikkontrolle*, *in* ANALYSE DEMOKRATISCHER REGIERUNGSSYSTEME, 479, 479–98 (Klemens H. Schrenk & Markus Soldner eds., 2010).

[10] *See* Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 INT'L ORG. 171, 171–181 (1995).

[11] *See* Arthur Dyevre, *Unifying the Field of Comparative Judicial Politics: Towards a General Theory of Judicial Behaviour*, 2 EUR. POL. SCI. REV. 297, 301, 311 (2010).

[12] R. Daniel Kelemen, *The Limits of Judicial Power: Trade-Environment Disputes in the GATT/WTO and the EU*, 34 COMP. POL. STUDS. 622, 622 (2001).

[13] *See* Uwe Kranenpohl, *Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts*, 48 DER STAAT 387, 398 (2009).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

C. The FCC and European Integration

In contrast to lower national courts, which are empowered by the preliminary ruling procedure allowing them to directly submit their cases to the CJEU, national constitutional courts lose out through European integration.[14] The relationship of the FCC to the CJEU has therefore not been an easy one. In its first landmark ruling, *Solange I* of 1974, the FCC claimed for itself the right of judicial review of European legal acts, notwithstanding the supremacy of European law, should they not meet the high German standards of basic fundamental rights.[15] This is generally hailed as having been an important impetus for the CJEU to develop its own fundamental rights protection, which the FCC then recognized in 1979 in *Solange II*.[16] This European-friendly decision seemed to imply that the FCC had made its peace with the CJEU. But what could be seen as the arrogance of the FCC continued with the following Maastricht ruling in 1993, where the FCC claimed for itself the right of an *ultra vires* control in order to assess whether European integration was taking place within the limits delineated by the Treaty.[17] At issue in this ruling, as in several to come, was, among others, the question of whether the extent of integration agreed on in the Maastricht Treaty was by now undermining the democracy principle of the Basic Law (Art. 20). This is protected by the eternity clause of Article 79(3) in the Basic Law and could only be changed by a new constitution based on a referendum (Art. 146 Basic Law). This added a new argument to the legal dispute between the FCC and European integration.

The question whether the extent of delegation of competences violates this principle has remained a core concern. Together with the right to vote found in Article 38, citizens could address the Court with constitutional complaints against the progress of European integration. The Maastricht ruling also had other memorable features, notably its emphasis on the member states as "masters of the treaty." This emphasizes the fundamentally intergovernmentalist understanding of European integration that the FCC follows. This is despite the fact that the changed Article 23 laid a new basis for Germany's participation in the EU with the Treaty of Maastricht, taking account of its supranational and not only intergovernmental nature. But the FCC only saw the European Parliament

[14] *See* Alec Stone Sweet, *Rights Adjudication and Constitutional Pluralism in Germany and Europe*, 19 J. EUR. PUB. POL'Y 92, 92 (2012).

[15] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVL 52/71, May 29, 1974, 37 BVERFGE 271 (Ger.).

[16] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 197/83, Oct. 22, 1986, 73 BVERFGE 339 (Ger.).

[17] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 2134/92, Oct. 12, 1993, 89 BVERFGE 155 (Ger.).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

(EP) in a subsidiary position, the primary legitimizing role remaining with national parliaments.

In particular, the announcement of the FCC's intention to examine further steps of integration with regard to a possible violation of the EU's competences according to the principle of conferral has meant that in subsequent cases the "final countdown" was expected—but did not materialize. Instead the Court has emphasized the responsibility of the Bundestag (federal parliament) for integration and safeguarding its competences. Most notably this was the case in the ruling on the European Arrest Warrant in 2005, where the FCC clearly criticized the Bundestag for blindly following the lead of the executive and the supremacy of European law, and for not using the existing scope of parliamentary powers to achieve a transposition safeguarding the principles of the Basic Law.[18]

In its *Lisbon* ruling in 2009, the FCC repeated the limits that the Basic Law imposes on European integration and its own rights of judicial review.[19] Next to referring to the *ultra vires* control introduced by the Maastricht ruling, it invented a right of "identity control" to prevent integration undermining German constitutional identity. As fuzzy as the term is, the FCC mentioned criminal law, culture and education, the welfare state, and taxes to be crucial for German identity, ignoring largely that in particular the case law of the CJEU has already imposed clear limits on the ability of member states to act in these areas.[20] The ruling was heavily criticized with regard to its intergovernmental understanding of integration, its one-sided emphasis of legitimation through national parliaments, and its usurpation of the right of judicial review over European legal acts. Especially the combination of *ultra vires* based on the principle of conferral and a very fuzzy "identity control" seemed to imply that the FCC could at any time decide to block further integration. In a community of 27 member states, such preemption was also deemed unacceptable, as it could not be generalized to other member states, thus jeopardizing the integration process.[21] In an unprecedented move, a group of law professors, which

[18] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 2236/04, July 18, 2005, 113 BVERFGE 273 (Ger.).

[19] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Jun. 30, 2009, 123 BVERFGE 267 (Ger.).

[20] *See* Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, 40 J. COMMON MKT. STUDS. 645, 645 (2002); Susanne K. Schmidt, *Law-Making in the Shadow of Judicial Politics*, *in* THE "COMMUNITY METHOD": OBSTINATE OR OBSOLETE? 43, 43 (Renaud Dehousse ed., 2011); Philipp Genschel & Markus Jachtenfuchs, *How the European Union Constrains the State: Multilevel Governance of Taxation*, 50 EUR. J. POL. RES. 293, 293 (2011).

[21] *See* Martin Höpner et al., *Kampf um Souveränität? Eine Kontroverse zur europäischen Integration nach dem Lissabon-Urteil des Bundesverfassungsgerichts*, 51 POLITISCHE VIERTELJAHRESSCHRIFT 323, 347 (2012). Recently, the Czech constitutional court has declared a CJEU judgment *ultra vires*, motivated by an internal judicial conflict. *See* Jan Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a*

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

included Wilhelm Hankel, Wilhelm Nölling, Karl Albrecht Schachtschneider and Joachim Starbatty, criticized the FCC. They demanded that its rules of procedure needed change, to require it to address a preliminary procedure to the CJEU, when using its self-claimed right of judicial review.[22] But while being highly critical of the course of integration, the FCC subjugated its criticisms to the fact that politically the Lisbon Treaty had broad majorities. It only demanded changes in the accompanying law, emphasizing again the participation rights of the Bundestag and Bundesrat (upper house).

Given the renewed will of the FCC to use judicial review, it was expected that it would use its *Honeywell* ruling in 2010 for a first demonstration.[23] The much-criticized *Mangold* ruling of the CJEU was at issue here, which had construed a prohibition of age discrimination from general principles of EU law.[24] But the FCC let this opportunity pass.[25] It substantiated its right of judicial review by limiting it to cases of an "obvious and structurally significant violation of the principle of conferral of competences" to the EU, which would require that a preliminary procedure be addressed first to the CJEU, had the latter not yet clarified the issue.[26] Thus, the criticism having been voiced by law professors after the *Lisbon* judgment was dutifully taken on board.

This is the background to the then-ensuing rulings concerning the euro crisis, to which I turn now. Despite the very critical stance of the FCC, which repeatedly threatens a veto against European integration in general and the CJEU in particular, it limits itself to reprimanding the German parliament to take its rights and duties more seriously. Particularly in reaction to the *European Arrest Warrant* and the *Lisbon* rulings, participation of the Bundestag in matters of European integration had been strengthened. In a parliamentary democracy, the separation of powers cannot work in the sense of the legislative controlling the executive. But it is fair to say that the repeated calls of the FCC for such control has led to a situation where parliamentarians have taken their responsibility with regard to European integration more seriously. This facilitates, among

---

Judgment of the Court of Justice of the EU Ultra Vires; Judgment of 31 January 2012, Pl. ÚS 5/12, 8 EUR. CONST. L. REV. 323, 323 (2012).

[22] *See Das Lissabon-Urteil des Bundesverfassungsgericht*: *Auswege aus dem drohenden Justizkonflikt*, EUROPA-UNION BERLIN, *available at* http://berlin.europa-union.de/fileadmin/files_eud/Appell_Vorlagepflicht_BVerfG.pdf.

[23] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 2661/06, July 6, 2010, 126 BVERFGE 286 (Ger.).

[24] *See* Case C-144/04, Mangold v. Helm, 2005 E.C.R. I-9981.

[25] It would have been difficult for the FCC to follow a more restrictive line on fundamental rights than the CJEU. *See* STONE SWEET, *supra* note 14, at 102.

[26] Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 2661/06, July 6, 2010, 126 BVERFGE 286 (Ger.).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

other things, isolated instances of dissent of parliamentarians, particularly within the ruling Christian Democrats, against the policy of the government.

D. The FCC and European Monetary Integration

The delegation of monetary policy responsibility had already been a major issue in the *Maastricht* judgment, with the question of whether such competence transfer was possible under the Basic Law. That monetary policy is a major issue in Germany is not surprising given the trauma of inflation of the late 1920s, the economic miracle of the 1950s, and the high esteem the Bundesbank always held; giving up monetary policy was therefore a dear price to pay for German unification. It was contentious, especially among economists. It only became acceptable through the confirmation of the "no bailout clause" of Article 125, the modeling of the European Central Bank (ECB) on the Bundesbank (albeit with even greater independence), and the agreement on strict fiscal discipline with the Maastricht criteria of a limit of 3% budget deficit and 60% of public debt (measured against the gross domestic product). Even though Germany was early in recognizing that in a recession austerity policy does not help, and violated itself these criteria under chancellor Schröder in 2003/04, these agreements have guided the politics of monetary union, and its contention. In the Maastricht ruling, the FCC saw the delegation of monetary policy within the responsibility of the parliament. Also, the constitutional complaint raised by the four professors in 1998 against the introduction of the Euro failed.[27] In the course of the euro crisis since 2009, the FCC had several other occasions to rule on the question. I discuss these cases shortly before turning to the current decision on the "temporary injunctions to prevent the ratification of the ESM Treaty and the Fiscal Compact."

As is well-known, euro rescue attempts are a conundrum. At the center of the contention has been the "no bailout clause" of Article 125 TFEU, which was introduced precisely to dampen fears of a mutual liability of member states for their debts. As a result of the financial aid needed by Greece, and also by Ireland, Portugal, Cyprus, and Spain, compliance with this prohibition would endanger the existence of the monetary union. Once one member state threatened to leave the Euro, markets would turn against the other weak candidates, setting in motion a bandwagon. Such a dynamic process can only be stopped by committing to assist weak member states. However, by bailing out failing states, there is a problem of moral hazard. Countries being bailed out could lose the incentive to consolidate their finances and to enact reforms.

In May 2010, the FCC declined a temporary injunction against the financial aid package to Greece that had been agreed by the European Council in March 2010, and then

[27] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 50/98 (Ger.).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

coordinated with the IMF and the European Central Bank (ECB).[28] The German guarantees amounted to € 22.4 billion (bn). The FCC argued that declining the guarantees could prove more harmful given the implications of the stability of the European Monetary Union, and that it was up to the government to make the assessment, with the FCC only reviewing for "erroneous" assessments.[29]

Another temporary injunction was declined in June 2010 concerning the decision of the Euro group in May to enter into a three-year program with the IMF,[30] the "euro rescue package," which the ECB joined by purchasing government bonds. The European stabilization mechanism was established, including the European Financial Stabilization Mechanism (EFSM), a Council regulation, and the European Financial Stability Facility (EFSF), founded by an intergovernmental agreement of the euro group, in order to grant loans and issue bonds. Germany's share was up to € 148 billion at that point. Similar to the order in May, the FCC argued that the risks of stopping the guarantees were higher, and that the government had acted within its margin of discretion.[31]

In September 2011, the first judgment of the FCC on the questions of whether the euro rescue package and financial aid package for Greece were violating the Bundestag*'s* budget autonomy occurred, picking up the issues of the temporary injunctions.[32] The FCC declined such a violation but held that the government could only give financial guarantees if approved first by the parliamentary budget committee. The FCC emphasized that larger aid measures needed approval by the Bundestag, who also had to be involved in the day-to-day operation of aid funds. The Bundestag could not take over financial responsibilities of an uncertain height, implying that such liabilities would have to be rejected by the FCC. But so far "the Federal Republic of Germany is not subjecting itself to an incalculable automatism of a liability community which follows a course of its own that can no longer

---

[28] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 987/10, May 7, 2010, 125 BVERFGE 385 (Ger.).

[29] *See Temporary Injunction to Prevent Giving of Guarantee for Loans to Greece is Not Issued,* BUNDESVERFASSUNGSGERICHT, *available at* http://www.bundesverfassungsgericht.de/en/press/bvg10-030en.html [hereinafter Temporary Injunction].

[30] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 1099/10, Jun. 9, 2010, 126 BVERFGE 158 (Ger.).

[31] *See* Temporary Injunction, *supra* note 29.

[32] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVR 987/10, May 7, 2010, 125 BVERFGE 385 (Ger.); *see also* Antje von Ungern-Sternberg, *Parliaments—Fig Leaf or Heartbeat of Democracy? German Federal Constitutional Court Judgment of 7 September 2011, Euro Rescue Package,* 8 EUR. CONST. L. REV. 304, 304 (2012); Sebastian Recker, *Casenote—Euro Rescue Package Case: The German Federal Constitutional Court Protects the Principle of Parliamentary Budget,* 12 GERMAN L.J. 2071, 2071 (2011).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

be steered."[33] To give guarantees of a height of € 170 billion was within the Bundestag's "margin of appreciation."[34]

In February 2012, the FCC accepted a complaint in a dispute between organs of the state concerning the lack of involvement of the Bundestag in the administering of the EFSF.[35] In this matter, the FCC had issued a temporary injunction in October 2011. According to the German Implementation Act, the decisions of the German representative in the EFSF (the German guarantees had been raised to € 211 billion) needed, in principle, the consent of the Bundestag. However, for matters of particular urgency, a special committee of only nine members had been established. These nine members were elected from the forty-one members of the budget committee. All emergency measures were defined as urgent or confidential; moreover, the German government could decide which other measures should be dealt with by this committee. The FCC held this to be a disproportionate restriction of the rights of members of the Bundestag and decided that only when government bonds were being bought by the EFSF on the secondary market were the secrecy requirements high enough to justify the special committee. Thus, while refraining in these different cases from addressing the central issue of whether the "no bailout clause" prohibited the Euro rescue, it emphasized its position that the Bundestag needed to be involved.

Then, in June 2012, the FCC pronounced its judgment in another dispute between organs of the state concerning the involvement of the Bundestag in the negotiation of the ESM/Euro Plus Pact.[36] This complaint of the parliamentary group of Alliance 90/The Greens was regarded as well-founded, as the Federal Government had infringed the right of the Bundestag to be informed according to Article 23(2) of the Basic Law (on the right of the Bundestag to be informed about the European Union).[37] Thus, the German government had not informed the Bundestag sufficiently of the decision to establish the European Stability Mechanism following the European Council meeting in February 2011, updated it on its intended features, or instructed it early on the draft of the treaty. The

---

[33] *Constitutional Complaints Lodged Against Aid Measures for Greece and Against the Euro Rescue Package Unsuccessful—No Violation of the Bundestag's Budget Autonomy,* BUNDESVERFASSUNGSGERICHT, *available at* http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html [hereinafter Constitutional Complaints].

[34] *See id*.

[35] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVE 8/11, Feb. 28, 2012 (Ger.).

[36] *See* Bundesverfassungsgericht [BVERFG - Federal Constitutional Court], Case No. 2 BVE 4/11, Jun. 19, 2012 (Ger.).

[37] *See Successful Application in* Organstreit *proceedings Regarding the 'ESM/Euro Plus Pact,'* BUNDESVERFASSUNGSGERICHT, *available at* http://www.bundesverfassungsgericht.de/en/press/bvg12-042en.html [hereinafter Successful Application].

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

other complaint concerned the Euro Plus Pact, aiming to improve economic coordination, which was agreed to at the instigation of the German chancellor at the same European Council meeting. Again, the Bundestag felt insufficiently informed, and the claimant argued that the government should have informed the Bundestag of its intention beforehand. In its judgment, the FCC substantiated what the need of "early and comprehensive information" of the Bundestag entails. The government's executive responsibility only shields its internal opinion formation. As soon as this is completed and the government negotiates with third-parties, it has to inform the Bundestag. Even though the ESM treaty has an intergovernmental character, it does not absolve the government from these responsibilities, given its inherent interconnection with the EU, which is also apparent in the fact that it gives new rights to the Commission and the CJEU. Similarly, the Euro Plus Pact with its self-commitments concerning social and tax policy, subject to the monitoring of European institutions, "affects important functions of the German *Bundestag*."[38] By being informed late, it was impossible for the Bundestag to influence the negotiations.

In summary, in these earlier judgments the FCC maintained its right to monitor the course of European integration. Instead of interfering with the commitments assumed on the European level, and tackling the question of the no bailout clause, the FCC has continuously strengthened the rights of the Bundestag—and curtailed those of the executive in acting unilaterally on the supranational level, preferring the flexibility of ad hoc intergovernmental agreements not bound by the rules of the EU. By strengthening the rights of the Bundestag, the FCC enhanced the transparency of the euro-rescue politics for the public. The government has a wide margin of discretion, concerning the obligations it enters at the European level; however, it may not agree to an unlimited financial liability of Germany, as this would undermine the budgetary autonomy of the Bundestag. With the rescue packages picking up size, such serious implications for the budget autonomy seemed a matter of time.

E. The Temporary Injunctions to Prevent the Ratification of the ESM Treaty and the Fiscal Compact

On 12 September 2012, the FCC delivered its preliminary judgment after its summary review of the facts.[39] This case has the largest number of participants in a constitutional complaint ever (more than 37,000). In addition, the parliamentary group, *Die Linke*,

[38] *See id.*

[39] Only "extracts" of the ruling are translated, which also have a different numbering than the German version. *See Extracts from the Decision of the Federal Constitutional Court of 12 September 2012,* BUNDESVERFASSUNGSGERICHT, *available at* http://www.bundesverfassungsgericht.de/en/decisions/rs20120912_2bvr139012en.html [hereinafter Extracts from the Decision].

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

initiated a dispute between organs of the state. Next to the ESM treaty (TESM) and the fiscal compact, the new Article 136 of the TFEU was an issue. By modifying the bailout prohibition of Article 125 of the TFEU, it was allegedly introducing unconstitutional liability obligations for Germany.

Which were the most critical points? At the core was the general question of whether the nature of the monetary union had changed through the introduction of financial transfers and liability obligations, and a violation of the prohibition of the EU Treaty on monetary financing through the European Central Bank. More specifically, the question of unlimited financial obligations for Germany was a major point. While Article 8(V) TESM limits the financial obligations of participants "in all circumstances" to the agreed sums—in the case of Germany, approximately € 190 billion—other provisions of the Treaty could be interpreted as requiring Germany to commit further funds. In particular, Germany could be required to commit financial funds when one of the other partners does not meet its financial obligations. The issue of budgetary autonomy of parliament was particularly crucial given the earlier argument that the obligations of Germany were within the "margin of discretion." With a considerably heightened financial obligation, this discretion was possibly exhausted. All different rescue measures, the FCC estimated, put the maximum burden for Germany at about € 310 billion. The federal budget of 2012 was € 312 billion. The establishment of the ESM treaty outside of the structure of the EU, and its detailed provisions on secrecy and immunity raised the fear of an insufficient parliamentary control of the German members in the ESM. The complicated governance structure of the ESM operating partly by a qualified majority and not giving any say to those member states not meeting their payment obligations raised fears of a possible lack of German participation in its operation. However, as Germany holds 27 percent of the shares right now, it cannot be outvoted.

Touching upon the budgetary autonomy of parliament are also the provisions of the fiscal compact. Though being modeled on the German debt brake and being introduced on the instigation of the German government, its provisions are stricter than the German ones, and include not only a limit on public deficit but also an obligation to reduce the level of indebtedness. In the German case, this amounts to € 26 billion per year.[40] Finally, the missing termination provision of both treaties was criticized as "irreversibly"[41] determining the economic policy of the member states.

In the announcement of the judgment, president of the FCC, Andreas Voßkuhle, emphasized that it was not the court's duty to say anything about the appropriateness of the measures; rather, the responsibility fell to politics.[42] The court largely followed the

[40] *See id.* at no. 163.

[41] *See id.* at no. 165.

[42] *See Karlsruhe billigt ESM und stellt Bedingungen*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 13, 2012.

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

government in its assessment that the new Article 136, the ESM and fiscal compact were mere specifications of the principles guiding the monetary union from the beginning, including the "no bailout" provision. Also, the overall budgetary autonomy of the Bundestag was not undermined. Germany had to ensure, however, that it would not forego the participation rights of its representatives in the ESM, the finance minister and the permanent secretary, by not meeting its financial requirements in time. Given that the ESM treaty could indeed be interpreted in a way that the overall financial obligation of Germany is not fixed, the FCC required the government to seek a confirmation under international law, removing "such doubts".[43] The Bundestag and the Bundesrat would need to be sufficiently informed, and the Bundestag's approval would need to be secured for "every large-scale federal aid measure".[44] In order to maintain the Bundestag's control, those parts of the ESM treaty inhibiting its control rights would need to be interpreted "in conformity with the constitution".[45] In order to facilitate transparency, the FCC also required the government to seek a clarification under international law: "The Federal Republic of Germany must clearly express that it cannot be bound by the Treaty establishing the European Stability Mechanism in its entirety if the reservation made by it should prove to be ineffective".[46] The lack of a termination date, in contrast, was not regarded as problematic, as this is common for international treaties and does not foreclose a termination by mutual agreement or by drawing on the Vienna Convention on the Law of Treaties. Soon after the ruling, Germany received the required confirmation that the FCC had demanded by the other eurozone countries in an interpretative declaration of the ESM treaty. The ESM could therefore start its operation in October 2012.

Yet, the final ruling of the FCC is still to come. While the summary review has assessed the new international obligations, the FCC also emphasized that it sees strict limits concerning the ESM mandate that is under consideration at the European level. The FCC notes that, "borrowing by the European Stability Mechanism from the European Central Bank, alone or in connection with the depositing of government bonds, would be incompatible with European Union law, the Treaty can only be taken to mean that it does not permit such borrowing operations".[47] This option, however, had been favored by Italian prime minister Mario Monti.[48]

---

[43] *See* Extracts from the Decision*, supra* note 39, at no. 220.

[44] *See id.* at no. 198.

[45] *See id.* at no. 210.

[46] *See id.* at no. 228.

[47] *See id.* at no. 245.

[48] *See* James Hertling, *German Judges Reject Monti Bid for Rescue-Fund Bank License, BLOOMBERG,* Sept. 12, 2012, *available at* http://www.businessweek.com/news/2012-09-12/german-judges-reject-monti-bid-for-rescue-fund-bank-license.

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

F. Discussion

Against the background of other judgments of the FCC on European integration in general and monetary union in particular, the judgment does not come as a big surprise. While the FCC's announcement of taking the time for a "summary review" raised some anxiety, it seems that, at the hearing on 10 July 2012, it became clear that the FCC was not inclined to take upon itself such a huge responsibility, given the complicated and contentious issue of monetary integration as well as the large parliamentary majority in both the Bundestag and Bundesrat.[49] While the FCC was pondering about the case, German economists rallied in several groups against the ESM or supporting it. As a group of economists even joined both camps, raising their voice to the public did not bring any enlightenment: as sociologist Wolfgang Streeck observed, these activities only showed how much closer economic thinking is to religious belief, rather than to proven scientific statements.[50] At the same time, it is striking how on the international level there seems to be broad consensus that Germany needs to act as a hegemon, paying what is needed to stabilize the eurozone.[51] From what is known about courts and their fragile autonomy, it is not surprising that the FCC did not want to obstruct in this case.

But the FCC did not just succumb to the factual realities; it instead demanded that the information rights of the Bundestag be granted by an interpretation of the laws "in conformity with the constitution." It also required, for the first time, intergovernmental assurance that the financial commitment of Germany was definitely restricted to the sum of € 190 billion. Further, it signaled that in the final judgment of the case it would discuss the issue of the purchase of government bonds through the ECB. This is a highly contentious matter in Germany, particularly given the outspoken opposition of the Bundesbank, whose president, Jens Weidmann, had been isolated in the decision of the ECB's board.[52] In view of the lack of support by the parliament or the public for these measures, it may well be that the FCC finally toughens and materializes its critical stance. But the next judgment is always the one expected to escalate the conflict—another example of déjà-vu. After what it has said in the *Mangold* case, the FCC would need to address the CJEU, asking about the *ultra vires* nature of these acts. In Luxembourg, there is

[49] *See* Max Steinbeis, *ESM/Fiskalpakt in Karlsruhe, Teil 2: Parlamentarier und ihre Verantwortung*, (2012), *available at* http://verfassungsblog.de/esmfiskalpakt-karlsruhe-teil-2-parlamentarier-und-ihre-verantwortung/.

[50] *See* Ferdinand Knauß & Tim Rahmann, *Der Glaubenskrieg der Ökonomen*, WIRTSCHAFTSWOCHE (2012), *available at* http://www.wiwo.de/politik/konjunktur/professorenstreit-der-glaubenskrieg-der-oekonomen/6872348.html.

[51] *See* Hassel Anke & Waltraud Schelkle, *Hier spricht man deutsch*, BERLINER REPUBLIK (2011), *available at* http://www.b-republik.de/archiv/hier-spricht-man-deutsch; *Inside the Winter 2012 EUSA Review*, EUROPEAN UNION STUDIES ASSOCIATION, *available at* http://www.eustudies.org/files/eusa_review/winter_12final.pdf .

[52] *See* Ian Wishart, *ECB Unveils Bond-Buying Plan*, EUROPEANVOICE.COM, *available at* http://www.europeanvoice.com/article/2012/september/ecb-unveils-bond-buying-plan-/75090.aspx.

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

already the request by the Irish Supreme Court, instigated by a member of the Irish Parliament, Thomas Pringle.[53] The hearing is scheduled for 23 October 2012.[54] At issue is the intergovernmental nature of the ESM Treaty, instead of integrating it fully into the European framework, next to the use of the simplified treaty revision procedure for the amendment of Article 136 TFEU. Ireland had a referendum on 31 May 2012 for the fiscal compact but not for the ESM treaty. Also, other member states' supreme courts have ruled on the ESM but refrained from involving the CJEU.[55]

With its critical stance towards the extent of integration and its emphasis on the need of a national parliamentary legitimation of European integration through the Bundestag, the recent ruling continues the line of its predecessors. After the conservative judge rapporteurs Paul Kirchhof, responsible for the *Maastricht* ruling, and Udo Di Fabio, responsible for the *Lisbon* ruling, Peter M. Huber, a party member of the CDU/CSU, is the new rapporteur. It is questionable whether the criticism of the very traditional concept of the state and on parliamentary legitimation that has been widely voiced with regard to previous judgments, notably the *Lisbon* judgment, has to be extended to this ruling.[56] For this question it is important to note that, despite all continuity over the course of the different judgments, the issues being dealt with here differ. In the course of the euro crisis, we are confronted to an extent unknown before with non-majoritarian technocratic politics that present themselves as being without democratic alternative. Höpner/Rödl and Scharpf have emphasized the difference of the politics of the fiscal compact to the normal community measure.[57] The former consists of particular orders that are being directed by the Commission at individual member states, rather than general directives or regulations targeting all member states.

---

[53] *See* Case C-370/12, Pringle v. Ireland, 2012.

[54] *See ESM, German Constitutional Court, Passing the Hat onto Ireland*, NEWEUROPE, *available at* http://www.neurope.eu/article/esm-german-constitutional-court-passing-hat-ireland.

[55] *See Constitutional Judgement 3-4-1-6-12, SUPREME COURT: REPUBLIC OF ESTONIA*, *available at* http://www.riigikohus.ee/?id=1347; *Decision No. 2012-653 DC of 9 August 2012, CONSEIL CONSTITUTIONNEL, available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/case-law/decision/decision-no-2012-653-dc-of-9-august-2012.115501.html.

[56] *See* Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 GERMAN L.J. 1241, 1241 (2009); Höpner, *supra* note 21; Robert C. Van Ooyen, *Eine "europafeindliche" Kontinuität? Zum Politikverständnis der Lissabon-Entscheidung des Bundesverfassungsgerichts*, 4 INTERNATIONALE POLITIK UND GESELLSCHAFT 26, 26 (2009).

[57] Martin Höpner & Florian Rödl, *Illegitim und rechtswidrig: Das neue makroökonomische Regime im Euroraum*, 92 WIRTSCHAFTSDIENST 219, 219 (2012); Fritz W. Scharpf, *Legitimacy Intermediation in the Multilevel European Polity and its Collapse in the Euro Crisis* (Max Planck Institute for the Study of Societies, Discussion Paper NO. 12/6, 2012).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

Though the judgment deals with both the ESM treaty and the fiscal compact, it is striking that the FCC discusses the latter mainly in comparison to the German debt brake, not paying specific attention to its legitimacy problems when transferred to the European level. The fiscal compact is primarily dealt with in its function to avoid moral hazard, and to keep the German financial risk low. Despite the difficulties Germany has faced internally with the indebtedness of some of its *Länder*—notably Bremen—there is overwhelming trust that the dynamic of debt can be controlled hierarchically by the Commission by putting pressure on the responsible member-state government. But many of the relevant economic variables that drive a debt dynamic are not under governmental control.[58] And the development of the euro crisis in Southern Europe with vehement protests evolving has clearly shown the limited effectiveness of heteronomy.

Alongside transnational market integration, the EU has significantly strengthened the importance of non-majoritarian institutions since the beginning of its single-market program.[59] Independent regulatory agencies, like independent central banks, rely on output legitimation. The idea is that they improve economic governance and can be legitimated through this welfare enhancing function. However, rarely are regulatory decisions value-neutral, as there are often distributional implications. Therefore, output legitimation depends on an ultimate input legitimation.[60] This is, however, not available. Also, before the euro crisis, the question of how to legitimate the European Union was an unsolved issue. The missing demos, a missing European-wide political discourse and European elections that serve as second-order national elections, are some of the most well-known problems. Fritz Scharpf has pointed out that the EU has to be understood as a "government of governments" since member states have to transpose European directives, or implement directly legally binding regulations.[61] In the normal course of things, they are the ones taking the blame for the effects of European policies vis-à-vis their citizens.

In times of the euro crisis, this intermediation of national governments is no longer available. European demands at fiscal consolidation directly address European electorates. For the extent of hardships imposed, the EU lacks the necessary input legitimacy. And European monetary policy has clearly failed to deliver its output–not being able to be legitimized in this way.[62] Such negative-sum integration seriously undermines the viability

[58] *See* Scharpf, *supra* note 57, at 30.

[59] *See* Giandomenico Majone, *Europe's 'Democratic Deficit': The Question of Standards*, 4 EUROPEAN LAW JOURNAL 5, 5 (1998).

[60] *See* Fritz W. Scharpf, *Legitimacy in the Multilevel European Polity*, 1 EUR. POL. SCI. REV. 173, 173 (2009).

[61] *See id.* at *180.*

[62] *See* Scharpf, *supra* note 20, at 25.

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

of the whole European project, as can be seen from the rising animosities among member states that are unprecedented since World War II.[63]

In this situation, the FCC assesses policy with a purely national benchmark. The question is whether this has only negative or also positive externalities for other member states. Concerning the strengthened rights of approval of the Bundestag, the implications are negative for debtor countries, as further conditions will be imposed. With regard to the clearly limited financial obligations, the result is mixed, depending on the status as debtor or creditor state. Greater transparency obligations, however, should be beneficial for democratic rule in all member states. In fact, all euro countries adopted the required intergovernmental assurance on the liability ceiling and improved parliamentary transparency also for themselves.[64] At the time, Italian Prime Minister Monti demanded that governments be able to act under fewer parliamentary constraints in the euro crisis, underlining that this is an important signal.[65] Less apparent are other factors. One of them is time. By taking some months for its examination, the prevailing logic of rapid reactions in order to counteract incipient market reactions was violated certainly with costs on debtor states—but possibly also with benefits. By insisting on the time requirements of the rule of law—next to the transparency requirements of democratic rule—the FCC implicitly emphasized the costs that hardly regulated and globally liberalized financial markets impose on constitutional democracies. In the course of the euro (as in the global financial) crisis, the implications of globally operating financial markets have increasingly pushed politics to ever faster decisions of the executives, with little feedback by the legislative, and with an increasing role for non-majoritarian institutions. The latter, as we have seen, are difficult to legitimize at the supranational level, given the unmet requirement for input legitimation.

Also, courts are non-majoritarian institutions. The constraints imposed by the FCC resonate with ideas of an increase in accountability when different non-majoritarian institutions interact and control each other.[66] This does not counteract the lack of input legitimacy but the FCC at least credits its importance. With the overarching problems of legitimizing the EU, it seems useful to turn to a concept analogous to Sen's "Idea of Justice," distinguishing between more and less legitimate forms of European integration, rather than discussing absolute criteria.[67] In that sense, by emphasizing the necessities of

---

[63] *See* Giandomenico Majone, *Has Integration Gone Too Far—or Not Far Enough? Rethinking the Union of Europe After the Crisis of Monetary Union* (2012) (unpublished manuscript).

[64] *See Kabinett soll Vorbehaltserklärung zum ESM erhalten*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 21, 2012.

[65] *See Streit über richtigen Kurs in der Euro-Krise*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 6, 2012.

[66] *See* Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, 14 EUR. L. J. 271, 271 (2008).

[67] *See* AMARTYA SEN, THE IDEA OF JUSTICE (2009).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

the rule of law next to the transparency requirements of democratic governance, the FCC, for the time being, has a role to play.

G. Conclusion

Courts would not need to be called upon were it possible to foresee their judgments. But previous case law and the extent of political pressure are points of orientation that courts cannot easily ignore. In a case of high uncertainty, such as the development of the euro crisis, it is hardly possible for the FCC to take the responsibility for a policy U-turn. But it has to guard certain principles, particularly if it has repeatedly emphasized them in its rulings.

The conclusion of the ESM case is a mixed one. The benchmark of the FCC is the Basic Law, and therefore purely national. Thus, the *Economist* quibbled before, "Can we all have our own Karlsruhe?," pointing to the fact that the constraints that the German government faced with regard to European integration in the aftermath of the *Lisbon* ruling significantly strengthened German negotiation power.[68] Clearly, national benchmarks do not do justice to the underlying mutual dependence, but are likely to impose externalities on other member states. However, despite its national outlook, by strengthening national parliamentary rights and by requesting time, the FCC has contributed to raising the awareness of the costs of the current euro-rescue politics to democracy and the rule of law. Democracies are said to face particular problems with fiscal consolidation, if they cannot devalue their currency, as it is only with great difficulty that they can impose hardship on their electorates.[69] Nevertheless, before the euro crisis, Organisation for Economic Co-operation and Development (OECD) governments had made some progress at fiscal consolidation.[70] This progress is relevant as highly indebted governments lose their political room for maneuver, implying risks for democracy.[71] The banking crisis, which then turned into a sovereign debt crisis, quickly undid all achievements. With the difficulties encountered now when submitting the rescue politics to judicial review, it becomes apparent that not only democracies face problems with fiscal consolidation—global capitalism faces as much of a problem with the time needed for democratic processes and judicial review.

---

[68] *The Myth of the Periphery*, THE ECONOMIST, Mar. 25, 2012, *available at* http://www.economist.com/node/15769602.

[69] *See* Henrik Enderlein, Laura Müller & Christoph Trebesch, *Democracies Default Differently*: *Regime Type and Debt Crisis Resolution* (unpublished manuscript), *available at* http://www.sfb-governance.de/teilprojekte/projekte_phase_1/projektbereich_d/d4/DDD_Enderlein_et_al.pdf?1277900047.

[70] *See* Herbert Obinger, *Die Finanzkrise und die Zukunft des Wohlfahrtsstaates*, 40 LEVIATHAN 441, 441 (2012).

[71] *See* Wolfgang Streeck & Daniel Mertens, *Fiscal Austerity and Public Investment: Is the Possible the Enemy of the Necessary?* (Max Planck Inst. for the Study of Societies, Discussion Paper NO. 11/12, 2011).

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press

In her discussion of the judgment on the euro rescue, Christina von Ungern-Sternberg draws an interesting parallel to the privatization processes, which also result in a loss of democratic control of the Bundestag. It is one of the shortcomings of the FCC that while critically accompanying the process of European integration and the loss of control to the supranational level, it has not emphasized the loss of democratic control following processes of privatization, or to markets, to the same extent.[72] Along with liberalization and globalization, governments have come under increasing pressure from markets undermining democratic governance.

By helping to obstruct a determined German bailout of the eurozone, the FCC can be blamed for preventing the monetary union from finally delivering on its output legitimacy. Yet, this review has shown that the FCC has become conciliatory over the years, concentrating on consequences for the German polity. Had the benefits of monetary union been better mediated, it is likely that along with a more positive public opinion, the FCC would be even less of a constraint. But income inequalities have risen, with deepened European integration bringing more benefits to elites than to lower-tier incomes.[73] A "pattern of diffuse reciprocity can be maintained only by a widespread sense of obligation" and trust among all participants.[74] As nobody wants to take the political responsibility for the costs of the eurozone, the climate of blame avoidance leading to mutual accusations undermines the prerequisites of a system of diffuse reciprocity. It will be difficult to realize far-reaching plans for a fiscal union on this basis. Finally, in view of the rapidly declining legitimacy of European integration, one should not lose sight of the contribution of the FCC to the legitimacy of the German political system, even though it could not be further discussed in this comment.

[72] *See* VON UNGERN-STERNBERG, *supra* note 32, at 311.

[73] *See* NEIL FLIGSTEIN, EUROCLASH: THE EU, EUROPEAN IDENTITY, AND THE FUTURE OF EUROPE (2009).

[74] Keohane, *supra* note 3, at 20.

https://doi.org/10.1017/S2071832200001693 Published online by Cambridge University Press