The problematic legal basis: Analysis of the Flexibility Clause as a legal basis for the proposed European Monetary Fund

Fanni Teinilä 507314
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University of Turku, Faculty of Law
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The European Commission proposed on late 2017 that the European Stability Mechanism would be transferred into the EU legal framework. The transfer would establish a new European agency, the European Monetary Fund (EMF). The Commission proposes that the establishment of the EMF could be based on article 352 TFEU, which is often referred to as the flexibility clause. Under article 352 TFEU the EU can take measures if they are necessary to attain one of the objectives set out in the Treaties and within the framework of the policies defined in the Treaties, even when the Treaties have not provided the necessary powers. The application of the flexibility clause would establish the EMF through secondary legislation without a Treaty amendment. However, it is not straightforward that the flexibility clause is a proper legal basis for the establishment. This thesis explores whether the EMF can be established through applying article 352 TFEU. The thesis evaluates whether the application of the flexibility clause is possible both in the EU law perspective and the Member States' perspective. The study analyses the Commission's proposal alongside with the different arguments favouring or opposing the application of the flexibility clause in the issue.

According to the thesis, the application of the flexibility clause for the establishment of the EMF is problematic. The study finds that the principle of conferral and the limited competence in the field of economic policy may oppose the establishment of the EMF through applying the flexibility clause. As the EU can only act within the competence that the Member States have attributed to it and the competence is limited in the field of economic policy to Member States coordinating their economic policies, it is not straightforward that the EU has competence to establish EMF through applying the flexibility clause. Also, according to the thesis, the establishment of the EMF may not fulfil the conditions laid in the flexibility clause. It is required, among others, that the measure must be within the framework of the policies of the EU and the measure must be necessary to attain one of the objectives set by the Treaties. It is not straightforward that the establishment of the EMF fulfils these conditions as the status of the financial stability, which is the objective of the EMF, as EU's objective is not evident and the framework of economic policies is limited. Also, the study claims that the establishment of the EMF through application of the flexibility clause may be in breach of the constitutional laws of Member States. According to the study, it appears that the application of the flexibility clause in the establishment of the EMF is not problem-free. At the time of writing, the legislative process remains open.

Keywords: EU constitutional law, competence, the flexibility clause, article 352 TFEU, European Monetary Fund, European Stability Mechanism

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Euroopan komissio ehdotti loppuvuodesta 2017 Euroopan vakausmekanismin siirtämistä EU:n oikeudelliseen kehikkoon uutena EU:n virastona, jonka nimi olisi Euroopan valuuttarahasto (EMF). Komissio ehdotti, että EMF:n oikeusperustana olisi Euroopan Unionin toiminnasta tehdyn sopimuksen (SEUT) 352 artikla, jota usein kutsutaan joustavuuslausekkeeksi. Tämä artikla mahdollistaa sen, että EU voi hyväksyä toimenpiteen, joka kuuluu perussopimuksissa määriteltyihin politiikan aloihin, silloin kun se on välttämätön perussopimuksissa asetettujen tavoitteiden saavuttamiseksi silloin, kun perussopimuksissa ei erikseen ole määräyksiä tarvittavista valtuuksista. Joustavuuslauseketta käyttämällä perustettu EMF olisi EU:n sekundaarilainsäädännön alainen, eikä perustamisen yhteydessä muutettaisi perussopimuksia. Ei ole kuitenkaan selvää, voiko joustavuuslauseke olla riittävä oikeusperusta EMF:n perustamiselle. Tämä tutkielma perehtyy siihen, voidaanko EMF perustaa soveltamalla SEUT:n 352 artiklaa. Tutkielmassa lähestytään asiaa niin EU-oikeuden kuin jäsenvaltioidenkin oikeuden kannalta. Tutkielmassa analysoidaan komission ehdotusta rinnakkain joustavuuslausekkeen käyttöä tukevien ja vastustavien seikkojen kanssa.

Tutkielmassa tullaan siihen lopputulokseen, että joustavuuslausekkeen käyttämiseen EMF:n oikeusperustana liittyy ongelmia. Tutkielman mukaan annetun toimivallan periaate ja EU:n toimivallan rajoitukset talouspolitiikan alueella saattavat olla ristiriidassa EMF:n perustamisen kanssa silloin, kun perustamiseen käytetään joustavuuslauseketta. EU voi toimia ainoastaan sen toimivallan puitteissa, jonka jäsenvaltiot ovat sille antaneet. Annettu toimivalta on talouspolitiikan alueella rajoitettu siihen, että jäsenvaltiot koordinoivat talouspolitiikkansa itse. Tämän vuoksi ei ole selvää onko EU:lla toimivaltaa perustaa EMF:ia joustavuuslauseketta käyttämällä. Tutkielma nostaa esiin myös sen, että EMF:n perustaminen ei välttämättä täytä joustavuuslausekkeen soveltamiselle asetettuja ehtoja. Näiden ehtojen mukaan soveltamisen täytyy muun muassa kuulua EU:n määriteltyjen politiikkojen alle ja sen täytyy olla välttämätön EU:n perussopimuksissa määriteltyjen tavoitteiden saavuttamiseksi. Ei ole selvää täyttääkö EMF:n perustaminen nämä ehdot. Ehtojen täyttyminen on epävarmaa, sillä taloudellisen vakauden, joka on EMF:n tavoite, asema EU:n tavoitteena ei ole selvä sekä EU:n toimintavaltuudet talouspolitiikan alueella ovat rajoitetut. Tutkielman mukaan on myös mahdollista, että EMF:n perustaminen joustavuuslauseketta käyttämällä rikkoo jäsenvaltioiden perustuslakeja. Näiden seikkojen vuoksi tutkielmassa tullaan siihen lopputulokseen, että joustavuuslausekkeen käyttäminen EMF:n perustamisessa ei ole ongelmatonta. Tutkielman kirjoitushetkellä lainsäädäntöprosessi asiassa on yhä kesken.

Asiasanat: EU:n peruslaillinen oikeus, toimivalta, joustavuuslauseke, artikla 352 SEUT, Euroopan valuuttarahasto, Euroopan vakausmekanismi

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ABBREVIATIONS

CJEU	The Court of Justice of the European Union
ECB	The European Central Bank
EMF	The European Monetary Fund
EMU	The Economic and Monetary Union
ESM	The European Stability Mechanism
EU	The European Union
OMT	The Outright Monetary Transactions programme
TEU	The Treaty of the European Union
TFEU	The Treaty of the Functioning of the European Union

1 INTRODUCTION

1.1 The general background

If the Union wants to act, the Union needs to have competence to act. The European Commission proposed on the 6th of December 2017 that the EU should establish the European Monetary Fund (EMF) through applying article 352 Treaty of the Functioning of the European Union (TFEU).[1] Article 352 TFEU, often referred as the flexibility clause, can provide a legal basis for a Union actions even when the Treaties, TFEU and Treaty on the European Union (TEU), have not provided the necessary powers.

The EMF would, if it is established, be a Union agency and an emergency financial assistance system mobilizing funding and providing stability support through various instruments.[2] The current financial assistance system is intergovernmental between the euro area Member States. The proposal suggests transfer of the current institution into the EU legal framework. The deeper integration in the field of Economic and Monetary Union (EMU) has been on the political discussion for many years. The Union authorities have been in favor of the deepening of the EMU[3] and the authorities have made concrete initiatives.[4] The Commission's proposal represents EU's ambition go further with the integration in the EMU.

The EMF would be the next instrument in the chain of instruments after the financial crisis. These instruments have aimed to protect the financial stability of the euro area by providing financial assistance. The instruments have varied within and outside the Union legal framework.

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[1] The European Commission, 'Proposal for a Council Regulation on the establishment of the European Monetary Fund', COM/2017/0827 final, 2017/0333 (APP), 6 December 2017.

[2] The proposed instruments are stability support to EMF Members, EMF precautionary financial assistance, financial assistance for the re-capitalization of credit institutions of an EMF Member, EMF loans, Primary market support facility, Secondary market support facility and Instrument for the direct re-capitalization of credit institutions. The European Commission, (n 1), Articles 13 – 19 of the Annex.

[3] See, e.g. Jean-Claude Juncker and others, 'Completing Europe's Economic and Monetary Union', (Five Presidents' Report), (2015); the European Commission, 'Reflection paper on the deepening of the Economic and Monetary Union, COM(2017) 291, (2017); the European Commission, 'Deepening Europe's Economic and Monetary Union – Commission Note ahead of the European Council and the Euro Summit of 28 – 29 June 2018 < https://ec.europa.eu/commission/sites/beta-political/files/euco-emu-booklet-june2018_en.pdf> accessed 19 February 2019.

[4] The European Commission, 'Communication to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of Regions on completing the Banking Union, COM (2017) 592, 11 October 2017.

Some of them have been Union governed actions and others intergovernmental initiatives. The first instruments were bilateral case-by-case rescue programmes. The regime has evolved towards more structured programs and more structured instruments. The current instrument, the European Stability Mechanism (ESM), is established outside the Union framework. The Commission's proposal, *Proposal for a Council Regulation on the Establishment of the European Monetary Fund*, would evolve and replace the ESM.

The establishment of the EMF through applying the flexibility clause begs the question of the Union's competence to take the action. The notion of competence refers to the Union's jurisdiction, which refers to the scope of action, and the power, which refers to the means and the instruments of the action.[5] The Union competence is governed by the principle of conferral. Under the principle, the Union can only act within the limits of the powers conferred to it by Member States in the Treaty of the European Union (TEU) or in the TFEU) (together the Treaties).[6] The Treaties do not explicitly state that the Union would have competence to establish EMF. However, the principle of conferral leaves some room for discretion. Article 352 TFEU, the flexibility clause, allows the Union to take measures if they are necessary to attain one of the objectives of the TEU or TFEU even when the Treaties do not provide such powers.

The scope of application of the flexibility clause is limited. The flexibility clause itself sets three conditions for the application. The first condition is that there is no specific legal basis in the Treaties for the measure. The second condition is that the action is within the framework of Union policies. The third condition is that the measure is necessary to attain one of the objectives set out in the Treaties.[7] Before the establishment of the EMF, it must be examined whether these conditions are met. Furthermore, the case law of the Court of Justice of the

[5] The notion of power can be determined, also, by division of three defining features. In this determination, the allocation of the powers refers to who exercise the powers, the exercise of the powers relates to how the powers are used. The scope of a given power is categorized in three categories. This categorization of competence is introduced in Chapter 3.1.3. On the notion of power, see e.g. Lena Boucon, 'EU Law and retained Powers of Member States', 170. In Azoulai L (ed), The Question of Competence in the European Union (2014) Oxford University Press; Loïc Azoulai (2014) Introduction: The Question of Competence, 2. In 'The Question of Competence in the European Union' edited by Loïc Azoulai (22014) Oxford University Press.

[6] Article 5(2) TFEU.

[7] Article 352(1) TFEU.

European Union[8] is important when considering the interpretation of the flexibility clause. According to the Court, the flexibility clause cannot be used for widening the scope of the Union powers beyond the general framework. The general framework is set on the Treaty provisions and especially on the provisions defining the tasks and the activities of the Union. The Court stated that the flexibility clause cannot be used to amend the Treaties without following the procedure set for amendments.[9] Therefore, it is important to study whether the establishment of the EMF would widen the scope in such a way the Court rejected. It must be studied whether the conditions for the use of the flexibility clause are met. Accordingly, it must be studied whether the EU has competence to establish the EMF in the form now proposed.

A study concerning the Union competence to establish the EMF through applying the flexibility clause is needed, because the competence in the issue is vague. There is no direct, authoritative answer available. Also, the studies related often concern the ESM, not the possible Union agency. The Commission's recourse to the flexibility clause has been rare and therefore, the boundaries of the flexibility clause's applicability needs to be examined. Also, the establishment of the EMF seems to have significance as the current mechanism concern remarkable liabilities and notable economic importance. Accordingly, it seems important to evaluate whether the action can be taken.

Also, the importance of the study concerning the establishment of the EMF through applying the flexibility clause relates to the need to protect the Treaty revision procedure. As the flexibility clause can be used to establish secondary legislation and not to amend the Treaties, the study about the issue is important. The secondary legislation does not require the ratification of the Member States. In some Member States, a Treaty amendment requires referendum. As the Treaty revision procedure is long and difficult, it is understandable that the Commission wants to avoid it. However, as Treaty amendments may change the structure and functioning of the Union, the Treaty amendment procedure should be protected. Therefore, the Commission's proposal, as it suggests significant changes, should be evaluated carefully. The flexibility clause cannot be used as the circumvention of the Treaty revision procedure. If the

[8] The Court of Justice of the European Union is referred as the Court, except when there is possibility of confusion with national courts. When this occurs, the Court is referred by the abbreviation CJEU.

[9] Opinion of 28 March 1996, *Opinion 2/94*, C-2/94, EU:C:1996:140, paragraph 30.

Union does not have competence to establish EMF through applying the flexibility clause, the EMF can be established through a Treaty amendment.

The Commission gave the Proposal in December 2017. Despite the prolonged time and the lack of actions taken, the establishment of the EMF is a timely topic. The Commission has planned that decisions on the matter would be taken in the mid-2019. The Commission has stated in the summer of 2018 that it is important to ensure the future incorporation of the ESM into EU law.[10] Also, there have been recent statements in the issue. For example, a candidate for the Commission's next president, Manfred Weber, has stated that the establishment of the EMF is a top priority to him.[11] The statement implies that the topic will be, most likely, under discussions in the near future.

1.2 The research question

The subject of the research focuses on the Union competence to establish EMF. It concentrates on the question of the suitability of the flexibility clause in the matter. The research question is as follows:

> *Can Article 352 Treaty of the functioning of the European Union serve as legal basis for the establishment of the European Monetary Fund?*

The question requires yes or no as answer because a legal basis cannot be partly applicable. Although the answer cannot include middle ground, the question must be examined broadly and requires research and analysis. In order answer to the research question, a set of more specific aspects need to be assessed. The sub-questions in the thesis are as follows: How the notion of competence is understood in the Union constitution? Does the establishment of the EMF fulfil the conditions set to the application of the flexibility clause? How the national constitutions of Member States' take a view of the Union competence in the matter? Answers to these questions are crucial to the answer to the research question.

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[10] The European Commission, 'Deepening Europe's Economic and Monetary Union – Commission Note ahead of the European Council and the Euro Summit of 28 – 29 June 2018 < https://ec.europa.eu/commission/sites/beta-political/files/euco-emu-booklet-june2018_en.pdf> accessed 19 February 2019.

[11] Michelle Martin, 'Germany's Weber: Creating European Monetary Fund should be a priority', *Reuters* (2018) https://www.reuters.com/article/us-eu-election-weber/germanys-weber-creating-european-monetary-fund-should-be-a-priority-idUSKCN1NO1M5 accessed 31 January 2019.

The subject of the study is the legal basis for the EMF and the political considerations are limited out of the study. Political considerations include the political opinions and evaluation of the political need for the EMF. Also, the political evaluation of the monetary and economic union (EMU) are excluded out of the study. The political opinions can easily be represented as legal.[12] The answer to the research question has large political impacts. The competence in the context of the establishment of the EMF may influence the political actions of Member States. However, the different aspects are tried to represent as widely as possible and the risk of political opinions is perceived and opted out as much as possible.

The main source of the study is the Commission's proposal. The proposal is studied alongside the constitutional material of the EU. As main actors in the European Constitution the Treaties and the Court provide the most important sources.[13] It is worth noticing that the Court's case law is integral part of the EU legal system. The case law of the Court is equal constitutional source with the Treaties. The Court has played an important role in monitoring the division of competence.[14] The Court's most significant case law related to the issue is the *Pringle* case[15] and the opinion 2/94[16]. The constitutions of Member States are the sources of the Member States' views in the issue. The constitutional actors of the Member States, such as constitutional courts, are referred to as sources of national constitutions. Other references used include academic studies and publications of the EU authorities.

1.3 Analytical framework of the study

This sub-chapter examines the theoretical approach of the thesis. The methodology applied in the thesis is mainly constitutionalism.[17] However, as the thesis includes also other theoretical

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[12] Paul Craig and Gráinne De Búrca, 'EU Law: Text, Cases, and Materials' (2015), 76.

[13] More about the constitutional actors in the context of the EU constitution in Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015) 133.

[14] Ronald van Ooik, *The European Court of Justice and the Division of Competence in the European Union* (2007) 13.

[15] Judgement of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

[16] *Opinion 2/94* (n 11).

[17] Some commentators have claimed that the EU legal studies do not need its own analytical approaches as the regular sub-disciplines in law are relevant. However, the EU legal studies regularly apply constitutionalism as methodology. Some commentators have seen that the EU legal studies, as autonomous legal system that has a special nature, has, also, other methodologies than constitutionalism. These methodologies include, for example, new governance, institutionalism and constructivism. See, e.g. Karl Riesenhuber, *European Legal Methodology*,

approaches, the approach is often inter-disciplinary. Methodology, the theoretical framework and the systemic procedure of the thesis, is applied in the thesis in order to answer the research question.[18] The examination of meta-theory places the thesis in the wider theoretical context of the EU legal studies, the EU constitutional studies, the Member States' constitutional studies and studies concerning law and economics in both the EU and Member States. This sub-chapter examines the theoretical approach of the thesis by examining the literature of the meta-theory about the EU law and especially about the constitutionalism. Also, other theoretical aspects that related to the research subject are briefly examined. These aspects include two sub-disciplines of law, legal dogmatics and law and economy. In addition, this sub-chapter examines the methods used in the thesis. The main method used in the thesis can be described as argumentative context analysis: the study examines the research question through analyzing the EU legal system. This method is accompanied with different methods for the interpretation of law, such as systemic, linguistic and teleological interpretation.

A closer look into the meta-theory of the EU legal studies reveals that the EU legal studies are not a homogenous field. Nevertheless, the commentators have mostly agreed on the idea of inter-disciplinary and contextual approach of the EU legal studies.[19] These features are included in the thesis as well. The application of multiple methodologies, both regular sub-disciplines and constitutionalism, implies the inter-disciplinary nature of the study. In the thesis, the contextual approach appears in several ways. The context has an emphasized role in the approach to the research problem. The pronounced role of the principles and objectives in the EU law underlines the context-based approach of the EU legal studies. In the thesis, this is implied, for example, through the important role of the principle of conferral. Also, the objectives of the Union have an emphasized role in the research problem. In addition, the EU

(Intersentia, 2017); Simon Bulmer, 'Institutional and Policy Analysis in the European Union: From the Treaty of Rome to the Present' in David Phinnemore and Alex Warleigh-Lack (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome* (2009) 118; Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart 2011) 20.

[18] Methodology is the systematic procedure that a scholar applies. See, Cryer and others (n 17) 7.

[19] Hunt and Shaw include critical approach to the nature of EU legal studies. However, the thesis is not, mostly, critical. The thesis does not apply the traditional critical methodologies, such as the critical theory, the critical legal studies or the poststructuralism. According to Hunt and Shaw the idea has been first represented by Francis Snyder in 1990's. Jo Hunt and Jo Shaw, 'Fairy Tale of Luxembourg? Reflections on Law and Legal Scholarship in European Integration' in David Phinnemore and Alex Warleigh-Lack (eds), *Reflections on European Integration: 50 Years of the Treaty of Rome* (2009) 97. See also, Neil Walker, 'EU Constitutionalism in the State Constitutional Tradition' (2006) 21, 583.

legal studies have been described being reactive and based on events.[20] This is due to the evolving nature of the EU polity.[21] The thesis reflects this tradition of EU legal studies. The study reacts to the Commission's proposal. The event that the thesis studies is the possible establishment of the EMF.

The EU legal studies have often structured the EU legal order through doctrines. The doctrinal approach has been the most common through the integration.[22] However, recently the pluralist approach has been highlighted.[23] In the thesis, the both trends have been taken into consideration. On the one hand, the question whether the establishment of the EMF fulfils the conditions of the flexibility clause represents the doctrinal approach. On the other hand, the national constitutions provide pluralist perspective.

The scope of the EU legal studies is extensive. The EU constitutional order is only one piece of the EU legal studies.[24] The Union competence is considered as one of the most important research subjects of the EU constitutional studies.[25] Constitutionalism, as a methodology, is interested in the constitutional translation from Member States to the Union.[26] The constitutionalism seeks to explain interfaces between constitutional doctrine and institutions and, also, the broader socio-political dynamics of the EU.[27] Notably, the EU law is not separate and distinct from the legal orders of Member States and the same theoretical tools can be applied.[28] At the same time, the special characteristics of the Union require the translation of the concepts of national constitutions. The constitutionalism as a methodology has attracted, however, direct criticism. The critics have seen it only being the *terrain of study*.[29] The criticism

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[20] Neil Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 581, 583.

[21] Hunt and Shaw (n 19).

[22] ibid, 97.

[23] ibid, 107.

[24] ibid, 96.

[25] Azoulai (n 6) 1.

[26] Cryer and others (n 17) 51.

[27] Bulmer (n 21) 121.

[28] Hunt and Shaw (n 19) 108.

[29] For example, Bulmer mentions that the constitutionalism can be criticised as being only a terrain of study. As for Walker, he claims that the constitutionalism can be understood as category-error. If the constitutionalism is seen as a category-error, the word constitution in the Union context could be only imitation or nonsense due to the

is valid. However, it is not necessary to classify constitutionalism as methodology, it to be a useful approach in this study.

The constitutionalism can be applied into three different tasks: The first task is to determine the boundaries of the Union competence. The second task is to examine the principles that govern the use of the competence. The third task is evaluating the division of powers.[30] The thesis includes all three of these tasks. The issues are related and could not easily be separated from each other. The thesis seeks to determine the boundaries of the Union competence by analyzing the general constitutional framework of the Union, the arguments of the Commission in the Proposal and the Member States' constitutions. The principles governing the use of competence, especially the principle of subsidiarity, are evaluated in the context of the establishment of the EMF. The question whether the CJEU or the national actors, such as constitutional courts, hold the power to determine the boundaries of the Union competence, implies the third task of determination of division of powers. However, the thesis emphasizes the determination of the boundaries of the Competence.

The theoretical approach of the thesis has interconnections with the regular sub-disciplines of law. The regular sub-disciplines of law support the constitutionalism and they provide the base that the constitutionalism is built on. Thus, the application of constitutionalism does not exclude the use of the regular sub-disciplines of law. The thesis applies features from legal dogmatics and legal positivism. The legal dogmatics focuses on the analytical studies of law. It does not concentrate only on linguistic arguments, but also the contextual aspects.[31] The thesis implies this by not only focusing on the wording of the Treaties, but also examining the context. The context focuses on the competence through the objectives of the EU on the one hand, and the competence through national constitutions on the other. In the thesis, as in the legal positivism, the law is valid when it has formal legal status. The legal positivism focuses on the description

lack of political ambition. Other critics towards the constitutionalism in the Union context, as Walker states, include, on the one hand the ambiguity of the term and, on the other hand, the establishment of the term in the nation-state context. Walker explains that the meta-theoretical question of constitutionalism in the Union is not important due to the possibility to determine the concept all over again in different contexts. Then again, according to Walker, the national constitutional tradition can be understood as only relevant reference to the Union constitution. Bulmer (n 21) 121; Walker (n 20) 2 – 3.

[30] Azoulai (n 6) 1.

[31] Seppo Laakso, *Lainopin teoreettiset lähtökohdat* (2012) 510.

and explanation of the law as it is.[32] Other than legal aspects, such as morality, are not taken into consideration.[33] The thesis seeks to determine the purview of the flexibility clause in the context of the establishment of the EMF. Therefore, the thesis seeks to explain the valid law. The study is based on the systematization and interpretation of valid law. The thesis focuses on the valid law as it now stands.

The thesis has, also, strong interconnections with the law and economics. This methodology is not applied directly in the thesis, but it is examined here due to the impact on the research subject. The law and economics explain the law by reference to economic analysis. It is based on the legal positivist approach to the law as the law is seen as regulated by active legislators and it studies the valid law as it is. The law and economics often seek to find the most effective way to legislate economic actors and apprising the law.[34] The thesis, although, does not include such remarks. The connection between the research subject and the law and economics is, rather, shown in the thesis in the examination of the financial assistance mechanisms and the proposed regulation. The subject of the study needs the reflection of the economic thinking.

The study has interest on the law and economics because of its discussion on the notion of the economic constitution. The notion has interconnections with the research subject. The notion of the economic constitution tries to combine the legal and economic scholarship at the deep, conceptual level.[35] The German ordoliberal school introduced the notion in the 1960's[36], but it is not unanimously accepted.[37] Unlike in the thesis, the ordoliberals connect the economic constitution with a specific economic model. The economic constitution has been used in the Union context as well. According to some commentators, the ordoliberal school promoted the free movement of goods, capital, services and labor.[38] In the Union context, the notion refers today to interrelation between the constitutional law of the Union and economy. Because of the

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[32] Cryer and others (n 17) 38

[33] ibid, 37.

[34] Cryer and others (n 17).

[35] Kaarlo Tuori and Klaus Tuori, *The Eurozone Crisis – A Constitutional analysis*, (Cambridge University Press 2014), xi.

[36] Walker (n 20), 595

[37] Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015), 127.

[38] Christian Joerges, *The European Economic Constitution and Its Transformation Through the Financial Crisis* (2015) ZenTra Working Paper in Transnational Studies No. 47/2015.

multidimensional nature of the Union constitution, as some commentators have put it, the economic constitution refers to the economic dimension of the competence.[39] According to these commentators, the economic provisions of the Treaties form a central piece of the economic constitution.[40] The question of competence is highly interconnected with the economic constitution, too. The concept of the economic constitution is, therefore, an interesting theoretical background to the thesis.

The methods used in the thesis are argumentative context analysis accompanied with different interpretation methods of the law. These interpretation methods are teleological, systemic and linguistic interpretation. Notably, the methods applied in the thesis include the methods of interpretation of the EU law and the constitutional law of the Member States as well.

The thesis approaches the Union constitution in, at least, two ways. Firstly, the Union constitution is analysed through the form of application. This application is the establishment of the EMF. Secondly, the Union constitution is analysed through its interaction with the national constitutions of Member States.[41] This is partly because the EU constitution relies on the support from Member State constitutions[42] and the EU constitution cannot be taken out of this context. Accordingly, the interrelation between the constitutional law and its object of regulation, which is in the thesis the establishment of the EMF, is examined multi-dimensionally.

In the thesis, the constitutions of the Member States are illustrated through two examples, Finland and Germany. Finland is used as an example because of the thesis' nature being a thesis of Finnish master's degree. As for Germany, it has been used as an example because of the extensive case law related to the research question. However, the constitutional traditions of the Member States are all different, and the examples chosen reflects only two example constitutions. These examples represent quite similar jurisdictions. Clearly, the natures of these two constitutions have an effect on the findings in the thesis. Different examples could lead to

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[39] The economic constitution has been used in this sense also by Tuori and Tuori. See, Tuori and Tuori (n 45), xii.

[40] Éloi Laurent and Jacques Le Cacheux, 'Integrity and Efficiency in the EU: The Case Against the European Economic Constitution' (2006) 130.

[41] Tuori and Tuori (n 45), xii, 9; Tuori (n 13). xii – xiii.

[42] Tuori and Tuori (n 45), 9.

different conclusions. For example, Germany has taken a stricter stand on the Union competence issues than many other Member States.[43] Therefore, using of other Member States as examples could lead into a conclusion that the Member States and the Union agree in the competence division issue. Accordingly, by using Germany as an example the issues related to the competence are more apparent.

The thesis uses different interpretation methods for law. The interpretation of the Union law differs slightly from the interpretation of national laws. The linguistic interpretation is emphasized in the interpretation of the constitutions of the Member States. The thesis is mostly relied on the authoritative statements about the interpretation of the constitutions. These authorities are constitutional courts of Member States or other constitutional authorities, such as parliamentary committees.

As for Union law, the systemic and the teleological interpretation is in more important role than the linguistic interpretation. Back at the 1960's, the Court ruled that it interprets the Union law based on 'the spirit, general scheme and wording'.[44] Later on, the Court ruled that the interpretation involves comparing different language versions and placing Union provisions in its context. The Union law as a whole, including the objectives of the Union, must be considered.[45] The Court has ruled that both teleological and linguistic interpretation are valid. The former interpretation method, in the Union context, refers to both purpose-oriented and contextual interpretation. The linguistic interpretation has strong interconnections with systemic interpretation, as the systemic understanding of the Union legal order, including the principles of the Union, is required in the EU law interpretation.[46] In the question of the establishment of the EMF, the teleological interpretation underlines the relevance of the legal framework.

In addition, linguistic interpretation is also applied in the thesis. The linguistic interpretation of the EU law has been under criticism. The Union has multiple official languages and, therefore,

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[43] Mikko Puumalainen, *EU:n etusijaperiaatteesta Suomen valtiosäännössä* (doctor, Turun yliopiston oikeustieteellinen tiedekunta 2018), 148.

[44] Judgement of the Court of 5 February 1963, *Van Gend & Loos*, 26-62, EU:C:1963:1, para 5.

[45] Judgement of the Court of 6 October 1982, *CILFIT*, C 283/81, EU:C:1982:335, paragraph 18.

[46] Miguel Poiares Maduro, 'Interpreting European Law: Judical Adjudication in a Context of Constitutional Pluralism' (2008) 137 European Journal of Legal Studies, 140.

the linguistic equality requires that all language versions of the provisions are relevant. Problematically, linguistic interpretation easily concentrates on one language version.[47] However, the Court has constantly relied on linguistic interpretation, and, therefore, it cannot pass over. The multilingual nature of the Union should, in any case, take into account in the interpretation of the Union provisions. Considering the research question, the linguistic interpretation stands out when interpreting the Union competence and the flexibility clause.

To sum up, the thesis applies constitutionalism, a special EU legal studies approach, as methodology. The constitutionalism is accompanied with the regular sub-disciplines of law. As examined in this sub-chapter, the finding a singular methodology for the research question is not an easy task – or even desired, as using a couple of methodologies helps to find answers to the question. Also, the thesis applies multiple methods in order answering the research question. These methods are argumentative context analysis and different interpretation methods of law.

1.4 The structure of the thesis

The thesis is structured as follows. In the second chapter, the instruments aiming to stabilize are examined. The chapter illuminates the context of the proposed measure and instrument. The reasons behind the need for financial assistance mechanism are briefly examined. The current mechanism, as being the foundation for the proposed measure, provides context for the research question. Also, the legal framework of the current mechanism is examined before the detailed look at the Commission's proposal. Finally, the Commission's proposal is examined through examining the questions about why the proposal is made, how it is made and what it suggests.

Third chapter examines the Union competence. The chapter evaluates the notion of the Union constitution. The chapter clarifies the legal framework of the competence in the context of the EMF. The most important principles related to the research question, the principle of conferral and the principle of subsidiarity, are examined in detail. The third chapter, also, introduces the flexibility clause and its significance.

In the fourth chapter, the conditions, which arose from the linguistic interpretation of the flexibility clause, are applied into the establishment of the EMF. The chapter aims to test

[47] Elina Paunio and Susanna Lindroos-Hovinheimo, 'Taking Language Seriously : An Analysis of Linguistic Reasoning and Its Implications in EU Law' (2010) 16 European Law Journal, 396 – 397.

whether the proposed measure fulfils these conditions. The chapter focuses on the following questions: whether the Treaties have provided the legal basis, whether the measure is within the framework of the Treaties, what are the objectives of Treaties in the context of the EMF and whether the establishment of the EMF is necessary.

In the fifth chapter, the question how national constitutions interconnects the Union competence in the context of the flexibility clause and EMF, is examined. The chapter evaluates whether the national constitutions make it possible to the flexibility clause to serve as legal basis for the establishment of the EMF. Finally, on chapter six, concluding remarks are outlined.

2 EUROPEAN MONETARY FUND AND OTHER INSTRUMENTS AIMING TO SAFEGUARD THE STABILITY OF THE EURO AREA

2.1 Reasons behind the establishment of the early instruments

This chapter focuses on the financial assistance regime. In order to understand the research problem, it is important to draw some attention to the development of the instruments that have been created to stabilize the euro area. For understanding the financial assistance regime, the financial crisis is briefly examined. The current mechanism, the ESM, is the basis for the proposed EMF and, therefore, it needs to be examined in detail. Finally, this chapter examines the Commission's proposal and the proposed instrument.

The Commission's proposal on the establishment of the EMF has not been created in political or economic void. Therefore, the earlier instruments, the development of the legal framework and the earlier applications of the flexibility clause sheds a light for the reasons why the establishment of the EMF is proposed now and why the Commission suggests using the flexibility clause. Knowledge of the historical context and political reasons, under which the earlier instruments have been established, provide understanding to the instrument now proposed. Furthermore, it is impossible to understand the institutional framework without reference to previous policy measures. The entrenchment of the term 'stability' to EU's constitutional discourse has deepened during the evolution of the institutions and, also, this development is briefly examined in this sub-chapter. This sub-chapter examines the financial crisis, the financial assistance instruments in the recent history and other tools established aiming to stabilize the euro area. However, the complex history of the financial crisis and

instruments aiming to stabilize the financial sector of the euro area can only be briefly outlined here due to the limited space.

The need for special instruments aiming to stabilize the euro area originates from the financial and economic crisis. The financial crisis continued as prolonged crisis in the euro area. The crisis was not only financial but also economic, fiscal and banking crisis. Fiscal crisis led to sovereign debt crisis. The markets began to mistrust the financial standing of some European countries, such as Greece, Ireland and Portugal. This was partly because these countries had been, possibly due to the lax oversight of banks, coerced to bail out troubled banks. Also, some countries were seen riskier because of the deficits were let balloon by the governments. These factors led the increase of governments' budget deficits.[48] Due to the quick increase in public debt, the Market Participants had less confidence in the liquidity and solvency of these countries. The interest rates raised extremely high to these countries. This led to the reduce of competitiveness and, over time, these countries started to lose market access. In this situation, the need for financial assistance packages was seen inevitable.

The need for financial assistance has been seen extra high in the euro area. The crisis revealed the weaknesses of the financial system of the euro area. The contagion and spillover effects between Member States are more likely in the area of single currency than those Member States that have different currencies. These effects increase the urge for financial assistance. At the peak of the financial crisis, the desire to enhance the confidence of financial markets was strong.[49] As the economic health of individual euro area Member State can impact on the valuation of the single currency, the financial assistance between Member States has been seen necessary. Failure of euro area Member State would endanger the whole euro system.[50] At the time of the financial crisis, there was a need for the establishment of new financial assistance mechanisms because there were no instruments to overcome the crisis. The economic policy instruments of the EU were too weak and did not prevent unsound budgetary policies by

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[48] Jale Tosun, Anne Wetzel and Galina Zapryanova, 'The EU in Crisis: Advancing the Debate' (2014) 36 Journal of European Integration 195, 197.

[49] Tuori and Tuori (n 45), 85; Rodrigo Olivares-Caminal, 'The European Stability Mechanism: Some Notes on a New EU Institution Designed to Avert Financial Crises' in John Raymond; LaBrosse, Rodrigo; Olivares-Caminal and Dalvinder Singh (eds), *Financial crisis containment and government guarantees* (Edward Elgar Publishing 2013) 212.

[50] Filippo Donati, 'The Euro Crisis, Economic Governance and Democracy in the European Union' (2013) 5 Italian Journal of Public Law 129, 131.

Member States.[51] Also, the limited budget of the EU restricted the possibilities to react the crisis. The funding from the Union budget is opted out. This caused that the EU did not have tools to react to the crisis.[52] Therefore, new mechanisms were needed.

In addition, the crisis revealed the vicious circle, also called the doom loop, between the euro area banks and the Member States. It was lightened upon that serious difficulties in the banking sector may lead fiscal distress in Member States. On the contrary, banks are exposed to sovereign risk. The financial architecture was required to be under reform to weaken the vicious circle.[53]

The financial assistance instruments within the euro area have been either within or outside the union framework. The progression has been from case-by-case bilateral loans to more structured institutions. First attempts to create stability was outside the Union framework and based on bilateral loans. Member States participating the European Monetary Union, alongside the International Monetary Fund, created rescue packages to fund Greece. The bilateral loans to Greece were emergency assistance where the terms and structure of the loans were decided to this special rescue package. The financial assistance was accompanied with an austerity package, which required the adoption of austerity economic policy. [54] The European Financial Stabilization Mechanism (EFSM), which was a temporary instrument, was the first measure based on EU law. It was established in 2010.[55]

The EFSM was followed by the European Financial Stability Facility (EFSF). It was created by euro area Member States. The financial assistance provided by the EFSF was bilateral and the EFSF was created to give financial support to a broader group of Member States. The EFSF was created to be temporary. However, it still exists as a legal entity, but it can no longer grant new loans.[56] The EFSF is a private company, a special purpose vehicle. It must comply with

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[51] ibid, 148.

[52] Amy Verdun, 'A Historical Institutionalist Explanation of the EU's Responses to the Euro Area Financial Crisis' (2015) 22 Journal of European Public Policy 219.

[53] Spyros Alogoskoufis and Sam Langfield, 'Regulating the Doom Loop' (2018) 74, 1.

[54] Financial assistance to Greece, Letter of Intent, Memorandum of Economic and Financial Policies, Technical Memorandum of Understanding, 6 August 2010.

[55] Council Regulation, (EU) No 407/2010, establishing a European financial stabilisation mechanism [2010] OJ L 118.

[56] EFSF Framework Agreement, adopted 7 June 2010.

the Luxemburg law, under which it is established. The shareholders of the company are the euro area member States.[57]

The current financial assistance instrument, which is further examined in the following sub-chapter, is the European Stability Mechanism, ESM, was established in 2012. The European Council stated already in 2010 that there was a need for a permanent institution as the bilateral loans failed to calm the markets and the crisis threatening the financial stability remained. The ESM was created to fulfill the need for permanent instrument.[58] The ESM is the successor of those earlier instruments providing financial assistance to Member States. In fact, the financial assistance provisions and instruments have been built on top of earlier institutional structures.[59] For example, the ESM is structurally very similar with the EFSF.[60] The decision-making process, for example, implies this similarity. The institutions, according to some commentators, are structured in such way that in the future they may well become incorporated within the EU Treaties.[61] The Commission's proposal represents this idea. The more detailed analysis of the ESM is provided in the next sub-chapter.

One of the aspects of financial assistance in the euro area is the involvement of the International Monetary Fund (IMF). The IMF has been involved in the bilateral instruments and the current instrument. The IMF is designed to provide countries financial help when the country's central bank runs out with foreign currencies and when borrowing from the private sector is too expensive or difficult.[62] In a sense, in the euro area the single currency is a foreign currency in the eyes of individual Member State, as the central banks of the Member States cannot print euro-notes. Therefore, the Member State can run out of euros. When this happens, the financial assistance can be provided by the IMF or the other Member States can lend euros. The Member

[57] There are two exceptions; Latvia and Lithuania are not shareholders.

[58] Treaty establishing the European Stability Mechanism, T/ESM 2012-LT/en, signed in 2 February 2012.

[59] Verdun has studied the financial assistance regime through historical institutionalist lenses. Verdun (n 25), 225.

[60] ibid, 227.

[61] Verdun comparises the financial assistance regime to Schengen provisions. Ibid, 232.

[62] Charles Wyplosz, 'In-Depth Analysis - A European Monetary Fund? Scrutiny Paper Provided in the Context of Economic Dialogues with the President of EUrogroup in the Economic and Monetary Affairs Committee' (2017) 11.

State cannot go to the European Central Bank (ECB) as it is forbidden to the ECB directly lend to Member State governments.[63]

There have been different instruments aiming to stabilize the euro area. The financial assistance instruments have been important, but there have been also other instruments that have similar objectives. The ECB launched a government bond purchase program, named as the Securities Markets Program.[64] The ECB replaced it with the Outright Monetary Transaction Program in 2012.[65] The program has been providing safety net for the euro area Member States through buying government bonds in secondary sovereign bond markets and decreasing financing costs and interest expenses for Member States.[66] Also, the EU has made improvements in the banking supervision and bank resolution. These improvements have strong interconnections with the public economies of the Member States due to the vicious circle between the banks and the Member States. The EU has aimed to weaken that vicious circle and to establish and maintain the integrated internal market of the banking services. Therefore, the integration in the field and new regulation has been taken. The integration has been taken especially through the establishment of the Single Resolution Mechanism and Single Supervision Mechanism. The Single Resolution Mechanism is a banking sector resolution system and the Single Supervision Mechanism is a banking supervision system.[67]

To sum up, this sub-chapter examined the financial assistance regime by exploring the context of the financial assistance mechanisms. This context includes the aftermath of the financial crisis. After the financial crisis revealed the need for financial assistance, the regime has evolved and there have been different instruments providing that assistance. The understanding about the reasons behind the financial assistance mechanisms provide important information

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[63] Article 123(1) TFEU.

[64] 'ECB decides on measures to address severe tensions in financial markets' (2010) https://www.ecb.europa.eu/press/pr/date/2010/html/pr100510.en.html accessed 20 February 2019.

[65] 'Technical features of Outright Monetary Transactions' (2012) <https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html> accessed 20 February 2019.

[66] The purchases from secondary markets are only tools the ECB holds. The ECB is prohibited from granting direct loans to the public sector. Article 123(1) TFEU.

[67] Council Regulation (EU) No 806/2014 of the European Parliament and of the Council (2014) establishing uniform rules and uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 Council Regulation (EU) No 1024/2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (2013) OJ L 287.

for the evaluation of the proposed instrument. Next, the current mechanism is examined in detail.

2.2 The European Stability Mechanism – the current instrument

The current, permanent, bail-out instrument provides the basic context to the proposed instrument. It provides clear insights into the current legal and institutional framework, including the amended Treaty provision of the financial assistance mechanism and intergovernmental nature of the current system. The EMF is suggested to follow and replace the intergovernmental ESM and transfer it to the Union legal framework. After the establishment of the EMF, it would take over the ESM as a whole. The EMF would inherit the legal position of the ESM, with all its rights and obligations.[68]

The ESM is based on an intergovernmental treaty, the Treaty Establishing European Stability Mechanism (ESM Treaty).[69] Therefore, the ESM is outside the Union framework. The commentators have supposed that this was the easiest way to establish the mechanism. According to the commentators, the Union lacked the legal basis for the establishment of a stability mechanism and it was unlikely that the Member States would have agreed the Treaty change needed.[70] Even though the ESM Treaty is intergovernmental, the ESM entrusts EU institutions, ECB and the Commission, central roles. The roles contain tasks in granting and supervising financial assistance.[71]

The purposes of the ESM and the proposed EMF are similar. The purpose of the ESM is to provide financial assistance to euro area Member States when they are experiencing, or threatened by, severe financing problems. The ESM provides a backstop, through funding from the capital contributions of the Member States, for euro area governments that are no longer able to borrow on the market. The tasks of the ESM are to promote financial stability,

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[68] The European Commission (n 1), 5.

[69] The ESM Treaty (n 69).

[70] Several commentators have come into the same conclusion. See, e.g. Verdun (n 53). 231; Paul Craig, 'The New Constitutional Architecture of European Economic and Monetary Union' in Maurice Adams, Federico Fabbrini and Pierre Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart Publishing 2014) 25; Gianni Lo Schaviavo, 'The Judicial "Bail Out" of the European Stability Mechanism: Comment on the Pringle Case' (2013) 5 Italian Journal of Public Law, 213.

[71] The ESM Treaty (n 69) article 13.

sustainable public finances and restore conditions for growth.[72] The financial assistance can consist also of financial support for the recapitalization of the financial institutions of a Member States.[73] The financial assistance can only be given under strict conditionality and if it is *indispensable to safeguard the financial stability of the euro area as a whole*.[74] Practically, the financial assistance can be granted if there are remarkably financial needs, but the Member State cannot access funds in the markets, either because lenders are unwilling to grant loans, or will only do so at unsustainable interest rates. The EMF would inherit these tasks from the ESM, as examined further in the next sub-chapter.

Even though the ESM is an intergovernmental institution, there are strong interconnections with the Union. The Council has stated that the objective of the ESM also helps preserving the economic and financial stability of the Union itself.[75] In the *Pringle* ruling, the Court drafted an idea of higher, abstract objective and primary, concrete objective of the ESM. The abstract objective is, according to the court, the financial stability. The concrete objective is the budgetary discipline.[76] Although, as the ESM is an intergovernmental mechanism, the Court does not hold the power to determine its objectives.

The article 136 TFEU was amended to ensure that the ESM is compatible with EU Law.[77] Under Article 136 paragraph 3 TFEU:

> *Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality.*

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[72] Ibid, article 3.

[73] Ibid, articles 14 – 18.

[74] Ibid, article 3.

[75] European Council Decision 2011/199/EU 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] OJ L 91, recital, para 4.

[76] *Pringle* (n 17).

[77] European Council Decision (n 75).

However, the amendment was not in force when the ESM was established.[78] The Court has ruled that the amendment was not needed for the establishment and the Member States could have entered into the ESM Treaty even without the amendment.[79] According to the Court, the amendment confirmed the existence of a power possessed by Member States.[80] Therefore, the Article 136(3) does not provide the legal basis for the establishment of the ESM and the legal basis comes from the intergovernmental Treaty, the ESM Treaty. The Article 136(3) TFEU only affirms the legal situation.

The article 136 TFEU was amended by the simplified amendment procedure under Article 48(6) TEU. The chosen amendment procedure may implicate on the ESM's, and more widely financial assistance mechanisms', position on the Union legal system. Amending the Treaties, either by simplified or ordinary revision procedure, requires ratification by all Member States according to their own constitutional procedures. Key amendments, including increasing competence, demands the ordinary revision procedure. The simplified amendment procedure, as the name of the procedure implies, can be simpler than the ordinary amendment procedure. The procedure can only be used to amend EU's internal policies and actions.[81] However, the ordinary amendment procedure can be quick in the right circumstances, such as political mutual understanding about the matter. On the contrary, the simplified revision does not necessarily mean that the amendment could not be legally, politically, or technically complex.[82]

The Court has examined the legality of the ESM in the Union law perspective in the *Pringle* case.[83] In the case, Irish national court referred two questions to the Court. The first question was about the validity of the Decision 2011/199 that amended the Article 136 TFEU.[84] The second question was about the Member States' right to conclude and ratify the ESM Treaty. The question on the validity of the Decision 2011/199, had two aspects. Firstly, it was under interpretation if the Amendment met the criteria for the simplified procedure under Article

[78] The amendment entered into force on 1 January 2013.

[79] *Pringle* (n 17), paras 73 – 73. See also, Lo Schaviavo (n 71) 208.

[80] Ibid, para 184.

[81] Article 48(6) TEU.

[82] S Peers, 'The Future of EU Treaty Amendments' (2012) 31 Yearbook of European Law 17, 36.

[83] *Pringle* (n 17).

[84] European Council Decision (n 75).

48(6) TEU and whether it increased the powers conferred on the EU. The second aspect concerned the harmony of the Amendment with the Treaties and general principles of EU law.[85] The Court ruled that the establishment of the ESM did not breach the Treaties.[86] The ruling has significance, also, in the evaluation whether the ESM could be transferred into the Union framework.

In conclusion, the ESM as current mechanism is the basis for the now proposed new instrument. As the ESM is intergovernmental institution established by the Member States of the euro area, it is not based on the EU law. However, the strong interconnections with the EU make the boundaries between the international law and EU law vague in this exact issue. The sources examined in this sub-chapter, the intergovernmental ESM Treaty, the amendment to the article 136 TFEU and the Court's Pringle ruling, serve as the basic sources and the basis for the evaluation whether the ESM could be transferred to the Union legal system. These sources are examined later in the thesis in many ways.

2.3 Proposed European Monetary Fund

The Commission proposed the establishment of the EMF on 6 December 2017. There has, also, been earlier discussion on the need for a regional monetary fund and the Commission was not the first one coming up with the idea. There have been suggestions on both academic and political discussion. However, the Commission's proposal is not fully compatible with the earlier suggestions. This sub-chapter examines, after briefly discussing the discussion before the current proposal, what is proposed, why it is proposed and how it is proposed.

The idea of regional monetary fund is not new. Suggestions have appeared especially in the moment of financial crisis.[87] For example, Asian Monetary Fund was proposed during the East Asian crisis in the 1990s.[88] The Asian Monetary Fund was never established, but the discussion

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[85] Tuori and Tuori (n 45), 146.

[86] *Pringle* (n 17).

[87] It is not coincidence that the suggestions relate in occasions of crisis. The political agreement is difficult in bilateral loans and more structured frameworks are easier way to negotiate financial assistance. This was, also, the reasoning behind the proposed Asian Monetary Fund, see. Saori N Katada, 'Banking on Stability: Japan and the Cross-Pacific Dynamics of International Financial Crisis Management' [2001] University of Michigan Press, 196.

[88] Japanese government made the proposed the creation of an Asian Monetary Fund at the G7-IMF meeting in Hong Kong during the East Asian crisis at 1997.

concerning regional monetary fund stayed. In European context, suggestions for a regional monetary fund have appeared especially after the financial crisis.[89] However, the Commission's proposal is the first Union based initiative in the issue.

Earlier suggestions about the European Monetary Fund have been based on the solidarity principle or the doctrine of implied powers. Before the current debate, in the center of the discussion has been the idea of a fund based on the Union's solidarity principle.[90] However, the Court have rejected the idea of the fund based on solidarity.[91] Therefore, the idea of the fund based on solidarity is no longer valid. As for discussion on the fund based on the implied powers, the Court has not excluded that the implied powers could not provide the legal basis for the fund. The notion of implied powers refers to the idea, found in the Court's case law, that the existence of a given power or objective implies the existence of any other power that is reasonably necessary for the exercise of the former. [92] Some commentators argue that the achievement of the ECB's objectives requires the achievement of financial stability.[93] The ECB cannot, however, perform the tasks of the ESM because of the institutional power division of the Union. Also, as stated above, the ECB is prohibited to provide loans to the Member States.[94] Therefore, it could be argued that the powers attributed to the ECB implies powers to establish EMF. However, due to the scope of the thesis, this alternative legal basis for the fund is not discussed here further.

The now proposed EMF is not equivalent with the previous suggestions. The form of the initiative is a proposal for a Council Regulation. Accordingly, the proposal seeks for secondary

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[89] Daniel Gros and T Mayer, 'How to Deal with Sovereign Default in Europe: Create the European Monetary Fund Now!' [2010] CEPS Policy Brief 1, 2.

[90] The idea is based on the third subparagraph of the article 3(3) TEU and the Article 122(1) TFEU. Under these provisions the Union promotes solidarity between the member States and the Council may take a measure that is appropriate to the economic situation in a spirit of solidarity. However, the Court has rejected the idea of Article 122(1), and, therefore, solidarity principle, providing legal basis for such financial assistance as ESM provides. See, *Pringle* (n 17), para 115.

[91] Ibid.

[92] Judgement of 29 November 1956, *Fédération Charbonnière de Belgique*, 8/55, EU:C:1956:11; judgement of 9 July 1987, *the Federal Republic of Germany*, 281/85, EU:C:1987:351; judgement of 9 July 1987, *Germany v Commission*, joined cases 281, 283 – 285 and 287/85, EU:1987/351; judgement of 17 September 2007, *French v Commission,* T-240/04, EU:T:2007:290; judgement of 17 November 2009, *MTZ Polyfilms v Council*, T-143/06, EU:T:2009:441.

[93] Michael Waibel, 'Monetary Policy : An Exclusive Competence Only in Name ?' (2017) 11/2017, 19.

[94] Article 123(1) TFEU.

legislation, that would establish the EMF. The establishment of the EMF as now proposed would transfer the ESM to an EU agency. The creation of the new instrument would transform the role of government-controlled ESM into EMF under Union's parliamentary control and anchored in EU law. The Emf would be significantly similar with the ESM. The objectives of the proposed EMF are equivalent with the ESM. Similarities include, also, the institutions of the EMF. These institutions, the Board of Governors, the Board of Directors and the Managing Director, are identical to those of the ESM.[95]

The proposal is structured as follows. The proposal itself includes an explanatory part and the suggested regulation. The annex includes the suggested statute of the EMF. The Commission examines the context of the proposal, legal basis, subsidiarity and proportionality aspects, fundamental rights aspects and budgetary implications. The proposal, also, explains the specific provisions of the proposal in detail.

The Commission recommends, simply, transfer of the current mechanism into the Union legal framework. The fund would hold legal personality and its members would be the Union Member States that have the euro as currency. The objective of the EMF would be to contribute to the financial stability of the euro area, as well as the financial stability of the 'participating Member States', i.e. a Member State whose currency is not the euro that has established a close cooperation with the ECB. For the achievement of its' aims the EMF would *mobilize funding and provide stability support under strict conditionality*. The financial assistance would be available for Member States that are *experiencing, or threatened by, severe financial problems*. The financial assistance is only possible if it is *indispensable to safeguard the financial stability of the euro area as a whole or of its Members*.[96]

According to the proposal, the EMF's objective is to contribute to safeguarding the financial stability of the euro area, as well as the financial stability of the 'participating Member States'.[97] The objective of the EMF includes reducing risks to financial stability.[98] The financial assistance would help attaining the objective of risk reduction. According to the proposal, the

[95] Ibid, Article 4(1) of the Annex.

[96] The European Commission (n 1), Articles 1, 2 and 3 of the Annex.

[97] The European Commission (n 1), Article 3 of the Annex.

[98] Ibid, 12.

precautionary financial assistance can sustain sound economic policies and avert economic crisis. Precautionary financial assistance aims helping EMF Members to get financing from markets by strengthening the credibility and providing a safety-net.[99] Also, the proposal suggests that the EMF would provide backstop for the Single Resolution Fund. However, after the proposal was given, Eurogroup has decided that the ESM provides the backstop. [100] Therefore, the proposal would not add any new tasks through the backstop as the decision has been made elsewhere.

The EMF would change the decision-making process from the ESM. The fundamental decisions are made by the Board of Governors consisting of the financial ministers of the euro area Member States.[101] The similar institution makes fundamental decisions in the ESM as well.[102] However, the proposed EMF would change the number of votes needed for granting financial assistance. The decisions are made unanimous in the EMF. Therefore, the Member States must mutually agree to the financial assistance package.[103] In the proposed EMF, the decision of providing a stability support to an EMF Member requires reinforced qualified majority, which is 85 percent of the votes cast.[104]

According to the Commission, the establishment of the EMF is next logical step in the deepening of the EMU. The Commission justifies the proposal on unity, efficiency and democratic accountability. The Commission argues that the euro area crisis preparedness requires EMF.[105] The Commission suggests that the flexibility clause would serve as legal basis for the establishment. The Commission's view is that the regulation on the establishment of the EMF fulfils the conditions that the flexibility clause sets. It is also mentioned in the proposal that applying the clause would not be extraordinary, because the clause has already been applied

[99] Ibid, 22, recital 44.

[100] Euro Summit Statement, EURO 502/18 [2018], Eurosummit 2 TSGC 9; Eurogroup report to Leaders on EMU deepening (2018), <https://www.consilium.europa.eu/en/press/press-releases/2018/12/04/eurogroup-report-to-leaders-on-emu-deepening/pdf> accessed 6 February 2019.

[101] The European Commission (n 1), Article 5(1) of the Annex.

[102] The ESM Treaty (n 69), Articles 4, 5.

[103] The ESM Treaty (n 69) article 4(3).

[104] The European Commission (n 1), Articles 4(4), 5(7) of the Annex.

[105] Ibid, 2 – 3.

in historically significant measures, such as measures establishing European Monetary Cooperation Fund, the European Currency Unit and the balance of payment mechanisms.

In conclusion, this chapter has examined the financial assistance regime, the ESM and the EMF. The understanding about the evolution of the regime is important for the knowledge of the proposed institution. The chapter shed light to the reasons behind the financial assistance instruments and examined the different institutions. The chapter viewed the current mechanism and its background. In addition, the chapter compared the ESM and the proposed EMF between each other. In conclusion, the most important changes are changes in the legal status and decision-making process. The establishment would change the legal status of the intergovernmental mechanism to Union agency. Also, the establishment would change the decision-making process from the unanimity voting into the reinforced qualified majority voting of 85 percent of the votes.

3 THE QUESTION OF COMPETENCE

3.1 The EU Constitution

The Union constitution determines whether the flexibility clause can serve as legal basis for the establishment of the EMF. This chapter focuses on the constitutional features of the Union that influence on the application of the flexibility clause in the establishment of the EMF. Firstly, the Union constitution is examined. The examination of the nature of the Union constitution works as context for the research question. After the examination of the Union constitution generally, the important features of the Union constitution for the research question are examined. The examination starts with the principle of conferral, which stipulates that the Union can only act within the limits of the powers attributed to it by Member States. The principle of conferral sets the base for the Union actions and effects on other constitutional features of the Union. The flexibility clause is, also, based on the principle of conferral. The detailed examination of the flexibility clause clarifies the application of the clause in specific cases, such as the establishment of the EMF. The examination includes the article 352 and its predecessors. Also, other constitutional features that has impact on the application of the flexibility clause in the establishment of the EMF are studied. The division of the competence in different categories impacts on the application of the flexibility clause in the context of the establishment of the EMF. Additionally, the principle of subsidiarity, which stipulates that Union can only act if the desired objectives cannot be sufficiently achieved by the Member

States, but can rather be better achieved at Union level, is examined as it has impact on the application of the flexibility clause in the establishment of the EMF.

The question, whether the flexibility clause can be used to establish the EMF, is a constitutional question. It is important to examine what the EU constitution means and how it deviates from the nation-state constitution. This examination helps to determine the boundaries of the competence in the specific application of the constitution, the establishment of the EMF through using the flexibility clause. Notably, the notion of the constitution in nation state context is not fully equivalent with the notion of the constitution in the Union context. The differences between these two viewpoints reveal the identity of the Union constitution. There is not universally accepted and valid definition of the constitution. There are, however, certain elements that can be identified.[106] The word constitution usually prescribes the extent and manner of the exercise of sovereign powers, it organizes the government and lists the rights of the citizens and how these rights are protected. A constitution is often described as a fundamental law.[107] A nation-state constitution is often understood as written guidelines for self-governance by people to government agents.[108] These interpretations of the notion of competence do not fully respond to the identity of the EU constitution.

However, the notion of the constitution is customary in the EU context as well.[109] The EU constitution has special characteristics. These can be divided into three main features. Firstly, the EU constitution is evolutionary. Compared with the nation-state constitution, which is usually a stationary single normative entity, the EU constitution is more dynamic unity consisting of more than one source. The term *constitutionalisation* describes the process-like nature of the EU constitution.[110] Nation-state constitutions are often changed under a strict legislative procedure. In the Union, the constitution can be changed in several ways. One way

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[106] The EU constitution is sometimes compared with the nation-state constitution and their formation under impression that using a word constitution refers to federal state. However, the political question of the federal evolution is not discussed here.

[107] Jean-Claude Piris, 'Does the European Union Have a Constitution? Does It Need One?' (2000) 3.

[108] James A Gardner, 'What Is a State Constitution' (1993) 24 Rutgers Law Journal, 1024.

[109] The Court has used it in several judgements. See, e.g. judgement of 23 April 1986, *Les Verts*, C- 403/03, EU:C:1986:166, paragraph 23; Opinion of the Court of 26 April 1977, *Opinion 1/76*, EU:C:1977:63, para 12; Judgement of the Court of 23 March 1993, *Beate Weber v European Parliament*, C-314/91, EU:C:1993:109, para 8.

[110] Tuori and Tuori (n 45), 3.

is to change the Treaties and this process is under a strict legislative procedure. The *constitutionalisation* is, however, often driven by the Court. The Court has often led the integration further and many of the principles that have been crucial to the integration have been found in the case law.[111] However, the process-like nature does not mean that the process always leads integration forward.[112]

Secondly, the EU constitution is not based on single written constitutional act. Nation-state constitutions are usually legislative entities. The EU constitution can be described more like a functional constitution. It is said that the existence of a constitution does not depend on the adaption but on the functionality of the constitution. Therefore, the lack of a single written entity does not mean that the constitution would not exist. It is, however, required for the existence of a constitution that the constitution is respected.[113]

Thirdly, the EU constitution is brought through constitutional speech acts, which include more than the legislative acts. In nation-state context, a constitution is often brought by a revolutionary constitutional event.[114] In the EU constitution, speech acts are issued by relevant constitutional actors[115], such as the Treaties and the Court acting as the constitutional court of the EU.[116] EU constitutional scholarship is trying to assess the weight of the interventions by those constitutional actors.[117] The EU Treaties have been considered as 'constitutional charter' by the Court.[118]

These three factors have impact on the research question. Because of the exceptional nature of the EU constitution, the determination of the boundaries of the competence, which is required to find out whether the flexibility clause can serve as legal basis for the establishment of the

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[111] These include basic principles of the Union, such as the direct effect found in the *Van Gend & Loos* ruling and the supremacy of the Union law found in the *Costa v Enel* ruling. See, e.g. *Van Gend & Loos* (n 54); judgement of 15 July 1964, *Costa v Enel*, C 6-64, EU:C:1964:66.

[112] Hunt and Shaw (n 19) 106

[113] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (2007) Oxford University Press, chapter 3.3.

[114] Tuori (n 38).

[115] ibid, 113.

[116] Tuori and Tuori also sees other actors as relevant constitutional actors. The actors are the Commission and the Council, the ECB, constitutional scholars and even national constitutional courts. Tuori and Tuori (n 45), 3, 6.

[117] Ibid, 6.

[118] This is found originally in *Les Verts* ruling. The Court has referred to the notion in its other cases as well. *Les Verts* (n 111) para 23. See also, *Opinion 1/76* (n 111) para 12; *Beate Weber* (n 111), para 8.

EMF, is not straightforward. As two main constitutional actors, the Treaties and the Court has a significant role when determining the boundaries of the competence. The Treaties set foundations for the evaluation of the competence. The Court's interpretations are legally binding and are inseparable part of the EU's constitution. These special features of the notion of Union constitution provide context for the evaluation of the specific constitutional innovations of the Union, such as the principle of conferral which is examined next.

3.2 The principle of conferral

The principle of conferral is a fundamental principle of the Union. The EU does not have any inherent powers and the functioning of it is based on the powers delegated from the sovereign Member States. The Union can only act within the limits of the powers attributed to it by Member States. The principle of conferral implies the nature of the Union. The principle is phrased in the Article 5(2) TEU. This provision governs the limits to EU competence. Under the Article 5(2) TEU:

> *Under the principle of conferral, the Union shall act only within the limits of the competence conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competence not conferred upon the Union in the Treaties remain with the Member States.*

The principle makes the Treaties the only source for the competence. Thus, all Union actions should be based on this principle. The Union measures must aim to attain an objective stated in the Treaties. The Treaties either expressly state certain powers to attain a certain objective or the powers are implied in the expressly stated objectives. The latter includes application of the flexibility clause. In either way, the objectives set by the Treaties limit the competence.[119] On the one hand, the principle of conferral limits the exercise of the competence, as the Union should only act on the limits of the competence attributions from the Member States. On the other hand, the principle limits the existence of the competence, as the competence that is not conferred to the Union upon the Treaties remain with the Member States.

[119] Carl Lebeck, 'Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties' (2008) 17 Journal of Transnational Law & Policy.

The principle of conferral is based on the idea that it is possible to determine the limited scope of the conferred powers. The limited scope is easier to determine when the powers are explicitly stated in the Treaty provisions. As for competence based completely on the objectives of the Union, the boundaries are less clear. The boundaries of the competence get even more indistinct if the objectives are unclear or wide.[120]

The establishment of Union measures, including the secondary law, requires that the Member States have conferred the necessary competence to the Union. This applies, also, to the measures taken through application of the flexibility clause.[121] Therefore, the principle of conferral influences on the establishment of the EMF through secondary law. The question, whether the proposed regulation is in accordance with the principle of conferral has deep interconnections with the research question. The answers to the questions should be the same. If the answer to the research question is positive, and the flexibility clause can serve as legal basis for the establishment of the EMF, the answer to the question, whether the measure is in accordance with the principle of conferral, should also be positive.

To sum up, the principle of conferral stipulates the outer boundaries of the Union competence. The determination of these boundaries is critical in order to trace whether the flexibility clause can serve as legal basis for the establishment of the EMF. Therefore, the principle of conferral is kept in mind and evaluated throughout the evaluation of the research question.

3.3 The Article 352 TFEU – the Flexibility clause

One of the constitutional oddities of the Union, among the other special characteristics, is the flexibility clause under article 352 TFEU. The Commission proposes applying the flexibility clause for the establishment of the EMF. The clause, the article 352 TFEU, has a special role in the Union legal system. This sub-chapter focuses on the evolvement of the flexibility clause.

The purpose of the flexibility clause is to provide subsidiary and residual powers for the Union. Under the flexibility clause, the EU can take measures that are necessary to attain one of the objectives of the Treaties even when the Treaties do not provide such powers. The requirement,

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[120] Jan H Jans, 'Stop the Integration Principle?' 33:1533 Frodham International Law Journal.

[121] The Court have ruled that the flexibility clause is not separate from the principle of conferral. *Opinion 2/94* (n 11).

that the Treaties have not provided expressly stated powers implies the subsidiary nature of the clause.[122] The clause provides the legal basis for unforeseen cases and unforeseen circumstances given to the residual nature of the clause.[123] The clause is often justified with the need for 'emergency clause' when the high-speed changes in the economic, in the politics or in the technology have left the Treaty provisions outdated or created caps in the expressly stated competence.[124]

The flexibility clause, in some form, has remained in part of the Union legal system since the early stages of the integration. The article 352 TFEU is a successor to Article 235 Treaty establishing European Economic Community and Article 308 Treaty establishing the European Community. The flexibility clause has remained similar, by the principle, but the form, wording and significance has varied over time. The flexibility clause played an important role especially in the 1970s and 1980s.[125] One of the most significant examples of the usage of the flexibility clause is the environmental policy. The Community used the Article 308 EC to establish a new policy area.[126] The growth of the environmental policy not only added Community's powers but also objectives.[127] However, the environmental policy, among others, was added to the official Treaty framework by Single European Act in 1987.

As the environmental policy was added into the Union legal framework by applying the flexibility clause, one could think that other policy areas could be added by applying the article

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[122] Franziska Tschofen, 'Article 235 of the Treaty Establishing the European Economic Community : Potential Conflicts Between the Dynamics of Lawmaking in the Community and National Constitutional Principles' (1991) 12 Michigan Journal of International Law, 485.

[123] According to van Ooik, the flexibility clause is the legal basis for unforeseen cases. Knstadinides claims that the purpose of the clause is to react unforeseen circumstances. van Ooik (n 14) 31; Theodore Konstadinides, 'Drawing the Line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty's Flexibility Clause' (2012) 31 Yearbook of European Law 227, 228.

[124] Laeken Declaration [2001] Bull EU 12-2001, 19 – 23, part II. See, also Tschofen (n 123) 503.

[125] According to Tschofen, the importance of the flexibility clause grew since 1972, when the Paris Summit stated that the flexibility clause should be used broadly. The Paris Summit is examined further in Chapter 4.2, page 49. Bergström and Almer has came into conclusion that the recourse to the flexibility clause was its highest during period between 1975 – 1985. Tschofen (n 123) 474, 485; Carl Frederik Bergström and Josefin Almer, 'The Residual Competence : Basic Statistics on Legislation with a Legal Basis in Article 308 EC' (2002).

[126] This is expressed for example in the Council Directive that concerned protection of ground water. The justification for the use of the flexibility clause is on the recitals of the directive. The directive argues that the sphere of environmental protection and improvement of the quality of the life require legislation on this field, even though this phrase cannot be found in the Treaties. Council Directive 80/68/EEC on the protection of ground water against pollution by certain dangerous substances [1979], OJ L 20.

[127] Robert Schütze, *From Dual to Cooperative Federalism: The Changing Scructure of European Law* (2009).

352 TFEU. Nevertheless, there are elements precluding such enlargement of the scope of the Union. One of the main reasons preventing the enlargement is the changed phrasing of article 352 TFEU. The phrasing precludes taking measures that are not within the framework of the policies of the Union. This precludes integrating new policy areas through applying the flexibility clause.[128] Also, the other conditions for the use of the flexibility clause, as described in the next sub-chapter, has become stricter since the environmental policy was added. Therefore, a new policy area cannot be added into the selection of Union competence through applying the flexibility clause.

The role of the flexibility clause has been under academic debates during the different stages of the integration. At the 1970's, there were two different scholarships that had different opinions on the position and the importance of the flexibility clause. The first school saw the flexibility clause only being able to fill gaps in those areas in which the Community had already been given specific powers. According to this school, there are no objectives outside expressly stated policy fields. The school claims that the legislators make intentional acts and, therefore, the legislator indicates the areas that are meant to be regulated by expressly stating these policy fields. The areas that are not expressly stated are not intended to be within the Union competence. The other school was in favor for wider application of the flexibility clause. They interpreted that the flexibility clause was established to fill any gap between the Treaty's aims and its powers. They saw the Community's competence as the sum of its objectives.[129] The Court has favored the latter.[130] However, despite the Court's rulings, the conceptual limits to the competence have been difficult to identify.[131]

The phrasing of the flexibility clause was not changed significantly until the Lisbon Treaty when the article 352 was established. The phrasing of article 352 has its basis in the European Convention and the Draft Treaty. The Laeken Declaration wondered, on the one hand, whether the flexibility clause leads to the *creeping expansion of the competence of the Union*. The Laeken Declaration was, on the other hand, worried on the European dynamic. The working

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[128] Robert Schütze, 'Organized Change towards an "Ever Closer Union": Article 308 EC and the Limits to the Community's Legislative Competence' (2003) 22 Yearbook of European Law, 114.

[129] Schütze (n 128) 136 – 138.

[130] Judgement of 12 July 1973, *Massey-Ferguson*, C-8/73, EU:C:1973:90.

[131] Schütze (n 128) 136 – 138.

group of the Draft Treaty came into a conclusion, that the flexibility clause should be retained. However, the working group stated that the flexibility clause should not give an impression that the Union could itself define its competence.[132] These considerations made their way in the current phrasing of the flexibility clause.

The possible scope for the use of the flexibility clause has widened in the Lisbon Treaty. Article 352 TFEU is widely worded, and it could serve as the basis for competence in almost all areas of EU Law[133], unlike the earlier versions of the clause, where the use was restricted only to the measures that were necessary to the internal market.[134] The reason for the enlargement in the scope of the clause is due to the changes of the Union. The amount of the Union objectives has increased compared with the former Community, so the scope of the flexibility clause has also enlarged.[135]

Although the scope of the clause has enlarged from the internal market issues to other areas as well, the actual recourse to the clause has decreased. The clause is today more difficult to use and the Council's recourse to the clause has been uncommon.[136] There are several reasons for this trend. The need to use the flexibility clause was earlier high due to the lack of explicitly stated competence in the Treaties. The Treaties has gone through reforms and those reforms have increased expressly stated legal bases in the Treaties. Therefore, the need for open provision is not that likely. In addition to the increased competence stated in the Treaties, the operational requirements and constraints have become stricter. The requirement of the consent of the European Parliament influences the application of the flexibility clause.[137] Previously, the clause required the Commission to only consult the European Parliament[138]. Also, the obligation to notify the national parliaments has led to the subsidiarity checks when the

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[132] The European Convention, Final Report of Working Group V, CONV 375/01/02, 14.

[133] Alan Dashwood, 'Article 308 EC as the Outer Limit of Expressly Conferred Community Competence' in Catherine Barnard and Okeoghene Odudu (eds), *The Outer Limits of European Union Law* (Hart, 2009).

[134] Under Article 308 EC and Article 235 EEC Treaty "If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community --."

[135] Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union Law: Cases and Materials* (2010) Cambridge University Press, 214.

[136] Konstadinides (n 124).

[137] Craig and De Búrca (n 12) 90.

[138] Article 308 EC Treaty.

flexibility clause is used. The strict legislative procedure is required due to the exceptional character of the clause.

The Court's case law and the national case law of the Member States have limited the application of the clause. The Council recourses to the flexibility clause less frequently due to the Court's self-restraint. The Court has given two main Opinions in the issue. First, more significant in the context of the research question, Opinion 2/94, prohibit using the flexibility clause in a way that would change the Union's legal framework fundamentally. The idea behind the opinion is that the flexibility clause cannot be used in a way that would avoid using the Treaty amendment procedure.[139] Second, Opinion 1/94, precludes using the flexibility clause to confer exclusive competence.[140] Less obvious reason, for the uncommon application of the flexibility clause is the statements of national parliaments and constitutional courts. The special procedures set by the national parliaments for measures that involve flexibility clause set powerful warning to the Union not to use the flexibility clause with feeble arguments.[141]

Due to these reasons, the use of the flexibility clause is quite rare. Article 352 has been used only about three or four times a year. Some commentators have claimed that the legal proposals involving article 352 TFEU are rather trivial.[142] Indeed, when taking closer look at the examples of the recent application, the list seems short and includes insignificant regulations and decisions.[143] Undoubtedly, the flexibility clause has become less powerful. The application in the establishment of the EMF would be exceptional and change of course.

In conclusion, the flexibility clause has developed throughout the integration process and its significance has varied. The Lisbon Treaty changed the phrasing of the clause, and after the

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[139] *Opinion 2/94* (n 11), para 30.

[140] Opinion of 15 November 1994, *Opinion 1/94*, EU:C:1994:384, paras 89 and 101.

[141] E.g. Germany and United Kingdom has these national procedures for the measures that involve flexibility clause.

[142] Theodore Konstadinides, 'The Competence of the European Union.' In: Robert Schütze and Takis Tridimas (eds.) *The Oxford Principles of European Union Law, Vol. 1: The European Union Legal Order* (2018) Oxford University Press, 211.

[143] See, e.g. Council Regulation (EU) No 216/2013 on the electronic publication of the Official Journal of the European Union [2013] OJ L 69; Council Decision (EU) 2017/2269 establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2018–2022 [2017], OJ L 326; Council Regulation (EU) 2015/496 amending Regulation (EEC, Euratom) No 354/83 as regards the deposit of the historical archives of the institutions at the European University Institute in Florence [2015] OJ L 79; Council Regulation (EU) No 390/2014 establishing the 'Europe for Citizens' programme for the period 2014-2020 [2014] OJ L 115.

new phrasing the actual recourse to the clause have been unusual. Therefore, the establishment of the EMF through application of the flexibility clause would be, to some extent, unexpected.

3.4 The categories of the competence

The Treaties divide the competence into three different categories, which are exclusive, shared and supportive competence. In addition to these three categories, there is also a special "co-ordination category". Different policy areas are divided into different categories based on the question whether the EU can take actions in that certain policy field. Therefore, the different categories determine the boundaries of the Union competence. The importance of the division of the competence in the research question is related to the need to determine the boundaries of the Union competence. The category under which the EMF falls needs to be determined in order to answer the research question.

If the Union has exclusive competence in the area, only the Union can legislate and adopt legally binding acts. The Member States has only competence to implement these acts. Exclusive competence covers e.g. monetary policy.[144] Within shared competence, the competence is shared between the EU and the Member States. The Member States can act only if the EU has not exercised its competence. [145] The category of shared competence covers e.g. the internal market. Within supportive competence, the Union can take supporting, coordinating, or supplementary actions. Supportive competence covers e.g. education.[146]

In addition to these three categories, EU sets up arrangements, under which the Member States must co-ordinate their policies.[147] This *sui generis* "category" includes areas of economic, social and employment policies. This category does not fit the division of three categories. The economic coordination is led by the EU institutions, mainly the Commission. However, the EU does not have competence to coordinate the economic policies of the Member States, but the Member States coordinate their economic policies within the Union.[148] The coordination can

[144] Article 3 TFEU.

[145] Article 4 TFEU.

[146] Article 6 TFEU.

[147] Article 5 TFEU.

[148] View of AG Kokott of 27 November 2012, Pringle, C-370/12, EU:C:2012:675, paragraph 93.

be described as deliberative intergovernmentalism.[149] In principle, the Union plays a merely coordinating role mainly through soft-law[150].[151] Also, the Court has interpreted that the Treaties limit, in the field of economic policy, the Union holds only competence to the coordinating measures.[152] However, the economic policy competence has also been understood having characteristics from all categories. For example, sanctions that concern issues in the field of economic policy, are, in a sense, within exclusive competence.[153] Therefore, economic policy can be understood being under a system of multiple competence.[154]

The determination of the category that the EMF falls within, is necessary in order to find out whether the Union holds competence to establish the EMF through applying the flexibility clause. The categories determine whether the EU can take the action. The question whether the EMF falls within the monetary or the economic policy needs to be evaluated.

This question culminates in the asymmetry between the monetary and the economic policy. The economic nature of the proposed EMF is similar with the ESM. Although the name of the proposed institution is *monetary* fund[155], there have been accusations that the fund would be economic in nature.[156] Even though both policies are part of the EMU, the competence in these policy areas differ from each other. In the field of economic policy, the Member States are supposed to coordinate their economic policies within the EU, but the EU itself does not have competence to coordinate these policies. The Member States still hold sovereignty over

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[149] Uwe Puetter, 'Europe's Deliberative Intergovernmentalism: The Role of the Council and European Council in EU Economic Governance' (2012) 19 Journal of European Public Policy, 165.

[150] Soft-law refers to Union measures that are not binding, such as guidelines, recommendations, declarations and opinions.

[151] Tuori and Tuori (n 45), 188.

[152] *Pringle* (n 17), para 64.

[153] The Stability and Growth Pact gave to the Economic and Financial Affairs Council configuration (Ecofin) of the Council of the EU a power to impose sanctions to the Member States that breach the Pact's budgetary targets.

[154] Roland Bieber, 'The Allocation of Economic Policy Competence' (2014) 9 in Azoulai L (ed), *The Question of Competence in the European Union* (2014) Oxford University Press.

[155] Notably, the name of the IMF also includes *monetary*. The EMF would have similarities with the IMF and the word monetary is, to some extent, reasonable in the EMF context. The IMF is designed to provide countries financial help when the country's central bank runs out with foreign currencies and when borrowing from the private sector is too expensive or difficult. In the euro area the single currency is a foreign currency in the sense of Member States' central banks cannot create euros and thus the Member State can run out of euros. Wyplosz (n 63) 10.

[156] European Central Bank, Opinion of the European Central Bank of 11 April 2018 on a proposal for a regulation on the establishment of the European Monetary Fund (CON/2018/20), 5.

economic policy. As for monetary policy, the EU has exclusive competence and the Member States can only take implementing actions.

The division between these two policy areas is not straightforward. Several commentators have seen this division impossible.[157] The policy areas are, indeed, deeply interconnected. In the economic literature the monetary policy, accompanied with the fiscal policy, is usually inseparable part of the economic policy.[158] According to some commentators, the economic policy and the monetary policy have an inherent factual link between each other and therefore the division is always artificial.[159] However, in the Union these policy areas are separated and the division has practical significance when determining the boundaries of the competence. The Union measures always fall under one of the categories, and, in principle, it is not possible that a measure would fall under multiple categories. Therefore, the establishment of the EMF cannot fall into both monetary and economic policy.

The Treaties neither defines the monetary policy nor the economic policy.[160] Definition of monetary and economic policies can be found in the case law of the Court. The Court has tested the division between monetary and economic policy in two cases. Firstly, the Court tested the division in the context of the ESM in the *Pringle* ruling.[161] Secondly, the Court tested it in the context of the ECB's Outright Monetary Transactions (OMT) programme in the *Gauweiler* case.[162] The questions were opposite in these cases. In the *Pringle*, the Court tested whether a measure was under monetary policy and came into a conclusion that it was under economic policy. In the *Gauweiler*, the Court tested whether a measure was under economic policy and came into a conclusion that it was under monetary policy.

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[157] Waibel (n 94). 15; Opinion of Advocate General Cruz Villalón on 14 January 2015, *Gauweiler,* C-62/14, EU:C:2015:7, para 129; Alicia Hinarejos, 'Gauweiler and the Outright Monetary Transactions Programme : The Mandate of the European Central Bank and the Changing Nature of Economic and Monetary Union' (2015) 11 European Constitutional Law Review. 575; Paul Craig and Menelaos Markakis, 'Gauweiler and the Legality of Outright Monetary Transactions' (2016) 1 European Law Review. 17.

[158] Waibel (n 94) 14.

[159] Craig and Markakis (n 158) 26.

[160] Even though the exact definition of the monetary policy is not included in the Treaties, the Treaties define the implicitly the area of monetary policy. The chapter 2 of Title VIII of the TFEU is titled 'Monetary Policy'. Therefore, the definition can be found in the chapter. Advocate General Kokott has drawn the conclusion in her view on the *Pringle* ruling. Kokott (n 136) para 78.

[161] *Pringle* (n 17).

[162] Judgement of 16 June 2015, *Gauweiler*, C-62/14, EU:C:2015:400.

In the *Pringle* ruling, the Court defined the distinction of the policies principally by the indication of objectives. Also, the Court ruled that the instruments should be given relevance in the evaluation.[163] The Court tested whether the establishment of the ESM was within Union's exclusive competence, and, therefore could not have been established by Member States. The phrasing of the question was, therefore, contrary to the EMF, as the open question in the EMF is whether the Union holds competence to establish EMF. The Court evaluated whether the objectives of the ESM fall within monetary policy. The Court ruled that the ESM was under economic policy. The Court argued as follows: as the objective of the monetary policy is to maintain price stability[164], and the ESM's objective is to safeguard the stability of the euro area, the objectives are clearly distinct. Therefore, the possible indirect effects of the stability of the euro area to the monetary stability do not mean that the economic policy measure could be treated as a monetary policy measure.[165]

As for the *Gauweiler* ruling, the Court reinforced that the categorization between the monetary and the economic policy is made principally through examination of the objectives, and, subsidiarily, of the instruments.[166] The Court evaluated whether the ECB's OMT programme was under monetary policy. The referring court, the German Constitutional Court, asked, inter alia, whether the mandate of the ECB is exceeded. The referring court argued that the breach could be based on the features of the programme that reflected conditionality, selectivity, parallelism and circumvention. According to the referring court, the ECB's mandate was exceeded because the purchases were linked to the financial assistance programmes, the purchases concerned selected Member States only, the purchases were parallel with the financial assistance programmes and the purchases circumvented the conditions and limitations of those financial assistance programmes. The starting point of the referring court was different in comparison with the Court's starting point. As the referring court argued based on the interest spreads, the Court evaluated the objectives. The Court viewed the objectives of the OMT programme and came into a conclusion that the programme was under monetary policy, and,

[163] *Pringle* (n 17), paras 53 – 57.

[164] Article 127(1) TFEU and article 119(2) TFEU.

[165] *Pringle* (n 17), para 56.

[166] *Gauweiler* (n 173), paras 42 – 44.

therefore, did not exceed the ECB's monetary policy mandate.[167] Also, the Court repeated the idea established in the Pringle ruling that a measure cannot be treated as equivalent to measures of another policy area merely because it may have implications for that area.[168]

The Proposal does not explicitly state on which category the measure would fall. However, the Proposal evaluates the conditions of the subsidiarity principle. The subsidiarity principle, as examined in next sub-chapter, only applies within non-exclusive competence. Therefore, the Commission, has understood the EMF being under policy area that is categorized as non-exclusive. Accordingly, as the monetary policy is under exclusive policy, the Commission has seen that the EMF is not under that policy area.

The Court's test for the category through examining the objectives leads to the same conclusion. In the *Pringle* case, the Court ruled that the creation of a stability mechanism is under economic policy.[169] Even though the case considered ESM, the interpretation most likely consider the EMF, also, due to the equivalent objectives. According to the Proposal, the objective of the EMF is to contribute to safeguarding the financial stability of the euro area or participating Member States.[170] In the *Pringle*, the Court ruled that the ESM's objective was under economic policy. The objectives of the EMF and the ESM are mostly the same. However, the phrasing of the EMF's objective differs from the ESM Treaty, which refers to "financial stability of the euro area as a whole and of its Member States". The phrase "as a whole" is deleted and "and" has been replaced with "or". Even though this is a very important shift, it does not have an effect on the interpretation on the category of the competence. This is because of the widening of the scope of application does not change the nature of the financial assistance or the scope of the objective. In this issue, the establishment of the EMF is compatible with *Pringle* ruling and the objective can be classified as economic rather than monetary.

The Court also mentions the instruments as a test for distinction between the monetary and economic policy. The evaluation of the instruments, also, leads to the conclusion that the EMF falls within the economic policy. The ESM has instruments that are classified economic. The

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[167] The Court ruled that the objectives to secure the appropriate monetary policy transmission and the singleness of monetary policy implied the programme being under monetary policy. Ibid, para 47.

[168] Ibid, 52.

[169] *Pringle* (n 17), para 60.

[170] The European Commission (n 1), Article 3(2) of the Annex.

packages usually require from the receiving Member States certain, dictated economic measures, often including cuts from social policy funding. If the Union establishes the EMF within the Union legal framework, these fiscal requirements that the financial assistance package is accompanied with, originates from the Union institution.

The proposed measure seems to fall under economic policy. This may be problematic, as the competence in the area of economic policy are limited to the coordinative measures. The flexibility clause cannot be used to take measures that the Union does not hold competence to take. However, the flexibility clause has played a role in the development of the EMU despite the limited economic policy competence. The clause was used when the European Monetary Cooperation fund was established in 1973[171], when the Community loans were established[172] and to the development of these instruments[173]. The flexibility clause has been, more recently, applied in the Union borrowing scheme in 2002.[174] The Commission, also, proposed that the flexibility clause could be used to establish a financial assistance scheme for non-euro Member States, but the legislation was never adopted.[175]

Evidently, the Council cannot take a measure that deviates from the Treaties and competence framework. Accordingly, the change of Union competence in the field of economic policy requires a Treaty change through the Treaty amendment procedure. The flexibility clause cannot be used, as described above in the sub-chapter 3.3, to add economic policy into a different category of competence.

3.5 Principle of subsidiarity

The principle of subsidiarity is a significant Union principle safeguarding the Member States' sovereignty. The principle acts as a gatekeeper of EU actions expanding further. It governs the

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[171] Regulation of the Council (EEC) No 907/73 establishing a European Monetary Cooperation Fund [1973] OJ L 89.

[172] Regulation of the Council (EEC) No 397/75 concerning Community loans [1975] OJ L 46.

[173] Council Regulation (EEC) No 3181/78 relating to the European monetary system [1978] OJ L 379; Council Regulation (EEC) No 682/81 adjusting the Community loan mechanism designed to support the balance of payments of Member States [1981] OJ L 73; Council Regulation (EEC) No 1969/88 establishing a single facility providing medium-term financial assistance for Member States' balances of payments [1988] OJ L 178.

[174] Council Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments [2002] OJ L 53.

[175] 'The role of the 'Flexibility Clause': Article 352' (2017) <https://ec.europa.eu/commission/sites/beta-political/files/role-flexibility-clause_en.pdf> accessed 21 February 2019.

use of competence and the flexibility clause. Due to the role of the principle in the determination of the boundaries of the Union competence, the principle has effect on the establishment of the EMF.

The principle of subsidiarity governs the use of competence, if the EU takes actions that do not fall in the area of exclusive competence. Under Article 5(3) TEU the Union can

> *act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.*

The legal basis comes, also, from the Protocol (No 2) on the application of the principles of subsidiarity and proportionality. The idea behind the principle is that matters should be addressed the level closest to those effected.[176] The principle works as limitation to the Union actions. The need for the principle is based on the idea that in the areas that competence is not exclusive, there should be specific reason to take an action in the Union level. Existence of the flexibility clause also emphasizes the need for a principle that restricts the competence in procedural norms rather than substantive norms.[177]

The principle of subsidiarity is a relatively new principle in the Union legal framework. It was first established in the Treaty of Maastricht in 1992. The Single Act had already referred to the idea behind the principle in the context of environmental law. The Treaty of Amsterdam amended the protocol on subsidiarity into Treaties. The Lisbon Treaty developed the principle further. The Treaty change added the regional and local dimension of the principle in the Treaty framework and created a new role to the national parliaments to ensure compliance with the principle. The national parliaments are the monitors of the principle under *subsidiarity principle mechanism*.[178] Under the mechanism, the Commission is bound to send legal proposals to national parliaments and the national parliaments then check the compliance of the measure

[176] Craig and De Búrca (n 12), 95.

[177] Lebeck (n 120).

[178] Also called as early warning system and subsidiarity protocol.

with the principle.[179] However, the mechanism is non-binding as the Union is not required to respect the findings of national parliaments.[180]

The principle of subsidiarity can be considered as a test for Union actions. According to the Commission, the test is twofold: a test consists of a test of comparative efficiency and a proportionality test.[181] The first test is that the area concerned is not within the exclusive competence and the proposed action cannot be sufficiently achieved by Member States. Therefore, the EU intervention is necessary. The second test is that the action can be implemented more successfully by the EU, and, for that reason the EU intervention adds value. Accordingly, the principle of subsidiarity relates to the principle of proportionality and the flexibility clause, which requires that the measure, which is established through application of the clause, is necessary.

The interconnections between the principle of subsidiarity and the flexibility clause is not limited to the necessity test. The flexibility clause requires subsidiarity monitoring and under the second paragraph of Article 352 TFEU:

> *Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.*

The principle only applies to the areas that do not fall within the exclusive competence. The establishment of the EMF is not within exclusive competence, as described above in the sub-chapter 3.4. Therefore, the principle of subsidiarity applies to the proposed establishment and the compliance with the principle needs to be examined in detail.

The Commission does not see any conflict in the establishment of the EMF and the principle of subsidiarity. According to the Commission the objectives of the regulation establishing the EMF *cannot be sufficiently achieved by the Member States individually*.[182] Accordingly, the

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[179] Protocol (No 2) on the application of the principles of subsidiarity and proportionality, Article 4.

[180] Article 5(3) and Article 12(b) of the TEU, Protocol (No 2) on the application of the principles of subsidiarity and proportionality.

[181] The European Commission Communication to the Council and the European Parliament [1992] Bull EC 10-1992, 116.

[182] The European Commission (n 1), 12.

Commission interprets the EU intervention in the financial assistance scheme necessary. The Commission claims that the objectives of the EMF can, by reason of the scale of action, be better achieved at Union level.[183] Accordingly, the Commission construes that the EU intervention adds value on the matter.

The Commission has not taken a stand on the question whether the Member States could achieve the objectives of the proposed Regulation collectively. The Commission has referred only to Member States individually and national authorities. According to the Commission, the Member States have difficulties in mitigating how much their own systemic risks can risk the financial stability of the whole Union. The Commission refers, also, to the fact that the Member States and their national authorities have weaker abilities to solve risks based on the cross-border nature of the financial market. The Commission argues this with the limited scope of national jurisdictions.

The Commission has based its argumentation in the issue of narrow interpretation of the phrase *national, regional, or local level*. The Commission has not taken the partly-EU-level actions into account. It is not evident, whether the application of the principle of subsidiarity includes also these partly-EU-level groups, such as euro area Member States. The estimation could cover the actions already taken by a group of Member States such as the ESM. Nevertheless, the general meaning of the words national, regional and local does not include groups consisting of several Member States.

Even if the principle of subsidiarity does not include the partly-EU-level, the Commission should, also, compare possible Union action with the current situation. The Commission's arguments seem, in a way, unsuitable, as more a suitable point of comparison can be found. The comparison, when the factors are the possible EMF and national instruments, leads to the different conclusion than the comparison when the factors are the possible EMF and the ESM. Arguably, the former leads to the same conclusion as the Commission had. As for the latter, the Commission did not evaluate the subsidiarity test, including whether the Union action is necessary and whether it adds value. The comparative efficiency test, whether the Union intervention is necessary, has strong interconnections with the requirements of the application of the flexibility clause. Therefore, the necessity to establish EMF is further evaluated in

[183] Ibid.

Chapter 4.4. If the proportionality test includes the partly-EU-level, the value that the EMF adds, should be evaluated.

To sum up, this chapter examined the EU's constitutional features that effect on the establishment of the EMF through applying the flexibility clause. The constitutional evaluation of the research question primarily concerns the Union's competence in the flexibility clause. The most important features of the competence in the context of the research question, alongside the flexibility clause, are the principle of conferral and division into different competence categories. The principle of conferral has significance as it is the basic principle behind Union competence. Not even the flexibility clause is separate from this principle. The categories of the competence determine whether the Union can act in a certain policy field. Therefore, it has relevance in the determination whether the Union can establish the EMF. The establishment of the EMF falls under economic policy, which limits the competence in coordinative measures. It is not straightforward whether the EMF would be coordinative measure as it has binding effect on the Member Sates' fiscal policies, especially to the Member States which receive financial assistance. Also, the principle of subsidiarity must be taken into consideration although the role of the principle in the context of the research question is not straightforward. The principle of subsidiarity, however, most likely does not pose such obstacle to the establishment of the Emf that is impossible to overcome.

4 THE CONDITIONS SET BY THE FLEXIBILITY CLAUSE APPLIED TO THE EUROPEAN MONETARY FUND

4.1 The Flexibility clause as a test

Despite the emphasized role of context related interpretations in the Union, the exact wording of the flexibility clause is also important for the interpretation. This chapter focuses on the linguistic interpretation of the flexibility clause. The linguistic interpretation provides important input for the evaluation whether the EMF can be established in the proposed form. In this chapter the conditions, which can be found through the linguistic interpretation of the flexibility clause, are examined one by one alongside with the Commission's arguments. Especially, the first three paragraphs of the article 352 TFEU contain the relevant part regarding to the research question. Fourth paragraph of the article 352 TFEU, which is not examined further due to the scope of the thesis, excludes the use of the clause as a basis for common foreign and security policy.

The first paragraph of Article 352 sets out the conditions for the use of the clause and the procedure followed. Under the paragraph:

> *If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*

Before evaluating this paragraph in greater detail, the rest of the article 352 TFEU needs to be examined.

The second paragraph requires monitoring of the subsidiarity principle. Under the second paragraph of Article 352 TFEU:

> *Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.*

The paragraph states that legislative proposals that use the flexibility clause are under the subsidiarity control mechanism, under which the national parliaments are allowed monitoring the proposals compliance with the subsidiarity principle. The mechanism in the context of the establishment of the EMF is evaluated in Chapter 3.5.

Under the third paragraph:

> *Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.*

This paragraph stipulates that flexibility clause cannot be applied to harmonize areas that are excluded from the harmonization. The Treaties have expressly stated certain areas where

harmonization is precluded.[184] Also, under article 2(5) TFEU the harmonization is excluded in the third category of competence, under which the EU may only support, coordinate, or supplement the actions of the Member States.[185] Economic policy and financial assistance mechanism is not included in these provisions. Therefore, the Treaties have not excluded the harmonization in the financial assistance scheme.

The conditions set by the first paragraph, which are evaluated in this chapter in greater detail, are the most important feature of the flexibility clause in the context of the establishment of the EMF. The conditions are as follows: Firstly, the measure must be within the framework of the policies of the Union. Secondly, the Treaties have not provided the necessary powers to take the measure. Thirdly, the measure must be necessary to attain one of the objectives of the Union. The Union objectives can only be set by the Treaties. The last condition can be divided into two subsections, which are as follows: The objective must be set out in the Treaties and the measure must be necessary to attain it. By using the conditions as a test, it can be examined whether the flexibility clause can serve as legal basis for a certain measure. These conditions are evaluated in the next subchapters together with the evaluation whether the EMF meets these conditions. The proposed measure must meet all these conditions. Next, the conditions are examined each separately.

4.2 Condition 1: The Treaties have not provided the necessary powers

Under the first condition of the flexibility clause, the application of the clause is only possible when the Treaties have not provided the necessary powers. This condition has evolved through the case law. This sub-chapter examines this case law as a context for the first condition. The case law is examined alongside the proposed establishment of the EMF. The question whether the establishment of the EMF fulfils this condition, is evaluated.

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[184] The Treaty provisions that preclude harmonization are as follows: Article 19(2) TFEU, which concerns the incentive measures anti-discrimination policies; Article 79(4) TFEU, which concerns integration of immigrants; Article 84 TFEU, which concerns crime prevention; Article 153(2) TFEU, which concerns social policy cooperation; Articles 165(4) and 166(4) TFEU, which concerns education and vocational training; Article 167(5) TFEU, which concern culture; Article 168(5) TFEU, which concern health; Article 173(2) TFEU, which concerns industry; Article 189(2) TFEU, which concerns space policy; Article 195(2) TFEU, which concerns tourism; Article 196(2) TFEU, which concerns civil protection; Article 197(2) TFEU, which concerns administrative cooperation; Article 207(6) TFEU, which concerns common commercial policy.

[185] Article 2(5) TFEU.

The first condition has evolved in the case law. In the early case law, the Court interpreted the condition broadly.[186] In the *Massey-Ferguson* ruling the Court ruled that despite the legal bases that were available in the Treaty, the application of the flexibility clause was justifiable in the name of legal certainty.[187] Therefore, the application of the flexibility clause did not require lack of other possible legal bases. The broad reading reflected the wider political atmosphere at the time.[188] This was expressed in the 1972 Paris European Council, which stated that it was desirable to make the widest possible use of all provisions in the Treaties, including the flexibility clause.[189] Later on, the political spirit changed and, also, the Court came into a conclusion that the flexibility clause can only be applied if the Treaties does not provide the necessary powers.[190]

The first condition is quite clear in the EMF context – the Treaties do not confer a legal basis for the establishment of a stability mechanism such as the proposed EMF. The Treaties do refer to the financial assistance in the article 136 TEU. However, the article does not empower the Union financial assistance but financial assistance mechanism of Member States.[191] This has been confirmed by the Court's case law.[192] The Court ruled in the *Pringle* case that *the provisions of the Treaties do not confer on the Union a specific competence to establish a permanent stability mechanism*. Therefore, the first condition is met. The Commission, as it states in the Proposal, agrees with the Court.[193]

It is not apparent whether the Court's ruling means that the Union does not have power to establish financial assistance mechanism at all. On the one hand, the ruling can be read that the

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[186] Konstadinides (n 124) 231.

[187] *Massey-Ferguson* (n 178), para 4.

[188] For example, Konstadinides and Schütze have come into a conclusion that political ambition was in favor of wide interpretation of the flexibility clause. Konstadinides (n 124); Schütze (n 128) 232, 138.

[189] Statement from the Paris Summit, Bull EC 10-1972, 23.

[190] Judgement of 26 March 1987, *Tariff Preference*, C 45/86, EU:C:1987:163, para 13. See, also judgement of 11 June 1991, *Titanium Dioxide*, C-300/89, EU:C:1991:244, para 2; judgment of 17 March 1993, *Waste Disposal Directive*, C-155/91, EU:C:1993:98, para 1.

[191] The European Council has stated this in the preamble of the Decision which amended article 136 TEU. Also, academics have come into the same conclusion. European Council Decision (n 75), preamble. See also, Tuori and Tuori (n 45), 148.

[192] *Pringle* (n 17), para 168. The Court refers to Articles 2(3), 5(1), 122(2), and 143(2) TFEU.

[193] The European Commission (n 1), 11.

Court rejected the Union's capability to establish a financial assistance instrument completely. This would mean that the application of the flexibility clause to establish the EMF is not possible. On the other hand, the ruling can be read that the Court reserved the possibility to integrate the financial assistance mechanism into Union framework in the future. There has been academic discussion on the question on the issue. According to some commentators, the Court rejected the Union competence to establish a permanent stability mechanism.[194] Then again, according to others, the Pringle ruling keeps the possibility to integrate the ESM into the Union open.[195] The Commission has come into a conclusion that the ruling didn't take a stand whether the financial assistance mechanism could be established only within the Union framework or only outside the framework.[196] Due to the lack of an authoritative statement on the issue, the question remains controversial.

To sum up, the answer to the first condition is apparent and there are no necessary powers to establish EMF provided in the Treaties. The *Pringle* ruling confirms this. However, it is controversial whether the Court completely rejected the establishment of permanent stability mechanism. If the Court rejected the Union competence to establish permanent stability mechanism, the flexibility clause could not be applied for the establishment.

4.3 Condition 2: The measure is within the framework of the policies of the Union

4.3.1 The second condition in the case law and the framework of policies

Under the second condition of the flexibility clause, the measure must be within the framework of the Union policies. In order to trace whether the establishment of the EMF fulfils the second condition the following steps needs to be taken. Firstly, the interconnected case law and the confirmation of the case law in the Declaration no 42 of the Treaties are examined. These sources provide the context for the second condition. Secondly, the boundaries of the Union framework of the economic policy are examined. These boundaries imply the boundaries of the wider framework of the policies of the Union. This wider framework consists of specific policies, which are, in accordance of principle of conferral, explicitly stated in the Treaties. The boundaries of the specific policies define the outer boundaries of the wider framework. The

[194] Tuori and Tuori (n 45), 255.

[195] Lo Schaviavo (n 71) 212.

[196] European Commission (n 173).

establishment of the EMF falls within economic policy, as examined in Chapter 3.4. Therefore, in order to trace whether the second condition is met, the boundaries of the economic policy needs to be examined. Thirdly and finally, the evaluation whether the condition is met, can be made.

There has been academic discussion concerning the meaning of the second condition. Some of the commentators have argued that the condition, which was not included in the predecessor forms of the flexibility clause, means that new policy areas can no longer be added by the flexibility clause.[197] Some commentators have, however, seen the second condition simply implying the widened scope of the Union to other areas than the internal market.[198]

The second condition is interconnected with the Court's case law and Declaration No 42 of the Treaties, which repeat the case law. These sources exclude the application of the flexibility clause in cases where the application would lead widening the general framework of the Treaties. These limitations are due to the need to secure that the Treaty amendment procedure is followed. The Treaty amendment procedure is strict and, usually, more difficult than establishing secondary legislation. Treaty revision requires ratification by all Member States, whereas establishing a secondary legislation does not. The Court and the Member States have seen the preservation of the Treaty amendment procedure important, as implied in the case law and in the Treaty's Declaration. The flexibility clause, therefore, cannot be used to circumvent the Treaty amendment procedure.

The Court has restricted the application of the flexibility clause in the predecessor form of the clause. In the Opinion 2/94, the Court evaluated whether the flexibility clause could serve as legal basis for accession to an international treaty, the Convention for the Protection of Human Rights and Fundamental Freedoms. The Court ruled that the flexibility clause:

> *--being integral part of an institutional system based on the principle of conferred powers, cannot serve as basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities*

[197] Schütze (n 129) 114.

[198] Viljam Engstrom, 'How to Tame the Elusive; Lessons from the Revision of the EU Flexibility Clause' (2010) 7 International Organizations Law Review. 360.

> *of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.*[199]

The Court ruled that the flexibility clause is part of the institutional system of the Community. According to the Court, the institutional system is based on the principle of conferral. Accordingly, the principle of conferral has effect on to the application of the flexibility clause and the flexibility clause is not separate from the system. The Court states that the general framework of the Community is created by the provisions of the Treaty. When determining the boundaries of the framework, the provisions concerning tasks and activities of the Community are the most important. The Court ruled that the flexibility clause cannot be used to widen the scope of Community powers beyond this general framework. According to the Court, the flexibility clause cannot be used to adopt measures that would amend the Treaties without the Treaty amendment procedure. The Court argues that using the flexibility clause to widen the scope of competence would lead to the circumvention of the ordinary Treaty amendment procedure.[200]

In the Opinion 2/94, the Court come into a conclusion that due to the fundamental institutional implications, caused by the accession to the Convention for the Protection of Human Rights and Fundamental Freedoms, for Member States and for the Community would be of constitutional significance. Therefore, the accession would have gone beyond the scope of the flexibility clause and the accession required Treaty amendment.[201] The Court applied fundamental institutional implications that have constitutional significance as factors in the evaluation of the question whether the measure is widening the framework. The Court applied these factors not only for the Union but, also, for the Member States. The Court's ruling has gained some criticism. According to critics, the Court's argumentation was a vicious circle: the application of the flexibility clause is unconstitutional when it goes beyond the constitution.[202]

Declaration No 42 to the Treaties stipulates that the case law applies also to the current flexibility clause. The declaration repeats the doctrine settled in the Opinion 2/94 and states the

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[199] *Opinion 2/94* (n 11), para 30.

[200] Ibid.

[201] *Opinion 2/94* (n 11), para 35.

[202] Schütze (n 129) 94.

same requirements, as the Opinion 2/94, for the application of the flexibility clause. Under the declaration, the flexibility clause cannot serve as a basis for widening the scope of Union powers beyond the Union general framework. This is because the Union is based on the principle of conferral. As regards the determination of the framework, the declaration emphasizes the role of the provisions in the Treaties that define the tasks and the activities of the Union. Also, the declaration prohibits taking measures whose effect would, in substance, amend the Treaties without the Treaty amendment procedure.[203]

The Opinion 2/94 and Declaration No 42 present the factors that need to be taken into consideration when evaluating whether the second condition is met in the proposed establishment of the EMF. The establishment of the EMF by applying the flexibility clause cannot widen the scope of Union powers beyond the general framework. The regulation establishing the EMF cannot amend the Treaties. If the establishment of the EMF has institutional implications of constitutional significance, it is likely that the general framework is widened. Before further evaluation of these factors in the context of the proposed establishment of the EMF, the framework of the economic policies of the Union is examined.

4.3.2 Framework of the economic policy of the Union

To find out what goes beyond the general framework of the Union, the borders of the economic framework needs to be determined. As determined in the case law, the framework of the economic policy of the Union is based on the Treaties.[204] The economic policy is, as mentioned above in Chapter 3.4, under the additional category of competence, under which the Member States must coordinate their economic policies within the Union. This coordination of the economic policies forms the framework of the economic policy of the Union. The framework of the economic policy of the Union is not fully equivalent with the framework of the economic policy of the EMU. The euro area has accompanied the Union framework with more rules.

As the Court determined in the Opinion 2/94, the provisions that define the tasks and the activities of the Union, are in a significant role when determining the boundaries of the general

[203] 42. Declaration on Article 352 of the TFEU.

[204] Relevant Treaty provisions are: Articles 3, 119 – 144, 136, 219 and 282 – 284 TFEU; Protocol (No 12) on the excessive deficit procedure; Protocol (No 13) on the convergence criteria annexed to the TFEU.

framework. At the time of Court's opinion, the opening provisions of the EC Treaty referred to these concepts. The current provisions of the Treaties, however, do not make general reference to tasks and activities of the Union. [205] The provisions that refer to tasks or activities do so in context of specific institutions. Some commentators have connected tasks and activities to objectives.[206] This reading can be drawn from the Court's *Massey-Ferguson* ruling.[207] The Union institutions do not have similar tasks or activities than the proposed EMF would have. The provisions defining the tasks and activities of the Union can be accompanied with the provisions defining the aims and functions of the Union.[208] The aims of the Union in the field of economic policy can be found in the general provision article 3 TEU. The aims are further evaluated in Chapter 4.4. As for provisions defining the functions of the Union, the Treaties only refer to the functions of the institutions. The institutions of the Union do not have similar functions than the proposed EMF would have.

The secondary law provides more input in the determination of the boundaries of the economic policy of the Union. The Stability and Growth Pact provides the framework for the coordination of fiscal policies of the Member States. The Pact consists of rules that ensure the sound public policies and coordination of the fiscal policies. The Pact includes the preventive arm and the corrective arm, which is also referred to as the excessive deficit procedure.[209] This framework

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[205] For example, the specific tasks of the ESCB are determined in articles 127(2), (3) and (5) and in the Statute of ECB and ESCB, which is annexed in the Treaties.

[206] Schütze (n 129) 85.

[207] *Massey-Ferguson* (n 178).

[208] European Commission (n 176).

[209] The Stability and Growth Pact is based on articles 121 and 126 TFEU. The Pact consists of Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [1997], OJ L 209; Council Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [1997], OJ L 209; Council Regulation (EC) No 479/2009 on the application of the Protocol on the excessive deficit procedure annexed to the Treaty establishing the European Community (Codified version) [2009], OJ L 145; Regulation of the European Parliament and of the Council (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area [2011], OJ L 306; Regulation of the European Parliament and of the Council (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011], OJ L 306; Regulation of the European Parliament and of the Council (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances [2011], OJ L 306; Council Directive 2011/85/EU on requirements for budgetary frameworks of the Member States [2011], OJ L 306; Regulation of the European Parliament and of the Council (EU) No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013], OJ L 140; Regulation of the European Parliament and of the Council (EU) No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013], OJ L 140.

is accompanied in the EMU with intergovernmental Fiscal Compact. The Fiscal Compact is agreed on the Treaty on Stability, Coordination and Governance.[210] The Fiscal Compact recognizes the reinforcement of financial stability as objective, which the contracting parties are bound to pursue.[211] The Commission has proposed that the Fiscal Compact should be incorporated into the Union legal framework.[212] However, the Fiscal Compact has not been incorporated at the time of writing.

According to the Commission, the measure for the establishment of the EMF is within the framework of the economic policy. According to the Proposal:

> *Within the framework of the economic policy of the Union, as provided for in Title VIII "Economic and Monetary Policy" of Part III of the TFEU, the necessary powers for the Union to establish a Union body in charge of providing financial support for ensuring the financial stability of the euro area have not been enshrined.* [213]

Also, the Commission refers to the Regulation (EU) No 472/2013, which the Commission claims to assert the Union's competence *in the area of financial assistance and the economic policy coordination related thereto*.[214] However, it is not straightforward whether this regulation proves that the Union has competence to establish permanent stability mechanism. The regulation stipulates the economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability. This regulation stipulates the EU rules that govern the procedures for awarding financial assistance.[215] However, the regulation is based on the idea that the EU is not the source of the financial assistance, but the Union effects on the conditions of the assistance.

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[210] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, concluded 2 March 2012, entered into force 1 January 2013.

[211] Ibid, article 9.

[212] Proposal for a Council Directive laying down provisions for strengthening fiscal responsibility and the medium-term budgetary orientation in the Member States, COM/2017/0824 final.

[213] The European Commission (n 1), 11.

[214] Ibid, 10.

[215] Regulation of the European Parliament and of the Council (EU) No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013], OJ L 140

The Commission determines the framework of economic policy through the Treaties. According to the Commission, a Union body in charge of providing financial support is within the framework of economic policy. Also, the Commission has argued that the creation of the EMF is within the framework of the Union policies due to the *Pringle* ruling.[216] The Court ruled in the *Pringle* case that the ESM was under economic policy. Accordingly, other financial assistance mechanisms, would be under economic policy. The Commission reads that the establishment of the EMF is under the objectives of the Union in article 3(4) TEU.[217] It is not straightforward, as Chapter 4.4 examines, that the article 3(4) TEU establish Union objective that requires the establishment of the EMF.

The boundaries of the economic policy of the Union are defined by the Treaty provisions. However, these provisions do not clearly mark the boundaries. The Union framework is based on the Treaties and secondary law reflect the primary law. Therefore, the secondary law is needed to determine these boundaries. The economic policy framework includes two, partly overlapping and complementary, policies. The one is the economic framework for the Union and the another is the economic framework for the EMU. The intergovernmental solutions, however, do not provide input for the determination of the Union economic framework.

4.3.3 Application of the second condition to the establishment of the European Monetary Fund

The question whether the establishment of the EMF is within the framework of the policies defined in the Treaties, includes several aspects. The claim that the EMF would not widen the scope of the general framework is not straightforward. Possible problems may occur due to the limited character of economic policy competence. Also, the institutional implications of the establishment of the EMF and constitutional significance of these implications may rise the question of the widening of the economic framework of the Union.

The evaluation of Treaty provisions may reveal that the establishment of the EMF oversteps the economic framework of the Union. The Court ruled that the Treaty provisions that concern the tasks and activities of the Union should be taken into consideration when determining the general framework. The EMF's tasks are to mobilize funding, to provide stability support and

[216] Ibid.

[217] European Commission (n 176).

credit lines or set guarantees to the Single Resolution Board. The Treaties does not establish equivalent tasks to the Union. In addition, the aims and functions can be taken into consideration. These two additional features originate from the Commission's statement, that the transfer of the EMF into the Union legal framework would not widen the scope of the Union's powers. The Commission sees the transfer rather filling *a cap in its specific powers without widening its aims, functions and activities*.[218] However, this is not straightforward. The Treaties do not establish aims, functions or activities to the Union that are fully equivalent and corresponding with the aims, functions and activities of the EMF. Therefore, the Commission's claim that the establishment of the EMF would not widen aims, functions or activities of the Union, is not straightforward.

The institutional implications of constitutional significance may incur the widening of the Union framework. The Court came into a conclusion in Opinion 2/94 that the constitutional significance caused by the institutional implications can cause that the measure would widen the scope of general framework. The Court included in the evaluation the institutional implications for both Union and Member States. The establishment of the EMF may have institutional implications that would have constitutional significance.

The implications for the Union culminate in the establishment of new Union agency. The new Union agency would change the institutional setting in the Union. In the current mechanism, the Commission and the ECB have significant tasks, including the execution of the financial assistance, but, as the Court has ruled, they only act on behalf of the ESM.[219] After the establishment of the EMF, not only the execution of the financial assistance, but also the decision-making is under the tasks of Union institution. In the Union context, the constitutional significance relates to the question of competence. If the establishment of the EMF oversteps the competence attributed to the Union and adds the competence in the field of economic policy, the establishment of the EMF has constitutional significance for the Union. However, the establishment of the EMF through secondary legislation, as stated in the case law and Declaration no 42 of the Treaties and principle of conferral, cannot add new competence to the Union. Therefore, if the EMF widens the scope of competence, it does not fulfil the second condition of the flexibility clause.

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[218] European Commission (n 176).

[219] *Ledra* (n 234).

In addition, the constitutional significance for the Member States should be examined as the Court tested it in the Opinion 2/94. It is possible, that establishment of the EMF has constitutional significance to the Member States as the EMF would be binding Union agency armed with powers to grant financial assistance with strict conditions. The constitutional significance would be directed to the economic sovereignty of the Member States, which is examined in detail in Chapter 5.3.

The Member States are required to coordinate their economic policies. This coordinative character may be overstepped in the establishment of the EMF due to the impacts on the macroeconomic policies of the Member States that receive financial assistance. The financial assistance functions are problematic as the financial assistance packages are tied to strict macroeconomic conditions. The packages require austerity economic policy and have strict and specific conditions. These may exceed the common objectives and responsibilities determined in the Stability and Growth Pact. The economic framework of the Union includes macroeconomic surveillance tools and a macroeconomic imbalance procedure, but then again, the strict and detailed macroeconomic conditions tied to the financial assistance seem to go beyond the macroeconomic framework of the Union. The intensity and breadth of the rescue packages may imply the widening of the economic framework.

In conclusion, it is not straightforward whether the establishment of the EMF is within the framework of the Union policies. The most significant factors in the application of the second condition, the measure being within the framework of the Union policies, culminates in the Union framework of economic policies and its boundaries. The establishment of the EMF may overstep these boundaries by involving more than coordinative measures. Also, the establishment of the EMF may have constitutional significance caused by the institutional implications, and, therefore, it is not evident whether the flexibility clause can serve as legal basis for the establishment of the EMF.

4.4 Condition 3: Necessary to attain one of the objectives of the Union

4.4.1 Financial stability as objective

Under the article 352 TFEU the measure can be taken if it is necessary to *attain one of the objectives set out in the Treaties.* The possible lack in Union objectives Stated in the Treaties does not necessarily mean that the objective could not be pursued through Union actions.

However, the flexibility clause will not be able to serve as legal basis if the measure is not necessary to attain a Treaty objective. The question is whether the EMF fulfils this condition. The examination of the objective of the EMF and examining whether this objective is, also, a Union objective, provide an answer to the question.[220]

According to the Commission, the objective of the EMF is the financial stability. The proposal states that the EMF's objective is to *contribute to safeguarding the financial stability of the euro area, as well as the financial stability of the 'participating Member States'*.[221] The objective of the EMF includes reducing risks to financial stability.[222] However, the Treaties do not state financial stability as Union objective. The flexibility clause cannot be used to create any new objectives.[223] It is not stipulated, however, that the objective should be stated explicitly. The Court has ruled, in the context of the flexibility clause, that the Treaties may express an *implicit underlying objective*.[224] This provides some leeway and discretion in the interpretation of the Treaty objectives.[225]

For the evaluation of the objective, it is necessary to know what financial stability means. The notion of financial stability is not explained in the Treaties. Therefore, the usual meaning of the notion provides help for the determination. Financial stability can refer to the functioning of the financial system including financing through markets and indirect financing through intermediaries.[226] Therefore, financial stability is broader than the concept of the banking stability, which refers to the capacity of the banking sector to fulfill its role in the economy. Financial stability can, simply, also refer to a situation where there are no excessive volatility, stress or crises in the market. Then again, according to some commentators, the financial

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[220] In theory, it is possible that a measure is necessary to attain one of the Treaty objectives even if the Treaty objective and the objective of a measure are not equal. That kind of 'side-effect' of a measure is, however, unlikely to be overriding reasoning in the taking of a measure. Therefore, this mainly hypothetical approach is excluded in the evaluation.

[221] The European Commission (n 1), Article 3 of the Annex.

[222] Ibid, 12.

[223] Tschofen (n 123) 481.

[224] Judgement of 3 September 2008, *Kadi*, C-402/05 and C-415/05 P, EU:C:2008:461, paragraph 226.

[225] Rossi and Casolari have seen that the leeway could, e.g. provide change to interpret the stated objectives in the light of certain principles. Lucia Serena Rossi and Federico Casolari, *The EU after Lisbon* (Springer 2014) 67.

[226] Tuori and Tuori (n 45) 58.

stability requires more than these negative instability factors.[227] As for some of the commentators, financial stability represents a situation where regular shocks to the system cannot cause a financial crisis.[228] The European Central Bank has defined financial stability as being a condition where the financial system is capable of standing shocks and financial imbalances.[229] In summary, the notion is not always determined consistently.[230] Despite the unestablished determination[231] of the notion, it is frequently used in the Union context. For example, the ECB review the financial stability of the euro area and the Commission has a directorate-general focusing on financial stability among financial services and capital markets.

As the Court have ruled that the Treaty provisions may express implicit underlying objectives, financial stability could also be implied in other Treaty provisions. The Court has found that measures found through application of the flexibility clause may act for the achievement of these implicit underlying objectives.[232] The general provision of the objectives, article 3 TEU, is widely worded and other Treaty provisions define the contents of these objectives.[233] It could be possible that these general objectives include financial stability as implicit objective. According to some commentators, financial stability is implicit part of the Union objectives of sustainable development of Europe, based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress.[234] However, distinguishing arguments can be made. For example, Constitutional Law Committee of Finnish Parliament has stated that the general provision of the objectives does not allow the extensive use of that provision in the economic policy. This is, also, related to the limited

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[227] Blaise Gadanecz and Kaushik Jayaram, 'Measures of Financial Stability – a Review', *IFC Bulletin* (International Bank of Settlements 2009). 365; Claudio Borio and Mathias Drehmann, 'Towards an Operational Framework for Financial Stability : " Fuzzy " Measurement and Its Consequences', 4.

[228] Borio and Drehmann (n 228) 6.

[229] European Central Bank, 'Financial Stability Review' (2018) 3.

[230] Borio and Drehmann (n 228) 4.

[231] The controversial determination of the notion makes the evaluation of the question, whether the financial stability is Union objective determined by the Treaties, difficult. One could even rise a question, whether the Union can have an objective that is as controversial as the notion of financial stability is. Although, many of the objectives determined in the Treaties are as abstract as the financial stability. Many of them, such as well-being of Union's peoples stated in article 3 TEU, are difficult to measure. These factors, therefore, does not automatically lead to the conclusion that the financial stability could not serve as Union objective.

[232] *Kadi* (n 226), para 226.

[233] Article 3(3) TEU.

[234] Tuori and Tuori (n 45) 58

competence in the field of economic policy.[235] Therefore, the Constitutional Law Committee of Finnish Parliament would not, most likely, interpret the general provision including other objectives.

At least financial stability is closely related to these objectives. Especially, the internal market and EMU have strong interconnections with the financial stability. The ECB's tasks are related to the financial stability. The Treaties define the stability of the financial system as objective of European Central Bank and the European System of Central Banks.[236] It is not straightforward whether the stability of the financial system and financial stability are equivalent. Also, the ECB's competence and tasks, as monetary institution, differ from the proposed EMF. The EMF is proposed to provide financial assistance. On the contrary, direct lending to the Member States is prohibited from the ECB.[237]

Also, the frequent use of the notion of financial stability in the Union context may imply its establishment as Union objective. For example, the ECB publishes annual Financial Stability Review and the Commission has Directorate-General concerning financial stability issues[238]. It has been argued that the financial crisis revealed the financial stability as overriding objective, which EU's economic policies are expected to serve. [239] This could apply, at least, within the EMU.[240]

The Court has touched on the topic. In the Pringle ruling the Court seemed to suggest that Eurozone pursues a new objective of the stability.[241] However, this was not stated explicitly. The Court ruled in *Ledra* case that ensuring the stability of the banking system of the euro area as a whole is an objective of general interest pursued by the EU.[242] However, the stability of the banking system and the financial stability are not wholly corresponding. All in all, the Court

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[235] Constitutional Law Committee of Finnish Parliament, PeVL 38/2018 vp.

[236] Article 127(5) TFEU.

[237] Article 123(1) TFEU.

[238] The name of the Directorate-General is FISMA.

[239] Tuori and Tuori (n 45) 183.

[240] Arne Niemann and Demosthenes Ioannou, 'European Economic Integration in Times of Crisis: A Case of Neofunctionalism ?' (2015) 0 Journal of European Public Policy 1. 201.

[241] *Pringle* (n 17), para 56. See also, Lo Schaviavo (n 71) 211 – 212.

[242] Judgement of 20 September 2016, *Ledra*, C-8/15, EU:C:2016:701, paragraph 71.

has not directly interpreted that the financial stability is a Union objective. The fact, that the euro area Member States see the stability as objective for them, does not mean that the objective would automatic be Union objective.

The Union publications have discussed the position of the financial stability. Even though the Union institutions frequently use the notion of financial stability and refer to it, the statements that directly address the position of financial stability deny it being under Union's responsibility. The Four President's Report from 2012 stated that the financial stability is under national responsibilities. The Report, nevertheless, saw this problematic and paved the way for integration.[243] However, no such exact integration has been established.[244]

The Commission has not seen this as a problem for the establishment of the EMF. The Commission sees the financial stability as implicit objective of the general objectives stated in the article 3 TEU. The Commission refers to the paragraphs 3(3) and 3(4) TEU, which state objectives related to the internal market and EMU. According to the Commission, the establishment of the EMF is necessary to attain the objectives of establishing the EMU and to attain the sustainable development of Europe. Also, according to the Commission, safeguarding the financial stability aims at achieving a deeper, fairer and more resilient EMU.[245] However, it is not evident whether the link between financial stability and explicitly stated Union objectives is close enough to the financial stability to be also Union objective.

As the Commission evaluates the third condition, it focuses arguing the necessity of the measure, not the status of the financial stability as objective. However, the arguments are reserve closer look as they provide input for the evaluation of the financial stability as Treaty objective. According to the Commission, the necessity of having a Union body safeguarding the stability of the euro area is based on factual elements. The Commission finds these factual elements illustrated in article 136(3) TFEU and second recital of the ESM Treaty. [246] Under article 136(3) TFEU, the Member States whose currency is euro may establish a stability

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[243] Herman Van Rompuy, José Manuel Barroso, Jean-Claude Juncker and Mario Draghi, 'Towards a Genuine Economic and Monetary Union', Four Presidents' Report (2012).

[244] Integration have been established in the field of banking supervision, which serve the objective of financial stability. However, the financial stability has not been officially stated to be new Union objective.

[245] The European Commission (n 1), 19, recital 15.

[246] The European Commission (n 1), 11.

mechanism. The article states that the mechanism can be activated if it is indispensable to safeguard the stability of the euro area as a whole. The Article does not mention that this would be EU's objective. On the contrary, the Court have ruled in the *Pringle* that the third paragraph of article 136 TEU did not establish any legal basis for the Union to be able to undertake any action that was not possible before the amendment of the third paragraph.[247] This is important, as the third paragraph is the only Treaty provision explicitly concerning financial stability. The Court have ruled that the Treaty provisions can express implicit underlying objectives.[248] When interpreting this alongside the *Pringle* ruling, it appears that the third paragraph of article 136 TEU cannot alone establish implicit underlying objective of financial stability. The second recital of the ESM Treaty refers to the article 136(3) TFEU. It is notable that the ESM Treaty is intergovernmental Treaty, and it cannot establish or influence on the establishment of Union objectives.

To sum up, there are several points favoring the financial stability as Treaty objective and several points that could exclude the financial stability from Treaty objectives. The most significant reasoning concerns the general Treaty objectives implying the financial stability. This is the reasoning that the Commission favors in its proposal. This interpretation may be correct due to the case law recognizing the possibility to Treaty provisions establish implicit underlying objectives, the deep interconnections between the expressly stated objectives and the financial stability and the frequent use of the financial stability in the Union context. However, there are also arguments against the financial stability being implicit objective in the Treaties. The Union authorities have expressed that financial stability is in the responsibilities of the Member States, but integration in the field is wanted. However, no such integration has been established and the flexibility clause cannot be used to establish any new objectives. Therefore, in accordance with the principle of conferral, the establishment of the EMF cannot establish the financial stability as new objective. It remains controversial, whether the financial stability is a Union objective established in the Treaties.

[247] *Pringle* (n 17), para 73.

[248] *Kadi* (n 226), para 226.

4.4.2 Necessity

Under the third condition the measure must be *necessary* to attain the objectives of the Union. In the evaluation of the necessity rule, the case law on the issue, academic discussions and Commission's arguments needs to be examined. The case law related to the necessity rule is read broadly and not limited to the case law concerning the flexibility clause. Therefore, the interconnections with necessity in other provisions and principles are taken into consideration. The academic commentators have divided the third condition in two questions. These two questions are evaluated. Finally, the evaluation whether the establishment of the EMF fulfils the third condition, can be made.

The necessity test has interconnections with two common principles of the Union, the principle of subsidiarity and the principle of proportionality. The principle of subsidiarity has been evaluated above in Chapter 3.5. As stated in that chapter, the subsidiarity test includes the comparative efficiency test under which the necessity of the measure should be examined. Under the debate about the European Convention, the necessity test under the principle of subsidiarity and the necessity test under the flexibility clause were connected. The working group of the European Convention stated that the necessity test under the flexibility clause should include evaluation whether the satisfactory result may not be achieved through national action.[249] However, the Draft Treaty was rejected, and, therefore, the statement of the working group can only be used as indicative help for interpretation.[250] Under the principle of proportionality, the *content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*.[251] Even though the point of reference in these necessity tests varies, the necessity check serves multiple purposes.

The Court has tested the necessity more frequently in the context of the principle of proportionality than the flexibility clause. Despite the different angle in the proportionality

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[249] The Working Group (n 186), 15.

[250] The connection between these two necessity tests have, also, been questioned. According to some commentators, the distinction of the two tests is based on the different purpose for which the test is used. The necessity test under subsidiarity focuses on the exercise of the Union competence. As for necessity test under the flexibility clause, the focus is on the existence of Union competence. Also, the different timing of the necessity tests separates the tests from each other. Schütze (n 129) 91.

[251] Article 5(4) TEU.

examination compared with the flexibility test, as the proportionality often functions as a balancing test between competing principles[252], it provides input in the determination of the notion of necessity. However, it should be kept in mind, that the resemblance between these two necessity tests is only partial.[253] The Court has found in its settled case law that proportionality test includes, among other steps, the determination whether the measure taken is necessary in order to achieve the objective.[254] This has strong interconnections with the necessity test required in the application of the flexibility clause. Also, some commentators understood that the case law rules that the proportionality test requires, among others, the necessity test, which evaluates the necessity of the measure to achieve the desired objective.[255] The necessity step corresponds with the third condition of the flexibility clause.

The Court have evaluated the necessity test and have quashed Union measures based on the test. It should, however, to be acknowledged that the proportionality test has no straightforward or established substantial meaning in the EU law.[256] Also, the proportionality test differs depending on the issue. The Court has often applied the so-called manifestly disproportionate test for the Union measures. As for the Member States' measures, the Court has often applied different versions of the so-called least restrictive means test. The least restrictive means test can be understood as one form of the necessity test.[257] The cases where a Union measure is quashed on the basis of necessity, have varied. For example, in early case law, Skimmed milk cases, the Court found that the regulation concerned was not necessary in order to attain the desired objective.[258] Also, the Court have struck down an EU measures more recently. The

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[252] Wolf Sauter, 'Proportionality in EU Law: A Balancing Act?' (2013) 15 Cambridge Yearbook of European Legal Studies 439.

[253] Schütze (n 129) 90.

[254] Judgement of 23 February 1983, *Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, C 66/82, EU:C:1983:42, para 1; judgement of 1 October 1985, *Office belge de l'économie et de l'agriculture (OBEA) v SA Nicolas Corman et fils*, C 125/83, EU:C:1985:382, para 36; judgement of 18 September 1986, *Commission v. Federal Republic of Germany*, C 116/82, EU:C:1986:322, para 2.

[255] Craig and De Búrca (n 12), 551; Justyna Maliszewska-Nienartowicz, 'The Principle of Proportionality in the European Community Law - General Characteristic and Practical Application' (2008) 89 Pravni Vjesnik, 91.

[256] Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' (2010) 16 European Law Journal, 160.

[257] Judgement of 13 November 1990, *Fedesa*, C-331/88, EU:C:1990:391; Opinion of AG Van Gerven of 11 June 1991, *SPUC v Grogan*, C-159/90, EU:C:1991:249. See, also Sauter (n 253) 445, 456.

[258] The cases concerned a Council regulation that provided compulsory purchase of skimmed milk powder in statutory price. The measure was taken due to the overproduction of skimmed milk powder. The Court quashed

Court ruled in *ABNA Ltd and Others v Secretary of State for Health and Food Standards Agency* that Union measure was not necessary to attain the desired objective.[259] The Court has based its evaluation in these cases on factual elements.

The Commission has, in the Proposal, argued that the EMF is necessary. The necessity, according to the Commission, is based on factual elements. The Commission refers to Article 136(3) TEU and the second recital of the ESM Treaty as proofs of these factual elements. Article 136(6) stipulates that *the Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole*. According to the second recital of the ESM Treaty, the ESM is *a stability mechanism to be activated if indispensable to safeguard the financial stability of the euro area as a whole*. The Commission states that *the establishment of the EMF is necessary to contribute to the safeguarding of the financial stability of the euro area as a whole, its Member States and the non-euro Member States which participate in the Banking Union*. Accordingly, the Commission understands that the establishment of the ESM is actual proof of it being necessary. However, these arguments are not watertight. It is not evident that the Union could use an international Treaty, the ESM Treaty, as a reasoning for its own actions. Then again, even though the financial assistance mechanism could be necessary, it does not mean that it is necessary to have it within the Union legal system.

One of the aspects the Commission observes is the participation of the non-euro Member States that participate in the European System of Central Banks, to the financial assistance mechanism. The parties of the ESM Treaty, as the ESM Treaty and article 136(6) TEU states, include only the euro area Member States. According to the Commission it is necessary to include also the non-euro Members in the financial assistance mechanism. However, it is not straightforward whether this is necessary. One of the factors that should be taken into consideration is that the non-euro Member States react differently for the unstable financial system. For example, the

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the Council regulation on the grounds of necessity. The Court ruled that the regulation was not necessary in order to attain the objective in view, which was the disposal of stocks of skimmed milk powder. Judgement of 5 July 1977, *Bela-Muhle v Grows-Farm*, 114/76, EU:C:1977:116; judgement of 5 July 1977, *Granaria*, 116/76, EU:C:1977:117, judgement of 5 July 1977, *Oelmuehle and Becher*, 119 and 120-76, EU:C:1977:118.

[259] The Court ruled that directive which required the manufacturers of animal feed to indicate the exact composition of the feed, was not necessary to protect health. Judgement of 6 December 2005, *ABNA Ltd and Others v Secretary of State for Health and Food Standards Agency*, C-453/03, C-11/04, C-12/04 and C-194/04, EU:C:2005:741, para 70.

risk of contagion of financial crisis is higher within the area of single currency than in the non-euro area.[260] The mandatory participating into financial assistance mechanism needs more evaluation. However, the matter is not discussed here further due to the limited nature of the thesis.

Under academic discussion, the necessity condition is shaped into two questions: Firstly, has one of the objectives of the Treaties not been fully or satisfactorily attained? Secondly, can the Union institutions correct the situation by exercising a power?[261] To establish EMF as proposed, the answer to the first question should be negative and the answer to the second question should be positive. The necessity condition and its sub questions in the context of the EMF are as follows. First question is whether the financial stability is fully or satisfactorily attained? Answering the question requires measuring the state of financial stability. The question connects with the nature of the financial assistance mechanisms being crisis preparedness institutions. The question whether the financial stability is not fully or satisfactorily attained in the current economic environment should be accompanied with the question whether the financial stability can be fully or satisfactorily attained even at the peak of financial crisis. The second question is whether the Union institutions can correct the situation. It is not straightforward that the answers to these questions are yes.

Answering the first question, whether the financial stability has not fully or satisfactorily been attained, the status of the current state of financial stability needs to be measured. However, the measuring is not an easy task. The issue how the financial stability should be measured has been under academic debate. The Central Banks have, also, joined in the debate. To begin with, the financial stability is a fluid state of economy depending on various factors, which makes the measuring of the financial stability difficult. It is a lot easier to measure financial stability after a crisis, on an ex post basis, but measuring a current state of stability is not that simple.[262] The Financial Stability Reports, published by Central Banks, usually focuses only on a few key indicators.[263] The financial stability studies often measure the traditional financing market

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[260] Graham Bird and others, 'Safe Haven or Contagion? The Disparate Effects of Euro-Zone Crises on Non-Euro-Zone Neighbours' (2017) 49 Applied Economics. 5903.

[261] Tschofen (n 123) 480.

[262]Gadanecz and Jayaram (n 228) 378; Borio and Drehmann (n 228) 2.

[263] Gadanecz and Jayaram (n 228) 365.

leaving the so-called shadow-banking sector without a closer look.[264] Comparing different reports is not an easy task, either. The reports emphasize different factors. There is no single measure that every report would make use of and it is not likely that such measure would be established due to the difficulties of establishing such measure. Most of the obstacles that make the establishment of such measure improbable are connected to the complexity of the financial system and the links between different sectors. Also, different countries have different risks and factors.[265] The European Central Bank has focused in its Financial Stability Review in identifying and prioritizing the main sources of systemic risks and vulnerabilities to the euro area financial system. Notably, the scope of the ECB's report has been only the euro area, not the Union area.[266]

The nature of financial assistance mechanisms being crisis preparedness instruments adds the complexity of the issue. The measuring report that states that current state of financial stability is satisfactorily attained, does not fully respond to the objective of the financial assistance mechanism. The financial assistance mechanisms aim safeguarding the financial stability also in the event of crisis. Therefore, the financial stability measurements should include the evaluation of the capacity of the financial system to withstand risks. The difficulties of measuring the state of financial stability complicate the examination whether the financial stability is satisfactorily attained. The methods of measuring the financial stability require further evaluation, which cannot be made here due to the wide, complex nature of the issue.

The answer to the second question, whether the Union action would correct the situation, is not evident, either. Since the financial assistance mechanism, the ESM, already exists and it would remain considerably similar after transformation to EMF, it is not straightforward whether the establishment of the EMF would be necessary. The earlier academic debates before the Commission's proposal, being speculative in nature, denied the necessity of the EMF in the basis of the existence of International Monetary Fund. The need for European mechanism, according to some commentators, is due to the limited resources of the IMF.[267] When the

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[264] Scott Brave and R Andrew Butters, 'Monitoring Financial Stability : A Financial Conditions Index Approach' (2011) 35 Economic Perspectives 22.

[265] Gadanecz and Jayaram (n 228) 378.

[266] European Central Bank (n 230) 3.

[267] Wyplosz (n 63) 7.

existence of distinct institution would mean that European mechanism is unnecessary, the existence of basically similar mechanism, with the same tasks, scope and objectives, could also preclude the fulfilment of the necessity condition. Arguably, when there already is an instrument, the necessity to establish a new one is not by no means self-evident.[268]

The Commission did not explain explicitly, in the proposal, why it sees the transfer necessary. The Commission, however, explains why it has chosen a Council Regulation to the instrument: The Commission states that the EMF, within the Union framework, *has to be binding in its entirety and directly applicable in Member States*.[269] The current mechanism is not legally binding in a sense that it only involves Member States that have signed and ratified the ESM Treaty. But, after a state has ratified the ESM Treaty, it is no longer voluntary.[270]

One aspect in the evaluation of the question whether the transfer into the Union framework is necessary, is related to the credibility of the current system. Notably, even the existence of a credible system may prevent financial crisis. Therefore, if the ESM is not credible enough, the establishment of the EMF is necessary. The credibility depends on, at least, three factors. The mechanism must be financially adequate for not only small Member States, but also for bigger Member States, such as Italy or Spain, too. The financial assistance mechanism is only credible if all Member States support it politically. Also, the conditions of the financial assistance must be acceptable for the receiving Member States. The lack of political will for economic reforms required would torpedo the rescue package. These requirements for the credibility of the mechanism consider both, the ESM and the EMF. If the ESM is not credible, the establishment of the EMF can be understood as necessary. However, if the establishment would not improve the credibility of the mechanism, the credibility evaluation does not provide fulfilment of the necessity condition.

To sum up this sub-chapter, it is not straightforward whether the third condition is met. It is not certain whether the financial stability is a Union objective. The financial stability can be implicit underlying objective of the Treaties. At least it has deep interconnections with the Treaty objectives. If the financial stability is not a Treaty objective, the third condition is not met. Then

[268] ibid.

[269] The European Commission (n 1), 13.

[270] All signatory states have ratified the ESM Treaty.

again, if it is a Treaty objective, the necessity test still needs to be examined. It is not certain, either, whether the establishment of the EMF is necessary. The necessity depends on whether the already existing ESM is taken into consideration. As the ESM already exist, and it is equivalent with the proposed EMF, the necessity test should consider whether the transfer into the Union framework is necessary, not whether the stability mechanism is necessary in the first place.

In conclusion to this chapter, it is possible that the conditions set on the application of the flexibility clause are not met. The first condition, which stipulates that the Treaties have not provided the necessary powers, is the easiest to meet. However, not even that condition is straightforward. The issues related to the first condition culminate in the issue whether the competence to establish EMF is excluded. The second condition, which stipulates that the measure must be within the framework of Union policies, is complex. The framework of economic policies does not have clear boundaries, and therefore, it is not easy to determine when exactly the boundaries are crossed. The third condition, whether the measure is necessary to attain one of the Treaty objectives, is the most complex condition of these three. It is not evident whether the financial stability is a Treaty objective or whether the transfer into the Union legal framework is necessary as the ESM already exists. If the EMF is wanted to establish through applying the flexibility clause, these conditions needs to be met. Therefore, the possible issues should be reviewed and overcome.

5 UNION COMPETENCE GIVEN BY THE MEMBER STATES IN THEIR CONSTITUTIONS

5.1 The significance of national constitutions in the competence

The constitutions of Member States effect on the establishment of the EMF. It is possible that the Union law accepts the establishment of the EMF, but the constitutions of Member States prohibit it. In practice, if the establishment of the flexibility clause is in breach of its constitution, the Member States representative in the Council is not likely agreeing for taking a Council regulation on the establishment of the EMF. Taking a measure through the application of the flexibility clause requires the unanimity of the Council, and the Member States' stand on the issue have a huge practical impact on the possibilities to establish the EMF as proposed. Therefore, it is important to evaluate the research question, also, in the perspective of the constitutions of Member States. In this chapter, the relation between national constitutions and

the Union competence is examined. If the research question is only studied on the perspective of the Union law, the examination falls short of the desired. This first sub-chapter focuses on the relation between the Union law and Member States' laws. The second subchapter focuses on the doctrine of *kompetenz-kompetenz,* which means competence to determine competence, and its aspects. In the third sub-chapter, the sovereignty in the field of economic policy is evaluated. All these themes are interpreted in the perspective of the establishment of the EMF.

The Constitution of Finland and the Constitution of Germany, which is called *Basic Law*, are used here as examples. In both these Member States the constitution is high authority in political and legal culture. [271] The rulings of the Federal Constitutional Court of Germany[272] and statements of Constitutional Law Committee of Finnish Parliament illustrate the constitutions of their States. The status of these national institutions are different from each other. The Federal Constitutional Court examines matters retrospectively whereas the Constitutional Law Committee concerns issues handed to it before a measure is taken.[273] Germany has quite extensive case law in the area. The Federal Constitutional Court of Germany has interpreted the relation between the Basic Law and EU law several times.[274] The relationship with the Federal Constitutional Court and the CJEU[275] has not always been straightforward[276] and the Federal Constitutional Court represents, at least to some extent, a stricter stand than some of the other national constitutional courts of Member States[277].

The CJEU has constantly ruled that the Union law and national laws represent different bodies and that they are distinct and separate[278]. However, the relation between the national

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[271] Tuori and Tuori (n 45), 190.

[272] BVerfG.

[273] The Constitution of Finland has a mention of the Union membership. However, the Constitutional Law Committee has stated that the mention is mainly declaratory. Perustuslakivaliokunnan mietintö, PeVM 9/2010 vp, HE 60/2010 vp, LA 44/2010 vp.

[274] See, e.g. *Maastricht ruling*, BVerfG, Order of the Second Senate of 31 March 1998, 2 BvR 1877/97; *Lisbon ruling*, BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08.

[275] The Court of Justice of European Union is referred in this chapter by the abbreviation CJEU, unlike the rest of the thesis refers to it as the Court. The different name used is due to the possible confusion as national courts are examined.

[276] Susanne K Schmidt, 'A Sense of Déjà Vu: The FCC's Preliminary European Stability Mechanism Verdict' (2013) 13 German Law Journal, 5.

[277] Puumalainen (n 53), 148.

[278] For example, *Van Gen & Loos* (n 54).

constitutions and EU constitution is not straightforward.[279] The source of legitimation comes from Member States' constitution. The Member States are, in principle and primarily, sovereign. The competence is attributed to the Union by the operation of national constitutions. Therefore, the Union law is justified from the national constitutions, not the other way around.[280] From the Union point of view, the principle of conferral implies this need for legitimation. As for Member States' point of view, the legitimacy of the EU is based on the functional and limited chains of delegation by the Member States to the EU.[281] The need for national level legitimation is constant and is not limited to the time of joining the EU and signing the accession Treaty.[282]

The idea of functional and limited delegation chains is in some cases overly black-and-white. The view that emphasizes the outcome and objectives, which the flexibility clause represents, complicates the basic idea of the functional and limited delegations of competence from Member States to the Union. In some cases, the principle of conferral and the efficiency are in conflict between each other. The conflict appears when the objectives of the Union can only be achieved by non-functional and unlimited way, which is based on values. In the context of the establishment of the EMF, this means that the Union acts, in a way, in grey area. It may be necessary, to attain the objective of financial stability, to use the flexibility clause to take measures. The application of the flexibility clause may mean acting beyond the functional and limited competence.[283] This leads to a situation where the Member States no longer has those functional and limited chains of delegation and the Union acts on based more open-ended powers. If the EU oversteps explicitly the powers attributed to it, the national legitimation can be lost.[284]

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[279] Tschofen (n 123). 492.

[280] Brono De Witte, 'Direct Effec, Supremacy, and the Nature of the Legal Order' in Paul Craig and Gráinne de Bùrca (eds) *The Evolution of EU Law*. (2nd ed.) Oxford University Press 2011, 201 – 202.

[281] According to Lebeck, the conferred powers are a meaningful basis only when the power delegations are limited in scope and those limitations are possible to determine. Lebeck states that the power delegations are acceptable only as the character of these delegations is functional and limited. Puumalainen has come into the same conclusion in the perspective of the constitution of Finlad. See, e.g. Lebeck (n 120). 308; Puumalainen (n 53), 133.

[282] Puetter (n 150) 163.

[283] Lebeck (n 120), 308.

[284] For example, the Spanish *Tribunal Constitutcional* have given a Declaration, under which the attribution of competence to the Union is only allowed if the EU law is in line with the Spanish Constitution and respects it. Tribunal Constitucional refers to state sovereignty being one of the factors in the evaluation. The Tribunal

Then again, the Union legal system itself may represent a threat to the legitimation chains. The CJEU has, in its case law, emphasized the Union's role as a new legal order.[285] Through this notion, the Court has argued that when the competence attributions are sufficient, and in certain in nature, the Union's jurisdiction starts to live its own life. This own life of the EU law is considered independent from the Member States will.[286] However, this argumentation is, to some extent, in conflict with the idea of Union based on the division of competence and principle of conferral.

Despite the ex-ante perspective of the proposed EMF in the thesis, the ex post perspective presents relevant aspects to the relation between the Member States' constitutions and the Union constitution. The national courts hold a significant role in the Union law enforcement. The national courts remain actors and they resolve cases that arise before them and involve a conflict between the EU law and national law.[287] The national courts hold the power to decide which cases to refer to the CJEU. The national courts and the CJEU share a function and sharing of a function leads to sharing a power, too.[288] The CJEU holds the power of *interpretation* whereas the national courts hold the power of *application*.[289] The national courts not only apply the Union law into the cases, but also interpret the national constitution. The national courts hold the power to interpret the provisions of national constitutions that concern the power delegations to the Union. Within the limits of these provisions, the national courts may interpret cases concerning the extent of the competence attributed to the Union. The case law of the German Constitutional Court is a good example of drawing the line between the question which instance, national or the Union, should rule the case. [290] The law enforcement illustrates the

Constitucional have not, however, stated whether it would be competent to judge the possible infringements of the national constitution and the lack of acceptability of the attributions. This would be under discussion in the context of the establishment of the EMF. Declaration of the Tribunal Constitucional DTC 1/2004 of 13 December 2004, paragraph 2.

[285] The Court established the notion of a new legal order in the Van Gend & Loos case 1963. *Van Gend & Loos* (n 54) para 3.

[286] Puumalainen (n 53), 128.

[287] Craig and De Búrca (n 12), 278.

[288] Gareth Davies, 'The Division of Powers between the European Court of Justice and National Courts' [2004] conWEB webpapers on Constitutionalism and Governance beyond the State. 2.

[289] This origins from the Court's case law, see. e.g. *Costa v Enel* (n 113) para 1; judgement of 8 February 1990, *Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV*, C-320/88, EU:C:1990:61, paragraph 11.

[290] E.g. *Maastricht ruling* (n 263); *Lisbon ruling* (n 263).

importance of national constitutions when determining the boundaries of the Union competence.

The influence of the Member States' constitution and Union constitution is two-way. Clearly, the Union law contributes to the national laws. The Union law is, under the principle of primacy, superior to the national law, including the constitutions. The influence is, however, also opposite. The national constitutions can contribute to the interpretation of the Union law. This, at least partly, follows from the expansion of the notion of constitutional identity.[291] The concept is based on article 4(2) TEU, under which the Union must respect Member States' *national identities, inherent in their fundamental structures, political and constitutional*. The Court has also noticed the concept, although, it has not interpreted it directly.[292] The Court has taken national constitutions into account.[293] The fundamental constitutional principles common to all Member States have more important role when interpreting open-ended provisions, such as the flexibility clause, than regular provisions. [294] This can partly be because of the amount of discretion in the open-ended provisions. In the context of the establishment of the EMF, this relates to the sovereignty of Member States in the field of economic policy. The sovereignty of economic policy is a common principle to all Member States. It remains open, whether the Union should take this into account when proposing new measures under the flexibility clause.

To sum up, the research question cannot be studied without taking the Member States' perspective into account. The Union is based on the competence attributed by the Member States. Therefore, the legitimation of the Union comes from the Member States. The Member States justify the power transfer in functional and limited delegation chains. However, the boundaries and limitations of this attributed competence are not always straightforward. The national authorities have a role in the determination of the competence they have attributed. Therefore, the national constitutions and the statements of the authorities interpreting them

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[291] Francois-Xavier Millet, 'Respect for National Constitutional Identity in the European Legal Space: An Approach to Federalism as Constitutionalism', in Loïc Azoulai (ed) *The Question of Competence in the European Union* (2014) Oxford University Press, 260-261.

[292] Several Advocates General have used the notion in their opinions. E.g. AG Maduro Poiares in opinion of 16 December 2008, Michaniki, C-213/07, EU:C:2008:544.

[293] Millet (n 280) 261.

[294] Tschofen (n 123).

needs to be examined in order to find out whether the flexibility clause can be applied as the legal basis for the establishment of the EMF.

5.2 The notion of Kompetenz-kompetenz

5.2.1 The prohibition of self-conferral

National constitutions have restrictions on the powers that are possible to transfer to the Union. These restrictions effect on the Member States' interpretation whether the Union oversteps its competence. If it is prohibited in the first place from the Member State to confer the powers needed to the establishment of a measure, the Member States' authorities most likely interpret that this certain measure oversteps the Union competence. These restrictions are often described through the doctrine of *kompetenz-kompetenz*, which describes the competence to determine competence. The doctrine is established in its German phrasing also in the Union context. The doctrine is discussed not only in literature but also in German case law. There are, at least, two aspects in the *kompetenz-kompetenz* that effect on the establishment of the EMF. These aspects are the question of possible self-conferral and the question of the authority to decide the boundaries of the competence.[295] These aspects are deeply interrelated. The question of the self-conferral is examined first before moving forward to examine the question of the authority to determine the boundaries of the competence.

Kompetenz-kompetenz doctrine prohibits self-conferral. The self-conferral means a situation when a subject of the power delegation could determine its powers. Some of the Member States have stated this explicitly in their constitutions or the constitutional case law.[296] In the Union context, this means a situation when the EU or its institution could determine its powers and even add those powers without delegation from the sources of these powers, which are the Member States.[297] The flexibility clause may imply self-conferral, if the Union can, by using the clause, create new powers.[298] The prohibition of the self-conferral explains the problematic

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[295] Some refer by *kompetenz-kompetenz* only to the authority to decide the boundaries of the competence. Some, however, include the power to create powers in this doctrine. See, e.g. ibid, 503.

[296] For example, Polish Constitutional Court has ruled that *within the meaning of the Constitution, it is possible to confer competence "in relation to certain matters", which excludes conferral of competence to determine competence*. Judgement of the Constitutional Tribunal of 24 November 2010, K/32/09, 36.

[297] Christian Wohlfahrt, 'The Lisbon Case: A Critical Summary' (2009) 10 German Law Journal. 1281.

[298] Konstadinides (n 124) 227.

nature of the establishment of the EMF, where the legal basis, claimed by the Commission, is vague. The notion of self-conferral is related to the ban on transferring blank empowerments, which is represented in some of the Member States' constitutions. The ban prohibits the national authorities attributing all-embracing powers to the EU.[299]

Throughout the history of integration, there have been concerns that discretionary powers, such as the flexibility clause, represent a threat to the sovereign rights of Member States.[300] The has been seen problematic especially in the German jurisdiction. The German Constitutional Court has tested the flexibility clause and the *kompetenz-kompetenz*, which has concerned the question whether the Union has competence to decide and change its own legal competence.[301] It ruled that the EU integration could only be taken through German Basic Law procedures. Because of the *kompetenz-kompetenz* doctrine, the Union cannot independently amend the foundations of the Union and the Treaties.[302] According to the Constitutional Court of Germany, the ultimate *kompetenz-kompetenz* to decide whether the Union action is within the scope of the Union competence belongs to itself.[303]

However, there are also arguments denying the self-conferral of the Union through the flexibility clause. According to some commentators, applying *kompetenz-kompetenz* doctrine into the Union jurisdiction is not straightforward. The Union is based on enumerated powers. Accordingly, as some commentators have stated, the flexibility clause is not meant to function as self-conferral. This is because the flexibility clause does not entitle the Union to create or expand attributed powers. Instead of creating powers, the clause creates new Union law.[304] The clause can be used to put powers that already exist in the Treaties into concrete form.[305] Also, the clause cannot entitle the Union to create new objectives or modify the scope of the existing objectives of the Union.[306] Therefore, the commentators have seen that the flexibility clause does not provide self-conferral.

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[299] BVerfG, Judgment of the Second Senate of 18 March 2014, 2 BvR 1390/12, para 160.

[300] Tschofen (n 123) 491.

[301] Lisbon ruling (n 263).

[302] Wohlfahrt (n 298) 1277.

[303] See, eg, BVerfG (n 310) para 160.

[304] Schütze (n 128) 153 – 154.

[305] Tschofen (n 123) 484.

[306] Schütze (n 128) 153 – 153.

The impact of the self-conferral doctrine on the research question is not straightforward. The possible self-conferral, that the flexibility clause may represent, causes problems to the national justification. It is possible, that the establishment of the EMF is possible through the EU law, but in breach of the prohibition of self-conferral, and, therefore, in breach of some of the Member States' laws. Also, the self-conferral in the flexibility clause could be in breach of the EU law as it can violate the principle of conferral. However, as the prohibition of self-conferral represents mostly an abstract and theoretical determination of the Union competence, the actual recourse to the self-conferral is not likely. The significance of the self-conferral doctrine in the research question, consequently, is based on the explanatory effect of the controversial nature of the flexibility clause. Another side of the *kompetenz-kompetenz*, the authority to determine the boundaries of the Union competence, has more practical importance on the issue.

5.2.2 Authority to decide the boundaries of the Union competence

Another aspect of the *kompetenz-kompetenz* doctrine, alongside the self-conferral, is the question who has the authority to decide the boundaries of the Union competence.[307] There are two, rival, candidates on the issue. Firstly, the Member States could hold the authority to decide the boundaries of their power attributions. Under the principle of conferral, the Union only has the powers that the Member States has conferred to it.[308] Accordingly, it would be logical that the Member States and their constitutional courts would define the contents of the conferred competence. Secondly, the CJEU could have the competence to determine the boundaries of the competence. According to the Treaties, the Court has the authority to determine all issues involving the interpretation and application of the Treaties.[309] Therefore, as the competence is determined in the Treaties, the Court could hold the authority to determine the boundaries of the Union competence. These rival candidates have both relevant arguments in favor of their authority.

The Court has favored its authority to decide the boundaries of the competence as it is the final interpreter of the EU law. There are certain reasons why the Court has favored its own jurisdiction. The Court has the authority to determine all issues involving interpretation and

[307] Craig and De Búrca (n 12), 279.

[308] Article 5 TEU.

[309] Article 19 TEU.

application of the Treaties. Also, the Court has jurisdiction to review the legality of legislative acts and other acts of the Union institutions. [310] The Courts role as Treaty interpretation may imply the powers to define the limits of the Union's competence.[311] The competence is determined in the Treaties. Accordingly, when the Court is determining the boundaries of the competence it is interpreting the Treaties. Also, as widely accepted, the uniform application of the Union law throughout the Member States requires that one institution has the power to secure the uniform application. The Courts authority, confirmed by the Treaties, implies with the Member States' intention to secure the uniform application.[312] Furthermore, the Court has exclusive jurisdiction to invalidate the acts of the Union.[313] This means that no other institution has the power to invalidate the Union measures based on the overstepping of the competence. This includes the national authorities of the Member States such as the constitutional courts. This can imply the power to determine the boundaries of the competence.[314] Justifiably, it would be impractical if the authority to decide the boundaries of the Union competence would belong to a party that does not have power to apply this authority in Union measures that overstep the competence.

However, also the national authorities have relevant factors in their favor. The possible national authorities include authorities to interpret national constitutions, such as constitutional courts and parliamentary constitutional committees. Institutions interpreting the national constitutions have seen that they hold powers to determine what competence the Member State concerned has attributed.[315] This is mostly because of the national constitutions, which have different

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[310] Article 19 TEU.

[311] Gunnar Beck, 'The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz : A Conflict between Right and Right in Which There Is No Praetor 1' (2011) 17 European Law Journal. 473.

[312] ibid 473.

[313] Judgement of 22 October 1987, *Foto-Frost*, C-314/85, EU:C:1987:452.

[314] Beck (n 312) 473.

[315] Constitutional Law Committee of Finnish Parliament has not stated whether the Member State or the Union holds the power to determine the boundaries of the competence. However, it has took a stand on the Union competence. Therefore, the Committee sees itself competent to do so. Constitutional Law Committee of Finnish Parliament, Perustuslakivaliokunnan lausunto, PeVL 38/2018 vp, U 86/2018. However, it seems, that not all constitutional courts of Member States have seen themselves holding the *kompetenz-kompetenz* to determine the boundaries of the Union competence. For example, the Polish Constitutional Tribunal (Trybunał Konstytucyjny) has emphasized the different tasks of the Tribunal and the Court: The Tribunal safeguards the national constitution and the Court safeguards the Union law. Judgement of 16 November 2011, SK 45/09, paragraph 2.4. The commentators have seen that the ruling suggests that the Tribunal does not process cases that concern the possible

provisions and principles in different Member States concerning the limitations of the power attributions. For example, according to the Constitutional Court of Germany, it possesses the ultimate *kompetenz-kompetenz* and the authority to determine the boundaries of the Union competence. It states that, under the Basic Law, it is prohibited to confer authority to determine the boundaries of the competence to the Union. It claims that the EU or institutions created in connection with it cannot hold the *kompetenz-kompetenz*.[316] Also, it has claimed in its order for reference in the *Gauweiler* case that it has the right and even duty to examine the *ultra vires* questions of the EU actions.[317]

Even though the Member States interpret their own constitutions and not the Union law, the Union law may seem to support the Member States' authority. The Union is based on the principle of conferral, and it would be logical that the actors of the power delegations could determine the contents of these delegations.

The starting points of the argumentation of the rival candidates are different. The Court sees the overstepping of Union competence violation of the Treaties. The Court reads that overstepping of the competence when establishing the EMF as proposed would be a Council's breach of the Treaties. At the point of view of the national constitutions, the overstepping of the Union competence is in the breach of the Accession Treaty and national constitution. The national constitutional authorities would see the establishment of the EMF, if it overstepped the competence conferred to the Union, as a breach of their own constitutions. Therefore, the Court and national authorities see the subject of the violation differently.

The nature of the flexibility clause as open-ended provision has given rise to the establishment of national proceedings. The Federal Constitutional Court of Germany has ruled that the establishment of a measure under the flexibility clause requires national, parliamentary voting. According to the Federal Constitutional Court, the vote is required due to the possible amendments to the foundations of the EU and the lack of participation of legitimate legislative

exceeding of the Union competence in the Union secondary legislation. See, Monica Claes and Jan-Herman Reestman, 'The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case' (2015) 16 German Law Journal, 959.

[316] See, e.g. BVerfG (n 310) para 160.

[317] BVerfG, Order if the Second Senate of 14 January 2014, 2 BvR 2728/13, para 23.

bodies.[318] The need for the vote originates from the Basic Law.[319] Also, the Federal Constitutional Court ruled that the German representative in the Council is not entitled to express the formal approval on behalf of Germany.[320] The establishment of Council regulation through application of the flexibility clause requires unanimity of the Council, and, therefore, the Court's ruling is significant. The German representative cannot, because of the requirement of parliamentary voting, himself decide, even after consultation, the German's stand on a measure. Also, other Member States have proceedings for the cases where the flexibility clause is cited as a legal basis for a measure.[321] The proceedings may include testing the conditions that have been evaluated in Chapter 4.[322]

The doctrine of supremacy could seem to favor the Courts jurisdiction regarding the matter. Under this doctrine, any norm of Union law, including the case law of the CJEU, takes precedence over any provision of national law, including the constitutions and national courts are required to give direct effect to the Union law.[323] However, the principle of conferral limits the supremacy. The Union law is superior to all national law, but the supremacy extends no further than the scope of the powers that Member States have chosen to confer on the Union.[324] Therefore, the supremacy does not provide a simple answer to the question of the boundaries of the competence. This is exemplified in the case law of The Constitutional Court of Germany. It has not accepted the supremacy of the EU law without exceptions. According to the Constitutional Court of Germany, the boundaries of the competence limit the supremacy.[325] Therefore, it is not straightforward that the doctrine of primacy would lead into a conclusion that the Union case law concerning the boundaries of the competence overrules the national interpretations of the contents of the conferred powers.

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[318] BVerfG (n 263), para 328.

[319] The second and third sentence of Article 23.1 of the German Basic Law.

[320] BVerfG (n 263), para 328.

[321] E.g. United Kingdom has special process how to react these measures.

[322] Konstadinides (n 189), 209.

[323] Supremacy doctrine was established in the case law of the Court. *Costa v Enel* (n 113); judgement of 17 December 1970, *Internationale Handelsgesellschaft*, C-11-70, EU:C:1970:114; Declaration 17 of the Treaties.

[324] Beck (n 312) 472.

[325] *Maastricht ruling* (n 263).

Some of the commentators have seen that the Treaty of Lisbon solves the question in favor of the CJEU. Indeed, the Treaty of Lisbon clarified the boundaries of the competence and the sources of the competence. The answer, however, depends upon the phrasing of the question. If the question is phrased as ultra vires question, the Treaties provides an answer. According to the Treaties, the source of the competence is the Member States, but the interpretation of the competence is within the Court's competence.[326] The borders of the competence are determined mainly in the Treaty amending and ratification process.[327] Then again, if the question is phrased as concerning the boundaries of the attributed competence, such as whether the Member States have attributed certain powers to the Union, the answer is opposite. The Member States can define their own actions and retrospectively state what the action included. As long as the competence is not determined exhaustively, the debate continues. It is not expected that the Union and Member States would fully agree with all the details in the boundaries of the Union competence. This concerns especially open-ended provisions – such as the flexibility clause.

In conclusion, the question of whom holds the authority to determine the boundaries of the competence have significance in the context of the establishment of the EMF. The Member States' role in the determination of the boundaries of the competence means that the constitutional views of Member States on the issue have impact on the establishment of the EMF. The application of the flexibility clause requires the unanimity of the Council, and, therefore, it would be impossible to take a measure that national authorities oppose heavily. A Member State that opposes the establishment of the EMF on the basis of its constitution, would preclude the unanimity. The answer to the question whether the EU has competence to establish EMF without a Treaty amendment will vary depending on the responder. For example, Finland and Germany, which both have stated their authority to determine the boundaries of the conferred competence[328], would potentially deny the competence to establish the EMF through secondary law.

[326] Puumalainen (n 53), 140.

[327] Ibid, 144.

[328] Constitutional Law Committee of Finnish Parliament (n 327); Lisbon ruling (n 263).

5.3 Sovereignty and economic policy

The Member States' sovereignty is a basic principle in the area of economic policy. This applies both EU and national constitutional law.[329] Under the Member States' constitutions, the national governments have the highest budgetary powers. The establishment of the EMF may breach this principle, and, therefore, the issue must be examined. If the Member States read the EMF limiting their sovereignty in a manner which is prohibited in their constitution, the Member States are not willing to agree on the establishment of the EMF. This sub-chapter examines the economic sovereignty in the financial assistance regime, changes on the sovereignty connected to the establishment of the EMF and Germany and Finland as examples.

The Member States do not hold full competence in the current system. It has been argued that *Pringle* ruling and the Amendment to Article 136 TFEU have made it explicit that the beneficiary states of financial assistance must approve that reduction of sovereignty is the price of the assistance.[330] Arguably, the Member States have transferred some of their sovereignty under the financial crisis to the financial assistance mechanisms.[331] The strict conditionality and austerity requirements have influenced on the sovereignty of the Member States receiving financial support. The fiscal powers in the beneficiary states have shifted to the institution that provides the assistance, such as the ESM. The providing parties, including other Member States but also International Monetary Fund (IMF), have decided the loan terms. Also, the EU institutions have received some of the economic authority due to the role of these institutions in the ESM and deciding the conditions of the financial assistance.[332] The terms have required from the receiving parties' austerity economic policy. In a sense, the democratically elected and electorally accountable national parliaments no longer had sovereignty to decide in the economic matters.[333] However, the financial assistance is based on intergovernmental Treaty that the sovereign States have participated. The participating Member States have, therefore,

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[329] Tuori and Tuori (n 45), 10.

[330] Tuori and Tuori (n 45), 189.

[331] Verdun (n 53). 225; Tuori and Tuori (n 45), 189.

[332] Pieter-augustijn Van Malleghem, 'Special Section The ESM Before the Courts Pringle : A Paradigm Shift in the European Union ' s Monetary Constitution', 164.

[333] Tosun, Wetzel and Zapryanova (n 49).

already delegated its' sovereign powers to the ESM. Therefore, the current situation and existence of the ESM already limit the sovereignty in the field of economic policy.

The establishment of the EMF as proposed would have effect on the economic sovereignty of Member States. The most important changes proposed are directed to the decision-making process. In the ESM, the decision of granting financial assistance is made unanimous. Therefore, the Member States must mutually agree to the financial assistance package.[334] The proposed EMF would change the number of votes needed to financial support. The Commission propose the reinforced qualified majority of 85 percent of the votes when deciding on granting of financial assistance or disbursements. [335] This would remove the veto right from some Member States.[336]

The establishment of the EMF would change the position of national parliaments and, therefore, effect on the sovereignty of the Member States. In the decision-making process of the ESM, the national parliaments can agree with the Minister of Finance whether he or she needs to agree with the use of the ESM and granting financial assistance. As the decision-making process of the ESM requires unanimity, the opinion of the Minister of Finance has had an effect. In the EMF decision-making, this is not the case. The qualified majority voting leads to the situation where the national parliament, except from German, France and Italy due to their big size, cannot rely on the veto.

It is possible, that the establishment of the EMF is legitimate under the Union law, but not under the German constitution, the Basic Law. The principle of democracy and the constitutional identity of Germany are the two most important features in the issue. Under the principle of democracy, Germany is a democratic and social federal state. These two features, democratic and social federal state, form a basis for the interpretation of other constitutional provisions. Therefore, these two constitutional principles form the basis of the constitutional identity of Germany.[337] Under the Basic Law, concerning the integration of the EU, the amendments to

[334] The ESM Treaty (n 69) article 4(3).

[335] The European Commission (n 1), Articles 4(4) and 5(7) of the Annex.

[336] For example, Netherlands.

[337] Suzanne Poppelaars, 'The Involvement of National Parliaments in the Current ESM and the Possible Future EMF' (2018) 8.

the constitution that effect on the constitutional identity, are prohibited.[338] The changes to the EU that effect to the constitutional identity are, also, precluded.[339] The Bundestag and German government are bound to protect the principle of democracy and the constitutional identity of Germany in the EU integration.[340]

The German Constitutional Court has claimed that the constitutional identity of Germany differs from the notion of constitutional identity defined in the article 4(2) TEU.[341] The difference consists not only from the difference in scope between the article 4(2) TEU and constitutional identity of Germany, but also in the way these notions are applied. The constitutional identity in the Union context includes discretion, whereas the constitutional identity of Germany cannot include balancing exercise.[342]

In the current system, the German Bundestag discusses, and must agree, prior to the ESM decisions which concern the overall budgetary responsibility of Germany. The overall budgetary responsibility includes granting the financial assistance, conditions for the assistance, and changing the authorized capital or the lending volume.[343] Therefore, every time the ESM is used, the German Bundestag has approved the usage. As the establishment of the EMF would transfer the mechanism into Union legal framework, it is not straightforward whether the Bundestag can retain this procedure in the context of the EMF. Notably, Germany still has the veto right due to its size.

The Constitutional Court of Germany has tested the boundaries of the Bundestag's budget sovereignty and the notion of constitutional identity in its case law. It has ruled that the Bundestag cannot transfer budgetary responsibility to other authorities as the financial effects of the agreed budgetary matters must be apparent beforehand.[344] Also, it has held that the

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[338] Article 79 of the German Basic Law.

[339] BVerfG has stated that the article 79 of the Basic Law protects the constitutional identity against erosion in the process of European integration. BVerfG (No 328), para 5.

[340] Article 23 of the German Basic Law. See, also Poppelaars (n 338) 9.

[341] BVerfG (No 328).

[342] Claes and Reestman (n 316) 941.

[343] Article 4, Gesetz zur finanziellen Beteiligung am EuropäischenStabilitätsmechanismus [2012]. See, also Poppelaars (n 338) 7.

[344] Lisbon ruling (n 263), para 179. See, also ibid. 10.

fundamental choices in the fiscal matters should remain under the control of the people's representative body. This is because of the principle of democracy, and, therefore, the constitutional identity of Germany, enshrined by the fundamental law.[345] The Constitutional Court has claimed that it has duty to examine the Union actions in the perspective of the constitutional identity.[346] The Constitutional Court has ruled that the ESM does not infringe constitutional identity because of the limited financial liability for Germany.[347] It is not straightforward whether the Federal Constitutional Court would come into the same conclusion regarding the EMF.

In Finland, the constitutional debate relevant to the establishment of the EMF have focused on the parliament's budgetary powers. Under the Constitution of Finland, the Finnish Parliament holds the highest budgetary powers.[348] There have been concerns that the change of the voting rules is problematic for the parliament's budget sovereignty.[349] As the ESM requires unanimity in decisions concerning granting of financial assistance, Finland has influence. However, as the EMF is proposed to change the decision-making procedure, Finland, as small Member State, cannot have effect on the decisions in such straightforward manner.

If the EMF hindered the parliament's role, the EMF would most likely breach the Finnish Constitution. Constitutional Law Committee of Finnish Parliament has given a statement on the issue. The Committee stated that deciding national budgets is a central part of parliamentarian democracy. Therefore, the budgetary sovereignty must be protected.[350] Also, the Committee has noted that financial support should be seen unity. Important aspects for the evaluation are the amount of liabilities, the risk that the liabilities default, parliament's participation in the decision-making and the possible impact on the state's responsibilities under the

[345] BVerfG, judgment of 07 September 2011, 2 BvR 987/10; Article 20 of the Basic Law.

[346] BVerfG (No 328), para 23.

[347] BVerfG, decision of 12 September 2012. On that decision, see, among others Filippo Donati, 'The Euro Crisis, Economic Governance and Democracy in the European Union' (2013) 5 Italian Journal of Public Law 139.

[348] 82§ and 83§ the Constitution of Finland.

[349] The Finnish Government (n 333), 6.

[350] Constitutional Law Committee of Finnish Parliament, Perustuslakivaliokunnan lausunto, PeVL 13/2018 vp – U 4/2018 vp – E 115/2017 vp, 4 – 5; Constitutional Law Committee of Finnish Parliament, Perustuslakivaliokunnan lausunto, PeVL 28/2013 vp – U 58/2013 vp, 4.

Constitution.[351] Also, the Committee has, repeatedly, stated that the EMU should be developed within the framework of the Treaties.[352] Therefore, when asked to Finland, the answer to the question whether the Constitution of Finland precludes establishing the EMF as proposed, may be positive.

Nevertheless, opposite arguments for the effects of the establishment of the EMF to the sovereignty can be claimed. The EMF may be understood as adding the sovereignty. The desirability of the EMF depends on the determination of what is seen as "the inside" and "the outside". In a sense, the involvement of the IMF in financial support programmes can be seen the reduction of sovereignty.[353] The establishment of the EMF would add the sovereignty of the EU when the involvement of the IMF in rescue packages is ruled out. The Commission's proposal represents the will to detach extraneous interference. The establishment of the EMF would change the decision-making to fully European without the involvement of the IMF.

Regardless of the exclusion of international involvement, the national perspective to the sovereignty issue has significance. The international perspective does not remove the need for the establishment of the EMF to meet the requirements of the national constitutions of Member States. To conclude this sub-chapter, the EMF, as proposed, would change the decision-making of the decisions about granting financial assistance. This weakens the ability of small Member States, such as Finland to effect on the decisions. To big Member States, such as Germany, this is not that significant change, as they still can veto decisions. However, there are also other constitutional obstacles to the establishment of the EMF that concern especially Germany. The notion of constitutional identity is the main concern related to the economic sovereignty of Germany in the establishment of the EMF. The constitutional identity of Germany requires that Bundestag remains in control of economic decisions. On this account, the establishment of the EMF as proposed is controversial.

To sum up this chapter, it is possible that the establishment of the EMF is under the Union law, but in breach of Member States' constitutions. This chapter examined the role of the

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[351] Constitutional Law Committee of Finnish Parliament (n 324), 5; Constitutional Law Committee of Finnish Parliament, Perustuslakivaliokunnan lausunto, PeVL 3/2013 vp – E 130/2012 vp, 2.

[352] Constitutional Law Committee of Finnish Parliament, Perustuslakivaliokunnan lausunto, PeVL 13/2018 vp – U 4/2018 vp – E 115/2017 vp, 5; Constitutional Law Committee of Finnish Parliament, Perustuslakivaliokunnan lausunto, PeVL 55/2017 – E 80/2017, 3.

[353] Wyplosz (n 63) 9.

constitutions of Member States in regard to the establishment of the EMF. The most important constitutional features in the issue relate to the doctrine of *kompetenz-kompetenz* and the economic sovereignty of the Member States. Some of the Member States have seen that they hold the authority to determine the boundaries of the Union competence due to their national constitutional law and the principle of conferral in the constitutional law of the EU. As the Member States interpret that they hold the authority, they could review the establishment of the EMF in this regard. In addition, the Member States' constitutions take a view on the economic sovereignty of Member States' parliaments that may preclude their willingness to agree on the establishment of the EMF. These features are significant not only ex post judicial reviews through CJEU and national courts, but also in the time of the adoption of the measure. This is because of the procedural requirements of the flexibility clause. The application of the flexibility clause requires the unanimity of the Council, and the Council representatives are not likely to agree on issues that are in breach of their national constitutions.

6 CONCLUSIONS

The financial crisis revealed the need for financial assistance mechanism in the euro area. The regime has evolved and the current stability mechanism providing financial assistance to the euro area Member States, the ESM, is more structured than the early financial assistance arrangements. The incorporation of the ESM into the Union legal framework has been under debate for over a year. The Union authorities have clearly stated that the transfer is desired, and, according to these authorities, the development of the EU and the EMU requires it. The Commission gave its proposal for a Council Regulation on the issue 6 December 2017 and the legislative process remains open in the time of writing. The Commission suggests the establishment of the EMF through secondary law through application of the flexibility clause. However, there has been concerns related to the proposed form of the establishment.

The focus of the thesis has been on the establishment of the EMF and the proposed legal basis of it. The research question of the thesis, whether the current flexibility clause, Article 352 TFEU can serve as legal basis for the establishment of the EMF, is sought to answer through analysing the context of the proposed EMF, including the institutional changes proposed and the constitutional features of the Union and Member States. The thesis has examined possible legal problems for the flexibility clause to serve as legal basis for the establishment of the EMF. The approach to the research question is constitutional: On the one hand, the thesis examines

the EU constitution and possible problems arising from it to the establishment of the EMF as proposed. On the other hand, the issue is approached through the constitutional laws of Member States.

To sum up, the thesis has examined the regime of the financial assistance mechanisms, the EU's constitution, the wording of the article 352 TFEU and Member States' constitutional features. The main findings of the thesis are related to these perspectives. The findings of the study, as reviewed next one by one, include different features that effect on the establishment of the EMF. The findings consist on individual factors that may prevent the application of the flexibility clause in the establishment of the EMF.

The examination of the financial assistance regime, and especially the differences between the ESM and EMF, reveals that the proposed EMF is in many ways equivalent with the ESM. However, there are also distinctions. These distinctions include changes to the decision-making process. The change to reinforced qualified majority instead of unanimity in the decisions concerning the granting of financial assistance may occur problematic to some Member States.

As found in the evaluation of the constitutional features of the EU, these features affect the application of the flexibility clause for the establishment of the EMF. These effects culminate in the question of competence. It is possible that the Union does not have competence to establish the EMF as proposed. The most important feature in the evaluation of the boundaries of the competence in regards the establishment of the EMF is the principle of conferral, which stipulates that the Union only has the competence that the Member States have conferred to it. This applies as well to the flexibility clause. The thesis founds that as the Union competence is divided into categories based on the Union's competence to act in certain policy fields, the categorization of the EMF is necessary. The category of competence informs whether the Union can act in that specific policy area under which the establishment of the EMF falls within. The EMF falls within the economic policy, and it is not straightforward that the Union holds the needed competence in that policy field. In the area of economic policy, the Member States coordinate their economic policies. Also, the principle of subsidiarity affects the establishment of the EMF as it is a constitutional principle of the Union and requirement of the application of the flexibility clause. However, it is not straightforward whether the principle of subsidiarity requires the comparison of the proposed action and the current stability mechanism, or whether it simply requires the comparison of the current mechanism into national solutions.

The study finds that after the changed phrasing of the flexibility clause the actual recourse to the clause has been minor. Therefore, the application of the flexibility clause for the establishment of the EMF would, in a way, be change of course. Also, the thesis founds that the conditions set by the flexibility clause are not all easily met in the establishment of the EMF. These conditions are laid in article 352 TFEU. The flexibility clause itself, under linguistic interpretation, limits the application, and these limitations may reveal problems to the application in the establishment of the EMF. The flexibility clause's wording can be understood as a test for the application of the clause. Under these conditions, the Treaties have not provided the necessary powers to take the measure, the measure must be within the framework of the policies of the Union and the measure is necessary to attain one of the objectives of the Union determined in the Treaties. The most problematic issues relate to the second and third conditions.

According to the findings of the thesis the problems related to the second condition of the flexibility clause may be that severe that they exclude the application of the clause for the establishment of the EMF. The problems in the fulfilment of the second condition, that the measure must be within the framework of the Union policies, relates to the Court's case law and the requirements found in the case law. Under the case law, the application of the flexibility clause in a manner that would widen the general framework of the Treaties is excluded. The proposed regulation is not necessarily within the framework of the Union policies as the EMF would be binding and under economic policy area, under which only Member States coordinate their economic policies. Also, the establishment of the EMF would possibly change the general Union framework as it establishes new Union agency that has constitutionally a significant role.

The thesis finds that there are some problems in the issue related to the third condition of the flexibility clause as well. As for fulfilment of the third condition, that and the measure is necessary to attain one of the objectives of the Union determined in the Treaties, it is not straightforward whether the EMF's objective, financial stability, is a Union objective under the Treaties. The Treaties do not state it as objective. Financial stability can be Union objective if it is implied in the general objectives of the Union. Financial stability is deeply interconnected with the objectives, but it is not straightforward whether it is an objective. Besides the financial stability being objective, the third condition requires necessity. The existence of functioning ESM may mean that it is not necessary to establish EMF. The relevant question is rather whether the transfer to the Union legal system is necessary than whether the financial assistance

mechanism is necessary at all. The necessity of the transfer is not straightforward, either. It is not an easy task to measure whether the financial stability is not sufficiently attained. There have not been claims of errors in the functioning of the ESM. As the EMF would be significantly similar with the ESM and there would not be changes to the system, it is not straightforward that the Union action would add new value on the regime.

In addition, the thesis finds that the Member States' constitutional considerations may pose problems to the establishment of the EMF. As the justification of the Union competence comes from the Member States' constitutions, the statements of constitutional actors have a significant role in the determination whether the establishment of the EMF would be under the conferred powers. The practical significance relates, also, to the procedural requirement in the flexibility clause. The application of the flexibility clause requires that the Council is unanimous. Therefore, all Council representatives from all Member States must agree on taking the measure. The problems relate to the doctrine of *kompetenz-kompetenz* and sovereignty in the area of economic policy. Under the doctrine of *kompetenz-kompetenz* the self-conferral of the Union is prohibited and the Member States' authorities have claimed that they hold authority to determine the boundaries of the competence they have attributed. The constitutions of Finland and Germany are used as examples. As for Germany, the problematics for the establishment of the EMF through applying the flexibility clause relates to the constitutional identity of Germany, whereas for Finland the same problematics are phrased into concerns of retaining the parliament's budgetary sovereignty. As the examples used in the thesis are limited mainly to Germany and Finland, and the other Member States are left outside of the examination, the findings reflect the constitutions of these two Member States. Other constitutional features may be found when different Member States are studied.

The overall conclusion of the thesis is that the application of the flexibility clause for the establishment of the EMF is not problem-free. The answer to the research question, whether the article 352 TFEU can serve as legal basis for the establishment of the EMF, is negative in the light of the findings in this study. As the thesis recognizes several obstacles to the application of the flexibility clause in the establishment of the EMF, it is not likely that the EMF is established prior overcoming these obstacles. However, it must be noticed that the different problems related to the application of the clause have different importance depending on the point of view.

Some of these possible obstacles for the application of the flexibility clause in the establishment of the EMF found in the thesis can be more easily overcome than others. This depends partly on the significance of the obstacle. Fundamental and constitutional problems are more difficult to overcome than problems posed by technical aspects. However, the technical aspects often relate to the more significant aspects. For example, the decision-making in the proposed EMF and the principle of sovereignty of the Member States are related. The voting rules of the proposed EMF would possibly hinder the sovereignty of Member States. It is easier to change the voting rules than the constitutional principle of the sovereignty.

The legislative procedure of the proposal is unfinished. The next steps in the process is the discussion and the possible establishment of the Council regulation. As examined, it is not straightforward that the Council can accomplish unanimity in the issue. If the unanimity is accomplished, and the Council adapts the measure, the next step is the approval by the European Parliament. These next steps are excepted in mid-2019.

The study is the limited number of the Member States' constitutions evaluated. The examples used in the thesis, the constitutions of Finland and Germany, does not reflect the constitutions of all Member States. By the evaluation of other Member States and their constitutions could provide additional information for the constitutional requirements rising from national constitutions. Also, the other examples could offer more in-depth knowledge for the issue.

The thesis leaves some questions unanswered. The most important questions for the future relate to the need for the detailed analysis of the necessity of the establishment of the EMF. As the thesis only named the possible obstacles of the application of the flexibility clause, the detailed analysis could provide more information about the actual need for the EMF. Firstly, the evaluation of the applicability of the flexibility clause in this matter requires the economic analysis of the state of financial stability and the crisis preparedness of the current mechanism compared with the proposed EMF. Secondly, the evaluation of the necessity of the EMF compared with the ESM needs to go more in detail. This evaluation could, among other things, study the credibility of the current system. If there are lacks in the credibility, the EMF, provided that it improves the credibility, could prove itself as necessary.

Some of the open questions that remain open relate to the status of the proposal as the opening of the legislative process. The possible outcome in the debate has importance broadly and some of the open questions get answered during the debate. The future will show whether the debate

leads to the more specific determination of the boundaries of the Union competence. As the thesis has been shown, the boundaries of the Union competence are vague especially in the area of economic policy. This interconnects with the determination of the status of the financial stability among the Union objectives. It is possible that during the debate about the establishment of the EMF these boundaries get clearer in context of the financial stability. Also, the debate may have implications for the determination of the flexibility clause's role in the future. As the article 352 TFEU has been applied only for minor legislative acts, the establishment of the EMF as proposed would be, in a way, change of course. The possible establishment of the EMF by applying the flexibility clause directs the future applications of the flexibility clause. The possible establishment of the EMF would, also, guide the future integration of the EMU. The possible application of the flexibility clause and the future case law testing the legality of the application of the flexibility clause in the matter determine the roles of the financial stability and the economic policy in the post-financial crisis framework.