

## Article

### The amendment of the European Stability Mechanism



**Andreu Olesti-Rayó**

Professor of Public International Law at the University of Barcelona. His main field of specialization is in European Union Law. Bachelor and PhD in Law (1991). Bachelor in Economics (1986) and Law (1985). He is currently the Director of the Department of Criminal Law and Criminal Science and Public International Law and International Relations at the University of Barcelona. Director of PROJECT: EUROFUTURUM – PGC1028-094489-B100 and the Consolidated Group: DIDUE- 2017 SGR1371 Mail: [olesti@ub.edu](mailto:olesti@ub.edu)

Received 10 September 2021, Accepted 27 September 2021

KEYWORDS:

European Union,  
Economic and  
Monetary Union,  
European Stability  
Mechanism,  
European Monetary  
Fund, Banking  
Union, Single  
Resolution Fund

ABSTRACT:

The depth of the economic crisis that began in 2008 led to financial stabilization instruments in the European Union (EU). After a period of transience and provisionally, the European Stabilization Mechanism (ESM) allowed the Economic and Monetary Union (EMU) countries to consolidate a permanent financial assistance fund. In 2017, the Commission proposed revising the ESM to revoke its international organizational character and transform it into an EU agency included in the EU's institutional structure. The strong opposition of some Member States (MS) has avoided this possibility. The ESM Treaty has been revised and signed by the Eurozone states and maintains its intergovernmental nature. In any case, some new functions have been added, including its establishment as the Single Resolution Fund (SRF) backstop facility only in case of extreme need and when its liquidity is insufficient. Creating this support to the SRF is essential for consolidating the Banking Union.

PALABRAS CLAVES:

Unión Económica y Monetaria, Mecanismo Europeo de Estabilidad, Fondo Monetario Europeo, Unión Bancaria, Fondo Único de Resolución

RESUMEN:

La profundidad de la crisis económica iniciada en el año 2008 condujo a la creación de instrumentos de estabilización financiera en el ámbito de la Unión Europea (UE). Tras un período de transitoriedad y provisionalidad, el establecimiento del Mecanismo Europeo de Estabilización (MEDE) permitió la consolidación de un fondo permanente de asistencia financiera los países de la Unión Económica y Monetaria (UEM). En 2017, la Comisión propuso la revisión del MEDE con la intención de revocar su carácter de organización internacional y transformarlo en una agencia de la UE incluida dentro de la estructura institucional de la UE. La oposición decidida de algunos Estados miembros ha evitado esta posibilidad. El Tratado constitutivo del MEDE ha sido revisado y firmado por los Estados de la Eurozona y mantiene su naturaleza intergubernamental. De todas formas, se ha aprovechado la ocasión para ampliar sus funciones, entre las que se destaca su constitución como el instrumento de último recurso del Fondo Único de Resolución (FUR) sólo en caso de extrema necesidad y cuando su liquidez no fuera suficiente. La creación de este apoyo al FUR es considerado una condición esencial para consolidar la Unión Bancaria.

MOTS CLES :

Union économique et monétaire, Mécanisme européen de stabilité, Fonds monétaire européen, Union bancaire, Fonds de résolution unique

RESUME :

La profondeur de la crise économique qui a débuté en 2008 a conduit à la création d'instruments de stabilisation financière au sein de l'Union européenne (UE). Après une période transitoire et provisoire, la mise en place du Mécanisme européen de stabilisation (MES) a permis la consolidation d'un fonds permanent d'assistance financière aux pays de l'Union économique et monétaire (UEM). En 2017, la Commission a proposé la révision du MES dans le but de lui retirer son caractère d'organisation internationale et de le transformer en une agence de l'UE incluse dans la structure institutionnelle de l'UE. Une opposition chez de certains États membres a empêché cette possibilité. Alors le traité instituant le MES a été revu et signé par les États de la zone euro et conserve son caractère intergouvernemental. En tout cas, cela aura été le moyen d'élargir ses fonctions, y compris celle de la constitution qui n'imposera le fonds de résolution unique (FRU) qu'en tant qu'instrument de dernier recours en cas d'extrême nécessité et lorsque la liquidité n'est pas suffisante. La création de ce soutien au FRU est considérée comme une condition essentielle à la consolidation de l'Union bancaire.

CREATIVE COMMONS  
LICENSE

This work is licensed under a Creative Commons Attribution 4.0 International License.

CONTENTS:

**1 Introduction; 2 The need to create a European stabilization mechanism; 2.1 The adoption of the ESM Treaty and its compatibility with the founding Treaties; 2.2 The organizational structure and financing instruments; 3 The amendment of the Treaty establishing the European Stability Mechanism.; 3.1 The European Commission's proposal to create a European Monetary Fund; 3.2 The most significant adjustments to the Treaty amending the European Stabilization Mechanism; 4 Final considerations and reflections; 5 Bibliography**

## 1 INTRODUCTION

The financial crisis that began in 2008 highlighted some of the main structural weaknesses in European monetary integration. One of the characteristic elements of the situation was the interconnection between financial difficulties and sovereign debt problems. Although the origin was in the financial sector, it gradually spread to other economic sectors.

The shortcomings in the construction and development of the Economic and Monetary Union (EMU) have prevented the European Union (EU) from adopting an appropriate and flexible response to the severe consequences of crises. EMU was initially built based on a monetary union with decentralized fiscal policies and no accurate coordination of MS' macroeconomic policies, with a central instrument, the European Central Bank (ECB), whose main objective was to avoid inflationary pressures

The tools to ensure the viability of monetary Union were set up, on the one hand, through the creation of the Stability and Growth Pact (SGP), aimed at ensuring the sustainability of public finances. On the other hand, the institutionalization of the no-bailout rule implies that budgetary decisions are the sole responsibility of states, ruling out the possibility that the whole of EMU will assume the public debt of a Eurozone country.

However, reality showed that this set of rules was not enough to ensure the financial stability of the Eurozone in times of crisis. In this situation, the paralysis of the interbank markets led to a problem that affected the structural components of EMU. The banking crisis made it difficult when it obstructed the financing of the real economy, and the states agreed on instruments to help banks in trouble, which caused their public debt to increase exponentially and worsen its quality.

In this sense, developments have revealed that the EU in general and members of EMU lack the appropriate tools to prevent the crisis. Moreover, once immersed in the problem, the Union also did not have the necessary financial assistance devices to prevent the situation's aftermath from spreading to the whole Eurozone and did not have the sufficient agility required for a true monetary union to provide the necessary assistance to states in difficulty.

In other words, the development of sovereign debt crises highlights the need for a resolution and management mechanism that could alleviate the profound socio-economic consequences of emergencies.

## 2 THE NEED TO CREATE A EUROPEAN STABILIZATION MECHANISM

The economic crisis that began in 2008 led the MS of the European Union to adopt various corrective or palliative measures that, until the first months of 2012, had the common feature of being temporary and not necessarily homogeneous.

The first Eurozone country to suffer from the sovereign debt crisis was the Hellenic Republic. In the absence of a crisis management mechanism, the Eurozone states decided to provide financial assistance to Greece on 2 May 2010 through bilateral loans worth 80 billion euros. This sum was complemented by additional aid from the International Monetary Fund (IMF) of a maximum amount of 30 billion euros, which raised the sum of the bailout to 110 billion euros. Financial assistance was conditional on Greece implementing an economic adjustment program negotiated by the Greek Government with the Commission, the ECB, and the IMF.

As market pressure continued, Eurozone countries took a further step by establishing a 500 billion euros financial mechanism in the Council meeting on 10 May 2010, joined by 250 billion euros committed by the IMF for Eurozone countries with funding problems. Two elements constituted the instrument.

The first component was the European Financial Stabilization Mechanism (EFSM), set up by Council Regulation 407/2010 of 11 May 2010 and adopted on Article 122.2 TFEU. EFSM allows the Union to assist an MS with difficulties if these are caused by natural disasters or exceptional occurrences, which that State has not been able to control. Regulation 407/2010 considers the global financial crisis an extraordinary situation as provided for in Article 122.2 TFEU. It, therefore, enables the possibility of granting, under strict conditionality, loans or lines of credit to the MS in difficulty until the maximum limit of 60 billion euros.

The European Financial Stability Facility (EFSF) was the second element. EFSF was a special-purpose instrument established by agreement between the Eurozone members and with the capacity to guarantee pro-rata loans for up to 440 billion euros. In June 2010, the euro area members signed the Framework Agreement of the EFSF. They became the shareholders of a public limited company incorporated in Luxembourg called "European Financial Stability Facility Société Anonyme". The EFSF Framework Agreement entered into force on 4 August 2010 and provided for its liquidation on 30 June 2013.

The facility's function consisted, essentially, of granting loans to Eurozone states with financial difficulties, with the endorsement of the Eurozone members, which were, at the same time, shareholders of the EFSF. This entity was financed in the international capital market with the support of the guarantees conferred by the shareholders. In return for the aid, the beneficiaries accepted a program of economic and budgetary adjustments to reduce the public deficit and ensure debt sustainability ([Pastor Palomar, 2014, p. 297-298](#)). In principle, it had a complementary character to the EFSM, and, unlike the latter, it was created without a legal basis in the founding Treaties. Nevertheless, essential functions were reserved for the European Commission within the framework of applying the instruments designed in the EFSF ([Carrera Hernández, 2020, p. 17](#)).

Regarding the participation of the IMF, the discrepancies and the internal debate that its participation caused should be pointed out. On the one hand, it was argued that generalized acceptance would imply a failure of the EMU. It would reduce the credibility of the Union on the international stage; on the other, the IMF's intervention was justified on the grounds of the Commission's lack of experience in the design, management, and implementation of economic adjustment programs, and the ability of the European institutions to force countries to implement policies was doubted ([Casanova Domenech & Millet Soler, 2019, p. 161-163](#)). In fact, and since its participation in the first rescue of the Hellenic Republic, the IMF took part in the instruments and operations to deal with the financial crises in Greece, Portugal, Ireland, and Cyprus ([Pisani-Ferry, Sapir & Wolffeu, 2013, p. 53-99](#)). It also participated in the situation in Spain. However, it did not provide funds but instead supervised, together with the European Union, compliance with the conditionality provided for in the financial aid program, especially in providing technical assistance in the reform of the financial sector ([Pisani-Ferry, Sapir & Wolffeu, 2013, p. 5](#)).

## 2.1 THE ADOPTION OF THE ESM TREATY AND ITS COMPATIBILITY WITH THE FOUNDING TREATIES

The persistence of the crisis led to the creation of the European Stability Mechanism (ESM) through an international treaty concluded by, at that time, the 17 MS of the Eurozone; on 2 February 2012, entered into force on 27 September 2012. The ESM, which replaced the EFSF, is an international organization based in Luxembourg. Since 1 July 2013 represents the only instrument granting financial assistance to Eurozone countries with difficulties to capitalize autonomously.

The birth of the ESM was not without problems, and among the most relevant, the need to make the instrument compatible with the so-called no-bailout clause. Indeed, article 125.1 TFEU prohibits the Union and its member states from assuming economic

commitments by one of them, regardless of the national authority responsible for meeting them. It prevents the assumption of States debt by the Union or the rest of the EMU members.

In this context, the European Council adopted on 25 March 2011, Decision 2011/199, which inserted in the TFEU a new provision according to which the EMU countries instituted a stability mechanism that would be activated when it was essential to safeguard the strength of the Eurozone<sup>1</sup>. This new provision, article 136.3 TFEU, affirms that granting all necessary financial assistance under the mechanism will be subject to strict conditionality.

The modification operated through the European Council Decision was challenged before the Supreme Court of Ireland, which formulated several preliminary questions before the CJEU. Thus, the Irish parliamentarian Mr. Pringle argued that using the simplified revision procedure provided in article 48.6 TEU was contrary to the primary law. According to the applicant, the Decision scope implied a competence alteration incompatible with the provisions of the founding Treaties relating to the functioning of the EMU. Furthermore, Mr. Pringle invoked that Ireland, expressing its consent to be bound by the ESM, would assume obligations incompatible with the founding Treaties, insofar as the formerly contained provisions contrary to the latter on economic and monetary policy.

The CJEU judgment of 27 November 2012 determined the validity of Decision 2011/199 and the compatibility of the ESM with EU law<sup>2</sup>.

The Court affirmed that the vehicle allowed by the European Council Decision did not invade the exclusive competence of the Union in matters of monetary policy. It was a complementary aspect of the new regulatory framework for strengthening the economic governance of the Union, and, ultimately, it was an instrument included in the field of economic policy. The CJEU asserted that the primary purpose of the Union's monetary policy is to maintain price stability. At the same time, the ESM seeks to fulfill a different goal: to preserve the euro area's solidity. The mere fact that this economic policy measure may have indirect repercussions on the euro's stability does not allow it to be associated with a monetary policy measure. The ESM does not aim to maintain price stability but instead seeks to meet the financing needs of its members. ESM must cover the granting of assistance with the capital that its shareholders have disbursed or through the issuance of financial instruments. It is not authorized to promote conventional monetary policy measures such as setting interest rates or issuing currency.

In this sense, the ESM constitutes a complementary aspect of the new regulatory framework for strengthening the economic governance of the Union. This framework establishes closer coordination and supervision of the financial and budgetary policies developed by the MS and seeks to consolidate macroeconomic firmness and the viability of public finances. From this perspective, the ESM is a complementary instrument, a corrective mechanism, which comes into play when coordination measures fail ([Martínez Mata, 2013, p. 89](#)).

Regarding the compatibility of the ESM Treaty with EU Law, the Court declares that the purpose of the non-rescue clause, mentioned previously, and contemplated in article 125 TFEU, does not consist in prohibiting any financial assistance in favor of an MS. The provision aims to encourage MS to preserve budgetary discipline that allows, in turn, maintaining the financial solidity of the EMU. Thus, there is room for financial assistance mechanisms compatible with this clause, provided they are essential to safeguard that

---

<sup>1</sup> European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, OJ L 91, 6.4.2011.

<sup>2</sup> Judgment of the Court (Full Court) of 27 November 2012, Pringle, C-370/12, ECLI: EU:C:2012:756

"higher objective", which is the financial stability of the euro area as a whole. The clause tries to ensure that the MS observe a healthy budgetary policy, certifying that, when they incur in debts, they remain subject to the logic of the market. Therefore, it does not prohibit granting one or more States financial assistance to a member who remains liable for its commitments vis-à-vis its creditors if the conditionality attached to such service is appropriate. In this context, the clause would not prohibit all financial aid, but only that which implies the direct assumption of the debts of said State.

In any case, if the amendment scope of article 136 TFEU had as its objective the creation of a tool such as the ESM, it would not have been necessary. The necessity of a prior modification of the TFEU to establish a permanent instrument capable of providing financial support to the MS was a German condition required to constitute a solid foundation in the original law on which to cement the mechanism (Barysch, 2010, p. 2).

Setting up the ESM as an international organization rather than an EU agency is linked to the previous background. ESM was founded as the "natural successor" to the EFSF, which had an intergovernmental character. Likewise, it has been justified that the large number of funds necessary to finance the ESM, in the absence of EU budgetary resources, caused the reluctance of EU states, not members of the Eurozone, to assume financial contributions and associated risks (De Witte & Beukers, 2013, p. 813). In any case, the delay in the subsequent text approval and the urgencies derived from the crisis consequences led the States to use the intergovernmental procedure to create the ESM (Hinojosa Martínez, 2014, p. 234-235).

## 2.2 THE ORGANIZATIONAL STRUCTURE AND FINANCING INSTRUMENTS

The members of the ESM are currently 19 Eurozone states. Each of them contributes to the capital of the ESM, to a total of more than 704 billion euros<sup>3</sup>. The responsibility of each participant is limited to its part of the subscribed capital stock. The contribution to the capital of the ESM determines the decision-making capacity of the countries, given that the number of voting rights attributed is equal to the number of shares each member has subscribed to the authorized capital of the ESM (art. 4 ESM Treaty). Thus, Germany has the highest percentage of the vote, with 26.96%, followed by France with 20.74%, Italy with 17.79%, and Spain with 11.82%. The countries with the lowest vote percentage are Malta with 0.07%, Estonia, 0.18%, and Cyprus, 0.19%.

In this regard, the German Constitutional Court determined the need, in its judgment of 12 September 2012, to exclude the risks of possible liability for Germany over 190 billion euros of its contribution to the share capital of the ESM. It forced the adoption of an interpretative declaration to the ESM Treaty to guarantee that no additional state contributions would be made to the ESM. Indeed, the German Constitutional Court (GCC) imposed several conditions for its ratification. Accordingly, the German Parliament should approve future ESM bailouts individually. GCC also stipulated that Germany must attach an interpretative statement to its treaty ratification instrument stating that its liability is limited to 190 billion euros unless the German Parliament approves an increase and that the confidentiality of the information provided by the ESM will not prevent the German Parliament from being informed about the functioning of the ESM<sup>4</sup>.

---

<sup>3</sup> Each country contributes to the proportions set in Annex I and Annex II to the ESM Treaty. The participation band ranges from the 511 million that Malta contributes to the 190 billion euros that the Federal Republic of Germany allocates.

<sup>4</sup> The Judgement can be consulted at following web page: [https://www.bundesverfassungsgericht.d/entscheidungen/rs20120912\\_2bvr\\_139012.html](https://www.bundesverfassungsgericht.d/entscheidungen/rs20120912_2bvr_139012.html)



### 2.2.1 Financial assistance

The main objective of the ESM is to mobilize funds and provide support for the stability of its members under strict conditionality when they experience or are at risk of experiencing severe financing problems (art. 3 ESM Treaty).

A varied set of mechanisms are foreseen to carry out its assistance activity. The most outstanding is granting loans to countries with difficulties accessing the capital market and recapitalizing financial entities (both already used by the ESM during the financial crisis). Together with them, there is the possibility of acquiring bonds in primary and secondary debt markets and providing financial assistance to the States, on a preventive basis, in the form of credit lines. In all cases, the host country is obliged either to assume a program that includes economic restructuring measures through a macroeconomic adjustment program or to satisfy eligibility conditions, which may affect fundamental rights, circumstances that provoke resistance in the affected countries (Donaire Villa, 2018, p. 18-28).

As has been said, granting financial assistance is subject to strict conditionality in all cases. The terms are specified in a Memorandum of Understanding (MoU) negotiated between the MS that has requested the aid and the European Commission. MoU must be fully compatible with the economic policy coordination measures provided for in the TFEU. With the prior approval of the Board of Governors, the European Commission will sign the MoU on behalf of the ESM. In coordination with the ECB and the IMF, it will ensure compliance with the conditionality of the financial assistance instrument. In short, financial stability and conditionality appear as two elements of the ESM and any assistance program adopted under it (Urbaneja Cillán, 2019, p. 96).

Since it entered into force, the ESM has acted on three occasions providing liquidity to Spain, Cyprus, and the Hellenic Republic, in 2015, within the framework of the third financial assistance program<sup>5</sup>.

In the Spanish case, the financial sector's recapitalization aid was agreed upon during the validity of the EFSF. The signing of the financial assistance agreement was concluded between the EFSF and Spain. On 25 June 2012, the Spanish Government requested external aid in restructuring and recapitalizing financial institutions. It was the first time that financial assistance was granted to an MS, with a clear and restrictive mandate to recapitalize the financial sector (Corti Varela, 2015, p. 125). The request for aid was registered under the terms of financial assistance by the EFSF, which would provide it until the ESM was available, at which point the latter would take responsibility<sup>6</sup>.

The assistance activity has undergone significant changes because of the crisis caused by Covid-19. Eurogroup, at its meeting of 9 April 2020, agreed to make available to the States a line of loans, called Pandemic Crisis Support (PCS) through the ESM, aimed at backing and reinforcing the financial stability of the members of the Eurozone<sup>7</sup>.

The design and characteristics of the aid were defined at the Eurogroup meeting held on 8 May and implemented by the ESM Board of Governors<sup>8</sup>. The type of intervention chosen consists of granting loans on a preventive basis to guarantee their financing. The ESM Treaty

---

<sup>5</sup> Details on the participation of the ESM in the Hellenic and Cypriot financial assistance can be found on the following websites: <https://www.esm.europa.eu/assistance/greece> and <https://www.esm.europa.eu/assistance/cyprus>

<sup>6</sup> Memorandum of Understanding on Financial Sector Policy conditions, made in Brussels and Madrid on 23 July 2012, and Financial Assistance Framework Agreement, made in Madrid and Luxembourg on 24 July 2012, BOE no. 296, of 10.12.2012.

<sup>7</sup> The press release of the meeting can be consulted on the following website: <https://www.consilium.europa.eu/en/press/press-releases/2020/04/09/report-on-the-comprehensive-economic-policy-response-to-the-covid-19-pandemic/>

<sup>8</sup> The press release of the meeting can be consulted on the following website: <https://www.consilium.europa.eu/es/press/press-releases/2020/05/08/eurogroup-statement-on-the-pandemic-crisis-support/>

provides two kinds of precautionary credit lines, the conditional precautionary lines of credit, addressed to the MS with a healthy economy and respecting the PEC criteria; and the credit lines with reinforced conditionality if the State does not meet the requirements in its entirety, but its economy can be considered healthy (arts. 13 and 14 ESM Treaty). As we will have the opportunity to examine in the next section, the access conditions have been subject to substantial changes in the revised ESM Treaty.

About the covid-19 crisis, the second modality has been selected. The volume of aid planned would initially comprise a sum equivalent to 2% of the State's GDP in 2019, approximately 240 billion euros, of which about 25,000 million would be destined for Spain. Nevertheless, it could be adjusted depending on the severity of the pandemic and its economic consequences. The period to request the credit line ends in December 2022. Like all credit, it must be repaid, within a specified period, with a maximum term of 10 years, at a discounted interest rate lower than that set in the market. Specifically, the requesting country should pay a margin of 10 basis points (0.1%) annually, a single initial service fee of 25 basis points (0.25%), and an annual service of 0.5 basis points (0.05 %) ([Urbaneja Cillán, 2021, p. 80](#)).

This instrument is constituted with a finalist character. It is aimed at helping to cover the expenses in medical care services. The responses related to prevention and treatment were addressed to reduce the pandemic's consequences, which have occurred since February 2020. In principle, and unlike the rest of the ESM interventions, the beneficiaries would not be subject to the fulfillment of strict economic conditions. The requesting country will only be bound to dedicate the amount to financing the pandemic response plan that it elaborates with the ESM and the Commission and justifies the request for the loan ([Markakis, 2020, p. 373](#)). There is no macroeconomic adjustment plan, and the standard surveillance system envisaged within the framework of the European Semester will be applied ([Carrera Hernández, 2020, p. 21](#)). In this sense, the Commission has established that aid supervision must be proportionate to the nature of the health, social, and economic difficulties caused by the pandemic<sup>9</sup>.

However, no country in the Eurozone has requested a justified credit line in this program. Aside from reputational issues, the absence of candidates may be because Eurozone MS can access financing in ways more attractive, like the ECB's debt purchase program and other loans and grants provided by the EU ([Guttenberg, 2020, p. 2](#)).

In effect, through its Decision 2020/440, the ECB approved, in March 2020, a temporary program for the purchase of assets of the States affected by the pandemic, known as the "PEPP" (Pandemic Emergency Purchase Program). PEPP authorizes central banks of the Eurozone the purchase assets for a maximum value of 750 billion euros, which has been increased to 1,850 billion<sup>10</sup>. Likewise, other programs such as SURE, with 100 billion euros, and especially the Next Generation EU program, which with 750 billion euros, provide financing in the form of loans and grants that are more interesting to States.

## 2.2.2 The organic structure

ESM has the following organization: the Board of Governors, the Board of Directors, and an Executive Director.

The Board of Governors comprises a government representative from the MS responsible for financial matters. It is chaired either by the Eurogroup President or by one of

---

<sup>9</sup> The conditions can be consulted on the following web page: <https://www.consilium.europa.eu/media/44011/20200508-pcs-term-sheet-final.pdf>

<sup>10</sup> Decision 2020/440 of the European Central Bank of 24 March 2020 on a temporary pandemic emergency purchase program, OJ L 91, 25.3.2020.



the Governors elected for two years. By a qualified majority, the Board of Governors takes the decision; this is 80% of the votes expressed by the MS. Since 13 January 2018, the President has been Mr. Mario Centeno, President of the Eurogroup.

The Commissioner for Economic and Monetary Affairs, the President of the ECB, and the President of the Eurogroup if he is not President or Governor participate as observers. Occasionally, representatives of other international organizations (such as the IMF) or the EU states who are not EMU members but participate in the ESM may participate in an operation to assist a specific member of the Eurozone (art. 5 ESM Treaty).

The Board of Directors composition reproduces that of the Board of Governors, each of the latter being the ones who must appoint an administrator and an alternate representing each MS. Administrators are selected from among highly competent persons in economic and financial matters, and their mandate is revocable at any time (art. 6 ESM Treaty). Finally, the Board of Governors elects the Executive Director for five years, renewable for one term. He must have the nationality of an MS, adequate international experience, and a high level of competence in the economic and financial field. He is responsible, among other functions, for presiding over the meetings of the Board of Directors and participates in the Board of Governors. He is the legal representative of the ESM and manages the current affairs of the institution under the direction of the Board of Directors (art. 7 ESM Treaty). The Executive Director is Klaus Regling, a German national who has served as Executive Director of the EFSF.

Finally, an Auditors Committee is also envisaged, made up of five members of recognized competence in auditing and financial matters, including two representatives of the supreme audit bodies of the MS and one of the European Court of Auditors. The tasks assigned to him consist of carrying out independent audits, inspecting the accounts of the ESM, and verifying that the income statement and balance sheet are correct (art. 30 ESM Treaty).

Regarding controversies, an arbitration clause is foreseen favoring the CJEU. In the first instance, when a dispute on interpretation or application of the ESM Treaty arises, the decision corresponds to the Council of Governors. The latter will decide on disputes among ESM members and between members and the ESM concerning the Treaty interpretation and application, including any dispute on compatibility decisions taken by the ESM with its founding Treaty. If a member of the ESM appeals the decision, the matter will be submitted, in a second instance, to the CJEU, whose judgment will be binding on the parties involved in the dispute, who must adopt the necessary measures to comply with it (art. 37 ESM Treaty).

In any event, the Court will not assess the conformity of the conduct of the ESM or its Treaty with EU law, which constitutes further confirmation of the ESM's autonomy from that legal order ([Bianco, 2015, p. 467](#)).

The Board of Governors and the Board of Directors adopt decisions by mutual agreement, a qualified majority, or a simple majority. Previously, it must reach for each vote, a quorum of two-thirds of the number of members with voting rights. The adoption of a decision by the joint agreement will require the members' unanimity in the vote, though abstentions do not prevent the adoption of a decision. Approving a decision by a qualified majority requires 80% of the votes cast while, in urgent cases, the qualified majority rises to 85% of the votes cast (art. 4 ESM Treaty). MS votes, as mentioned previously, are weighted and correspond to the number of shares of the capital subscribed<sup>11</sup>.

---

<sup>11</sup> Art. 5.6 ESM Treaty indicates the decision-making areas where the unanimity of the Governing Council is required to adopt certain decisions. By way of illustration, the approval of a financial assistance instrument for a Member State in difficulties, the modification of the list of financial assistance instruments available to the ESM, or the approval of applications for membership of the ESM.

### 3 THE AMENDMENT OF THE TREATY ESTABLISHING THE EUROPEAN STABILITY MECHANISM.

#### 3.1 THE EUROPEAN COMMISSION'S PROPOSAL TO CREATE A EUROPEAN MONETARY FUND

On 6 December 2017, the Commission approved the proposal to establish a European Monetary Fund (EMF) launched from the transformation of the ESM<sup>12</sup>. The EMF would succeed him and assume his rights and obligations. It would be integrated into the institutional framework of the EU and transformed into an EU body with its legal personality and subject to its operating rules. The mutation of the organization should take place from an agreement of the MS participating in the EMU where the capital of the ESM would be transferred to the new EMF.

The legal basis used would be based on Article 352 TFEU, the same legal basis that would be used to extend, in the future, new functions to the EMF. As stated by the Commission in the explanatory memorandum of the proposal, this action would be necessary to preserve the financial stability of the euro, and the founding Treaties do not provide any other legal basis for the EU to achieve this objective. This proposal would be complemented by the possibility of an international agreement between the Eurozone participants to transfer funds from the ESM to the EMF.

The future EMF would assume the functions entrusted to the ESM, and new tasks would be assigned. In this sense, it could constitute a standard protection mechanism for the Single Resolution Fund (SRF) within the Banking Union. The SRF would be activated when the available resources were insufficient to face a financial institution restructuring. This resource should be fiscally neutral to the extent that any disbursement made to a financial institution would be recovered in the medium term<sup>13</sup>.

The Commission proposal contained, from a substantive point of view, essential innovations compared to the original ESM Treaty. First, the EMF would safeguard the euro area's financial stability and of the participating MS. At the same time, the current ESM Treaty only speaks of a necessary intervention to protect the euro area's financial stability as a whole and of its MS. The deletion of the reference to "the whole" of the euro area would allow intervention in a crisis affecting a specific country without a systemic emergency involving the entire Eurozone. Second, the EMF would operate in favor of the banking system in two ways: a direct recapitalization of credit institutions and granting lines of credit or guarantees in favor of the Single Resolution Board (Megliani, 2020, p. 678-679). As we will have the opportunity to examine in the next section, a large part of the innovations suggested in the Commission's proposal are reflected in the revised ESM Treaty.

The incorporation of the EMF into the organizational structure of the EU, as we shall see, was quickly discarded. According to the Commission's proposal for a regulation, the EMF would be responsible to the European Parliament and the Council for executing its functions. Incidentally, the EMF should present an annual report on its activity to the Commission, the Council, and the European Parliament. Furthermore, the European Parliament could ask the Executive Director of the EMF, who would be obliged to reply orally or in writing. As a result, the acts of the EMF should be consistent with the EU Treaties and the EU Charter of Fundamental Rights and could be challenged before the CJEU.

In this sense, it is worth recalling the case-law of the CJEU, where various situations related to the actions of the ESM have been ruled. In the Mallis case, the Court stated that,

---

<sup>12</sup> Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 final of 6.12.2017.

<sup>13</sup> Statute of the European Monetary Fund, Annex to the Proposal for a Council Regulation on the establishment of the European Monetary Fund, COM (2017) 827 final of 6.12.2017.

although the Eurogroup approved the conditionality associated with the rescue of the Cypriot banking system approved by the Board of Governors of the ESM, this endorsement could not constitute a basis for annulment. Eurogroup was an informal body, and it was not an EU institution because it was not among the different Council formations and its acts were not binding but merely informative<sup>14</sup>. While in *Ledra*, the CJEU reiterated that the granting of assistance to Cyprus by the ESM was an international act beyond the domain of EU law. The Court underlined that in this process, the Commission has the task of ensuring consistency of the decision of the ESM with the EU legislation, and this circumstance could imply an action for damages, even though the burden of proof would be difficult to substantiate<sup>15</sup>.

As progress has been made, the negotiations within the Council quickly raised the difficulty of modifying the legal nature of the ESM. Consequently, it soon became apparent that it was impossible to achieve unanimity from the Council as required by Article 352 of the TFEU. Indeed, on 6 March 2018, a group of MS under the initiative known as the New Hanseatic League openly expressed against the deepening and communitarization of EMU<sup>16</sup>.

This initiative was established in February 2018 when the finance ministers of Denmark, Estonia, Finland, Ireland, Latvia, Lithuania, the Netherlands, and Sweden signed a founding document writing down the opinions and values shared in the debate on the architecture of the EMU<sup>17</sup>. Among the ideas shared, it was pointed out that any measure aimed at deepening the instruments of the Eurozone should emphasize the real added value that the proposals provide and not on the transfer of powers from MS to the EU. Specifically, about the reform of the ESM, it was indicated that the ESM should be strengthened, although decision-making should remain firmly in the hands of the MS. The importance of maintaining the intergovernmental structure and preserving the voting rules in force was also stressed. Likewise, creating the credit line that will support the SRF was advocated<sup>18</sup>.

This position has been preserved throughout the negotiating process, in such a way that on 8 November 2018, the States participating in the initiative of the New Hanseatic League issued a specific statement concerning the ESM. In this document, they support the establishment of a strengthened ESM. If it remains intergovernmental, that is, the Commission proposal is rejected. In addition, regarding the granting of financial assistance, some requirements were defined that had to be satisfied for a State to benefit from financial aid, such as guaranteeing debt sustainability, verifying the borrower's ability to pay, and introducing collective action clauses (CAC) of a single member. The CAC allows a qualified majority of debtors to agree to a debt restructuring that is legally binding on all bondholders, including those who vote against the restructuring<sup>19</sup>.

At the meeting of the Heads of State and Government of the Eurozone countries held in December 2018, it was decided that the ESM would retain its intergovernmental nature,

---

<sup>14</sup> Judgment of the Court (Full Court) of 20 September 2016, *Mallis et al/European Commission, European Central Bank*, C-105-109/15 P, ECLI: EU:C:2016:702.

<sup>15</sup> Judgment of the Court (Full Court) of 20 September 2016, *Ledra Advert Ltd et al/ European Commission, European Central Bank*, C-8-10/15, ECLI: EU:C 2016:701.

<sup>16</sup> The statement can be consulted on the following web page <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-integration-of-the-esm-into-eu-law-by-creating-an-emf/03-2021>

<sup>17</sup> It has been stated that the emergence of initiatives of these characteristics appears, in part, as a consequence of Brexit, which introduces a new dynamic in European politics by changing the coalition logic between the EU Member States. The loss of a powerful ally pushes smaller and relatively affluent states like the Nordics to express their preferences more audibly (SCHULZ, 2020, 415-416).

<sup>18</sup> The document can be consulted on the following website: <https://www.government.se/statements/2018/11/shared-views-of-the-finance-ministers-from-the-czech-republic-denmark-estonia-finland-ireland-latvia-lithuania-the-netherlands-sweden-and-slovakia-on-the-esm-reform>

<sup>19</sup> <https://www.europarl.europa.eu/legislative-train/theme-an-economy-that-works-for-people/file-integration-of-the-esm-into-eu-law-by-creating-an-emf/12-2020>

closing the possibility of its transformation into an EU body. Nevertheless, the option of including within its provisions a protection function that could face the possible shortcomings of the SRF was maintained<sup>20</sup>. In this sense, at its meeting on 13 June 2019, Eurogroup reached a political agreement on a proposal to revise the ESM Treaty. It includes, among others, the stipulation of a common mechanism for budgetary protection in the face of future tools for budgetary protection against bank resolutions and the establishment of cooperation tools between the Commission and the ESM. However, some technical details had to be specified<sup>21</sup>. On 4 December 2019, the Eurogroup, in its ECOFIN format, accepted the complete reform of the ESM Treaty<sup>22</sup>.

Despite the political agreement on the content of the review, the Italian Government was reluctant to sign the deal because of the controversy between the coalition members that formed the so-called Conte II Government on the compromise reached. (GALLI, 2020, 263-264). Final consensus on the entire amendment Treaty reached on 30 November 2020<sup>23</sup>.

The reform came to a halt in early 2020 because Italy opposed a specific aspect of the review: the obligation to introduce so-called single-member collective action clauses (CACs) that would procedurally facilitate a debt restructuring of a single country (Galli, 2020, p. 266-267). CACs allow a large majority of bondholders to agree to a debt restructuring that is legally binding on all creditors, including those who vote against the restructuring. The purpose of this possibility is to enable the restructuring of the debt of an ESM member if its debt burden is unsustainable and its ability to pay is questionable.

The impact of these clauses on the dynamics of sovereign guaranteed loans is not easy to predict because, on the one hand, it avoids discrimination between creditors that may form a blocking minority and creditors that are not. On the other hand, it opens the door to possible abuses against minority holders. It must be borne in mind that sovereign bonds are in the hands of a wide range of resolving subjects (commercial banks, investment banks, central banks, pension funds, vulture funds, retail investors). Retail investors pursue investment objectives that differ from institutional investors and are less able to cover losses in the event of a restructuring (Megliani, 2021, p. 85).

In any case, the revised ESM Treaty contains the commitment to introduce the CAC that provides for the aggregate vote of a single member for the year 2022. The legal modalities for its implementation will be agreed upon in the Economic and Financial Committee, considering the constitutional requirements determined by MS in such a way as to ensure that the legal impact is identical in all members (recital 11 Preamble of ESM Treaty).

Finally, on 27 January and 8 February 2021, the ESM countries signed the Agreement amending the ESM Treaty. The Agreement provides a legal basis for new tasks assigned to the ESM. The revised Treaty will be in force, foreseeably, during the year 2022, once the 19 members of ESM express their consent.

The ESM reform is a consequence of the institution's evolution during the last years. In part, stimulated by the recognition of importance and experience it has acquired in managing assistance programs. Its purpose has been to continue with the ESM position as a

---

<sup>20</sup> Declaration of the Euro Summit of 14 December 2018, Doc. EURO 503/18.

<sup>21</sup> The text of the proposed revision of the ESM Treaty can be consulted on the following website: <https://www.consilium.europa.eu/media/39772/revise-sm-treaty-2.pdf>

<sup>22</sup> The document can be consulted on the following web page: <https://www.consilium.europa.eu/en/meetings/eurogroup/2019/12/04/>

<sup>23</sup> The final text of the agreement amending the Treaty establishing the European Stability Mechanism can be consulted at the following electronic address: <https://www.consilium.europa.eu/media/47294/sn04244-en19.pdf>

crisis resolution mechanism in the euro area and to improve the financial instruments that are part of the set of actions of the ESM ([Aerts & Bizarro, 2020, p. 160](#)).

### 3.2 THE MOST SIGNIFICANT ADJUSTMENTS TO THE TREATY AMENDING THE EUROPEAN STABILIZATION MECHANISM

#### 3.2.1 The backstop facility to the Single Resolution Fund

On 15 July 2014, through Regulation 806/2014 of the European Parliament and of the Council, the Single Resolution Mechanism (SRM) was created. SRM is a uniform procedure for the resolution of credit institutions subject to the Single Supervisory Mechanism (SSM)<sup>24</sup>. A single authority that avoids possible divergent interpretations of its provisions controls it. This authority is the Single Resolution Board (SRB), which, since 1 January 2015, has been constituted as an EU agency with legal personality and with a specific structure per its functions (art. 42 Regulation 806/2014).

The Single Supervisory Mechanism (SSM) was established on 15 October 2013, through Council Regulation 1024/2013<sup>25</sup>. SSM is an entity made up of the ECB and the national supervisory authorities entrusted with inspecting credit institutions in the Eurozone. It is not a federation of national supervisors or a college of supervisors since the ECB is ultimately responsible for its operation. Consequently, it is granted a set of powers ([López Escudero, 2014, p. 197](#)).

Regulation 1024/2013 attributes to the ECB specific powers and functions to supervise the credit institutions of the States participating in the Monetary Union to contribute to the security, solidity, and stability of the financial system in the EU. SSM does not include the financial system as a whole. It embraces credit institutions at the individual level and extends to the supervision of financial holding companies and mixed financial companies, excluding insurance companies. In principle, it is an instrument destined primarily at the countries of the Eurozone, but it is flexible. It can be extended to any member of the EU, regardless of its currency, if it maintains "close cooperation" between its competent authorities and the ECB<sup>26</sup>. Supervision is dual since the ECB only supervises the so-called "significant entities" (whose characteristics are described in article 6.4 of Regulation 1024/2013). The corresponding competent national authority (CNA) supervises those that do not have this quality. The ECB focuses on those considered more systemically essential or meet certain conditions.

In May 2014, the European Parliament and the Council adopted Directive 2014/59, which determines the rules and procedures for the rescue and resolution entities in the financial system<sup>27</sup>. The purpose is to harmonize the national laws that regulate the rescue and resolution of credit and investment entities. The underlying issue is that banking entities have enjoyed a particular resolution mechanism, far removed from the general principles of liquidation. The fundamental differential element has consisted in the fact that the authorities of the MS have injected taxpayers' money into the entities in crisis, which has

---

<sup>24</sup> Regulation n° 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation n° 1093/2010, OJ L 225, 30.7.2014.

<sup>25</sup> Council Regulation n° 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, OJ L 287, 29.10.2013.

<sup>26</sup> 2014/434/EU: Decision of the European Central Bank of 31 January 2014 on the close cooperation with the national competent authorities of participating Member States whose currency is not the euro (ECB/2014/5), OJ L 198, 5.7.2014.

<sup>27</sup> Directive of the European Parliament and of the Council 2014/59 of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891, and Directives 2001/24, 2002/47, 2004/25, 2005/56, 2007/36, 2011/35, 2012/30 and 2013/36, and Regulations n° 1093/2010 and n° 648/2012, of the European Parliament and of the Council, OJ L 173, 12.6.2014.



made it possible to safeguard part of the liabilities. However, it has been at the cost of putting the stability of the public sector at risk.

Directive 2014/59 harmonizes national rules on bank resolution and provides for cooperation between the national authorities of the MS. It gives them ordinary powers and instruments to deal with bank resolution processes. Still, it leaves them with a relatively wide margin of discretion, susceptible to divergent decisions between national authorities. This harmonizing framework is insufficient for countries whose credit institutions are supervised within the framework of the SSM. In the same way that a specific and unique supervisory instrument has been adopted for all critical financial institutions, they needed a particular resolution mechanism that allows the centralized application of Directive 2014/59 by a single authority.

Regulation 806/2014, as we have mentioned, creates a uniform procedure for the resolution of credit institutions subject to the SSM by a single authority, the SRB, which avoids possible divergent interpretations of its provisions. With the SRM, Regulation 806/2014 also creates a Single Resolution Fund (SRF) that helps finance the cost of resolutions if entities in crisis cannot cover their losses.

The financing and operating rules of the SRF are excluded from the EU sphere. MS have opted to conclude an international treaty, the Agreement on the Transfer and Mutualization of contributions to the SRF, signed on 21 May 2014 and entered into force on 1 January 2016. This intergovernmental option responds to pragmatic approaches, which react to the need to guarantee, without obstacles, the creation and operation of SRF. Some States were very concerned about the possibility that their constitutional authorities could rule against the Regulation governing the SRM and the SRF if it included the possibility of pooling banking risks and facilitating an interstate transfer of resources. The alternative of an ordinary review of the TFEU was risky and with little chance of success given the express refusal of two members ([De Gregorio Merino, 2015, p. 7-8](#)).

SRF is endowed with approximately 55,000 million euros, which is the volume of resources equivalent to 1% of the number of guaranteed deposits of all authorized credit institutions in all participating MS, which must be collected progressively until 2024 and financed through contributions made by credit institutions that are subject to the SSM. From the beginning, the allocated amount was considered manifestly insufficient if the euro area were to be the object of a banking crisis affecting several critical financial institutions. The reason pursued with the constitution of the SRF is more to guarantee the system's financial stability than not to absorb losses or provide capital to financial entities in a resolution situation ([Busch, 2015, p. 298](#)).

About this issue, it became necessary to define a budgetary protection mechanism that would act in case of extreme need and when the liquidity of the SRF was not sufficient. It would be used as a last resort and would mean a temporary pooling of the possible risk. In principle, MS agree on the relevance of its existence and its advisability as a medium-term neutral budgetary instrument since beneficiary entities would have an obligation to repay the borrowed funds they had used. In fact, in October 2017, the Commission emphasized that the protection mechanism had to be of adequate size, quick to activate, and neutral from a budgetary point of view for being operational in banking crises. There should be no room for national considerations or segmentation in its implementation. The financial and institutional architecture should ensure full effectiveness in achieving the objectives of the backstop<sup>28</sup>.

The main aim of this protection mechanism, according to the Commission, would be to inspire confidence in the banking system by strengthening the credibility of the measures

---

<sup>28</sup> Reflection paper on the deepening of the economic and monetary Union, COM (2017) 291 final of 31.5. 2017.



taken by the SRB. It would only be activated as a last resort instrument if the SRF's immediately available resources were insufficient for capital or liquidity purposes<sup>29</sup>.

The funder will be the revised ESM. The support mechanism will take the form of a revolving line of credit, under which the ESM will be able to grant loans to the SRB. The loans granted will enjoy the status of preferred creditor, subordinated only to IMF loans. The size of the credit line has been initially set at 68 billion euros. This nominal limit assumes that the amount available for backup must always be equal to or less than the nominal limit. In any case, the Board of Governors may, by mutual agreement, review and adjust the sum of money<sup>30</sup>.

The backstop will be introduced in 2024 but may be available sooner, provided banks make enough progress in reducing their risk exposure. The Agreement on the transfer and mutualization of contributions to SRF, negotiated in parallel with establishing an EU resolution framework, has also been amended to include the backstop facility to the SRF<sup>31</sup>.

The amended ESM Treaty foresees that support will be available only to the extent that the current resolution framework remains in the present terms of reference, establishes a complex decision-making process, and provides for the establishment of an early warning system so that the ESM can guarantee timely receipt of disbursed funds. The SRB articulates the decision to request SRF backing according to a procedure consisting of two phases. First, the Executive Director proposes the support based on the request of the SRB, and the Board of Governors decides the opportunity to grant a support mechanism that covers all the uses of the SRM. In the second stage, the Board of Governors determines the financial terms of the facility, including the nominal ceiling and its possible adjustments, as well as the provisions on the procedure for verifying compliance with the required conditions and other demands related to its operation.

The financial support's detailed financial terms and conditions will be specified in an agreement with the SRB, which will be approved by the Board of Directors by mutual agreement and signed by the Executive Director (art. 18 A.1 and 5 ESM Amended Treaty). The Board of Directors may decide by mutual agreement to delegate this task to the Executive Director. The decision to activate the financial support instrument must be taken within 12 hours after the request made by the SRB; in the case of a particularly complex resolution operation, it can take up to 24 hours (Dias & Zoppè, 2021, p. 9).

There is an additional provision for an emergency voting procedure if the European Commission and the ECB conclude in separate assessments that the failure to adopt a decision urgently by the Board of Directors on loans and disbursements under the support would threaten the economic and financial sustainability of the euro area (art. 18 A.6 ESM Amended Treaty).

This decision will be adopted under the criteria outlined in Annex IV of the amended ESM Treaty. Among those criteria, its character of last resort and the neutral taxation of the instrument in the medium term stand out, which implies that the SRF repays the loan with money from bank contributions within three years. This period can be extended for another two years (Dias & Zoppè, 2021, p. 8).

---

<sup>29</sup> *Towards the completion of the Banking Union*, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic, and Social Committee and the Committee of the Regions, COM (2015) 587 final de of 24.11.2015, p. 15.

<sup>30</sup> Board of Governors Draft resolution for the nominal cap and the provisions on the procedure for verifying compliance with the condition of the permanence of the legal framework for bank resolution. El documento se puede consultar en la siguiente página web: <https://www.consilium.europa.eu/media/41669/20191206-draft-bog-resolution-1-nominal-cap.pdf>

<sup>31</sup> The agreement amending the agreement on the transfer and mutualization of contributions to the Single Resolution Fund can be consulted on the following website: <https://www.consilium.europa.eu/media/47292/sn01616-en20-002.pdf>

In any case, unlike the current instruments of the ESM, by providing support to the SRF, the revised ESM will financially support an entity of the EU, and not a State, since, as we have mentioned, the SRB is an agency of the EU ([Aerts & Bizarro, 2020, p. 164](#)). In exchange, the amended ESM Treaty provides that this support will be carried out, without prejudice to the legislation of the European Union and the powers of the institutions and bodies of the European Union, and always as a last resort and to the extent that it is fiscally neutral in the medium term (art. 12.1a ESM Amended Treaty). The underlying intention of this provision is to avoid a possible infringement of EU law.

### 3.2.2 Instruments and procedure to support the financial stability of the ESM Member States

Under the original ESM Treaty, precautionary financial assistance can take two forms: a preventive conditional credit line (PCCL); or an enhanced conditions credit line (ECCL). The conditionality attached to them will be detailed in a memorandum of understanding. Article 14 of the ESM Treaty does not determine substantial differences between the two instruments and entrusts the Board of Directors with adopting guidelines on the modalities of implementation of the precautionary financial aid (in particular, on the eligibility criteria and the procedures to be followed). The guidelines establish the conditions under which an MS can apply to one instrument. Access to both tools is reserved for the MS where the economic and financial situation remains healthy. ECCL is open to ESM members who do not fully meet the eligibility criteria for the PCCL and are, therefore, in "worse" economic and financial conditions ([Dias & Zoppè, 2021, p. 5](#)).

The modification of the ESM Treaty has reformed this situation clarifying the eligibility criteria and the conditions for making one or another instrument available (art. 14 and Annex III ESM Amended Treaty). In general terms, the requirements for access to the PCCL have been tightened since the amended Treaty requires that the beneficiary not be subject to an excessive deficit procedure, nor should it experience excessive macroeconomic imbalances. The ESM guidelines applicable to the original ESM Treaty require respect for the SGP or the recommendations of the Council adopted within the framework of an excessive deficit procedure and respect for the commitments acquired within the framework of the excessive imbalance procedure ([Markakis, 2020, p. 367](#)).

On the other hand, from another perspective, access to assistance can be considered more rigorous and objective, as is the case of the criteria related to the tension in the financial markets. The ESM guidelines applied to the original ESM Treaty require that the requesting State not have bank solvency problems that could pose systemic threats to the stability of the euro area financial system. In the amended ESM Treaty, it is only required that the banking sector of the requesting State does not have serious vulnerabilities that put its financial stability at risk ([Dias & Zoppè, 2021, p. 6](#)).

In return, access to a PCCL would not require an MoU detailing the conditionality but rather a letter of intent highlighting the political will of the MS. The President of the Board of Governors will entrust the European Commission with assessing whether the political intentions included in the letter of intent are entirely consistent with the economic policy coordination measures provided for in the TFEU. In particular, with any act of European Union legislation, including any opinion, warning, recommendation, or decision addressed to the member of the ESM in question (art. 14.2 ESM Amended Treaty).

The surveillance procedure is modified, and it is specified that both the Executive Director, who did not participate in surveillance in the original ESM Treaty, and the European Commission, in contact with the ECB, jointly and, whenever possible, also together with the IMF, will be in charge of supervising compliance with the conditionality attached to the financial assistance mechanism. (art. 13.7 ESM Amended Treaty).

These instances will prepare a report verifying the continuous respect of the eligibility criteria (PCCL) or the conditions fulfillment of the policy established in the MoU (ECCL). Suppose the report concludes that the ESM member in question continues to respect the eligibility criteria for the PCCL or meets the conditionality attached to the ECCL. In that case, the credit line will be maintained. However, if it determines that the ESM participant no longer respects the eligibility criteria of the PCCL or does not comply with the conditionality attached to the ECCL, access to the credit line will be suspended, unless the Board of Directors decides, by mutual agreement, to manage the line of credit. If the ESM member has already obtained funds, an additional margin will apply; unless the Board of Directors assesses based on the report that the non-compliance is due to events beyond the control of the assisted State. Nonetheless, if the line of credit is not maintained, another form of financial assistance may be requested and granted following the applicable rules under the ESM Treaty (art. 14.5 to 14.7 ESM Amended Treaty). The possibility of increasing the margin or maintaining precautionary aid even though the conditions have not been met are assumptions not contemplated in the original ESM Treaty ([Markakis, 2020, p. 368](#)).

### 3.2.3 Independence and accountability: the relevance of the Executive Director

The changes brought about in the ESM Treaty are intended to broaden and clarify the ESM mandate about its participation in economic governance in the euro area in general and in particular vis-à-vis the Commission. This function is reinforced in the amended ESM Treaty. It is added to the initial task of mobilizing financing and providing support for the States' financial solidity of the Eurozone. The Executive Director will be able to monitor and assess ESM members' macroeconomic and financial situation, including the sustainability of its public debt, and carry out analysis of relevant information and data. To this end, he will work with the European Commission and the ECB to ensure complete consistency with the economic policy coordination framework provided for in the TFEU (art. 3 ESM Amended Treaty).

The amended ESM Treaty gives a clear mandate to the Executive Director to assess the debt sustainability of MS. It offers an explicit legal basis for cooperation between the European Commission and the Executive Director, inside and outside financial assistance. It clarifies that the ESM should not coordinate economic policies among the ESM member, for which the Union legislation provides the necessary provisions ([Dias & Zoppè, 2021, p. 2](#)).

The close cooperation between the European Commission and the ESM, represented by its Executive Director, is institutionalized through a memorandum, subject to the approval of the Board of Directors by mutual agreement (art. 13.8 ESM Amended Treaty). From this perspective, the European Commission ensures consistency with European Union legislation, particularly with the economic policy coordination framework. At the same time, the ESM performs its analysis and evaluation from a lender's perspective (recital 5B Preamble ESM Amended Treaty).

In addition, the revised ESM Treaty provides that actions by the ECB or the Commission under the ESM Treaty commit only the ESM (recital 10 Preamble ESM Amended Treaty). In addition, it is warned that the European Commission will ensure that the financial assistance operations provided by the ESM are, where appropriate, compatible with European Union law and, in particular, with the coordination measures of the economic policy provided for in the TFEU (art. 12.4 ESM Amended Treaty).

The amended Treaty also modifies the procedure for granting aid for financial stability, where the involvement of the Executive Director acquires a relevance that was not contemplated in the original ESM Treaty. Its activity has acquired a prevalence in the procedure for granting financial assistance. When a State addresses a request for financial aid, the President of the Board of Governors will entrust both the Executive Director and the

European Commission in contact with the ECB to carry out specific tasks jointly. These include assessing the existence of a risk to the euro area's financial stability as a whole or its MS, evaluating the actual or potential financing needs of the ESM Member concerned, and considering whether the public debt is sustainable and whether the financial stability assistance amount can be repaid. This evaluation will be performed transparently and predictably, allowing a sufficient margin of judgment. Such an assessment is expected to be carried out in conjunction with the IMF whenever appropriate and possible (art. 13.1 ESM Amended Treaty).

If the collaboration does not lead to a common opinion, the European Commission will perform the general evaluation of the sustainability of the public debt. At the same time, the ESM will evaluate the capacity of the State in question to repay the ESM (recital 11 B Preamble ESM Amended Treaty).

Likewise, based on the evaluations mentioned above, the Executive Director will propose to the Board of Governors granting financial assistance through one of the instruments provided for that purpose (art. 13.2 ESM Amended Treaty). Furthermore, the Board of Governors will entrust the Executive Director and the European Commission, in collaboration with the ECB, jointly and, when possible, together with the IMF, with the task to negotiate, with the ESM member in question, an MoU including the conditionality attached to the financial assistance. Unlike the original ESM Treaty, the European Commission and the Executive Director will sign the MoU on behalf of the ESM (art. 13.3 y 13.4 ESM Amended Treaty). Together with the IMF, they will supervise compliance with the conditionality attached to the financial assistance mechanism (art. 13.7 ESM Amended Treaty).

#### 4 FINAL CONSIDERATIONS AND REFLECTIONS

The duration and persistence of the sovereign debt crisis led to creating a permanent instrument that would grant financial assistance to the countries of the Eurozone that had problems financing themselves autonomously. The creation and articulation of the ESM were not without problems. Due to its need to make its existence compatible with the provisions of the founding Treaties. As an international organization outside the system of agencies of the European Union, its nature does not prevent some European institutions, such as the Commission and the ECB, from having an impact highly relevant in the functioning of the ESM.

The revision of the ESM Treaty was initially proposed as an instrument that would transform the international organization of the ESM into an EMF, whose legal nature would be that of an EU agency with its legal personality, thereby including the future EMF within the institutional setting of the EU. EMF was driven by allowing the ESM acts to be accountable to the Commission, the Council, and the European Parliament and auditable by the CJEU. It quickly became plausible that such a transformation was impossible given the explicit and robust opposition of a significant group of MS. In any case, the aspiration to establish, in the future, an EMF: has not perished; it is like an underground stream, and it can emerge again, this time taking on a nature similar to that of the European Investment Bank (EIB) ([Megliani, 2020, p. 685](#)).

Likewise, the amendment of the ESM made it possible to add new functionalities and improve the financial assistance instruments and their operation. Among the new functions, the constitution of the ESM stands out as the SRF's instrument of last resort. The creation of this SRF facility is considered an essential condition to consolidate one of the pillars of the Banking Union.

In addition, it must be pointed out the clarification and precision of the criteria that must be met to access the different instruments, where the role of the Managing Director of

ESM has been reinforced. In any case, the governance system remains practically intact, and the improvement in the accountability of the ESM has been minimal. From this perspective, the amended ESM Treaty can be seen as a missed opportunity for a more comprehensive reform of the ESM.

Along these lines, one aspect to consider is the reputational cost of the financial assistance granted by the ESM acquired during the most severe years of the economic and financial crisis derived from the sovereign debt. The ESM, regardless of its welfare activity, lacks reputational prestige and has become so politically expensive that it will be used only in extreme circumstances when it is too late, and there are no possible alternatives. An example is the financial program adopted by the ESM in the context of the consequences derived from the Covid-19 crisis. Despite the favorable conditions, no States have applied for the loans offered by the ESM; other less expensive options, not only from the economic point of view but also politically, have been preferred.

## 5 BIBLIOGRAPHY

- Aerts, Jasper & Bizarro, Pedro, (2020). "The reform of the European Stability Mechanism", *Capital Markets Law Journal*, 15(2), 159-174.
- Bianco, Giuseppe, (2015), "EU Financial Stability Mechanisms: Few certainties, many lingering doubts", *European Business Law Review*, 26(3), 451-472.
- Barysch, Katinka, (2010). Why Berlin won't back down on euro reform, *Centre for European Reform, Brief Note*, November 2010.
- Busch, Danny, (2015). Governance of the single resolution mechanism, In Busch, Danny & Ferrarini, Guido (editors), *European Banking Union*, Oxford University Press, 281-335.
- Carrera Hernández, F. Jesús, (2020). Del Mecanismo Europeo de Estabilidad (MEDE) al nuevo Mecanismo de Reconstrucción y Resiliencia (MRR). ¿Ha sido necesaria una pandemia para reforzar la solidaridad? *Revista Española de Derecho Europeo*, 75, 9-54.
- Casanova Domenech, Miriam & Millet Soler, Montserrat (2019). El Fondo Monetario Europeo como sustituto del Fondo Monetario Internacional: Constatación jurídica y causas. In OLESTI RAYO, A (coord), *La profundización de la Unión Económica y Monetaria*, Marcial Pons, 151-168.
- Corti Varela, Justo, (2015). Direct recapitalization of Banks and sovereign debt: The ESM direct recapitalization instrument and its impact on sovereign debt. In Hinojosa-Martinez, Luis; Beneyto, José Maria, *European Banking Union*, Wolters Kluwer, 121-135.
- De Gregorio Merino, Alberto, (2015). The intergovernmental method as source of democratic legitimacy of the economic and monetary union: a critical view. In Garzón Clariana, Gregorio (editor), *La democràcia en la nueva governança econòmica de la Unió Europea*, Marcial Pons-Universitat Autònoma de Barcelona, 61-84.
- De Witte, Bruno & Beukers, Thomas, (2013). The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle, *Common Market Law Review*, 50 (3), 805–848.
- Dias, Cristina & Zoppè, Alice (2021). *The proposed amendments to the Treaty establishing the European Stability Mechanism*, Directorate-General for Internal Policies PE 634.357 - January 2021
- Donaire Villa, Francisco Javier, (2018). ¿Los derechos en serio en la Eurozona? Los recortes, las condicionales, la Carta y el Tribunal de Justicia. *Revista de Derecho Constitucional Europeo*, 29, 15-53.
- Galli, Giampaolo, (2020). The reform of the ESM and why it is so controversial in Italy, *Capital Markets Law Journal*, 15, 262-276.
- Guttenberg, Lucas, (2020). Time to come home. If the ESM is to stay relevant, it should be reinvented inside the EU, *Hertie School. Jacques Delors Centre Policy Brief*, 2020, 12 November
- Hinojosa Martínez, Luis Miguel, (2014). La compatibilidad del mecanismo europeo de estabilidad con el derecho europeo: jurisprudencia para tiempos de crisis. In Liñán Nogueras, Diego, J.; Segura Serrano, Antonio & García I Segura, Caterina (coord), *Las crisis políticas y económicas: nuevos escenarios internacionales*, Tecnos, 212-240.
- López Escudero, Manuel (2014). La Unión Bancaria en la Unión Europea: un tortuoso camino para un gran avance, In Liñán Nogueras, Diego J; Segura Serrano, Antonio & García I Segura, Caterina (coord), *Las crisis políticas y económicas: Nuevos escenarios Internacionales*, Tecnos, 186-211.

- Martínez Mata, Yolanda (2013). El Mecanismo Europeo de Estabilidad: Complemento de los instrumentos de coordinación de las políticas económicas de los Estados miembros de la zona Euro. In Olesti Rayo, A (coord) *Crisis y coordinación de políticas económicas en la Unión Europea*, Marcial Pons-Centre d'Estudis Internacionals, 75-89.
- Markakis, Menelaos, (2020). The reform of the European Stability Mechanism: process, substance, and the pandemic, *Legal Issues of Economic Integration*, 47(4), 359-384.
- Megliani, Mauro, (2021). Single-limb Collective Action Clauses and the European Stability Mechanism Reform, *European Business Law Review*, 32(1), 77-92.
- Megliani, Mauro, (2020). From the European Stability Mechanism to the European Monetary Fund: There and back again, *German Law Journal*, 21, 674-685.
- Pastor Palomar, Antonio, (2014). El Derecho internacional en los mecanismos de rescate financiero en la zona euro. In Aldecoa Luzárraga, Francisco; Fernández Liesa, Carlos R. & Abad Castelos, Montserrat (dir) *Gobernanza y reforma internacional tras la crisis financiera y económica de la Unión Europea*, Marcial Pons, 285-310.
- Pisani-Ferry, Jean; Sapir, André & Wolffeu, Guntram. B (2013). *IMF assistance to euro-area countries: an early assessment*, Bruegel Blueprint Series, Volume XIX.
- Schulz, Daniel F. & Henökl, Thomas (2020). New Alliances in Post-Brexit Europe: Does the New Hanseatic League Revive Nordic Political Cooperation?, *Politics and governance*, 8(4), 409-419.
- Urbaneja Cillán, Jorge, (2021). Los Fondos de la Unión Europea para financiar la recuperación tras la pandemia: su conexión con el desarrollo sostenible y la condicionalidad del Estado de Derecho, In Fernandez Liesa, Carlos & López-Jacoiste Diaz, Eugenia (dir), *Nuevas dimensiones del desarrollo sostenible y derechos económicos, sociales y culturales*, Thomson Reuters, 63-101.
- Urbaneja Cillán, Jorge, (2019). Towards a genuine Economic and Monetary Union: the proposal for a European Monetary Fund. In Hinojosa Martínez, Luis Miguel; Martín Rodríguez, Pablo (dir.), *International Markets Regulation and the Erosion of the European Political and Social Model*, Thomson Reuters Aranzadi, 87-112.