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JUDICIAL REVIEW OF EUROZONE LAW: THE ADJUDICATION OF POSTNATIONAL NORMS IN THE EU COURTS, PLURAL - A CASESTUDY OF THE EUROPEAN STABILITY MECHANISM

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Introduction

Despite its current significance for EU integration and the functioning of world economies and markets, from Cyprus to Washington DC, the "Eurogroup" of EU Member States is not an institution under European Union (EU) law and cannot take legally-binding decisions. It operates outside of Ecofin, the formation of the Ministers of Finance and Economy of the EU Council of Ministers.[1] Euro-zone decision-making seemingly takes place in the margins of the EU Treaties or is not strictly provided for there. While there is little case law on Eurozone law until recently, the Court of Justice of the EU (CJEU) has adopted a narrow view of its judicial role in the (domain of?) EMU law and EMU law has not been the subject of judicial review in the national courts.[2]

However, the limited role for law in this domain has changed dramatically in recent times. The European Stability Mechanism ("ESM") is the latest and most permanent in a series of law and governance mechanisms designed to finally resolve the Eurozone qua EU's financial crisis, purporting to create an EU replica of the International Monetary Fund ("IMF"). Recently enacted law and governance mechanisms perform, cumulatively, a radical rebalancing of powers and functions.[3] Whilst on the one hand, they purport to dramatically decrease Member State fiscal sovereignty through non-conventional non-*communautaire* means, on the other hand, they increase the capacity to protect the Eurozone through funds derived from the Member States themselves, albeit in shares apportioned relative to the size and financial capacity thereof.

The ESM has been subjected to a limited number of direct judicial review challenges in the Member States and also before the Court of Justice, raising many questions concerning adjudication practices and procedures. Yet the mere fact that the ESM has survived this spectrum of adjudication ostensibly reflects as much upon its character as upon the judicial machinery of the EU. Overall, the constitutional form and character of the ESM remains curious and ambivalent and strikingly "postnational."[4]

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1. Snyder, Francis: EMU – Integration and Differentiation: Metaphor for the European Union, in: PAUL CRAIG & GRAINNE DE BURCA, THE EVOLUTION OF EU LAW (Oxford University Press, USA 2nd ed.) (2011) p. 704; see also Snyder, Francis "EMU Revisited: Are we making a constitution? What constitution are we making?" in Craig, Paul & De Burca, Grainne eds, THE EVOLUTION OF EU LAW (Oxford University Press, 1st ed.) (1999).

2. For example, Case C-27/04 *Commission v. Council* [2004] ECR I– 6649.

3. These include the so-called "Six pack," five regulations and a directive on reinforced economic governance, the Treaty on Stability, Coordination and Governance, a so-called "Two-pack"; Single Supervisory Mechanisms, and the predecessors to the ESM, the ESF and ESFM. For a recent overview, see Christian Joerges, "A Crisis of Executive Managerialism in the EU: No Alternative?" (2012) 7 *Maastricht Faculty of Law Working Paper* 20 – 22 and see literature cited in fns. 9 and 11.

4. The term "postnational law" is a largely undefined concept in European legal literature, even in literature deploying it centrally and is used more usually in a descriptive sense to depict law-making beyond the Nation State, without normative definition thereof, albeit without much emphasis upon the place of the nation state in such law-making or its place within transnational constructs: see, for example, Nico Krisch's BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW (Oxford University Press, 2011) or by Neil Walker "Postnational Constitutionalism and Postnational Public Law: A Tale of Two Neologisms" (2012) 3 *Transnational Legal Theory* 61-86. However, contemporary literature on the phenomenon of postnational law is sharply

The account here argues that the adjudication of the ESM is a rich case study of both the role and rule of law in contemporary EU integration. Moreover, the account here contends that it constitutes an example of suboptimal adjudication in the EU courts, plural,[5] rooted in both the esoteric character of EMU law and a rather flawed procedural matrix for judicial review, in the form of the preliminary reference mechanism, pursuant to Article 267 TFEU.

We seek to argue that courts possibly offered a unique forum for participation and contestation for these esoteric mechanisms, which was largely not availed of. [6] Accordingly, in our analysis, firstly, we consider the characterization of the ESM, in light of how it was conceived by its framers. Secondly, we consider what happened when it was assessed by several European courts, national and supranational. Thirdly, we examine the preliminary reference mechanism as the tool that could have facilitated a more participatory and orchestrated judicial response, but did so to a very limited extent. We conclude by considering the reasons why this happened.

I. The Esoteric Legal Character of the ESMT

As to its conception, the ESM had numerous distinctive features as a matter of EU law that suggested it was esoteric. Firstly, it was enacted by way of a parallel agreement by the Member States *outside* of the EU treaties, using the vehicle of public international law: the ESM Treaty ("ESMT")[7] Secondly, it was enacted through the device of a European Council decision to amend the treaties. Thirdly, linking to the second, the decision purported to use the simplified revision procedure to achieve the end result: the ESMT.[8] The explicit reference in the ESMT to Article 273 TFEU jurisdiction of the CJEU self-characterized the ESMT as a "special agreement", further highlighting its esoteric nature.[9] The legal form of the ESMT as a "special agreement" deploying public international law was not beyond the letter of the Treaties or past practices.[10]

Undoubtedly, however, it was as exceptional as it was problematic in a number of ways. First and foremost, it created its own parallel institutional structure outside the EU treaties and borrowed the EU institutions such as the Commission for certain tasks.[11] This enhanced the complexity of the institutional design of the EU and at the same time stayed clear of any control from the European Parliament, the antithesis

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rebuked as EU-centric: Gregory Shaffer "A Transnational Take on Krisch's Pluralist Postnational Law" (2012) 23(2) *European Journal of International Law* 565–582. For a renowned argumentation in favor of transnational government qua postnationalism and arguably the source of contemporary deployment of the term, see Jurgen Habermas THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS (Studies in Contemporary German Social Thought) (MIT Press, 1st ed., 2001).

[5] As our account analyses the totality of the courts in the European Union – both the supranational courts *of* the European Union as well as the national courts (of the Member States) that belong to the judiciary of the European Union *lato sensu*, we chose the nomenclature of "EU courts, plural" to describe the totality.

6. We draw upon the work of Rachel Cichowski THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE (Cambridge University Press, 2007).

7. It was signed by the 17 Member States of the Euro-zone on 2 February 2012 and entered into force on 27 September 2012.

8. European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU), Official Journal (OJ) L91/1.

9. ESMT, Recital 16 of the Preamble.

10. See the analysis of the use of the term "special agreement" in the Fiscal Compact Treaty in Anna Kocherov ed., (Azoulai, Loic; Poiares Pessoa Maduro, Luis Miguel; De Witte, Bruno; Cremona, Marise; Hyvärinen, Anna; Kocharov, Anna; Abdallat, Anwar; Kocharov, Anna), "Another Legal Monster? An EUI debate on the Fiscal Compact Treaty Law" EUI Law Working Paper 2012/09. On past practices deploying such techniques and mechanisms see Bruno De Witte (2011). The European Treaty Amendment for the creation of a financial stability mechanism. European Policy Analysis, 6, 1–8. See also Gregorio Merino de Alberto "Legal Developments in the Economic and Monetary

Union During The Debt Crisis: The Mechanisms of Financial Assistance" *Common Market Law Review* 49: 1613–1646, 2012.

11. The ESMT envisages, *inter alia,* that the Commission will "negotiate, in liaison with the European Central Bank ("ECB") , the economic policy conditionality attached to each financial assistance" under the mandate given by the ESM Board of Governors (Article 5(6)(g)). The Commission shall be entrusted with assessment tasks in the process of granting stability support (Article 13(1)) as well as with negotiating and signing the memoranda of understanding with the ESM member requesting stability support (Article 13(2) and (3)) and then take part in the monitoring of the compliance with the memorandum (Article 13(7)). See also C–370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012, [2012] I-000, nyr, para.56 with regard to the tasks allocated to the Commission and para 157 with regard to tasks allocated to the ECB.

of the EU project post-Lisbon.[12] Secondly, the Heads of State or Government used a variant of simplified Treaty revision procedure, to insert the new third paragraph of Article 136 TFEU. This was seemingly motivated by a desire to avoid referenda in the Member States,[13] albeit legitimizing the new organization and actions taken through the veneer of law. Thirdly, it has been shaped as a tool for international cooperation, yet constructed deliberately beyond the EU Treaties for the moment, until the ESM is integrated into the EU treaties.[14] Last but not least, the ESMT removed the veto power of the smaller euro States by providing that it would enter into force if ratified by States that together would contribute 90% of the funds for the mechanism.[15]

Given that the largest contributor is Germany, contributing 27% of the funds, the reality of the power dynamic of the ESM and its actual functional operation is apparent.[16] This is perhaps best revealed through the position of the Courts, Tribunals and Committees regarding the compatibility of the ESMT with national sovereignty. In a certain number of the challenges to the ESM, sovereignty was considered through the "legitimacy link"[17] ostensibly mediated between National Parliaments and the ESM by the mediation of the Member States' representative in the ESM Board of Governors. However, this link varied substantially between the Member States, given that it depended upon the architecture of the legislative and executive branches and political control thereof, as well as the innate difference between debtor and creditor States of the ESM.[18] More importantly, unanimity in decision-making in the ESM Board of Governors is subject to exceptions and Member States may find themselves de facto and de jure excluded from decision-making in certain circumstances, such as if they are outvoted.[19] Overall, one can say that every possible step and device to construct "postnational" arrangements, conventional or otherwise, has been availed of in this process. The esoteric character of these arrangements is thus further reinforced by its operational impact *upon* the Member States.

The question of judicial review of these arrangements thus raises many questions and challenges for the rule of law. We examine next where and why the ESM was adjudicated, considering three Member States in particular.

II. Adjudication of the ESM in the EU Courts

The ESM was subject to judicial review in three Member States' highest courts: the Supreme Court of Ireland,[20] the Estonian Supreme Court (*Riigikohus*),[21] the German Constitutional Court

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12. Matthias Ruffert "the European Debt Crisis and EU Law" (2011) 48 *Common Market Law Review* 1777; Kaarlo Tuori "The European financial crisis- constitutional aspects and implications" (2012) 28 *EUI Law Working Paper*, p. 36

13. Bruno De Witte, (2012). Treaty revision procedures after Lisbon. In Andrea Biondi, Piet Eeckhout & S. Ripley (Eds.), EU LAW AFTER LISBON (pp. 107–127). Oxford: Oxford University Press; Paul Craig THE LISBON TREATY, LAW, POLITICS AND TREATY REFORM (Oxford University Press, 2010), p. 443–448.

14. See for example the Opinion of the European Central Bank of 17 March 2011 on a draft European Council Decision 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 (CON/2011/24), Official Journal (OJ) C 140/8, paragraph 8; referred to in the *Riigikohus* judgment, recital 220: see fn. 19, above.

15 Article 48 ESMT.

16. See Annex I to the ESMT for the Contribution Key. Spain (ESM Key: 11,9 %), France (20,4%) and Italy (17,9%) are the only other countries with shares large enough to be able to prevent the entry into force pursuant to Article 48.

17. BVerfG judgment recital 270.

18. See for example the *Eduskunta* Grand Committee Statement SuVL 3/2011vp of 2 September 2011 ("Revision of the EFSF and ESM Agreements"), p. 4. The *Riigikohus* referred to the size of Estonia's share and the relevance thereof for parliamentary control over ESM in recital 184. Similarly, see the Finnish Constitutional Law Committee, Report of the Constitutional Law Committee PeVL 5 and 12/2011; see Tuori, supra n. 12 at p. 40. The Irish Supreme Court found the combination of unanimous decision-making in the ESM Board of Governors and the controls of Parliament to suffice as a matter of sovereignty: *Pringle v The Government of Ireland*, [2012] IESC 47, para 17, available at http://courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/e7504392b159245080257a4c00517d6a?OpenDocument&Highlight=0,pringle (last visited Mar 30, 2013). See Miguel Poiares Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice*, (2012), http://cadmus.eui.eu/handle/1814/24295 (last visited Mar 30, 2013), p. 18, on the uncertainty of parliamentary control upon the ESM.

19. See Articles 4(4) and (8). See the BVerfG judgment recital 266.

20. *Pringle v The Government of Ireland*, [2012] IESC 47.

(*Bundesverfassungsgericht*).[22] In addition to that, it was subject of review before the Constitutional Committee of the Finnish Parliament (*Eduskunta*)[23] and the European Union Committee of the House of Lords of the United Kingdom.[24] At the time of writing, judicial review of the ESM was pending in two further Constitutional Courts in Austria and Poland.[25]

Only the Supreme Court of Ireland decided to engage in a formal judicial "dialogue" with the CJEU pursuant to the preliminary reference mechanism. This followed the refusal of the Irish High Court below it to do so, as was within its discretion.[26] The other courts, it seems, did not even consider the possibility of referring questions to the CJEU. In retrospect, the fact that the ESM was subject to several different judicial proceedings in a number of courts and review bodies across the EU implied that its creators, the EU Member States, ran the risk of facing diverging outcomes of these procedures. Given that aspects of domestic procedural rules and litigation strategies varied across the Member States, the judicial review of the ESM would not generate similar outcomes.

For example, the *Riigikohus* ruled on the ESMT itself,[27] the *Bundesverfassungsgericht* reviewed the ratification statutes introducing the ESM into the German legal order adopted by the German legislature, whilst the procedure in the Irish courts was initiated against both the European Council decision as well as the ratification statute of the ESMT itself, the European Communities (Amendment) Act 2012, along with a sovereignty challenge based upon Irish Constitutional law. The CJEU in turn, ruled on the validity of the European Council decision as an EU Act and on the question whether a Eurozone Member State was entitled to enter into and ratify an international agreement such as the ESMT, having regard to primary EU law, generating a tricky question as to the powers of the Court itself and its jurisdiction.[28]

Nevertheless, as the courts' rulings were in formal terms about differing legal norms, numerous "suboptimal" outcomes for judicial review were possible. Firstly, the contested provisions of the legal instruments involved (European Council Decision, the amendments to the treaties, the ESMT, the ratifying statutes) are interconnected. However, the *fundamental basis* of the entire ESM structure was the European Council Decision which provided for a revision of the TFEU through a "simplified" procedure. A finding of invalidity thereof would not have necessarily sent the creators of the ESM back to the drawing board since, in theory, the Decision qua Treaty amendment merely "confirmed" the powers of the Member States to do this. However, it could have called into question the legitimacy of the procedures and instruments used. At the same time, whereas negative outcomes in the *Riigikohus* and in the *Bundesverfassungsgericht* would have prevented (in the German case, temporarily) the respective state parties from ratifying the Treaty, in the specific case of Germany, the largest shareholder, this could possibly have killed off the ESM project.[29]

Secondly, while a Court might have technically ruled on the validity of one legal norm and pronounced on its validity in the operative part of its judgment, it was almost impossible not to transgress or indirectly review connected norms in its reasoning. A striking example of this is found in the judgment of the *Bundesverfassungsgericht*: its decision was formally a ruling on the constitutionality of the German ratification statutes and in substance an appraisal of the legal instruments that the German legislature ratified – the European Council Decision and the ESMT. The complexity of the legal structure of the mechanism meant that

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21. Supreme Court of Estonia, Judgment of the Supreme court *en banc* of 12 July 2012, Case Number 3–4–1–6–12, available at: http://www.riigikohus.ee/?id=1347 (last visited Mar 30, 2013).

22. Federal Constitutional Court, Judgment of the Second Senate of 12 September 2012, Case Number 2 BvR 1390/12, available at: http://www.bundesverfassungsgericht.de/entscheidungen/rs20120912_2bvr139012.html.

23. See Reports of the Constitutional Law Committee PeVL 5/2011 and 12/2011; see Tuori, supra n. 12 at p. 40.

24. European Union Committee - Tenth Report *Amending Article 136 of the Treaty on the Functioning of the European Union* (2011), http://www.publications.parliament.uk/pa/ld201011/ldselect/ldeucom/110/11002.htm.

25. Austrian Constitutional Court began deliberations on ESM Treaty on 20 February 2013, http://www.vfgh.gv.at/cms/vfgh-site/attachments/7/5/8/CH0004/CMS1363699451709/press_release_esm-starting.pdf. As to the Polish proceedings, see http://www.trybunal.gov.pl/OTK/ezd/sprawa_lista_plikow.asp?syg=K%2033/12.

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

27. I. e. Article 4(4) ESMT.

28. C–370/12 *Thomas Pringle v Government of Ireland, Ireland and The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012, [2012] I-000, nyr, para. 28.

29. Susanne Schmidt, *A Sense of Déjà Vu? The FCC's Preliminary European Stability Mechanism Verdict*, 14 GERMAN LAW JOURNAL 1 – 20, 2; Bruce Ackerman & Miguel Maduro, *Broken Bond*, FOREIGN POLICY, Sep. 17, 2012, http://www.foreignpolicy.com/articles/2012/09/17/germany_euro_broken_bond (last visited Mar 30, 2013)

there were several instruments exposed to contestation.

However, the specific reasons why the decisions of the different courts overlapped or varied because of jurisdictional limitations and the like is not, in our opinion, a convincing explanation for the incoherence in the judicial review of the ESM across the States. On the contrary, the adjudication of the ESM can be presented as an argument for a better coordinated system of judicial review in Europe in a context where courts provide a uniquely participatory forum for contestation. The fact that the Irish Supreme Court referred questions concerning the ESMT to the CJEU, which the CJEU engaged in substantive analysis thereof, is proof that the preliminary ruling was an available and, to some extent, also a useful tool in the adjudication of the ESM.

Accordingly, we look next at the character of the ESM through the "lens" of the mechanism of a reference for a preliminary ruling to the CJEU. We consider the structural problem as to why the ESMT was not referred to the CJEU more widely, focusing upon last instance courts and the question of the urgency in the adjudication process.

III. The Meta-Structural Problem: The Preliminary Reference Mechanism as the "Matrix" Link for Judicial Review

The fundamental link between national courts and the CJEU in the EU treaties is the preliminary reference mechanism (Article 267 TFEU) and the CJEU has carefully fostered a balance of roles therein.[30] The interaction between the CJEU and national courts within this device is widely depicted as a very successful dialogue mechanism, which does not reflect the fact that *realpolitik*, it establishes a hierarchy.[31] Article 267 TFEU provides that last instance courts must refer questions to the CJEU in a broad formulation of circumstances, albeit subject to vast exceptions.[32]

However, there are many last instance courts in the EU which, controversially, have never made a preliminary reference to the CJEU, including "specialized" constitutional courts, such as the German *Bundesverfassungsgericht*. The Spanish *Tribunal Constitucional* engaged in its first referral since accession in 2011.[33] Specialized constitutional courts may implicitly or explicitly reduce the extent to which they become part of the decentralized system of adjudication of EU law, creating a structural problem for Article 267 TFEU. They may not perceive themselves as "courts" both in the theoretical sense of the word as well as in the sense of 267 TFEU and they might (generally) hold a stance that EU law cannot contribute to the resolution of questions in their jurisdiction.[34]

Ordinary Supreme Courts, i.e. courts ultimately entrusted with the resolution of disputes involving ordinary legislation, differ again. The Estonian *Riigikohus,* a Supreme Court with express powers of judicial review is regarded as the Court that ignited the "dialogue" of the Estonian judiciary with the CJEU.[35] Karen Alter has previously argued with some notoriety that higher courts tried to prevent lower courts from making references to the CJEU and accepted the *acquis communautaire* only so far as it did not encroach upon their

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30. Franz Mayer, *"The European Constitution and the Courts"* in Armin von Bogdandy PRINCIPLES OF EUROPEAN CONSTITUTIONAL LAW (Hart ; C.H.Beck 2nd rev. ed) (2010) p. 287 – 288; Tom De La Mare & Catherine Donnelly "Preliminary Rulings and EU legal integration: Evolution and *Stasis*" in Paul Craig & Grainne de Burca eds *The Evolution of EU law* (OUP, 2nd ed. 2011) Ch. 13. Grainne De Burca & Joseph Weiler eds THE EUROPEAN COURT OF JUSTICE (Oxford University Press, 2011); Alan Dashwood & Aengus Johnston THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION (Hart, 2001); Philip Allott "Preliminary rulings - another infant disease" (2000) 25(2) *European Law Review* 538.

31. See the account of Joseph HH Weiler, "Deciphering the Political and Legal DNA of European Integration" in Julie Dickson & Pavlos Eleftheriadis eds PHILOSOPHICAL FOUNDATIONS OF EUROPEAN UNION LAW, (Oxford University Press, 2012) p. 138–158.

32. Most notably, through the doctrine of *acte claire*: see Case 283/81 *Srl CILFIT v. Ministero della sanita'* [1982] ECR 4315.

33. Case C-399/11 *Stefano Melloni v. Ministerio Fiscal*, judgment of 26 February 2013 (Grand Chamber) [2013] ECR I–000.

34. Franz Mayer supra n. 30 at p. 287 – 288. Tom De La Mare & Catherine Donnelly "Preliminary Rulings and EU legal integration: Evolution and *Statis*" in Craig & Búrca eds, supra fn. 1, Ch. 13. Grainne De Burca & Joseph Weiler eds *The European Court of Justice* (Oxford University Press, 2011) Alan Dashwood & Aengus Johnston THE FUTURE OF THE JUDICIAL SYSTEM OF THE EUROPEAN UNION (Hart, 2001); Craig, supra fn. 12, Ch. 4; Philip Allott "Preliminary rulings- another infant disease" (2000) 25(2) *European Law Review* 538.

35. Julia Laffranque: 'Community, Identity, Stability': Ideals and Practice in Building a Bridge between the Legal Systems of the European Union and One of the Smallest of the 'Brave New World' in Adam Lazowski (ed.) THE APPLICATION OF EU LAW IN THE NEW MEMBER STATES - BRAVE NEW WORLD (TMC Asser,2010).

own authority.[36] Hers is a highly controversial account because of its limited empirical sample and its grand theorization of the EU legal orders but it captures well the *realpolitik* of the factual matrix of the ESM depicted here, where last instance courts availed of the structures of the preliminary reference device.

A practical problem was posed by the expediency of resolving judicial review challenges to the ESM, assuaging markets and crucially "funding" the euro-zone, however indirect. The delay between sending a reference to the CJEU and receiving a decision from the Court became substantial over decades of expansion of the EU, sometimes rising over 20 months. This delay was perceived to be so great as to possibly discourage national courts and litigants from seeking references and resulted in new procedural rules.[37] In *Pringle v The Government of Ireland,* , the Irish Supreme Court availed itself of these procedural provisions and sought a ruling by way of the accelerated procedure pursuant to Article 104a of the Rules of Procedure of the CJEU on account of "exceptional urgency" and possible damage to the euro area from delayed ratification.[38]

The decision of the Court of Justice on the reference from Ireland was hastily delivered after 34 days and a "view" of the Advocate General published thereafter,[39] thereby accepting the urgency characterization. This urgency characterization, unmatched in any other jurisdiction, is highly significant. Urgency was referred to in passing in Estonia and the German *Bundesverfassungsgericht* delivered judgment on a temporary injunction. For Ireland, a small Eurozone country, access to the ESM was essential.[40] Yet this characterization was also transferrable across all of the other States in various ways, for example, as to its largest creditor, Germany. Its acceptance by the Court of Justice is perhaps a subtle point but nonetheless a critical one.

The metaphor of the preliminary reference mechanism as a dialogue arguably wears thin where courts simply do not deploy it, whether they are preciously guarding their autonomy or generously interpreting exceptions to the preliminary reference obligation, especially where an urgent request *was* possible. We suggest that the German, Estonian and Finnish courts, tribunal and Committee respectively could have through their own motion referred questions similar to the Irish Supreme Court. To put it another way, one can say that the protection of their own autonomy or the procedural limitations of the proceedings before them countenanced referrals, but this was not insurmountable. In the end, there is a distinct lack of dialogue with the CJEU, which could and should have been the case, on account of the esoteric form and character of the ESMT.

Conclusion

The specific manner in which EU institutions and national participation and contestation has been limited in the construction of the ESM entails that judicial review thereof may operate as a powerful check on its character. The legalization of governance through courts is a palpable feature of contemporary EU law.[41] Accordingly, we draw upon the work of Cichowski in contending that courts can provide more legitimate forums for contestation of norms in certain circumstances.[42] Given the awkward relationship of postnational

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36. Karen Alter THE SUPREMACY OF EUROPEAN LAW (Oxford University Press, 1999).

37. Memorandum by Damian Chalmers to the UK House of Lords, European Union Committee; Justice and Institutions Sub-Committee: *Inquiry into the Workload of the Court of Justice of the European Union* (24 September 2010), Written evidence, p. 17 – 18, available at: http://www.parliament.uk/documents/lords-committees/eu-sub-com-e/courtofjustice/euewrittenevidence.pdf (last visited Mar 30, 2013).

38 Supreme Court of Ireland, *Pringle v The Government of Ireland*, [2012] IESC 47

39 Case C-370/12 *Thomas Pringle v Government of Ireland, Ireland and the Attorney General,* View of Advocate General Kokott delivered on 26 October 2012.

40 Not only that, the Irish courts found that other Member States had a similar interest: **"**The High Court accepted evidence from the State to the effect that the ESM Treaty Members, including Ireland, and the Member States of the European Union all have pressing interest in Ireland's timely ratification of the ESM Treaty and that the stability of the euro area would be seriously damaged by delayed ratification. ….The State says that a range of adverse consequences may ensue if Ireland does not ratify the ESM Treaty in the short term, for example, detrimental impact on Ireland's phased re-entry into the financial markets and a serious set-back to the substantial progress made to date by Ireland towards completing and exiting the EU-IMF programme by 2013. …. In evidence placed before the Supreme Court on the injunction issue, it was suggested that a failure to ratify and implement the measures contained within the ESM Treaty at the earliest possible stage would lead to irreparable harm both to the interests of Ireland and those of the euro zone generally."
Supreme Court of Ireland, *Pringle v The Government of Ireland*, [2012] IESC 47, para 17, available at http://courts.ie/judgments.nsf/6681dee4565ecf2c80256e7e0052005b/e7504392b159245080257a4c00517d6a?OpenDocument&Highlight=0,pringle (last visited Mar 30, 2013). Although the subsequent adequacy of the ESM for Ireland has been under review since *Pringle.*

41. R.D. Kelemen "Eurolegalism and Democracy" (2012) 50 *Journal of Common Market Studies* 55-71; EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EU (Harvard University Press, 2012).

42. Rachel Cichowski, supra n. 6.

rules such as the ESM with both the Nation State as well as the supranational EU treaty law, the EU courts plural maybe uniquely provide an appropriate forum for contestation.

The preliminary reference mechanism is thus not only an important constitutional device in the EU treaties linking the national and supranational: it also provides an ostensibly broad forum for participation. While there is no general possibility of *amicus curiae* representations before the CJEU yet, Member States have a broad discretion to intervene and participate in preliminary references from other Member States, availed of in *Pringle* but not necessarily uniformly or consistently with their own judicial or parliamentary bodies.[43] Thus, participation must be more broadly and successfully fostered amongst the EU courts, plural, within this specific judicial architecture.

In *Pringle,* the CJEU roundly rejected attempts by the Member States governments to unanimously contest its jurisdiction on the ESM instruments. In this regard, the ESM "saga", if we may term it that, retells a familiar tale of the dialogue between Member State courts and the CJEU, and also the subtle contest between postnationalism and the Member States, procedurally and substantively. Procedurally, the adjudication of the ESM emphasizes how the discretionary exceptions and limitations of the preliminary ruling mechanism fundamentally impinge upon its intent. In absence of any indication by the Member State courts that did not refer the case the CJEU on whether this option was at all considered, we do not know with certainty reasons for non-referral.

As we have outlined here, time pressures as well as the safeguarding of constitutional autonomy may constitute possible explanations for the reluctance to engage in inter-judicial dialogue. Of course, both issues need to be reflected upon in the future discourse on the role of courts not only in the sphere of Eurozone law, but also more broadly. While the former, to a large extent, remains intrinsically connected to the caseload issue that the Court continues to face, the latter invites a discussion on the role of Member States' courts in the architecture of the EU judiciary.

Accordingly, and more substantively, the complex balance between the Member States and the EU that we can observe in the ESM instruments in terms of tasks, functions and obligations, leads us to believe that the future development of Eurozone law may see further "innovation" between the supranational and national levels. The ESM saga indicates that if the Member States continue to avail themselves of creative instruments of esoteric postnational character curbing or purporting to curb judicial review or national plebiscites on their character, this will require a rethink of the architecture of the EU judiciary, at supranational and national level, as much as the instruments themselves.

43. On the historically uneven use of this procedure, see Marie Pierre Granger "When governments go to Luxembourg. . .: the influence of governments on the European Court of Justice"(2004) *European Law Review* 1–31.