Danuta Hübner
Chair of the Committee on Constitutional Affairs, European Parliament

"The rule of law in the EMU - what role for the Court of Justice?"

Conference on the rule of law in the Economic and Monetary Union
27 May 2015, European Parliament, Brussels

Let me start by thanking you for inviting me here to speak to you on this important topic. On the EMU governance framework, we have certainly come a long way since the start of the crisis. But we are still a half way through. We certainly need an unprecedented level of shared effort, cooperation and coordination at the member state level and between member states and the Union level. There seems to be a growing consensus that weaknesses of the common currency system could be corrected by a deeper fiscal integration.

One of the fundamental values of the EU is the Rule of law. The concept of the rule of law is not precisely defined under Union law but without any doubt the judicial control over the rule based exercise of public authority is a crucial element of the essence of the principle of law in addition to separation of power and rule based action.

The Economic and Monetary Union has its legal basis in the treaties. Article 3 paragraph 4 (TEU) states that "the Union shall establish an economic and monetary union whose currency is the euro." EMU is thus part of the Union's objectives.
However, the Treaty on the Functioning of the European Union (TFEU) does not include a heading entitled "Economic and Monetary Union". The provisions concerning the EMU are grouped in Title VIII entitled "Economic and Monetary Policy".
Major characteristic of the EMU construction is the asymmetry with monetary Union being supranational entity and economic Union an intergovernmental one.

National economies and fiscal policies are aligned with EU governance but without a legally binding enforcement measures. The discipline is supposed to come from markets which decide on the price of government bonds.

The main institution in the Monetary Union is the ECB, independent from national governments and other institutions.

Unfortunately, the Treaty of Lisbon did not change the basic, Maastricht Treaty based, asymmetric construction of the EMU. This basic construction cannot be changed without a Treaty change. Over the last years we have been stretching the Treaties to the limits and there are limits to how far the secondary law can go or international treaties (ESM, Fiscal Compact).

ECJ confirmed in Pringle case that ESM treaty is compatible with EU law. But ESM, according to ECJ could have been also established within the existing Treaty (Art 352). Now, with a consensus on the need to move forward with EMU reforms it is legitimate to ask what the unchanged asymmetry of the EMU at the level of the

Treaties means for the future development of the Economic Governance and how to cope with this asymmetry.

If the coordination of member states economic and fiscal policies were is to be supranationalised, it would mean that the Treaty boundaries were reached. When would there be a supranationalisation of the Economic Union? A supranationalisation can be assumed if decisions taken at European level may substitute economic and fiscal policies decisions taken at national level. Does this mean that a Treaty change is inevitable in order to strengthen the European dimension of the Economic part of the EMU? to move towards a sort of supranationalisation of the economic Union.
Some experts say that there is still a potential for further movement within the Treaty boundaries. Rene Repasi says that in order to uncover this potential, a change of perspective from competences to means of enforcement would be needed. The possibilities to adopt guidelines for Member States' economic policies under Article 121 TFEU and for Member States' employment policies under Article 148 TFEU could become a sufficient basis for the setting of common economic and fiscal policy goals for Member States. The enforcement of policy goals, however, remains highly precarious, in this new, taking into account the intergovenmental nature of Economic Union.

The monetary policy is conducted by the ECB which is acting thereby as an independent institution (Article 282 TFEU) enjoying a wide margin of freedom in how it fills its mandate to define and implement the monetary policy of the Union. Monetary policy is merely defined by its objective to maintain price stability and not so much by specifying the precise instruments that the ECB can use for that purpose (Article 127 TFEU). Still the Protocol n° 4 on the statute of the ECB contains further precisions of monetary functions and operations. Parts of that statute can be modified by simplified procedure under codecision (Article 129(3) TFEU – a provision to take a closer look on when exploiting the full treaty potential!).

The creators of the common currency wanted to ensure that the institution responsible for the monetary policy should be free from political pressure. That's why the independence of the ECB is specifically on the monetary policy there ensured by the Treaties. But they did not want the ECB to be exempt from judicial control. As we see for example in the preliminary ruling of Court request from the German Bundesverfassungsgericht on the legality of the OMT decision, the ECJ can control whether the ECB has not exceeded its mandate when implementing measures of monetary policy. I remind you also of the recent judgment of the General Court (of 4 March 2015 in case T-496/11, UK/ECB) where a decision of the ECB has been annulled for lack of competence (requirement for central counterparties involved in the clearing of securities to be located in a Member State of the Eurozone).

With regard to monetary policy, we see that the powers in this policy field are attributed by the Treaty to the ECB and that the way the ECB is exercising its powers are subject to the control of the ECJ. The requirements of the rule of law seem to be met in the layout of this competence.

We are here to look at the situation is somewhat different in the field of economic policy coordination.

Firstly, we are not in a field where supranational decisions can be taken. The Treaty says that economic policy is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition. Stable prices, sound public finances and a sustainable balance of payments are anchored as guiding principles (Article 119 TFEU). The Treaty provisions defining more closely the economic policy coordination (Articles 120 to 126 TFEU) make clear that there is actually no economic union in the EU, but only coordination of the policies of 28 Member States which retain their full sovereignty in this field. Nevertheless some fundamental restrictions and cornerstones of EMU are clearly spelled out, namely the prohibition of monetary financing (Article 123 TFEU) and the no-bail out clause (Article 125 TFEU) which interdicts the Union or individual Member States to assume the financial commitments of other Member States.

The sovereign debt crisis which began in 2008 and kept us busy ever since has revealed the shortcomings of this asymmetrical design of EMU.

The ECB itself has declared that price stability oriented monetary policy alone is not sufficient for a proper functioning of EMU. But the Treaty did not provide for a rule based fiscal framework, and even less so for a judicial enforcement in this field.

Remedy was sought by prolonging the convergence criteria, the so-called Maastricht criteria, by secondary legislation: the Stability and Growth Pact (SGP) consists of two regulations - a preventive arm and a corrective arm – but it was weakened in 2005 when the sanctions that it provided should have been applied for the first time. Under the pressure of the sovereign debt crisis, the SGP was strengthened by the "six pack" in 2011 and then further by the "two-pack". However, the sanctions foreseen in the SGP have never been applied and the SGP did not succeed in securing fiscal discipline.

In the wake of the crisis, Treaty change was sought in order to enhance the European economic governance.

Only for the establishment of the European Stability Mechanism (ESM) - the solidarity mechanism allowing for financial assistance to euro Member States if this is necessary to safeguard the stability of the euro area as a whole - a legal basis was inserted into the Treaties (Article 136 (3) TFEU). As we learned from the Pringle judgment, this legal basis was even not necessary because according to the Court, the Member States were anyway entitled to conclude the ESM as an international treaty outside the Union law, making sure however that this construction complies with Union law.

With regard to stricter responsibility in order to avoid moral hazard and to make sure that emergency loans under the ESM will be paid back, Treaty change did not materialise. The idea to suspend voting rights in case of serious violation of basic principles of EMU did not gain support among Member States. The alternative objective to revise the Treaties to incorporate aspects of the reinforced SGP into the Treaties in order to avoid that they could too easily be softened again was opposed by the United Kingdom at the European Council meeting of 9 December 2011.

However, a mandate was given to negotiate a "*Fiscal Compact*" through an international agreement outside the European Union legal framework, since the other Member States were ready to foster fiscal discipline and stricter surveillance in order to ensure debt sustainability. Concerns over the legality of the TSCG (commonly called the "Fiscal Compact") for fear of by-passing the procedures for Treaty revision have been specifically addressed and, from the outset, the objective was declared to incorporate its provisions as soon as possible into the Union treaties.

Since the "rule of law" so far as laid down in EMU in the Treaties did not give all the necessary answers to tackle the crises, it was necessary to step into unchartered territory and to conclude two instruments outside the Treaties: the ESM and the Fiscal Compact. Furthermore the SGP was strengthened considerably but without bringing about effective enforcement of the declared ambition to ensure fiscal discipline.

We can continue to strengthen secondary law or through IGAsin the field of economic policy coordination, but we will not be able to remedy the lack of binding and enforceable rules in this regard in the Treaties.

We have seen before, that for the supranational branch of monetary Union, the Court has jurisdiction over the ECB and the way in which it is implementing monetary policy. The Protocol on the ECB statute clearly states (Article 35 of Protocol n°4) that the acts or omissions of the ECB are open to review or interpretation by the Court and we see that the Court is effectively exercising control over the ECB's activities (judgment of 4 March 2015 in case T-496/11, UK/ECB and the upcoming OMT preliminary reference ruling of the Gauweiler case).

For the economic branch of EMU, the control by the ECJ is much more limited. Of course, we have got important clarifications in the ECJ's judgment on the *Pringle* case. The main legal question submitted to the Court was whether 17 Member States of the EU had, by concluding amongst them the ESM Treaty, acted in breach of EU law. After examining the case, the Court rejected all the confirmed arguments challenging the validity of lawfulness of the financial rescue instruments created by the ESM Treaty and affirmed that the Member States have full competence to conclude such inter-governmental agreements as the ESM Treaty, as long as strict conditionality is imposed and compatibility with EU law is ensured. The CJEU also ruled that the ESM Treaty was compatible with EU law, interpreting the "*no bailout*" clause as allowing grants of financial assistance to Member States in need when the stability of the euro area as a whole is at risk and so long as a grant of financial assistance does not diminish the incentive of the beneficiary state to conduct sound budgetary policies.

With regard to the Fiscal Compact, a limited role has been attributed to the ECJ (Article 8 of the Fiscal Compact) in so far as it has been empowered to adjudicate over the implementation of the balanced budget rule in the domestic law of the Member States. The Court's competence is however limited to the mere issue of transposition in national law and does not stretch out to the question whether the balanced budget rules has been effectively respected or not.

Article 126 TFEU on excessive government deficits explicitly excludes the possibility to take action before the Court of Justice of the European Union (ECJ) when a Member State does not fulfil its obligations. Its paragraph 10 stated that "the rights to bring actions provided for in Articles 258 and 259 may not be exercised within the framework of paragraph 1 to 9 of this Article."

If a Member State under excessive deficit does not comply with the recommendations addressed to him by the Council, it's the Council only who "may decide to apply or, as the case may be, intensify one or more of the following measures" (Article 126, paragraph 11 TFEU).

There is thus no possibility for the Commission or a Member State to bring the case before the Court of Justice if the Member State under excessive deficit procedure does not comply with the Council recommendations.

Except if there is made use of other more general Treaties disposition like Article 13 (2) TEU under which "the institutions shall practice mutual sincere cooperation " and/or Article 273 TFEU under which the ECJ "shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties"; this impossibility to refer to the ECJ results in Member States being not always treated equally.
The adoption of Sylvie Goulard opinion on "the review of the economic governance framework: stocktaking and challenges", in AFCO handle this problematic.

In paragraph 13 AFCO give a definition of the rule of law (an institutional system in which public authority is subject to the law and the equality of legal subjects is guaranteed by independent jurisdictions) and considers that this question should be one of the priorities, to be tackled in the framework of the report entitled "Possible evolutions and adjustments of the current institutional set up of the European Union", and that this should include infringement proceedings and action for annulment against decisions of the Commission and the Council.

AFCO also believes that a genuine EMU requires on the economic side the reinforcement of the rule of law, as stated in Article 2 TEU and that the involvement of the ECJ may notably be a guarantee that the rules will be applied in a uniform manner irrespective of the size of the Member State and will protect citizens rights and the rights of their organisations in the countries under the programme;
The committee also states that this role for the ECJ will not result in economic governance procedures being delayed, as these procedures do not have suspensive effects.