



Legal Options and Limits for the Establishment of a European Unemployment Benefit Scheme

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1. INTRODUCTION

The European legal dimension of an establishment of a European Unemployment Benefit Scheme (hereinafter: EUBS) is only little discussed. Namely the European Commission stated in its communication on 'Strengthening the Social Dimension of the Economic and Monetary Union'¹ in the chapter on EUBS:

*'Such measures would require a substantial Treaty change, since, at present, the EU does not have the competence to adopt them, either for the euro area or for the EU as a whole. The EU cannot engage the budgetary responsibilities of its Member States. The EU's current competences are limited, as regards employment, to incentive measures designed to encourage cooperation between Member States and to support their action, excluding any harmonisation (see Article 149 TFEU). As regards social security and social protection, its competence is limited to adopting directives setting minimum requirements for Member States' systems whose fundamental principles and financial equilibrium are set by Member States (see Article 153 TFEU). Given the current framework of competences and the system of own resources of the Treaties, the flexibility clause of Article 352 cannot be used either, as the establishment of macroeconomic stabilisation systems would exceed the general framework of the current Treaties and thus amount to amending the Treaties without following the requisite procedures. In other words, this final stage would require a fundamental overhaul of the Treaties, which would also have to be accompanied — as detailed in the blueprint — by commensurate political integration, ensuring democratic legitimacy and accountability.'*²

The legal impossibility to introduce a EUBS within the existing Treaty framework is supported by Fuchs.³ In contrast to these statements, Kullas and Sohn⁴ concluded in a report that a 'stormy day' insurance could be realised on the basis of Article 122(2) TFEU and other equivalent systems on the basis of Article 352(1) TFEU. Eichenhofer⁵, Repasi⁶ and Barnard and De Baere⁷ consider Article 153 TFEU as possible legal base. Next to these articles and statements, there are, until now, no in-depth legal analyses on possible European Unemployment Benefit Schemes. The present legal analysis refers to the existing Treaties and examines to which extent a EUBS can be established without a Treaty amendment.

An in-depth legal analysis of the legal options and limits for the establishment of a European Unemployment Benefit Scheme has, as a first step, to break the several EUBS

¹ European Commission, Communication of 2 October 2013, Strengthening the Social Dimension of the Economic and Monetary Union, COM(2013) 690 final.

² COM(2013) 690 final, p. 11 et seq.

³ Fuchs, Statement 'Assessing the impact of an EMU UBS on diverse national benefits systems: (To what extent) Do we need common eligibility rules?' at the workshop 'Neue Wege zur Stabilisierung der Eurozone' on 11 October 2013 organised by the Bertelsmann-Stiftung.

⁴ Kullas and Sohn, Europäische Arbeitslosenversicherung – Ein wirkungsvoller Stabilisator für den Euroraum?, cepStudie, April 2015.

⁵ Eichenhofer, Europäische Arbeitslosenversicherung, ZESAR 2015, 259, 262 et seq.

⁶ Repasi, Legal options for an additional EMU fiscal capacity, Study for the European Parliament 2013, p. 26.

⁷ Barnard and De Baere, Towards a European Social Union, Euroforum KU Leuven, 2014, p. 29.

options down into subsections. The legal framework requires a separate assessment of the payment side of the scheme and the conditions linked to it (2.) and of the financing side of the scheme (4.). This follows from the fact that the general Union budget in its current state has not enough financial means in order to finance any of the 18 EUBS options. By that, next to a legal act establishing a EUBS, there has to be an additional legal act to raise funds for the EUBS. Furthermore, any cash flow from the European Union to Member States has to be assessed against the so-called 'no bail-out'-clause in Article 125 TFEU (3.). Finally, it has to be examined whether and to which extent those EUBS options that can be realised on the basis of the existing competences may also be adopted only by a subset of Member States (5.).

It should be noted that the separate legal discussion of the payment side and of the financing side does not result, by definition, into the necessity to adopt separate legal acts. Separate legal acts would only be required if the identified bases cannot be combined with each other. Conclusions

The debate around the creation of a Europe-wide shock absorber has been rekindled in recent years, but the initial idea dates back to the 1970s, as we show in our review. Based on an analysis of both recent and less recent work, we draw the following conclusions.

2. LEGAL BASE FOR ESTABLISHING THE PAYMENT SIDE OF A EUBS

The principle of conferral, enshrined in Article 5 TEU, requires that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Therefore a legal basis has to be found in order to establish the payment side of a EUBS. The choice of legal basis for a measure is based on objective factors which are amenable to judicial review.⁸ Those factors include in particular the aim and content of the measure.⁹ A purely ancillary aim of a measure cannot legitimately be used to justify the choice of legal basis.¹⁰ The aim is not only to be defined by the Union legislator but must '*in fact* [pursue] the objectives stated by the Community legislature'^{11,12} If a Union measure pursues several aims that can be linked to several Union competences and if one of those aims is identifiable as the main one, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant aim.¹³ With regard to a measure that simultaneously pursues a number of objectives, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaties are therefore applicable, such a measure will have to be founded, exceptionally, on the various corresponding legal bases.¹⁴ Such a conjunction of legal bases is, however, excluded if limitations of the one competence are not contained

⁸ CJEU, Case 45/86 Commission v Council [1987] ECR 1493 para. 11.

⁹ CJEU, Case C-271/94 Parliament v Council [1996] ECR I-1689 para. 14

¹⁰ CJEU, Case C-155/91 Commission v Council [1993] ECR I-939.

¹¹ Emphasis added.

¹² CJEU, Case C-376/98 Germany v European Parliament and Council [2000] ECR I-8419 para. 85.

¹³ CJEU, Case C-155/07 Parliament v Council [2008] ECR I-8103 para 35.

¹⁴ CJEU, Case C-155/07 Parliament v Council [2008] ECR I-8103 para 36; Case C-211/01 Commission v Council [2003] ECR I-8913 para. 40.

in the other. Therefore a legal base that, for example, excludes legal harmonisation may not be combined with a legal base that allows for harmonisation.

Based on these considerations, the identification of the suitable legal basis starts with a definition of the aim(s) of intended measure, at present of the establishment of the payment side of a EUBS.

2.1. Aims of the payment side of the several EUBS options

Despite the details, in which the 18 various options of EUBS differ, when it comes to defining the predominant aim pursued by these options, the basic distinction between equivalent and genuine EUBS becomes relevant.

In brief, equivalent and genuine EUBS are to distinguished by the presence of a trigger for the activation of payments and by the recipient of the payment. Whilst in genuine systems the Fund payments are made once the risk of unemployment of an eligible person materialises, in equivalent systems, an additional trigger defines the event that activates payments from the Fund. This trigger is characterised by an indicator and a threshold: When the short-term unemployment rate (covering an unemployment period of 0 to 12 months) of a specific country at a specific time (indicator) exceeds the threshold, which is defined by the sum of 10 years moving average of the short-term unemployment rate in that country, payments from the EUBS Fund to the country in question are activated.¹⁵ As regards the recipient of payments from the EUBS fund, the amount defined by the eligibility criteria is, under the equivalent EUBS, transferred to the general budget of the Member State concerned, whilst, under the genuine EUBS, the recipient of the payment is the eligible person itself.

Equivalent EUBS are, against this background, characterised by a transfer of a lump sum that is calculated on the basis of short-term unemployment from a European fund to the national general budget. The transfer takes place once the short-term unemployment rate deviates from the usual average rate of the country concerned. Such a deviation can usually be led back to on an economic crisis that hit this country. By that, equivalent EUBS contain financial transfers in case of an economic crisis. In contrast to this, genuine EUBS work like classical insurances, in which the materialisation of the insured risk triggers the payment to the insured eligible person.

These distinctive features of equivalent EUBS, on the one hand, and genuine EUBS, on the other, reveal the aims pursued by the respective scheme. Equivalent EUBS predominantly aim at macroeconomic stabilisation in order to mitigate the effects of an economic crisis. This does not exclude that equivalent EUBS can also have positive effects on the overall social standard of unemployed people. Yet, the fact that the financial support of national budgets is not earmarked for the exclusive use of these amounts for unemployed people clearly shows that equivalent EUBS pursues the objective of stabilising national budgets. In contrast to this, genuine EUBS aim at mitigating the social risk of getting unemployed by paying the financial support directly to the person concerned and by abstaining from any additional criteria for payment than those linked to unemployment and eligibility. Genuine EUBS aim hence primarily at insuring social risks and at strengthening social cohesion. A stabilising effect for national budgets in times of economic crisis is not excluded by this aim but rather to be considered as a welcome side effect of the genuine EUBS than a primary objective.

¹⁵ It is recalled that the several presently proposed triggers distinguish between the severity of the increase of short-term unemployment, which are 0.1%, 1% and 2% of increased short-term unemployment in a quarter of a year as compared to the average short-term unemployment rate of the last 40 quarters of a year.

In sum, equivalent EUBS predominantly aim at stabilising national budgets in times of economic crises, whereas genuine EUBS predominantly aim at insuring the social risks of unemployment of workers.

Against this background, possible legal bases for genuine EUBS (2.2) and for equivalent EUBS (2.3) can be identified and examined regarding their suitability to establish the payment side of EUBS on their basis. Finally, a closer look will be taken at Article 352(1) TFEU, which may serve as a legal base for both kinds of EUBS in case there can no suitable legal base be identified as well as an additional legal base to compensate for weaknesses found in more specific legal bases (2.4). Table 1 shows the possible legal bases as assigned to the identified predominant aims of the several EUBS options.

Table 1. Possible legal bases

Predominant aim	Possible legal bases							
	21(3)	48	121(6)	122(2)	148	153(2)(b)	175(3)	352(1)
Promoting social cohesion (<i>genuine EUBS</i>)	■	■	□	□	■	■	■	■
Macroeconomic stabilisation in case of (exogenous) crisis (<i>equivalent EUBS</i>)	□	□	■	■	□	□	□	■

2.2. Legal base for EUBS aiming at promoting social cohesion (genuine EUBS)

The possible specific legal bases that serve to attain the objective of promoting social cohesion are (in numerical order) Article 21(3) TFEU (measures concerning social security or social protection in the context of the free movement of Union citizens) (2.2.4), Article 48 TFEU (measures concerning social security in the context of the free movement of workers) (2.2.3), Article 148 TFEU (coordination of employment policies) (2.2.2), Article 153(2)(b) TFEU (minimum requirements in the field of social security and social protection of workers) (2.2.5) and Article 175(3) TFEU (specific actions in order to strengthen social cohesion) (2.2.6). Before, however, turning to the discussion of the suitability of the identified legal bases, the relationship between genuine EUBS and the national unemployment benefit scheme (NUBS) in the territory of the Member State is to be explored and to be defined for the purposes of the subsequent discussion of the legal bases (2.2.1).

2.2.1 Co-existence of EUBS and NUBS in the territory of the Member States

The relationship between genuine EUBS and NUBS in the territory of the Member States has to be defined before looking into the details of the various legal bases. This is necessary since the effect on national law of the measures that can be adopted on the basis of EU legal bases differs. They can either require an implementation into national law so that existing national law has to be adapted. As a consequence EU law does, in principle, not co-exist on the territory of the Member States. Or EU measures can stand-alone next to existing national law. In this case a conflict rule has to decide which rules take precedence in a situation where EU and national law overlaps.

There is no explicit definition of the relationship between genuine EUBS and NUBS in the territory of the Member States. It is, however, stated that genuine EUBS can be either designed as basic EUBS, in which each participating Member State remains free to increase the amount paid by the EUBS, its duration or include non-eligible people at its own expense, or as a top-up EUBS, in which the supranational fund supplements the payments of the national fund by the necessary amount to meet the requirements set by

the EUBS.¹⁶ Both variants suggest a co-existence of EUBS and NUBS in the territory of the Member States rather than a merger of NUBS with EUBS. They only differ with regard to the conflict rule that is used in order to define the relationship between both schemes. In order to increase the amount of the unemployment benefit, its duration or to extend benefits to people that are not eligible under the EUBS, an entire stand-alone national scheme must be in place, which defines autonomously its legal conditions. On a more abstract level, the European unemployment benefit, as defined by the rules governing the EUBS, co-exists next to the pre-existing national unemployment benefit, as defined by the rules governing EUBS. In case of an overlap of both benefits (with regard to the amount, its duration or the eligibility criteria) a conflict rule defines, which benefit takes precedence over the other and which fund therefore pays for the benefit.

In the basic genuine EUBS, the conflict rule defines that in case of an overlap the EUBS takes precedence over the NUBS. Within the scope of application of the EUBS, the European benefit supersedes the national benefit. If the NUBS is more generous than the EUBS, the national benefit can still be paid to the eligible person. The conflict rule that requires the application of the EUBS is not applicable because of a lack of conflict between the European and national benefit when the latter is more generous than the former. In the top-up genuine EUBS, the conflict rule defines that in case of an overlap the NUBS takes precedence over the EUBS. This means that only in cases, in which there is no overlap of the national and the European benefit (e.g. because the European benefit covers a higher amount, has a longer duration or requires different eligibility criteria than the national benefit) the EUBS is applicable. In all cases, in which the NUBS is outside the scope of application of EUBS, there is no legal obligation to adapt the conditions of the national benefit as defined by national law to the ones defined by the EUBS.

In brief, EUBS is a stand-alone measure that co-exists within its scope of application in the territory of the Member States. In case of an overlap with the existing NUBS, a conflict rule defines which of the benefits takes precedence over the other. If an EUBS legal act remains silent on the conflict rule, the EU principle of supremacy¹⁷ applies, according to which EU law takes precedence over conflicting national law.

Based on this understanding of the legal relationship between genuine EUBS and NUBS, the possible legal bases that were identified as possibly suitable for establishing the payment side of EUBS can be further discussed in the following.

2.2.2 Coordination of employment policies (Article 148 TFEU)

Under Article 148 TFEU, Member States' employment policies shall be coordinated by 'soft law' instruments. Broad guidelines adopted by the Council on the basis of conclusions of the European Council set certain policy goals, which are to be achieved by the Member States. The European Commission monitors the implementation but does not have any enforcement instruments in case of persistent non-compliance.

Soft law instruments and coordination processes are no appropriate means to introduce any kind of EUBS and Article 148 TFEU can therefore not be considered as an appropriate legal base for EUBS.

¹⁶ Cf. Beblavý, Lenaerts and Maselli, Report on Task 1C, E.6 and E.7.

¹⁷ Cf. CJEU, Case 6/64, Costa v ENEL [1964] ECR 585.

2.2.3 Social security in the context of the free movement of workers (Article 48 TFEU)

On the basis of Article 48 TFEU, the European Parliament and the Council may adopt measures, in accordance with the ordinary legislative procedure, in the field of social security. The measure must be necessary for the establishment and for the functioning of the free movement of workers. The scope of this legal base is therefore linked to the scope of the free movement of workers in Article 45 TFEU. According to settled case law of the CJEU, Article 45 TFEU cannot be applied to activities that are confined in all respects within a single Member State.¹⁸ By that, legal acts adopted on the basis of Article 48 TFEU may only deal with social security matters relating to migrant workers. This is reflected by Article 2(1) of Regulation (EC) No 883/2004 on the coordination of social security systems, which was based on the former Articles 42 and 308 EC (which are today's Articles 48 and 352 TFEU), according to which the regulation shall apply 'to nationals of a Member State [...] residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors'. Article 48 TFEU is therefore no legal base for measures that are to be applied to all residents of a Member State. It should, however, be noted that on the basis of another legal base such as Article 79(2)(b) TFEU rights that were defined under Article 48 TFEU may be extended to third-country nationals.¹⁹

Since all options of a EUBS are to be applied to workers who became unemployed independently of whether they made use of their free movement rights, the objectives pursued by none of the EUBS options could be achieved by a legal act based on Article 48 TFEU.

2.2.4 Social security or social protection in the context of the free movement of Union citizens (Article 21(3) TFEU)

According to Article 21(3) TFEU, the Council may adopt 'measures concerning social security and social protection'. The purposes for secondary law adopted on the basis of Article 21(3) TFEU must be the same as 'those referred to in paragraph 1', which contains the right of every Union citizen to move and to reside freely within the territories of the Member States. The free movement rights of Union citizens do not cover internal situations, which have no link with Union law.²⁰ Based on this consideration, measures concerning social security or social protection, which are to be adopted on the basis of Article 21(3) TFEU, may only regulate the situations of Union citizens that made already use or will make use of their free movement rights. Domestic situations can, however, not be subject matter of rules adopted under Article 21(3) TFEU.

Since all options of a EUBS are to be applied to Union citizens who became unemployed independently of whether they made use of their free movement rights, the objectives of none of the options could be achieved by a legal act based on Article 21(3) TFEU.

¹⁸ CJEU, Case C-41/90 Höfner and Elser [1991] ECR I-1979, para. 37; Case C-332/90 Steen [1992] ECR I-341, para. 9; Joined Cases C-29/94 to C-35/94 Aubertin and Others [1995] ECR I-301, para. 9.

¹⁹ Regulation (EU) No 1231/2010 extending Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 to nationals of third countries who are not already covered by these Regulations solely on the ground of their nationality, [2010] OJ L 344, p. 1.

²⁰ CJEU, Joined Cases C-64/96 and C-65/96, Uecker and Jacquet [1997] ECR I-3171 para. 23; Case C-434/09, McCarthy [2011] ECR I-3375 para. 45.

2.2.5 Minimum requirements in the field of social security and social protection of workers (Article 153(2)(b) TFEU)

The European Parliament and the Council may, based on Article 153(2)(b) TFEU, adopt, by means of directives, minimum requirements for gradual implementation in matters concerning the social security and social protection of workers (Article 153(1)(c) TFEU).

2.2.5.1 Scope of Article 153(1)(c) TFEU

In order to legislate on the basis of Article 153(2)(b) TFEU, the subject matter of the legal act has to be covered by one of the fields referred to in Article 153(1)(a) to (i) TFEU. Article 153(1)(c) TFEU relates to matters of 'social security and social protection of workers'.

'Social security' can be defined in line with Article 48 TFEU and Article 3(1) of Regulation (EC) No 883/2004 on the coordination of social security systems as covering 'sickness benefits', 'maternity and equivalent paternity benefits', 'invalidity benefits', 'old-age benefits', 'survivors' benefits', 'benefits in respect of accidents at work and occupational diseases', 'death grants', 'unemployment benefits', 'pre-retirement benefits' and 'family benefits'. Article 3(2) of Regulation (EC) No 883/2004 clarifies that the notion of 'social security' does not relate to financing of the system, so that 'general and special social security schemes, whether contributory or non-contributory' are covered by this term.

'Social protection' is understood broader than 'social security' and, by that, referring to all kinds of collective systems established in order to protect workers against social risks. Again in line Article 48 TFEU and Regulation (EC) No 883/2004 'social protection' can be understood as covering 'schemes relating to the obligations of an employer or shipowner' (Article 3(2)) and 'to the special non-contributory cash benefits' (Article 3(3)). The Regulation defines the latter as 'cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance' (Article 70).²¹

It is worth mentioning that Article 153(1)(c) TFEU refers to 'workers', which means that this field covers only those social security and social protection provisions that relate to workers. Social allowances are, hence, not covered by this field.

2.2.5.2 Limiting elements of Article 153 TFEU

Article 153 TFEU contains several limiting elements. A legal act adopted on the basis of Article 153(2)(b) TFEU may (1) only contain 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States', (2) not 'affect the right of Member States to define the fundamental principles of their social security systems', (3) not 'significantly affect the financial equilibrium' of the social security system and (4) only be a directive.

2.2.5.2.1 Minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States (Article 153(2)(b) TFEU)

The reference to 'minimum requirements' was introduced by the Single European Act as Article 118a(2) EEC. This reference has to be read in conjunction with Article 153(4) second intend TFEU, according to which Member States are regardless of legislation

²¹ Regulation (EC) No 883/2004 enumerates the covered 'special non-contributory cash benefits' according to Article 70(2)(c) in its Annex X.

adopted under this Article free to maintain or to introduce 'more stringent protective measures compatible with the Treaties'. Both limitations have to be understood in contrast to the other legislative technique in EU law that aims at establishing more unified standards within the Internal Market, which is 'harmonisation'. First, harmonisation, if based on Articles 114(1) or 115 TFEU, aims at the establishment and the functioning of the internal market. It also sets minimum requirements. But, when there is internal market harmonisation, Member States are not anymore allowed to introduce 'more stringent protective measures' than those set by the harmonising directive. Member States are only free in adopting standards that are more liberal. Against this background, it becomes clear that minimum requirements set under Article 153 TFEU mean precisely the opposite. Under Article 153 TFEU Member States are still free to introduce higher protective standards than those set by an EU directive. Second, the concept of 'harmonisation' may also include 'maximum harmonisation', which does not allow for any deviations by Member States anymore. The reference to 'minimum requirements' excludes the possibility to adopt a directive, which harmonises national legislation covered by its subject matter in an exhaustive manner.

It is important to note in this context that the reference to 'minimum requirements' does not mean that the Union may only adopt the minimum of all existing protective standards in the Member States' legal orders. The Union is free, in accordance with the principles of proportionality and subsidiarity under Article 5 TEU, to set own minimum requirements, which may result in some national legal orders in a legal obligation to raise the national level of protection.²²

The reference to 'gradual implementation, having regard to the conditions and technical rules obtaining in each Member State' specifies that the Union legislator has to take the specific legal and factual situations in each of the Member States into account when legislating on the basis of Article 153(2)(b) TFEU. A directive based on this Article may not set a minimum requirement, which is unrealistic and hard to achieve for one of the Member States. This reference is of particular importance when the Council may decide in accordance with the ordinary legislative procedure, which means that a Member State can be overruled by a qualified majority of Member States. This is the case in fields referred to in Article 153(1)(a), (b), (e), (h) and (i) TFEU. Since in the field of social security and social protection referred to in Article 153(1)(c) TFEU a measure may only be adopted if there is a unanimity in the Council, the reference to 'gradual implementation, having regard to the conditions and technical rules obtaining in each Member State' is, in fact, of no relevance since a non-observance of particularities of a national legal order would have been sanctioned by a veto during the legislative procedure.

2.2.5.2.2 Right of Member States to define the fundamental principles of their social security systems (Article 153(4) first indent TFEU)

Article 153(4) first indent TFEU states that legal acts 'adopted pursuant to this Article [...] shall not affect the right of Member States to define the fundamental principles of their social security systems'. The Treaties refer to the notion of 'shall not affect' when the Treaty makers intended to protect national competences from 'intrusion' of EU law.

²² CJEU, Case C-84/94, United Kingdom v Council [1996] ECR I-5755, para. 56: '*Furthermore, as is clear from paragraph 17 of this judgment, the applicant bases its argument on a conception of "minimum requirements" which differs from that in Article 118a. That provision does not limit Community action to the lowest common denominator, or even to the lowest level of protection established by the various Member States, but means that Member States are free to provide a level of protection more stringent than that resulting from Community law, high as it may be.*'

Provisions containing the notion of 'shall not affect' can therefore be understood as 'constitutional saving clauses'.²³

Article 153(4) first indent TFEU constitutes, in this respect, a special constitutional saving clause since it does not shield Member States' competence to adopt social security laws but only their power 'to define the fundamental principles of their social security systems'. This means that Union legislator may, in principle, adopt secondary law relating to social security law. Yet the Union legislator is not allowed to interfere with the fundamental design of the respective social security system. As already stated in Article 153(1) TFEU, the union legislator may only 'support and complete' the social security and social protection system of the Member States. To 'support and complete' does not mean, as stated above, that the scope of the Union measure depends on the scope of the national social security law. The Union legislator is, in principle, entitled to also introduce elements that are new for the social security system of a Member State provided that the overall level of protection is raised. Therefore not any minimum requirement introduced by an EU legal act that has no counterpart in national law affects fundamental principles of the national social security system. Against this background, one has to draw a line between those provisions of the national security systems that reflect fundamental principles and those that can be subject of an EU legal act.

As a starting point for drawing this line, it is important to recall that the reason for the reference to the 'fundamental principles' is the variety of 'welfare regimes' in Europe, which evolved historically and differ with regard to their ordering principles. By that, the principles that define the distinctive features of the different welfare state categories form the core of the 'fundamental principles' whose right to define may not be affected by EU legislation.²⁴ Based on this consideration, the way of how social security systems are financed (by contributions or by taxes) are excluded from setting minimum requirements. Furthermore, all those rules that implement the ordering principles of the national social security system in question are covered by the constitutional saving clause. This refers, in particular, to the definition of certain eligibility criteria.

On the other side of the dividing line, there are rules that relate to the control of the overall expenses of a social security system without implementing ordering principles. Those rules are not covered by the notion of 'fundamental principles of the social security systems of the Member States'. This can be drawn from the fact that Article 153(4) first indent TFEU mentions explicitly the 'financial equilibrium' of social security systems next to the 'fundamental principles'. If rules safeguarding the financial equilibrium of a social security system had already been covered by 'fundamental principles', it would not be convincing to explicitly mention them in the same indent. Against this background, national provisions including eligibility criteria, whose purpose is only to control the overall expenses of a social security system, but which do not specify the ordering principles of the social security system are not covered by the constitutional saving clause protecting the Member States' right to define the fundamental principles of their social security systems.

Finally, it is worth mentioning that the adoption of a legal act in the field of 'social security and social protection of workers' (Article 153(1)(c) TFEU) requires a unanimous vote in the Council. Since therefore every Member State that considers the 'fundamental principles' of its social security system to be affected by the legal act may raise its veto against this act, the adoption of such a legal act establishes in case of a legal review of

²³ Schütze, in: Oxford Handbook of European Union law, EU competences, p. 81 et seq.

²⁴ This relates to the main categories of 'Social Democratic', 'Conservative' and 'Liberal' welfare states, cf. Esping-Anderson, The three worlds of welfare capitalism, 1990.

this act the presumption that this act does not affect the fundamental principles of the social security systems of the Member States.

2.2.5.2.3 Not significantly affecting the financial equilibrium of the social security systems of the Member States (Article 153(4) first indent TFEU)

As the first alternative under Article 153(4) first indent TFEU, the second alternative referring to 'the financial equilibrium of the social security systems of the Member States' is a constitutional saving clause. It, however, does not exclude adopting European rules that may affect the national public budgets financing their social security systems. Those rules may only not 'significantly' affect the 'financial equilibrium' of the social security systems.

From a legal perspective, one may draw two conclusions from the wording of the second limitation in Article 153(4) first indent TFEU. First, the reference to 'financial equilibrium' clarifies that national rules relating to the financing of the social security systems may, in principle, be subject of a harmonisation under Article 153(2)(b) TFEU. By the same token, the requirement of affecting the 'financial equilibrium' allows for adopting rules that have a financial impact on the national social security systems. Rules affecting the 'financial equilibrium' of social security systems are ultimately something different than rules affecting the financing of social security systems. Based on this consideration, the constitutional saving clause referring to the financial equilibrium of national social security systems can be understood as a prohibition for the Union to adopt measures that are disproportionate with regard to the financing of national social security systems.

This shows that the reference to the second limitation, namely that the financial equilibrium should not be 'significantly' affected, defines, which Union measures are to be considered disproportionate in relation to the financial obligations attached to them. The use of the word 'significantly' clarifies, first of all, that Union legislation may at least 'insignificantly' affect the financial equilibrium of national social security systems. In other words, Union legislation may lead to an increase in expenses of the national social security systems as long as the threshold of 'significance' is not exceeded. Yet, defining 'significance' in legal terms is difficult. The reference point for an elaboration of a definition is the overall financial situation of a national social security system. This means that both the increased expenses because of an EU measure as well as the potential income stemming from an EU measure over a long period have to be taken into account when assessing the impact on the financial equilibrium. If after comparing the overall financial situation of a national social security system before and after the entry into force of an EU measure the system cannot meet its financial obligations vis-à-vis people that are eligible under national law anymore, the threshold of significance is exceeded if the Member State has to raise contributions or taxes refinancing its social security systems in a more than modest manner. Modest increases in contributions or taxes would still be insignificant to the financial equilibrium of the national social security system. Based on these considerations, the financial equilibrium of the social security system of a Member States is affected by an EU measure if the system cannot finance its remaining own commitments vis-à-vis the eligible people without having to raise permanently contributions or taxes in a more than modest manner.

In this context it is important to note that legislating in the field of 'social security and social protection of workers' (Article 153(1)(c) TFEU), which affects public budgets of the Member States the most, requires a unanimous vote in the Council (Article 153(2)(3) TFEU). Since the best in place to evaluate whether the financial equilibrium of their social security systems is affected are the Member States themselves, the unanimous adoption of a legal act based on Article 153(2)(b) TFEU establishes in case of a legal review of this

act a presumption that the financial equilibrium of the social security systems of the Member States is not significantly affected by this legal act.²⁵

2.2.5.2.4 Directive as the only admissible means for Union legislation based on Article 153(2)(b) TFEU

Finally, legal acts based on Article 153(2)(b) TFEU may only be adopted as directives. According to Article 288(3) TFEU, directives 'shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods'. Directives do, in principle, not contain individual rights but oblige Member States to create individual rights within their national legal orders. Only if, after the expiry of the implementation period, Member States have not implemented or have wrongly implemented a directive so that there are no individual rights in the national legal order, an individual may vis-à-vis the public authorities directly rely upon a provision of the directive.

In any event, the Union legislator may not establish, on the basis of directives, Union bodies or Union funds as well as legal claims for individuals against Union bodies or funds.

2.2.5.3 Article 153(2)(b) TFEU as a legal base for EUBS?

At the outset, it is worth recalling that because of the presence of a trigger the equivalent EUBS options that form the object of this study pursue mainly the objective of macroeconomic stabilisation (see sections 2.1 and 2.3). These options can therefore not be based on Article 153(2)(b) TFEU, which, read in conjunction with Article 153(1)(c) TFEU, empowers the Union to adopt measures in the field of 'social security and social protection of workers'. A benefit scheme that can only be applied to unemployed workers after the activation of a certain trigger cannot be considered as contributing to the 'social security' or the 'social protection' of workers. Such scheme must be permanent in order to do so. Thus the equivalent EUBS options that form the object of this study cannot be based on Article 153(2)(b) TFEU.

2.2.5.3.1 Independent EUBS is no minimum requirement

The remaining EUBS options that aim at improving the situation of short-term unemployed people and at promoting social cohesion could, in principle, be based on Article 153(2)(b) TFEU as they contribute to the 'social security and social protection of workers' in terms of Article 153(1)(c) TFEU. Yet the core feature of a EUBS option, which mainly pursues an objective covered by Article 153(1)(c) TFEU, to look at when considering its eventual adoption on the basis of Article 153(2)(b) TFEU is its relationship with the existing national UBS. This is because of two reasons. First, Article 153(2)(b) TFEU allows only for setting 'minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each Member State'. Second, the only kind of act available for legislating under Article 153(2)(b) TFEU are directives. Minimum requirements defined in a directive under Article 153(2)(b) TFEU need a transposition into national law. Against this background, a Union legal act, which is based on this article, aims at modifying national provisions in a way that all national legal orders are supposed to contain the same set of minimum requirements. In return, a Union act, which intends to establish rules that are independent from existing national

²⁵ It is worth mentioning that a 'presumption' does not exclude, by definition, that there can be a threat to the financial equilibrium of national social security systems even if there was a unanimous vote in the Council. Yet the margin for the CJEU to declare such a unanimous vote void because of a threat to the financial equilibrium of national public budgets is quite narrow if one takes into account that it lies within the political competence of the Member States' national institutions to decide on matters relating to their financial situation.

provisions and that do not have to be implemented into national law, cannot be based on Article 153(2)(b) TFEU.

In principle, the 14 genuine EUBS options that form the object of this study define the conditions for payment (e.g. eligibility), the amount of the payment (e.g. reference wage, replacement rate, capping, cyclical variability) and the duration of the payment themselves without reference to national UBS. Genuine EUBS are not intended to be a part of the national UBS but separate from it. Both co-exist in the territory of the Member States. Where both schemes overlap, EUBS as a Union instrument would take precedence over the NUBS. NUBS would still be entitled to top up or to pay benefits to beneficiaries, which would not be covered by EUBS (see section 2.2.1). The relationship between these genuine EUBS options and the national UBS already argues against the use of Article 153(2)(b) TFEU as suitable legal base. Furthermore, Article 153(2)(b) TFEU does not allow for adopting regulations but only for adopting directives. A Union agency that administers the EUBS or a fund that collects and pays out the benefit can, however, only be established by means of a regulation. By that, none of the 14 genuine EUBS options could be established on the basis of Article 153(2)(b) TFEU.

Going beyond the EUBS options that form the object of this study, one may, however, think about using Article 153(2)(b) TFEU in order to define minimum requirements for national unemployment benefits at Union level. There would be no co-existence of EUBS and national UBS in the territory of the Member States since the EU legal act would only refine the existing national unemployment benefits. In return for the implementation of minimum requirements into the NUBS, a European fund or a European clearing mechanism would transfer lump sums, which are calculated in accordance with criteria defined by an EU legal act, to the national unemployment budgets. 'EUBS' understood as minimum requirements combined with financial support would hence be national and based on national rights, but defined and (partly) financed by the European level. Amongst the 18 EUBS options that form the object of the present study, the equivalent EUBS options come the closest to this alternative. Under the equivalent EUBS options, the criteria set at Union level define the amount to be transferred to NUBS, whilst the definition of the actual benefit remains national but bound to certain minimum requirements. Yet and that's how the equivalent EUBS options are to distinguished from the just developed alternative option by the fact that under the former the lump sum is only transferred from the EU to the Member State concerned once a certain threshold (the 'trigger') is exceeded (see section 2.1).²⁶ Crucial for eventually basing this alternative EUBS option on Article 153(2)(b) TFEU is, however, that the minimum requirements do not affect 'fundamental principles' of the unemployment insurance system of the Member States as protected by Article 153(4) first indent TFEU (see section 2.2.5.2.3). Since none of the equivalent EUBS options that form the object of this study reflects this shortly described alternative EUBS option, any further elaboration on the question which minimum requirements would be covered by Article 153(2)(b) TFEU would surpass the scope of the present study and will therefore not be further addressed.

2.2.5.3.2 Accompanying measures covering minimum requirements with regard to the regulation of NUBS

Whilst being legally separate from national UBS, a genuine EUBS will nevertheless affect, in economic terms, the co-existing national UBS (see also section 2.2.6.3.2). One can easily imagine that the creation of a genuine EUBS can put in place a convergence of national schemes towards the European one in order to smooth the transition between

²⁶ It is worth recalling that the 4 equivalent EUBS options that form the object of this study cannot be based on Article 153(2)(b) TFEU since they mainly pursue the objective of macroeconomic stabilisation whilst the impact on 'social security and social protection of workers' is only ancillary because of the presence of the trigger.

the safety net of the European scheme and their own. It appears therefore to be recommended, in the context of genuine EUBS options, to adopt supplementing legislation on the basis of Article 153(2)(b) TFEU, which sets certain minimum requirements for national UBS in order to improve the legal coordination between national UBS and EUBS.

Such accompanying measures with regard to the regulation of NUBS appear even to be necessary when an equivalent EUBS option is to be established. As described above, under equivalent EUBS, the European level only defines a lump sum, which is transferred to NUBS and to be paid out by the national authorities in accordance with national law. There is a significant risk of divergence between the criteria set for the calculation of the lump sum at EU level and the criteria set at national level for the subsequent use of the lump sum. The bigger the divergence becomes, the more the EUBS lump sum turns into a simple subsidy of NUBS and risks to run counter the 'no bail-out' clause in Article 125(1) TFEU, as will be explained later in section 3.

Such minimum requirements with regard to the regulation of national UBS may, however, not affect fundamental principles of the respective national UBS. Fundamental principles cover, as explained above,²⁷ rules that implement ordering principles of the respective national social security system in contrast to rules that only relate to the control of the overall expenses of a national social security system. In the context of UBS, ordering principles refer, amongst others, to the way of how national UBS is financed (by contributions or by taxes). Setting minimum requirements for the way of how national UBS are financed appears therefore to be excluded from the scope of Article 153(2)(b) TFEU, but is also not necessary for the establishment of a EUBS. A closer look has to be taken at eligibility criteria. Eligibility criteria that implement ordering principles of the NUBS are excluded from an EU legal act defining minimum requirements. However, eligibility criteria and other rules that do not relate to ordering principles of the NUBS but rather serve the control of the overall expenses of the NUBS may still be addressed by a Union legal act.

In order to illustrate this distinction, an eligibility criterion that relates to the ordering principles would be the exclusion of self-employed people since the question of whether unemployment benefits are to be paid to self-employed people that, by definition, decided to bear social risks themselves is rather a matter of principle than of managing expenses.

Regulating part-time workers, on the contrary, rather belongs to criteria relating to the management of expenses than to fundamental principles. Part-time workers are under all unemployment benefit schemes eligible for unemployment benefits.²⁸ Their actual entitlement depends on criteria such as the minimum required contribution or work record in weeks, months or hours. A different treatment of part-time workers with regard to unemployment benefits amongst Member States can against this background rather be traced back to rules relating to the management of expenses such as the work record based on hours than ordering principles. This finding is supported by Leschke who concluded in her study on the unemployment insurance systems in Europe and their adaptation to 'new risks arising from non-standard employment': 'The countries' differences in coverage rates among non-standard workers are driven by differences in overall coverage levels rather than by specific principles such as tax financing or the

²⁷ See section 2.2.5.2.2.

²⁸ Leschke, Are unemployment insurance systems in Europe adapting to news risks arising from nonstandard employment?, Working paper No. 07-05.RS (2007), p. 15 et seqq.; OECD, Employment Outlook 2010, Chapter 4, How Good is Part-Time Work?, p. 211 et seqq.

predominance of the welfare principle.²⁹ Regulating unemployment benefits for part-time workers falls therefore within the scope of minimum requirements that can be set by the Union legislator without affecting the Member States' right to define the fundamental principles of their social security systems.

2.2.5.3.3 Minimum requirements for activation policies

Furthermore, it might be considered to introduce minimum requirements for activation policies under Article 153(2)(b) TFEU. As explained in Task 1A, 'they can be motivated predominantly by concern for individual and institutional moral hazard (Belgium is a telling case), but their motivation can also be broader, encompassing the quality of social rights for citizens (Austria is an example).' Minimum requirements play a role in Denmark and Austria (with regard to both UI activation and SA activation), in Belgium (with regard to UI activation), and in the US (with regard to UI and SA); however, the level of detail and the strictness of these requirements differs from case to case. Such minimum requirements can be the result of specific inter-institutional agreements (as in Belgium, with regard to activation), or of a consensus established among the lower level governments (as in the Swiss case, with the non-binding guidelines issued by the inter-cantonal cooperation conference).

In order to address issues of institutional and individual moral hazard, it might be considered to adopt minimum requirements for activation policies on the basis of Article 153(2)(b) TFEU. Activation policies are, as can be seen in the explanations of Task 1A, an important element relating to the social protection of workers since it addresses a moral hazard issue that is inherent to multi-tier unemployment benefit schemes. Yet, it is important to recall that minimum requirements can only be adopted on the basis of Article 153(2)(b) TFEU if they contribute to the 'social security and social protection of workers' (Article 153(1)(c) TFEU). Activation policies are, however, rather part of employment policies than of social security and protection policies. As such, activation policies would have to be based on competences in title IX of the TFEU on employment (Articles 145 to 150 TFEU). Title IX of the TFEU does only provide for coordinating competences (Article 2(3), 5(2) TFEU) but not for competences for the adoption of legally binding acts.

This does not imply, however, that, based on Article 153(2)(b) TFEU, no minimum requirements for activation policies may be adopted at all. In the context of the internal market harmonisation competence in Article 114(1) TFEU, the CJEU decided that provisions in a legal act, which were chosen on grounds that fall in the scope of another policy field than 'internal market', do not prevent the use of Article 114(1) TFEU for the entire legal act 'provided that the conditions for recourse to [Article 114(1) TFEU] as a legal basis are fulfilled'.³⁰ In fulfilling the conditions for recourse to Article 114(1) TFEU, the Union legislator may adopt provision, which it deems necessary 'for contributing to the implementation of a process of harmonisation'.³¹ The idea underlying this reasoning can be generalised and applied to other legal bases. Rules that are necessary to achieve the main objective of a harmonising measure may be included in this act although the

²⁹ Leschke, Are unemployment insurance systems in Europe adapting to new risks arising from nonstandard employment?, Working paper No. 07-05.RS (2007), p. 32.

³⁰ CJEU, Case C-376/98, Germany v Parliament and Council [2000] ECR I-8419 para. 88; Case C-491/01, British American Tobacco (Investments) and Imperial Tobacco [2002] ECR I-11453 para. 62; Case C-380/03, Germany v Parliament and Council [2006] ECR I-11573 para. 39; Case C-58/08, Vodafone [2010] I-4999 para. 36.

³¹ CJEU, Case C-217/04, United Kingdom v Parliament and Council [2006] ECR I-3771 para. 44; Case C-270/12, United Kingdom v Parliament and Council, ECLI:EU:C:2014:18, para. 104 et seq.

subject-matter of these particular rules falls into the scope of another policy field than the one of the competence, on which the harmonising measure is based. In order to prevent a circumvention of the distribution of competences between Member States and the Union and the limits set to Union competences by the Treaties, complementing rules falling in the scope of other policy areas than the one of the invoked competence have in fact to pursue the objectives of harmonising measure.³²

Applying this reasoning to Article 153(2)(b) TFEU and the question of setting minimum requirements for activation policies, the conclusion would be that minimum requirements for activation policies, although they would fall into the scope of title IX of the TFEU on employment policies, could be adopted on the basis of Article 153(2)(b) TFEU provided that they are necessary for the social security and social protection of workers under Article 153(1)(c) TFEU.

Against this background, Article 153(2)(b) TFEU can, in principle, be used for the adoption of minimum requirements for activation policies in relation to the objective set out in Article 153(1)(c) TFEU. Activation policies covered by such a legal act must in fact pursue the objective of social security and social protection of workers. Minimum requirements for activation policies that appear to be politically important but rather remote with regard to social security and social protection of workers may not be based on Article 153(2)(b) TFEU. They must either be included in guidelines coordinating Member States' employment policies under Article 148(2) TFEU or in a Council recommendation based on Article 292 TFEU.³³ It should be noted that these instruments are not legally binding upon the Member States.

With regard to those minimum requirements on activation policies that are necessary for the social security and social protection of workers under Article 153(1)(c) TFEU, Article 153(2)(b) TFEU would be a suitable legal base since these minimum requirements would not concern the fundamental principles of the social security system of the Member States as they do not affect the ordering principles of social security. The costs attached to activation policies do, furthermore, not significantly affect the financial equilibrium of the social security systems of the Member States. Because of the required nexus with minimum requirements for the social security and social protection of workers, however, it should be noted that probably only few elements of effective activation policies can be harmonised on the basis of Article 153(2)(b) TFEU.³⁴

2.2.6 Specific actions to strengthen social cohesion (Article 175(3) TFEU)

The use of Article 175(3) TFEU for the establishment of a EUBS was suggested by few authors and institutions.³⁵ This provision is part of Title XVIII on economic, social and territorial cohesion. It was used inter alia for the establishment of the European

³² In this sense CJEU, Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419 para. 85.

³³ An example for such a recommendation in the area of activation policies based on Article 292 TFEU can be found in Council Recommendation of 22 April 2013 on establishing a Youth Guarantee, [2013] OJ C 120, p. 1.

³⁴ On the impact of this limited use of setting legally binding minimum requirements for activation policies on the basis of Article 153(2)(b) TFEU on the limits set by the 'no bail-out clause' in Article 125(1) TFEU, cf. section 3.

³⁵ Proposed by Iliadou, Karakitsos and Tsibanoulis, in: Neergard/Jacqueson/Danielsen (eds.), *The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 1, The Economic and Monetary Union, Report on Greece*, p. 376-418 at 379; Ministero dell'Economia e delle Finanze, *European unemployment insurance scheme (October 2015)*, p. 3.

Globalisation Adjustment Fund.³⁶ This legal base allows for the establishment of specialised funds at EU level that lead to the strengthening of the social cohesion in the Union. A Union fund is detached from any national rules and defines its eligibility criteria autonomously. By that, Article 175(3) TFEU addresses some of the features that couldn't be realised on the basis of the Union competences examined previously.

2.2.6.1 Scope of Article 175(3) TFEU

The European Parliament and the Council may, in accordance with the ordinary legislative procedure, adopt on the basis of Article 175(3) TFEU 'specific actions outside the Funds' if necessary to attain the objective set out in Article 174 TFEU, which is the strengthening of the economic, social and territorial cohesion of the Union.³⁷ According to the CJEU, the content of a specific action adopted on the basis of Article 175(3) TFEU may not 'extend beyond the scope of the Community's policy on economic and social cohesion'.³⁸ Therefore, the scope of the legal base in Article 175(3) TFEU follows the scope of Article 174 TFEU defining the Union's policy on economic, social and territorial cohesion. The definition of the scope of Article 174 TFEU with regard to strengthening social cohesion meets with two obstacles: First, the question arises whether 'social cohesion' can be considered as stand-alone objective amongst 'economic, social and territorial cohesion', which is not reduced to addressing only region-specific social problems. Second, and more important, the term 'social cohesion' gives little guidance as to which kind of measures are suitable for promoting social cohesion. The term must therefore be defined more concretely in order to make it accessible for an assessment of the suitability of Article 175(3) TFEU to adopt a given measure.

2.2.6.1.1 Strengthening social cohesion beyond addressing region-specific problems

Article 3(3)(3) TEU defines the objective, according to which the Union 'shall promote economic, social and territorial cohesion, and solidarity among Member States.' Article 175(3) TFEU implements this objective. A question may now arise whether the objective to promote 'social cohesion' can be understood as a stand-alone objective or has to be read together with economic and territorial cohesion as one goal so that a Union measure may only promote social cohesion if it also strengthens the economic and territorial cohesion. The latter understanding would reduce the cohesion objective to one that only allows for addressing region-specific disparities and not Union-wide disparities as a EUBS would do.

Whilst the wording of 'economic, social and territorial cohesion' and the use of the word 'and' might speak in favour of a narrow understanding of the cohesion goal as only addressing region-specific disparities, the better arguments are in favour of interpreting the promotion of social cohesion as a stand-alone objective. This can, first, be drawn from the fact that until the entry into force of the Lisbon Treaty, territorial cohesion, which explicitly addresses region-specific disparities, was not even mentioned in the Treaties. Article 2, first indent of the TEU of 2006 defined hence as objective of the Union 'to promote economic and social progress [...], in particular [...] through the strengthening of economic and social cohesion'.

³⁶ Regulation (EU) No 1309/2013 of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006, [2013] OJ L 347, p. 855.

³⁷ CJEU, Case C-166/07, European Parliament v Council [2009] ECR I-7135 para. 45.

³⁸ CJEU, Case C-166/07, European Parliament v Council [2009] ECR I-7135 para. 46.

Furthermore, a closer look at the articles specifying the cohesion goal in the TFEU reveals that an understanding of the cohesion goal as only addressing region-specific disparities curtails the reach of this goal as it is meant by the Treaties. Article 174(2) TFEU states that when strengthening its economic, social and territorial cohesion '*in particular*, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions.³⁹ The reference to 'in particular' makes clear that the cohesion goal also includes measure that do not aim at reducing disparities between regions, but economic and social disparities. This finding is supported by secondary Union legislation. Regulation (EU) No 1304/2013 on the European Social Fund⁴⁰ seeks, according to its second recital, 'to improve employment opportunities, strengthen social inclusion, fight poverty, promote education, skills and life-long learning and develop active, comprehensive and sustainable inclusion policies in accordance with the tasks entrusted to the ESF by Article 162 of the Treaty on the Functioning of the European Union (TFEU), and *thereby contribute to economic, social and territorial cohesion in accordance with Article 174 TFEU*'.⁴¹ This shows that an instrument such as the ESF, which primarily aims at reducing social disparities, is covered by the objective of promoting 'economic, social and territorial cohesion'. Moreover, the most prominent specific action adopted on the basis of Article 175(3) TFEU, the European Globalisation Adjustment Fund (EGF),⁴² also extends its scope beyond region-specific problems. Whereas the original regulation⁴³ defined its scope in Article 1(1) as providing 'support for workers made redundant as a result of major structural changes in world trade patterns due to globalisation where these redundancies have a *significant adverse impact on the regional or local economy*',⁴⁴ already three years later as a reaction to the outbreak of the economic and financial crisis the Union legislator, based on the same legal basis, dropped the regional limitation and included Article 1(1a): 'By way of derogation from paragraph 1, the EGF shall also provide support to workers made redundant as a direct result of the global financial and economic crisis [...]. Member States applying for an EGF contribution under this derogation shall establish a direct and demonstrable link between the redundancies and the financial and economic crisis.'⁴⁵ This derogation can also be found in Article 2(b) of the current Regulation (EU) No 1309/2013 specifying that the derogation may also be applied 'as a result of a new global financial and economic crisis'. Furthermore, the Union legislator, based on Article 175(3) TFEU, extended the geographical point of reference for the 'significant adverse impact' of the redundancies in Article 2(a) to 'the local, regional and *national* economy.'⁴⁶ Including the impact on the national economy shows that promoting 'economic, social and territorial cohesion' is to be understood as going beyond addressing region-specific problems. The main purpose of the EGF is 'to show solidarity towards workers made redundant as a result of major structural changes in world trade patterns due to

³⁹ Emphasis added.

⁴⁰ [2013] OJ L 347, p. 470.

⁴¹ Emphasis added.

⁴² Regulation (EU) No 1309/2013 of 17 December 2013 on the European Globalisation Adjustment Fund (2014-2020) and repealing Regulation (EC) No 1927/2006, [2013] OJ L 347, p. 855.

⁴³ Regulation (EC) No 1927/2006 on establishing the European Globalisation Adjustment Fund, [2006] OJ L 406, p. 1.

⁴⁴ Emphasis added.

⁴⁵ Article 1(1) of Regulation (EC) No 546/2009 amending Regulation (EC) No 1927/2006 on establishing the European Globalisation Adjustment Fund, [2009] OJ L 167, p. 26.

⁴⁶ Emphasis added.

globalisation and global financial and economic crises⁴⁷ and, by that, to primarily achieve social cohesion.

Finally, Article 174(1) TFEU specifies that the Union should strengthen the economic, social and territorial cohesion '[i]n order to promote its overall harmonious development'. This reference to the overall development clarifies that positive effects of the means adopted in order to strengthen the economic, social and territorial cohesion must be measurable at EU level. In other words, measures that improve the overall development of the Union are covered by the cohesion goal even if they involve EU wide activities. From this perspective, it appears difficult to argue that 'social cohesion' could not be pursued by the Union legislator as a stand-alone objective and policy action must be limited to addressing region-specific problems. Against the background of these arguments, the Union legislator may adopt measures that primarily aim at promoting social cohesion as a part of the objective to strengthen economic, social and territorial cohesion without being limited to only addressing region-specific problems.

2.2.6.1.2 Meaning of 'social cohesion'

After having clarified that a specific action based on Article 175(3) TFEU may be adopted in order to promote social cohesion without being limited to only focus on region-specific problems, the question has to be addressed what kind of policy measures are covered by the notion of 'cohesion'. As mentioned above, there is wide range of possible understandings of the broad notions of 'economic, social and territorial cohesion'. Advocate General Bot therefore concluded that the *'protean nature of economic and social cohesion and the general nature of the tasks given to that policy mean that it is difficult to define it exactly. It thus proves difficult to lay down the limits of the area covered by the policy because economic and social cohesion emerges as a broad overall concept with imprecise contours.'*⁴⁸ The Court realised earlier that *'although [...] the strengthening of economic and social cohesion is one of the objectives of the Community and, consequently, constitutes an important factor, in particular for the interpretation of Community law in the economic and social sphere, the provisions in question merely lay down a programme, so that the implementation of the objective of economic and social cohesion must be the result of the policies and actions of the Community and also of the Member States.'*⁴⁹ In brief, the definition of what is covered by economic, social and territorial cohesion falls within the political sphere and is therefore to be made by the Union together with the Member States.⁵⁰

This broadest possible understanding of the scope of 'economic, social and territorial cohesion' was confirmed by the Court in its judgment in the IFI case concerning the financial contributions of the former European Community to the 'International Fund for Ireland' (IFI). This fund was established on the basis of an agreement between the governments of Ireland and the United Kingdom⁵¹ and had as objectives to promote economic and social advance and to encourage contact, dialogue and reconciliation between nationalists and unionists throughout Ireland. The IFI forms an international organisation with legal personality, which is administered by a board composed by

⁴⁷ Recital 2.

⁴⁸ AG Bot, Case C-166/07, European Parliament v Council [2009] I-7135 no. 82.

⁴⁹ CJEU, Case C-149/96, Portugal v Council [1999] ECR I-8395, para. 86.

⁵⁰ Kern and Eggers consider Article 175(3) TFEU therefore also as a 'subsidiary competence' for cohesion policy ('Auffangkompetenz'), in: Grabitz, Hilf and Nettesheim, Das Recht der Europäischen Union, 2015, Artikel 175 AEUV para. 21.

⁵¹ United Nations Treaty Series, Vol. 1515, No I-26244.

representatives of Ireland and the United Kingdom. The former European Community's financial contribution to the IFI was adopted by means of a regulation on the basis of former Article 308 EC (today's Article 352 TFEU). The European Parliament contested the choice of the legal base and argued that former Article 159(3) EC (today's Article 175(3) TFEU) would have been the correct legal base. The Court found, without rejecting the above cited reasoning of Advocate General Bot in his conclusions regarding this case, that the financing of the IFI and, by that, the support of its objectives is covered by 'economic and social coherence'.⁵²

Academia criticises the lack of a clear definition of the term 'social cohesion'.⁵³ This lack of clear definition reveals the main weakness of this term. It is only understood as an element that opens the scope of application of Articles 174, 175 TFEU rather than limits it. Yet, the term can only be considered useful for the definition of the scope of a legal provision if it not only provides for criteria opening the scope of this provision but also for those limiting it. Molle suggests to define cohesion as 'the degree to which disparities in social and economic welfare between different regions or groups within the European Union are politically and socially tolerable'.⁵⁴ Whether cohesion is achieved is to be observed by looking at the changes in disparities from one period to another. Strengthening cohesion means, in this context, a decrease of disparity.⁵⁵ Disparity is then measured on the basis of 'indicators to describe the actual situation and its development over time'.⁵⁶ The indicators are selected against the background of the policy field, in which disparity is not 'politically and socially tolerable'. The decision whether disparities are 'politically and socially tolerable' has a procedural and a substantive dimension. In procedural terms the Member States in the Council decide when adopting a specific action whether they consider certain disparities as not being tolerable anymore. That was what the CJEU meant when referring to 'the implementation of the objective of economic and social cohesion' as the 'result of the policies and actions of the Community and also of the Member States'.⁵⁷ In substantive terms, disparities are politically and socially intolerable if they cannot effectively be reduced by policy action only at the level of Member States. Here the definition of 'social cohesion' meets the principle of subsidiarity.

Against this definition, a Union policy action leading to the strengthening of social cohesion requires, first, the identification of social disparities between different regions or groups within the EU that are politically and socially intolerable. In order to be based on Article 175(3) TFEU, a specific action must, second, be suitable to reduce the identified disparities. It is worth mentioning at this point that the geographical point of reference is the entire EU and not a single Member State or region. Article 174(1) TFEU refers to the Union's 'overall harmonious development'.

Whilst the scope of 'social cohesion' can hence be interpreted broadly, a specific action on the basis of Article 175(3) TFEU must, furthermore, be 'necessary outside the Funds'. It is worth mentioning at that point that 'the Funds' not only mean funds established within Title XVIII of the TFEU but all financial support programmes that are foreseen in the Treaties (such as e.g. the European Social Fund) provided that these programmes

⁵² CJEU, Case C-166/07, *European Parliament v Council* [2009] ECR I-7135 para. 54.

⁵³ Molle, *European Cohesion Policy*, 2007, p. 5, 60.

⁵⁴ Molle, *European Cohesion Policy*, 2007, p. 5.

⁵⁵ A decrease of disparity can also be called 'convergence', cf. Molle, *European Cohesion Policy*, 2007, p.16.

⁵⁶ Molle, *European Cohesion Policy*, 2007, p. 61.

⁵⁷ CJEU, Case C-149/96, *Portugal v Council* [1999] ECR I-8395, para. 86.

contribute to the strengthening of the economic, social and territorial cohesion.⁵⁸ The reference in Article 175(3) TFEU to 'the Funds' can be understood in two ways: It can be a limiting criterion, which requires that the subject matter of the specific action has to fall within the nexus of the Funds. That is the case when the specific action supports the usage of the Funds or when the subject matter of the specific action falls, in principle, within the scope of the policies pursued by the Funds but concerns only an exceptional situation. Such a limiting understanding of the reference to the Funds is supported by the actual use of Article 175(3) TFEU. It was used in order to adopt Regulation (EU) No 1309/2013 on the European Globalisation Adjustment Fund, which can be used in order to mitigate negative effects of 'major structural changes in world trade patterns due to globalisation', and to adopt Council Regulation (EC) No 2012/2002 establishing the European Union Solidarity Fund, which can be used in order to mitigate the costs of major natural disasters. It was also used for the adoption of Regulation (EC) No 1082/2006 on a European grouping of territorial cooperation (EGTC), which supports cross-border territorial cooperation. To pursue a different policy by the specific action than the ones pursued by the Funds would, following this understanding, exceed the limits of the legal base of Article 175(3) TFEU.

In the alternative reading, the reference to the Funds still allows the Union legislator, when adopting specific actions, to pursue other policies than the ones pursued by the Funds but requires that the specific actions must serve strengthening the economic and social cohesion of the Union. In its judgment in the IFI case, the CJEU appears to follow this interpretation: *'It is, admittedly, true that [Article 175(3) TFEU] does not set out the form which such specific actions can take. However, [...] the Community, through all of its actions, implements an independent Community policy, with the result that Title XVII of the EC Treaty [Title XVIII of the TFEU] provides adequate legal bases allowing for the adoption of means of action which are specific to the Community, [...] the content of which does not extend beyond the scope of the Community's policy on economic and social cohesion.'*⁵⁹

The Union may therefore and following the case law of the CJEU, based on Article 175(3) TFEU, pursue a different policy than the one pursued by the Funds as long as it is covered by the scope of 'social cohesion'.

2.2.6.2 Limits of Article 175(3) TFEU

2.2.6.2.1 Limited geographical scope of the specific action

It could be argued that specific actions adopted under Article 175(3) TFEU have to cover the entire territory of the Union and cannot be limited to a particular area within the Union territory such as e.g. the Euro area. As, however, Advocate General Bot correctly pointed out in his opinion in the IFI case concerning financial contributions to support activities in Ireland, 'there is nothing in the wording of that article that rules out specific action for the benefit of one or more regions of the Community. In addition, if the Community's economic and social cohesion policy is regarded as a device for restoring a balance in order to promote convergence between the regions of the Community, it is perfectly logical that the Community should selectively focus its action on regions which manifest certain economic and social imbalances.'⁶⁰ Hence, specific actions based on

⁵⁸ Kern and Eggers, in: Grabitz, Hilf and Nettesheim, Das Recht der Europäischen Union, 2015, Artikel 175 AEUV para. 21.

⁵⁹ CJEU, Case C-166/07, European Parliament v Council [2009] ECR I-7135 para. 46.

⁶⁰ AG Bot, Case C-166/07, European Parliament v Council [2009] I-7135 no. 92.

Article 175(3) TFEU may be limited, if politically necessary, to a subgroup of Member States in the Union.

2.2.6.2.2 Use of financial means provided under a specific action must be approved by Union institutions

In the IFI case, the CJEU came to the final conclusion that the financial contributions of the Union to the IFI could not only be based on former Article 159(3) EC, although the objectives of the contested regulation would allow to legislate on its basis. The Court required in addition to the objectives that must fall within the scope of 'economic and social convergence' that specific actions based on former Article 159(3) EC have to be 'administered in accordance with the Community regulatory framework'.⁶¹ Since the subsequent use of the financial contributions of the Union to the IFI was exclusively decided by the IFI Board, which was only composed by representatives of Ireland and the United Kingdom, and, by that, to the exclusion of the former European Community, the latter was not in a position 'to prevent the use by the Fund of that contribution to cover actions which, while complying with the objectives of the IFI Agreement, extend beyond the scope of the Community's policy on economic and social cohesion or, at least, are not managed in accordance with the criteria applied by the Community within the framework of that policy'.⁶² This lack of a procedural influence of the former European Community on the decision about the actual use of the financial contributions lead to the conclusion of the Court that such contributions may not only be based on former Article 159(3) EC but in conjunction with former Article 308 EC. Against this background, the 'administration in accordance with the Community regulatory framework' set a limit for the use of Article 175(3) TFEU. This condition is met if the specific action provides for a definition of how the financial means provided by it are subsequently used and foresee for the European Union a possibility to raise a veto against activities financed by it, which would go beyond the scope of 'economic and social convergence'.

2.2.6.2.3 No undermining of limits set by other legal bases

Finally, legislating on the basis of Article 175(3) TFEU may not undermine limits set by other legal bases. In contrast to Article 352(1) TFEU, Article 175(3) TFEU is not designed as a flexibility clause, which may be used in order to compensate for limitations set by other Union legal bases. It therefore may not overrule such limitations. This refers in particular to the constitutional saving clauses in the Treaties. Such constitutional saving clauses can inter alia be found in Article 153(4) and (5) TFEU. Against this background, specific actions under Article 175(3) TFEU may not affect the right of the Member States to define the fundamental principles of their social security systems, must not significantly affect the financial equilibrium thereof and should not apply to pay. Read altogether, these constitutional saving clauses aim at shielding the national social security systems as part of the core of Member States' sovereignty against unreasonable influence of European legislation. Yet, the Union is not entirely excluded from adopting rules on social security. The existence of Article 151 and 153 TFEU illustrate that the Union legislator is entitled to adopt provisions that affect national security systems. These provisions have, however, to be adopted unanimously in the Council, which allows each Member State to raise a veto if it considers the Union measure to be too intrusive into the area of social security.

Against this background, specific actions, which under Article 175(3) TFEU require a qualified majority in order to be adopted in the Council, may not be of such a kind to influence national social security systems as if they set minimum requirements. As such,

⁶¹ CJEU, Case C-166/07, *European Parliament v Council* [2009] ECR I-7135 para. 46.

⁶² CJEU, Case C-166/07, *European Parliament v Council* [2009] ECR I-7135 para. 59.

it would undermine the majority requirements for adopting legislation that may set minimum requirements under Article 153 TFEU and allow for Union influence on national social security law beyond the overall limits set by the Treaties in order to shield this core area of Member States' sovereignty against European influence.

2.2.6.3 Article 175(3) TFEU as a legal base for EUBS?

2.2.6.3.1 EUBS as a means to promote social cohesion

The answer to the core question whether a EUBS could be based on Article 175(3) TFEU depends on the extent to which a EUBS strengthens the 'social cohesion'.

Social cohesion is understood at hand as the decrease of social disparities between different regions or groups within the EU that are politically and socially intolerable. Disparities are defined on the basis of indicators, which are selected against the background of the policy field, in which cohesion is to be achieved at EU level. With regard to EUBS the indicators are to be derived from the policy field relating to unemployment. The main indicators are the unemployment rate, the quality of unemployment (which refers to the level of education of unemployed people) and the quality of social protection (which refers to the amount of social benefits paid to the eligible person and to social benefits as a percentage of GDP).⁶³ A closer look at these indicators and their development over time⁶⁴ reveal the disparities in the area of unemployment and an increase of these disparities.

Disparities must, furthermore, be politically and socially intolerable. This element of the definition of 'social cohesion' has, as explained above in section 2.2.6.1, a procedural and a substantive dimension. In procedural terms, there would be a presumption that disparities are politically and socially intolerable when the Council adopts a specific action with the necessary majority. The legislator and the Member States have in this respect a political prerogative to determine whether disparities are tolerable ('Einschätzungsprärogative'). Moreover, in substantive terms, the identified disparities in relation to unemployment cannot effectively be reduced at the level of the Member States. Besides a procedural presumption that disparities are politically and socially intolerable when adopting specific actions with the necessary majority in the Council, there is a substantive presumption that the disparities cannot effectively be reduced at Member States level when there is an increase in disparities before the adoption of a specific action. Such increase allows for the conclusion that, assuming Member States intend to take necessary policy action at their level to fight increasing disparities, Member States are not effectively in a position to reduce disparities. This is, with regard to unemployment, especially true for Member States that are in a currency union. Since monetary policy instruments and, by that, nominal devaluation is not anymore at the disposal of a Member States to compensate for macroeconomic imbalances, it must employ policies of real devaluation, which lead to increased unemployment and the costs attached to it.⁶⁵ By that, Member States that are hit by an asymmetric shock are less in a position to reduce disparities than the European level.⁶⁶ In sum, the identified disparities in relation to unemployment can be considered politically and socially intolerable.

⁶³ See in details Molle, *European Cohesion Policy*, 2007, p. 62-82.

⁶⁴ See for instance Reports on Tasks 1A, 1C and 2B; Esser, Ferrarini, Nelson, Palme and Sjöberg, *Unemployment Benefits in EU Member States*, 2013.

⁶⁵ Corden, *Economic Policy, Exchange Rates and the International System*, 1977, p. 80.

⁶⁶ This is also supported by the findings of the backward looking analysis: Dolls/Lewney, Report on Task 3B.

As a next step, in order to be based on Article 175(3) TFEU, a EUBS must be suitable to reduce the identified disparities within the EU. In principle, the goal of a EUBS is not *per se* to reduce disparities relating to unemployment. It is an automatic stabiliser designed to cushion European national economies in case of negative shocks. Moreover, the system targets short-term unemployment. In other words, it is designed to smooth cycles and will not affect structural differences between economies, such as long-term unemployment rates. In particular, the equivalent systems focus on the macroeconomic stabilisation effect since they only apply in case the trigger is activated and since they include only transfers from a European fund to national budgets. Notably having regard to the indicator of the quality of social protection, one has to acknowledge that equivalent EUBS only have an impact on the quality of social protection in times of economic crises. Moreover, equivalent EUBS prevent only a further increase of disparities when an economic crisis hits a Member State.⁶⁷ In order to be considered strengthening social cohesion, however, a Union measure must achieve a decrease of disparities. This shows that the aspect of social cohesion is only of minor importance for equivalent EUBS, whilst the focus is on macroeconomic stabilisation. The equivalent EUBS options may therefore, in principle, not be based on Article 175(3) TFEU.

Turning to the genuine EUBS options, the relationship between macroeconomic stabilisation and social cohesion turns around. Whilst these EUBS options also have a macroeconomic stabilisation effect as they discharge national budgets from paying unemployment benefits also in crisis' times, they primarily aim at reducing disparities when it comes to short-term unemployment as they pay out a European benefit directly to the unemployed eligible person. By that, they appear, in principle, to be suitable to strengthen social cohesion.

A closer look at the impact of the several genuine EUBS options on the indicators that define the disparities over time such as the coverage rate of the total amount of short-term unemployed people, the employment, the unemployment rate or the quality of social protection reveals that many genuine EUBS options actually reduce disparities.

The backward-looking analysis by Dolls and Lewney shows with regard to the coverage rate of EUBS of short-term unemployed people as compared to NUBS that most of the variants lead to a higher coverage rate than the national unemployment insurances.⁶⁸ The only exception is variant V8, which is linked to the fact that this EUBS variant only covers the period between the third and the sixth month of unemployment. As regards the impact on employment, their analysis finds that all genuine EUBS variants have a more positive outcome than the situation, in which only national unemployment insurance are in place.⁶⁹ Concerning the unemployment rate, the effect of EUBS in comparison to stand-alone NUBS is only very small and calculated at +/- 0.05 percentage points.⁷⁰

The indicator of the quality of social protection is discussed by Coucheir, Strban and Hauben in the horizontal report on the legal and operational feasibility of the EUBS at national level.⁷¹ This follows from the fact that because of the co-existence of EUBS and NUBS in the territory of the Member States (see section 2.2.1) a higher level of EUBS

⁶⁷ See in this respect Dolls/Lewney, Report on Task 3B, 2.2.1.

⁶⁸ Dolls/Lewney, Report on Task 3B, 4.1.1

⁶⁹ Dolls/Lewney, Report on Task 3B, 4.2.1, figure 9.

⁷⁰ Dolls/Lewney, Report on Task 3B, 4.2.1, figure 11.

⁷¹ Coucheir/Strban and Hauben, Report on Task 2B.

benefits as compared to national benefits results into an easier implementation of EUBS in the Member States since the national unemployment insurance would not have to top up EUBS.⁷² The authors correctly point out that a comparison of EUBS and NUBS amounts is 'extremely complex' and goes beyond 'a simple comparison of the replacement rates of the EUBS benefits and NUBS benefits'.⁷³ This is due to the fact that an EUBS with lower replacement rate as compared to the one of the national unemployment insurance can still reduce disparities because of a more generous determination of reference earnings or capping. Despite this correct analysis one may already discard variant V9 from the ones that might be suitable to reduce disparities as it has a replacement rate of only 35%, which can only be found in few national system such as the Croatian one. The vast majority of NUBS is above this replacement rate. It is worth mentioning that variant V9 with a low replacement rate but a high capping at 150% favours, in particular, high-income earners over low-income earners. Furthermore, variant V14 referring to a capping of 50% can also be discarded as this low capping leads to lower unemployment benefits in most of the Member States and corresponds *de facto* to a flat-rate provision for above-average earners.⁷⁴ Variant V14 would therefore generate frequently top-ups by NUBS, which proves that it is not suitable to reduce current disparities.

Finally, EUBS has an indirect effect on reducing disparities, which are due to the significant differences between the various national unemployment schemes in place. If the eligibility criteria, the amount or the duration of the European unemployment benefit are more generous than the ones under the NUBS, the necessary takeover of the eligible person by the NUBS after the expiry of the European benefit could trigger a convergence in the design of national unemployment benefit schemes. By the time the EUBS expires (which is in most of the EUBS variants the 12th month of unemployment), the unemployed worker will be again in the hands of the national unemployment benefit schemes. This will lead to a jump that, depending on the country, is more or less large and entails that a worker is entitled to lower benefits (if not zero). Moreover, in many national systems unemployed workers would fall back on social assistance (or first on unemployment insurance and then on social assistance). This jump is an undesirable outcome, from the economic as well as from the administrative point of view. While the EU cannot force countries to adjust their systems, one can easily imagine that the creation of a EUBS can put in place a convergence of national schemes towards the European one in order to smooth the transition between the safety net of the European scheme and their own.

In sum, the arguments put forward show that genuine EUBS will reduce disparities in relation to unemployment within the European Union and, by that, strengthen social cohesion. The variants V8, V9 and V14, however, have to be excluded as they won't reduce the overall disparities. By that, the remaining variants of genuine EUBS can be considered to fall under the broad understanding of the notion of 'social cohesion' of the European Court of Justice. These genuine EUBS variants may therefore be established on the basis of Article 175(3) TFEU.

Finally, it is worth mentioning that a nucleus of a genuine EUBS can already be found in EU law in the shape of the European Globalisation Fund (EGF), established by Regulation (EU) No 1309/2013 on the basis of Article 175(3) TFEU. Beneficiaries of this fund are 'worker whose employment is ended prematurely by redundancy'. The regulation defines the eligibility for and the content of the support granted by this fund. In contrast to

⁷² Coucheir/Strban and Hauben, Report on Task 2B, 3.2.3.2.

⁷³ Coucheir/Strban and Hauben, Report on Task 2B, 3.2.3.2.

⁷⁴ Coucheir/Strban and Hauben, Report on Task 2B, 5.3.

genuine EUBS, payments by the EGF are authorised on a discretionary basis, whilst payments by EUBS are automatized. This refers, however, to a technicality, which is not required by the legal base itself.

2.2.6.3.2 No undermining of limitations contained in other legal bases

Yet, a specific action adopted under Article 175(3) TFEU may not undermine limitations, which the Treaties included into other Union legal bases. These limitations can be substantive such as constitutional saving clauses or procedural such as a unanimous voting requirement instead of a qualified majority voting requirement. Genuine EUBS take, within the scope of its application, precedence over NUBS (see section 2.2.1). Outside its scope of application, as just shown, EUBS will affect the national UBS in a way that it sets incentives for an adaptation of national UBS to the EUBS in terms of eligibility, duration or replacement rate in order to smoothen the transition between EUBS and national UBS. Against this background, EUBS has two impacts on the social protection of workers within the territory of a Member States.

First, within its own scope of application, it competes against the NUBS and takes precedence over the latter. If EUBS is now more generous than NUBS, frictions may occur with regard to the NUBS that regulated before the establishment of EUBS exclusively the unemployment benefits within the national territory. These frictions are, however, only a consequence of the co-existence of an EU fund, which has to define the conditions of its eligibility itself, and of a national fund, which also has to define the conditions of its eligibility itself. These frictions do not affect the 'the right of Member States to define the fundamental principles of their social security systems', as guaranteed by Article 154(4), first indent TFEU. Member States are still free to define their national social security systems. There are only not applicable anymore within the scope of application of EUBS. The danger of undermining Member States' sovereignty, which is the underlying rationale of Article 153(4), first indent TFEU, is not at stake when the Union establishes an own fund. Political responsibilities for the activities of this fund are clearly visible and assigned to the Union legislator.

Second and more important, outside its scope of application, a EUBS will probably achieve *de facto* convergence of national UBS. In situations, in which the NUBS is outside the scope of EUBS less generous than the EUBS, previous claimants under the EUBS, who after the transition from the EUBS to the NUBS won't be covered by a benefit at all anymore or who will receive less than under the EUBS, will certainly increase political pressure on national governments to adapt the national UBS. Moreover, the additional costs attached to the administration of different unemployment benefit schemes by the national unemployment authorities will prompt the national legislator to consider an adaptation of the NUBS to the EUBS.

This *de facto* convergence goes beyond economic convergence and might result into a legal adaption of the national UBS rules.⁷⁵ The co-existence of genuine EUBS and NUBS might against this background have, in political and in economic terms, a *de facto* harmonising effect on NUBS, which is still below legal harmonisation but not that remote from it to disregard the limitations set by Article 153 TFEU to legal harmonisation in the area of the 'social security and social protection of workers'. Hence, these limitations have to be taken into account when basing genuine EUBS options on Article 175(3) TFEU. Under Article 153 TFEU, the Union law may not affect the right of Member States to define the fundamental principles of their social security law and the Council has to vote unanimously in favour of Commission proposal (see section 2.2.5.2). If a EUBS were to be established not as a separate specific action but as a part of national UBS, a Union

⁷⁵ It is important to emphasise that this adaptation of national UBS is not required by an EU legal obligation but triggered by economic and political processes within the Member States.

legal act establishing this EUBS would have to be based on Article 153 TFEU. It appears not convincing that the *de facto* harmonising effect of a separate and independent EUBS on NUBS is so much different from the legal harmonisation under Article 153 TFEU that it would justify the adoption of a EUBS by qualified majority instead of a unanimity. Against this background, establishing the EUBS on the basis of Article 175(3) TFEU appears as undermining the limitations contained in Article 153 TFEU. As a consequence, Article 175(3) TFEU may also not serve as a legal base for the establishment of a genuine EUBS.

2.3. Legal base for EUBS aiming at macroeconomic stabilisation (equivalent EUBS)

The possible specific legal bases that serve to attain the objective of macroeconomic stabilisation are (in numerical order) Article 121(6) TFEU (detailed rules for the multilateral surveillance procedure) (2.3.1) and Article 122(2) TFEU (Union financial assistance in case of crises) (2.3.2). The meaning of Article 352(1) TFEU in the context of macroeconomic stabilisation will be assessed under section 2.4.

2.3.1 Detailed rules for the multilateral surveillance procedure (Article 121(6) TFEU)

The European Parliament and the Council may, in accordance with the ordinary legislative procedure, adopt on the basis of Article 121(6) TFEU 'detailed rules for the multilateral surveillance procedures referred to in' Article 121(3) and (4) TFEU. This legal base was proposed by a note of the Italian Ministry for Economic and Financial Affairs.⁷⁶ One may consider Article 121(6) TFEU as a legal base since at least with the adoption of Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances⁷⁷ macroeconomic stabilisation is an aim pursued by the multilateral surveillance procedure under Article 121 TFEU. One may therefore consider to base a EUBS, understood as an instrument for macroeconomic stabilisation, on Article 121(6) TFEU.

2.3.1.1 Scope of Article 121(6) TFEU

Measures based on Article 121(6) TFEU may specify and facilitate the multilateral surveillance procedure, as defined by Article 121(3) and (4). The scope of Article 121(6) TFEU is therefore defined by the scope of the multilateral surveillance procedure. The multilateral surveillance procedure aims at ensuring 'closer coordination of economic policies' and 'sustained convergence of the economic performances of the Member States'. In order to achieve this effect under the procedure, 'economic developments in each of the Member States and of the Union' and 'the consistency of economic policies with the broad guidelines' are to be monitored (Article 121(3) TFEU). Violations, which can be addressed under Article 121(4) TFEU, are inconsistencies of a Member State's economic policies with the broad guidelines and the risk of jeopardising the proper functioning of the economic and monetary union. The scope of the multilateral surveillance procedure is therefore defined, first, by the object of surveillance, which are 'economic policies' and 'economic performances' and, second, by the benchmark for the surveillance, which is set by the 'broad guidelines of the economic policies of the Member States and of the Union' (Article 121(2) TFEU) and the 'proper functioning the economic and monetary union'.

⁷⁶ Ministero dell'Economia e delle Finanze, European unemployment insurance scheme (October 2015), p. 3.

⁷⁷ Regulation (EU) No 1176/2011 of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L 306, p. 25.

The Union legislator made use of this legal base when adopting Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances and of Regulation (EU) No 1175/2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies. In conjunction with Article 136(1) TFEU, this legal base was used in order to introduce the so-called 'Two Pack'-Regulations for more restrictive rules on the economic policy coordination with regard to Member States whose currency⁷⁸ is the Euro and in order to introduce sanction for non-compliance of Member States whose currency is the Euro with the economic policy coordination requirements.⁷⁹

2.3.1.2 Limits of Article 121(6) TFEU

The limits of Article 121(6) TFEU are set by the limits of the multilateral surveillance procedure being an instrument of policy coordination. Member States shall, according to Article 5(1), 'coordinate their economic policies within the Union'. This coordination requires from Member States that they 'conduct their economic policies [...] in the context of the broad guidelines referred to in Article 121(2)' (Article 120 TFEU). Broad guidelines are adopted as recommendations (Article 121(2)(3) TFEU), which means, according to Article 288(5) TFEU, that they have no binding force. The European Commission may, therefore, not enforce broad guidelines, which were not implemented by a Member State, in the same manner as it can enforce directives under Article 288(3) TFEU in conjunction with Article 4(3) TFEU. Broad guidelines have no direct effect. Economic policy coordination is, by definition, not supranational but intergovernmental. This fundamental decision by the Treaties may not be changed by means of secondary law based on Article 121(6) TFEU. Secondary law may therefore not set any legally binding policy goals. It may not introduce an enforcement mechanism that allows the Commission or the Council to substitute national policy decisions.

Furthermore, on the basis of Article 121(6) TFEU, the Union legislator may not introduce, by means of secondary law, other sanctions than those foreseen by Article 121(4) TFEU. This can be seen having regard to Article 126(11) TFEU. In the context of the budgetary surveillance procedure, the Treaty defines in Article 126(11) TFEU, in an exhaustive manner, the range of possible sanctions in case of Member States' non-compliance. This range also covers financial sanctions such as non-interest-bearing deposits or fines. Other sanctions than those foreseen by Article 126(11) TFEU may not be imposed on Member States. This follows from the general relationship between Member States' sovereignty and the Union's right to intervene. The autonomy of the first is the rule, whilst the latter is the exception that must be justified on the basis of Primary law. In particular with regard to financial sanctions, Article 126(11) TFEU as Article 311(3) TFEU, according to which the increase of payments from the Member States budgets to the general Union budget may only be introduced by unanimity and in accordance with respective national constitutional requirements of the Member States, reflect the general principle that Member States' budgetary sovereignty may only be limited by Primary law but not by Secondary law and especially not by Secondary law, which may be adopted on the basis of a qualified majority and, by that, against the will of a Member State. Against this background, the introduction of enforcement measures in the context of the multilateral surveillance procedure other than those foreseen by Article 121(4) TFEU by

⁷⁸ Regulation (EU) No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability; Regulation (EU) No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area.

⁷⁹ Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area.

means of secondary law on the basis of Article 121(6) TFEU would be a violation of Primary law to the extent that they would cover sanctions.

In sum, Article 121(6) TFEU can only serve as a legal base for a mechanism that reinforces the multilateral surveillance procedure without providing for enforcement mechanisms that are forbidden by Primary law.

2.3.1.3 Incentive-based enforcement mechanism for matters falling under the multilateral surveillance procedure

The establishment of an incentive-based enforcement of recommendations adopted under Article 121(2) TFEU or with a view to avoid risks jeopardising the functioning of the economic and monetary union could be based on Article 121(6) TFEU, although such an enforcement measure is not mentioned by this Article. The only explicit enforcement measure in Article 121(4) TFEU is a warning by the European Commission addressed to a Member State and the publication of the Council recommendation containing the policy reforms to remedy non-compliance. Against the background of the just outlined limits of Article 121(6) TFEU under section 2.3.1.2, Member States are, in principle, protected against any other sanctions under Article 121 TFEU than the warning or the publication of the Council recommendation. An incentive-based mechanism, however, cannot be considered as a 'sanction'. A regulation based on Article 121(6) TFEU may provide for financial incentives for the adjustment of a Member State's economic and fiscal policies to policy goals set by Union guidelines or by Council recommendations adopted under Article 121(4) TFEU. Such a regulation would not infringe Primary law. In contrast to sanctions, refusing payment of financial incentives in case of non-compliance does not worsen the position of a Member State. Prior to a possible adoption of a regulation on financial incentives a Member State would have no right to claim financial assistance as it has no right to claim it after the adoption of such a regulation in case of non-compliance. Therefore, an incentive-based enforcement measure would not infringe Member States' sovereignty and would, hence, be covered by Article 121 TFEU. A legal act setting incentives for Member States to implement policy reforms required by broad economic guidelines could therefore be based on Article 121(6) TFEU.

2.3.1.4 Function of Article 136 TFEU

Seeing the limits of Article 121(6) TFEU, as outlined under section 2.3.1.2, one may raise the question whether Article 136(1)(a) TFEU, which allows for the adoption of measures specific to those Member States whose currency is the Euro in order 'to strengthen the coordination and surveillance of their budgetary surveillance'. An extensive interpretation of Article 136(1)(a) TFEU allows to cover also measures concerning the economic policy coordination by it, although its wording refers to the 'budgetary surveillance'. This follows from the fact the budgetary situation of a Member State is affected by its economic and fiscal policy decisions, which are coordinated under Article 121 TFEU. The economic policy coordination therefore aims at preventing excessive government deficits, which are to be observed and sanctioned under the budgetary surveillance procedure.

Yet, a closer look at the wording of Article 136 TFEU reveals that the potential of Article 136 TFEU is less significant than one may assume even on the basis of the extensive interpretation of Article 136(1)(a) TFEU. It states that 'in order to ensure the proper functioning of economic and monetary union [...], the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126 [...], adopt measures [...]'. This is an institutionalised form of an enhanced cooperation where the decision authorising enhanced cooperation, which is required by Article 20(2) TEU and Article 329(1)(2) TFEU, is made for the Euro-Member States by Primary law and where the procedure for joining this enhanced cooperation is covered by Article 140 TFEU. As legal acts of any other enhanced cooperation, measures based on Article 136 TFEU have to comply with Primary law and may not modify it (Article 326 TFEU). This is confirmed by the wording of Article 136(1) TFEU, which requires act adopted on its basis to be 'in

accordance with the relevant provisions of the Treaties'. This means that measures based on Article 136 TFEU may not modify Primary law.

Against this background, it is worth mentioning that the 'six pack'-legislation crossed the limits set by Primary law. The so-called reversed qualified majority voting, according to which a Commission recommendation is deemed to be adopted unless the Council decides by qualified majority to reject it, modifies the majority voting in the Council as prescribed by Article 16(3) TEU. Since Primary law cannot be modified on the basis of Article 136 TFEU, the reversed qualified majority voting cannot be considered to be covered by this legal base. The same applies to the financial sanctions introduced by the 'six pack'-legislation, which sanction non-compliance of a measure taken under the multilateral surveillance procedure. Those sanctions are, however, not foreseen by Primary law in Article 121(4) TFEU. All in all the potential of Article 136 TFEU is little. It is linked to the scope of Article 121(6) TFEU and, by that, to the scope of the multilateral surveillance procedure.

2.3.1.5 Article 121(6) TFEU as a legal base for EUBS?

Against the background of this analysis of the scope and the limits of Article 121(6) TFEU, the main objective that has to be pursued by a measure, which is to be based on this provision, is the reinforcement of the multilateral surveillance procedure. The main purpose of a EUBS is to absorb asymmetric shocks and to stabilise labour markets. The impact of cyclical unemployment as a consequence of an asymmetric shock should be cushioned so that an asymmetric shock does not turn into a recession. Hence, EUBS can be understood as an instrument for macroeconomic stabilisation.

Being an instrument of macroeconomic stabilisation, a EUBS is, however, not intended to reinforce the multilateral surveillance procedure under Article 121 TFEU. It is true that macroeconomic imbalances are covered by the multilateral surveillance procedure since the adoption of Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances.⁸⁰ Yet, the prevention and correction of macroeconomic imbalances has, according to the regulatory concept of the 'macroeconomic imbalances procedures' (MIP), has to be done by national policy measures. At the European level, the Commission monitors these national policy reforms and, in case there is an excessive macroeconomic imbalance, the Council adopts country-specific recommendations. On the basis of Article 121(6) TFEU, the Union legislator may now adopt measures that aim at increasing compliance of Member States within the MIP. By that, measures based on Article 121(6) TFEU may only strengthen the stabilisation instrument of the multilateral surveillance procedure, which aims at monitoring national policies, but not introduce an entirely new stabilisation instrument such as the EUBS, which aims at mitigating costs attached to macroeconomic imbalances.

Against this background, one may think of the establishment of an incentive-based enforcement mechanism for policy reforms in order to prevent or to correct macroeconomic imbalances, which grants financial support in return for policy reforms, on the basis of Article 121(6) TFEU.⁸¹ Under such a mechanism, payments would be stalled in case of non-compliance with the policy goals set under the multilateral surveillance procedure. A mechanism, which provides for financial support independently of any compliance with the broad guidelines set under Article 121(2) TFEU or the country-specific recommendations adopted under Article 121(4) TFEU cannot be considered as 'detailed rules for the multilateral surveillance procedure' in terms of

⁸⁰ Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances

⁸¹ Repasi, Legal options for an additional EMU fiscal capacity, Study for the European Parliament 2013, p. 22 et seq.

Article 121(6) TFEU. None of the EUBS options contains such conditionality, as it would run counter to the underlying rationale of a EUBS.

These boundaries of Article 121(6) TFEU can also not be overcome by Article 136 TFEU with a view to the euro area Member States. As just outlined, EUBS is a stabilisation instrument next to the multilateral surveillance procedure and not part of the multilateral surveillance procedure. Article 136 TFEU, however, only allows for special rules within the boundaries set by Article 121 TFEU and is not flexibility clause for euro area Member States.

In sum, none of the EUBS options could be realised by a legal act, which is to be based either on Article 121(6) TFEU or on Article 121(6) in conjunction with Article 136(1)(a) TFEU.

2.3.2 Union financial assistance in case of crises (Article 122(2) TFEU)

Under Article 122(2) TFEU, the Union may grant financial assistance to a Member State, which 'is in difficulties or is seriously threatened with severe difficulties caused by [...] exceptional occurrences beyond its control'.

The main criterion for the use of this legal base is the 'control' of the Member State over the 'exceptional occurrences' that caused the difficulties or will cause severe difficulties for the Member State concerned. Whilst this criterion is only affirmative in the case of 'natural disasters', it is more difficult to assess in the case of economic shocks that form 'exceptional occurrences'. On the one hand, global economic and financial crises can affect a Member State from the outside and lead to a serious threat to its fiscal stability. On the other hand, failed economic and fiscal policies may lead weak public budgets, which in a crisis situation are not able anymore to mitigate the expenses of such a crisis. The consequence of not meeting the condition of the lack of control of the Member State over the occurrence of the severe difficulties would be that the government budget of the Member State concerned has to bear the costs of mitigating the crisis on its own within the boundaries set by Article 126 TFEU and Council Regulation (EC) No 1467/97 on the excessive deficit procedure.

In deciding whether the criterion in a given situation is fulfilled, the Council has a wide discretion.⁸² Indications for the understanding of this criterion in the context of economic crises can be found by looking closer at the only legal act that was based on Article 122(2) TFEU until now, which is Regulation (EU) No 407/2010 establishing a European Financial Stability Mechanism (EFSM). Here the Council considered that difficulties beyond the control of the Member State concerned 'may be caused by a serious deterioration in the international economic and financial environment' (Recital No 2). According to the Council, an 'unprecedented global financial crisis and economic downturn [...] provoked a strong deterioration in the deficit and debt positions of the Member States' (Recital No 3). By that, economic and financial crises, which lead to deterioration of government budgets, establish a presumption of being 'beyond control' of the Member State concerned.

Against this background, the equivalent schemes could be based on Article 122(2) TFEU to the extent that the trigger relates to a 'serious threat with severe difficulties' for the Member State concerned. Amongst the four equivalent EUBS only the 'reinsurance of national UBS' (V4) appears to be suitable to be adopted in the basis of Article 122(2) TFEU. The trigger of a cut-off of 2% describes a situation of a severe recession, which can be considered as a serious threat with severe difficulties for the Member State concerned. The other triggers do not cross this threshold. For the same reason, the

⁸² General Court, Case T-259/10, Ax v Council [2011] ECR II-176*, para. 23.

genuine schemes cannot be based on Article 122(2) TFEU. They also apply when there is no crisis situation.

The 'reinsurance of national UBS' option conflicts, however, with the requirement of 'certain conditions' under Article 122(2) TFEU. Under the EFSM-Regulation, this requirement was implemented by requesting from the Member State seeking Union assistance to submit an 'economic and financial adjustment programme'. By that, Union financial assistance can only be granted in return for policy reforms. The 'reinsurance of national UBS' applies automatically once the trigger is activated. The trigger forms the only condition. Since the trigger is already defining whether a sufficiently serious economic crisis is at stake, it cannot be sufficient to also fulfil the requirement of 'certain conditions' under Article 122(2) TFEU. The introduction of any further conditions into the EUBS option, which would render the scheme discretionary, would undermine its purpose. Based on these considerations, also the 'reinsurance of national UBS' option may not be established on the basis of Article 122(2) TFEU.

2.4. Basing EUBS on the flexibility clause in Article 352(1) TFEU

If the Treaties do not provide for a legal base, but legislating turns out to be necessary in order to attain Union objectives, the Council may adopt, on a proposal of the European Commission and after having obtained the consent from the European Parliament, legal acts on the basis of the so-called 'flexibility clause' in Article 352(1) TFEU.

2.4.1 Scope of Article 352(1) TFEU

The scope of Article 352(1) TFEU is defined by the 'objectives set out in the Treaties'. The 'objectives' in terms of Article 352(1) TFEU can be explicitly objectives, as enshrined in Article 3 TEU, as well as implicit objectives, which can be deduced from other Primary law norms. In this context, Declaration No 41, annexed by the Member State to the Lisbon Treaty, states 'that the reference in Article 352(1) [TFEU] to objectives of the Union refers to the objectives as set out in Article 3(2) and (3) [TEU] ... It is therefore excluded that an action based on Article 352 [TFEU] would only pursue objectives set out in Article 3(1) [TEU]'.⁸³ A declaration annexed to an international Treaty are not binding but 'have to be taken into consideration as being instruments for the interpretation of the EC Treaty'.⁸³ By that, the main focus for identifying objectives, which define the scope of Article 352(1) TFEU, is on Article 3(2) and (3) TEU.

2.4.2 Limits of Article 352(1) TFEU

According to its wording, Article 352(1) TFEU is limited in three respects. First, the Union action has to be necessary 'within the framework of the policies defined by the Treaties'. Second, the Treaties must not provide for the necessary powers. The reference to the 'policies defined by the Treaties' has to be understood as excluding all those measures, which cannot be attributed to one of the Union policies, and, by that, as preventing the Union from 'capturing' new policy areas on the basis of Article 352(1) TFEU. Finally, the Court established a further limit, which is the prohibition of an implicit Treaty amendment.

2.4.2.1 No other express or implied Union competences

More important than the reference to 'policies defined by the Treaties' is the requirement that the Treaties do not provide for the necessary powers. This refers to express Union competences as well as to implied powers. Implied powers are powers that are either

⁸³ CJEU, Case C-135/08, Rottmann [2010] ECR I-1449 para. 40.

necessary for the exercise of express powers⁸⁴ or indispensable for a Union institution in order to carry out a task conferred upon it by the Treaties.⁸⁵ This means that Article 352(1) TFEU may not serve as a legal basis if the Treaty provides for other express and implied Union competences. In return, Article 352(1) TFEU requires, in principle, that there is no other express or implied Union competence. Yet, according to the case law of the CJEU, Article 352(1) TFEU may also be used in cases, in which the measure would be covered by an existing Union competence, but this competence is deficient in certain aspects (it allows, for example, only for the adoption of directives instead of regulations), which is the reason why the intended act cannot be based on the existing Union competence.⁸⁶ In such situation, the Union legislator may base its legal act in addition to the existing Union competence also on Article 352(1) TFEU.

2.4.2.2 Prohibition of an implicit Treaty amendment

In its opinion 2/94 on the accession of the European Union to the ECHR, the CJEU stated that Article 235 EEC (which is in substance replaced by today's Article 352 TFEU) 'being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 [today's Article 352 TFEU] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.'⁸⁷

This prohibition of an implicit Treaty amendment recalls the principle of conferral under Article 5(2) TEU, according to which the Union may act only within the limits of the competences conferred upon it by the Member States in the Treaties. Any additional competences require therefore a Treaty change. Yet, Article 352(1) TFEU is one of those conferred competences so that it seems to be circular to argue that legislating on the basis of Article 352(1) TFEU is limited by the principle of conferral. The Court therefore refers to the effect of the legal act, which would amount 'in substance' to a Treaty amendment. This means that a legal act, which is to be based on Article 352(1) TFEU, may not circumvent the established Treaty framework in a way that subject-matters, which are excluded by the overall European legal system, would be regulated by it.

The prohibition of an implicit Treaty amendment draws, furthermore, the dividing line between those weaknesses in other Union competences, which may be compensated by basing the legal act also on Article 352(1) TFEU, and those limits of legal bases, which may not be overcome without Treaty change. In particular, constitutional saving clauses fall under the latter category.

2.4.3 Article 352(1) TFEU as a legal base for EUBS?

In order to use Article 352(1) TFEU as a legal base for establishing a EUBS, this must be necessary to attain one of the objectives set out in the Treaties. Amongst the Treaty

⁸⁴ In that sense already CJEU, Case 8/55, *Fédération Charbonnière de Belgique* [1956] ECR 245, 280.

⁸⁵ In that sense CJEU, Joined Cases 281/85, 283/85 to 285/85 and 287/85, *Germany v Commission* [1987] ECR 3203 para. 28.

⁸⁶ CJEU, Case C-166/07, *Parliament v Council* [2009] ECR I-7135 paras 64 et seq.; Case 252/87, *Commission v Council* [1989] ECR 1425 para. 37; Case 8/73, *Hauptzollamt Bremerhaven* [1973] ECR 897 para. 4.

⁸⁷ CJEU, Opinion 2/94 [1996] ECR I-1759 para. 30.

objectives enshrined in Article 3 TEU, one may refer in this respect to Article 3(3) TEU, according to which the Union shall establish 'a highly competitive social market, aiming at full employment and social progress' and promote 'social justice and protection', 'economic, social and territorial cohesion' and 'solidarity among Member States'. These objectives have to be read in conjunction with Article 9 TFEU, according to which in 'defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'. Moreover, Article 34(1) and (2) of the EU Charter of Fundamental Rights, which binds the Union institutions, declares that the 'Union recognises and respects the entitlement to social benefits and social services providing protection [...] in the case of loss of unemployment'. All these provisions read together amalgamate into a clear Union objective that allows the Union to act in order to achieve a high standard of social cohesion in relation to unemployment.⁸⁸

A EUBS aims at stabilising Member States that are hit by an asymmetric shock by compensating for extraordinary expenses of the national UBS for short-term unemployment. High-level unemployment benefits have furthermore a cushioning effect on the declining private demand in an economic crisis situation. Moreover, a EUBS serves to achieve social cohesion as it would set incentives for national UBS that are less generous than the EUBS to align their conditions to the EUBS (see in that regard also section 2.2.6.4.1). Finally, a EUBS promotes social protection as it seeks to unify unemployment benefits for short-term unemployed people at a more generous level than the majority of the current national UBS. By that, establishing a EUBS serves to attain the Union objective to achieve a high standard of social cohesion in relation to unemployment.

Once the attainment of a Union objective is established, the use of Article 352(1) TFEU requires that the Treaties do not provide for the necessary competences otherwise. As explained above, this does not only refer to the non-existence of a Union competence, but also to the insufficiency of existing Union competences. As regards EUBS, the latter is of importance. Several EUBS options could partly be established on the basis of other Union competences. Amongst the equivalent EUBS options the reinsurance of national UBS could partly be based on Article 122(2) TFEU (see section 2.3.2) and amongst the genuine EUBS options all variants except for V8, V9 and V14 could partly be based on Article 175(3) TFEU (see section 2.2.6.4). The remaining equivalent EUBS options (V1 to V3) cannot be based on existing Union competences but would serve the attainment of the abovementioned Union objectives, so that they could be, in principle, based on Article 352(1) TFEU. The remaining genuine EUBS options (V8, V9 and V14) fail to strengthen the social cohesion of the Union and can therefore not be assigned to any of the Union objectives. By that, they could also not be based on Article 352(1) TFEU alone.

The question now arises whether basing the establishment of a EUBS in addition to the insufficient Union competences on Article 352(1) TFEU may lead to a compensation for the weaknesses of the insufficient legal bases. In order to assess whether such a compensation is legally possible, one has to define whether the limits of the insufficient legal bases are of such a nature that they can only be overcome by a Treaty amendment.

2.4.3.1 Compensation for weaknesses of Article 122(2) TFEU with regard to the reinsurance of national EUBS (V4)

The reinsurance of national UBS option (V4) could not be realised on the basis of Article 122(2) TFEU because this legal base requires conditionality whilst EUBS is, by definition,

⁸⁸ Cf. Hendrickx, *Towards Labour Law for the United States of Europe*, in: Countouris/Friedland (eds), *Resocialising Europa in a Time of Crisis*, Cambridge 2013, 61 at 71-73.

an instrument that is to be activated automatically once the predefined conditions are met.

The issue of conditionality has two dimensions. First, it is explicitly mentioned by Article 122(2) TFEU. Second, it is considered by the CJEU to be the essence of Article 125(1) TFEU, the so-called 'no bailout'-clause. According to the CJEU, 'Article 125 TFEU does not prohibit the granting of financial assistance [...] provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.'⁸⁹ The Court assessed in its 'Pringle' decision whether the ESM-Treaty is in line with Article 125(1) TFEU since an intergovernmental Treaty of a subset of EU Member States may not modify Primary law. The same must apply to a legal act based on Article 352(1) TFEU. Article 125(1) TFEU sets an ultimate Treaty limit for any kind of secondary law. Article 352(1) TFEU may therefore not overcome conditionality in terms of Article 125(1) TFEU.

This appears at first sight to be different with regard to 'certain conditions' in terms of Article 122(2) TFEU. Conditionality defines here the limits of a legal base, which might be compensated by additionally basing a Union measure on Article 352(1) TFEU. A strong argument in favour of this understanding can be found in the fact that adopting measures under Article 122(2) TFEU requires only a qualified majority in the Council (Article 16(3) TEU), whereas Article 352(1) TFEU refers to unanimity. Therefore lowering the requirements of legal base would be compensated by raising the procedural hurdles.

This understanding of conditionality in Article 122(2) TFEU disregards the interplay between Article 122(2) TFEU and Article 125(1) TFEU. As it will be explained later in section 3, measures based on a legal base such as Article 122(2) TFEU that allows explicitly for financial transfers between the Union and the Member States have not to comply with Article 125(1) TFEU.⁹⁰ The explicit legal base provides for the exception to the no-bailout clause. The reference to conditionality in Article 122(2) TFEU has therefore to be understood as 'part of the necessary reconciliation of Article 122(2) and 125 TFEU'.⁹¹ In this understanding, Art. 352(1) TFEU cannot overcome the 'conditionality' in Article 122(2) TFEU. The 'reinsurance of national UBS' option (V4) can therefore be realised on the basis of the existing Treaties if it complies with the conditionality as developed by the CJEU in the framework of Article 125(1) TFEU. Since both the conditionality under Article 122(2) TFEU and Article 125(1) TFEU have to be understood in the same way, reference shall now be made to section 3 elaborating on 'conditionality' in terms of Article 125(1) TFEU.

2.4.3.2 Compensation for weaknesses of Article 175(3) TFEU with regard to genuine EUBS

Genuine EUBS could not be based on Article 175(3) TFEU since this provision would undermine the limits set by Article 153 TFEU for legislating in the field of social security law, namely, in substantive terms, the prohibition to affect the right of Member States to define the fundamental principles of their social security systems (Article 153(4), first indent TFEU) and, in procedural terms, the unanimous voting rule in the Council (Article 153(2) TFEU). These limits set for legal harmonisation of the national law on unemployment benefits are to be taken into account when establishing genuine EUBS as a specific action in order to strengthen the social cohesion in the EU because of a *de facto* harmonising effect of the co-existence of genuine EUBS and NUBS in the territory of

⁸⁹ CJEU, Case C-370/12, Pringle, ECLI:EU:C:2012:759, para. 137.

⁹⁰ Cf. Louis, The No-Bailout Clause and Rescue Packages, CMLR 2010, 976 at 985.

⁹¹ Louis, The No-Bailout Clause and Rescue Packages, CMLR 2010, 976 at 985.

the Member States on the law of the NUBS. This co-existence might result into adaptations of the national law of the UBS to the EUBS in order to smooth transitions between both schemes and in order to reduce additional costs for the administration of different UBS in the territory of the Member States. The *de facto* harmonising effect behind these adaptations is below legal harmonisation but would derive from economic and political processes within the Member States (see sections 2.2.5.3.2. and 2.2.6.3.2).

The procedural point can easily be overcome by basing the establishment of the EUBS also on Article 352(1) TFEU since this provision requires a unanimous vote. It is getting more difficult with regard to the substantive point. Article 153(4), first indent TFEU is, as explained above (see section 2.2.5.2.2), a constitutional saving clause, which was included into the Treaties in order to shield certain areas of Member States' remaining sovereignty from an 'intrusion' of EU law. Now the question arises whether on the basis of Article 352(1) TFEU, constitutional saving clauses may be overcome.

In 2012, the European Commission tried to overcome a constitutional saving clause in Article 153 TFEU by relying on Article 352(1) TFEU. A similar constitutional saving clause to the one in Article 153(4) TFEU can be found in Article 153(5) TFEU. The Commission wanted to regulate the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services in the aftermath of the CJEU's judgments in in 'Viking'⁹² and 'Laval'⁹³. It based its proposal for a regulation⁹⁴ on Article 352(1) TFEU although Article 153(5) TFEU excluded legislating on the basis of Article 153 TFEU with regard to 'the right of association, the right to strike or the right to impose lock-outs'. The Commission argued that 'Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through Directives. However, the Court rulings [in cases 'Viking' and 'Laval'] have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law.'⁹⁵ In other words, according to the European Commission, if a subject matter falls within the scope of EU law for example by affecting fundamental freedoms, it may be regulated on the basis of Article 352(1) TFEU. After the first Yellow Card by national Parliaments under the Early Warning Mechanism was issued against the Commission proposal, the Commission decided to withdraw the proposal.⁹⁶

It is true that the exclusion of subject matters in Article 153(5) TFEU may not lead to a prohibition to legislate in 'questions involving any sort of link' to the matters covered by this paragraph.⁹⁷ If, however, a legal act aims at the core of subject matters covered by the exclusion, it may not be circumvented by basing the legal act on Article 352(1) TFEU instead of Article 153(2)(b) TFEU. The same reasoning applies to Article 153(4), first indent TFEU. By that, fundamental principles of the social security systems of the Member States may not be affected by any kind of Union legal act, even if it based on Article 352(1) TFEU.

⁹² CJEU, Case C-438/05, Viking [2007] ECR I-10779.

⁹³ CJEU, Case C-341/05, Laval [2007] ECR I-11767.

⁹⁴ European Commission, Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services, COM(2012) 130 final.

⁹⁵ COM(2012) 130 final, p. 11.

⁹⁶ Goldoni, The Early Warning Mechanism and the Monti II Regulation: The Case for a Political Interpretation, EuConst 2014, p. 90.

⁹⁷ CJEU, Joined Cases C-395/08 and C-396/08, INPS [2010] ECR, I-5119 para. 37.

This reasoning excludes the adoption of a legal act on the basis of Article 352(1) TFEU that aims at legal harmonisation in areas that are considered to be fundamental principles of social security systems of the Member States. The argumentation can, however, not be applied in the same manner to a legal act that only sets incentives for aligning national security systems with conditions set by this legal act without creating a legal obligation to implement those conditions into the national legal order. As explained above (see section 2.2.6.4.1), a EUBS is distinct from the national UBS. Both UBS co-exist within the territory of the Member State concerned. Within its scope of application, EUBS takes precedence over NUBS. The frictions relating to this co-existence of EUBS and NUBS within the national territory do not, as explained above in section 2.2.6.3.3, affect a Member State’s right to define the fundamental principles of its national social security system.

More important with regard to the prohibition of undermining constitutional saving clauses in the Treaties is the situation, in which a more generous EUBS may lead, outside its scope of application, to a political or economic pressure on the national legislator to adjust the national UBS. It should be recalled that a legal act establishing the EUBS, which is adopted as a specific action under Article 175(3) TFEU, may not provide for any legal obligation to implement the criteria that it defined for the use of the EUBS with regard to the payment of the European unemployment benefit into the national legal order. Member States are legally free to regulate their NUBS outside the scope of application of EUBS. Member States can therefore protect the fundamental principles of their social security systems by not adjusting them to the conditions of the EUBS without violating EU law. Political resistance to adjust the NUBS would, for example, not lead to an action of infringement initiated by the Commission under Article 258 TFEU. Furthermore, it has to be taken into account that a regulation establishing a EUBS on the basis of Articles 175(3) and 352(1) TFEU always has to be adopted by unanimity in the Council. Member States that are afraid of a negative impact of the EUBS on their national UBS may raise their veto in the Council.

Against this background, genuine EUBS options, with the exception of V8, V9 and V14, may be adopted as a regulation on the basis of Articles 175(3) and 352(1) TFEU.

2.4.3.3 Consequences for the decision-making procedure

In procedural terms, joining legal bases with different decision-making procedures leads, according to the recent case law of the CJEU, to a combination of the decision-making procedures.⁹⁸ This means with regard to a legal base that provides for the ordinary legislative procedure (such as Article 175(3) TFEU) and a legal base that provides for a special legislative procedure (such as Article 352(1) TFEU), that the ordinary legislative procedure is to be applied with a unanimous vote in the Council (replacing the qualified majority voting, which is normally foreseen in the ordinary legislative procedure).

2.5. Short summary of the findings on the legal base

Table 2 shows the possible legal bases as assigned to the identified predominant aims of the several EUBS options and the main features of the several EUBS options that have to be covered by a suitable legal base.

Table 2. Possible legal bases

		Possible legal bases								
		21(3)	48	121(6)	122(2)	148	153(2)(b)	175(3)	352(1)	

⁹⁸ CJEU, Case C-166/07, European Parliament v Council [2009] ECR I-7135 para. 69.

Feasibility and Added Value of a European Unemployment Benefit Scheme

Objective	Promoting social cohesion (<i>genuine EUBS</i>)	■	■	□	□	■	■	■	■
	Macroeconomic stabilisation in case of (exogenous) crisis (<i>equivalent EUBS</i>)	□	□	□	■	□	□	□	■
Features of EUBS	Applicable to all unemployed people	□	□	■	■	■	■	■	■
	Beyond reinforcing multilateral surveillance	■	■	□	■	□	■	■	■
	Automatised application	■	■	■	□	□	■	■	■
	Autonomous fund	■	□	■	■	□	□	■	■
	Respect of constitutional saving clauses with regard to social security (no possibility to outvote a MS)	■	□	□	□	■	■	□	■

Table 3 shows the 18 EUBS options and the legal basis, on which they could be adopted and which decision-making procedure it would entail.

Table 3. 18 EUBS options and their legal base

		Legal base	EP	Council	Compliance with Art. 125 TFEU
equivalent EUBS	V1/18	352(1)	APP	UN	(-)
	V2/18	352(1)	APP	UN	(+)
	V3/18	352(1)	APP	UN	(+)
	V4/18	(-)			
genuine EUBS	V5/18	175(3), 352(1)	COD	UN	(+)
	V6/18	175(3), 352(1)	COD	UN	(+)
	V7/18	175(3), 352(1)	COD	UN	(+)
	V8/18	(-)			
	V9/18	(-)			
	V10/18	175(3), 352(1)	COD	UN	(+)
	V11/18	175(3), 352(1)	COD	UN	(+)
	V12/18	175(3), 352(1)	COD	UN	(+)
	V13/18	175(3), 352(1)	COD	UN	(+)
	V14/18	(-)			
	V15/18	175(3), 352(1)	COD	UN	(+)
	V16/18	175(3), 352(1)	COD	UN	(-)

V17/18	175(3), 352(1)	COD	UN	(-)
V18/18	175(3), 352(1)	COD	UN	(+)

2.6. Principles of subsidiarity and of proportionality, Article 5 TEU

Finally, any Union legal act has to respect the principles of subsidiarity (Article 5(3) TEU) and of proportionality (Article 5(4) TEU).

According to the principle of subsidiarity, the Union legislator may only act 'if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' The purpose of the EUBS is to establish a mechanism that supports unemployed people or the Member States' unemployment benefit schemes union-wide. The necessity for establishing a EUBS derives from the fact that Member States are not able to achieve the same stabilisation effect as the one intended to achieve by EUBS on their own. Based on this consideration, Member States are not able to achieve this purpose for the establishment of a EUBS and the Union level is in a better position to achieve it. Furthermore, as explained above, none of the EUBS options can be introduced without a unanimous vote in the Council. Therefore, the adoption of EUBS in the Council gives rise to the presumption that the principle of subsidiarity is respected.

The principle of proportionality requires that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties'. This refers in particular to the degree of how much the EUBS would interfere with the NUBS in place. Reference shall in this respect be made to the constitutional saving clauses in Article 153(4) TFEU. Any EUBS, as explained above, has to respect these constitutional saving clauses in a way not affect the fundamental principles of Member States' social security systems. These constitutional saving clauses are a codification of the principle of proportionality in the area of social security law. Therefore, as long as the EUBS does not violate these constitutional saving clauses, it is also in line with the principle of proportionality. Since, as established above, no legal act can be based on any Union competence that circumvents the constitutional saving clauses the principle of proportionality is, with regard to social security law, already observed by meeting the requirements of the chosen legal base. Proportionality would also apply to the financing side of the EUBS. Since proportionality is defined in relation to the objective of the Treaty that is to be achieved, the financial means assigned to the EUBS must be sufficient in order to either achieve the intended stabilisation effect with regard to the equivalent schemes or to achieve an effective reduction of disparities in relation to unemployment with regard to the genuine schemes.

3. LIMITS FOR PAYMENT SET BY ARTICLE 125(1) TFEU

Special attention with regard to the payment side of EUBS should be given to the limits set by Article 125(1) TFEU, the so-called 'no bail-out' clause. According to this provision, '[t]he Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State'. At first sight, one may argue that the purpose of a EUBS is not assuming commitments of Member States and that, by that, EUBS does not affect Article 125(1) TFEU. It rather installs in form of the genuine schemes an insurance system aiming at one particular social risk (unemployment) or in form of the equivalent schemes a reinsurance of national insurance systems aiming at one particular social risk

(unemployment) a system of redistribution amongst Member States independently of a Member State's ability to assume its own commitments.⁹⁹

Article 125(1) TFEU has, however, to be understood in a much broader sense. This provision embodies the general principle of Union law, according to which the Union is not allowed to finance Member States. Member States remain solely responsible for their budgetary commitments and, by that, for their fiscal stability. The Union may only interfere with Member States' budgets as long as there is an explicit legal base for it. Therefore the Union is entitled to set up cohesion funds that finance activities in Member States (Article 174 et seqq. TFEU). Therefore the Union may grant financial assistance to Member States with a derogation in case of difficulties as regards their balances of payment (Article 143 TFEU). Therefore the Union may grant financial assistance to Member States in difficulties or seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control (Article 122(2) TFEU).¹⁰⁰ Beyond these legal bases, the Union is, in principle, not allowed to transfer funding to the Member States. The limits to transfers of funding, which are based on implied powers, on the flexibility clause in Article 352(1) TFEU or on intergovernmental agreements between (a subset of) Member States are then defined by Article 125(1) TFEU.

With regard to Article 125(1) TFEU, the CJEU clarified in its 'Pringle' decision that 'it is apparent from the wording used in Article 125 TFEU [...] that that article is not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State. [...] [It] prohibits the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy is diminished. [...] Article 125 TFEU does not prohibit the granting of financial assistance [...] provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary policy.'¹⁰¹ This follows for the Court from the 'higher objective' pursued by Article 125(1) TFEU, which is 'namely maintaining the financial stability of the monetary union.'¹⁰² Sound budgetary policies are a necessary precondition for the financial stability of the Member State concerned and of the Euro area as a whole.¹⁰³

⁹⁹ In that sense Kullas and Sohn, *Europäische Arbeitslosenversicherung – Ein wirkungsvoller Stabilisator für den Euroraum?*, cepStudie, April 2015, p. 33.

¹⁰⁰ With regard to the relationship between Article 122(2) TFEU and Article 125(1) TFEU: Louis, *The No-Bailout Clause and Rescue Packages*, CMLR 2010, 976 at 983 et seq. and CJEU, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756 para. 131. In detail on 'Pringle': Borger, *The ESM and the European Court's Predicament in Pringle*, 14 *German Law Journal* (2013), 113; Craig, *Pringle: Legal Reasoning, Text, Purpose and Teleology*, 20 *Maastricht Journal of European and Comparative Law* 1 (2013), 3; de Witte and Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, CMLR 2013, 805.

¹⁰¹ CJEU, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756 paras 130, 136.

¹⁰² CJEU, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756 para 135.

¹⁰³ It should be noted at this point that the transfer of funding can be considered as 'indispensable for the safeguarding of the financial stability of the euro area as a whole' (CJEU, Case C-370/12, *Pringle*, ECLI:EU:C:2012:756 para 136) already before a Member State is unable to refinance itself on the private markets. The objective of maintaining financial stability of the euro area as a whole includes the restoration of financial stability of a Member State as well as the prevention of financial instabilities (cf. Smulders and Keppenne, in: von der Groeben, Schwarze and Hatje (eds), *Europäisches Unionsrecht*, 2015, Artikel 125 AEUV para 15; de Witte and Beukers, *The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: Pringle*, CMLR 2013, 805 at 842 et seq.; Louis, *The No-*

Having regard to the purpose of Article 125(1) TFEU as interpreted by the CEJU, it becomes clear that any transfer of funding to a Member State, which cannot be traced back to an explicit legal base providing for such transfers, has to be designed in such a way that it prompts a Member State to implement sound budgetary policies or, in other words, that it does not set any incentives for national policies to avoid necessary structural reforms.

As shown above, except for option V4 neither equivalent nor genuine EUBS options can be based on either Article 122(2) TFEU or Article 175(3) TFEU alone. The limits of these legal bases have to be compensated by additionally relying on Article 352(1) TFEU. EUBS options V1 to V3 have to be based solely on Article 352(1) TFEU. A EUBS must therefore also comply with the conditions set by Article 125(1) TFEU. Hence EUBS must prompt Member States to implement sound budgetary policies and may, by that, not set any incentives, which may allow Member States to avoid necessary structural reforms. Necessary structural reforms in the context of EUBS relate to labour market reforms. This derives from the fact that the most important incentive for Member States to reform the labour markets are the costs attached to labour market failure, which are the unemployment benefits. If now another authority than the national authorities pays for the costs of unemployment, the financial incentive for national policies to reform labour markets could appear to be diminished by the establishment of a EUBS. This shows that there is an inherent link between the financial transfers from the EU to the national level and the necessity to reform labour markets at the national level. Other structural reforms, as politically desirable they might be considered, cannot be linked to transfer of funding from a EUBS as European unemployment benefits would not relax expenses related to failed or neglected structural reforms in other policy areas.

There are three elements that can be found in the several EUBS options, which may serve as incentives for Member States to continuously reform national labour markets although (parts of) the costs related to short-term unemployment would be borne by the European level: Experience rating, claw-back and minimum requirements with regard to activation policies. Experience rating refers to a mechanism that links the EUBS contributions to the past experience of the contributors with unemployment and, by that, to the likelihood of the contributor to avail itself of the EUBS fund. Linking the contributions to the EUBS to the extent EUBS is used sets a financial incentive for Member States to reform labour markets and prevents permanent redistribution between Member States with a low short-term unemployment rate to countries with high short-term unemployment rate. Claw-back is a mechanism, which allows for an adjustment of the contributions to the EUBS by referring to the long-term development of positive or negative net pay-ins into the EUBS by Member States. At present, it is proposed to activate a claw-back after 3 years of more than 1% of GDP cumulative negative balance vis-à-vis EUBS. The contribution of the Member State in question would then be raised until the balance declines below the 1%-threshold. The mechanism seeks to achieve a long-term country-level budget neutrality. Minimum requirements with regard to activation policies link the use of EUBS with measures to prompt and to support the unemployed person to be employed again and contribute, by that, in a legally binding manner to the reforms of national labour markets.

Combining experience rating with claw-back mechanisms and minimum requirements with regard to activation policies leads to an overall system that sets enough incentives for national labour policies to reform their labour markets. It should be noted that the

Bailout Clause and Rescue Packages, CMLR 2010, 976 at 985). The core element of Article 125(1) TFEU is therefore less whether a transfer of funding is 'indispensable' but rather whether the conditions attached to it prompt a Member State to implement sound budgetary policies as any transfer of funding releases a Member State from the refinancing pressure on private markets.

need for minimum requirements for activation policies in order to prevent institutional moral hazard is linked to the effectiveness of experience rating and claw-back mechanisms. If both perform ideally, firm and far-reaching minimum requirements for activation policies are practically not needed since the financial adjustments resulting from experience rating and claw-back should prevent a shift of the financial responsibility for national labour market failure to the EU level. Yet it appears, in practice, still to be recommendable to set legally binding minimum requirements for activation policies although they do not have to be far-reaching in order to be effective next to experience rating and a claw-back mechanism. Against this background, it is therefore still sufficient with a view to Article 125(1) TFEU in order to prevent institutional moral hazard that on the basis of Article 153(2)(b) TFEU only those elements of activation policies can be harmonised that are necessary for the social security and social protection of workers (Article 153(1)(c) TFEU).¹⁰⁴

In sum, if a EUBS provides for experience rating, claw-back and minimum requirements with regard to activation policies, it can be considered as not violating Article 125(1) TFEU. It is also worth mentioning at this point that the EUBS should not include any kind of mechanism to ease these elements in case of an economic crisis in order to give a Member State in crisis additional public budgetary leeway.¹⁰⁵ If a Member State is in a situation of difficulties to refinance public budgets because of an economic crisis, the current legal framework requires from this Member State to request financial assistance from the ESM and in line with the conditions set by Regulation (EU) No 472/2013¹⁰⁶ instead of gaining national budgetary leeway by suspending financial obligations without having to comply with these conditions. This framework cannot be undermined by an easing mechanism for economic crisis' situations with regard to experience rating or claw-back in a EUBS.

Against this background, amongst the equivalent EUBS options V1 violate Article 125(1) TFEU as it does not provide for experience rating (V1). The same applies to V16 (no experience rating) and V17 (no claw-back mechanism) amongst the genuine EUBS options. The equivalent EUBS option V4 could have been based exclusively on Article 122(2) TFEU. As it was explained above in section 2.3.2, the 'conditionality' requirement in Article 122(2) TFEU has to be interpreted in the same way as the 'conditionality' under Article 125(1) TFEU. Since V4 does not provide for a claw-back mechanism, it does not meet the conditionality criterion in Article 122(2) TFEU.

4. ESTABLISHING THE FINANCING SIDE OF A EUBS

Under section 2 it was discussed whether the Treaties provide for a legal basis in order to establish a payment scheme at European level that includes benefits for Union citizens in case of short-term unemployment. Whilst therefore section 2 dealt with legal questions relating to Union expenditure, the present section addresses the legal questions relating to the revenue of EUBS. There are two possibilities for the financing of EUBS imaginable: Either EUBS is financed by the general Union budget (4.1) or it is financed by a dedicated fund outside the general Union budget (4.2). Examples in the recent legislative activities

¹⁰⁴ Cf. section 2.2.5.3.3 on the limits of Article 153(2)(b) TFEU with regard to activation policies.

¹⁰⁵ One might imagine that an adjustment of a Member State's contributions to the EUBS fund under the claw-back mechanism is suspended in times of a recession in order to allow e.g. more public investments.

¹⁰⁶ Regulation (EU) No 472/2013 of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L 140, p. 1.

of the Union legislator for the latter can be found in the establishment of a 'Single Resolution Fund'.¹⁰⁷

4.1. Introducing a budget line in the general Union budget

Following the principle established by the CJEU in Case C-106/96, according to which '[a]ny Community expenditure [...] requires a dual legal basis: entry in the budget and, as a general rule, prior adoption of an act of secondary legislation authorising the expenditure in question',¹⁰⁸ Union expenditure, which is established by a Union secondary legal act, has to be included into the Union's general budget.

4.1.1. Legal base for the inclusion in the Union's general budget

The legal base for the inclusion of expenditure into the Union's annual budget is Article 314 TFEU together with Regulation No 966/2012 on the financial rules applicable to the general budget of the Union.¹⁰⁹

4.1.2. Contributions earmarked to the budget line

More important for the legal framework of revenue of the EUBS than the assessment of the way on how to include expenditure into the general Union budget is the rule under Article 17(1) of Regulation No 966/2012 on the financial rules applicable to the general budget of the Union¹¹⁰ (hereinafter: Regulation on financial rules), according to which '[r]evenue and payment appropriations shall be in balance'. The importance of this rule becomes clear when one realises that the amount of payment appropriations needed for a EUBS is beyond the financing capacity of the current general Union budget. This leads therefore to the question of raising additional financial contributions in order to finance expenditure relating to EUBS. In this context, one has to distinguish between the equivalent EUBS options, where the contributions are paid by the Member States (4.1.2.1), and the genuine EUBS options, where the contributions are paid by the individuals (4.1.2.2). Finally, for the political persuasiveness of additional financial contributions, it is important to assess whether such additional contributions can be earmarked for the exclusive use by the EUBS (4.1.2.4).

The starting point for the following analysis is Article 311(2) TFEU, according to which the general Union budget shall be financed wholly from own resources, without prejudice to other revenue. This means that there are two sources of income for the general Union budget: Own resources and other revenue. The former is defined by a legal act, whose legal basis is Article 311(3) TFEU, the so-called Own Resources Decision,¹¹¹ whilst the

¹⁰⁷ Articles 67 et seqq. of Regulation (EU) No 806/2014 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 (EU) No 1093/2010, [2014] OJ L 225, p. 1.

¹⁰⁸ CJEU, Case C-106/96, *United Kingdom v Commission* [1998] ECR I-2729 para. 19.

¹⁰⁹ Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L 298, p. 1.

¹¹⁰ Regulation (EU, Euratom) No 966/2012 of the European Parliament and the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 [2012] OJ L 298, p. 1.

¹¹¹ Council Decision 2007/436/EC, Euratom of 7 June 2007 on the system of the European Communities' own resources, [2007] OJ L 163, p. 17.

latter as a category is not defined by any act of secondary law. This means that the Union may only raise own resources, as they are defined by the Own Resources Decision, or may generate 'other revenue' as long as there is a legal base for it in the Treaties.

4.1.2.1 Contributions paid by Member States (equivalent EUBS)

First, one has to specify whether additional financial contributions by Member States in order to finance the EUBS are to be considered as a new 'own resource' or 'other revenue'. If such contributions are to be classified as 'other revenue', they can be included into legal act establishing the EUBS.

The 'own resources' are, as explained above, defined by the Own Resources Decision. It becomes more difficult to define 'other revenue'. Article 311(2) TFEU indicates that 'other revenue' are those sources of income of the Union, which are not primarily intended to finance the general Union budget.¹¹² According to this provision, the Union budget shall be wholly financed from own resources 'without prejudice to other revenue'. This means that only revenue originating from own resources may be used for balancing the general Union budget and that 'other revenue' may not replace such revenue from own resources. Put differently, if revenue may not be used to balance the general Union budget but to finance exclusively a specific purpose, it may be considered 'other revenue' in terms of Article 311(2) TFEU.

Examples can be found by having a closer look at external assigned revenue in terms of Article 21(2) of the Regulation of financial rules. This provision lists certain financial contributions from Member States to finance certain Union programmes and actions such as research programmes or external aid projects. Budget items financed by such 'external assigned revenue' are, according to Recital No 8 of the Regulation laying down the multiannual financial framework for the years 2014-2020,¹¹³ not to be taken into account by the ceilings set by the multiannual financial framework. Such exclusion from the MFF ceilings makes only sense if the revenue assigned to its financing is not considered as 'own resource', since 'own resources' finance the expenditure of the general Union budget, which is, according to Article 312 TFEU, defined by the MFF. From the perspective of the general Union budget, assigned revenue and budget items financed by this assigned revenue are neutral. The amount of the assigned revenue equals the amount of the budget item that it finances. Therefore, raising such assigned revenue does not conflict in the same way with Member States' budgetary sovereignty as raising revenue for the general Union budget. There is therefore no need to apply the higher procedural hurdles enshrined in Article 311(3) TFEU for creating assigned revenue. In sum, assigned revenue, which is not used to balance the general Union budget, is considered 'other revenue' in terms of Article 311(2) TFEU and may therefore be raised without modifying the Own Resource Decision under Article 311(3) TFEU.

Yet, raising 'other revenue' may not be based on Article 311(2) TFEU since this is no legal base. Article 311(2) TFEU only confirms that 'other revenue' generated by a legal act adopted on the basis of Union competences may constitute a source of income of the Union. Therefore, as a second step after the classification of financial contributions by Member States earmarked to finance EUBS as 'other revenue', one must identify the legal base in the Treaties for raising contributions from the Member States to finance the EUBS. In principle, financial contributions should be defined by the legal act that established the legal framework for the payments, which the contributions should finance. In the case of EUBS this means, that, in addition to the payment side of the

¹¹² CJEU, Case 265/87, Schröder [1989] ECR 2237 para. 10.

¹¹³ Council Regulation (EU, Euratom) No 1311/2013 of 2 December 2013 laying down the multiannual financial framework for the years 2014-2020 [2013] OJ L 347, p. 884.

EUBS, the legal base for the act establishing the EUBS would also have to support the financing side. In this regard, financial contributions paid by EU Member States, which are additional to the contributions paid by Member States under the Own Resources Decision (GNI contributions), can, in principle, not be created by another majority than the one foreseen by Article 311(3) TFEU. Raising additional financial contributions from Member States on the basis of a legal base, which refers to another decision-making procedure than Article 311(3) TFEU (Article 352(1) TFEU, for example, requires unanimity but does not refer to an approval by Member States in accordance with their respective constitutional requirements) appears therefore to undermine the own resources legislative procedure, whose purpose is to protect Member States' budgetary sovereignty.

In the existing EU law concerning Union agencies there is, however, precedent, which contradicts the just mentioned finding. The Union legislator already raised additional financial contributions from Member States in accordance with the ordinary legislative procedure. Article 62(1)(a) of the regulation on the European Banking Authority¹¹⁴ provides for 'obligatory contributions from the national public authorities' to the budget of EBA. The legal base for the EBA regulation is Article 114(1) TFEU. This suggests that the creation of additional financial contributions from EU Member States does not *per se* require the same majority as the one foreseen by Article 311(3) TFEU and not even the consent of every EU Member State.

There are, however, good reasons to come to the conclusion that with regard to additional contributions of Member States to finance a newly created Union task such as the EUBS at least unanimity is required and, by that, only Article 352 TFEU would be the right legal base for additional financial contributions. Contributions paid by competent national authorities to the budget of a Union authority that is distinct from the EU budget (like the EBA budget) cannot be compared to earmarked contributions paid by Member States to the general EU budget. Allowing to create additional financial contributions without the possibility for a single Member State to raise its veto against a financial obligation would undermine the clear Treaty statement in Article 311(3) TFEU according to which no additional financial burden for the Member States' budget can be created by the European Union without the approval of all Member States. The use of legal bases, which refer to a qualified majority voting in the Council, is, furthermore, highly questionable with regard to Member States budgetary sovereignty protected by the national constitutions. Therefore, being classified as 'other revenue', earmarked financial contributions by Member States can be included into the legal act establishing the EUBS. The adoption of this legal act is then only possible on the basis of Article 352(1) TFEU.

4.1.2.2 Contributions paid by individuals (genuine EUBS)

Genuine EUBS options are financed through contributions from employers or employees. As with regard to contributions from Member States, it has to be assessed with regard to contributions from individuals whether these constitute an own resource or other revenue. The reasons put forward for arguing that earmarked contributions by Member States in order to finance EUBS apply to the same extent to earmarked financial contributions by individuals.

The main difference between contributions paid by Member States and contributions paid by individuals refers less to the qualification of the contribution under EU budget law but more to the powers of the Union to levy financial contributions from individuals. This was

¹¹⁴ Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331, p. 12.

the driving factor behind the conclusion of an intergovernmental agreement on the transfer and mutualisation of contributions to the Single Resolution Fund (SRF). The SRF was established by a Union regulation (Articles 67 et seqq. of Regulation (EU) No 806/2014) and is exclusively financed by credit institutions. Whilst the establishment of the Fund was done on the basis of EU law, the transfer of the contributions levied by the national authorities to the SRF was based on an intergovernmental agreement.

Whether such a distinction between the establishment of the Fund and the power to levy the contributions is required by EU law can be disputed. Reference shall be made to the judgment of the CJEU in the 'Vodafone' case.¹¹⁵ In this case the Court considered valid a Union regulation based on Article 114(1) TFEU, which introduced Union wide roaming caps directly applicable to telecommunication operators. Imposing roaming caps on private market operators can be compared with regard to the intensity of interference with an individual's freedoms with imposing contributions on individuals. Based on this consideration, there is enough legal ground for establishing financial contributions paid by individuals on the basis of a Union competence.

A precedent for raising contributions directly from individuals can be found in Article 9 of Regulation (EC) No 443/2009 setting emission performance standards for new passenger cars as part of the former Community's integrated approach to reduce CO₂ emissions from light-duty vehicles. According to this Article 'in respect of each calendar year from 2012 onwards for which a manufacturer's average specific emissions of CO₂ exceed its specific emissions target in that year, the Commission shall impose an excess emissions premium on the manufacturer or, in the case of a pool, the pool manager'. Furthermore, 'the amounts of the excess emissions premium shall be considered as revenue for the general budget of the European Union' according to Article 9(4) of the Regulation. It is worth mentioning that Member States' constitutional courts did not raise any constitutional objections against the rule in Article 9 of Regulation (EC) No 443/2009.

Yet, the example of the SRF shows that also an intergovernmental agreement could be envisaged. In its 'Pringle' judgment, the CJEU clarified that, in fields where there is no specific competence conferred upon the Union and where the Union legislator has not yet acted, the Member States may instead of adopting Union legislation also conclude international agreements.¹¹⁶ This refers in particular to situations where Article 352(1) TFEU would be the only suitable legal base. It would therefore not violate EU law if Member State concluded an intergovernmental agreement following the model of the SRF in order to agree on levying the financial contributions from individuals.

From an operational point of view, it would even be recommendable to supplement a Union legal act establishing a genuine EUBS by an intergovernmental agreement concerning the financial contributions paid by individuals. In such a situation, national authorities would keep on levying contributions for financing unemployment benefits. Only the part, which finances the EUBS would have to be transferred by the national authorities to the European fund whilst the national part remains in the national UBS. Such a construction would facilitate the practical implementation of a EUBS in the national legal orders.

4.1.2.3 Financing through EU own taxes

Finally, there are proposals to finance EUBS through EU own taxes such as a dedicated tax on consumption or labour. An EU own tax can be introduced under the existing

¹¹⁵ CJEU, Case C-58/08, Vodafone [2010] ECR I-4999.

¹¹⁶ CJEU, Case C-370/12, Pringle, ECLI:EU:C:2012:756 para. 64, 67; Repasi, *Völkervertragliche Freiräume für EU-Mitgliedstaaten*, *Europarecht* 2013, 45, 59.

Treaties in two steps: First, the EU tax has to be established on the basis of a Union competence. Second, the EU own tax has to be included as a new own resource in the Own Resources Decision according to the procedure laid down in Article 311(3) TFEU. Article 311 TFEU does not itself provide for any legal basis to establish taxes. An EU own tax has to be considered as an 'own resource' and not as 'other revenue' since the purpose of a tax is to finance the general budget.

The Union can adopt measures in tax matters on the basis of Article 113 TFEU concerning indirect taxes, Article 115 TFEU concerning direct taxes, Article 192(2)(1)(a) TFEU concerning environmental taxes, Article 194(3) TFEU concerning energy taxes and Article 352 TFEU. Article 115 TFEU only serves as a basis for tax legislation by means of directives. An EU own tax can only be created by means of a regulation. Article 113 TFEU is not restricted to directives but requires a 'harmonisation of legislation'. The establishment of an EU own tax can hardly be considered as a 'harmonisation'. Although the CJEU decided that the establishment of an own EU agency can be done by means of regulation on the basis of Article 114 TFEU, that requires 'approximation', such an establishment is only possible 'in order to facilitate the uniform implementation and application of acts based on that provision'.¹¹⁷ As long as the establishment of an EU agency (or tax) facilitates an existing EU legal act it can be based on 'harmonising' legal bases. An EU own tax, however, cannot be considered as an 'annex' to an existing EU legal act. It is not 'harmonisation' in terms of Article 113 TFEU and it is not 'approximation' in terms of Article 115 TFEU. Articles 192 and 194 TFEU allow for the adoption of 'provisions' (Article 192 TFEU) and 'measures' (Article 194 TFEU) if they are 'primarily of a fiscal nature'. This includes regulations. Except for those very specific fields, the only remaining legal basis for the establishment of an EU own tax would be Article 352 TFEU. There can be, however, no legislation based on Article 352 TFEU if an overall assessment of all possible legal bases results in the conclusion that legislating on the basis of Article 352 TFEU would amount to a circumvention of the division of competences between the EU and Member States. The Treaties only provided for a possibility to adopt 'measures' in very specific fields (environment and energy). In all other fields of taxation it only provides for harmonisation of Member States' legislation and the adoption of directives. This means, conversely, that the Treaties do not provide for any legal basis for an EU own tax, which cannot be circumvented by relying on Article 352 TFEU.¹¹⁸

This finding is supported by the fact that the introduction of an EU own tax requires an enhanced democratic control which is not foreseen by the existing legal bases in tax matters. Articles 113 and 115 TFEU only require a consultation of the European Parliament and Article 352 TFEU only requires consent by the European Parliament. Taxation, however, requires representation. The creation of a future legal base for an EU tax whose purpose is to generate revenue for the EU needs a complete involvement of the European Parliament and special rules on taxation in Primary law (comparable to a financial constitution).¹¹⁹

¹¹⁷ CJEU, Case C-217/04, *United Kingdom v European Parliament and Council (ENISA)* [2006] ECR I-3771 para. 44.

¹¹⁸ This could be seen differently with regard to the introduction of the financial transaction tax if the main purpose of this tax is not to generate revenue for the EU but a steering effect with regard to financial transactions. The introduction of a financial transaction tax as a Member States' tax whose revenue is assigned partly or completely as an own resource of the EU budget remains, however, possible under the existing Treaties. Cf. Mayer and Heidfeld, *Europarechtliche Aspekte einer Finanztransaktionsteuer*, *Europäische Zeitschrift für Wirtschaftsrecht* 2011, 373, 375.

¹¹⁹ Waldhoff, *Steuerhoheit für die Europäische Union?*, in: *Zentrum für Europäisches Wirtschaftsrecht (ZEW), Vorträge und Berichte*, No 195, 2012, p. 12.

4.1.2.4 Earmarking contributions to expenditure of EUBS

An important feature for the financing side of the EUBS is the possibility to earmark contributions raised for the purpose of financing the EUBS so that revenue originating from these contributions may not be used in order to finance other Union tasks. Without such earmarking additional financial contributions raised from either Member States or individuals have to be considered as financing the general Union budget and would then have to be included into the Own Resources Decision.

With regard to own resources, Article 6 of the Own Resources Decision states that 'the revenue [...] shall be used without distinction to finance all expenditure entered in the general budget of the European Union.' The wording appears to preclude any possibility to earmark certain contributions. One has, however, to distinguish the establishment of expenditure that is directly linked to a certain own resource, which is prohibited, and the establishment of a new budget line financed by revenue originating from certain financial contributions. With regard to the latter, Article 21(1) of the Regulation on financial rules states that '[e]xternal assigned revenue and internal assigned revenue shall be used to finance specific items of expenditure'. By that, EU budget law recognises the possibility to earmark certain revenue. It only excludes the earmarking of own resources, which are, by definition, intended to balance the general Union budget. Article 21 distinguishes between external and internal assigned revenue. The distinction is made according to the source of the revenue. If the revenue originates from contributions of Member States or third parties, it is considered as 'external assigned revenue'. If the revenue originates from transactions, in which Union institutions are involved, it is to be qualified as 'internal assigned revenue'. Contributions to finance EUBS are therefore 'external assigned revenue' and would be classified as 'revenue earmarked for a specific purpose' under Article 21(2)(d) of the Regulation on financial rules.

Whilst the Regulation on financial rules confirms the existence of earmarked revenue, it does not provide for a legal base to assign external revenue. This has to be done by the legal act raising the earmarked financial contributions. With regard to EUBS, this means that the legal act establishing the EUBS has also to earmark the financial contributions raised by either the Member States or individuals. It is, finally, worth to recall that expenditure financed by 'external assigned revenue' is not to be taken into account by the ceilings set by the multiannual financial framework.

4.2. Establishment of a dedicated fund outside the general Union budget

As an alternative to introducing a budget line in the general Union budget, which is exclusively financed by external assigned revenue originating from financial contributions raised either from Member States (equivalent EUBS) or from individuals (genuine EUBS), one may consider the establishment of a fund outside the general Union budget, which finances EUBS, following the model of the European Development Fund (EDF). The EDF is a fund that has been set up by the Member States and not by the Council, whose expenditure is assumed directly by the Member States and not the Union. The CJEU considered the EDF valid, even though the former Community had a competence for development cooperation (Articles 208 et seqq. of today's TFEU). The Member States had the competence to set up such a fund since 'the Community's competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non-member States, either collectively or individually or even jointly with the Community'.¹²⁰ In other words, as long as there is no exclusive Union competence and as long as a shared competence was not yet used by the Union legislator, the Member States may also set up a fund outside the general Union budget.

¹²⁰ CJEU, Case C-316/91, Parliament v Council [1994] ECR I-625 para. 26.

Since there is not yet any EUBS, a fund financing such scheme could, according to this case law, also be established outside the general Union budget.

Yet, establishing a fund outside the general Union budget may not undermine the budgetary control function and rights of the European Parliament and the Council. In principle, establishing a Fund outside the general Union budget although there is a Union competence for establishing such a fund within the general Union budget runs counter the general principle of unity of the EU budget and its completeness, as enshrined in Article 310(1) TFEU, according to which 'all items of revenue and expenditure of the Union shall be included in estimates to be drawn up for each financial year and shall be shown in the budget'. The principle of unity requires that *all* revenues and expenditures of the Union are part of *one* EU budget. It forbids any kind of separate or subsidiary budget within the EU framework. The principle of unity includes the completeness of the EU budget which requires that the one EU budget which is established under the principle of unity is complete and includes *every* predictable revenue and expenditure of the Union.

The purpose of this principle is the protection of the budgetary powers of the Council and, in particular, of the European Parliament. The Treaties have very carefully balanced the participation rights of the European Parliament and the Council in the Union's budgetary procedure with the decision-making procedure under Article 314 TFEU, the discharge duty of the Commission towards the European Parliament under Article 319 TFEU and the adoption of the financial rules regulation in the ordinary legislative procedure under Article 322 TFEU. Especially the strong position of the European Parliament as the representative of the Union citizens (Article 10 TEU) exercising budgetary functions jointly with the Council (Article 14(1) TEU) could be undermined by a restrictive interpretation of Article 310(1) TFEU which would allow separate funds within the EU framework but outside of EU budget law. The Council as the representative of the governments of the Member States does not need a comparable protection as Member States' governments are also involved in the decision on public spending outside of the Union framework. It could, however, be otherwise if not all the Member States which participate in the Council take part in decisions on public spending.

The case law of the CJEU, allowing funds within the EU framework but outside the EU budget, and the aforementioned restrictive interpretation of Article 310(1) TFEU can be reconciled by allowing, in principle, to set up a fund outside the general Union budget provided that the European Parliament and the Council as budgetary authorities exercise a control over the fund as foreseen by the EU budget law in Articles 310 et seqq. TFEU.¹²¹ This view is confirmed by the EDF judgment of the CJEU since the European Parliament has, at least, to discharge the Commission for the financial management of the EDF according to Article 11(8) of the Internal Agreement on the financing of Community aid.¹²² A fund financing EUBS established outside the general Union budget has therefore to provide for an involvement of the European Parliament in the supervision of the action of the fund as in the discharge of its financial management.

Based on this reasoning and subject to the just mentioned conditions, the EUBS could also be financed by a fund established outside the general Union budget.

¹²¹ Repasi, Legal options for an additional EMU fiscal capacity, Study for the European Parliament 2013, p. 17, 19.

¹²² [2006] OJ L 247, p. 32.

4.2.1. Legal base

There are two ways on how a fund outside the general Union budget could be established. It could be done by founding a Union agency with a legal personality distinct from the Union, whose budget is the fund, based on Article 352(1) TFEU. The 'Office for Harmonisation in the Internal Market' (OHMI) can be considered as a precedent for this way of establishing a fund outside the general Union budget.¹²³

Alternatively, the 'Representatives of the Governments of the Member States, meeting within the Council' could conclude an intergovernmental agreement establishing the fund financing the EUBS. This would follow the legislative technique used for the EDF and confirmed by the judgment of the CJEU on the legality of the EDF. Another example is the ESM-Treaty, which was concluded even though the ESM could also have been established on the basis of Article 352(1) TFEU.

4.2.2. Contributions to a dedicated fund

Contributions to the fund could be raised either from Member States or from individuals if provided for by the regulation establishing the EUBS agency whose budget would be the EUBS fund or agreed upon by the Member States in an intergovernmental agreement.

This general right to raise contributions is limited by the duty not to circumvent limitations foreseen by EU law. Member States are not allowed by simply using a different legislative technique to undermine the distribution of competences between the Union and Member States, on the one hand, and the involvement of Union institutions such as the European Parliament, on the other hand. Those limitations were previously outlined in section 4.1.2. In brief, the limitations may be summarised that no Member State may be obliged to pay any contributions against its will. There are no further limitations deriving from EU budget law since contributions to a dedicated fund can be compared to earmarked contributions to the general Union budget. Therefore, the legal act raising financial contributes for a dedicated fund has to observe the abovementioned conditions for generating other revenue.

Since both a legal act establishing a Union agency whose budget would finance EUBS on the basis of Article 352(1) TFEU or an intergovernmental agreement require either a unanimous vote or a ratification by all Member States, raising contribution for a dedicated EUBS fund outside the general Union budget would not undermine EU law and is, by that, legally possible.

4.3. Possibility to raise debt

Finally, some EUBS options include the possibility to raise debt. Such a possibility appears to be legally problematic. Article 17(2) of the Regulation on financial rules states that 'the Union and [Union agencies], may not raise loans within the framework of the budget.' At the same time, the Union already raised such loans with regard to balancing of payment difficulties caused by the increase in prices of petroleum products (cf. regulation (EEC) No 397/75¹²⁴), to assisting non-eurozone Member States which are experiencing or are seriously threatened with difficulties in their balance of current

¹²³ Cf. Articles 138 et seqq. of Regulation (EC) No 207/2009.

¹²⁴ Regulation (EEC) No 397/75 of the Council of 17 February 1975 concerning Community loans, [1975] OJ L 46, p. 1.

payments (cf. regulation (EC) No 332/2002¹²⁵), to financing investment projects which contribute to greater convergence and integration of the economic policies of the Member States (cf. Council decision 78/870/EEC¹²⁶) or to the European Financial Stabilisation Mechanism (cf. Article 6 of Council Regulation (EU) No 407/2010¹²⁷). Revenue of these loans is considered to be 'other revenue' of the EU budget in terms of Article 311(2) TFEU.

The contradiction between the prohibition of raising loans, on the one hand, and the somehow different practice, on the other hand, can be explained by the fact that, for predefined and specific purposes, the Union is allowed to enter into borrowing-and-lending operations. The Union may, however, not do so in order to finance the general EU budget. The ability to enter into borrowing-and-lending operations must therefore be limited to a specific purpose in the legal act enabling the Union to raise loans. Furthermore, the guarantees for these borrowing-and-lending operations have to be included in the general EU budget. The borrowing-and-lending operations as such are then not part of the general budget.

Since raising loans for the financing of the EUBS would be a specific purpose and since the loans would not be used in order to finance the general budget of the Union, the EUBS would be entitled under the existing EU budget law to raise debt in case the legal act establishing the EUBS fund would enable the Union to do so.

5. POSSIBILITIES FOR DIFFERENTIATED INTEGRATION

As it was shown under sections 2 and 4, a fully-fledged EUBS can be established without Treaty change, but the legal bases supporting the establishment of a EUBS require a unanimous vote in the Council. This leads to the final question whether a EUBS could also be introduced by a subset of Member States. There are two tools for a differentiated integration with regard to EUBS. It could either be done by establishing an enhanced cooperation under Article 20 TEU and Articles 326 et seqq. TFEU (5.1.) or by concluding an *inter se* agreement under International law amongst a subset of Member States (5.2.).

5.1. Possibility to use Enhanced Cooperation

The role model for every cooperation of a subset of Member States with a view to adopt legally binding rules is the Enhanced Cooperation in terms of Article 20 TEU. First, the procedural requirements for establishing an enhanced cooperation will be addressed (5.1.1) before turning to the substantive ones (5.1.2).

5.1.1. Procedural requirements for establishing an enhanced cooperation

The procedure for establishing an enhanced cooperation is a three-step-procedure with, *first*, the authorisation procedure, *second*, the legislative procedure and, *third*, the participation procedure. In order to establish an enhanced cooperation between them, a subgroup of at least nine Member States has to submit a request to the European

¹²⁵ Council Regulation (EC) No 332/2002 of 18 February 2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments, [2002] OJ L 53, p. 1.

¹²⁶ Council Decision 78/870/EEC of 16 October 1978 empowering the Commission to contract loans for the purpose of promoting investment within the Community, [1978] OJ L 298, p. 9.

¹²⁷ Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, [2010] OJ L 118, p. 1.

Commission, which may propose a decision authorising the enhanced cooperation to the Council. The decision whether or not the Commission will present such a proposal remains at the discretion of the Commission. The Council adopts, after obtaining the consent of the European Parliament, a decision with qualified majority amongst all EU Member States. The adoption of this decision is linked to two conditions: First, the objectives of the requested enhanced cooperation cannot be attained within a reasonable period by the Union as a whole and, second, this decision shall be adopted as a last resort.

In its recent decision on the legality of the enhanced cooperation concerning the creation of unitary patent protection the CJEU had the opportunity to specify both criteria.¹²⁸ With regard to the impossibility to legislate with effect to the entire Union 'the impossibility referred to may [according to the CJEU] be due to various causes, for example, lack of interest on the part of one or more Member States or the inability of the Member States, who have all shown themselves interested in the adoption of an arrangement at Union level, to reach agreement on the content of that arrangement.'

'The expression "as a last resort" highlights [for the European Court of Justice] the fact that only those situations in which it is impossible to adopt legislation in the foreseeable future may give rise to the adoption of a decision authorising enhanced cooperation.' However, not any 'fruitless negotiation could lead to one or more instances of enhanced cooperation, to the detriment of the search for a compromise enabling the adoption of legislation for the Union as a whole.' The authorising decision is therefore a 'balancing act' between the duty and need for negotiations with all EU Member States aimed at reaching a compromise, on the one hand, and the determination of a failure of these negotiations, on the other. The Council has a wide margin of political discretion for the determination whether or not to authorise the establishment of an enhanced cooperation.

On the basis of this authorising decision the participating Member States may proceed with the legislative procedure. Decision-making is modified, according to Article 330 TFEU, with regard to the Council, but explicitly not with regard to the European Parliament. All Member States may participate in the deliberations, but only the participating ones shall take part in the vote. The European Parliament, however, votes in its full composition.

Finally, once a non-participating Member State wishes to join an established enhanced cooperation, this Member State has to notify its intention to the Commission and the Council. The Commission either confirms the participation or indicates arrangements to be adopted in order to fulfil certain conditions for participation and sets a deadline. If after the expiry of this deadline the Commission still considers that the conditions are not yet met, the non-participating Member State may request a Council vote on the participation.

5.1.2. Substantive requirements for establishing an enhanced cooperation

With regard to the substantive requirements for establishing an enhanced cooperation, such cooperation shall not undermine the internal market and shall not constitute a discrimination based on grounds of nationality. It must therefore be in conformity with Primary as well as with existing Secondary law. This 'non-regression' with regard to the current state of Union law is furthermore combined with an obligation to only act in order to advance the Union. Enhanced cooperation is therefore only possible if it serves exclusively a better and quicker integration without harming the rights of non-participating Member States. Finally, an enhanced cooperation can only be established within the framework of the Union's non-exclusive competences. This means that all

¹²⁸ CJEU, Joined Cases C-274/11 and C-295/11, Spain and Italy v Council, ECLI:EU:C:2013:240.

Union competences, which are not listed in Article 3(1) TFEU on the Union's exclusive competences, are suitable for the establishment of an enhanced cooperation, including Article 352(1) TFEU.

5.1.3. Establishment of a EUBS under Enhanced Cooperation

Since the legal bases supporting the establishment of a EUBS, as shown above under section 2, are all non-exclusive Union competences, EUBS could be adopted under enhanced cooperation. The most relevant obstacle for the use of enhanced cooperation is then the prohibition under Article 326(2) TFEU to undermine the internal market or economic, social and territorial cohesion. The prohibition to undermine the internal market is to be understood that provisions adopted under enhanced cooperation just as national law may affect the exercise of the fundamental freedoms but can be justified by mandatory requirements. In the case of EUBS social cohesion and macroeconomic stabilisation are such mandatory requirements. With regard to the prohibition to undermine economic and social cohesion, it must be noted that EUBS under enhanced cooperation won't impede the social cohesion of the Union but only strengthen the one between the participating Member States.

5.1.4. Enhanced Cooperation and EU budget law: Can there be differentiation within the EU budget?

Whilst in the previous section it was shown that the payment side of a EUBS can be established under enhanced cooperation, one has now to examine whether the financing side can also be adopted by means of differentiated integration. This refers in particular to the question of differentiation within EU budget law in case the financing of the EUBS is introduced through a new budget line in the general Union budget (see for this option section 4.1).

In case the EUBS is financed by a dedicated fund, issues with regard to enhanced cooperation only arise when the EUBS is implemented by establishing a separate Union agency under Article 352(1) TFEU (see for this option section 4.2). When establishing the EUBS on the basis of an intergovernmental agreement, problems relating to the conclusion of an agreement of a subset of Member States are addressed below in section 5.2. In the case of installing a dedicated fund outside the general Union budget, the financing side is embodied in the legal act establishing the EUBS on the basis of Article 352(1) TFEU. Hence, if the legal act on the EUBS can be adopted under enhanced cooperation in line with conditions set out in section 5.1.3, the financing side as a necessary element of this legal act can also be adopted under enhanced cooperation.

5.1.4.1 Differentiation with regard to revenue

EU budget law allows for differentiation with regard to revenue. This can be seen by Article 332 TFEU. According to this article, expenditure other than administrative costs entailed for the Union institutions shall be borne, in principle, by the participating Member States. This means that the participating Member States must also have the legal possibilities to finance this expenditure. The wording of Article 332 TFEU seems to suggest that a subset of Member States should establish an own fund in order to finance expenditure resulting from an enhanced cooperation and seems even to require that this fund is established outside the general EU budget since the latter is financed by all Member States. Such an understanding of Article 332 TFEU, however, runs counter EU budget law. If understood in that way, Member States would have an easy way to avoid the procedures to establish the Union's annual budget under Article 312 TFEU and to avoid the control of the use of the Union's budget exercised by the European Parliament and the Council by simply establishing an enhanced cooperation amongst each other with an own budget.

Against this background, the main idea of Article 332 TFEU is less to allow an enhanced cooperation to deviate from EU budget law but rather that non-participating Member States should not bear costs of decisions on which they have no political influence. One may therefore draw the conclusion from Article 332 TFEU that the participating Member States should make use of the possibilities to differentiate with regard to the financing of the enhanced cooperation. Article 326(1) TFEU, moreover, confirms the present view that Article 332 TFEU builds upon pre-existing possibilities to differentiate with regard to revenue. This provision states that any enhanced cooperation shall comply with the Treaties and Union law. Since EU budget law is part of Union law and since therefore establishing an enhanced cooperation does allow for any deviation from EU budget law, a differentiation with regard to revenue must be covered by the existing EU budget law.

The interpretation of EU budget law, which allows for differentiation with regard to revenue, is also supported by a precedent in existing EU law where a group of Member States finances a specific European project. It is the case of the 'High Flux reactor' which is financed by Belgium, France and the Netherlands.¹²⁹ The Council decision on the financing of this project was adopted on the basis of Article 7 Euratom Treaty. The contributions paid by Belgium, France and the Netherlands are financial contributions made to the general EU budget by way of assigned revenue in terms of Article 21(2) of the Regulation on financial rules. These contributions are classified as 'other revenue' in terms of Article 311 TFEU.

Based on these considerations, a subset of Member States may contribute financially to the general Union budget and assign these contributions to a specific budget line.

5.1.4.2 Differentiation with regard to expenditure

Differentiation with regard to expenditure is also allowed under the existing EU budget law. This follows from the fact that every expenditure is linked to a Union legal act. Since EU law provides for enhanced cooperation with regard to Union legal acts, the same must apply to expenditure. Otherwise, the general Union budget could not cover expenditure resulting from the implementation of enhanced cooperation. Article 332 TFEU is, however, based on the assumption that the general Union budget may also cover such expenditure.

There is also a precedent in EU law that confirms the legal possibility to introduce differentiated expenditure. According to Article 10 of Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the Euro area,¹³⁰ 'the interest earned by the Commission shall constitute other revenue as referred to in Article 311 TFEU and shall be assigned to the European Financial Stability Facility.' Regulation (EU) No 1173/2011 defines payment obligations only for Euro area Member States and assigns the revenue to the EFSF, which is a body exclusively composed by Euro area Member States and which only provides for financial assistance for Euro area Member States.

5.2. Possibility to conclude an *inter se* Agreement amongst a subset of EU Member States

As an alternative to the adoption of EUBS under enhanced cooperation, a subset of Member State could also consider to conclude an *inter se* agreement amongst each other

¹²⁹ Council Decision 2012/709/Euratom on the adoption of the 2012-2015 High Flux Reactor supplementary re-search programme to be implemented by the Joint Research Centre for the European Atomic Energy Community, [2012] OJ L 321, p. 59.

¹³⁰ [2011] OJ L 306, p. 1.

under International law. With the rise of the economic and financial crisis in 2008 international agreements were used more frequently in order to adopt binding rules for a subset of Member States. This intergovernmental method of law-making was used when concluding the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG, also known as 'Fiscal Compact') (25 Member States), the Treaty Establishing the European Stability Mechanism (ESM-Treaty) (19 Member States) and the Intergovernmental Agreement on the Single Resolution Fund (SRF Agreement) (26 Member States).

5.2.1. Limits for the conclusion of agreements by a subset of Member States

International agreements concluded by a subset of Member States (*inter se* agreements) remain subject to European law.¹³¹ Even though, by concluding the EU Treaties, Member States have not renounced their international Treaty-making capacity in areas covered by the EU Treaties, the Treaties provide for rules pre-empting the use of this Treaty-making capacity. Firstly, international agreements concluded by a subset of Member States may not modify Primary law because their conclusion would violate Article 48 TEU. Secondly, international agreements have to be in compliance with existing primary and secondary EU law. They cannot modify existing rules. Thirdly, within the scope of Union competences, international agreements are pre-empted insofar as they concern subject matters covered by exclusive Union competences (Article 2(1), 3(1) TFEU). Insofar as they concern subject-matters covered by shared competences, international agreements are pre-empted to the extent that the Union has exercised them (Article 2(2), 4 TFEU). As the only exception to these rules, Member States may conclude international agreements as 'trustees of the common interest' in the absence of appropriate action of the Council, when the adoption of measures is necessary.¹³² These agreements must, however, be interim measures and to be suspended once Union measures are adopted.

Furthermore, the principle of sincere cooperation as enshrined in Article 4(3) TEU limits the use of the Treaty-making capacities of the Member States. Pursuant to this principle, Member States are required, *inter alia*, to refrain from any measure which could jeopardise the attainment of the Union's objectives and which could thwart the EU legal order. The system of checks and balances between the Member States, represented by the Council, and the EU, represented by the European Commission and the European Parliament, is at the constitutional core of the EU legal order. If, therefore, the adoption of a Union legal act is legally possible on the basis of a Union competence which refers, in particular, to the ordinary legislative procedure, such an act shall be adopted on the basis of this competence.

If it were at Member States' discretion to choose between, on the one hand, the conclusion of an international agreement, which is drafted by the Member States, negotiated by the Member States without any kind of formal involvement of the Commission and the European Parliament and, on the other hand, the adoption of a legal act, in accordance with the ordinary legislative procedure, where the proposal is exclusively drafted by the European Commission and where the European Parliament has the right to amend and to block any kind of provision, the whole system of checks and balances would be rendered meaningless. Member States are therefore under a legal obligation to sincerely respect the Union legislative procedures foreseen by a Union competence if the conditions for the use of this competence are fulfilled and the legislative procedure is initiated by a Commission proposal. Only with regard to legislating under the flexibility clause in Article 352(1) TFEU, the Court decided in its

¹³¹ Repasi, *Völkervertragliche Freiräume für EU-Mitgliedstaaten*, *Europarecht* 2013, 45.

¹³² CJEU, Case 804/79, *Commission v United Kingdom* [1981] ECR 1045.

'Pringle' judgment that the Member States may in areas, where the Union legislator has not yet acted, conclude international agreements instead of adopting Union legal acts.¹³³

Yet, the mere existence of an ordinary legislative procedure does not *per se* preclude the conclusion of an *inter se* agreement. Just as legislating under the enhanced cooperation procedure (cf. Article 20(2) TEU), concluding an *inter se* agreement can replace an ordinary legislative procedure if the latter failed or is likely to fail. This raises now the question of the relationship between the enhanced cooperation procedure and the conclusion of an *inter se* agreement amongst a subset of Member States. Especially when an enhanced cooperation on the basis of a Union competence, which refers to the ordinary legislative procedure, is possible, the attempt to legislate under the enhanced cooperation takes precedence over the negotiation and conclusion of an *inter se* agreement. This follows from the principle of institutional balance and democracy. If the conclusion of *inter se* agreement would lie within the discretion of the Member States, they could easily circumvent the participation rights of the European Parliament in the ordinary legislative procedure. Therefore, an *inter se* agreement of a subset of Member States may, within the scope of Union competences that refer to the ordinary legislative procedure, only be concluded if an enhanced cooperation failed or is likely to fail. In sum, this leads to the following legal framework for the conclusion of *inter se* agreement under International law amongst EU Member States. Such agreements are legally valid provided that:

- Intergovernmental *inter se* agreements may not modify Primary law if concluded outside of Article 48 TEU;
- Intergovernmental *inter se* agreements have to be in compliance with existing Primary and Secondary law;
- Intergovernmental *inter se* agreements are pre-empted within the scope of
 - exclusive Union competences or of
 - shared Union competences to the extent that the Union has exercised them;
- Intergovernmental *inter se* agreements of all Member States may only be concluded if a Union legislative procedure failed or is likely to fail;
- Intergovernmental *inter se* agreements of a subset of Member States may only be concluded if an Enhanced Cooperation failed or is likely to fail;
- Intergovernmental *inter se* agreements may not circumvent Union legislative procedures if there is a Commission proposal on the basis of a shared Union competence;

5.2.2. The use of an *inter se* agreement for establishing EUBS

Based on this reasoning, EUBS could also be established by a subset of Member States on the basis of an intergovernmental agreement. With regard to the genuine EUBS options this possibility is subject to the fact that an enhanced cooperation on the basis of Union competences failed or is likely to fail. This is because the legislative procedure for genuine EUBS follows from the combined legal bases of Article 175(3) TFEU, which refers to the ordinary legislative procedure, and Article 352(1) TFEU, which requires a unanimous vote in the Council.

¹³³ CJEU, Case C-370/12, Pringle, ECLI:EU:C:2012:756 para. 64, 67; Repasi, *Völkervertragliche Freiräume für EU-Mitgliedstaaten*, *Europarecht* 2013, 45, 59.

6. CONCLUSIONS

The present legal analysis ascertained that a EUBS can be established within the boundaries of the existing Treaties. A Treaty change is only required for few of the 18 EUBS options. The establishment of a EUBS has thereby to be realised by a set of three legal acts: (1) a legal act establishing the payment side of the scheme, (2) a legal act establishing the financing side of the scheme and (3) a legal act setting minimum requirements with regard to the regulation of NUBS and with regard to activation policies. In case the legal acts (1) and (2) can be based on the same legal basis, both can be adopted as one measure.

As regards the (1) legal act establishing the payment side of the scheme, equivalent EUBS options V2 and V3 can be based on Article 352(1) TFEU and the genuine EUBS options V5 to V7, V10 to V13, V15 and V18 can be based on Article 175(3) TFEU in conjunction with Article 352(1) TFEU. Variants V8, V9 and V14 fail to strengthen the social cohesion within the EU and can therefore neither be based on Article 175(3) TFEU nor on Article 352(1) TFEU. The EUBS options V1, V4, V16 and V 17 lack either an experience rating or a claw-back mechanism, wherefore they would violate Article 125(1) TFEU or in case of V4 do not meet the 'conditionality' criterion required by its possible legal base Article 122(2) TFEU.

With regard to the (2) financing of the EUBS, the legislator has to decide whether it wants to include the revenue of the EUBS into the general Union budget or whether it wants to establish a dedicated fund outside the EU budget. In the former case, financial contributions can be raised from Member States (with regard to equivalent EUBS options) or from individuals (with regard to genuine EUBS options) on the basis of a regulation based on Article 352(1) TFEU. The revenue has to be earmarked for the exclusive use by the EUBS. As a consequence of this earmarking, the contributions would be considered 'external assigned revenue' and can be included into the general Union budget as 'other revenue' without modifying the Own Resources Decision. In case of establishing a dedicated fund, the Union legislator has either to found a EUBS agency with an own distinct budget on the basis of Article 352(1) TFEU or, following the model of the EDF, establish a fund on the basis of an intergovernmental agreement. In both cases, the budgetary control of the European Parliament and the Council has to be included in the act establishing the dedicated fund.

Finally, (3) minimum requirements for the regulation of NUBS may be adopted on the basis of Article 153(2)(b) TFEU in order to smooth the transition from EUBS to NUBS with regard to genuine EUBS options or in order to specify the use of the lump sum transferred from the EUBS to NUBS within the framework of equivalent EUBS options. The inclusion of minimum requirements for activation policies in this legal act is, provided that these minimum requirements are necessary for the social security and social protection of workers, recommended in order to address possible institutional moral hazard, which would affect the 'no bail-out' clause in Article 125(1) TFEU.

		Legal act 1				Legal act 2				Issuing debt	Legal act 3	
		Payment side of EUBS				Financing side of EUBS					Minimum requirements	
		Legal base	EP	Council	Compliance with Article 125 TFEU	Within the EU budget		Dedicated fund outside EU budget			w.r.t. regulation of NUBS	w.r.t. activation policies
				Legal base	Characteristics	Legal base	Characteristics					
equivalent EUBS	V1/18	352	APP	UN	(-)	352	<ul style="list-style-type: none"> No change of Own Resources Decision required External assigned revenue (Art. 21(2)(d) of Regulation 966/2012) Earmarked for the exclusive use of EUBS 	352 or IGA	<ul style="list-style-type: none"> Establishment of an EUBS agency Distinct budget for EUBS agency Control by budgetary authorities (EP/Council) has to be secured 			
	V2/18	352	APP	UN	(+)					(+)	153(2)(b)	153(2)(b)
	V3/18	352	APP	UN	(+)					not foreseen	153(2)(b)	153(2)(b)
	V4/18	(-)										
genuine EUBS	V5/18	175(3), 352	COD	UN	(+)	Financed by MS contributions		Financed by MS contributions		(+)	153(2)(b)	153(2)(b)
	V6/18	175(3), 352	COD	UN	(+)	352	<ul style="list-style-type: none"> No change of Own Resources Decision required External assigned revenue (Art. 21(2)(d) of Regulation 966/2012) Earmarked for the exclusive use of EUBS 	352 or IGA	<ul style="list-style-type: none"> Establishment of an EUBS agency Distinct budget for EUBS agency Control by budgetary authorities (EP/Council) has to be secured 	(+)	153(2)(b)	153(2)(b)
	V7/18	175(3), 352	COD	UN	(+)					(+)	153(2)(b)	153(2)(b)
	V8/18	(-)										
	V9/18	(-)										
	V10/18	175(3), 352	COD	UN	(+)				(+)	153(2)(b)	153(2)(b)	
	V11/18	175(3), 352	COD	UN	(+)				(+)	153(2)(b)	153(2)(b)	
	V12/18	175(3), 352	COD	UN	(+)	Financed by EUBS own premium		Financed by EUBS own premium		(+)	153(2)(b)	153(2)(b)
	V13/18	175(3), 352	COD	UN	(+)	352+ IGA	<ul style="list-style-type: none"> No change of Own Resources Decision required External assigned revenue (Art. 21(2)(d) of Regulation 966/2012) [352] Earmarked for the exclusive use of EUBS [352] Levy and transfer of the contributions by national authorities [IGA] 	352+ IGA or IGA	<ul style="list-style-type: none"> Establishment of an EUBS agency Distinct budget for EUBS agency Control by budgetary authorities (EP/Council) has to be secured Establishment of an EUBS agency [352/IGA] Distinct budget for EUBS agency [352/IGA] Control by budgetary authorities (EP/Council) has to be secured [352/IGA] Levy and transfer of the contributions by national authorities [IGA] 	(+)	153(2)(b)	153(2)(b)
	V14/18	(-)										
	V15/18	175(3), 352	COD	UN	(+)					(+)	153(2)(b)	153(2)(b)
	V16/18	175(3), 352	COD	UN	(-)							
	V17/18	175(3), 352	COD	UN	(-)							
	V18/18	175(3), 352	COD	UN	(+)					not foreseen	153(2)(b)	153(2)(b)

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