

# Deepening the EMU

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European Research  
Centre for Economic and  
Financial Governance

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## Legal framework for an EMU fiscal capacity

### RESEARCH FELLOWS

**Fabian Amtenbrink**

Erasmus University Rotterdam  
(Scientific Director EURO-CEFG)

**Stefaan van den Bogaert**

Leiden University

**Matthias Haentjens**

Leiden University

**Markus Haverland**

Erasmus University Rotterdam

**Klaus Heine**

Erasmus University Rotterdam

**Madeleine Hosli**

Leiden University

**Alessio M. Paces**

Erasmus University Rotterdam

**Erik Pruyt**

Delft University of Technology

**René Repasi**

Erasmus University Rotterdam  
(Scientific Coordinator EURO-CEFG)

**Casper De Vries**

Erasmus University Rotterdam



**Universiteit  
Leiden**  
The Netherlands



Delft  
University of  
Technology

**Erasmus  
University  
Rotterdam**



# Preliminary remark: Compliance

# Analytical framework: Compilation of approaches

	<b>Voluntary non-compliance</b>	<b>Involuntary non-compliance</b>
Sanctioning	'Sticks' monitoring and sanctioning <i>(compliance through enforcement)</i>	'Carrots' Capacity building and contracting <i>(compliance through management)</i>
Socialization	Precaution and learning <i>(compliance through persuasion)</i>	Legal Internalization <i>(compliance through litigation)</i>

*Table: Theoretical approaches in the compliance literature (according to Börzel et al. (2003))*

# Analytical framework: Adapted compliance model

	<b>Intentional non-compliance</b> <i>(aiming at the political will)</i>		<b>Unintentional non-compliance</b> <i>(aiming at the ability)</i>	
Perspective	Top → Down	Bottom → Up	Top → Down	Bottom → Up
Ex ante	<i>Compliance through persuasion</i>	<i>Compliance through internalization</i>	<i>Compliance through management</i>	<i>Compliance through internalization</i>
Ex post	<i>Monitoring and sanctioning</i>	<i>Compliance through internalization</i>	<i>Compliance through management</i>	<i>Compliance through internalization</i>

*Table: Amtenbrink/Repasi (2017)*

# Assessment of compliance mechanisms

	<b>Intentional non-compliance</b> <i>(aiming at the political will)</i>		<b>Unintentional non-compliance</b> <i>(aiming at the ability)</i>	
Perspective	Top → Down	Bottom → Up	Top → Down	Bottom → Up
Ex ante	<i>European semester (NRP, SCP, MIP)</i>	<i>Articles 123, 124, 125 TFEU 'Golden Rule'</i>	<i>Precautionary financial assistance (ESM)</i>	<i>Articles 123, 124, 125 TFEU</i>
Ex post	<i>European semester EDP Fiscal Stability (‘conditionality’)</i>	<i>Articles 123, 124, 125 TFEU 'Correction Mechanism' (Debt Brake) in the TSCG</i>	<i>Financial assistance (under ESM/EFSM) Enhanced surveillance (under Regulation 472/2013)</i>	<i>Articles 123, 124, 125 TFEU</i>

- Internalization did not lead to compliance (as seen in the financial and economic crisis)
- Basically no ex ante compliance through management foreseen in terms of capacity-building as an ex ante mechanism
- Ex post compliance through management only in case of serious difficulties with regard to financial stability, not with regard to other objectives

# Legal Framework for an EMU Fiscal Capacity

# Legal Questions

- Payment side I: Is there is legal base?
- Payment side II: Limitations for transfer of funding set by Article 125(1) TFEU (the so-called 'No Bailout' clause)
- Financing side I: Does EU budget law allow for additional funding earmarked for the use by the fiscal capacity?
- Financing side II: Does EU budget law allow for a differentiated integration?

# Legal Framework for an EMU Fiscal Capacity

## Act 1

Payment side

Defining the conditions for payment

## Act 2

Minimum requirements

Defining the conditions to prevent 'moral hazard'

## Act 3

Financing side

Definition of the revenue

- Contributions by Member States
- Own EU tax

Earmarking of the expenditure



Payment side

# Payment side: Is there a legal base?

- What is the aim that is predominantly pursued?
  - Reinforcing multilateral surveillance?
    - Article 121(6) TFEU
  - Macroeconomic stabilisation in crisis times?
    - Article 122(2) TFEU (used for the EFSM)
    - Only when 'exceptional occurrences'
    - Only 'under certain conditions', no automatization
  - Reducing economic/social disparities?
    - Article 175(3) TFEU (used for the EGF)
  - Fallback option: Article 352(1) TFEU

# Payment side: Limitations set by Article 125

- Issue of Article 125(1) TFEU ('no bail-out' clause)
  - General principle that EU does not finance MS
    - EU may only transfer funding to MS if there is an explicit legal base (such as e.g. in the case of cohesion policy)
    - Otherwise, Article 125(1) TFEU sets the limits for any other transfer
      - CJEU, Case C-370/12, Pringle
      - 'Article 125(1) 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 sound budgetary policies'
  - Issue of conditionality
    - Not required by the wording of Article 125(1) TFEU
    - 'Pingle' confirmed the legality of ESM, which was built on the principle of conditionality

# Payment side: Limitations set by Article 125

- Understanding Article 125(1) TFEU
  - EU/MS shall not be liable for or assume commitments of other MS
  - MS are solely responsible for sound budgetary policies
    - Sound budgetary policies of the participating countries as a precondition for financial stability in a currency area
    - Sound budgetary policies means that state budgets may not be used to finance the consequences of unsound economic policies
  - Financial assistance is acceptable under Article 125(1) TFEU if it does not diminish a MS's incentive to conduct sound budgetary policies
    - Maastricht principle: Market pressure prompts Member States to conduct sound economic policies since the financial consequences of unsound economic policies will be costly to refinance on the markets
    - Applying to financial assistance: As long as it can be ensured that unsound budgetary policies can be avoided through mechanisms prompting sound economic policies, financial assistance is acceptable
    - Not by definition: Conditionality

Financing side

# Financing side

- Two ways of designing the financing side
  - (1) Within the EU budget
    - Earmarking revenue for the exclusive use of the FC ( $\Rightarrow$  External assigned revenue, Article 21(2)(d) of Regulation (EU) No 966/2012)
    - External assigned revenue is excluded from MFF ceilings
    - External assigned revenue is considered to be 'other revenue' in terms of Article 311 TFEU ( $\Rightarrow$  no change of Own Resources Decision)
    - Legal base: Article 352(1) TFEU
  - (2) Dedicated fund outside EU budget
    - Establishment of an agency with an own distinct budget
    - Control by budgetary authorities (EP/Council) comparable to EU budget law in order not to circumvent institutional balance
    - Legal base: Article 352(1) TFEU or IGA

# Financing side

- Is a Euro area budget possible?
  - Revenue
    - Article 332 TFEU: Expenditure shall be borne by the participating MS
    - Example: 'High Flux Reactor' (Council Decision 2012/709/Euratom)
  - Expenditure
    - Principle: The revenue shall be used without distinction to finance all expenditure entered in the general budget of the European Union
    - Exception: Earmarking
      - Certain revenue is assigned by the basic legal act on the creation of the revenue to a certain budget line
      - Example: Article 10 of Regulation (EU) No 1173/2013 on the enforcement of budgetary surveillance in the Euro area:  
*"The interest earned by the Commission [...] shall constitute other revenue as referred to in Article 311 TFEU and shall be assigned to the EFSF."*

# Financing side

- Possibility to raise debt
  - Principle: EU is not allowed to raise debt in order to finance the general budget of the Union
  - Precedents: e.g. EFSM may raise debt (Article 6(3) of Regulation (EU) No 407/2010)
  - EU is allowed to enter into borrowing-and-lending operations for a specific and predefined purpose, which may not lead to an indirect financing of the general budget
  - Legal base: Legal base of the legal act establishing the fiscal capacity



# Thank you for your attention

European Research  
Centre for Economic and  
Financial Governance

**euro-cefg.eu**

Dr. René Repasi  
European Research Centre for Economic and Financial  
Governance (EURO-CEFG)

E-Mail: [repasi@law.eur.nl](mailto:repasi@law.eur.nl)  
Phone: +49(0) 177 75 111 24  
+31 (0) 6 30 77 0721

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