

# EU Financial Assistance Conditionality after “Two Pack”

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Abstract	62
I. Introduction	62
II. Background of EU Financial Assistance Conditionality and the Purposes of Regulation 472/2013/EU	64
1. Conditionality before “Two Pack”	64
a) The IMF Origins of EU Conditionality	66
b) Conditionality in the Medium-Term Financial Assistance Facility (MTFA)	68
c) Euro-Area Conditionality: The Early Steps	70
2. The Purposes of Regulation 472/2013/EU	74
III. Conditionality after Two Pack	76
1. Programme-Based Surveillance	76
a) Scope and Procedure	76
b) Content and Form	77
c) Monitoring	81
2. Enhanced Surveillance	82
a) Scope and Procedure	82
b) Content and Form	83
c) Monitoring	85
d) Conditionality in Enhanced Surveillance	86
3. Post-Programme Surveillance	88
a) Scope and Procedure	88
b) Content	88
c) Monitoring	88
IV. The New Obscurity: Power Reallocation and the Diffusion of Responsibility	89
1. Conditionality: Between Ownership and Coercion	91
a) Ownership as a Justification of Conditionality	91
b) The Poverty of Ownership	94
2. Transparency	96
a) Internal Transparency: Power Distribution within the Troika	96
b) External Transparency: On the Legal Character of Conditionality	98
3. Parliamentary Control and Direct Participation	100
a) European Parliament	101
b) Domestic Parliaments	102
c) What Role for Parliaments in EU Conditionality?	102
V. Outlook	103

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## Abstract

Conditionality is the new topos of EU economic governance. In *Pringle*, the ECJ raised “strict conditionality” to a necessary requirement of assistance to Members in financial distress, and after the recent amendment of Article 136 TFEU this is also explicitly set out in the Treaties. Moreover, conditionality proved to be an extremely powerful instrument. It has been used to press for reforms in recipient countries’ economies, healthcare and pension systems, education and research. On many occasions, the conditions for accessing European financing are prescribed in minute detail. Never before had European institutions been engaged in so close surveillance and micromanagement of domestic public policies. Starting from these observations, this article has two purposes. Firstly, to shed some light to the origins and the mechanics of EU financial assistance conditionality, and, secondly, to offer a critical appraisal of its role in the context of the new EU economic governance, especially after the so-called “Two Pack” set of reforms. Although Regulation 472/2013/EU succeeds in putting all forms of conditional lending under a common EU framework, it fails to address the basic concerns raised by the emergence of conditionality as a cornerstone of EU economic governance. Blurred responsibility, wide executive discretion, and uncertainty as to the legal instruments are some of the points that remain problematic.

## I. Introduction

Conditionality is the new topos of EU economic governance.<sup>1</sup> So far, all types of European financial assistance have been contingent upon the recipient Member State fulfilling certain budgetary and macroeconomic conditions<sup>2</sup> and no less than seven Member States have been under conditionality

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<sup>1</sup> Until recently, conditionality in the EU was mainly associated with the accession process. For a country to become an EU member, specific conditions are set and elaborate monitoring mechanisms supervise regularly the applicant’s progress towards meeting them, see Art. 49 TEU. This type of conditionality is well researched, see indicatively *M. Cremona*, Accession to the European Union: Membership Conditionality and Accession Criteria, Polish Y.B. Int’l L. 25 (2001), 219 et seq.; *K. Smith*, The Evolution and Application of EU Membership Conditionality, in: *M. Cremona* (ed.), *The Enlargement of the European Union*, 2003, 105 et seq.

<sup>2</sup> Namely, the Medium-Term Assistance Facility (MFTA), the ad hoc Greek Loan Facility (GLF), the European Financial Stability Facility (EFSF), the European Financial Stability

schemes in the last five years.<sup>3</sup> According to the ECJ, “strict conditionality” was a necessary requirement for financial assistance packages to be compatible with Article 125 TFEU.<sup>4</sup> And after the 2011 reforms, conditionality is now explicitly enshrined in EU primary law. Article 136 para. 3 TFEU requires that “the granting of any required financial assistance under the [euro-area stability] mechanism will be made subject to strict conditionality”.<sup>5</sup>

Conditionality proved to be an extremely powerful instrument. It has been used to press for reforms in recipient countries’ economies, healthcare and pension systems, education and research, and even national defence. On many occasions, the conditions for accessing European financing are prescribed in minute detail. Never before had European institutions been engaged in so close surveillance and micromanagement of domestic public policies.

Considering the breadth and depth of conditionality, it might be surprising how sparse and fragmented the relevant legal framework has been. When firstly introduced, conditionality was addressed as an emergency instrument and there was little time to embed it to the overall EU legal framework. For the longest part of the crisis, the few applicable rules on the development and monitoring of assistance conditions depended on the source of financial assistance. In the first assistance package to Greece, rules on conditionality were mainly contained in the respective Loan Agreement. After the establishment of the dedicated European assistance mechanisms, namely the European Financial Stability Facility (EFSF), the European Financial Stability Mechanism (EFSM), and the European Stability Mechanism (ESM), some basic guidelines were incorporated in the instruments establishing those institutions. In all these documents, however, basic questions about the substance and procedure of conditionality remained unclear.

Regulation 472/2013/EU, set into force in May 2013 as part of the so-called “Two Pack” set of reforms,<sup>6</sup> aims at codifying conditionality and put-

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Mechanism (EFSM), the European Stability Mechanism (ESM), and the ECB Outright Monetary Transactions (OMT) mechanism.

<sup>3</sup> In a chronological order, Hungary, Latvia, Romania, Greece, Ireland, Portugal, and Cyprus. Ireland exited its adjustment programme in December 2013. Spain has also been under a surveillance scheme until January 2014, restricted, however, to its financial sector.

<sup>4</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, Judgment of 27.11.2012, not yet reported, paras. 136-137 and 142.

<sup>5</sup> Emphasis added. This amendment was adopted under the so-called simplified amendment procedure, see European Council Decision 2011/199/EU of 25.3.2011 amending Art. 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011) OJ L91/1.

<sup>6</sup> Two Pack comprises of two Regulations, Regulation (EU) No. 472/2013 of the European Parliament and of the Council of 21.5.2013 on the strengthening of economic and budget-

ting it on a more solid basis. It establishes a single EU framework for conditional sovereign lending, common for all forms of financial assistance, irrespective of their source. It also intends to streamline the relevant procedures and instruments, and clarify the powers of the institutions involved. More ambitiously, Regulation 472/2013/EU seeks to introduce some limits to EU conditionality as well as elements of parliamentary control. Also very importantly, Regulation 472/2013/EU extends some of the governance mechanics of conditionality to countries that face “serious economic difficulties” even if they do *not* receive assistance. Typical elements of conditionality-governance become thus relevant also outside financial assistance schemes.

This article has two purposes. Firstly, to shed some light on the origins and the mechanics of EU financial assistance conditionality, and, secondly, to offer a critical appraisal of its role in the context of the new EU economic governance. The first part presents the origins of conditionality and its development in the early phases of the eurozone crisis. The second part discusses the rules on conditionality introduced with Regulation 472/2013/EU. The third part assesses these rules in the light of the principles of transparency and parliamentary control. Although Regulation 472/2013/EU succeeds in putting all forms of conditional lending under a common EU framework, it fails to address the basic concerns raised by the emergence of conditionality as a cornerstone of EU economic governance. Blurred responsibility, wide executive discretion, and uncertainty as to the legal instruments are some of the points that remain problematic.

## II. Background of EU Financial Assistance Conditionality and the Purposes of Regulation 472/2013/EU

### 1. Conditionality before “Two Pack”

When the sovereign debt crisis started in 2010, the EU was not equipped with the necessary instruments to address it. The modalities of European intervention and assistance had to be developed step-by-step and under the

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ary surveillance of Member States in the euro-area experiencing or threatened with serious difficulties with respect to their financial stability (2013) OJ L140/1 and Regulation (EU) No. 473/2013 of the European Parliament and of the Council of 21.5.2013 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 (2013) OJ L140/11.

ZaöRV 74 (2014)

pressure of time. The final EU response is based on three basic premises.<sup>7</sup> Firstly, the existing coordination mechanisms of fiscal and economic policies were deemed insufficient, and new, more elaborate mechanisms of surveillance and sanctioning have been created to supplement them. This extensive reform was mainly undertaken with the so-called “Six Pack” set of rules.<sup>8</sup> Secondly, the stability of the eurozone required some form of assistance to countries facing severe financial difficulties. This support came initially from bilateral loans and later from the special European institutions established for this purpose, namely the EFSF, the EFSM, and the ESM. The third basic element of the European post-2010 economic architecture is conditionality. If necessary, financial support should be contingent upon the recipient Member State fulfilling certain budgetary, financial sector, and macroeconomic conditions.

Although conditionality emerged as a basic element of EU economic governance only after 2010, it built upon IMF practice (a) and the earlier EU experience with the medium-term financial assistance facility (MTFA) (b). This experience set the basis for the euro-area conditionality, as it gradually developed during the crisis (c).

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<sup>7</sup> Generally, on the responses in addressing the eurozone crisis from an EU law perspective, see *M. Ruffert*, *The European Debt Crisis and European Union Law*, CML Rev. 48 (2011), 1777 et seq.; *T. Oppermann*, “Euro-Rettung” und europäisches Recht, NJW (2013), 6 et seq.; *E. Chiti/P. G. Teixeira*, *The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis*, CML Rev. 50 (2013), 683 et seq.; *K. Tuori/K. Tuori*, *The Eurozone Crisis: A Constitutional Analysis*, 2014.

<sup>8</sup> The “Six Pack” is a set of rules adopted to reinforce budgetary discipline in the EU and introduce a form of macroeconomic surveillance. It comprises various regulations of the European Parliament and the Council adopted on 16.11.2011, namely Regulation (EU) No. 1173/2011 on the effective enforcement of budgetary surveillance in the euro-area (2011) OJ L306/1; Regulation (EU) No. 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro-area (2011) OJ L306/8; 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 (2011) OJ L306/12; Regulation (EU) No. 1176/2011 on the prevention and correction of macroeconomic imbalances (2011) OJ L306/25; Regulation (EU) No. 1177/2011 of the Council of 8.11.2011 amending Regulation (EC) No. 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure (2011) OJ L 306/33, and Council Directive 2011/85/EU of 8.11.2011 on requirements for budgetary frameworks of the Member States (2011) OJ L 306/41. On this reform, see *C. Antpöbler*, *Emergenz der europäischen Wirtschaftsregierung – Das Six Pack als Zeichen supranationaler Leistungsfähigkeit*, ZaöRV 72 (2012), 353 et seq. In detail on EU financial architecture, see *P. Hilpold*, *Eine neue europäische Finanzarchitektur – Der Umbau der Wirtschafts- und Währungsunion als Reaktion auf die Finanzkrise*, in: *P. Hilpold/W. Steinmair*, *Neue europäische Finanzarchitektur*, 2014, 3 et seq.

### a) The IMF Origins of EU Conditionality

When international financial institutions, such as the World Bank or the IMF, make resources available to their members, they usually do so under the condition that the beneficiary state implements certain policies. Some of these policies need to be implemented prior to the approval of the financing arrangement and others before the disbursement of the subsequent tranches, when support is phased. In international economic law, conditionality means thus two things: the specific policies that a state needs to follow in order to have access to certain financial resources and the procedures for adopting them and monitoring their implementation.<sup>9</sup>

One of the most elaborate and influential forms of conditionality is that of the IMF, developed through an almost seventy-year-long practice in the field of conditional lending.<sup>10</sup> Despite the differences across the various IMF lending instruments (or facilities, in IMF terminology) there is a basic core of features and procedural steps associated with conditionality.<sup>11</sup> As EU conditionality essentially replicates basic IMF governance modalities, a short sketch of those features and procedures is here useful.

In IMF practice, lending conditions firstly appear in a draft adjustment programme, prepared by IMF staff. This contains some basic macroeconomic assumptions and the IMF proposals on the measures that need to be adopted before providing IMF assistance (“prior actions”).<sup>12</sup> This blueprint is then negotiated with the domestic government, over the course of one or several visits in the country concerned.<sup>13</sup> The outcome of the negotiations is usually detailed in a Memorandum of Understanding (MoU), attached to a so-called Letter of Intent.<sup>14</sup> This letter is usually signed by the country’s

<sup>9</sup> See <<http://www.imf.org>>. For the development of the term “conditionality” in the IMF context, see *J. Gold*, *Conditionality*, IMF Pamphlet Series 31 (1982), 1 et seq.

<sup>10</sup> The literature on IMF conditionality is vast. For an introduction, see *G. Bird*, *Reforming IMF Conditionality: From “Streamlining” to “Major Overhaul”*, *World Economics* 10 (2009), 81 et seq.; *A. Dreber*, *IMF Conditionality: Theory and Evidence*, *Public Choice* 141 (2009), 233 et seq.; *E. Denters*, *Law and Policy of IMF Conditionality*, 1996. For a historical account of the development of conditionality, see *J. Gold* (note 9). For an analysis of the workings of the IMF from political science perspective, see *R. H. R. Harper*, *Inside the IMF*, 1998, esp. 175 et seq.; *N. Woods*, *The Globalizers: The IMF, the World Bank and Their Borrowers*, 2006, 65 et seq.

<sup>11</sup> For the stages of preparing conditionality, see *M. Mussa/M. Savastano*, *The IMF Approach to Economic Stabilization*, IMF Working Paper, WP/99/104 (1999), 8 et seq.; *K. W. Stiles*, *Negotiating Debt: The IMF Lending Process*, 1991, 25 et seq.

<sup>12</sup> *M. Mussa/M. Savastano* (note 11), 10.

<sup>13</sup> *M. Mussa/M. Savastano* (note 11), 10 et seq.

<sup>14</sup> IMF Conditionality Guidelines, adopted 25.9.2002, para. 10. Usually two memoranda are attached to the letter of intent, a Memorandum of Economic and Financial Policies

finance minister and the president of the central bank, and is directed to the IMF Managing Director.<sup>15</sup> The Letter of Intent and its attachments define the objectives of the adjustment programme, the actions that are expected from the government during the period of the programme, and the modalities of the programme’s monitoring.<sup>16</sup> The IMF does not sign the arrangement,<sup>17</sup> which is not registered with the United Nations, and is not considered as a legal agreement by the IMF.<sup>18</sup> The form of a letter was adopted in order to avoid any contractual connotation – it is supposed to declare the unilateral policy aims of the recipient government. In fact, of course, it has been defined in negotiation with and, most of the times, under the pressure of the IMF.<sup>19</sup>

After being cleared by the IMF Managing Director, generally without changes, the adjustment programme is submitted to the Executive Board. Although members of the Board can be expected to raise objections or even abstain from voting, the Board has invariably accepted the programmes submitted.<sup>20</sup>

The next phase, monitoring compliance with programme conditions, is probably the most important one.<sup>21</sup> The disbursement of IMF financing depends on the findings of periodical review missions, typically at quarterly intervals. These reviews have two dimensions: they are both backward-looking and forward-looking.<sup>22</sup> On the one hand, they monitor whether programme conditions, and especially numerical performance criteria, are met. On the other hand, they assess whether the programme needs to be modified in order to accommodate failures or new developments with a

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(MEFP), and a Technical Memorandum of Understanding (TMU, containing mainly definitions).

<sup>15</sup> Although sometimes the signature of the Prime Minister is also added, *J. R. Vreeland*, *The International Monetary Fund: Politics of Conditional Lending*, 2007, 32.

<sup>16</sup> *M. Mussa/M. Savastano* (note 11), 11 et seq.

<sup>17</sup> In IMF parlance, this arrangement is also called adjustment programme or simply programme.

<sup>18</sup> Most influential in this context have been the views of *J. Gold*, former General Counsel and Director of the Legal Department of the IMF, see *J. Gold*, *The Stand-By Arrangements of the International Monetary Fund*, 1970, 44 et seq.; *J. Gold*, *The Legal Character of the Fund’s Stand-By Arrangements and Why it Matters*, IMF Pamphlet Series 35 (1980).

<sup>19</sup> *E. Denters* (note 10), 100.

<sup>20</sup> *M. Mussa/M. Savastano* (note 11), 12. The Board exerts however considerable influence on IMF conditionality by indicating to the Managing Director, IMF staff, and the government concerned the aspects of the programme they regard essential.

<sup>21</sup> *M. Mussa/M. Savastano* (note 11), 13 et seq.

<sup>22</sup> *M. Mussa/M. Savastano* (note 11), 13.

view to meeting its primary objectives.<sup>23</sup> This “iterative, open loop”<sup>24</sup> character is a defining element of conditionality.

If the IMF mission is convinced that the recipient country complies with all performance criteria,<sup>25</sup> disbursements follow according to the original schedule. However, this is *not* what usually happens. Most IMF assessments follow one of the other three possible tracks.<sup>26</sup> Firstly, they may establish non-compliance with a performance clause, which is subsequently waived or accordingly modified to allow continuance of disbursements. Secondly, they may find some more substantial deviation that cannot be rapidly modified, leading to the interruption of programme disbursements, which are, however, resumed after a revised programme is agreed. Or, thirdly, they may establish inability to comply, which cannot successfully be addressed by a modified programme, leaving the arrangement permanently suspended until it expires.

### b) Conditionality in the Medium-Term Financial Assistance Facility (MTFA)

EU experience with conditional lending goes back to the “community loans” of the 1970s, and the efforts to address the balance-of-payments repercussions of the oil crisis.<sup>27</sup> These rules, adopted on the basis of the then Article 235 EC Treaty, set out that Community loans would be conditional to the adoption of policy measures designed to redress balance of payment problems. Already Regulation 398/75/EEC entrusted the Commission to “take the necessary measures to verify that the economic policy of [the member state receiving a community loan] accords with the conditions laid down by the Council”.<sup>28</sup>

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<sup>23</sup> <<http://www.imf.org>>.

<sup>24</sup> *M. Mussa/M. Savastano* (note 11), 4.

<sup>25</sup> Not all conditions are treated in the same way, for a summary of the different categories of IMF conditions and their importance for the continuance of an IMF programme, see the IMF Conditionality Factsheet, available at <<http://www.imf.org>>.

<sup>26</sup> *M. Mussa/M. Savastano* (note 11), 15.

<sup>27</sup> See Regulation (EEC) No. 397/75 of the Council of 17.2.1975 concerning Community loans (1975) OJ L46/1 and Regulation (EEC) No. 398/75 of the Council of 17.2.1975 implementing Regulation (EEC) No. 397/75 concerning Community loans (1975) OJ L46/3. For a comparison of these early mechanisms of financial assistance with the contemporary efforts to face the eurocrisis, see *S. Piecha*, Die Europäische Gemeinschaftsanleihe – Vorbild für EFSF, ESM und Euro-Bonds?, *EuZW* (2012), 532.

<sup>28</sup> Art. 6, Regulation 398/75/EEC. The Commission would act in collaboration with the Monetary Committee.

Although governance by conditionality dates back to the 1970s,<sup>29</sup> the closest predecessor of current conditional lending instruments is the Medium-Term Financial Assistance Facility (MTFA). According to Article 143 TFEU, Member States *outside* of the euro-area might be granted financial assistance under certain conditions.<sup>30</sup> The details of the mechanism are set out in Regulation 332/2002/EC.<sup>31</sup> The MTFA facility required loans to be linked to the adoption of economic policy measures, presented by the Member State seeking financial assistance in the form of an adjustment programme and designed to re-establish a sustainable balance of payments.<sup>32</sup> The decision to award assistance as well as the conditions are defined by the Council, acting by qualified majority on a proposal from the Commission.<sup>33</sup> On the basis of this decision, the Commission concludes with the Member State a MoU and a loan agreement.<sup>34</sup> The Commission, in collaboration with the EFC, monitors compliance with the conditions, and decides the release of further instalments.<sup>35</sup>

The request of Hungary to assistance in November 2008 under the MTFA facility introduced a new era for EU conditional lending.<sup>36</sup> Hungary was the first country to accept assistance from *both* European sources and the IMF. This required new procedures to facilitate EU-IMF coordination, and lead to a novel institutional setting that remained more or less unchanged for the long series of assistance schemes that followed: Latvia, Romania, Greece, Ireland, Portugal, and Cyprus. EU-IMF lending required joint missions to negotiate the conditions of loan arrangements and monitor compliance with them, setting the stage for what would later develop, with the addition of the European Central Bank (ECB), to the institution that became known as the “Troika”. Moreover, whereas previous Commission

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<sup>29</sup> See also the mechanisms of macroeconomic support to non-member states, <<http://ec.europa.eu>>.

<sup>30</sup> Art. 143 paras. 1 and 3 TFEU.

<sup>31</sup> Which replaced the older “medium-term financial assistance” facility, see Regulation (EEC) No. 1969/88 of the Council of 24.6.1988 establishing a single facility providing medium-term financial assistance for Member States’ balances of payments (1988) OJ L178/1.

<sup>32</sup> Art. 3 para. 2 and recital 3 of the Preamble to Regulation (EC) No. 332/2002 of the Council of 18.2.2002 establishing a facility providing medium-term financial assistance for Member States’ balances of payments (2002) OJ L53/1.

<sup>33</sup> Art. 1 para. 2 lit. (b) and Art. 8 Regulation 332/2002/EC. The Council is also competent for deciding on any adjustments to be made to the initial economic policy conditions, Art. 5 Regulation 332/2002/EC.

<sup>34</sup> See for example the Irish Agreement, available at <<http://www.efs.europa.eu>>.

<sup>35</sup> Art. 5 Regulation 332/2002/EC.

<sup>36</sup> See S. Lütz/M. Kranke, *The European Rescue of the Washington Consensus? EU and IMF Lending to Central and Eastern European Countries*, *Review of International Political Economy* (2013), 1.

monitoring missions would be fewer and shorter, the need to align EU with IMF lending operations lead to a systemization of EU surveillance on a quarterly basis.<sup>37</sup>

### c) Euro-Area Conditionality: The Early Steps

Experience with joint EU-IMF conditional lending to non-euro-area Members proved instrumental for designing responses to the eurozone crisis. Already the Greek Loan Agreement, which governed bilateral loans from euro-area Member States, made explicit reference to conditionality. These loans were made dependent on compliance by Greece with the conditions contained in a MoU<sup>38</sup> and Council Decision 2010/320/EU,<sup>39</sup> adopted on the basis of Articles 126 para. 9 and 136 TFEU.<sup>40</sup> The Eurogroup statement of 11.4.2010 announced that the Commission, in liaison with the ECB, will start working with the IMF and the Greek authorities on a conditional joint assistance programme: Thus emerged the institution that became known as the Troika.<sup>41</sup> Compliance with conditions was assessed by the euro-area Member States (except Greece, of course) after consultation with the ECB and on the basis of an assessment by the Commission.<sup>42</sup> For the purpose of this assessment, the Commission was given the right to perform on-the-spot checks and inspections,<sup>43</sup> and Greek authorities were obliged to supply all relevant information and facilitate the work of persons instructed to carry out those inspections.<sup>44</sup>

<sup>37</sup> S. Lütz/M. Kranke (note 36), 7 et seq.

<sup>38</sup> Actually, the conditions are contained in three Memoranda, the Memorandum of Economic and Financial Policies, Memorandum of Understanding on Specific Economic Policy Conditionality and Technical Memorandum of Understanding (hereinafter also referred to together as the “MoU”).

<sup>39</sup> Council Decision 2010/320/EU of 10.5.2010 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2010) OJ L145/6. This decision was subsequently amended to accommodate changes in the adjustment programme.

<sup>40</sup> Recital 6 of the Preamble to the Loan Facility Agreement between Euro-area Member States and KfW, the Hellenic Republic, The Bank of Greece acting as agent on behalf of the Hellenic Republic, 8.5.2010 (Greek Loan Facility Agreement).

<sup>41</sup> Statement on the Support to Greece by Euro-area Members States, European Commission – MEMO/10/123, available at <<http://europa.eu>>.

<sup>42</sup> Recital 8 of the Preamble to the Greek Loan Facility Agreement.

<sup>43</sup> Recital 12 of the Preamble to the Greek Loan Facility Agreement.

<sup>44</sup> Art. 10 lit. (b) Greek Loan Facility Agreement.

This basic scheme was subsequently generalized to cover assistance to any euro-area Member. All three relevant subsequent instruments, the EFSF Framework Agreement, Regulation 407/2010/EU establishing the EFSM, and the ESM Treaty, restate as basic rule that financial assistance is conditional upon the recipient countries implementing certain policies.<sup>45</sup> They also set out some basic guidelines for the preparation and monitoring of assistance conditions that generally follow the steps of the first Greek assistance package.

In all three cases of assistance that preceded the ESM, namely Ireland, Portugal, and the second package to Greece, the procedure followed was similar.<sup>46</sup> The adjustment programme was negotiated between domestic authorities and officials from the Commission, the ECB, and the IMF. After an agreement was reached, domestic authorities submitted three MoU each<sup>47</sup> and the competent body made the formal decision on the approval of the programme: the Council for EFSM assistance and the Eurogroup Working Group for EFSF assistance. A Council Implementing Decision followed.<sup>48</sup> Conditionality was thus not contained in a single instrument, but spelled out in a series of documents. A Memorandum of Economic and Financial Policies sets the strategic aims and general measures to be adopted; a Memorandum of Understanding on Specific Economic Policy Condition-

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<sup>45</sup> Recital 2 of the Preamble to the EFSF Framework Agreement; Recital 7 of the Preamble to Regulation (EU) No. 407/2010 of the Council of 11.5.2010 establishing a European financial stabilisation mechanism (2010) OJ L118/1; and Arts. 3 and 12 Treaty Establishing the European Stability Mechanism (ESM Treaty).

<sup>46</sup> EFSM Regulation formally established a more complicated conditionality procedure for EFSM assistance. Art. 3 para. 1 requires the Member requesting assistance to “submit a draft economic and financial adjustment programme” to the Commission and the EFC. The Council Decision to award any assistance shall, however, contain the general economic policy conditions as “defined by the Commission, in consultation with the ECB” (Art. 3 para. 3 lit. (b) and para. 4 lit. (b)), and an “approval of the adjustment programme prepared by the beneficiary Member State to meet the economic conditions attached to the Union financial assistance”. (Art. 3 para. 3 lit. (c) and para. 4 lit. (c) Regulation). Moreover, the Commission and the Member State concerned shall “conclude a Memorandum of Understanding detailing the general economic policy conditions laid down by the Council” (Art. 3 para. 5 Regulation 407/2010/EU). Art. 3 para. 5 Regulation 407/2010/EU, governing EFSM assistance only refers to the Commission as a negotiating party. However, in all cases where EFSM assistance was awarded, the IMF and the ECB also participated.

<sup>47</sup> All available at <<http://ec.europa.eu>>.

<sup>48</sup> Council Decision 2011/734/EU of 12.7.2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2011) OJ L296/38; Council Implementing Decision 2011/77/EU of 7.12.2010 on granting Union financial assistance to Ireland (2011) OJ L30/34; Council Implementing Decision 2011/344/EU of 30.5.2011 on granting Union financial assistance to Portugal (2011) OJ L159/88. All Decisions have been subsequently amended to incorporate changes in conditionality.

ality describes in detail the measures to be adopted; and a Technical Memorandum of Understanding contains important definitions and technical details. The basic elements of the arrangement are also included in a Council Decision directed to the recipient state concerned.

These are overlapping documents but not identical. Of them, most important are the Memoranda. They are significantly longer and contain a far more detailed description of conditionality than the respective Council Decisions, which simply copy the most important conditions included in the Memorandum.<sup>49</sup> Temporally, the conclusion of an agreement on the content of a Memorandum usually precedes the adoption of the relevant Council Decision.<sup>50</sup> That means that conditionality is mainly defined at staff-level negotiations rather than in the Eurogroup or the Council. Only in the case of Cyprus the key elements of the adjustment programme were defined by the Eurogroup before the Troika reached staff-level agreement with domestic authorities.<sup>51</sup> Moreover, subsequent monitoring uses as touchstone the provisions of the Memorandum rather than that of the Council Decision. Memoranda and Decisions have been actualized after each monitoring mission to accommodate failures and changing circumstances.

In July 2013, the ESM replaced both EFSF and EFSM as vehicle of assistance to euro-area Members.<sup>52</sup> Although procedures and requirements might differ according to the specific assistance instrument adopted, the basic elements of ESM conditionality are common.<sup>53</sup> The mandate to negotiate conditionality is given to the Commission, acting in liaison with the ECB and, “wherever possible”, together with the IMF.<sup>54</sup> Conditions take

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<sup>49</sup> In the case of the second Package to Greece, for example, the Memorandum of Economic and Financial Policies is 26 pages (including annexes), the Memorandum of Understanding on Specific Economic Policy Conditionality, 48 pages (including annexes), and Council Decision 2011/734/EU, 15 pages.

<sup>50</sup> See, for example the programmes of Portugal, Greece, and Ireland. The Portuguese adjustment programme was agreed on 3.5.2011. A Memorandum of Understanding was signed on 17.5.2011 and the Council Implementing Decision 2011/344/EU was adopted on 30.5.2011. The first Greek adjustment programme was signed on 3.5.2010 and the Council adopted Decision 2010/320/EU giving notice to Greece to take measure to face its budget deficit on 10.5.2010 ((2010) OJ L145/6). Ireland reached an agreement with the Troika on 28.11.2010 and Council Implementing Decision 2011/77/EU was adopted on 7.12.2010.

<sup>51</sup> Eurogroup reached agreement on 25.3.2013 and the adjustment programme was concluded on 2.4.2013, see Eurogroup Statement on Cyprus, available at <<http://www.consilium.europa.eu>>.

<sup>52</sup> For a presentation of the ESM, see *F. Bark/A. Gilles, Der ESM in der Praxis: Rechtsgrundlagen und Funktionsweise*, EuZW (2013), 367.

<sup>53</sup> See *F. Bark/A. Gilles* (note 52), 369 et seq.

<sup>54</sup> Art. 13 para. 3 subpara. 1 ESM Treaty; Art. 2 para. 3 lit. (a) European Stability Mechanism, Guideline on Loans.

the form of a Memorandum of Understanding, signed by the Commission on behalf of the lenders,<sup>55</sup> and approved by mutual agreement by the Board of Governors,<sup>56</sup> a body comprised by the Ministers of the euro-area countries, in effect also the Eurogroup.<sup>57</sup> The most important of the conditions are also included in a decision discussed in the Eurogroup and adopted by the Council.

Regarding the substance of conditionality, no concrete limits or directions are set. According to Article 12 para. 1 ESM Treaty, conditionality may range “from a macro-economic adjustment programme to continuous respect of pre-established eligibility conditions”. Which type of conditionality is appropriate for each case lies at the discretion of the parties involved. The ultimate choice needs, however, to reflect the financial instrument chosen,<sup>58</sup> the severity of the financial weakness to be addressed,<sup>59</sup> and be consistent with the measures of economic policy coordination provided for in the TFEU, including any opinion, warning, recommendation, or decision addressed to the ESM Member concerned.<sup>60</sup>

Monitoring compliance with the economic policy conditions as defined by the Memoranda of Understanding and the respective Council Decisions is also assigned to the Troika.<sup>61</sup> On the basis of its report, subsequent loan tranches are disbursed.<sup>62</sup> In the case of precautionary assistance or assistance directed to the recapitalisation of financial institutions, the relevant European Supervisory Authorities (ESAs) are also involved in the monitoring of conditionality.<sup>63</sup> Any question of interpretation might be submitted to the ECJ.<sup>64</sup>

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<sup>55</sup> Art. 13 para. 4 ESM Treaty; Art. 2 para. 3 lit. (a) European Stability Mechanism, Guideline on Loans.

<sup>56</sup> Art. 5 para. 6 lit. (f) ESM Treaty.

<sup>57</sup> Art. 5 para. 1 ESM Treaty.

<sup>58</sup> Art. 12 para. 1 and Art. 13 para. 3 subpara. 1 ESM Treaty.

<sup>59</sup> Art. 13 para. 3 subpara. 1 ESM Treaty.

<sup>60</sup> Art. 13 para. 3 subpara. 2 ESM Treaty. Cf. Recital 2 of the Preamble to the EFSF Framework Agreement.

<sup>61</sup> Art. 13 para. 7 ESM Treaty.

<sup>62</sup> Art. 15 para. 5 ESM Treaty; Art. 3 para. 3 European Stability Mechanism, Guideline on Loans. This obligation is restated in the respective Council Decisions, see for example, Art. 3 para. 2 Decision 2011/77/EU.

<sup>63</sup> Art. 5 para. 1 ESM Guideline on Precautionary Financial Assistance; Art. 5 para. 2 Guideline on Financial Assistance for the Recapitalisation of Financial Institutions. In the first of these two cases, the European Systemic Risk Board (ESRB), and where appropriate the IMF, are also involved.

<sup>64</sup> Art. 37 para. 3 ESM Treaty.

## 2. The Purposes of Regulation 472/2013/EU

Conditionality, as evolved since the beginning of the crisis, has been hotly criticized both on procedural and substantive grounds. Procedurally, conditionality has been attacked as being drafted behind closed doors by unaccountable European and international technocrats. As seen above, EU financial assistance conditionality is essentially governed by an atypical tripartite institution, comprised by staff from the Commission, the ECB, and the IMF, and charged both with negotiating and monitoring the lending conditions. These officials, the argument goes, decide on issues vital for recipient countries and the eurozone insulated from effective public scrutiny and parliamentary control. Indeed, parliamentary control of conditionality was extremely weak in the early European conditionality schemes. Until 2013, the European Parliament had no power over conditionality.<sup>65</sup> The role of domestic parliaments is also rudimentary in both phases of the preparation and monitoring of conditions.<sup>66</sup>

Regarding the substance of assistance conditions, economists and other commentators have attacked adjustment programmes as overly focusing on austerity, hurting the prospects of recipient countries to return to growth, and imposing cuts that undermine access to vital public services, such as healthcare and education. In the legal instruments providing for conditionality substantive limits are very sparse.<sup>67</sup> The ESM Treaty simply requires that conditionality “should reflect the severity of the weakness to be addressed and the financial assistance instrument chosen”.<sup>68</sup> Clauses are contained in all financial assistance instruments requiring that conditionality is “fully consistent” with the measures of economic policy coordination provided for in the TFEU, and “in particular with any act of European Union law, including any opinion, warning, recommendation or decision ad-

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<sup>65</sup> The acceptance of invitation extended for an exchange of opinions was accepted by the Troika as matter of courtesy and not as a legal obligation. See the exchange of views with the Greek Troika in the Joint Meeting of Committees on Economic and Monetary Affairs and the Committee on Employment and Social Affairs, 27.3.2012.

<sup>66</sup> See *M. Dawson/F. de Witte*, Constitutional Balance in the EU after the Euro-Crisis, *The Modern Law Review* 76 (2013) 817, 834.

<sup>67</sup> Of course, IMF staff needs to abide by IMF law as well. IMF staff needs to ensure that imposed conditions are “adequate safeguards” (Art. I (v) IMF Articles of Agreement) and also take into account the relevant soft-law Guidelines on Conditionality, first introduced in 1979 and since then revised a number of times, see *Guidelines on Conditionality* (note 14). For an introduction to the evolution of the Guidelines, see *A. F. Lowenfield*, *International Economic Law*, 2<sup>nd</sup> ed. 2008, 647 et seq.; *E. Denters* (note 10), 94 et seq.

<sup>68</sup> Art. 13 para. 3 subpara. 1 ESM Treaty. See also Art. 2 para. 3 lit. (a) ESM Guideline on Loans.

dressed to the ESM Member concerned”.<sup>69</sup> However, no additional specific requirements are set to the Troika, excluding, for example, some policy fields from conditionality. Some general references to “minimising harmful social impacts” of consolidation measures, such as those contained in the Portuguese Implementing Decision,<sup>70</sup> are too general to function as substantial constraints of Troika’s discretion.

Taking into account those procedural and substantive criticisms, full-fledged conditionality through the preparation of a macroeconomic adjustment programme was considered to be too intrusive for Members facing serious financial difficulties, but *not* receiving any financial assistance at all. For this category of Member States a milder mechanism of surveillance appeared to be necessary, which would be less intrusive than programme-based supervision, but tighter than normal fiscal surveillance in the context of the European Semester. This intermediate form of surveillance could also be used for post-programme countries, namely Member States that have graduated from a macroeconomic adjustment programme, but have not yet fully repaid the assistance they have received.

Moreover, the rules on conditionality have been outside the EU legal framework. Apart from the single reference to “strict conditionality” in Article 136 para. 3 TFEU, all other norms on conditional lending are contained in the ESM Treaty and the respective ESM Guidelines, namely public international law and soft law.

Thus, purpose of Regulation 472/2003/EU is, firstly, to set an EU framework for drafting conditions for countries receiving financial assistance; secondly, to establish a new, less intrusive surveillance mechanism for Member States that do not receive assistance or are in a post-programme phase; and thirdly, to respond to some of the general criticisms on conditionality by inserting some elements of transparency, parliamentary accountability, and protection of social rights. Whether Regulation 472/2013/EU succeeds in meeting those aims will be discussed in the third part of this article. Before that, I will turn to the scope and content of the forms of conditionality surveillance governed by Regulation 472/2013/EU.

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<sup>69</sup> Art. 13 para. 3 ESM Treaty.

<sup>70</sup> Art. 3 para. 9, Decision 2011/344/EU: Council Implementing Decision of 30.5. 2011 on granting Union financial assistance to Portugal. (“Within the framework of the assistance to be provided to Portugal, together with the IMF and in liaison with the ECB, it shall periodically review the effectiveness and economic and social impact of the agreed measures, and shall recommend necessary corrections with a view to enhancing growth and job creation, securing the necessary fiscal consolidation and minimising harmful social impacts, particularly regarding the most vulnerable members of Portuguese society.”).

### III. Conditionality after Two Pack

Regulation 472/2013/EU governs three types of economic surveillance: enhanced surveillance, programme-based surveillance, and post-programme surveillance.<sup>71</sup> The differences in the intrusiveness of these types of surveillance reflect differences in conditionality, which might range from a full-fledged macroeconomic adjustment programme to continuous respect of pre-established eligibility conditions. As a general principle, the intensity of surveillance is proportionate to the seriousness of the financial difficulties of the Member State concerned and the nature of the financial assistance it receives.<sup>72</sup> Enhanced surveillance is the least intrusive form of surveillance whereas programme-based surveillance is the most demanding, requiring the preparation of a full-fledged macroeconomic adjustment programme. Post-programme surveillance largely coincides in its content and intrusiveness with enhanced surveillance.

#### 1. Programme-Based Surveillance

##### a) Scope and Procedure

Member States that accept financial assistance from any official (i. e. non-market) source are required to “prepare, in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF” a draft Macroeconomic Adjustment Programme (MAP).<sup>73</sup> This programme contains the conditionality attached to financial assistance. Disbursement of the successive tranches of assistance is contingent upon fulfilment of those conditions, as verified by regular reviews by lenders’ representatives. The obligation to draft and abide by a MAP covers any form of official financial assistance, irrespective if it comes from one or several other Member States or third countries, the EFSM, the EFSE, the ESM, or the IMF.<sup>74</sup> The only exception to this rule is precautionary assistance. In that case, the rules on enhanced surveillance discussed below apply.

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<sup>71</sup> Regulation 472/2013/EU does not explicitly refer to “programme-based surveillance”. With this term, is here described surveillance that is based on a macroeconomic adjustment programme, as defined in Art. 3 Regulation 472/2013/EU.

<sup>72</sup> See Recital 5 of the Preamble to Regulation 472/2013/EU.

<sup>73</sup> Art. 7 para. 1 subpara. 1 Regulation 472/2013/EU.

<sup>74</sup> Art. 7 para. 1 subpara. 1 Regulation 472/2013/EU.

In an important innovation, Regulation 472/2013/EU requires the involvement of the European Parliament and the civil society already during the drafting process. In the phase of preparation of a MAP, the Commission has to inform orally the Chair and Vice-Chairs of the competent Committee of the European Parliament,<sup>75</sup> while the Member States concerned have to seek the views of social partners as well as relevant civil society organizations.<sup>76</sup> Finally, the MAP shall be made public, including its objectives and “the expected distribution of the adjustment effort”.<sup>77</sup>

## b) Content and Form

Macroeconomic adjustment programmes are a rather recent instrument of EU economic governance. They are officially described as “extensive programme[s] of policy reforms aimed at addressing problems in an ESM Member’s general economic and fiscal situation”.<sup>78</sup> A typical MAP would contain an analysis of macroeconomic and financial developments, and more importantly, the economic and financial conditions for awarding financial assistance. These conditions span an enormous range of policy fields from privatization to pensions to tax law. Its typical length is two years.

Macroeconomic adjustment programmes have evolved to a key form of post-2010 EU economic governance and their introduction to the EU instrumentarium deserves particular attention for a number of reasons. Macroeconomic adjustment programmes are *broad* in scope; go *very deep in regulating details* of social and economic policies; they are supported by an *elaborate monitoring mechanism*; and their non-observance is tied with *high costs*.

The exact *scope* of every MAP depends on the specific circumstances and weaknesses of the recipient country. Considering the experience with Greece, Portugal, Ireland, and Cyprus, a MAP may cover fields ranging from that country’s financial system and labour market, to the judiciary.

Regulation 472/2013/EU contains only some broad orientation points as to its content. According to Article 7 para. 1 subpara. 2, the MAP shall address the specific risks for the financial stability of the euro-area and shall aim at rapidly re-establishing a sound and sustainable economic and finan-

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<sup>75</sup> Art. 7 para. 1 subpara. 5 Regulation 472/2013/EU. According to the same provision “That information shall be treated as confidential.”

<sup>76</sup> Art. 8 Regulation 472/2013/EU.

<sup>77</sup> Art. 7 para. 8 Regulation 472/2013/EU.

<sup>78</sup> <<http://www.esm.europa.eu>>.

cial situation. Ultimate aim of the MAP should be to restore the recipient Member State's capacity to finance itself fully on the markets.<sup>79</sup> According to Regulation 472/1013/EU thus, adjustment measures have to be oriented in regaining trust of international private lenders. Additionally, a MAP has to be based on a Commission's assessment of the sustainability of the government debt and give "due account" of any potential recommendations addressed to the Member State concerned under Articles 121, 126, 136, or 148 TEU. The MAP should not, however, simply replicate such recommendations but aim at "broadening, strengthening, and deepening the required policy measures".<sup>80</sup>

For example, structural measures with budgetary relevance, usually one of the most far-reaching parts of a MAP, may include conditions on the reform of tax policy,<sup>81</sup> the structure of public administration,<sup>82</sup> the system of public healthcare<sup>83</sup> as well as specific benchmarks regarding the privatisation of certain public assets.<sup>84</sup> With regard to the financial sector, conditions may require the amendment of legislation concerning credit institutions. In the labour market, MAP-conditionality might make assistance contingent upon the adoption of reforms in the system for defining the minimum wage and the reduction of non-wage labour costs.<sup>85</sup> Under the general heading "favourable conditions for economic activity", changes in the business environment and judicial system are usually set, such as the reform of the Greek code of civil procedure and the promotion of e-justice.<sup>86</sup> Finally, conditionality in the field of network industries might cover the energy sector, but also transportation.<sup>87</sup>

In sum, considering the early experience with MAP conditionality, it can be said that such programmes may cover the complete spectrum of econom-

<sup>79</sup> Art. 7 para. 1 subpara. 2 Regulation 472/2013/EU.

<sup>80</sup> Art. 7 para. 1 subpara. 3 Regulation 472/2013/EU.

<sup>81</sup> See Memorandum of Understanding on Specific Economic Policy Conditionality, The Second Economic Adjustment Programme for Greece, March 2012, Occasional Papers 94, 127.

<sup>82</sup> See Memorandum of Understanding ... Greece (note 81), 130 et seq.; Memorandum of Understanding on Specific Economic Policy Conditionality, The Economic Adjustment Programme for Portugal, June 2011, Occasional Papers 79, 59 et seq.

<sup>83</sup> See Memorandum of Understanding ... Greece (note 81), 134 et seq.; Memorandum of Understanding ... Portugal (note 82), 60.

<sup>84</sup> Memorandum of Understanding ... Greece (note 81), 126 et seq.; See Memorandum of Understanding ... Portugal (note 82), 69 et seq.

<sup>85</sup> See Memorandum of Understanding ... Greece (note 81), 147 et seq.; Memorandum of Understanding ... Portugal (note 82), 80 et seq.

<sup>86</sup> See Memorandum of Understanding ... Greece (note 81), 162 et seq.

<sup>87</sup> See Memorandum of Understanding ... Greece (note 81), 155 et seq.; Memorandum of Understanding ... Portugal (note 82), 111 et seq.

ic and social relations of the recipient Member States, including some of the most divisive areas of public policy, such as labour law and public healthcare.

MAPs, however, are not only broad in scope, but also go *deep in regulating details* of economic and social activity in the countries concerned. How much discretion will be left to the recipient Member State when implementing the conditions set out in a MAP depends, again, on the case at issue. Countries with a poor record in sufficiently implementing previous conditions might have to subscribe to more detailed versions in the future. This has been, for example, the case with the Greek adjustment programme, which gradually evolved to regulating in minute detail many fields of public policy. For example, the Second MAP for Greece goes as far as to define upper limits to the prescription of non-generic medicine by Greek physicians.<sup>88</sup>

Although Article 7 para. 1 Regulation 472/2013/EU establishes as a rule that any form of non-precautionary assistance should be coupled by a macroeconomic adjustment programme, the ESM Treaty follows a more differentiated approach. According to Article 12 ESM Treaty, the intensity of conditionality and surveillance depends on the specific financial assistance instrument chosen.<sup>89</sup> Whereas assistance in the form of a loan is always supplemented with a macroeconomic adjustment programme,<sup>90</sup> in other forms of assistance, conditionality is milder. For example, in financial assistance for the re-capitalization of financial institutions, conditionality focuses only on the financial sector of the recipient country, covering issues such as financial supervision and corporate governance.<sup>91</sup> Assistance offered to Spain thus had the form of a Financial Sector Adjustment Programme (rather than an Economic Adjustment Programme) and was contained in a Memorandum

<sup>88</sup> According to condition 2.9.2.4. of the Second MAP for Greece, aimed at promoting the use of cheaper generic medicine by the overspending Greek health system, the share of non-generic prescriptions can be no more than 15 % of the overall prescriptions of each doctor while each doctor needs to provide the relevant justification in each case, Memorandum of Understanding on Specific Economic Policy Conditionality, The Second Adjustment Programme for Greece, First review, December 2012, Occasional Papers 123, 93.

<sup>89</sup> Art. 12 para. 1 ESM Treaty.

<sup>90</sup> Art. 16 para. 2 ESM Treaty; Art. 3 para. 3 lit (a) Guideline on Loans.

<sup>91</sup> Conditionality attached to the two other ESM support facilities, the primary market support facility and the secondary market support facility, does not take the form of a macroeconomic adjustment programme. For countries already under a macroeconomic adjustment programme or precautionary programme, the conditionality of that programme applies. For ESM Members outside of a macroeconomic adjustment programme, a separate MoU detailing the policy conditions would be negotiated. See Arts. 17 and 18 ESM Treaty; Arts. 3 para. 1 lit (b) and 4 para. 3 lit. (a) Guideline on the Secondary Market Support Facility; Art. 1 Guideline on the Primary Market Support Facility.

dum of Understanding of Financial-Sector Policy Conditionality (rather than a Memorandum of Understanding on Specific Economic Policy Conditionality or a Memorandum of Economic and Financial Policies).<sup>92</sup> Considering that Regulation 472/2013/EU is an act adopted by an EU institution, its provisions take precedence over those of a plurilateral agreement such as the ESM Treaty.<sup>93</sup>

Regulation 472/2013/EU requires that future programmes respect some basic social standards. Macroeconomic adjustment programmes should thus take into account the practices and institutions of wage formations and the national reform programme of the Member State in the context of the Union's strategy for growth and jobs,<sup>94</sup> as well as fully observe Article 152 TFEU and Article 28 of the Charter of Fundamental Rights.<sup>95</sup> Those provisions, together with the special reference to the right to negotiate, conclude, and enforce collective agreements and to take collective action,<sup>96</sup> reflect the scepticism in some quarters that recent MAPs have undermined such rights.<sup>97</sup> Article 7 para. 7 subpara. 2, inserted in Regulation 472/2013/EU at the initiative of the parliament, requires that any MAP should take into account "the need to ensure sufficient means for fundamental policies, such as education and health care".

Finally, Regulation 472/2013/EU provides explicitly that a MAP may also include provisions for technical assistance when Members experience "insufficient administrative capacity or significant problems in the implementation of the programme".<sup>98</sup> These Members shall seek technical assistance from the Commission, which may constitute groups of experts composed of members from other Member States and other Union institutions or from relevant international institutions. Such assistance may include the establishment of a resident representative and supporting staff to advise au-

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<sup>92</sup> See <<http://ec.europa.eu>>.

<sup>93</sup> See *J. Bast/J. Heesen*, European Community, Supplementary Agreements between Member States, in: R. Wolfrum, MPEPIL, online edition, para. 7.

<sup>94</sup> Art. 6 para. 1 subpara. 4 Regulation 412/2013/EU.

<sup>95</sup> Arts. 1 (4) and 7 (1) subpara. 5 Regulation 412/2013/EU.

<sup>96</sup> Art. 1 para. 4 Regulation 412/2013/EU.

<sup>97</sup> See *A. Fischer-Lescano*, Austeritätspolitik und Menschenrechte: Rechtspflichten der Unionsorgane beim Abschluss von Memoranda of Understanding, Rechtsgutachten im Auftrag der Kammer für Arbeiter/innen und Angestellte für Wien, available at <<http://media.arbeiterkammer.at>>, 22 et seq.

<sup>98</sup> Art. 7 para. 11 Regulation 472/2013/EU. According to the same provision, "the objectives and the means of the technical assistance shall be explicitly outlined in the updated versions of the macroeconomic adjustment programme and focus on the area where major needs are identified".

thorities on the implementation of the programme.<sup>99</sup> Specific reference is made to effectiveness of revenue collection capacity and the fight against tax fraud. Member States experiencing such problems shall take measures in close cooperation with the Commission and in liaison with the ECB and, where appropriate, with the IMF.<sup>100</sup> These provisions codify the experience with the so-called Task Force for Greece, a subdivision of the Commission that was established in the context of the Greek adjustment programme.<sup>101</sup>

### c) Monitoring

The Commission, in liaison with the ECB and, where appropriate, with the IMF ensures the monitoring of the implementation of the programme.<sup>102</sup> This review stage is very important, because the programme documents are not static, but living documents and are modified at every quarterly review mission.

Any change to be made to the programme shall be decided by the Council.<sup>103</sup> During the implementation phase, the Troika shall inform the Economic and Financial Committee (EFC) every three months.<sup>104</sup> Regarding parliamentary control, the competent committee of the European Parliament may offer the opportunity to the Member State concerned and the Commission to participate in an exchange of views on the progress made in the implementation of the MAP.<sup>105</sup> Representatives of the Commission may be invited by the respective domestic parliament to participate in an exchange of views.<sup>106</sup>

Where the monitoring highlights significant deviations from a Member State’s macroeconomic adjustment programme, the Council, acting by a qualified majority on a proposal from the Commission, may decide that the

<sup>99</sup> Art. 7 para. 11 Regulation 472/2013/EU.

<sup>100</sup> Art. 9 Regulation 472/2013/EU.

<sup>101</sup> See <<http://ec.europa.eu>>.

<sup>102</sup> As the macroeconomic adjustment programme normally encompasses all relevant policy advice given in the context of the Stability and Growth Pact (SGP), the Macroeconomic Imbalances Procedure (MIP) and the EU Semester (see Art. 7.1), the new legislation avoids duplication of reporting obligations and overburdening by suspending the reporting and monitoring on the implementation of the SGP, the application of the MIP, the monitoring under the European Semester and Regulation 473/2013/EU – the other regulation of the Two Pack on fiscal issues.

<sup>103</sup> Art. 7 para. 5 Regulation 472/2013/EU.

<sup>104</sup> Art. 7 para. 4 Regulation 472/2013/EU.

<sup>105</sup> Art. 7 para. 10 Regulation 472/2013/EU.

<sup>106</sup> Art. 7 para. 11 Regulation 472/2013/EU.

Member State concerned does not comply with the policy requirements contained in its programme.<sup>107</sup> Although Regulation 472/2013/EU does not explicitly provide that such a decision would interrupt the disbursements of the financial assistance, non-compliance would result in the non-disbursement of subsequent tranches.<sup>108</sup>

## 2. Enhanced Surveillance

### a) Scope and Procedure

Enhanced surveillance applies in two cases. Firstly, when Member States are in serious financial difficulties, but do not receive any form of assistance, and, secondly, when Member States receive support in the form of precautionary assistance.<sup>109</sup>

For Member States that do not receive assistance, surveillance is at the discretion of the Commission, provided two conditions are fulfilled. A Member State has to experience or be threatened with serious difficulties with respect to its financial stability or to the sustainability of its public finances, and these difficulties should lead to potential adverse spill-over effects on other eurozone Members.<sup>110</sup> Article 2 para. 1 Regulation 472/2013/EU sets out the rules to the exercise of the Commission's discretion.<sup>111</sup>

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<sup>107</sup> Art. 7 para. 7 Regulation 472/2013/EU. The Commission, in its proposal, shall assess explicitly whether such significant deviations are due to reasons that are not within the control of the Member State concerned.

<sup>108</sup> See Art. 15 (5) ESM Treaty.

<sup>109</sup> For the first category, the only applicable rules are those contained in Regulation 472/2013/EU. For countries that receive precautionary assistance, however, one has to distinguish according to the source of that assistance. When precautionary assistance is provided by the ESM, relevant is also the Guideline on Precautionary Financial Assistance, annexed to the ESM Treaty. When precautionary assistance is offered by a source other than the ESM, such as one or several other Member States or an international financial institution, the recipient Member is subject to surveillance only in the terms of Regulation 472/2013/EU. In practice, however, this differentiation does not substantially change the content of enhanced surveillance, as the provisions of the ESM Guideline on Precautionary Financial Assistance are largely identical with those of Regulation 472/2013/EU. Compare Art. 3 para. 3 (applicable to states in serious financial difficulties) to Art. 3 para. 4 (applicable to states receiving precautionary financial assistance).

<sup>110</sup> Art. 1 para. 1 lit. (a) Regulation 472/2013/EU.

<sup>111</sup> Subpara. 2 contains an indicative list of the parameters that the Commission has to take into account when assessing whether the difficulties that a Member State faces are serious enough to justify enhanced surveillance. And subpara. 3 requires the Commission to hear the Member State concerned before deciding. Even if this preliminary investigation satisfies the

The second category of states eligible for enhanced surveillance is that of Member States whose “economic conditions are still sound to maintain continuous access to market financing”<sup>112</sup> and only receive precautionary financial assistance.<sup>113</sup> EU surveillance of these Members is compulsory, with the sole exception of precautionary assistance in the form of unconditional credit lines that have not yet been drawn.<sup>114</sup>

## b) Content and Form

The primary obligation of Member States under enhanced surveillance is to adopt “measures aimed at addressing the sources or potential sources of their financial difficulties”.<sup>115</sup> Which specific measures are needed in each case, has to be decided by the Member State concerned “after consulting, and in cooperation with” the Commission, acting in liaison with the ECB, the ESAs, the European Systemic Risk Board (ESRB) and, where appropriate, the IMF.<sup>116</sup> In the case of Members receiving ESM precautionary assistance, the nature of conditions imposed depends on the form of precautionary assistance. When precautionary assistance has the form of the Precau-

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Commission that the financial difficulties the investigated Member faces are indeed serious, it still may decide to subject the Member State concerned under enhanced surveillance.

<sup>112</sup> Art. 1 ESM Treaty, Annex 1, Guideline on Precautionary Financial Assistance. At the time, there are two forms of such assistance foreseen under the EFSF/ESM mechanisms: of a credit line under an Enhanced Conditions Credit Line (ECCL) or a Precautionary Conditioned Credit Line (PCCL), see ESM Treaty, Annex 1, Guideline on Precautionary Financial Assistance.

<sup>113</sup> Art. 2 para. 3.

<sup>114</sup> Art. 2 paras. 3 and 4 Regulation 472/2013/EU; Art. 5 para. 1 Guidelines. The ESM provides for two precautionary assistance facilities, the PCCL and the ECCL. Of those, only ECCL requires the adoption of “corrective measures” and thus triggers enhanced surveillance already when granted. Precautionary assistance in the form of a PCCL subjects the beneficiary Member State to surveillance only when the credit line is drawn. For the differences in the eligibility criteria of these two forms of precautionary assistance, see Art. 2 Guideline on Precautionary Financial Assistance. In general, access to a PCCL is limited to ESM Members whose economic and financial situation is fundamentally sound and which fulfil the eligibility criteria defined in Art. 2 para. 2 Guideline on Precautionary Financial Assistance. Access to an ECCL is open to Member States which do not comply with some of the eligibility criteria required for accessing a PCCL but whose general economic and financial situation remains sound.

<sup>115</sup> Art. 3 para. 1 Regulation 472/2013/EU; Art. 5 para. 1 Guideline on Precautionary Financial Assistance.

<sup>116</sup> Art. 3 para. 1 Regulation 472/2013/EU; Art. 5 para. 1 Guideline on Precautionary Financial Assistance. In any case, these measures need to take into account any potential recommendation adopted under Regulation 1466/1997, Regulation 1467/1997, and Regulation 1176/2011, Art. 3 para. 1 Regulation 472/2013/EU.

ZaöRV 74 (2014)

tionary Conditioned Credit Line (PCCL), the Memorandum of Understanding includes as conditions only the continuing respect of the eligibility requirements (*ex-ante* conditionality).<sup>117</sup> In the case of an Enhanced Conditions Credit Line (ECCL), the Memorandum combines elements of both *ex-ante* and *ex-post* conditionality. It does not only require the continuous respect of eligibility criteria, but also compliance with detailed corrective measures, aiming at addressing economic weaknesses and avoiding future financing problems.<sup>118</sup>

Beyond the general requirement to adopt measures addressing the source of their difficulties, Members under enhanced surveillance are also required to meet certain specific information and supervision obligations with regard to their financial, fiscal, and other macroeconomic policies.

Regarding their financial sectors, Member States under enhanced surveillance have three obligations. They need to communicate to the ECB and the ESAs disaggregated information on developments in their financial system;<sup>119</sup> to assess the resilience of their financial sector by carrying out stress tests under the supervision of the ECB or the appropriate ESAs;<sup>120</sup> and to submit their general supervisory capacities over their financial sector to regular assessments by the ECB or the appropriate ESAs.<sup>121</sup>

In the field of fiscal policies, Article 3 para. 2 Regulation 472/2013/EU extends some of the obligations of Member States in excessive deficit procedures to Member States under enhanced surveillance, irrespective of the existence of an excessive deficit in them. These obligations are, again, three: carrying out a comprehensive assessment of the in-year budgetary execu-

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<sup>117</sup> European Commission, The Two-Pack on Economic Governance: Establishing and EU Framework for Dealing with Treats to Financial Stability in Euro-area Member States, Occasional Paper No. 147, May 2013, 12. Countries that fulfil the rigorous criteria to be eligible for PCCL assistance are deemed to be in a financially sound position and a full-fledged economic programme with detailed conditionality is not deemed necessary.

<sup>118</sup> European Commission, The Two-Pack ... (note 117), 12.

<sup>119</sup> Art. 3 para. 3 lit. a; Art. 3 para. 4 lit. a; Art. 5 para. 2 lit. (b) Guideline on Precautionary Financial Assistance. Art. 3 para. 4 lit. (a) Regulation 472/2013/EU requires Members receiving precautionary assistance to communicate the disaggregated information on the developments in their financial systems not only to the ECB and the relevant ESAs, but also to the Commission.

<sup>120</sup> Art. 3 para. 3 lit. b; Art. 3 para. 4 lit. b; Art. 5 para. 2 lit. (c) Guideline on Precautionary Financial Assistance (the only difference is that the Guidelines do not refer to the ECB). Art. 3 para. 4 lit. (b) additionally requires countries receiving financial assistance to share the detailed results of the stress tests they carry out with the ECB, the relevant ESAs, and the ESRB.

<sup>121</sup> Art. 3 para. 3 lit. c; Art. 3 para. 4 lit. (c) Regulation 472/2013/EU; Art. 5 para. 2 lit. (d) Guideline on Precautionary Financial Assistance (the only difference is that the Guidelines do not refer to the ECB).

tion for the general government and its subsections;<sup>122</sup> reporting basic budgetary figures to the Commission and the EFC on a quarterly basis;<sup>123</sup> and reporting, upon request, a comprehensive independent audit of the public accounts of all subsectors of the general government as well as providing additional information for the purposes of the monitoring progress.<sup>124</sup> Finally, with reference to macroeconomic issues, Member States under enhanced surveillance have to communicate to the Commission any information needed for the monitoring of macroeconomic imbalances in accordance with Regulation 1176/2011/EU.<sup>125</sup>

As to the form of these measures, countries of the first category, which do not receive any form of assistance, are expected to specify them in some kind of Letter of Intent directed by the Member State to the respective EU institutions and the IMF, if the latter is involved.<sup>126</sup> The form of Letter of Intent draws directly from IMF conditionality practice, as described above. In the case of Members receiving ESM precautionary assistance, conditionality will be spelled out in a MoU, negotiated by the recipient Member State and the Commission in liaison with the ECB and, wherever possible, also with the IMF.<sup>127</sup> As noted above, according to the ESM Treaty, the Memoranda setting out the respective conditions shall be signed by the Commission on behalf of the ESM and approved by the ESM Board of Directors.<sup>128</sup>

### c) Monitoring

Fulfilment of these obligations is reviewed in regular missions by the Commission in liaison with the ECB, the relevant ESAs, and, where appropriate with the IMF.<sup>129</sup> Quarterly, the Commission has to communicate the findings of this report, together with the assessment on whether further measures are needed, to the competent committee of the European Parlia-

<sup>122</sup> Art. 10 para. 2 Regulation 473/2013/EU.

<sup>123</sup> Art. 10 para. 3 Regulation 473/2013/EU and Art. 3 para. 2 Regulation 472/2013/EU.

<sup>124</sup> Art. 10 para. 6 Regulation 473/2013/EU; Art. 5 para. 2 lit. (e) and (f). Guideline on Precautionary Financial Assistance. See also Art. 5 para. 2 lit. (a) Guideline on Precautionary Financial Assistance (containing a general obligation of the Member State under enhanced surveillance to provide the ESM with “all necessary information required for the execution of its lending activity and related risk management”).

<sup>125</sup> Art. 3 para. 3. lit. (d); Art. 3 para. 4. lit. (d) Regulation 472/2013/EU.

<sup>126</sup> European Commission, *The Two-Pack ...* (note 117), 10.

<sup>127</sup> Art. 3 para. 4 Guideline on Precautionary Financial Assistance.

<sup>128</sup> Art. 3 para. 5 Guideline on Precautionary Financial Assistance.

<sup>129</sup> Art. 3 para. 5 Regulation 472/2013/EU; Art. 5 para. 3 Guideline on Precautionary Financial Assistance.

ment and to the EFC.<sup>130</sup> In case of ESM precautionary financial assistance, the outcome has also to be communicated to the ESM Board of Directors.<sup>131</sup>

If these regular reviews show that further measures are needed and the situation has adverse effects on the financial stability of the eurozone or of its Member States, the Council, acting on the proposal of the Commission, has two options. It can either recommend to the Member State concerned to adopt precautionary corrective measures or to step up the level of surveillance by proposing the adoption of a full-fledged macroeconomic adjustment programme (MAP).<sup>132</sup> The Council may decide to make this recommendation public.<sup>133</sup> In that case, the European and domestic parliament have the right to request an exchange of views on that decision.<sup>134</sup>

#### d) Conditionality in Enhanced Surveillance

Although enhanced surveillance does not require the drafting of a full macroeconomic adjustment programme, it is based on the typical elements of conditionality. Firstly, policy requirements are defined in a negotiating process between the Member State in financial distress and an *ad hoc* body representing international lenders (or potential lenders). Countries under enhanced surveillance have to adopt “measures aimed at addressing the sources or potential sources of difficulties” after consulting an “extended Troika”, comprised by the Commission, the ECB, the ESAs, the ESRB, and potentially also the IMF. When it comes to the ESM precautionary assistance facilities, PCCL and ECCL, a Memorandum of Understanding needs to be additionally prepared. In the case of a PCCL, this Memorandum contains only limited *ex-ante* conditionality, while in the case of an ECCL more detailed *ex-post* conditions are added. Although less demanding than

<sup>130</sup> During the whole process the EP and the parliament of the Member State concerned may invite representatives of the IMF, the ECB and the Commission to participate in an economic dialogue.

<sup>131</sup> Art. 5 para. 3 Guideline on Precautionary Financial Assistance.

<sup>132</sup> In case of ESM precautionary assistance, deviation from policy commitments or their inadequacy to resolve the threat of financial disturbance may lead to a decision of the Board of Governors to close the respective credit line. The beneficiary ESM Member would then be expected to request a regular stability support, with a full macroeconomic adjustment programme, Art. 7 para. 2 Guideline on Precautionary Financial Assistance.

<sup>133</sup> Art. 3 para. 7 subpara. 2 Regulation 472/2013/EU.

<sup>134</sup> Art. 3 paras. 7 and 8 lit. (a) and (b) Regulation 472/2013/EU. In that case, the Council has also to inform the relevant committee of the European Parliament in due time about the content of the recommendation (Art. 3 para. 8 lit (c) Regulation 472/2013/EU).

adjustment-programme conditionality, thus, enhanced surveillance is based on *ex-ante* and *ex-post* requirements developed in the same way as “traditional” economic conditionality.

Secondly, compliance with those requirements is assessed in regular review missions undertaken by a supervisory body comprised by the Commission, the ECB, the relevant ESAs, and, where appropriate, the IMF. Again here, this “extended Troika” enjoys broad discretion in measuring compliance with the measures “suggested” as necessary for addressing serious financial difficulties or for accessing precautionary assistance.

Thirdly, the extended Troika enjoys significant bargaining power, both during the phase of designing the measures and requirements for addressing potential macroeconomic problems and when it comes to assessing compliance with them. Although the measures required by Regulation 472/2013/EU and the Guideline on Precautionary Financial Assistance are formally taken by the Member States, they are in effect determined in a negotiating process in which power asymmetries favour the Commission and the IMF. Of course, considering that in all cases covered by enhanced surveillance Member States continue to enjoy access to market funding, the conditions are not drafted and monitored under the spectre of default, like in the case of MAP-conditionality. Countries that face serious difficulties, but do not receive assistance, are not under the spectre of interruption of official funding. However, the Troika does enjoy a privileged power position *vis-à-vis* the Member State concerned. In particular, there are two threats that give force to Troika’s directives. Firstly, for countries receiving precautionary assistance, a negative assessment can interrupt access to precautionary assistance, and secondly, it might ultimately lead to the more intrusive form of MAP-conditionality.<sup>135</sup> But also for the category of Member States that do not receive assistance, non-observance might lead, according to Article 3 para. 7 Regulation 472/2013/EU, to additional corrective measures or more intrusive MAP-conditionality.

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<sup>135</sup> See Art. 7 para. 2 Guideline on Precautionary Financial Assistance; Art. 3 para. 7 Regulation 472/2013/EU. Earlier Programmes are referred to as Economic Adjustment Programmes.

### 3. Post-Programme Surveillance

#### a) Scope and Procedure

The third form of surveillance contained in Regulation 472/2013/EU refers to countries that do not receive financial assistance anymore, but have received such assistance in the past and have not yet repaid a minimum of 75 % of it. Like in the case of programme-based surveillance, all sources of official funding are here covered, namely assistance from one or several other Member States, the EFSM, the ESM, and the EFSF.<sup>136</sup> The duration of post-programme surveillance may be extended when the Council, at the proposal of the Commission, establishes a persistent risk to the financial stability or fiscal sustainability of the Member State concerned.<sup>137</sup>

#### b) Content

Member States under post-programme surveillance are essentially at the same status as those under enhanced surveillance. They are thus required to comply with the requirements under Article 3 para. 3 Regulation 472/2013/EU as well as to provide the Commission with the information referred to in Article 10 para. 3 Regulation 473/2013/EU.<sup>138</sup> The Council, acting on the proposal from the Commission, may also recommend a Member under post-programme surveillance to adopt corrective measures.<sup>139</sup> The Commission's proposal is deemed to be adopted by the Council unless the latter decides to reject it by a qualified majority within ten days.<sup>140</sup>

#### c) Monitoring

Monitoring of compliance with the obligations entailed in post-programme surveillance is assessed by regular review missions conducted by the Commission and the ECB.<sup>141</sup> Unlike enhanced or programme-based surveillance, no involvement of the IMF is provided for. During post-

<sup>136</sup> Art. 14 para. 1 Regulation 472/2013/EU. Although here there is no mention of assistance from third countries, like in Art. 7 para. 1 Regulation 472/2013/EU.

<sup>137</sup> Art. 14 para. 1 Regulation 472/2013/EU.

<sup>138</sup> Art. 14 para. 2 Regulation 472/2013/EU.

<sup>139</sup> Art. 14 para. 4 Regulation 472/2013/EU.

<sup>140</sup> Art. 14 para. 4 Regulation 472/2013/EU.

<sup>141</sup> Art. 14 para. 3 subpara. 1 Regulation 472/2013/EU.

programme surveillance, assessments shall be communicated to the competent committee of the European Parliament, to the EFC, and the domestic parliament concerned.<sup>142</sup> The European Parliament may offer the Member State concerned the opportunity to present its views while the domestic parliament may extend a similar invitation to the Commission.<sup>143</sup>

#### IV. The New Obscurity: Power Reallocation and the Diffusion of Responsibility

EU assistance conditions raise a number of questions regarding their compliance with primary EU law, such as the Charter of Fundamental Rights and Freedoms.<sup>144</sup> Such an assessment requires, however, a case-by-case study, something that is outside the scope of this article, which is concerned with the general EU framework of conditionality.

In this broader context, the most important question concerns the legal basis of Regulation 472/2013/EU. Regulation 472/2013/EU has been adopted with reference to Article 136 TFEU in combination with Article 121 para. 6 TFEU. There are significant doubts, however, whether those two provisions offer adequate support to an extensive macroeconomic regulation as exercised through economic conditionality.<sup>145</sup> Article 121 para. 6 TFEU empowers the European Parliament and the Council to adopt detailed rules for the multilateral surveillance procedure referred to in paras. 3 and 4 of the same article. These paragraphs, however, refer to procedures culminating to the adoption of measures that are firstly, non-binding, and secondly, restricted to ensuring the consistency of domestic economic policies with “broad guidelines” adopted by the Council.<sup>146</sup> Irrespective of the discussion on the binding character of the Memoranda of Understanding, Regulation 472/2013/EU provides that conditions to financial assistance also take the form of Council decisions. Moreover, the conditionality as currently prac-

<sup>142</sup> Art. 14 para. 3 subpara. 1 Regulation 472/2013/EU.

<sup>143</sup> Art. 14 paras. 3 and 5 Regulation 472/2013/EU.

<sup>144</sup> See A. Fischer-Lescano (note 97).

<sup>145</sup> On the limits of these provisions to support binding and extensive EU economic measures, see J. Bast/F. Rödl, *Jenseits der Koordinierung? Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung*, EuGRZ 39 (2012), 269, 270 et seq.; A. Fischer-Lescano/S. Kommer, *Verstärkte Zusammenarbeit der EU – Ein Modell für Kooperationsfortschritte in der Wirtschafts- und Sozialpolitik?*, Friedrich-Ebert-Stiftung, 2011, 15; C. Ohler, *Die zweite Reform des Stabilitäts- und Wachstumspaktes*, Zeitschrift für Gesetzgebung 25 (2010), 338; C. Antpöhler (note 8), 369 et seq.

<sup>146</sup> J. Bast/F. Rödl (note 145), 271.

ticed goes far beyond “broad guidelines”. As discussed above, it contains detailed rules on a variety of policy fields, such as social and health policy.

Article 136 para. 1 TFEU, which governs the coordination of the economic policies of euro-area Members in particular, also refers to “guidelines”. Moreover, according to the most convincing interpretation, Article 136 TFEU does not extend the competences of the EU beyond those provided for in Article 121 TFEU. It simply allows for measures directed to euro-area Members to be adopted by euro-area Members. The grammatical, historical, and teleological interpretation of paras. 1 and 2 of Article 136 TFEU seem to preclude binding macroeconomic measures being adopted by the EU also for euro-area Members.<sup>147</sup> The only possible candidate as legal basis is thus the new para. 3 of Article 136, which requires that any financial assistance under the ESM shall be made subject to strict conditionality. Whether the reference to “strict conditionality” provides an adequate basis is again doubtful. For one, it can be contested whether these two words are sufficient to transfer to the EU competences in the full spectrum of economic and public policy, including the fields of education, healthcare, and social policy.

Beyond the question of the legal basis, the most upsetting problem with EU financial assistance conditionality, as emerged during the crisis and essentially reaffirmed with Regulation 472/2013/EU, is that it leads to a significant reallocation of power to new actors that are not embedded in the ordinary EU constitutional system. Most importantly, this reallocation is profoundly obscure. For policies implemented through the mechanisms of conditionality, it is often very difficult to say whether they are imposed by lenders’ representatives, whether they reflect government choices, or are the result of compromise. This obscurity frustrates one of the basic purposes of public law, namely to allow the proper allocation of responsibilities for public decisions, and has profound implications on democratic accountability.

Democratic accountability of any form of EU governance is, however, a general postulate of EU constitutional law. Article 2 TEU raises democracy to a value of the EU and Article 10 TEU sets out the two sources of democratic legitimacy in the Union, namely European citizenry, as expressed

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<sup>147</sup> J. Bast/F. Rödl (note 145), 271 et seq. See also U. Häde, Art. 136 AEUV – Eine neue Generalklausel für die Wirtschafts- und Währungsunion?, JZ 66 (2011), 333 et seq.; A. Weber, Europa- und völkerrechtliche Elemente der Gewährleistung von Haushaltsdisziplin in der Währungsunion, EuR 2013, 375, 378 et seq.

through the European Parliament, and domestic democratic polities.<sup>148</sup> EU law raises thus radically different legitimacy expectations than an international organization, such as e. g. the IMF; simply replicating the IMF governance structures is not sufficient for EU conditionality.<sup>149</sup>

The remainder of this article discusses three issues with regard to this central issue of EU economic conditionality. Firstly, it revisits the basic question of who actually “owns” economic conditionality, lenders or domestic authorities. Secondly, it discusses the shortcomings of the EU framework on conditionality in terms of transparency. Thirdly, it assesses the parliamentary control over European conditional lending, as introduced by Regulation 472/2013/EU.

## 1. Conditionality: Between Ownership and Coercion

### a) Ownership as a Justification of Conditionality

A common justification for conditionality is that it actually expresses the recipient government’s programme of reforms or at least a consensual arrangement between the latter and its lenders. This approach is often reflected in IMF documents. According to IMF Conditionality Guidelines, for example, the “primary responsibility for the selection, design, and implementation” of economic policies lies with the Member.<sup>150</sup> According to the same Guidelines, the documents containing conditionality are supposed to be prepared by domestic authorities and to describe the “authorities” policy intentions,<sup>151</sup> with the IMF involvement limited to “cooperation and assistance”.<sup>152</sup> Promoting domestic ownership<sup>153</sup> of conditionality has also been suggested as a response to the legitimacy problems and poor implementation.<sup>154</sup> Lender’s representatives, according to this view, should be re-

<sup>148</sup> On the dual structure of EU’s democratic legitimacy, see S. Oeter, *Federalism and Democracy*, in: A. von Bogdandy/J. Bast, *Principles of European Constitutional Law*, 2<sup>nd</sup> rev. ed. 2010, 237; A. Peters, *Elemente einer Theorie der Verfassung Europas*, 2001, 209, 219.

<sup>149</sup> See M. Ruffert (note 7), 1790.

<sup>150</sup> IMF, *Guidelines on Conditionality*, adopted 25.9.2002, available at <www.imf.org>, para. 3.

<sup>151</sup> IMF (note 150), para. 10.

<sup>152</sup> IMF (note 150), para. 10.

<sup>153</sup> Basic element of ownership is the “willing assumption of responsibility for an agreed programme” by domestic officials, IMF, *Strengthening Country Ownership of Fund-Supported Programs*, 2001, 6.

<sup>154</sup> Basic element of ownership (note 153). Generally on the concept of ownership in IMF law and policy, see J. M. Boughton, *Who’s in Charge? Ownership and Conditionality in IMF-*

stricted in an advisory role, offering expertise to domestic decision-makers.<sup>155</sup>

The wording of Regulation 472/2013/EU seems to follow this approach, allocating primary responsibility for conditionality to the Member State concerned. The Troika's involvement is often presented in terms of consultation and negotiation and sometimes in terms of agreement. In enhanced surveillance, for example, the Member State concerned is required to decide which measures are necessary to overcome its financial difficulties "after consulting, and in cooperation with" the Troika.<sup>156</sup> In the case of a macroeconomic adjustment programme, the programme is supposed to be prepared by the Member State requesting financial assistance "in agreement with" the Troika.<sup>157</sup> The ESM Treaty assistance also adopts a contractual approach to this question, referring to conditionality as the outcome of negotiations between the Troika and the recipient Member.<sup>158</sup> Of the previous mechanisms, the EFSF Framework Agreement also makes reference to negotiations<sup>159</sup> as does the Greek Loan Facility,<sup>160</sup> while in Regulation 407/2010/EU establishing the EFSM the approach is less straightforward. On the other hand, the adjustment programmes' wording focuses on the domestic ownership of conditionality. The preamble of the second Greek adjustment programme stresses that, "the ownership of the programme and all executive responsibilities in the programme implementation remain with the Greek Government".<sup>161</sup> This approach is also explicitly defended by the Commission in its response to the 2013 European Parliament investigation. There, the Commission responded to the question about the leeway of domestic authorities in the preparation of adjustment programmes with the

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Supported Programs, IMF Working Paper, WP/03/1991 (2003); *J. M. Boughton/A. Mourmouras*, Is Policy Ownership an Operational Concept?, IMF Working Paper 07/72 (2002); *A. Drazen*, Conditionality and Ownership in IMF Lending: A Political Economy Approach, CEPR Discussion Paper 3562 (2002).

<sup>155</sup> *J. M. Boughton* (note 154), 2.

<sup>156</sup> Art. 3 para. 1 Regulation 472/2013/EU.

<sup>157</sup> Art. 7 para. 1 subpara. 1 and para. 2 subpara. 1 Regulation 472/2013/EU.

<sup>158</sup> Art. 13 para. 3 ESM Treaty.

<sup>159</sup> Art. 2 para. 1 lit. (s) EFSF Framework Agreement.

<sup>160</sup> Art. 2 para. 1 of the Intercreditor Agreement of 8.5.2010 between Kingdom of Belgium, Federal Republic of Germany, Ireland, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grand Duchy of Luxembourg, Republic of Malta, Kingdom of The Netherlands, Republic of Austria, Portuguese Republic, Republic of Slovenia, Slovak Republic, and Republic of Finland, 8.5.2010.

<sup>161</sup> Memorandum of Understanding ... Greece (note 81), 123.

claim that “the ownership of the design of the programme belongs to the authorities of the Member State concerned”.<sup>162</sup>

This unclear ownership is reflected on the legal status of conditionality. As with IMF lending, conditionality is mainly documented in a Memorandum of Understanding and a Letter of Intent, addressed by the authorities of the recipient country to the lenders. These instruments are so drafted as to imply that their content expresses a commitment of the recipient government that is simply accepted as sufficient by the lenders, rather than a set of measures some of which are imposed by the latter. Conditions are not to be found in a single document, but are dispersed in a convoluted web of instruments, the binding qualities of which are uncertain.<sup>163</sup> Memoranda are also signed by the recipient state. Council Decisions on the other hand are unilateral instruments of an EU institution.<sup>164</sup>

The endorsement of the outcome of conditionality negotiations by means of the legal form of a Council Decision is an element that distinguishes EU economic conditionality from that of the IMF and merits special attention. As explained above, the IMF has been very keen to avoid any language that might have hinted to some obligatory force conditionality – much less obligatory based on some *unilateral* decision. Yet, in the European context, conditionality has a hybrid legal form. Substantively, it is the product of negotiations between the recipient state and the Troika. Formally, for the conditions that are contained both in the Memorandum and the Decision, it is a unilateral decision of the EU. This hybrid form of decision-making is not foreign to EU law. In the context of structural funds, “who decides what” has been a major question, directly connected with the specificities of cohesion governance,<sup>165</sup> for many the “leading edge of a system of multi-level governance”.<sup>166</sup> Similarly with economic conditionality, a plan is originally prepared by the Member State concerned with the collaboration of the

<sup>162</sup> Response of the European Commission to the questionnaire supporting the own initiative report evaluating the structure, the role and the operations of the troika; (Commission, ECB and the IMF) actions in euro-area programme countries, available at <<http://www.europarl.europa.eu>>, 5.

<sup>163</sup> See *A. Fischer-Lescano* (note 97), 32 et seq.

<sup>164</sup> On the legal character of decision as a legal form of EU law, see *M. Vogt*, *Die Entscheidung als Handlungsform des Europäischen Gemeinschaftsrechts*, 2005, 45 et seq.

<sup>165</sup> *G. Marks*, *Exploring and Explaining Variation in EU Cohesion Policy*, in: L. Hooghe, *Cohesion Policy and European Integration: Building Multilevel Governance*, 1996, 389.

<sup>166</sup> *G. Marks*, *Structural Policy and Multilevel Governance in the EC*, in: A. W. Cafruny/G. G. Rosenthal, *The State of the European Community*, 1993, 401. For the development of this field, see *B. Schönendorf-Haubold*, *Die Strukturfonds der Europäischen Gemeinschaft*, 2005, 46 et seq.; *J. Bachtler/C. Mendez*, *Who Governs EU Cohesion Policy? Deconstructing the Reforms of the Structural Funds*, *Journal of Common Market Studies* 45 (2007), 535.

Commission, but ultimately takes the legal form of a unilateral EU decision.<sup>167</sup>

Nevertheless, experience with conditionality has shown that conditionality is much closer to authority than Regulation 472/2013/EU suggests.

## b) The Poverty of Ownership

In order to get a realistic picture of the actual positioning of conditionality at the continuum between agreement and coercion, it is necessary to have a closer look on the actual process of the negotiations and the balance of bargaining power between national officials and the representatives of international and European institutions.

At the stage of negotiating and monitoring conditionality, only a small number of domestic actors are involved, mainly Ministers and some key advisors. In this small circle, international pressure through leverage or linkage can be very efficient.<sup>168</sup> Although there are yet no empirical studies investigating the factors determining the bargaining power of the Troika in EU conditionality negotiations, empirical literature at the level of international financial institutions, such as the World Bank or the IMF, offers important insights. The promise of reward (or continuing such reward) for carrying out a desired policy often put lenders' representatives in a privileged position *vis-à-vis* domestic actors.<sup>169</sup> The actual leverage of the international lenders depends, of course, on the parties involved and the particular circumstances of the negotiating process. Empirical studies have identified, however, certain variables that influence the allocation of bargaining power between the negotiating parties. These variables include the recipient country's financial needs, the potential availability of financing alternatives, how unified creditors are, the credibility of the incentives they offer, and the quality of the domestic negotiating team.<sup>170</sup>

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<sup>167</sup> B. Schöndorf-Haubold (note 166), 221.

<sup>168</sup> See B. Stallings, International Influence on Economic Policy: Debt, Stabilization and Structural Reform, in: S. Haggard/R. R. Kaufman, The Politics of Economic Adjustment: International Constraints, Distributive Conflicts, and the State, 1992, 85.

<sup>169</sup> B. Stallings (note 168), 55.

<sup>170</sup> There is a number of studies developing proxies for assessing the IMF's bargaining power, see B. Stallings (note 168), 55; A. Buira, An Analysis of IMF Conditionality, G-24 Discussion Paper Series (2003), 4; R. W. Stone, The Scope of IMF Conditionality, International Organization 62 (2008), 589, 607 et seq.; N. Woods (note 10), 70 et seq.; A. Wood, Power Without Responsibility? Enhancing Learning and Policy Accountability at the International Monetary Fund, 2005, 70 et seq.

Applying these proxies to the European assistance schemes, may support the hypothesis that the bargaining power of lender’s representatives is indeed significant. Beyond the pressure exercised by the need for timely official lending, the specific architecture of the EU might add to the coercive dimension of conditionality. Creditors are unified and their promises are made credible by the new powerful economic facilities they have at their disposal. Moreover, peer pressure is considerably higher in the context of a monetary union due to much closer interdependencies.

This hypothesis seems to be in line with some of the responses of domestic actors to the recent investigation launched by the European Parliament on the role of the Troika in euro-area programme countries. To the question “how much leeway did you have upon the design of the necessary measures”, the Cypriot finance minister responded that the Cyprus government “was forced to accept ... under duress” the most important element of the programme, the bail-in instrument on bank deposits.<sup>171</sup> The Greek minister also noted that “given the inability of Greece to access capital markets, its bargaining power was *de facto* weak”, but the negotiating power of the country gradually enhanced as it gradually remedied fiscal imbalances and accomplished the programme’s targets.<sup>172</sup> The Irish Central Bank also noted that “certain elements of the financial part of the programme were presented as non-negotiable by the Troika”.<sup>173</sup>

This is, of course, not to say that recipient countries are simply recipients of policies framed in the form of assistance conditions. More empirical research will be needed to assess the mixture of consensus and coercion in EU conditionality. Judging from experience so far, however, one can reasonably hypothesize that a justification of EU conditionality *solely* based on the alleged consensus of the recipient state is not convincing.

Importantly, this is not to say that *more* domestic ownership could be the solution of the legitimacy issues in the conditionality context. There are three reasons why the concept of ownership cannot alone legitimate condi-

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<sup>171</sup> Response of the Cypriot Minister of Finance to the questionnaire supporting the own initiative report evaluating the structure, the role and the operations of the troika; (Commission, ECB and the IMF) actions in euro-area programme countries, available at <<http://www.europarl.europa.eu>>, 3.

<sup>172</sup> Response of the Greek Minister of Finance to the questionnaire supporting the own initiative report evaluating the structure, the role and the operations of the troika; (Commission, ECB and the IMF) actions in euro-area programme countries, available at <<http://www.europarl.europa.eu>>, 3.

<sup>173</sup> Response of the Central Bank of Ireland to the questionnaire supporting the own initiative report evaluating the structure, the role and the operations of the troika; (Commission, ECB and the IMF) actions in euro-area programme countries, available at <<http://www.europarl.europa.eu>>, 1.

tionality. The first is that adjustment programmes, although they indeed mostly affect the citizens of the recipient countries, are funded by foreign assets. There are thus *two* relevant constituencies when it comes to accountability: the recipient state's and that of international lenders. Transferring full ownership of the programme to domestic actors, even if it was possible, would result in the policy choices of a certain government being financed by foreign funds. The second problem with the ownership narrative is that it has the potential to mask the authority exercised by international lenders. To call power, advise is an old way to disguise it. The concept of ownership may thus have the undesired effect of being used by lenders only to conceal their actual power and divest themselves of any responsibility. Finally, in the context of EU economic governance ownership is even less convincing, considering that domestic economies in general are to be regarded as a "matter of common concern". To treat the economic policies of states receiving assistance as their sole affair would go against all the recent reforms of EU economic governance.

If the concept of national ownership is both empirically and normatively insufficient to justify conditionality, alternative ways should be investigated to make it compatible with the postulates of Arts. 2 and 10-12 TEU. The most obvious candidates are enhanced transparency, which allows public scrutiny and proper allocation of responsibility, and parliamentary control.

## 2. Transparency

Transparency is a fundamental issue for conditionality governance and is relevant on two occasions. Internally, with regard to the process leading to the development of the position of the Troika and the role of each institution in this process. Externally, with regard to the actual influence of the Troika's suggestions to the adoption of a measure by a domestic authority.

### a) Internal Transparency: Power Distribution within the Troika

In the recipient countries' press, the Troika is often depicted as a three-headed monster. This depiction is apt to the extent that only few insiders have access to its internal workings and the way it formulates decisions and policy suggestions. Regulation 412/2013/EU misses the opportunity to challenge this picture. The Troika remains a peculiar institution, foreign to

the general institutional architecture of the EU, and without clear demarcation of responsibility between its constituent parts.<sup>174</sup>

The Commission remains the senior partner of the Troika, and Regulation 412/2013/EU reasserts its central role both in the preparation and monitoring of EU conditionality. The Commission is the only institution that participates in all configurations of the Troika, regardless of form of assistance or surveillance modus. Within conditionality framework the Commission functions both as agent of the ESM and an EU institution. Moreover, its relative position *vis-à-vis* the other Troika partners, and especially the IMF, can be expected to be strengthened as it gradually develops more expertise in the field of macroeconomic conditionality.

On the other hand, the role of the IMF is less certain. The involvement of the IMF was a contested issue already from the beginning of the crisis, and this is also reflected in Regulation 472/2013/EU.<sup>175</sup> As noted above, all references as to the participation of the IMF in negotiating and monitoring conditionality are qualified with the caveat “where appropriate”. Moreover, the IMF is participating in most but not all forms of surveillance.<sup>176</sup> In those cases where the IMF co-constitutes the Troika, Regulation 472/2013/EU does not contain specific rules governing the cooperation of the Fund with EU institutions. The only example that such norms exist, is in the context of the Spanish assistance programme. There, the IMF has only a supportive role, which is further detailed in the so-called Terms of Reference.<sup>177</sup> This instrument, agreed between the IMF, the Spanish authorities, and the Commission, details how the IMF supports the monitoring of the financial assistance for the recapitalization of Spanish financial institutions. This formalized demarcation of tasks between the IMF and EU institutions is, however, the exception. Disagreements on the fundamentals of financial assis-

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<sup>174</sup> More empirical research will be needed to ascertain actual power relations and the extent to which all three participating institutions express the same or diverging positions during negotiations.

<sup>175</sup> When the crisis started, there was little confidence that EU institutions had the expertise to administrate assistance and monitor compliance with conditionality. The Commission had very little experience in the field of conditional lending, and the ECB had no experience whatsoever. This was one of the reasons why several actors insisted on involving the IMF in the early European assistance schemes.

<sup>176</sup> In assistance aimed at bank recapitalization, for example, the IMF is only offering technical assistance.

<sup>177</sup> Terms of Reference for Fund Staff Monitoring in the Context of European Financial Assistance for Bank Recapitalization, dated 20.7.2012, available at <<http://ec.europa.eu>>.

tance and conditionality are usually expressed through policy papers and public announcements.<sup>178</sup>

Finally, Regulation 472/2013/EU has few rules on the participation of other EU institutions in conditionality procedures. The ECB participates in most forms of assistance surveillance, but it does not publish its own assessment reports, and experience shows that, until now, it has been the junior partner of the Troika.<sup>179</sup> Other institutions, such as the EBA or the EFSB are also referred to in Regulation 472/2013/EU as possible participants in an “extended Troika” when conditionality is connected to their field of expertise. Until now, the EBA is the only agency actually engaged in the preparation and monitoring of conditionality.<sup>180</sup>

## b) External Transparency: On the Legal Character of Conditionality

Internal transparency concerns the relation between the constituent parts of the Troika. External transparency refers to the relation between the Troika and domestic authorities. The main question here is how a specific condition relates to the final domestic measure. Does a government cut a certain social benefit because it is required by its lenders or because it deems this cut as economically prudent?

Regulation 472/2013/EU contains a number of provisions aimed at making clearer the role of the Troika in EU economic governance. According to Article 2 para. 3, when the Commission decides to subject a Member to surveillance, it shall make this decision public. Public need also be the basic parameters of the macroeconomic scenario on which the decisions on assistance and conditionality are based<sup>181</sup> as well as the macroeconomic adjustment programme itself.<sup>182</sup>

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<sup>178</sup> See, for example, the discussion on the fiscal multipliers and the relation between growth forecast errors and planned fiscal consolidation. The debate opened with the opinions expressed in *O. Blanchard/D. Leigh*, Growth Forecast Errors and Fiscal Multipliers, IMF Working Paper WP/13/1 (2013) and continued with the letter of Commissioner *O. Rehn* to the ECOFIN Ministers, dated 13.2.1013, available at <<http://ec.europa.eu>>.

<sup>179</sup> See Response of the European Central Bank to the questionnaire supporting the own initiative report evaluating the structure, the role and the operations of the troika; (Commission, ECB and the IMF) actions in euro-area programme countries, available at <<http://www.europarl.europa.eu>>. For the potential reasons that supported ECB’s participation in the Troika, see *J. Pisani-Ferry/A. Sapir/G. Wolff*, EU-IMF Assistance to Euro-area Countries: An Early Assessment, Bruegel Blueprint Series, Vol. XIX, 2013, 25.

<sup>180</sup> Namely, in the Spanish programme.

<sup>181</sup> Including the growth scenario, the relevant parameters underpinning the assessment of the sustainability of the government debt of the Member State concerned, and the estimated

These requirements, however, are not sufficient to remedy the opaqueness and informality that has been so characteristic of economic conditionality from the beginning of the crisis. To this opaqueness contributes significantly the unclear legal form of conditionality. Conditions are contained in two types of instruments, Memoranda of Understanding and Council Decisions. As seen above, Memoranda are the most important of them. However, Memoranda are not typical instruments of EU law. In a much discussed decision, the Greek Supreme Administrative Court denied that the First Greek Adjustment Programme bound the Greek government in imposing any kind of measures.<sup>183</sup> According to that Court, the Memoranda in which these measures were detailed were policy documents prepared by the Greek Government. No responsibility could thus be attributed, according to that decision, to the Troika. On the contrary, the Portuguese constitutional court has affirmed the binding character of the Memorandum concerning Portugal.<sup>184</sup>

Another element contributing to the lack of transparency is that the Troika is not obliged to expose publicly its negotiating positions, and most of the times the public is informed of the lender’s arguments through informal leaks. Much of conditionality governance seems to be done through email exchange, through which domestic authorities receive Troika’s positions on how obligations contained in the respective Memorandum are to be interpreted and implemented.<sup>185</sup>

Attribution problems are of course a general problem in multi-level governance.<sup>186</sup> Sometimes, this difficulty is called the paradox of shared responsibility.<sup>187</sup> As responsibility is scattered among more actors, the discrete re-

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impact of the aggregate budgetary measures on economic growth, Art. 6 Regulation 472/2013/EU.

<sup>182</sup> Art. 7 para. 8 Regulation 472/2013/EU.

<sup>183</sup> StE 668/2012, decision of 20.02.2012.

<sup>184</sup> See Tribunal Constitucional, Acórdão No. 187/2013, Lei do Orçamento do Estado, 5.4.2013, para. 2.

<sup>185</sup> See, for example, the emails published in the Greek daily newspaper *Kathimerini*, on 4.9.2013, “Όλο το επίμαχο email του Μορς για ΕΑΣ, ΛΑΡΚΟ και ΕΛΒΟ” (on the privatization of Greek defence industries) and on 11.4.2013 “Πίεση από την τρόικα για πώληση Εθνικής, Eurobank εάν δεν βρουν ιδιώτες επενδυτές” (on the merger of two systemic Greek banks). Such emails are usually signed by one of the three head representatives of the Commission, the ECB, and the IMF, also “on behalf” of the other two. Emails are signed with the first names of the Troika members.

<sup>186</sup> See *Y. Papadopoulos*, Accountability and Multi-level Governance: More Accountability, Less Democracy?, *West European Politics* 33 (2010), 1030, 1033.

<sup>187</sup> *M. Bovens*, The Quest for Responsibility: Accountability and Citizenship in Complex Organizations, 1998, 45 et seq.

sponsibility of each of them diminishes, allowing actors to engage in blame-shifting with regard to the undesired effects of their decision.<sup>188</sup>

Attribution errors with regard to the responsibility of decisions as important as those concerning the pensions or healthcare systems are of cardinal importance for democratic politics. By emphasizing the role of national governments in the preparation of a MAP and the alleged domestic ownership of adjustment programmes, retrospective and prospective mechanisms of democratic accountability are distorted.<sup>189</sup> Retrospectively, national governments may be held responsible (or be praised) for decisions that have been actually formulated and imposed by the Troika. Or governments may use conditionality as a mask, allowing them to pursue unpopular economic agendas and then shift the blame to the Troika. Prospectively, political competitors, such as opposition parties, may be able to suggest alternative policies that in reality they cannot follow. Some actors may thus be punished for decisions they could not have changed while others rewarded for promises they cannot fulfil.

### 3. Parliamentary Control and Direct Participation

Parliamentary scrutiny of financial assistance has two aspects. From the perspective of countries offering such assistance, it concerns the control of the decision whether to award it and under which conditions. From the perspective of recipient countries, it refers to the control of the conditions under which assistance is accepted. In the context of the EU, parliamentary control involves thus three categories of parliaments: domestic parliaments of the Members offering assistance; domestic parliaments of the Members receiving assistance; and the European Parliament. The first dimension has been the object of long discussions, especially after the relevant decision of the German Federal Constitutional Court.<sup>190</sup>

Here, the question of parliamentary control is approached from the perspective of the European Parliament and the parliaments of the recipient countries.

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<sup>188</sup> *M. Bovens* (note 187), 46.

<sup>189</sup> See *Y. Papadopoulos* (note 186), 1036.

<sup>190</sup> BVerfG, 2 BvE 4/11, decision of 19.6.2012. See also Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten der Europäischen Union – EUZBBG, BGBl. I S. 2170.

### a) European Parliament

The European Parliament is involved in two ways in conditionality governance. It receives information on the progress of the procedure, and can invite other actors to an “exchange of views”.

In the context of enhanced surveillance, the Commission shall inform the competent committee of the European Parliament of the measures that the respective Member State needs to adopt<sup>191</sup> and communicate its quarterly assessment to that committee.<sup>192</sup> The European Parliament may invite representatives of the Commission, the ECB, and the IMF to participate in an economic dialogue.<sup>193</sup> If the Council decides to recommend to a Member State under surveillance to proceed with adopting precautionary corrective measures or preparing a draft macroeconomic adjustment programme, this recommendation has to be communicated in “due time” to the relevant committee of the European Parliament,<sup>194</sup> and can be the object of inquiry by the European Parliament, which has the right to invite representatives of the Commission and of the State for this purpose.<sup>195</sup>

In the case of programme-based surveillance, the Commission shall inform orally the Chair and Vice-Chair of the competent committee of the European Parliament at both stages of preparing and monitoring conditionality.<sup>196</sup> The competent committee of the European Parliament may offer the opportunity to the Member State concerned and to the Commission to participate in an exchange of views on the progress made in the implementation of the adjustment programme.<sup>197</sup> Unlike regular enhanced surveillance, Article 7 para. 10 Regulation 472/2013/EU does not extend this right of invitation to the representatives of the other two parts of the Troika, the ECB and the IMF.

Similar is the role of the European Parliament also when it comes to post-programme surveillance. The Commission has to communicate its assessment on the economic, fiscal, and financial situation to the competent committee of the European Parliament every six months. The committee

<sup>191</sup> Art. 3 para. 1 Regulation 472/2013/EU.

<sup>192</sup> Art. 3 para. 5 the ECON Committee, but probably also the Employment and Social Affairs Committee (EMPL).

<sup>193</sup> Art. 3 para. 9 Regulation 472/2013/EU.

<sup>194</sup> Art. 3 para. 8 lit. (c) Regulation 472/2013/EU.

<sup>195</sup> Art. 3 para. 8 Regulation 472/2013/EU.

<sup>196</sup> Art. 7 paras. 1 and 4 Regulation 472/2013/EU.

<sup>197</sup> Art. 7 para. 10 Regulation 472/2013/EU.

has the right to invite the Member concerned (but, in this case, not the Commission) for an exchange of views on the progress of surveillance.<sup>198</sup>

## b) Domestic Parliaments

Regulation 472/2013/EU foresees the involvement of domestic parliaments in two ways. It establishes an obligation of the Commission to keep parliaments informed, and gives them the right to invite representatives of the Troika. The information rights of domestic parliaments, however, are more limited than those of the European Parliament.

In enhanced surveillance, the Commission has to inform the parliament on the measures aimed at addressing the sources or potential sources of difficulties.<sup>199</sup> During enhanced surveillance, the parliament may invite in an exchange of views representatives of all three Troika partners, the Commission, the ECB, and the IMF.<sup>200</sup> The domestic parliament concerned may also invite representatives of the Commission (only) in an exchange of views, when the Council publicly recommends to a Member State under enhanced surveillance to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme.<sup>201</sup>

In the case of programme-based surveillance, only representatives of the Commission may be invited during the implementation stage.<sup>202</sup> The same is true in post-programme surveillance. In this latter case, the Commission is also required to communicate its assessment on the economic, fiscal, and financial situation, in particular, whether corrective measures are needed.<sup>203</sup>

## c) What Role for Parliaments in EU Conditionality?

Although Troika representatives had already responded to invitations by the European Parliament even before Regulation 472/2013/EU entered into force, the right of domestic parliaments to “exchange views” with representatives of the Troika is a novelty. Nevertheless, parliamentary involvement does not amount to parliamentary accountability properly speaking. The only rights Regulation 472/2013/EU awards to the European Parlia-

<sup>198</sup> Art. 14 para. 3 Regulation 472/2013/EU.

<sup>199</sup> Art. 3 para. 1 Regulation 472/2013/EU.

<sup>200</sup> Art. 3 para. 9 Regulation 472/2013/EU.

<sup>201</sup> Art. 3 para. 8 lit. (b) Regulation 472/2013/EU.

<sup>202</sup> Art. 7 para. 11 and Art. 14 para. 5 Regulation 472/2013/EU.

<sup>203</sup> Art. 14 para. 3 Regulation 472/2013/EU.

ment and the respective domestic parliaments are rights to information and discussion. It does not provide for rights to participation in the actual decision-making process and it does not establish a proper system of parliamentary control. Beyond the obligation of the Troika to inform the parliament and justify its choices to it, a relationship of accountability would also require the ability of the parliament to impose some form of sanctions if not satisfied with the justifications offered. The European Parliament has no such power. Domestic parliaments theoretically retain the right to refrain from taking the implementing measures necessary to transpose the conditions contained in an adjustment programme. This is, however, rather a fictitious power. Conditionality takes the form of a package deal. The outcome of the negotiations between the Troika and the government is presented to other actors, such as parliaments and courts, as a *fait accompli*. These actors then face the dilemma of either approving the deal, despite their potential disagreements with some parts of it, or face the possibility of losing access to official lending. The high costs attached to such a choice make it a non-alternative for most European parliaments. After a MAP is prepared, it is usually too late for substantial changes. In those cases, one should rather speak of a “red-line parliamentarism”. Parliaments are only able to draw some broad red lines of accepted policies rather than making concrete decisions.

This rudimentary role of parliaments reflects the general marginalization of parliamentary procedures in European economic governance after Six Pack.<sup>204</sup> The marginalization of the European Parliament has been pointed out as a major concern also in the Six Pack reforms, where the Parliament is simply informed or participating in an “Economic Dialogue”.

## V. Outlook

EU financial assistance conditionality is the most intrusive and challenging of the instruments adopted to tackle the eurozone crisis. Never had the EU institutions been involved to such close surveillance and micromanagement of such a wide spectrum of policies.

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<sup>204</sup> See *D. Chalmers*, The European Redistributive State and a European Law of Struggle, *ELJ* 18 (2012), 667, 692; *F. Scharpf*, Monetary Union, Fiscal Crisis and the Pre-emption of Democracy, *Zeitschrift für Staats- und Europawissenschaften* 9 (2012), 163; *C. Fasone*, European Economic Governance and Parliamentary Representation. What Place for the European Parliament?, *ELJ* 19 (2013), (online, early view version).

Some authors have spoken of an “*Über-Europeanization*”.<sup>205</sup> As most phases of importance in European integration, conditionality developed in a time of crisis and in an incremental way. Regulation 472/2013/EU consolidates this development, and offers an opportunity to look back at the already rich legacy of the early phase of the crisis and revisit some of the important questions on new forms of EU governance.

Conditionality expresses a unique system of intensive cooperation between international, European, and domestic actors, but also raises important questions of legality and legitimacy. Regulation 472/2013/EU codifies and systematizes practice so far, but does not do enough to promote clarity and parliamentary accountability. More importantly, it fails to offer a principled basis for citizens in recipient countries, but also in the euro-area as a whole, to allocate responsibilities for decisions that profoundly affect their lives. Informality and obscurity still characterize the preparation and monitoring of conditionality. This is not to replicate the picture of a “bad” Troika, imposing strict measures to domestic actors with no alternative but to accept them. Conditionality has a great potential in introducing reforms and practice has shown that it can be a powerful instrument in transforming weak economies and deficient institutions. What cannot be accepted, however, from the perspective of EU constitutional law, is an institutional set-up that allows blame shifting. *De facto*, the Troika is a political actor and should be exposed in political scrutiny.

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<sup>205</sup> K. Featherstone, The JCMS Annual Lecture: The Greek Sovereign Debt Crisis and EMU: A Failing State in a Skewed Regime, J. Common Mkt. Stud. 49 (2011), 193.