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'Til Debt Do Us Part

**The Enforceability of Council's Country-Specific
Recommendations under the Excessive Deficit Procedure**

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“Europe will not be made all at once, or according to a single plan. It will be built through concrete achievements which first create a de facto solidarity.”

Robert Schuman, 9th May 1950

Statesman

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ABSTRACT

Under Article 126 TFEU “*Member States shall avoid excessive government deficits*”. Member States are still in charge of their own budgetary policies, but they are still under the scope of the Treaties. Paragraph 7 of Article 126 states that “*Where the Council decides, in accordance with paragraph 6, that an excessive deficit exists, it shall adopt, without undue delay, on a recommendation from the Commission, recommendations addressed to the Member State concerned with a view to bringing that situation to an end within a given period. Subject to the provisions of paragraph 8, these recommendations shall not be made public.*” The changes brought by recent pieces of legislation reinforced the enforceability given to Recommendations on the matter of Economic and Monetary Integration.

The Nature of Recommendations was addressed by the ECJ in *Grimaldi* and in *Altair Chimica*. It was there stated that Recommendations might carry legal enforceability, and that their content should be interpreted regarding its execution.

It is my understanding that the current legal framework regarding Recommendations, more specifically Recommendations made under an Excessive Deficit Procedure, should be revisited in order to answer the questions of their enforceability. The answers to these questions are crucial pieces of the puzzle in which the Economic and Monetary Governance of the European Union entrenched in. As the time passes and more procedures of this kind come to their final stages, the more likely it is to a Member State or its Courts to challenge such Recommendations enforceability. This is why I believe it is relevant to revisit the question regarding Recommendations in order to make some sense of what really is the corrective arm of the Stability and Growth Pact.

Keywords: European Union, Economic and Monetary Union, Stability and Growth Pact, Excessive Deficit Procedure, Recommendations, *Altair Chimica*, *Grimaldi*.

CHAPTER I

“Life in the Valley”

“*Once upon a time, not too long ago*”¹, in the greenest of the valleys there were a few small villages, made entirely of white stone and maple wood, settled alongside a river so clear that, from shore to shore, you could see all kinds of fish swimming upstream. Among those villages three special clans lived their lives in peace and harmony: the clan of the Good people, the Bad people and the Ugly ones.

The valley was prosperous, trade was blooming, primarily due to an old agreement between its villages to facilitate trade; they even shared a common currency, which made their merchants’ life a lot easier by granting price stability and lower transaction costs.

But one day the level of the river started to decrease severely, making it more difficult for villagers to make their living. To add to that crisis, fishermen from the Ugly people’s villages bought a great deal of “toxic” fish, putting them in danger and likely to default with their own obligations regarding the common market. Rather than facing a meltdown of its economy, the leaders of the Ugly decided to bail out their fishermen. As a result, these villages have now a large volume of public debt and face liquidity problems.

Bad people’s villages also faces their own liquidity problems. They already had a problem of public debt, but now are finding out that, because of the lowering of the river’s level, it has become more and more difficult to borrow money in the markets, either by borrowing directly from banks or by selling bonds to private merchants. When their struggles became public, private merchants panicked and refused to buy their bonds. To make up for the risk levels, the Bad have to offer an ever-increasing interest rate, which very soon will make it so expensive for it to borrow money through the issuing of bonds, they will be shut down from the market, and therefore be unable to borrow the necessary money to refinance their debt. The risk of default is now at its highest.

¹ Jay-Z “99 Problems” (The Black Album, Def Jam, 2004)

As everyone in the valley shares a common currency, they all decide to bail-out both the Ugly and the Bad in risk of default. Investors are already worried about the creditworthiness of other members of the valley, which makes it more likely that these other villages, will also face escalating costs when borrowing money from the markets. The economies of every village in the valley are also intertwined in other ways as, for example, the Good people's villages' banks own a great portion of the Ugly people's debt; so much that the Good people's economy would suffer a severe blow if the Ugly were unable to pay their debt.

Adding to the unsettling mood that spread across the valley, villagers from different parts of the valley are worried about the fate of the bail-out money. Residents of the Good people villages are not happy about sending their tax money to the Bad or the Ugly. They think that they should not be paying for other village's mistakes. Villages which, on their minds, were not as responsible as they were. They also think that the moment the Ugly receive their bail-out, they will just go back to spending too much, believing that they shall be saved again if necessary.

On the other hand, Bad and Ugly villagers hope for some solidarity from the rest of the valley, and they argue that the richer villages, like the Good people villages, have benefited from the common market of the valley and from the common currency for many years. In fact, they argue that they benefited more than anyone else.

In order to receive the bail-out, the Bad and the Ugly have to comply with a strict set of conditions, they have to make dramatic economic reforms. Some villagers from the Bad and the Ugly find these conditions unfair. Villagers from across the valley feel let down and tensions grow; there is a whispering against the Good; the Good, on the other hand, do not understand the backlash and feel that the entire valley is taking advantage of them.

To make sure this sort of things do not happen again, there is a consensus that the common market and common currency framework needs to change.

Firstly, Ugly's problems could have been avoided if their fishermen behaviour had been better regulated. Secondly, the leaders of the valley agreed that no village should be allowed to get in a situation as that of the Bad people before the bail-out. A

stricter set of rules, put in place at the time of the beginning of the common market and currency, created in order to enhance control over public spending, would in principle have stopped the villages from accumulating such a volume of debt. But such rules were never properly enforced. Accordingly, the leaders want to give teeth to this mechanisms, by adopting new measures to make sure that sanctions are applied whenever a village goes above the level of debt or deficit set out in those rules.

In order to improve surveillance over the budgets, every year members of the common currency have to send reports on the state of their economy, as well as draft budgets for the next year, to a commission responsible for overseeing them. The commission produces a report for each village with specific recommendations. For instance, recommendations regarding a village's pension system, or the need to cut salaries in the public sector. If a village is perceived to be in trouble, either because of its excessive deficit or because of imbalances in its economy, it will be placed under a special monitoring and, if it fails to address the situation, sanctions may be imposed under certain criteria.

Some villages, together with the commission, reason that this sort of control has been proven necessary by the crisis and that the mechanisms put in place and the common currency have no future without it. Other leaders of the valley start demonstrating their discontent with what they perceive as undemocratic interference from the commission, and villagers grumble. As villages tend to consider that these recommendations undermine their authority, independence and democratic legitimacy, questions regarding their enforceability start to arise.

This little tail comprises what the European Union (EU) and the Eurozone are facing at the moment. The Economic and Monetary Union (EMU), the Stability and Growth Pact (SGP) and the Excessive Deficit Procedure (EDP) have evolved over the years, but they are now at a time where everything might be put in question if no light is shed over their strength.² It is our understanding that the current legal framework regarding Recommendations, more specifically Recommendations made under an EDP, should be revisited in order to answer the questions of their enforceability. As the time

² CHAMPEAU, Serge; CLOSA, Carlos; INNERARITY, Daniel; POIARES PESSOA MADURO, Luis Miguel, *"The future of Europe : democracy, legitimacy and justice after the Euro crisis"*(Rowman & Littlefield International, 2014)

passes and more procedures of this kind are initiated, the more likely it is for a Member State to challenge such Recommendations. Also, as a last resort a Member State might simply not comply with any recommendations and questions regarding the primacy of EU law will arise, namely on a constitutional level and its increased tensions.³ This is why we believe it is relevant to revisit the question regarding Recommendations enforceability, the missing link of the EDP.

To do so we shall take a comprehensive approach to the EMU, focused on its recent changes driven by the financial crisis, then we shall analyse in more detail the preventive and the corrective arms of the SGP. This shall be followed by an examination of the general framework of Recommendations under EU Law and compare them under the architecture of the EDP. With this approach we hope to obtain a clear view over the formal and the substantive dimension of Recommendations under EU Law.

³ MADURO, Miguel Poiares; FRADA, António; PIERDOMINICI, Leonardo, “*A Crisis Between Crises: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*” (E-Pública Revista Eletrónica de Direito Público, Vol. 4, nº 1, May, 2017) pp. 10

CHAPTER II

“The Economic and Monetary Union”

The case for EMU is based on the argument that it would foster economic growth and provide greater price stability through low inflation. This argument is based on several factors, being one that EMU would save transaction costs, as a single currency removes the cost of exchange-rate conversions when money moves within the EU.⁴ The Commission estimated that the total savings would be approximately €25 billion.⁵

The case against EMU focus on the argument that the Member States were not ready for it and that such a commitment to further integration lacked common political will. But the fact is that EMU was put into action and it is now one of the most relevant aspects of EU integration, but of course it is also one of the most controversial.⁶

Nonetheless, the EMU represents a major step in European Integration, one that has deepened the ties between EU economies. The EMU was a recurring ambition for the European Union as it promised stability and an environment for higher growth and employment. However, a variety of political and economic obstacles barred the way. Weak political commitment, divisions over economic priorities and turbulence in international markets, all played their role in frustrating progress towards EMU.⁷

Despite those obstacles, a growing number of EU Member States sought for deeper economic integration as a means of strengthening the political bonds between them and protecting the market.

The international currency stability that reigned in the immediate post-war period did not last.⁸ In the late 1960's turmoil on international currency markets threatened the common price system of the common agricultural policy, a main pillar of what was then

⁴ CRAIG, Paul, DE BÚRCA, Gráinne, “EU LAW, Text, Cases and Materials” (Oxford University Press 6th edn, 2015) pp. 701

⁵ GRAUWE, Paul de, “*Economics of Monetary Union*” Oxford University Press, 6th edn, 2005.

⁶ HINAREJOS, Alicia “Economic and Monetary Union” (in “European Union Law” Oxford Univeristy Press, 2014) pp.567

⁷ European Commission Report “One Currency for One Europe, The Road to the Euro” Belgium, 2007

⁸ SHEVCHENKO, Taras “European Monetary Union: Theory, History and Consequences” Kyiv National University, 2009

the European Economic Community. In response to this troubling background, the EMU was put on the European agenda, when the Heads of Government agreed that a plan should be drawn up to create an economic and monetary union within the Community, this led to the Werner Report in 1970.⁹

The Werner group set out a three-stage process to achieve EMU within ten years, including the possibility of a single currency. The Member States agreed in principle in 1971 and began the first stage: narrowing currency fluctuations. However, a fresh wave of currency instability on international markets squashed any hopes of tying the Community's currencies closer together. Subsequent attempts at achieving stable exchange rates were hit by oil crises and other shocks until, in 1979, the European Monetary System (EMS) was launched.¹⁰

The EMS determined that the reference for exchange rates would be a newly created European Currency Unit (ECU), a weighted average of EMS currencies. The EMS represented a new and unprecedented coordination of monetary policies between the Member States, and operated successfully for over a decade.¹¹

This success provided the impetus for further discussions between the Member States on achieving economic and monetary union. At the request of the European leaders, the European Commission President, Jacques Delors, and the central bank's governors of the EU Member States produced the 'Delors Report' on how EMU could be achieved.

The Delors Report proposed a three-stage plan for economic and monetary union and the euro area, to be achieved between 1990 and 1999. Preparations involved: Stage 1: completing the internal market (1990-1994), namely through the introduction of the free movement of capital; Stage 2: preparing for the European Central Bank (ECB) and the European System of Central Banks (ESCB), and achieving economic convergence

⁹ "Report to the Council and the commission on the realization by stages of the Economic and Monetary Union in the Community" Luxemburg, 1970

¹⁰ European Commission "One currency for one Europe, The road to the euro", European Communities, 2007

¹¹ Summaries of EU legislation "Towards a single currency: a brief history of EMU" 2011

(1994-1999); and Stage 3: fixing exchange rates and launching the euro (1999 onwards).¹²

The European leaders accepted the recommendations in the Delors Report and the decision to form an economic and monetary union was finally adopted by the European Council, the new Treaty on European Union, which contained the provisions needed to implement EMU, was agreed at the European Council held at Maastricht, the Netherlands, in December 1991.

EMU involves coordination of economic and fiscal policies, a common monetary policy and a common currency, conducted by a single monetary authority. It delivers coordination of economic policy-making between Member States, coordination of fiscal policies, notably through the SGP, (which imposes limits on government debt and deficit, an independent monetary policy run by the European Central Bank), the single currency and the euro area.

Not all Member States of the EU participate in all phases of EMU: as of 2016, 19 Member States have entered the last stage of the EMU and adopted the euro as their currency, these countries constitute the Eurozone or “euro area”.

A vast net of bodies is responsible for the economic policy, which includes Member States and EU institutions. The European Council sets the main policy orientations; the Council of the EU coordinates EU economic policy-making¹³ and decides whether a Member State may adopt the euro; the “Eurogroup”, a meeting of the finance ministers of the Eurozone, coordinates policies of common interest for the euro area Member States; Member States set their national budgets within agreed limits for deficit and debt, and determine their own structural policies involving labour, pensions and capital markets; the European Central Bank sets monetary policy, with price stability as the primary objective; finally the European Commission monitors performance and compliance; the European Parliament shares the job of formulating legislation with the Council, and subjects economic governance to democratic scrutiny.

¹² Committee for the Study of Economic and Monetary Union, “Report on economic and monetary union in the European community” 1989

¹³ Article 2(3) TFEU

The current framework was the result of the 1960's debate between "monetarists" and "economists". The "monetarists" believed that the starting point of the EMU should be fixing exchange rates or the introduction of a common currency, and coordination should then follow. The "economists" believed that coordination policies should happen prior to the introduction of a common currency. In this context, it is important to note the theory of the Endogeneity of the Optimum Currency Area, from which, its members can build an optimum currency area ex post even if they do not do ex ante.¹⁴ This position is underpinned by the idea that a monetary union will progressively lead to a decrease of asymmetric shocks and greater association between the economic fluctuations of the Member States.¹⁵ The "monetarists" view prevailed and the design of EMU gives great emphasis to the monetary component, while integration of economic policies lags behind. The result was a centralized monetary policy for the euro area conducted by the ECB, assisted by the national central banks; all together they form the European System of Central banks. But at the same time, economic policy remains in the hands of Member States, there is, therefore, an underlying tension within EMU between a centralized monetary policy and an essentially decentralized economic and fiscal policy, i.e. the EMU includes a full monetary union conducted at EU level, while economic/fiscal policies are still conducted at the national level.¹⁶

The asymmetric design of the EMU proved to have certain flaws and was redesigned in order to enhance coordination of economic policy. The multilateral surveillance mechanism was enhanced as the economic health of individual Member States' economies can have a marked impact on the evaluation of the Euro.

Articles 121 and 126 of the TFEU, which provide the legal basis of the SGP, were reformed by Regulation (EU) 1466/97, of July 7th on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies and Regulation 1467/97 of July 7th on speeding up and clarifying the implementation of the excessive deficit procedure. The purpose of the SGP was to ensure fiscal discipline in the EU by setting reference values for annual national budget

¹⁴ PRAUSELLO, Franco, "The Theory of Endogenous Optimum Currency Areas: A Critical Note" in "Economica Internazionale", vol. 65, n.º 1, 2012, p 84.

¹⁵ TORRES, Francisco, "The Economic and Political Debate on EMU: Europe and Portugal" in "Temas de Integração", n.º 4, 1997, p.73.

¹⁶ GOUCHA SOARES, António, "O que nasce torto...", p. 54.

deficits at 3% of GDP and public debt at 60% of the GDP, these values are defined in Protocol 12¹⁷. This pact applies to all EU members, but it has stricter enforcement mechanisms for the Eurozone Member States.¹⁸

These mechanisms consist of two parts: Art. 121 outlines the preventive arm of the SGP, Art. 126 of the Treaty forms the basis for the corrective arm, and the Excessive Deficit Procedure (EDP). Thus, it was created two set of legal instruments: a "soft" instrument for economic stabilization policy, which requires coordination, and a "hard" instrument on fiscal discipline and monetary policy.¹⁹

The preventive arm of the SGP foresees the European Semester. The European Semester aims to coordinate at European level the main economic and budgetary planning exercises of Member States.²⁰ Every year in April, euro area member states submit stability programmes, while Member States outside the euro area submit convergence programmes, which outline the main elements of the Member States' budgetary plans and are assessed by the Commission. Based on its assessment on the stability and convergence programmes, the Commission draws up country-specific recommendations on which the Council adopts opinions. These include recommendations for appropriate policy actions.

The corrective arm of the SGP is the EDP. This procedure is triggered if a member state's budget deficit exceeds 3% of GDP. When the Council decides that the deficit is excessive, it makes recommendations to the Member State concerned and sets a deadline for bringing the deficit back below the reference value. At this point, if the Member State fails to comply, the Council can impose sanctions. The SGP applies to all EU countries, but the sanctions can be imposed only on euro area member states.

In practice, however, the need for political agreement within the Council in order to impose sanctions meant that the corrective arm of the Pact lacked effectiveness, as

¹⁷ Protocol (No 12) on the excessive deficit procedure , Official Journal 115 , 09/05/2008 P. 0279 - 0280

¹⁸ European Commission Communication, "Economic governance review Report on the application of Regulations (EU) n° 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013" (COM(2014) 905) Brussels, 2014

¹⁹ CRAIG, Paul, DE BÚRCA, Gráinne, "EU LAW, Text, Cases and Materials" (Oxford University Press 6th edn, 2015) pp. 734-735

²⁰ MADURO, Miguel Poiars; FRADA, António; PIERDOMINICI, Leonardo, "A Crisis Between Crisis; Placing the Portuguese Constitutional Jurisprudence of Crisis in Context" (E-Pública Revista Eletrónica de Direito Público, Vol. 4, n° 1, May, 2017) pp. 15

revealed in 2002 and 2003, when the Commission initiated excessive deficit procedures against Germany and France.²¹ At the time, these countries adopted measures not considered effective enough by the Commission, therefore the Commission urged the Council to pursue more forceful action, but the Council decided not to follow the Commission's recommendations.

The Commission then challenged before the European Court of Justice²² (ECJ) the legality of the Council's measures in abeyance for France and Germany.²³ The Court found that the Council's decision to place the EDP in abeyance was unlawful, however it rejected the Commission's claim that the Council's failure to adopt the Commission's recommendation was itself a decision, and that it should be annulled under Article 230 EC. It was settled that the Commission could not require the Council to pursue further action against France, Germany or any other country that breached the Pact. Recurring breaches without significant consequences were likely to diminish the credibility of the Pact further. It was then considered preferable to reform the Pact, and in 2005 its rules were made more flexible, allowing for broader discretion,^{24 25} the final result of which was the Pact losing its teeth, making it clear that there was no credible sanctioning mechanisms put in place to enforce the Pact.

The EMU needed a central monetary policy and effective coordination of economic and fiscal policies, yet this coordination was shown to be more difficult than what was anticipated.²⁶ This imbalance triggered many of the current problems we are facing, which were severely amplified by the euro area crisis.

²¹ AZEVEDO, Maria Eduarda, "*O Duplo Impulso para a Refundação da Europa – da Convenção Europeia ao Novo Modelo de Governação Económica*", in *Estudos Jurídicos e Económicos em Homenagem ao Prof. Doutor António de Sousa Franco*, vol III, Coimbra Editora, 2006, p. 53.

²² Case C-27/04 *Commission v Council* [2004] ECR I-6649

²³ 2546yh Meeting of the Council of the European Union (Economic and Financial Affairs), Brussels 25 Nov. 2003.

²⁴ Council Regulation (EC) No 1055/2005 amending Regulation (EC) No 1466/97 (OJ [2005] L174/1); Council Regulation (EC) No 1056/2005 amending Regulation (EC) No 1467/97 (OJ [2005] L174/5).

²⁵ MADURO, Miguel Poiars; FRADA, António; PIERDOMINICI, Leonardo, "*A Crisis Between Crisis; Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*" (E-Pública Revista Eletrónica de Direito Público, Vol. 4, nº 1, May, 2017) pp. 16

²⁶ HINAREJOS, Alicia "Economic and Monetary Union" (in "European Union Law" Oxford Univeristy Press, 2014) pp.571.

CHAPTER III

“Economic Governance and the Euro Crisis”

The recent financial and sovereign debt crisis subjected the EU's regime for coordination of economic policy to a more general strain and to deep reforms in the Economic and Monetary Governance in the EU, particularly in the Euro area, leading the EU institutions into a process of co-government of debt and deficits.²⁷ Those reforms operated a structural change in the architecture of the EMU: surveillance systems have been strengthened for budgetary and economic policies and a new budgetary timeline for the euro area has been introduced.

The European Council and Commission were the main players devising the strategy and to this end they put forward several legislative proposals through time. Firstly, in 2011, they introduced the six legislative proposals in order to monitor both budgetary and economic policies under the European Semester. In 2013 through the “Two-Pack” adherence to the SGP is further strengthened by new laws, as the “Two Pack” reinforces economic coordination between Member States and introduces new monitoring tools.²⁸ On the same year the importance of the budgetary targets set by the SGP's preventive arm (the Medium-Term Objectives or “MTO”), are strengthened by the “Fiscal Compact”, which is part of an inter-governmental treaty known as the Treaty on Stability, Coordination and Governance (TSCG). In 2014 there was a review of the “Six Pack” and “Two Pack” rules which was called for in the legislation, determined that the legislation had contributed to the progress of fiscal consolidation in the EU. The review highlighted some strengths as well as possible areas for improvement. Finally, in 2015 the Commission issues guidance on how it will apply the SGP rules to strengthen the link between structural reforms, investment and fiscal responsibility in support of jobs and growth.

We now must look in more detail at each of this “pack of rules” in order to understand the role they had on the current strength of the SGP.

²⁷ CHALMERS, Damian, *“The European Redistributive State and a European Law of Struggle”* (European Law Journal, Vol. 18, Issue 5, September, 2012) pp. 680

²⁸ SADELEER, Nicolas de, *“The New Architecture of the European Economic governance: A Leviathan or a flat-footed Colossus?”* in Maastricht Journal of European and Comparative Law, Vol. 19, n.º3, 2012

a) The “Six-Pack”

In 13th December 2011 the legislative package on economic governance, “Six-Pack”, entered into force. The first major response to what was the banking and financial crisis that began in 2008 and also the most comprehensive reinforcement of economic governance in the EU, since the launch of the EMU.²⁹ Secondary legislation governing the SGP was initially introduced in 1997, with significant reforms in 2005 and now 2011³⁰. The 2011 reforms which are referred as the “Six-Pack”, significantly strengthened both the fiscal surveillance and enforcement provisions of the SGP by adding an expenditure benchmark to review countries' fiscal positions, operationalising the Treaty's debt criterion, introducing an early and gradual system of financial sanctions for euro area Member States, and requiring new minimum standards for national budgetary frameworks.

The 2011 reforms also brought the surveillance of both budgetary and economic policies together under the European Semester, to ensure the consistency of the policy advice given.³¹

The Six-Pack is composed by 6 sets of rules: Regulation (EU) No 1173/2011 on the effective enforcement of budgetary surveillance in the euro area; Regulation (EU) No 1174/2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area; Regulation (EU) No 1175/2011 amending this Regulation on surveillance procedures for budgetary positions; Regulation (EU) No 1176/2011 on the prevention and correction of macroeconomic imbalances; Regulation (EU) No 1177/2011 amending the procedure on excessive deficits; Directive No 2011/85/EU on requirements for budgetary frameworks of the Member States.

This set of rules applies to the 27 Member States but it has special rules for euro area Member States, especially regarding sanctions. In the fiscal field, the six-pack strengthens the SGP by reinforcing both the preventive and the corrective arm of the Pact, i.e. the EDP.

²⁹ “EU Economic governance: The Commission delivers a comprehensive package of legislative measures”, (IP/10/1199, 29 September 2010)

³⁰ European Commission MEMO/13/318

³¹ European Commission MEMO/11/14 “European semester: a new architecture for the new EU Economic governance – Q&A”

The six-pack ensures stricter application of the fiscal rules by defining quantitatively what a "significant deviation" from the Midterm Objective (MTO) or the adjustment path towards it means in the context of the preventive arm. Moreover, the six-pack operationalizes the debt criterion, so that an EDP may also be launched on the basis of a debt ratio above 60% of GDP which would not diminish towards the Treaty reference value at a satisfactory pace (and not only on the basis of a deficit above 3% of GDP, which had been the case so far).

Financial sanctions for euro area Member States are imposed in a gradual way, from the preventive arm to the latest stages of the EDP, and may eventually reach 0.5% of GDP. The six-pack introduces inverse qualified majority voting (RQMV) for most sanctions, therefore increasing their likelihood for euro area Member States. RQMV implies that a recommendation or a proposal of the Commission is considered adopted in the Council unless a qualified majority of Member States votes against it.³²

b) Treaty on Stability, Coordination and Governance: “The Fiscal Compact”

In a later moment, in response to the crisis, an inter-governmental treaty was agreed upon. This was particularly interesting in regards of the institutional balance of the EU as this response came not within the Union per se, (by its institutions) but through state-level negotiations. This treaty, the Treaty on Stability, Coordination and Governance (TSCG), contained the “Fiscal Compact”. The Fiscal Compact requires Member States to enshrine in national law a balanced budget rule with an annual lower limit of a structural deficit of 0.5% GDP, centred on the concept of the country-specific MTO as defined in the SGP. The Fiscal Compact’s provisions also increase the role of independent bodies, which are given the task of monitoring compliance with the national fiscal rules, including the operation of the national correction mechanism in case of deviation from the MTO or the adjustment path towards it. The TSCG, signed by 25 EU Member States (all but UK and Czech Republic), entered into force on January 1, 2013 and is binding for all euro area Member States that have ratified it,

³² “Six-pack? Two-pack? Fiscal compact? A short guide to the new EU fiscal governance” available at http://ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm

while other contracting parties will be bound only once they adopt the euro or earlier if they signal it.

These budget rules shall be implemented in national law through provisions of "binding force and permanent character, preferably constitutional" as stated in Article 3 of the TSCG.

The European Court of Justice (ECJ) may impose financial sanction (0.1% of GDP) if a country does not properly implement the new budget rules in national law and fails to comply with a ECJ ruling that requires it to do so. In the case of euro area Member States, sanctions would be channelled to the European Stability Mechanism (ESM), in the case of "non-euro area Member States", the money would be attributed to the EU budget.

Compliance with the rule implementing the MTO in national law will also be monitored at the national level by independent institutions.

Other provisions aim at reinforcing the implementation of the Stability and Growth Pact: re-statement of the debt rule set up by the six-pack, behavioural commitment reproducing RQMV among euro area Member States when the Commission considers that an excessive deficit exists (formal modification of the voting rules would require a Treaty change).

Finally, the TSCG set the stones for a reinforced surveillance and coordination of economic policies, with ex ante coordination of debt issuance plans among Contracting Parties and economic partnership programmes for Member States in EDP, which detail the structural reforms needed for an effective and durable correction of their excessive deficit.³³

c) The "Two-Pack"

Fearing the potential consequences of "spillovers" among euro area Member States' economic and budgetary situations, the "Two-Pack" was adopted in May 2013, these new procedures are based on Article 136 of the EU Treaty. This Article enables euro area Member States to strengthen the coordination and surveillance of budgetary

³³ *Idem.*

policies in order to ensure the necessary budgetary discipline in the Economic and Monetary Union. The new legislation therefore only applies to the euro area.³⁴

The Two-Pack Regulations entails Regulation No 472/2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability and Regulation No 473/2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area. In abstract, these rules support adherence to the SGP's existing fiscal surveillance framework, while at the same time establish a comprehensive surveillance regime for those Member States in the euro area threatened with or experiencing serious difficulties with respect to their financial stability.

This legislation introduces a European assessment of draft budgetary plans on a coordinated timeframe in autumn for euro area Member States and improves national budgetary frameworks by requiring them to set up independent bodies in charge of monitoring national fiscal rules and to base budgetary forecasts on independent macroeconomic forecasts. For euro area Member States in EDP, a system of graduated monitoring is established in order to secure a timely and durable correction of excessive deficits and to allow an early detection of risks that a Member State does not correct its excessive deficit by the deadline set by the Council. Requirements placed on financially fragile countries are streamlined for countries currently receiving financial assistance while enhancing monitoring that will also enable the Commission to better assess the risks threatening or faced by the Member State in question and thus, in some cases, address vulnerabilities even before a need for financial assistance arises.

d) SGP review

In 2014, a review of the 'Six Pack' and 'Two Pack' rules which was called for in the legislation, determined that the legislation had contributed to the progress of fiscal

³⁴ CRAIG, Paul, "Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications" (Oxford Legal Studies Research Paper) 2014

consolidation in the EU. The review highlighted some strengths as well as possible areas for improvement.

This review introduced new features both to the Preventive and Corrective Arm of the SGP.

On the Preventive Arm side it brought new enforcement specifications: A procedure for correcting significant deviation (0.5% in one year or cumulatively over 2 years from the MTO or the adjustment path it). For euro area: financial sanctions in case of repeated non-compliance (interest-bearing deposit of 0.2% of GDP).

On the Corrective Arm side it envisages for the euro area an early and gradual sanction system to be activated at each stage of the EDP procedure.³⁵

In 2015 The Commission issues guidance on how it will apply the SGP rules to strengthen the link between structural reforms, investment and fiscal responsibility in support of jobs and growth.³⁶

Under this guidance, among other guidelines, the Commission says it will take into account the existence of a dedicated structural reform plan, providing detailed and verifiable information, as well as credible timelines for adoption and delivery, when recommending a deadline for the correction of the excessive deficit or the length of any extension to that deadline. The Commission will closely monitor the implementation of the reforms. In case of failure to implement, the Commission says it will take the necessary action.

There is, therefore, an underlying sense that the Commission wants to give a more flexible interpretation to the Preventive Arm of the SGP in order to accommodate structural reforms, investment and fiscal responsibility in support of jobs and growth. At the same time it reinforces its intention of enforcing this mechanism if states fail to comply as it says it will continue to assess effective action under the corrective arm of the Pact on the basis of a measurement of structural fiscal effort, excluding budgetary developments which are outside the control of governments.

³⁵ Economic governance review Report on the application of Regulations (EU) n° 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013

³⁶ Communication From The Commission To The European Parliament, The Council, The European Central Bank, The Economic And Social Committee, The Committee Of The Regions And The European Investment Bank from January 13th 2015.

CHAPTER IV

“The Launch of an Excessive Deficit Procedure”

We have just gone through what was the evolution of the EMU, namely, the SGP and its features. We have learned how and why the system was put in place and how was it tested through time. We need now to analyse the result of all this changes and their current framework in order to assess its enforceability.

We have seen that the European Commission monitors economic developments in the EU's Member States and in the global economy in detail. It monitors for potential problems, risks, unsustainable policies or declining competitiveness, through regular analysis, forecasts, assessments of national budgets and assessment of stability or convergence programmes. Then, to prevent economic problems from worsening and affecting other EU members, EU governments have agreed on a wide range of rules to ensure the quality and appropriateness of their economic policies. Finally, the EU's system of economic rules is further strengthened by provisions to ensure that they are enforced and that governments take effective action to correct economic problems, the correction system, the Excessive Deficit Procedure or the Excessive Imbalance Procedure. We will now focus on the EDP.

An EDP is launched by a Council decision based on a Commission proposal on the existence of an excessive deficit. The Commission proposal is based on a Commission report³⁷ which considers the deficit and debt position of the Member State in question to see whether either or both of these positions merit the launch of an EDP. The breach in itself is just the first step; it triggers the writing of a report which considers in detail a series of factors and concludes whether the breach of the criteria merits the launch of an EDP against the Member State in question.

The identification of the breach can be based on either outturns, plans or forecast data. The launch of an EDP on the basis of forecast data can be based on either the Member State's plans – as outlined in their Stability or Convergence Programmes or in other announcements made by the government – or on the Commission's forecasts.

³⁷ Article 126, paragraph 3 of the TFEU.

It is then established the non-compliance with the deficit criterion if the Member State is non-compliant with the deficit requirement, i.e. if its general government deficit is greater than 3% of GDP. This Report will conclude whether the Member State in question should have an EDP opened. The Treaty, and by extension the SGP, provides two exception clauses with regard to the opening of an excessive deficit procedure on the basis of the deficit criterion. Member States are deemed to have complied with their deficit commitment if at least one of the two following conditions is met: the deficit has declined substantially and continuously and has reached a level close to 3% of GDP; the excess is only exceptional and temporary, and the deficit value is still close to 3% of GDP.³⁸

A deficit above 3% of GDP is considered exceptional when it results (i) either from an unusual event outside of the Member State's control and with a major impact on its public finances, or (ii) from a severe economic downturn. A severe economic downturn is defined as a negative real growth of GDP or as an accumulated loss of output during a protracted period of very low real growth of GDP relative to its potential. The excess over 3% is considered temporary if the Commission forecasts indicate that the deficit will fall below 3% following the end of the unusual event or the severe economic downturn.³⁹

The Report is submitted to the Economic and Financial Committee which has 2 weeks following its adoption by the Commission to formulate an opinion under Article 126 paragraph 4.

The report presents an overall assessment of the deficit situation. Article 126 paragraph 3 specifies:

"The report of the Commission shall also take into account whether the government deficit exceeds government investment expenditure and take into account all other relevant factors, including the medium-term economic and budgetary position of the Member State."

³⁸ European commission, "Vade mecum on the Stability and Growth Pact", Occasional Papers 151, May, 2013.

³⁹ Idem.

Regulation 1467/97 gives further details on the relevant factors to be taken into account, presenting a list that falls under three headings: developments in the medium-term economic position, developments in the medium-term budgetary positions and developments in the medium-term government debt position. However, the regulation states that this list is not exhaustive and also the following:

"The Commission shall give due and express consideration to any other factors which, in the opinion of the Member State concerned, are relevant in order to comprehensively assess compliance with deficit and debt criteria and which the Member State has put forward to the Council and the Commission. In that context, particular consideration shall be given to financial contributions to fostering international solidarity and achieving the policy goals of the Union, the debt incurred in the form of bilateral and multilateral support between Member States in the context of safeguarding financial stability, and the debt related to financial stabilisation operations during major financial disturbances".

Once consideration has been taken of the wider economic context and all relevant factors, the Article 126 report concludes whether the data should lead to the Member State being placed in EDP. Either way, the report is forwarded to the Economic and Financial Committee of the Council which has 2 weeks to formulate an opinion.

In addition, where the conclusion of the report is that the Member State should be placed in EDP, the Commission addresses an opinion to that effect to the Member State concerned and inform the Council accordingly. It also prepares a recommendation for a Council decision on the existence of an excessive deficit under Article 126, paragraph 6, and a recommendation for a Council recommendation under Article 126, paragraph 7, on the provisions to take to correct the excessive deficit.

CHAPTER V

“Council’s Country Specific Recommendations under EDP”

Article 126, paragraph 7, tells us how those recommendations must be put forward. The Commission recommendation for a Council recommendation under Article 126 paragraph 7 to correct the excessive deficit contains an analysis of the situation, a timeframe and annual targets for the nominal and structural deficit linked by an underlying macroeconomic scenario.

The aim of the Article 126 paragraph 7 Recommendation is to present a credible path for the timely correction of the excessive deficit. According to Article 3, paragraph 4, of the Regulation 1467/97: *“The Council recommendation shall also establish a deadline for the correction of the excessive deficit, which shall be completed in the year following its identification unless there are special circumstances. In its recommendation, the Council shall request that the Member State achieve annual budgetary targets which, on the basis of the forecast underpinning the recommendation, are consistent with a minimum annual improvement of at least 0.5 % of GDP as a benchmark, in its cyclically adjusted balance net of one-off and temporary measures, in order to ensure the correction of the excessive deficit within the deadline set in the recommendation.”*

Article 2(6) of Regulation 1467/97 specifies that: *“If the Council, acting under Article 126(6) TFEU, decides that an excessive deficit exists in a Member State, the Council and the Commission shall, in the subsequent procedural steps of that Article of the TFEU, take into account the relevant factors referred to in paragraph 3 of this Article, as they affect the situation of the Member State concerned, including as specified in Article 3(5) and Article 5(2) of this Regulation, in particular in establishing a deadline for the correction of the excessive deficit and eventually extending that deadline.”*

Three quantitative budgetary objectives are required to be set in EDP recommendations: (i) A deadline for the correction of the excessive deficit; (ii) A path towards the correction of the excessive deficit with intermediary annual targets for the

general government balance; (iii) Annual fiscal effort of at least 0.5% of GDP, defined in structural terms, consistent with the nominal path towards the correction of the excessive deficit.

Under Article 126 paragraph 7 recommendations also establish a maximum deadline of six months for effective action to be taken in order to correct the excessive deficit in a timely manner, unless the seriousness of the situation justifies a deadline for effective action of three months. Alongside the deadline for action, the recommendation also specifies the deadline by which the Member State should submit a report on the action taken on which the Commission will base its assessment of effective action.

Following the expiry of the date for taking effective action and based on the Member State's report, the Commission examines it to see whether the Member State has complied with the Article 126 paragraph 7 recommendations. This is done by assessing whether the Member State is forecast to meet all the nominal targets, according to the Commission forecasts. If some of the years covered by the EDP are not within the time horizon of the Commission forecasts, the assessment of compliance is preliminary and focuses on the credibility of the Member States' plans. According to the Code of Conduct, this preliminary assessment should consider whether the Member State concerned has publicly announced or taken measures that seem sufficient to ensure adequate progress towards the correction of the excessive deficit within the time limits set by the Council.⁴⁰

If the Commission considers that the Member State has acted in compliance with the recommendation (or notice) and that the EDP fiscal requirements are likely to be fulfilled, it informs the Council of its assessment and the procedure is held in abeyance. Otherwise, the procedure is either stepped-up (if no effective action has been taken – see below) or a revised EDP recommendation is issued (if the assessment of effective action is positive but “unexpected adverse economic events with major unfavourable consequences for government finances occurred”).⁴¹

⁴⁰Economic and Financial Committee “*Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes*” July, 2016, available at:

http://ec.europa.eu/economy_finance/economic_governance/sgp/pdf/coc/code_of_conduct_en.pdf

⁴¹ Art. 3(5) of Council Regulation (EC) 1467/97.

If the Member State is not compliant with the nominal targets, an assessment of effective action will be undertaken. The focus of this will be the structural adjustment, with the aim of determining whether the Member State has actually taken effective action of the magnitude required in its Article 126 paragraph 7 recommendations, i.e. Member States that have improved their structural balance in line with the recommendations will be assessed as having taken effective action.⁴²

Where the Commission concludes that effective action has not been taken, it issues a recommendation for a Council decision establishing ineffective action under Article 126 paragraph 8. The Commission then issues a recommendation for a decision to give notice under Article 126 paragraph 9 for euro area Member States, or for new recommendations under Article 126 paragraph 7 for non-euro area Member States.

Following the Council's adoption of a decision under Article 126 paragraph 8 establishing non-effective action to the Article 126 paragraph 7 recommendations, the Commission shall issue a recommendation for a Council decision requiring the euro area Member State to pay a fine equal to 0.2% of their previous year's GDP, as a rule. The Commission shall issue its recommendation within 20 days of the Council's adoption of the decision. The fine will be payable to the Commission and will be assigned to the European Stability Mechanism. If the country had already lodged a non-interest bearing deposit under the preventive arm, it will be converted into a fine and any difference in the applicable amount will be returned to the Member State or made up by it.

The Council's decision on the imposition of a fine shall be considered adopted, unless the Council decides to reject the Commission's recommendation within 10 days, using qualified majority voting. While the default position is for the Commission to ask

⁴² The Code of Conduct specifies that: "*A Member State should be considered to have taken 'effective action' if it has acted in compliance with the recommendation or notice, regarding both the implementation of the measures required therein and budgetary execution. The assessment should in particular take into account whether the Member State concerned has achieved the annual budgetary targets initially recommended by the Council and the underlying improvement in the cyclically adjusted balance net of one off and other temporary measures. In case the observed budget balance proves to be lower than recommended or if the improvement of the cyclically-adjusted balance net of one-off and other temporary measures falls significantly short of the adjustment underlying the target, a careful analysis of the reasons for the shortfall would be made. In particular, the analysis should take into account whether expenditure targets have been met and the planned discretionary measures on the revenue side have been implemented.*".

for a fine equal to 0.2% of the previous year's GDP, the Commission may recommend that the Council reduce the amount or cancel the fine altogether. This can happen on the grounds of exceptional economic circumstances or following the reasoned request by the Member State concerned, addressed to the Commission within 10 days of the Council's adoption of the Article 126 paragraph 8 decision. The Council may also amend the Commission's recommendation for a fine using qualified majority voting and adopt the amended text as a Council decision.

In addition, as Article 4 paragraph 1 a) of Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94 asserts the conditionality of Cohesion Fund assistance on an absence of an excessive deficit, any EU Member State that is a recipient of the Cohesion fund, could have its commitments under the Fund suspended following an Article 126 paragraph 8 decision.

Following the adoption of an Article 126 paragraph 8 decision establishing non-effective action to Article 126 paragraph 7 recommendations, regulation 1467/97 requires that a Council decision to give notice to euro area Member States to take measures for deficit reduction according to Article 126 paragraph 9 be taken within 2 months. The Commission therefore prepares a Commission recommendation for this notice within that timescale. Notice under Article 126 paragraph 9 differs from the Article 126 paragraph 7 recommendations in that there is an explicit requirement in Regulation 1467/97 for the notice to indicate measures conducive to the achievement of the budgetary targets.

Member States submit reports to the Council and the Commission which set out measures taken, in line with the notice under 126 paragraph 9. The reports, which are made public by the Member State, include the targets for government expenditure and revenue and for the discretionary measures on both the expenditure and the revenue side and information on the measures taken in response to the particular Council notice.

Where the Commission concludes, following the assessment of the report that effective action has not been taken, it issues a recommendation for a Council decision establishing ineffective action under Article 126 paragraph 11, which should impose/intensify sanctions. Following an Article 126 paragraph 11 recommendation the

Commission will then issue a new recommendation for a decision giving notice under Article 126 paragraph 9.

Each year after the imposition of such a fine, the Commission will assess whether the Member State has taken effective action in relation to its Article 126 paragraph 9 notice and issue a recommendation to the Council to take a decision about effective or non-effective action. Where the recommendation is for a non-effective action decision, the Commission will recommend a new decision under Article 126 paragraph 11 and hence the imposition of another fine. Fines should therefore be paid every year until the EDP is placed in abeyance or abrogated. The fines will be assigned to the European Stability Mechanism.⁴³

⁴³ European commission, “Vade mecum on the Stability and Growth Pact”, Occasional Papers 151, May, 2013.

CHAPTER VI

“EDP Recommendations under EU Law”

As we have just seen there is a clear and automatic sanctioning system put in place following Council's country specific recommendations under an EDP under Article 126 paragraph 11 when non-effective action is established under Article 126 paragraph 7 and paragraph 9 that implies enforceability of such Recommendations. We must now look more closely to Recommendation's framework under EU law in order to understand its legal grounds and assesses the level of enforceability that the Recommendations in question imply.⁴⁴

Article 288 TFEU lists Recommendations as a legal act of the Union by stating that to exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. Regarding Recommendations specifically the treaty expressly says that “*Recommendations and opinions shall have no binding force*”. However the expression “*binding force*” has to be cautiously analysed when faced with specific Recommendations such as those put forward under an EDP and the European Semester.

In this respect it should be noted that there are opinions from EU institutions which may be binding. For instance, opinions of the Court have a legally binding force, resulting from the fact that EU law preconizes the need, in some cases, for such opinions to be respected. Also, a preliminary reference to the Court under Article 267 TFEU, may relate to the validity and interpretation of acts adopted by the institutions, bodies or agencies. This formulation, referring widely to “acts”, includes the whole set of “legal acts”, secondary legislation of the Union listed in Article 288 TFEU, among which are, of course, Recommendations of the EU institutions. So, the formulation of Article 288 precludes Recommendations from having direct effect, but it does not immunized them from the judicial processes. It its open to a national court to make a

⁴⁴ MADURO, Miguel Poiares; FRADA, António; PIERDOMINICI, Leonardo, “*A Crisis Between Crisis; Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*” (E-Pública Revista Eletrónica de Direito Público, Vol. 4, n° 1, May, 2017) pp. 19

reference to the ECJ concerning the interpretation or validity of such measure, as it happened in the *Grimaldi* case.⁴⁵

The Court, when confronted directly, in the *Grimaldi* judgment, with the problem of the effects of a Commission Recommendation, although expressing that Recommendations are acts that are not intended to produce binding effects, even in relation to the recipients and, in particular, that cannot create rights for individuals before a national court, did not fail to state clearly that Recommendations are legal acts of the Union, that cannot be considered as having no legal effect. In the view of the Court, “*national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.*”

Therefore, Member States’ courts should consider in the context of the principle of interpretation national law in accordance with European Union Law.⁴⁶ It might have been thought, in the wake of *Von Colson*,⁴⁷ that national courts would only be required to consider the instruments that can be directly applicable in national courts (i.e. the provisions of the Treaty, regulations, decisions and directives) . In 1989, however, the Court established that the rule of consistent interpretation was a separate principle in its own right. It may have been developed in the context in which it sought to find ways to ensure the effectiveness of directives before national courts but as early as 1989, this is no longer the only goal. In *Grimaldi*, the Court held that national courts should take into account not only “hard law”, but also recommendations.⁴⁸

Incidentally, in the judgment *Altair Chimica*⁴⁹, 2003, the Court goes even further, to rule on the interpretation of Recommendation 81/924 / EEC of 27 October 1981 concerning the tariff structures for electricity in the Union. The Court held that this Recommendation gave indications as to the different costs that the prices must cover but did not, however have any evidence to show that it can be interpreted as

⁴⁵ Case C-322/88 *Grimaldi v Fonds des Maladies Professionnelles* [1989] ECR 4407.

⁴⁶ MADURO, Miguel Poiães; FRADA, António; PIERDOMINICI, Leonardo, “*A Crisis Between Crisis: Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*” (E-Pública Revista Eletrónica de Direito Público, Vol. 4, nº 1, May, 2017) pp. 13

⁴⁷ Case 14/83 *Von Colson v Land Nordrhein-Westfalen*, [1984] ECR 1891

⁴⁸ CHALMERS, Damian, DAVIES, Gareth, MONTI, Giorgio, “*European Union Law*”, 2nd edition, 2010, Cambridge University Press, p. 300.

⁴⁹ Case C-207/01 *Altair Chimica SpA v ENEL Distribuzione SpA* [2003] ECR I-8875

applying to the adoption of a tax electric power consumption. Then concluded that in those circumstances, it must be said that Recommendation 81/924 was not capable of preventing a Member State from levying surcharges such as those at issue in the main proceedings. The ECJ reveals in this judgment that the Council Recommendation in question could, in general thesis, if it could be construed to apply to the adoption of taxes on electricity and yet be a Recommendation, have the effect of preventing a Member State to charge certain supplements like those which were involved in the proceedings. In this sense, the recommendation would have legal effects, if they were not considered legally binding for the Member State, they would be very close, to it, as the reasoning of the Court clearly opens the door to an *a contrario* interpretation, according to which, if the Recommendation could be interpreted in the sense that it applied also to situations involving the introduction of taxes on electricity consumption, then, notwithstanding being a recommendation, it would prevent a Member State from charging supplements like those involved in the proceedings at hand.

In practice, the result was that the Member State would be prevented, according to EU Law, to act in violation of the recommendation. In essence, the Court's reasoning relies much more on the interpretation of the content of the Recommendation in order to realize its substantive scope of application, than on the rather formal element that what it had at hand to interpret was a recommendation, non-binding according to the black-letter of article 288 TFEU.⁵⁰

It results from the jurisprudence of the European Court of Justice that recommendations, even if they are not considered legally they may produce legal effects, and, notably, an obligation to interpret national law in light of such recommendations.⁵¹

Therefore, if to enforce means to compel observance of or obedience to, enforceable means capable of being enforced. A right or obligation is enforceable if a party obligated to an act can be forced or ordered to comply with the legal process.

⁵⁰ MADURO, Miguel Poiars; FRADA, António; PIERDOMINICI, Leonardo, "A Crisis Between Crisis; Placing the Portuguese Constitutional Jurisprudence of Crisis in Context" (E-Pública Revista Eletrónica de Direito Público, Vol. 4, nº 1, May, 2017) pp. 22

⁵¹ Idem. pp. 23

In the case of the EDP, by setting that when Member States draft budgetary plans they should be consistent with and have to take into account the Recommendations issued under the EDP context, and that these legal acts of the Council have to be met, otherwise sanctions will be brought against the Member State, it is legitimate to consider that Recommendations have legal enforceability for Member States to whom they are addressed, therefore recommendations will not have a legal binding force by itself, but that such legal binding force results from the content of a rule mandating compliance with such recommendations⁵²

When EMU Treaty Provisions and SGP Regulations provide that national budgets have to be coherent with the Recommendations adopted in the context of the SGP and that Member States must put in practice and comply with such recommendations, it is appropriate to consider that we are in the face of Recommendations that, by virtue of those other rules, legally bind member States to whom they are addressed as it triggers the operation of the sanction mechanisms alluded in article 126(11) TFEU and the proceedings to be followed for the adoption of those sanctions detailed in articles 5, 6 and 7 of Regulation 1467/97 as well as, additionally, in articles 4, 5, 6, and 7 of Regulation 1173/2011.

In other words, Council Recommendations adopted in the context of a EDP, are EU legal acts that, not only produce legal effects for the Member States to whom they are addressed, but also might be rightly regarded as effectively or 'de facto' binding those Member States, since non-compliance with those recommendations involves an actual and concrete risk for such Member States of becoming subject to significant sanctions.

Of course, the specific normative force of some recommendations may still raise some doubts and difficulties as there might be recommendations that have a more general character, setting forth deficit targets and objectives but no specific measures to achieve them. The legal binding character of such recommendations cannot, in any case, be excluded. Much to the contrary, the question must be referred to the ECJ.⁵³

⁵² *Idem.*

⁵³ *Idem.* pp. 24

CHAPTER VII

“The End”

There is therefore a double enforceability regarding Council's country-specific Recommendations under an Excessive Deficit Procedure.

On one side, the failure to comply with Council's Recommendations by the Member State to whom they are addressed within a EDP results in the implementation of sanction mechanisms provided for in Article 126, paragraph 11 of the TFEU, with the following procedures in the adoption of these detailed sanctions in articles 5, 6 and 7 of Regulation No 1467/97, as well as additionally in Regulation No 1173/2011. Given this procedural control framework, quasi-automatic, in particular by the Commission (and Council), the fulfilment of the established deficit targets and the adoption of the recommended measures for this purpose, these recommendations, particularly in the context of a EDP, may also not be regarded as devoid of effects on the Member States to whom they are addressed. This entails a quasi-automatic mechanism of monitoring compliance with the Recommendations of the Commission, in particular, because of the inverse vote mechanism on Article 5, paragraph 2 of Regulation 1173/2011. This provides that a decision recommended by the Commission to impose the constitution of unpaid deposit to the defaulting member State to obligations under the SGP is considered "as adopted by the Council", "unless it [Council] decides by qualified majority to reject the Commission's Recommendation within 10 days of its adoption by the Commission.

Also, Council's country-specific Recommendations under an Excessive Deficit Procedure should even be considered endowed with a binding character from, as Recommendations can be considered legal acts of the Union with a special or enhanced legal significance, different from the majority of the Recommendations from other EU institutions or bodies due to the ECJ stand on Recommendations as seen above. Also the outset that reference is made in Regulation No 1467/97 (in its current version) and by Regulation No 473/2013, Regulations as legislative legal acts of the Union have clear legal force and binding on the Member States, as is clear from Article 288 TFEU which

establishes that "*A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.*". Therefore Recommendations act as to complete in substance EU Regulations that are uniquely endowed with binding character.

In light of what was said it clearly results from the legal framework of the EMU that Recommendations under the EDP impose duties to act and also provide for penalties in case of non-compliance, providing for a clear understanding that these Recommendations have binding force, making them undoubtedly enforceable by national courts under the principle of interpretation national law in accordance with European Union Law.

BIBLIOGRAPHY

- **AZEVEDO**, Maria Eduarda, “*O Duplo Impulso para a Refundação da Europa – da Convenção Europeia ao Novo Modelo de Governação Económica*”, in *Estudos Jurídicos e Económicos em Homenagem ao Prof. Doutor António de Sousa Franco*, vol III, Coimbra Editora, 2006;
- **CHALMERS**, Damian, “*The European Redistributive State and a European Law of Struggle*” (*European Law Journal*, Vol. 18, Issue 5, September, 2012);
- **CHALMERS**, Damian, **DAVIES**, Gareth, **MONTI**, Georgio, “*European Union Law*”, 2nd edition, 2010, Cambridge University Press;
- **CHAMPEAU**, Serge; **CLOSA**, Carlos; **INNERARITY**, Daniel; **POIARES PESSOA MADURO**, Luis Miguel, “*The future of Europe : democracy, legitimacy and justice after the Euro crisis*” Rowman & Littlefield International, 2014;
- Committee for the Study of Economic and Monetary Union, “*Report on economic and monetary union in the European community*” 1989;
- Communication From The Commission To The European Parliament, The Council, The European Central Bank, The Economic And Social Committee, The Committee Of The Regions And The European Investment Bank from January 13th 2015;
- **CRAIG**, Paul, **DE BÚRCA**, Gráinne, “*EU LAW, Text, Cases and Materials*” Oxford University Press 6th edn, 2015;
- **CRAIG**, Paul, “*Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications*” Oxford Legal Studies Research Paper, 2014;
- Economic and Financial Committee “*Specifications on the implementation of the Stability and Growth Pact and Guidelines on the format and content of Stability and Convergence Programmes*” July, 2016;
- Economic and Financial Affairs “*2546th Meeting of the Council of the European Union*”, Brussels 25 Nov. 2003;

- Economic governance review Report on the application of Regulations (EU) n° 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013;
- European Commission Communication, “*Economic governance review Report on the application of Regulations (EU) n° 1173/2011, 1174/2011, 1175/2011, 1176/2011, 1177/2011, 472/2013 and 473/2013*” (COM(2014) 905) Brussels, 2014;
- European Commission MEMO/11/14 “*European semester: a new architecture for the new EU Economic governance – Q&A*”;
- European Commission *MEMO/13/318*;
- European Commission “*Six-pack? Two-pack? Fiscal compact? A short guide to the new EU fiscal governance*”2012;
- European commission, “*Vade mecum on the Stability and Growth Pact*”, Occasional Papers 151, May, 2013;
- European Commission Report “*One Currency for One Europe, The Road to the Euro*” Belgium, 2007;
- EU Economic governance: The Commission delivers a comprehensive package of legislative measures”, IP/10/1199, 29 September 2010;
- **FEIO**, Diogo Nuno de Gouveia Torres, “*Uma história Interminável: Entre a União Europeia e a União Económica e Monetária: o Governo, o Orçamento, e os Impostos*” Tese de Doutoramento apresentada na Faculdade de Direito da Universidade do Porto, 2016;
- **GOUCHA SOARES**, António, “O que nasce torto... breve reflexão sobre a UEM” in 25 Anos na União Europeia : 125 reflexões / Eduardo Paz Ferreira, coord. ; Instituto Europeu da Faculdade de Direito de Lisboa, Almedina, Coimbra, 2011;
- **GRAUWE**, Paul de, “*Economics of Monetary Union*” Oxford University Press, 6th edn, 2005;
- **HARTLEY**, Trevor “*The Foundations of European Union Law*” Oxford, Eighth Edition, 2014;

- **HINAREJOS**, Alicia “*Economic and Monetary Union*” in “European Union Law” Oxford Univeristy Press, 2014;
- **MADURO**, Miguel Poiares; **FRADA**, António; **PIERDOMINICI**, Leonardo, “*A Crisis Between Crisis; Placing the Portuguese Constitutional Jurisprudence of Crisis in Context*” E-Pública Revista Eletrónica de Direito Público, Vol. 4, nº 1, May, 2017;
- **NOTA TÉCNICA** de Desenvolvimento Jurídico-Europeu e Jurídico-Constitucional das Exposições de motivos das propostas de lei do governo que deram origem a um conjunto de normas constantes do Decreto n.º 262/XII e Decreto n.º 264/XII;
- **PAIS**, Sofia Oliveira, “Estudos de Direito da União Europeia” Almedina, 4ª Edição, 2017;
- **PAIS**, Sofia Oliveira, **FONTAINE CAMPOS**, Manuel, **FRAGOSO MARTINS**, Patrícia, “Princípios Fundamentais de Direito da União Europeia
- Uma Abordagem Jurisprudencial ” Almedina, 3ª Edição, 2018;
- **PRAUSELLO**, Franco, “*The Theory of Endogenous Optimum Currency Areas: A Critical Note*” in “Economica Internazionale”, vol. 65, n.º 1, 2012;
- **TORRES**, Francisco, “*The Economic and Political Debate on EMU: Europe and Portugal*” in “Temas de Integração”, n.º 4, 1997;
- “Report to the Council and the commission on the realization by stages of the Economic and Monetary Union in the Community” Luxemburg, 1970;
- **SADELEER**, Nicolas de, “*The New Architecture of the European Economic governance: A Leviathan or a flat-footed Colossus?*” in Maastricht Journal of European and Comparative Law, Vol. 19, n.º3, 2012;
- **SHEVCHENKO**, Taras “*European Monetary Union: Theory, History and Consequences*” Kyiv National University, 2009;
- Summaries of EU legislation “*Towards a single currency: a brief history of EMU*” 2011;