



## COMPLETING EUROPE'S ECONOMIC AND MONETARY UNION

The Commission's Contribution to the Leaders' Agenda

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### THE ROLE OF THE 'FLEXIBILITY CLAUSE': ARTICLE 352

The so-called 'flexibility clause' (see Box 1) set out in Article 352 of the Treaty on the Functioning of the European Union (TFEU)<sup>1</sup> has played a pivotal role in the history of the Economic and Monetary Union.

#### The Economic and Monetary Union: A brief legal history

1957	▶ Signing of the Rome Treaties, establishing a European Economic Community based on a Single Market	1988	▶ Heads of State or Government set up a committee to study Economic and Monetary Union under the chairmanship of the President of the European Commission, Jacques Delors
1969	▶ Heads of State or Government define the Economic and Monetary Union as an objective of European integration	1989	▶ The Delors Report on the Economic and Monetary Union proposes to strengthen the introduction of Economic and Monetary Union in three stages
1970	▶ Werner Group – a working group chaired by the Prime Minister of Luxembourg Pierre Werner – submits its final report envisaging the achievement of full Economic and Monetary Union in ten years, through progressive steps	1990	▶ Heads of State or Government decide to launch first stage of Economic and Monetary Union with full liberalisation of capital movements by 1 July 1990
1971	▶ The (then six) Member States approve the gradual introduction of the Economic and Monetary Union, including narrower margins of currency fluctuation	1992	▶ Maastricht Treaty provides for the gradual introduction of the Euro as the single currency of the Member States and the implementation of a common monetary policy through the European Central Bank
1972	▶ Creation of the 'snake in the tunnel' mechanism by the six Member States: a mechanism to manage the floating of currencies against the dollar	1999	▶ Launching of the Euro and transfer of exclusive competence over monetary policy to the European Central Bank
1979	▶ Creation of the European Monetary System based on the concept of fixed, but adjustable exchange rates against the European Currency Unit	2002	▶ The Euro comes into circulation

The evolution of the legal history of the Economic and Monetary Union and the use of Article 352 TFEU go hand in hand (Table 1).

The management of the early balance of payments facilities, the establishment of the European Monetary Cooperation Fund, as well as the European Currency Unit were all based on the flexibility clause.<sup>2</sup>

Even if the history of the European Stability Mechanism originates from an international treaty among the members of the euro area, its creation is linked to Article 352 TFEU.

This became evident when the European Court of Justice ruled on the legality of the European Stability Mechanism in the famous 'Pringle' case. It considered the possibility that

Article 352 TFEU could give the EU the necessary powers to establish a permanent mechanism allowing for financial support to euro area members under pressure – even if the use of the flexibility clause rather than an international treaty among the Member States was not deemed to be compulsory by the Court.<sup>3</sup>

Nonetheless, the current Article 352 TFEU was already used for the creation of the balance of payments facility: a loan facility set up to provide assistance to Member States experiencing balance of payment difficulties. This use made of Article 352 TFEU in the context of taking the first steps of the Economic and Monetary Union indicates that there was already a common understanding that Article 352 TFEU could be used in order to set up comparable instruments.

## BOX 1: WHAT IS THE 'FLEXIBILITY CLAUSE'?

The flexibility clause was included by the fathers of the Treaties in recognition of the fact that it would be impossible to provide for all contingencies that may arise throughout the integration process. It allows the EU to act in areas where EU competences have not been explicitly granted in the Treaties but are necessary to the attainment of the objectives set out in the Treaty. It thus represents a means of adapting to new challenges.

The former flexibility clause – found in ex Article 235 of the Treaty establishing the European Economic Community (EEC Treaty) and ex Article 308 of the Treaty establishing

the European Community (EC Treaty) – was retained in the Treaty of Lisbon in Article 352 TFEU despite the broadening of competences of the EU.

It requires unanimity in the Council and, since the Lisbon reform, also the consent of the European Parliament. The Commission is obliged to draw the attention of national Parliaments to the use of this legal basis. The ex-ante review procedure for subsidiarity applies to all legislative proposals.

The application of the clause has been particularly visible in the history of European Monetary System.

A similar reasoning could therefore be applied in taking the Economic and Monetary Union to its next logical step: a European Monetary Fund within the framework of the Treaties, achieved by transposing the current European Stability Mechanism into EU law.

The integration of the European Stability Mechanism into the Union framework can thus be done through a Regulation based on Article 352 TFEU. In order to ensure a seamless continuation of activities, Member States would agree that the capital of the European Stability Mechanism is attached to the European Monetary Fund – through individual pledges or a simplified multilateral act. Nevertheless, in order to rely on Article 352 TFEU several conditions must be met.

As the European Court of Justice already found in its 'Pringle' judgment,<sup>4</sup> there is no specific legal basis in the Treaties for the establishment of a mechanism such as the European Stability Mechanism. Moreover, the Court established that the European Stability Mechanism belonged to economic policy.<sup>5</sup> As this is, according to Article 3 (4) TEU, an objective of the European Union, the creation of an European Monetary Fund based on the European Stability Mechanism is within the framework of the policies defined in the Treaties. The necessity of having a body like the European Stability Mechanism is based on factual elements and confirmed by Article 136(3) TFEU, as well as by the second recital of the European Stability Mechanism Treaty. Both refer to the current European Stability Mechanism as 'to be activated if **indispensable** to safeguard the stability of the euro area as a whole'.

## BOX 2: WHAT ARTICLE 352 TFEU SAYS

1. If action by the Union should **prove necessary, within the framework of the policies defined in the Treaties**, to attain one of the **objectives set out in the Treaties**, and the Treaties have **not provided the necessary powers**, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.
2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission **shall draw national Parliaments' attention** to proposals based on this Article.
3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

A Regulation based on Article 352 TFEU does not represent a circumvention of the procedure for the revision of those Treaties. As underpinned by Art. 136(3) TFEU, the European Stability Mechanism's integration into EU law does not widen the scope of the Union's powers, but rather fills a gap in its specific powers without widening its aims, functions and activities.

With regard to procedure, Article 352 TFEU requires a Commission proposal which will be dealt with in accordance with a special legislative procedure: a unanimous vote in the Council (with all the Member States, in principle including those whose currency is not the euro), and the consent of the European Parliament. The second paragraph of Article 352 TFEU would also require the Commission to draw the attention of national Parliaments to such a proposal and the ex-ante subsidiarity review procedure (Protocol No 2 to the Treaties) would apply.

### BOX 3: ARTICLE 352 TFEU AND TREATY AMENDMENT

The European Court of Justice has made clear that Article 352 TFEU, 'being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of [Union] powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the [Union]. Article [352 TFEU] cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose'.<sup>6</sup> This case law is recalled in declaration No 42 to the Treaties.

Unlike an amendment of the European Stability Mechanism Treaty or a Treaty revision, the use of Article 352 TFEU does not require ratification by all national Parliaments. Notwithstanding, under some Member States' constitutional laws,<sup>7</sup> a positive vote by its representative in the Council is subject to prior parliamentary approval. In that respect, for those Member States, the national steps required to amend the European Stability Mechanism Treaty could be as demanding as those imposed on the use of Article 352 TFEU in general. For others, national ratification is not compulsory.

### BOX 4: THE ROLE OF NATIONAL PARLIAMENTS IN ARTICLE 352 TFEU

The German Constitutional Court held in its Lisbon Judgment that the formal agreement of the German Bundestag and Bundesrat was required in order for the German representative in the Council to express its approval of an act to be adopted on the basis of Article 352 TFEU.<sup>8</sup> This would also be the case for the UK under the European Union Act of 2011.

Regarding Article 352 TFEU, the Polish Cooperation Act also foresees specific guarantees, as was considered by the Polish Constitutional Court in its Lisbon Judgment.<sup>9</sup>

By contrast, the Czech Constitutional Court and the French Constitutional Court have interpreted the flexibility clause as covered by the original ratification instrument.<sup>10</sup> Other Member States such as Denmark, Sweden, Finland, Austria or Spain have provisions – in general and not specifically for Article 352 TFEU – enabling their parliaments to require ministers to discuss their positions before Council meetings.<sup>11</sup>

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1. The former equivalents of Article 352 TFEU are found in Article 235 of the Treaty on the European Economic Community (EEC Treaty) and Article 308 of the Treaty establishing the European Community (EC Treaty).
  2. The actual article used in this instance was the predecessor of Article 352 TFEU i.e. Article 235 of the Treaty on the European Economic Community.
  3. Case C-370/12, Pringle, EU:C:2012:756, paragraph 67.
  4. *Ibid.*, paragraph 64.
  5. *Ibid.*, paragraph 60.
  6. Opinion 2/94, of 28 March 1996, EU:C:1996:140, paragraph 30.
  7. This is the situation in Germany. See the judgment of the German Constitutional Court of 30 June 2009 on the Lisbon Treaty, DE:BVerfG:2009:es20090630.2bve000208, paragraph 417: "In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law". This has been codified in Article 8 of the *Integrationsverantwortungsgesetz* of 22 September 2009. For such cases, the German Constitution requires a two third majority in both the Bundestag and the Bundesrat.
  8. See the judgment of the German Constitutional Court of 30 June 2009 on the Lisbon Treaty, DE:BVerfG:2009:es20090630.2bve000208, paragraph 417: "In so far as the flexibility clause under Article 352 TFEU is used, this always requires a law within the meaning of Article 23.1 second sentence of the Basic Law". This has been codified in Article 8 of the *Integrationsverantwortungsgesetz* of 22 September 2009.
  9. According to Articles 7 and 11 of the Polish Cooperation Act the Council of Ministers must submit the draft acts to the Sejm and the Senate before the position is adopted and there is a duty of consultation with the appropriate authority in the Sejm and the Senate. See the judgement of 24 November 2010 – Ref. No. K 32/09, English version available in 'Selected Rulings of the Polish Constitutional Tribunal Concerning the Law of the European Union (2003-2014)', Biuro Trybunału Konstytucyjnego, Warsaw, 2014, at 237 (available at [http://trybunal.gov.pl/uploads/media/SiM\\_LI\\_EN\\_calosc.pdf](http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf)).
  10. P. Kiiver, 'German Participation in EU Decision-Making after the Lisbon Case: A Comparative View on Domestic Parliamentary Clearance Procedures', (2009) 10 German Law Journal, 1287-1296, at 1296.
  11. *Ibid.*, at 1295; Article 8 of the Spanish Law 8/1994, of 19 May, regulating the Mixed Committee for the European Union, as added by Article 2 of Law 38/2010 of 20 December.

TABLE 1: ARTICLE 352 TFEU AND THE MILESTONES IN THE HISTORY OF EMU

	Milestones	Legal bases
1971	The Council adopted Decision 71/142/EEC by which it activated the possibility of mutual assistance in the form of bilateral loans for crisis situations concerning balance of payments.	Ex Art 108 EEC Treaty (current Art 142 TFEU)
1973	Council Regulation (EEC) No 907/73 established a <b>European Monetary Cooperation Fund</b> to support the functioning of the ‘snake’ mechanism. Member States would deposit reserves to provide a pool of resources to stabilise exchange rates and finance balance of payments support. The value of the unit of account was determined on the basis of the value of a certain weight of fine gold. The European Monetary Cooperation Fund ceased operations with the introduction of the euro in 1999.	Ex Article 235 EEC Treaty (current Article 352 TFEU)
1975	The oil crisis of 1973 and the balance of payment difficulties faced by several Member States made the credit volume insufficient and the procedure for bilateral assistance too time consuming to constitute an effective remedy for crisis situations. The Council thus adopted <b>Regulation(EEC) No 397/75 concerning Community loans</b> , based on the flexibility clause. As a result, the Community was authorised to raise funds of up to \$3 billion from third countries, banks, or directly on capital markets by issuing loans with a duration of at least five years, and making them available to the Member States. The role of the Community was in that case limited to organising the resources and conducting negotiations but the guarantee was still with the Member States and not with the Community budget.	Ex Art 235 EEC Treaty (current Art 352 TFEU)
1978	<b>Council Regulation (EEC) No 3181/78 relating to the European Monetary System.</b> By this regulation the European Monetary Cooperation Fund was empowered to receive monetary reserves from monetary authorities of the Member States and issue ECUs against such assets. The basket currency known as ECU had previously been laid out in Council Regulation (EEC) No 3180/78 changing the value of the unit of account used by the European Monetary Cooperation Fund on the basis of the provisions laid down in Council Regulation (EEC) No 907/73. Originally, the <b>European Council Resolution of 5 December 1978 on the establishment of the European Monetary System</b> and related matters already referred to the ECU as a central element of the European Monetary System.	Ex Article 235 EEC Treaty (current Article 352 TFEU)
1981	<b>Council Regulation (EEC) No 682/81</b> adjusting the Community loan mechanism designed to support the balance of payments of Member States reformed the facilities created in 1975. Through this Regulation the Commission was now entitled to conclude the loans on behalf of the EEC, whereby the Community itself could be held liable to the lenders.	Ex Article 235 EEC Treaty (current Article 352 TFEU)
1988	The Council opted for merging the mutual assistance facility existing in 1971 with the Community loan system set up in 1975 through the adoption of <b>Regulation (EEC) No 1969/88 establishing a single facility providing medium-term financial assistance for Member States balances’ of payments.</b> With a budget of up to ECU16 billion, the Council was able to provide balance of payments loans to Member States.	Ex Article 235 EEC Treaty (current Article 352 TFEU) Ex Article 108 EEC Treaty (current Article 143 TFEU)

Milestones	Legal bases	
2002	The facility established in 1988 was reformed by Council Regulation (EC) No 332/2002 establishing a facility providing medium-term financial assistance for Member States' balances of payments. With this Regulation, which is still in force and applicable to countries whose currency is not the euro, the Council completed the setup of a Community – now EU – borrowing scheme. This facility involved initially a volume of €12 billion, which then was raised in 2008 to €25 billion and to €50 billion in 2009.	Ex Article 308 EC Treaty (current Article 352 TFEU)
2012	The Commission issued a proposal to bring financial assistance to non-euro Member States in line with the new assistance tools created in the context of the financial crises such as the European Financial Stability Facility (EFSF), the European Financial Stability Mechanism (EFSM) and the European Stability Mechanism (ESM). This would allow for a reinforcement of economic governance and the strengthening of economic and budgetary coordination, as well as increase the efficiency of decision-making through a simplification of the procedure for its activation. This proposal has however not yet been adopted by the legislator.	Article 352 TFEU
2012	The Court in the 'Pringle' case considered the possibility that Article 352 TFEU could confer sufficient powers to the European Union to adopt a system comparable to the ESM.	