

## NOTES

### GERMANY AND THE U.S. PRESENT: A ROADMAP FOR PROTECTING STATE SOVEREIGNTY IN THE EUROPEAN STABILITY MECHANISM

*Matthew Gregory*\*

#### TABLE OF CONTENTS

|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION .....  | 134 |
| II.  | BACKGROUND .....  | 136 |
|      | <i>A. The BVerfG Decides ESM Respects Statehood</i> .....     | 138 |
|      | <i>B. Sovereignty and Guns: An American Perspective</i> ..... | 143 |
| III. | ANALYSIS .....  | 147 |
|      | <i>A. A Synthesis of the Two Courts' Views</i> .....          | 148 |
|      | <i>B. Maintaining Autonomy</i> .....                          | 150 |
|      | <i>C. Limiting Liability</i> .....                            | 151 |
|      | <i>D. Exit Strategy</i> .....                                 | 152 |
| IV.  | CONCLUSION .....  | 155 |

---

\* J.D., University of Georgia, 2015; B.B.A., University of Georgia, 2010.

## I. INTRODUCTION

On September 29, 2008, the United States stock market lost roughly \$1.2 trillion in market value after the House of Representatives rejected the federal government's proposed bailout plan.<sup>1</sup> A recession that started with a credit crunch in 2007<sup>2</sup> was causing stocks to plummet on the U.S. stock market,<sup>3</sup> and soon, Europe would be feeling it in full force as well.<sup>4</sup> Three years later, the recession's effects had gone global, leaving the European Union (EU) reeling and in desperate need of a bailout.<sup>5</sup>

Europe's economic crisis began with concerns over sovereign debt—the amount of debt that a country has on its books—specifically in Greece.<sup>6</sup> Ireland<sup>7</sup> and Portugal<sup>8</sup> would soon face the same debt fears. The European Council of March 24–25, 2011, recognizing the financial fragility of the Eurozone, adopted the European Stability Mechanism (ESM) as part of a plan designed to help alleviate these concerns and prevent future crises.<sup>9</sup>

---

<sup>1</sup> See Alexandra Twin, *Stocks Crushed*, CNN MONEY (Sept. 29, 2008, 9:10 PM), [http://money.cnn.com/2008/09/29/markets/markets\\_newyork/index.htm](http://money.cnn.com/2008/09/29/markets/markets_newyork/index.htm) (detailing the panic and turmoil surrounding the stock market's nose dive in September 2008).

<sup>2</sup> See *Global Recession Timeline*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8242825.stm> (chronicling the events of the global recession).

<sup>3</sup> Barbara Hagenbaugh, Adam Shell & Sue Kirchhoff, *Official Recession News Hammers Dow*, USA TODAY (Dec. 1, 2008, 10:17 PM), [http://www.usatoday.com/money/economy/2008-12-01-recession-pummels-dow\\_N.htm](http://www.usatoday.com/money/economy/2008-12-01-recession-pummels-dow_N.htm). For a more in-depth statistical analysis of the 2007–2009 recession, see *The Recession of 2007–2009*, U.S. Bureau of Labor and Statistics, Feb. 2012, [http://www.bls.gov/spotlight/2012/recession/pdf/recession\\_bls\\_spotlight.pdf](http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf).

<sup>4</sup> Carter Dougherty, *Europe Catching Up Quickly With U.S. Recession*, N.Y. TIMES (Jan. 7, 2009), <http://www.nytimes.com/2009/01/07/business/worldbusiness/07iht-euecon.4.19167210.html>.

<sup>5</sup> See Brian Blackstone & William Horobin, *Fresh Worries of Recession Grip Europe*, WALL ST. J. (Oct. 25, 2011), <http://online.wsj.com/article/SB10001424052970204644504576650410991502504.html> (detailing the worsening outlook in Europe at the time).

<sup>6</sup> See *Europe at the Brink — A WSJ Documentary*, WALL ST. J. (Dec. 30, 2011, 8:58:55 PM), <http://live.wsj.com/video/europe-at-the-brink---a-wsj-documentary/AF34C290-FBD3-44A9-AFA9-10E2AB7A8BFA.html#!AF34C290-FBD3-44A9-AFA9-10E2AB7A8BFA> (discussing the roots of the European recession); see also *European Debt Crisis*, N.Y. TIMES (last visited Sept. 26, 2012), [http://topics.nytimes.com/top/reference/timestopics/subjects/e/european\\_sovereign\\_debt\\_crisis/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/e/european_sovereign_debt_crisis/index.html) (detailing the events of the European Debt Crisis).

<sup>7</sup> Larry Elliot & Jill Treanor, *Ireland Forced Into New £21bn Bailout By Debt Crisis*, GUARDIAN (Mar. 31, 2011, 16:17 EDT), <http://www.guardian.co.uk/world/2011/mar/31/ireland-new-bailout-euro-crisis>.

<sup>8</sup> James G. Neuger & Anabela Reis, *Portugal's \$111 Billion Bailout Approved as EU Prods Greece to Sell Assets*, BLOOMBERG (May 17, 2011, 1:45 AM), <http://www.bloomberg.com/news/2011-05-16/portugal-bailout-approved-as-eu-prods-greece-to-sell-assets.html>.

<sup>9</sup> See *The European Stability Mechanism*, ECB MONTHLY BULL. 71, 71, July 2011, available at [http://www.ecb.int/pub/pdf/other/art2\\_mb201107en\\_pp71-84en.pdf](http://www.ecb.int/pub/pdf/other/art2_mb201107en_pp71-84en.pdf) (providing a

With a lending capacity of €500 billion,<sup>10</sup> the ESM is designed to be the permanent stability instrument for the EU.<sup>11</sup>

The EU originally anticipated that the ESM would go into effect on July 1, 2013, following member states' approval of amendments to the Treaty on the Functioning of the European Union and the Eurozone countries sign a new ESM treaty.<sup>12</sup> However, soon after the German Parliament passed the measure, injunctions filed with Germany's federal constitutional court, the *Bundesverfassungsgericht* (BVerfG),<sup>13</sup> prevented the president from signing the package. The BVerfG heard these complaints on July 10, 2012.<sup>14</sup>

With the European economies still hurting,<sup>15</sup> the BVerfG declared that the German President had the authority to ratify the ESM.<sup>16</sup> The court's decision cleared the way for the ESM to take effect soon and begin to stabilize the Euro.<sup>17</sup> However, the BVerfG was quick to limit the amount of debt commitment that could be placed on Germany without its approval.<sup>18</sup>

This Note will address how the EU's primary economic decision making body, the European Central Bank (ECB), should tailor its future economic and monetary policies to alleviate the sovereignty concerns of its member states, particular those with greater financial strength like Germany. The future strength of the EU may be at risk if it fails to address these concerns because national governments' primary concerns are the interests their respective citizens, not the broader EU community.

In Part II, this Note will discuss sovereignty and its historical importance in shaping today's world. It will then examine the sovereignty and federalist principles that German and United States courts explored in the BVerfG's

---

comprehensive explanation of the background and purpose of the ESM).

<sup>10</sup> *Id.* at 75.

<sup>11</sup> Treaty Establishing the European Stability Mechanism, Preamble, ¶ 1, Feb. 2, 2012, <http://www.european-council.europa.eu/media/5823E11/05-tesm2.en12.pdf>.

<sup>12</sup> See *European Stability Mechanism*, *supra* note 9, at 71.

<sup>13</sup> *German Court Could Issue Injunction Against ESM*, SPIEGELONLINE (July 2, 2012), <http://www.spiegel.de/international/germany/german-constitutional-court-to-consider-anti-esm-complaints-on-july-10-a-842120.html>.

<sup>14</sup> *German Court Hears Pleas Against Eurozone Bailout Fund*, BBC NEWS (July 10, 2012, 12:55 PM), <http://www.bbc.co.uk/news/world-europe-18780948>.

<sup>15</sup> Laurent Belsie, *For These Four Nations, 2012 Is Worse Than the Great Recession*, CNBC (Sept. 17, 2012, 1:00 AM), <http://www.cnbc.com/id/49056918>.

<sup>16</sup> *German Court Backs Eurozone's ESM Bailout Fund*, BBC NEWS (Sept. 12, 2012, 8:31 AM), <http://www.bbc.co.uk/news/world-europe-19567867>.

<sup>17</sup> *Id.*

<sup>18</sup> *Extracts from the Federal Constitutional Court of 12 September 2012*, 2 BvR 1390/12, available at [http://www.bverfg.de/en/decisions/rs20120912\\_2bvr139012en.html](http://www.bverfg.de/en/decisions/rs20120912_2bvr139012en.html).

recent ruling on the ESM and the U.S. Supreme Court's decision in *Printz v. United States*.

In Part III, this Note will draw from the aforementioned cases the sovereignty obstacles relevant to the EU and posit a manner in which the ECB can navigate them going forward. This section will include a synthesis comparing and contrasting the courts' opinions; it will specifically address the prevailing concerns and suggest a manner in which to alleviate them.

## II. BACKGROUND

To fully appreciate the struggle the EU faces, one must first understand the core issue of sovereignty and its historical importance. Sovereignty refers to an independent nation or state's absolute political authority.<sup>19</sup> In the United States, the Founding Fathers paid great attention to this principle in establishing its system of federalism, codifying it in the Articles of Confederation and Perpetual Union<sup>20</sup> and again in the U.S. Constitution via the Tenth Amendment in the Bill of Rights.<sup>21</sup> Other countries such as Australia,<sup>22</sup> Switzerland,<sup>23</sup> Austria,<sup>24</sup> and Germany,<sup>25</sup> also have provisions in their respective federal constitutions protecting the sovereignty of their states. This same desire to maintain autonomy is also a natural and important concern when nations collaborate and sign treaties.

In the Treaty on European Union (Maastricht Treaty), signed in 1992, concessions were made from the outset that protected the rights of certain nations and their laws.<sup>26</sup> As the EU expanded, new treaties were agreed to in order to help the EU deal with problems that arose. One such treaty, the Treaty of Lisbon, was signed in December 2007 to replace a previously

---

<sup>19</sup> Moore v. Smaw, 17 Cal. 199, 218 (1861).

<sup>20</sup> ARTICLES OF CONFEDERATION OF 1781, art. II.

<sup>21</sup> U.S. CONST. amend. X.

<sup>22</sup> AUSTRALIAN CONST. s 107.

<sup>23</sup> CONSTITUTION FÉDÉRALE [CST][CONSTITUTION] Apr. 18, 1999, RO 101, art. 3 (Switz.).

<sup>24</sup> BUNDES-VERFASSUNGSGESETZ [B-VG][CONSTITUTION] BGBl No. 1/1930, art. 16, ¶ 1 (Austria).

<sup>25</sup> GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ][GG][BASIC LAW], May 23, 1949, BGBl. 1, art. 70, para. 1 (Ger.).

<sup>26</sup> See Maastricht Treaty, Protocol on the Statute of the European System of Central Banks and of the European Central Bank, art. 43, § 43.2, July 29, 1992, 1992 O.J. (C 191), available at <http://eur-lex.europa.eu/en/treaties/dat/11992M/htm/11992M.html#0087000012> ("The central banks of Member States with a derogation as specified in Article 109k(1) of this Treaty shall retain their powers in the field of monetary policy according to national law."); see also Maastricht Treaty, Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, ¶ 4 ("The United Kingdom shall retain its powers in the field of monetary policy according to national law.").

proposed European Constitution, which the French and Dutch governments opposed.<sup>27</sup> The new treaty replaced Article 3 of the Treaty on European Union,<sup>28</sup> which dealt with the powers conferred on both the EU and its member states.<sup>29</sup> The new version included the provision, “[c]ompetences not conferred upon the Union in the Treaties remain with the Member States.”<sup>30</sup> It should be noted that, like in the case of the ESM decision this Note analyzes, the BVerfG ruled on the constitutionality of the Treaty of Lisbon before it was ratified.<sup>31</sup> The chief concern in that case, like the ESM case, was maintaining national sovereignty.<sup>32</sup> There, the BVerfG found the Treaty did not violate Basic Law,<sup>33</sup> but ruled that an accompanying law was in violation due to “the *Bundestag*<sup>34</sup> and the *Bundesrat*<sup>35</sup> [not being] accorded sufficient rights of participation in European lawmaking procedures and treaty amendment procedures.”<sup>36</sup> In permitting the Treaty, the court laid a clear precedent for the future, saying that it will strike down anything running afoul of the “inviolable core content of the constitutional identity of the Basic Law and Article 23(1), Third Sentence, in conjunction with Article 79(3) of the Basic Law . . . .”<sup>37</sup>

---

<sup>27</sup> See *EU Leaders Sign Landmark Treaty*, BBC NEWS, <http://news.bbc.co.uk/2/hi/europe/7141651.stm> (last updated Dec. 13, 2007, 16:17 GMT) (reporting on the signing of the Lisbon Treaty).

<sup>28</sup> Treaty of Lisbon, art. 1, § 5, Dec. 17, 2007, 2007 O.J. (C. 306/12), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0010:0041:EN:PDF>.

<sup>29</sup> See Maastricht Treaty, *supra* note 26, art. G.

<sup>30</sup> See Treaty of Lisbon, *supra* note 28, art. 3(a).

<sup>31</sup> Press Release, Bundesverfassungsgericht, Act Approving the Treaty of Lisbon compatible with the Basic Law; accompanying law unconstitutional to the extent that legislative bodies have not been accorded sufficient rights of participation (June 30, 2009), available at <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg09-072en.html>. The BVerfG also heard arguments over the Maastricht Treaty. See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 12, 1993, BVERFGE 89, 155 (Ger.) (ruling the constitutionality of the Maastricht treaty). For a more detailed discussion of the general friction between the German Constitutional Court and European law, see Jared Curzan, Comment, *A Critical Linkage: The role of German Constitutional Law in the European Economic Crisis and the Future of the Eurozone*, 35 FORDHAM INT’L L.J. 1543, 1549–64 (2012).

<sup>32</sup> Bundesverfassungsgericht, *supra* note 31.

<sup>33</sup> The Basic Law is Germany’s constitution. For the entire text of the constitution, see GRUNDGESETZ, *supra* note 25.

<sup>34</sup> The *Bundestag* is the Parliament of the Federal Republic of Germany. For more information see the Bundestag’s website, [http://www.bundestag.de/htdocs\\_e/index.html](http://www.bundestag.de/htdocs_e/index.html).

<sup>35</sup> The Bundesrat is the constitutional body in Germany’s government that allows the Länder (states) to participate in federal decisions. For more information, see [http://www.bundesrat.de/nn\\_11004/EN/Home/homepage\\_\\_node.html?\\_\\_nnn=true](http://www.bundesrat.de/nn_11004/EN/Home/homepage__node.html?__nnn=true).

<sup>36</sup> BVerfGE, *supra* note 31.

<sup>37</sup> Paul Gallagher, *The Euro Crisis: Challenges to the ESM Treaty and the Fiscal Compact Treaty before the German Constitutional Court 2* (Inst. of Int’l & European Affairs, Working

In today's EU, the ideal of state sovereignty requires equal, if not greater, attention than in the past. The stakes are now much higher, given the global economic uncertainty, and countries simply cannot afford to be without a voice in policy making in this market. The ECB is seeing its arsenal of powers expand,<sup>38</sup> and thus will likely be responsible for much of the economic plans of the EU. It will also need to keep the principles of state autonomy in mind as it further carves out plans to pull Europe out of its financial crisis. That is precisely why Germany's highest court took a close look at the ESM treaty.<sup>39</sup> While the BVerfG's decision offers guidance for how to satisfy Germany's constitutional concerns, the ECB would also gain valuable insight into issues of state sovereignty by looking to U.S. case law. An analysis of *Printz v. United States*,<sup>40</sup> a gun control case dealing with states' rights, along with the BVerfG's decision will help illuminate for the ECB its member states' concerns. In Part II.A, this Note will delve into the German court's decision and the sovereignty issues presented. Part II.B will do the same for the U.S. Supreme Court's decision in *Printz*.

#### A. *The BVerfG Decides ESM Respects Statehood*

The BVerfG faced immense pressure from both the Chancellor and the German public when reviewing this case.<sup>41</sup> The entire world was watching and waiting;<sup>42</sup> some even believed the future of the EU rested with the

---

Paper No. 10, 2012) (internal quotation marks omitted), available at <http://www.iiea.com/blogsphere/challenges-to-the-esm-treaty-and-the-fiscal-compact-treaty-before-the-german-constitutional-court-by-paul-gallagher-sc-published> (quoting 2 BvE 2/08 at Guidelines, para. 4) (detailing the significance of the German Court's decision).

<sup>38</sup> Ian Traynor, *European Central Bank's Powers Grow but Can it Really Save the Eurozone?*, GUARDIAN (Sept. 11, 2012, 11:55 AM), <http://www.guardian.co.uk/business/2012/sep/11/european-central-bank-powers-grow> (listing the various roles the ECB will take in the future).

<sup>39</sup> *Extracts*, *supra* note 18.

<sup>40</sup> 521 U.S. 898 (1997).

<sup>41</sup> See Siobhan Dowling, *Euro Zone Holds Breath for German Court Decision*, GLOBAL POST (Sept. 11, 2012, 6:00 PM), <http://www.globalpost.com/dispatch/news/regions/europe/germany/120910/euro-zone-germany-court-esm> (quoting German Chancellor Angela Merkel as calling the ESM "of the utmost importance" and citing a then-recent poll in which fifty-four percent of the German populace wanted to block the ESM).

<sup>42</sup> See *Europe Awaits Top German Court Ruling on ESM*, RTTNEWS (Sept. 11, 2012, 2:09 AM), <http://www.rttnews.com/1962940/europe-awaits-top-german-court-ruling-on-esm.aspx> (describing the uncertainty of German officials and economists about what the court would decide); see also Ellen Freilich, *Stocks Slip, Euro Dips Before German Ruling, Fed*, REUTERS (Sept. 10, 2012, 4:29 PM), <http://www.reuters.com/article/2012/09/10/us-markets-global-idUSBRE88901C20120910> (analyzing the markets' responses ahead of the German court's decision).

German court.<sup>43</sup> The ESM needed Germany's ratification for it to ever take effect because of a provision in the ESM treaty that required ratification by members totaling at least ninety percent of the ESM's capital calls.<sup>44</sup> If enacted, the ESM would serve as an emergency fund to ensure the financial stability of the Euro zone.<sup>45</sup> The plan creates a €700 billion backstop for member states, when combined with prior commitments.<sup>46</sup> The fund could provide support in the following ways: (1) provide loans to troubled member states;<sup>47</sup> (2) implement a bond-buying program to purchase debt instruments from troubled countries via the primary market<sup>48</sup> and the secondary market;<sup>49</sup> (3) extend credit lines when needed;<sup>50</sup> (4) grant loans to countries whose financial institutions need help in "re-capitalisation."<sup>51</sup> While the consensus was that these options would help stem the recession and provide much needed support for the EU, opponents were concerned with the other details; accordingly, despite a last minute request for delay,<sup>52</sup> the BVerfG focused on the opponents' concerns.

The critical issue before the German court was whether accepting the ESM treaty's requirements violated the German Constitution, specifically Article 79(3) (the "Eternity Clause"), which makes it impossible for "any

---

<sup>43</sup> See Stephen Brown, *German Court Holds Euro Zone Fate in Its Hands*, REUTERS (Sept. 3, 2012, 5:06 PM), <http://in.reuters.com/article/2012/09/03/eurozone-germany-court-idINL6E8JVIWB20120903> (listing possible ways the German court could decide and the consequences of each).

<sup>44</sup> Treaty Establishing the European Stability Mechanism, *supra* note 11, art. 48. Capital calls occur when the ESM Board of Governors issues a demand for money from each member state. See *id.* art. 9 (outlining the policy for capital calls. These calls can be made generally (Art. 9(1)), to "restore the level of paid-in capital" (Art. 9(2)), or to prevent default (Art. 9(3)).). The total amount paid by a member state cannot exceed its pre-determined limit. *Id.* For a list of ESM members and their designated capital amounts, see *id.* at Annex II. Also, for a more detailed explanation of the capital calls, see *Terms and Conditions of Capital Calls for ESM*, ESM ONLINE (Oct. 9, 2012), <http://www.esm.europa.eu/pdf/Terms%20and%20conditions%20of%20capital%20calls.pdf>.

<sup>45</sup> Treaty Establishing the European Stability Mechanism, *supra* note 11, art. 3.

<sup>46</sup> *Id.* art. 8; see also *Frequently Asked Questions on the European Stability Mechanism (ESM)*, ESM ONLINE (Oct. 8, 2012), at A8, <http://www.esm.europa.eu/pdf/FAQ%20ESM%2008102012.pdf> (answering several questions pertaining to the basic functions, framework, and purpose of the ESM).

<sup>47</sup> Treaty Establishing the European Stability Mechanism, *supra* note 11, art. 16.

<sup>48</sup> *Id.* art. 17.

<sup>49</sup> *Id.* art. 18.

<sup>50</sup> *Id.* art. 14.

<sup>51</sup> *Id.* art. 15.

<sup>52</sup> See *German Court Says It Will Not Delay ESM Ruling*, SPIEGEL ONLINE (Sept. 11, 2012), <http://www.spiegel.de/international/germany/federal-constitutional-court-rejects-attempt-to-delay-esm-ruling-a-855082.html> (reporting on the court's decision to deny the petition for a new oral hearing which would delay the original ESM hearing).

national commitment to violate [constitutionally outlined] principles.”<sup>53</sup> In essence, Germany’s highest court sought to ensure that by agreeing to the terms of the European bailout plan, Germany would not be giving up too much of its national sovereignty. The BVerfG was primarily concerned with the following issues of autonomy: (1) ensuring that Germany maintains control over its budgetary matters;<sup>54</sup> (2) limiting Germany’s liability to that of its own choosing rather than obligations potentially based on decisions of other states;<sup>55</sup> and (3) not being able to exit the Treaty, if so desired.<sup>56</sup> After carefully examining these concerns, the BVerfG ultimately decided to deny a temporary injunction, finding that the law likely did not violate Germany’s Basic Law as long as certain provisions were accepted.<sup>57</sup>

The first issue decided by the German high court dealt with maintaining the government’s ability to make its own financial decisions.<sup>58</sup> One of the most important functions of any government is controlling the state’s finances, including making economic and fiscal policies and decisions. The German court acknowledged this in saying, “the decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself. The German *Bundestag* must therefore make decisions on revenue and expenditure with responsibility to the people.”<sup>59</sup> The court concluded that the Basic Law necessitates that budget decisions ultimately be the exclusive right of the legislature and must be made without outside influence.<sup>60</sup>

Without exclusive budgetary power, a government effectively loses its ability to address issues as they arise. This control becomes far more necessary in times of economic crisis. Here, the ESM provided that in the event a member state “fails to pay any part of the amount due in respect of its obligations . . . such ESM Member shall be unable, for so long as such failure continues, to exercise any of its voting rights [in ESM policy decisions].”<sup>61</sup> The petitioners in this case argued that this provision was a

---

<sup>53</sup> Gallagher, *supra* note 37, at 2; GRUNDGESETZ, *supra* note 25, art. 79, para. 3. The principles protected under Article 79(3) are outlined in Articles 1 and 20. Article 1 protects human dignity. GRUNDGESETZ, *supra* note 25, art. 1. Article 20 ensures that Germany is a democracy that derives its authority from the people. *Id.* art. 20.

<sup>54</sup> *Extracts*, *supra* note 18, ¶¶ 195–197.

<sup>55</sup> *Id.* ¶ 198.

<sup>56</sup> *Id.* ¶ 248.

<sup>57</sup> *Id.* ¶ 208.

<sup>58</sup> *Id.* ¶¶ 195–197.

<sup>59</sup> *Id.* ¶ 194.

<sup>60</sup> *Id.* ¶ 197.

<sup>61</sup> Treaty Establishing the European Stability Mechanism, *supra* note 11, art. 4, § 8.

“gross violation” of Basic Law.<sup>62</sup> In the event of even a short-term default on payments owed, Germany could have its voting rights stripped, crippling the *Bundestag*’s budgetary powers.<sup>63</sup> Though the court noted that the ESM treaty seemingly lacks a provision providing for a stay of the suspension during the appellate process<sup>64</sup> and acknowledged that the *Bundestag* could not oversee any ESM decisions during the suspended period,<sup>65</sup> the court found that this provision did not violate the Basic Law.<sup>66</sup> It reasoned that because the *Bundestag* would be constitutionally required to budget for the ESM’s financial obligations, it would always be able to pay its debts; therefore, the court held, it would be virtually impossible for Germany to lose its voting rights.<sup>67</sup>

On the second issue, the primary focus was ensuring that Germany would not be required to take on the debt of others, which could constrain its own budgetary powers.<sup>68</sup> The size and frequency of the previously issued bailouts made this a valid concern for the court.<sup>69</sup> The petitioners argued this point as well, claiming that in light of Germany’s existing outstanding debt and liability, accepting the debt obligations imposed by the ESM treaty would push Germany’s total outstanding debt and liability to a constitutionally impermissible level.<sup>70</sup> This resulted, they argued, from the ESM’s failure to place limits on the liability of member states.<sup>71</sup> The petitioners feared that the end result would be detrimental to not only the current *Bundestag* but also those in the future by “setting in motion an automatic process of liability and performance which such a future *Bundestag* cannot escape.”<sup>72</sup>

The BVerfG recognized the validity of the issue, declaring “no permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states.”<sup>73</sup> However, the court found that the ESM did not subject Germany to such

---

<sup>62</sup> *Extracts, supra* note 18, ¶ 156.

<sup>63</sup> *See id.* (“If the German voting rights were suspended, the Board of Governors and the Board of Directors would be able to pass resolutions which could seriously impair the overall budgetary responsibility of the *Bundestag*.”).

<sup>64</sup> *Id.* ¶ 234.

<sup>65</sup> *Id.* ¶ 235.

<sup>66</sup> *Id.* ¶ 236.

<sup>67</sup> *Id.* ¶ 237.

<sup>68</sup> *Id.* ¶ 198.

<sup>69</sup> *See European Debt Crisis, supra* note 6 (listing dates and amounts of the bailouts given to European Union member states thus far).

<sup>70</sup> *Extracts, supra* note 18, ¶ 152.

<sup>71</sup> *Id.* ¶ 154.

<sup>72</sup> *Id.* ¶ 151.

<sup>73</sup> *Id.* ¶ 198.

liability.<sup>74</sup> The court interpreted the first sentence of Article 8, Section 5, which places limits on a state's obligations,<sup>75</sup> as setting an absolute ceiling that Germany could not exceed.<sup>76</sup> Still, to ensure that Germany would indeed be free of the burden suggested by the Petitioners, the BVerfG noted that approval of the Treaty was based on the assumption that its reading was correct.<sup>77</sup>

The third sovereignty issue presented to the court pertained to Germany's ability (or inability) to freely exit the agreement and its impact on "statehood."<sup>78</sup> The petitioners' concern was that because the ESM lacks a termination provision, a point conceded by the German Parliament,<sup>79</sup> Germany would be locked in indefinitely and therefore subject to losing its veto power should member strengths change relative to one another.<sup>80</sup> The BVerfG deemed this problem a technicality rather than a substantive or practical issue.<sup>81</sup> It determined that in light of the liability caps in place, no express termination clause was needed.<sup>82</sup> The court concluded that in offsetting the lack of such a provision, the liability limitations meant that the German *Bundestag* must analyze and approve on an individual basis every proposed commitment to accept more debt or liability.<sup>83</sup>

Though the BVerfG ultimately found that the Treaty was in compliance with the Basic Law,<sup>84</sup> it noted that certain provisions might hamper the *Bundestag*'s overall budget responsibility.<sup>85</sup> To remedy this, the court required that, upon the Treaty's ratification, this possibility must be prohibited by avowals made under international law.<sup>86</sup>

---

<sup>74</sup> *Id.* ¶¶ 212–213.

<sup>75</sup> See Treaty Establishing the European Stability Mechanism, *supra* note 11, art. 8, § 5 ("The liability of each ESM Member shall be limited, in all circumstance, to its portion of the authorised capital stock at its issue price.").

<sup>76</sup> *Extracts, supra* note 18, ¶¶ 212–213.

<sup>77</sup> *Id.* (citing Bundestag printed paper 17/9045, p. 5); see also *id.* ¶ 248 ("With a view to the binding limitation of the burdens on the budget . . . , which is to be ensured by a reservation to this effect . . .").

<sup>78</sup> *Id.* ¶ 158.

<sup>79</sup> *Id.* ¶ 186.

<sup>80</sup> *Id.* ¶ 158.

<sup>81</sup> *Id.* ¶ 248.

<sup>82</sup> See *id.* ("With a view to the binding limitation of the burdens on the budget . . . , the safeguarding of the *Bundestag*'s overall budgetary responsibility does not require providing a special right of resignation or termination in the Treaty.").

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* ¶ 208.

<sup>85</sup> *Id.* ¶ 209.

<sup>86</sup> *Id.*

*B. Sovereignty and Guns: An American Perspective*

Similar to the BVerfG in the ESM case, the U.S. Supreme Court in *Printz* weighed in on a multi-state effort in order to ensure that effort was constitutionally valid. In *Printz*, the legislation at issue was the Brady Act of 1993.<sup>87</sup> The Act was designed to place more stringent requirements on gun dealers by creating a “national instant background-check system”<sup>88</sup> and having chief law enforcement officers (CLEOs) within each state enforce interim provisions until it was operational.<sup>89</sup> The provisions outline a three-step process that must occur before a firearm transaction can occur.<sup>90</sup> First, the gun dealer must obtain from the transferee a form, the Brady Form, with personal information about the transferee along with a sworn statement that he or she is not a member of any class of prohibited purchasers.<sup>91</sup> Next, the gun dealer must verify the transferee’s identity via a specified identification document.<sup>92</sup> Finally, the dealer must alert the CLEO of the transferee’s residence and of the transaction, and give the CLEO a copy of the Brady Form.<sup>93</sup> Under the Act, the CLEO then has five days to notify the dealer if the sale would be illegal; otherwise the dealer is clear to complete the sale.<sup>94</sup>

Under the Act, the CLEO was required to “make a reasonable effort to ascertain within five business days whether receipt or possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available.”<sup>95</sup> Taking issue with essentially being forced to do the federal government’s work,<sup>96</sup> two CLEOs subsequently challenged the Act’s constitutionality.<sup>97</sup> The issue before the Court was whether the federal government could compel a state to use its law enforcement officers to implement a federal regulatory program.<sup>98</sup>

The *Printz* majority addressed several principles of state autonomy, ultimately concluding that the federal government could not require the states to enforce the program by devoting resources and manpower to help

---

<sup>87</sup> *Printz*, 521 U.S. at 904.

<sup>88</sup> *Id.* at 902.

<sup>89</sup> *Id.* at 903.

<sup>90</sup> *Id.* at 902–03.

<sup>91</sup> *Id.* at 903.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 905.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

implement background checks for gun dealers.<sup>99</sup> The Court held that “such commands are fundamentally incompatible with our system of dual sovereignty.”<sup>100</sup> In the majority opinion, Justice Scalia wrote that the Brady Act violated the following sovereignty principles: (1) states should continue to be “independent and autonomous within their proper sphere of authority”;<sup>101</sup> (2) a state should not be placed in a zero-upside scenario where the federal government gets credit for a program’s success, but the state absorbs the burdens of its administration;<sup>102</sup> (3) controlling a state’s officers is, in effect, controlling the state, which is fundamentally not allowed;<sup>103</sup> (4) “where . . . it is the very object of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty . . . [i]t is the very principle of state sovereignty that such a law offends”;<sup>104</sup> and (5) the Constitution protects the sovereignty of the states even when the federal government wants to circumvent it with pure intentions or in times of crisis.<sup>105</sup>

The first concern addressed a state’s nexus of control over its own affairs.<sup>106</sup> The government argued that the Brady Act should be distinguished from the precedent established in *New York v. United States*,<sup>107</sup> where the Supreme Court invalidated provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that required the states to create legislation to dispose of waste within its borders or to take title to it.<sup>108</sup> In *New York*, the Court ultimately ruled that states could not be forced to implement a federal regulatory program.<sup>109</sup> In *Printz*, however, the government’s argument focused on the idea of enforcement rather than policy making.<sup>110</sup> It argued that since states were not being required to make

---

<sup>99</sup> *Id.* at 935. For an in-depth analysis of the history of state sovereignty in the U.S. as it pertains to Congress and the Constitution, see Kenneth R. Thomas, *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, CRS Report for Congress, Feb. 1, 2008, available at <http://www.fas.org/sgp/crs/misc/RL30315.pdf>.

<sup>100</sup> *Printz*, 521 U.S. at 935.

<sup>101</sup> *Id.* at 928.

<sup>102</sup> *Id.* at 930.

<sup>103</sup> *Id.* at 931.

<sup>104</sup> *Id.* at 932.

<sup>105</sup> *Id.* at 933.

<sup>106</sup> *Id.* at 928.

<sup>107</sup> 505 U.S. 144 (1992).

<sup>108</sup> *Printz*, 521 U.S. at 926.

<sup>109</sup> *Id.* (quoting *New York*).

<sup>110</sup> *Id.* at 926.

law, the Act did not violate their sovereign rights granted by the Constitution.<sup>111</sup>

After dismissing the notion that the act does not require policy making outright,<sup>112</sup> the Court posited that, if true, the government's position would encroach more severely upon the states' sovereignty.<sup>113</sup> Mere enforcement of federal laws, Justice Scalia said, would "reduc[e] [the states] to puppets of a ventriloquist Congress."<sup>114</sup> The Court emphasized the necessity of the states' power to maintain control and independence "within their proper sphere of authority,"<sup>115</sup> calling it a crucial component of their right to sovereignty.<sup>116</sup> The Court further lambasted the government's perspective by analogizing it to federal officers being required to administer state law,<sup>117</sup> declaring both equally abhorrent to the principles of dual sovereignty.<sup>118</sup>

The next sovereignty issue addressed the accountability of the sovereign.<sup>119</sup> The crux of the government's argument in support of the Brady Act on this front was that the state and federal officials remained just as accountable under the Act's requirements as before.<sup>120</sup> The Court also rejected this argument.<sup>121</sup> Justice Scalia based the dismissal on the following reasoning:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress [could] take credit for "solving" problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.<sup>122</sup>

---

<sup>111</sup> *Id.* at 926–27.

<sup>112</sup> *Id.* at 927–28.

<sup>113</sup> *Id.* at 928.

<sup>114</sup> *Id.* (quoting *Brown v. EPA*, 521 F.2d 827, 839 (9th Cir. 1977)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 929–30.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 930.

<sup>122</sup> *Id.*

The Court recognized that a sovereign state should not be forced to bear the financial burdens of a program without reaping its benefits.<sup>123</sup> In other words, the Court can be interpreted as asserting that states are not to be treated as mere pawns of the federal government.

Thirdly, the Court ruled that state officers should be treated as an extension of the State,<sup>124</sup> ensuring that the government could not create an end-run around its ruling, thereby violating state autonomy. The Court said that placing requirements on state officials was in essence placing requirements on the State, and thus forbid it.<sup>125</sup> In his dissent, Justice Stevens argued that this case should be distinguished from *New York* on the grounds that the Brady Act's mandates were targeted at individuals and not the state itself.<sup>126</sup> The Court found this approach to be unpersuasive, going so far as to say it "disembowels [*New York*]."<sup>127</sup> The majority analogized the situation to one in which an individual is sued in his or her official capacity as a state official.<sup>128</sup> Citing *Will v. Michigan Dep't of State Police*,<sup>129</sup> the Court asserted that there is no difference between suing a person in his or her official state capacity and suing the State itself because the official's office is being sued, not the individual.<sup>130</sup> The Court therefore ruled that a declaration forbidding control of a State while still allowing control of its employees said nothing at all.<sup>131</sup>

Next, further emphasizing its desire to ensure state autonomy, the Court addressed that issue directly.<sup>132</sup> The Court expressly forbade a law "where . . . it is the whole *object* of the law to direct the functioning of the state executive, and hence to compromise the structural framework of dual sovereignty."<sup>133</sup> The government then presented its case for utilization of a balancing test in this situation that would weigh against each other the benefits of the proposed program and the burdens it places on the respective

---

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 930–31.

<sup>125</sup> *Id.* at 931.

<sup>126</sup> *Id.* at 964–67.

<sup>127</sup> *Id.* at 931. Moreover, Justice Scalia found this argument insulting. He seemed to rebuke the other justices when he stated that the distinction between a suit against an individual in a personal capacity and one in an official capacity is an ancient one that "is dictated by common sense." *Id.* at 930.

<sup>128</sup> *Id.* at 930.

<sup>129</sup> 491 U.S. 58, 71 (1989).

<sup>130</sup> *Printz*, 521 U.S. at 930–31.

<sup>131</sup> *Id.* at 931.

<sup>132</sup> *Id.* at 932.

<sup>133</sup> *Id.*

states.<sup>134</sup> This test was ultimately deemed irrelevant,<sup>135</sup> with the Court ruling that “[i]t is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect.”<sup>136</sup>

The fifth issue addressed the role of sovereignty on a macro-level: that of the nation as a whole.<sup>137</sup> Citing *New York*, the Court acknowledged that historically courts have struck down measures that deviate from the form of government outlined by the Constitution despite the measure’s best intentions.<sup>138</sup> The Court reasoned that the Constitution specifically provides for separation of powers so that power does not become focused in one place, even if it would be a convenient solution to a major problem of the era.<sup>139</sup> Ultimately, the Court in *Printz* used this rationale when ruling against the Brady Act.<sup>140</sup> The Court seemingly underscores the importance of maintaining proper state autonomy by labeling sovereignty as a fundamental block of the governmental system, which should not be compromised even if it means quickly resolving a pressing issue.<sup>141</sup>

Unless appropriately addressed at the outset, sovereignty concerns like those addressed in the German and American courts will arise again in the future regarding ECB treaties. With the global economic climate rapidly changing and fears mounting, the ECB must ensure going forward that its plans do not run afoul of these concerns. Fortunately, with the decisions of the German and American courts at its disposal, the ECB possesses the tools to craft a plan that alleviates these apprehensions.

### III. ANALYSIS

The principles outlined in the previous section provide clear guidance for the ECB to design proposals that should effectively appease each EU member state involved by respecting the boundaries between the ECB’s

---

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 933.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* The government sought to employ a balancing test to justify the utilization of state officials to implement the Act, weighing the purposes of the Act against its burdens. *Id.* at 932. While admitting the test could possibly be used in some situations, where, as here, the law’s sole focus is to direct the state’s executive, the Court deemed such an approach “inappropriate.” *Id.*

<sup>141</sup> *Id.* at 933.

control and that of the states. This Note now moves to a synthesis of the two courts' views and then offers a set of proposals for future ECB measures. First, this section will compare and contrast the two courts' perspectives on sovereignty issues, then address how to structure a deal so that the member states maintain control over sensitive areas of national concern. The focus will then turn to ensuring that member states are not forced into any unwanted situations and do not have any unwanted circumstances forced on them as a result of the ECB's plan. Finally, this Note will concentrate on ensuring that member states are not trapped by the plan in the event they need to withdraw.

#### *A. A Synthesis of the Two Courts' Views*

The two courts' respective decisions displayed respect for the same principles of sovereignty despite facing two distinct situations. Both courts agreed on the need for state autonomy in decision-making,<sup>142</sup> both also affirmed that a state should not be exposed to liability beyond that which it voluntarily undertakes.<sup>143</sup> Finally, both agreed that sovereignty must not be sacrificed for any reason.<sup>144</sup>

The first rule the courts agreed on was that states must have exclusive jurisdiction over certain issues.<sup>145</sup> It is essential to the functioning of any governmental body that it have unquestioned control over certain areas and in certain matters.<sup>146</sup> Without this power, a government lacks any teeth in its ability to govern and essentially becomes an agent for another authority.

---

<sup>142</sup> See *Extracts*, *supra* note 18, ¶ 194 (stating that Germany's financial decisions must be made by German officials); see also *Printz*, 521 U.S. at 928 (asserting that states in the U.S. must have control over matters within their authority).

<sup>143</sup> See *Extracts*, *supra* note 18, ¶ 198 (rejecting any plan that would subject Germany to financial liability resulting from decisions of other countries); see also *Printz*, 521 U.S. at 930 (forbidding the federal government from imposing requirements on the states that burden them with liability for failure but give them no credit for success).

<sup>144</sup> See *Extracts*, *supra* note 18, ¶ 186 (recognizing the problems with a treaty not allowing Germany any exit); see also *Printz*, 521 U.S. at 933 (stressing that dual federalism must not be compromised even to solve a contemporary crisis).

<sup>145</sup> See *Extracts*, *supra* note 18, ¶ 194 ("The decision on public revenue and public expenditure is a fundamental part of the ability of a constitutional state to democratically shape itself."); see also *Printz*, 521 U.S. at 928 ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

<sup>146</sup> See U.S. CONST. art. I, § 8 (enumerating several actions held to be in the exclusive authority of the Congress of the United States); see also U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved by it to the States respectively, or the people.").

The second point of agreement pertained to a state's exposure to external liability. Both courts felt as though the states should only be held responsible for what they bring on themselves.<sup>147</sup> In a financial debt context, this is especially important because a state that is responsible for the debt of others can never have true financial stability since it cannot control its own liability. Though recognizing this principle, neither court established a firm boundary to guide their respective governments regarding the amount of liability acceptable for each state.<sup>148</sup>

The final point of agreement concerned the issue of when sovereignty should be compromised. The two courts agreed that it simply should not be.<sup>149</sup> They believed that ultimately, the need to maintain sovereignty could not be outweighed by any cause. As the Court said in *Printz*, power should not be “concentrate[d] . . . in one location [even] as an expedient solution to the crisis of the day.”<sup>150</sup>

One point raised by the U.S. Supreme Court but not directly touched on by the BVerfG is the issue of auxiliary control. In *Printz*, the Supreme Court ruled that controlling a state's officials is tantamount to controlling the state.<sup>151</sup> The German court indirectly addressed this in its concerns regarding budget autonomy, saying that it would not allow another country to dictate German policy through budgetary control.<sup>152</sup>

---

<sup>147</sup> See *Extracts*, *supra* note 18, ¶ 198 (“[N]o permanent mechanisms may be created under international treaties which are tantamount to accepting liability for decisions by free will of other states. . . . The Bundestag must individually approve every large-scale federal aid measure on the international or European Union level made in solidarity resulting in expenditure.”); see also *Printz*, 521 U.S. at 930 (preventing the federal government from burdening the states with the downside of a plan and putting them on the hook for the financial costs of its implementation while retaining for itself the exclusive ability to take credit for that plan).

<sup>148</sup> See *Extracts*, *supra* note 18, ¶ 201 (“When examining whether the amount of payment obligations and commitments to accept liability will result in the Bundestag relinquishing its budget autonomy, the legislature has broad latitude of assessment, in particular with regard to the risk of the payment obligations and commitments to accept liability being called upon and with regard to the consequences then to be expected for the budget legislature's freedom to act.”); see also *Printz*, 521 U.S. at 930 (forbidding the proposed system while declining to address any other potential scenarios).

<sup>149</sup> See *Extracts*, *supra* note 18, ¶ 248 (ruling that though the ESM treaty contains no termination provision, practically speaking it does not violate the Basic Law because it has other protections in place); see also *Printz*, 521 U.S. at 932–33 (ruling that where a law violates state sovereignty, “no comparative assessment of the various interests can overcome that fundamental defect” and thus would be useless).

<sup>150</sup> *Printz*, 521 U.S. at 933.

<sup>151</sup> *Id.* at 931 (“To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.”).

<sup>152</sup> See *Extracts*, *supra* note 18, ¶ 195 (“As representatives of the people, the elected

*B. Maintaining Autonomy*

It is not uncommon for treaties to contain language providing that signatories retain control over certain matters, even though they agree to the terms within that treaty.<sup>153</sup> However, the ESM treaty contains no such express provisions. Rather, it reads more like a business contract, laying out terms and conditions as absolute obligations.<sup>154</sup> Due to its business-like nature, this is not necessarily problematic for the ESM because the treaty's sphere of authority seems limited to its terms.

In the context of future agreements, however, the ECB may wish to include language in its treaties that will expressly address the sovereignty concerns. One example used in other treaties is to expressly concede control to the signatories in matters within their spheres of competence.<sup>155</sup> This language, while somewhat vague, delineates an area within which the state is qualified to act and should therefore be allowed to do so as it sees fit. This approach would benefit the ECB because it appears friendly to the governments of the member states by reserving authority to them, which will help with sovereignty concerns.

Also, the ESM contains no limiting language regarding the ECB's powers; instead, it grants powers to its member states to act in certain areas. This approach does not explicitly deny the ECB any authority or powers. However, the downside of this approach for the ECB is that it leaves open a large, undefined area for possible overlap between the powers of the treaty

---

Members of the German Bundestag must retain control of fundamental budgetary decisions even in a system of intergovernmental governing.”); *see also id.* ¶ 197 (recognizing as necessary for maintaining the country's identity that “the budget legislature makes its decisions on revenue and expenditure free of other-directedness on the part of the bodies and of other Member States of the European Union and remains permanently the master of its decisions.” (internal quotations omitted)).

<sup>153</sup> *See* Maastricht Treaty, *supra* note 26, art. G, § 5 (amending a prior treaty to contain the language, “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.”).

<sup>154</sup> *See generally* Treaty Establishing the European Stability Mechanism, *supra* note 11.

<sup>155</sup> *See* Treaty of Lisbon, *supra* note 28, art. 1, § 5 (“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”).

and those of the individual member states, potentially allowing for clashes between the two sides in the future. A potential solution would be to use language that explicitly limits the powers of the ECB to those explicitly conferred in provisions contained within the treaty. The Treaty of Lisbon contains such a provision,<sup>156</sup> which states:

Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.<sup>157</sup>

This language is restrictive enough to allow states security, but ambiguous enough to allow for flexibility and adaptability in situations that arise in the future given broad competences.

The ECB would certainly need to set such competences for itself if it chose this path since it would expressly state that it could not exceed its bounds. The benefits of this approach are clarity for both parties and an appearance of simplicity via defined boundaries. Both the ECB and the member states will have a strong foundation on which to base the expectations of the treaty. The downside for the ECB is obvious—its powers are expressly confined. Understanding that limiting language in a treaty could prove injurious to its purpose, the ECB is probably still better served by recognizing the powers of the member states rather than withholding those of the treaty; this will also allow more flexibility for members and likely satisfy their respective sovereignty reservations.

### *C. Limiting Liability*

Provisions that limit the liability members can be required to take on are another necessary aspect of treaties. Countries want to know that they will not be exposed to liability for the decisions of other countries. The Maastricht Treaty contains a rough provision to this effect.<sup>158</sup> It prevents a member state from being responsible for the obligations undertaken by

---

<sup>156</sup> *Id.* art. 1, § 6.

<sup>157</sup> *Id.*

<sup>158</sup> See Maastricht Treaty, *supra* note 26, at Title VI, art. 104b, ¶ 1 (“A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project.”).

another member state, except where a joint agreement was in place to fund a specific project.<sup>159</sup> While this provision certainly provides some assurance that liability limitations exist, it is still a vague limiting clause in that it lacks a cap. The provision was likely intended to be this way to allow for flexibility in unforeseen situations, given the Maastricht Treaty's purpose of establishing the European Union.<sup>160</sup> Yet, although the limiting principles still apply, to address the financial concerns ahead, more assurances will be needed.

The EU seems to have been cognizant of these concerns and addressed them in the ESM Treaty. The ESM Treaty not only explicitly states that members are not liable for ESM commitments "by reason of [the states'] membership,"<sup>161</sup> but also sets a firm cap for the total liability of each member.<sup>162</sup> This type of provision has many advantages. First, it allows for member states to participate in the program while feeling the security that their respective obligations will never exceed a pre-established amount. Second, membership alone does not impose liability on the members for the debts of the ECB. This provision therefore limits not only the amount of liability but also how a member can become liable for obligations, thereby providing more autonomy to members to control when and how much debt they accept. Finally, the Treaty provides predictability and a level of financial certainty, which enables the states to maintain budget autonomy and run their respective countries accordingly. Given the aforementioned strengths of this provision, mimicking its language in future treaties would go a long way to satisfy countries' concerns regarding liability exposure.

#### D. Exit Strategy

Most treaties omit express provisions on termination or withdrawal.<sup>163</sup> The ESM treaty is one example.<sup>164</sup> The reason for leaving out such language

---

<sup>159</sup> *Id.*

<sup>160</sup> *See generally id.*

<sup>161</sup> *See* Treaty Establishing the European Stability Mechanism, *supra* note 11, art. 8, ¶ 5 ("No ESM Member shall be liable, by reason of its membership, for obligations of the ESM.").

<sup>162</sup> *See id.* ("The liability of each ESM Member shall be limited, in all circumstances, to its portion of the authorised (sic) capital stock at its issue price."). It should be noted that other provisions of the ESM Treaty were challenged on the grounds that, when read in conjunction with one another, they served to counteract this restricting provision. *See Extracts, supra* note 18, ¶ 154 (describing how Article 9(2) and (3) as well as Article 25(2) of the ESM Treaty work to undermine the limitations of Article 8(5)). As previously mentioned, the German court found this not to be the case. *Id.* ¶¶ 212–213.

<sup>163</sup> United Nations, FINAL CLAUSES OF MULTILATERAL TREATIES HANDBOOK 109–17 (2003),

is understandable. The parties to a treaty, especially one of great significance, prefer for it to be binding for an indefinite duration. This would seemingly serve to invest each member in the success of the treaty and, by extension, the success of the other members. Still, even in instances where no express denunciation clause exists, countries have ways to leave the treaty.

The Vienna Convention on the Law of Treaties (Vienna Convention)<sup>165</sup> sets out ground rules for leaving a treaty. It allows for termination of a treaty by consent of the parties<sup>166</sup> or in a manner allowed by the treaty if explicitly included.<sup>167</sup> It also contains a section exclusively regarding treaties without any exit provisions.<sup>168</sup> In that portion, the Vienna Convention bars exit from a treaty that does not expressly allow it, unless it can be proven the parties intended to allow it<sup>169</sup> or the right to do so is “implied by the nature of the treaty.”<sup>170</sup> Either prong presents quite a high standard. In the past, when the economy was stronger, leaving a treaty may not have raised nearly as many concerns as would leaving those signed today. This statement is more accurate when the treaty directly concerns the financial obligations of a country. As the ECB moves forward, it will behoove it to include such language and not require their members to utilize the Vienna Convention standards.

The ECB can accomplish the goal of allowing a country to leave the treaty in a number of ways.<sup>171</sup> It can set a certain duration for the treaty to exist,<sup>172</sup> it can allow for withdrawal after a specified amount of time has passed;<sup>173</sup> it can allow for withdrawal at the occurrence of a specified event; or it could merely allow for a country’s withdrawal via majority vote of its current member states.<sup>174</sup> Another possibility is to allow for a country to leave at any time.<sup>175</sup> However, this is not a viable option for the ECB’s

---

available at <http://treaties.un.org/doc/source/publications/FC/English.pdf>.

<sup>164</sup> See Treaty Establishing the European Stability Mechanism, *supra* note 11 (excluding any denunciation provisions).

<sup>165</sup> Vienna Convention on the Law of Treaties, May 23, 1968, 1155 U.N.T.S. 331, available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

<sup>166</sup> *Id.* art. 54(b).

<sup>167</sup> *Id.* art. 54(a).

<sup>168</sup> *Id.* art. 56.

<sup>169</sup> *Id.* art. 56(a).

<sup>170</sup> *Id.* art. 56(b).

<sup>171</sup> FINAL CLAUSES, *supra* note 163, at 109–17.

<sup>172</sup> *Id.* at 115.

<sup>173</sup> *Id.* at 111.

<sup>174</sup> Vienna Convention, *supra* note 165, art. 56(a).

<sup>175</sup> FINAL CLAUSES, *supra* note 163, at 110.

treaties. Strong commitment of member states is crucial to alleviating the financial burdens of the EU, and a signatory's arbitrary exit would have substantial repercussions on other members. Thus, allowing members to leave at any time would undermine the stability of the EU.

The first option for the ECB is to set a time limit regarding the duration of the treaty.<sup>176</sup> This route would be the least efficient since there is no way of knowing how long an emergency economic treaty would be needed. For this reason, this option should be avoided.

The second alternative locks in the treaty for a certain time period and then allows for countries to leave under certain circumstances. The Stockholm Convention on Persistent Organic Pollutants<sup>177</sup> contains an example of this provision.<sup>178</sup> It provides a three-year fixed duration before allowing countries to walk away.<sup>179</sup> It stipulates, however, that the country must wait one year to leave once it has provided notification of its intent to leave.<sup>180</sup> This type of provision would be only slightly better than a flat duration clause because the risk still exists that a country will become less cooperative as the exit window approaches. It is very unlikely that the country would be asked to join anything during the lame duck year before leaving. For these reasons, this option is impractical.

Third, the treaty can include language that allows for withdrawal at the occurrence of a pre-identified event.<sup>181</sup> Given the high financial stakes of the potential ECB treaties, this option would allow for the countries to exit if

---

<sup>176</sup> For an example of this type of provision, see *id.* at 115 (illustrating a specified duration clause by citing Article 60(1) of the International Agreement on Olive Oil and Table Olives of 1986: "This Agreement shall remain in force until 31 December 1991 unless the Council decides to prolong it, extend it, renew it or terminate it in advance in accordance with the provisions of this article.").

<sup>177</sup> Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119, available at [http://www.pops.int/documents/convtext/convtext\\_en.pdf](http://www.pops.int/documents/convtext/convtext_en.pdf).

<sup>178</sup> *Id.* art. 28 ("At any time after three years from the date on which this Convention has entered into force for a Party, that Party may withdraw from the Convention by giving written notification to the depositary . . . Any such withdrawal shall take effect upon the expiry of one year from the date of receipt by the depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal."); see also FINAL CLAUSES, *supra* note 163, at 111 (citing Stockholm Convention to provide example of treaty provision).

<sup>179</sup> Stockholm Convention, *supra* note 177, art. 28(1).

<sup>180</sup> *Id.* art. 28(2).

<sup>181</sup> For an example of this type of provision, see Treaty of Nice, art. 64, Mar. 3, 2001, [http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C\\_EN.pdf](http://eur-lex.europa.eu/en/treaties/dat/12001C/pdf/12001C_EN.pdf) ("Until the rules governing the language arrangements applicable at the Court of Justice and the Court of First Instance have been adopted in this Statute, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the Court of First Instance governing language arrangements shall continue to apply.").

they simply could not uphold the duties of the treaty or if their respective current financial state dictated departure. Either of these would set a very high bar for withdrawal. Also, it would satisfy those countries that desire a viable exit option without compromising the goal of having countries invested in the treaty's success by maintaining a potentially indefinite duration for the treaty. This Note recommends this type of provision.

Finally, the treaty could include a provision that allows for a country to withdraw with the consent of the parties to the treaty.<sup>182</sup> This would allow for a country to withdraw without disrupting the treaty or that member's relationship with other members. The withdrawal would need to be approved by a vote of a majority or super-majority. It would also be a safeguard against countries leaving for unsound reasons since the members would get the opportunity to hear the leaving party's rationale and then decide if it is a sufficient reason to back out of the treaty. However, ultimately the exiting country is at the mercy of the other members in withdrawing, therefore this provision may not be accepted by countries with strong sovereignty concerns.

#### IV. CONCLUSION

The current global economic crisis will require the European Central Bank to take action to alleviate financial issues as they arise for the European Union. In doing so, the ECB will have to be cognizant of the sovereignty concerns of its respective members. The U.S. Supreme Court and the German Constitutional Court have both pointed out in their respective cases several sovereignty principles underlying these concerns.

These principles include: (1) a state should have the autonomy to make decisions regarding state matters; (2) a state should maintain control over its budget; (3) a state's liability exposure should be limited to that which it creates; (4) a state should not be trapped into a situation which it cannot escape when it is in its best interest to do so; and (5) and these principles should not be compromised for any reason.

The ECB has several options in addressing these concerns going forward. To address the issue of maintaining autonomy over decisionmaking, the ECB should include in its treaties language that expressly grants to the member states the power to decide matters within their respective spheres. This will give them assurance that they are protected from intrusion by the governing body or other members. The ECB should also include provisions stating that

---

<sup>182</sup> Vienna Convention, *supra* note 165, art. 56(a).

the member states are not liable for the commitments of other members or the ESM. Additionally, it should go a step further and place an absolute cap on the liability that each state can owe to the Mechanism. This will serve not only to limit each member's risk exposure, but will also enable the members' respective governments to maintain budget autonomy due to the predictability afforded by a debt ceiling.

Finally, the ECB should include a provision in the treaties that will allow for a member to exit the treaty at the occurrence of a pre-determined event or with the consent of the members. Either procedure will allow for the country to leave the agreement, affording the member states the comfort of knowing they are not permanently locked in, while maintaining a very high threshold for that exit. Without appropriate attention to each of these concerns, the ECB will undoubtedly face more roadblocks than necessary, as more countries will require greater control over their affairs in a bleak global marketplace.