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European Legal Networks in Crisis

The Legal Construction of Economic Policy

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Declaration

I have included a list of all references used in my doctoral thesis.

I hereby declare that I have completed this work on my own.

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Abstract

This dissertation investigates how legal and policy professionals have legally constructed the economic policy and governance of the EU since the beginning of the Eurozone crisis onwards. It follows the legal and policy professionals who reviewed the mandate to enable and consolidate solutions, as well as defend these solutions in court. By tracing the practices and trajectories of these agents, I show how, during an unfolding crisis, economic policy and governance becomes legally constructed and changes the terms of legitimation for EU economic governance. The stakes involved for the professionals involved also change. In this way, the dissertation speaks to the question of how intrusive political power has been legitimated during the Eurozone crisis and what this means for the legitimacy of European governance.

Theoretically, this thesis develops a Bourdieusian field approach that is adapted to the transnational and diachronic context of the Eurozone crisis, as it unfolded from the end of 2009 until the adjudication of key high-profile court cases before the Court of Justice of the European Union. Drawing on boundary work, bricolage, and network interactions to analyse the practices of legal and policy professionals, the process of enabling and consolidating solutions is elaborated. Attention is given to how this process engenders stakes for the professionals in this emerging euro-crisis law field, and what this means for emerging legal terms of legitimation for economic governance.

Methodologically, field-based and social network analysis are combined in two distinct ways. First, by employing a temporally-focussed network analysis, which caters for change by measuring the shifting centrality of legal and policy professionals over time, I show which professionals have had a high-level of involvement in dealing with crisis issues. This then permits the construction of a referral network based on how these professionals refer to their peers. The involvement of the professionals is further articulated as their accumulated symbolic capital: i.e. their involvement together with being perceived to know well. From this, I infer a species of symbolic capital unique to being part of the Eurozone crisis policy response: juridical capital.

This dissertation adds to scholarship on the Eurozone crisis by creating a theoretical framework based on Bourdieusian fields, which utilises a network analytical approach to show how the practices and interactions of legal and policy professionals reconfigure the transnational contexts that are implicated in the crisis policy response. Moreover, it is shown how these professionals' practices enable solutions that are contested before the Court of Justice of the European Union, putting the Court in a position where it has to bring the definitional power of the law to bear on the actions of EU institutions and the

Eurogroup. The Court must decide how responsibility should be attributed. The dissertation shows how legal and policy professionals developed practices, using jurisdictional and constitutionalising logics, and deployed at different times during the crisis, enabled and consolidated processes of legal integration and differentiation.

Dansk Resumé

Denne afhandling undersøger, hvordan juridiske og politiske fagfolk har skabt rammeværket for EU's økonomiske politik siden begyndelsen af eurozonekrisen. Afhandlingen følger de juridiske og politiske fagfolk, der gennemgik mandatet for at muliggøre og konsolidere løsninger, samt forsvare disse løsninger for retten. Ved at spore disse aktørers praksis og bevægelser viser jeg, hvordan den økonomiske politik og regeringsførelse under en krise, der udfolder sig, bliver lovligt konstrueret og ændrer betingelserne for legitimeringen af EU's økonomiske styring. Indsatserne for de involverede fagfolk ændrer sig samtidig. Dermed tager afhandlingen fat på spørgsmålet om, i hvor grad særdeles indgribende politisk magt er blevet legitimeret under Eurozonekrisen, og hvad det betyder for legitimiteten af europæisk regeringsførelse.

På det teoretiske niveau videreudvikler denne afhandling en Bourdieusiansk feltmetode, der er tilpasset den tværnationale og diakroniske kontekst af Eurozone-krisen, da den udfoldede sig fra slutningen af 2009 til de afgørende domme i en række centralt højprofilerede retssager ved Den Europæiske Unions Domstol. Med udgangspunkt i *boundary work*, *bricolage* og netværksinteraktioner mellem juridiske og politiske fagfolk undersøges processen hvorved juridiske løsninger aktiveres og konsolideres. Der lægges vægt på, hvordan denne proces samtidig ændrer indsatserne for fagfolkene i dette nye lovgivningsområde inden for euro-krisen, og hvad det betyder for nye juridiske betingelser for legitimering af økonomisk styring.

På det metodiske niveau kombinerer afhandlingen feltanalyse og social netværksanalyse på to forskellige måder. For det første viser jeg ved hjælp af en tidsligt fokuseret netværksanalyse, der måler forskydningen i centralitetsgraden af de juridiske og politiske fagfolk over tid, hvilke fagfolk der har haft et højt niveau af engagement i håndteringen af krisespørgsmål på forskellige tidspunkt. Dette tillader derefter gennemførelsen af et henvisningsnetværk baseret på, hvordan disse fagfolk henviser til deres fagfæller. Fagfolkenes inddragelse er yderligere formuleret som deres akkumulerede symbolske kapital: dvs. deres engagement betragtet i samspil med andres opfattelse af dem som velkendte. Ud fra dette udleder jeg en art af symbolsk kapital, der er unik for at være en del af euroområdet krisepolitiske svar: juridisk kapital.

Denne afhandling bidrager til videnskaben om krisen i euroområdet ved at skabe en teoretisk ramme baseret på Bourdieusianske felter, og som anvender en netværksanalytisk tilgang til at vise, hvordan praksis og interaktion mellem juridiske og politiske fagpersoner konfigurerer de tværnationale kontekster,

der er involverede i krisepolitikken respons. Derudover vises det, hvordan denne professionelle praksis muliggør løsninger, der anfægtes i EU's Domstol, hvilket sætter Domstolen i en position, hvor den ved lovens endelige magt skal bære EU-institutionernes handlinger og Eurogruppen. Domstolen skal beslutte, hvordan ansvaret skal placeres. Afhandlingen viser, hvordan juridiske og politiske fagfolk udviklede praksis ved brug af jurisdiktion og forfatningsmæssig logik implementeret på forskellige tidspunkter under krisen, der muliggjorde og konsoliderede processer med juridisk integration og differentiering.

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Preface

Sitting in the Grand Chamber of the Court of Justice of the EU, I watch the legal agents of the European Central Bank, the European Commission, and the Council converse together in hushed tones. Soon they will have to present their arguments to the Judges as to why the Eurogroup – the collective of finance and economics ministers of the Eurozone Member States – should not be recognised as a formal body of the European Union. The genesis of this question arose in the aftermath of the Eurozone crisis, specifically in regard to the Cypriot banking crisis, which itself arose as a knock-on effect of the Greek sovereign debt crisis. In the Cypriot case thousands of EU citizens lost their deposits when it was decided that two of its largest banks should be put into resolution. The Barrister to the right of the Court is discussing in earnest with his colleagues. He will be arguing that, in fact, the Eurogroup is a body of the EU, it had a definitive hand in this decision, and it should trigger the liability of the Union.

The year is 2020; the Cypriot bank crisis occurred 7 year ago, in 2013. What is striking is the realisation that the lawyers pleading before the Court are the same persons who were there when the Eurozone sovereign debt crisis started to erupting in late 2009; indeed, some of them were directly involved in constructing the legal scaffolding that has held up the economic policy response. In contrast, the finance ministers of the Eurogroup who were part of making the decisions in contention are long gone. It's as if the crisis came, was dealt with and dissipated, and now the legal agents and the judges must very diligently put the legal pieces of this political economic puzzle back together, and most importantly, in such a way that is seen to be just and fair. Any attempt to understand the Eurozone crisis would be incomplete without this piece of the puzzle.¹

¹ Notes of the author, taken during the public hearing of Joined cases C597/18 P C-598/18 P C-603/18 P C-604/18 P, at the Court of Justice of the European Union, Luxembourg, 25 January 2020.

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List of Abbreviations

BoP: Balance of Payments
CAC: Collective Action Clause
CJEU: Court of Justice of the European Union
DG ECFIN: Directorate-General of Economic and Financial Affairs
ECB: European Central Bank
ECOFIN: Economic and Financial Affairs Council (configuration)
EFC: Economic and Financial Committee
EFSF: European Financial Stability Facility
EFSM: European Financial Stability Mechanism
EMU: Economic & Monetary Union
ESM: European Stability Mechanism
EU: European Union
EZ: Euro Zone
FAF: Financial Assistance Facility
FCC: Federal Constitutional Court of Germany
FIDE: Fédération Internationale Pour Le Droit Européen
GLF: Greek Loan Facility
MFF: Multiannual Financial Framework
MoU: Memorandum of Understanding
OMT: Outright Monetary Transactions
SGP: Stability and Growth Pact
SPV: Special Purpose Vehicle
TFEU: Treaty on the Functioning of the European Union
TSCG: Treaty on Stability, Coordination and Governance (Fiscal Compact)

Introduction

On the 25th of February 2020, a public hearing was held in the Grand Chamber of the Court of Justice of the European Union (CJEU) in Luxembourg. This public hearing was in connection to a court case looking at the legal question of whether the Eurogroup – the informal meeting of finance ministers of the Eurozone (EZ) Member States – can be said to engage the non-contractual liability of the EU. This critical question arose in the aftermath of one of the most severe crises the EU, and the euro currency, has ever endured: the Eurozone crisis, which started with Greece at the end of 2009 and spread to other EZ Member States in 2010. This specific case goes back to 2012, when Cyprus was going through a banking crisis which was fatefully triggered by the Greek debt restructuring and meant that there was “significant bank exposure to Greece, which resulted in sizeable losses following the Greek debt restructuring”, indeed it amounted to over €4 billion in losses for Cypriot banks.² Incredibly, the two largest banks comprised 80 percent of the Cypriot banking sector and “400 percent of GDP in assets”.³

Based on these events, the Cypriot government sought to recapitalise them by requesting financial assistance from the European Financial Stability Facility (EFSF) or the European Stability Mechanism (ESM) via the President of the Eurogroup, which it did in the summer of 2012, but it was only in March 2013 that a political agreement for a draft Memorandum of Understanding (MoU) was actually reached.⁴ The MoU would go on to include the details of how these two banks should be put into resolution, which included the forced losses of bank deposits over €100 000, leading to countless EU citizens losing considerable amounts of money.

What is significant about this case is not only that it is still being adjudicated at the time of writing, almost 7 years after the event, but that the Court of Justice is being put in a position where it could legally define the Eurogroup – an informal meeting – as a body of the European Union so that in the future Eurogroup conduct could trigger the non-contractual liability of the EU as per Article 340 TFEU, as well as give the Court jurisdiction *over* Eurogroup conduct in that regard. In this way, the Court would be seen to clarify a legal and institutional issue and, in one way or another, change the institutional structure of the EU in the area of economic governance.

² See page 3, IMF Country Report No. 13/156, June 2013, “Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement”, International Monetary Fund, Washington, D.C.

³ Ibid.

⁴ See Case T-680/13, *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others*, ECLI:EU:T:2018:486

This thesis is about how EU economic policy and governance becomes legally constructed and the implications of this for the institutional structure of the EU. More specifically it is about how legal and policy professionals from different scales of governance are implicated in this process and what is at stake for them, the EU institutions in terms of institutional balance, and the EU more broadly. It also speaks to the question of how intrusive political power has been legitimated during the EZ crisis and what this means for the legitimacy of European governance.

The Puzzle

In October 2009, the incoming Greek government sent revised fiscal statistics to Eurostat – the Commission’s statistical division – showing that for 2009, the government deficit would be 12.5% of GDP, which far exceeded the 3 % deficit limit stipulated in the Treaties and the Stability and Growth Pact (SGP). In the Commission report on the issue dated 8 January 2010, the reasons for this revision were said to be “the impact of the economic crisis, budgetary slippages in an electoral year and accounting decisions”.⁵ The Greek government's admittance of statistical manipulation and re-adjustment is considered the critical point at which the Eurozone debt crisis is said to have started, as it was at that moment that financial markets became concerned about Greek sovereign bonds (M. Blyth, 2013). However, Greece is part of an economic and monetary institutional structure – the Economic and Monetary Union (EMU) – within which this deviation could be interpreted as such, and at the same time an institutional structure that could not account for a reality where a one of its members could go bankrupt.

This is crucial because up to that point, or at least since the end of WWII, the question of whether an advanced Western economy could go bankrupt had not come up. In terms of the EMU – established by the Maastricht Treaty in 1992 – it had been designed to deliver economic growth and price stability. These two policy targets would be achieved with an asymmetrical institutional structure whereby monetary policy moved to the supranational level and was centralized at the European Central Bank, and fiscal and economic policy stayed at the national level, albeit with the Member States coordinating their economic policies in a decentralized system of governance (Hinarejos, 2015a). This asymmetry meant fiscal integration would be substituted by financial integration (Rey, 2013), but also meant having the tension of fiscal constraints coming from the supranational level together with democratic sovereignty at the national level. With the introduction of the Stability and Growth Pact (SGP) in 1997 into the EMU,

⁵ See p.3 of European Commission, 8 January 2010, “Report on Greek Government Deficit and Debt Statistics”, Brussels.

clear excessive deficit procedures were laid out. However, these turned out to be unenforceable, especially in terms of the relaxed attitude of Germany and France towards their excessive deficits and the Pact.

Since the SGP came into force, it has been far from stable. Member States have never followed its rules to the letter of the law, and in fact, a year before the Eurozone crisis, there were several Member States that had breached the SGP fiscal rules: “Spain, France, Greece, Latvia, Malta and Ireland facing serious difficulties” (Coman, 2018, p. 546). In this way, the disciplinary side of the EMU has never been perceived as effective. Greece was simply the weakest link at that time (Lonergan, 2014) and from there, the crisis started to spread in early 2010, as financial markets started reacting to the possible spread of uncertainty from Greece to other periphery Eurozone (EZ) Member States.

It should be noted, that this crisis impacted not only fiscal and financial stability, but also confidence in the EU system of governance. Reform of the EMU regulatory and institutional structure as well as member states fiscal positions have been politically contentious issues. But the key changes have been the creation of various financial mechanisms – notably, the European Financial Stability Mechanism (EFSM), the European Financial Stability Facility (EFSF), and the European Stability Mechanism (ESM), two of which are anchored in hybrid legal arrangements. Moreover, the EZ crisis ushered in the wholesale legal reconstruction of Europe’s sovereign debt markets in a bid to avoid future bailouts (Gelpern & Gulati, 2013). This proliferation of legal instruments and regulations has been intensely debated in EU legal scholarship on the crisis, much of which has been critical (Adams, Louche & Fabbri 2014; Ruffert, 2011; Beck, 2014; Tuori & Tuori, 2014; Sarmiento, 2016; Sanders, 2016), as well as in European legal professional circles⁶ where it has been dubbed ‘juridification’ of European economic governance (Amtenbrink, 2014). This term refers to a number of legal developments, among others, the expansion and differentiation of new legal rules, the use of the Court of Justice of the EU (CJEU) in new international treaties, as well as a large number of court cases engendered by the Eurozone crisis policy response, all of which has in turn created a high degree of legal uncertainty (Takis, 2019).

In general terms, the role of law in European governance has been significant, from the first narratives of the constitutionalisation of the Treaties through the CJEU’s case law (Stein, 1981; Weiler, 1991a), to the positive feedback loops created by the preliminary reference tool connecting national courts to the CJEU in legal dialogue (Sweet & Sandholtz, 1997; Stone Sweet, 2004). Essentially, this was a story of

⁶ “The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU”, (2014) The XXVI FIDE Congress in Copenhagen 2014 Congress Publications Vol. 1.

how law played a role in the institutional construction of the European Union (Mudge & Vauchez, 2012). However, in the area of European economic governance, EU law has been very much absent, primarily because economic policy has been left to the Member States with the aim of economic coordination while state-financing has been left to financial markets. Indeed, the Economic and Monetary Union structure negotiated at Maastricht in 1992 was designed in such a way as to deny the possibility that a sovereign debt crises would occur in the Eurozone (M. Blyth, 2013). In this way, its legal structures set down strict rules related to budgetary discipline, as well as no tools to deal with financial or economic crisis. With the advent of the Eurozone crisis in 2010, within the space of a year, a loan scheme for Greece as well as two financial assistance mechanisms had been created, with a huge amount of legislation in tow.

And now the puzzle: if no institutional structure existed to deal with the Eurozone crisis, and the EMU structure denied such an occurrence could ever arising, how was an intricate legal, institutional economic framework for managing crises constructed while the crisis itself unfolded? Moreover, which legal and policy professionals were in a position to construct such a complex framework and how did they do it under such urgent circumstances?

Based on this puzzle, the following research question is put forward: *how do legal and policy professionals enable and consolidate solutions in an unfolding crisis?*

By answering this questions, the aim of the thesis is to show how legal and policy professionals enable and consolidate the legal construction of economic policy. The thesis seeks to answer this question by analysing the practices of the legal and policy professionals, which is done by, first, re-constructing these practices and examining them through the lens of boundary work, and second, connecting these practices to the network positions of these professionals in the field emerging from the Eurozone crisis.

Theoretical Positioning

Theoretically, this thesis develops a Bourdieusian field approach that is adapted to the transnational and diachronic case with the conceptual tools of boundary work, bricolage and networks. In this way, the thesis is anchored in a sociological approach based on Bourdieu's field theory in transnational contexts (Adler & Pouliot, 2011; Dezalay & Garth, 2011; Kauppi & Madsen, 2014; Mudge & Vauchez, 2012; Vauchez, 2008) in order to show how this process, that is the legal construction of economic policy, unfolds empirically and the implications it has for the professionals as well as for political power.

Following theoretical imperatives of a Bourdieusian framework, my theoretical focus is on the emergence of configured stakes in the spaces between two disrupted fields: economic policy and the transnational European legal field. By explaining how these stakes are forged through the practices of legal and policy professionals dealing with a crisis, we need to understand the nature of transnational fields; how fields are affected by crisis; why practices matter for fields; and how we can conceptually capture the process of practices producing effects that reconfigure stakes so that field and habitus structures become re-aligned through a crisis. A key theoretical point will be the implications of the type of capital that becomes effective in acting in the reconfigured field context. With this in mind, the following propositions are elaborated

- a) In a social context such as a transnational field, we can expect that the subjective (habitus) and objective (distribution of capital) structures will be disrupted by an unfolding crisis.
- b) If a transnational field is disrupted in a fashion asserted in propositions (a), then we can expect that the effects of practices to solve the crisis will produce reconfigured stakes that will shape the subjective and objective structures over time.
- c) If interactions between agents are part of practices, then tracing the effects of these interactions as network patterns over time can illustrate how the disrupted transnational field becomes stabilised with the emergence of reconfigured stakes.

By using these propositions to guide the analysis and the relations between the various concepts, I aim to answer the research question posed and fulfil the research objectives. In terms of the research question, the propositions help focus attention on the process by which the legal and policy professionals enable and consolidate solutions to the unfolding crisis in terms of the subjective structures (habitus); while the objective of showing how economic governance becomes legally constructed is sought to be fulfilled by seeing how the stakes of the crisis change the terms of legitimation for economic governance through legal means.

Research Design and Empirical Material

The thesis is based on an interpretive research design that utilises a case-study methodology and qualitative data in order to understand a relational process. This process is constructed in a narrative form based on multiple qualitative data sources in order to reconstruct the practices and relations of the legal and policy professionals involved. For the subjective structures, I have analysed interviews and documents using a Bourdieusian research strategy that foregrounds practices. However, following the assumption of a disrupted field, I use the concepts of boundary work and bricolage to analyse their

practices during a crisis.

For mapping the interactions, I employ a network method in two distinct ways. First, I employ a network method that can cater for change by measuring the centrality of legal and policy professionals over time. I use the measure of degree centrality to trace the level of an agents' involvement. In order for this measure of involvement to be conceptually meaningful, I then construct a referral network based on the answers of agents involved in the EZ crisis policy response. In this way, the degree centrality of the temporal network is compared to the degree centrality of the referral network, and thereby, the measure can be used to infer an agent's symbolic capital: i.e. their involvement together with whether they are also seen to know well. From this, I infer a species of symbolic capital unique to being part of the EZ crisis policy response.

Central Contributions

The central contributions of this thesis are fourfold.

First, the thesis contributes in a methodological and conceptual way by showing how social network analysis can be utilised to study the effects of the practices of agents on field structures. SNA was used to this in two key ways: These effects are traced diachronically as, first, interactions and experiences gained from being involved in key solutions to the Eurozone crisis, which is then rendered synchronically as a referral network indicating an accumulated symbolic capital from being seen to know well: juridical capital. In this way, a contribution is made to scholarship that argues for the utility of using SNA in terms of Bourdieusian fields (Bottero & Crossley, 2011; de Nooy, 2003; Lunding, Ellersgaard, & Larsen, n.d.; Singh, 2016).

Second, following from the methodological contribution noted above, a conceptual contribution is made to sociological studies of fields by elaborating a conceptual approach to trace field-level change by rendering the process of symbolic capital creation through practices as a property that is also seen to engender novel stakes at the intersection of the transnational fields of European economic governance, on the one hand, and European law on the other. In this case, European economic governance was seen to become legally constructed enabling the emergence of legal stakes, thereby giving agents with juridical capital high levels of influence on issues of European economic governance. Crucially, the conceptualisation utilised here is based on assumptions of field disruption through an exogenous crisis, which leads to a reconfiguration of the field through the accumulated effects of practices of the agents,

with the emergence of a core group of effective agents (Bourdieu, 2005; Lunding et al., forthcoming).

Third, an empirical contribution of this study is an approach to the Eurozone crisis that focuses on the trajectories of the agents involved and uses their experiences as well as their interactions and practices as the point of departure to understand how the Eurozone crisis has changed European economic governance by legitimizing political solutions through legal means. In this way, the empirical chapters have contributed with a nuanced and subjective view of how the crisis unfolded and its impact on those involved in the policy response.

A fourth contribution is to EU studies literature on integration-through-law, where it is shown that the use of law in different ways, reflected specific practice logics, namely a jurisdictional logic and a constitutionalising logic, whereby the former is deployed in a highly instrumental fashion to legally enable the economic solutions within and across jurisdictions; and whereby the latter is deployed to legally consolidate economic solutions. The relevant literature here has talked about the emergence of a large corpus of ‘euro-crisis law’ (Beukers, de Witte, & Kilpatrick, 2017) related to the Eurozone crisis policy response, the possible implications of the rule of law (Kilpatrick, 2015) and legal certainty (Tridimas, 2019), questions of constitutional mutation (Martinico, 2014; Tuori & Tuori, 2014) or simply institutional differentiation (de Witte, 2015) as well as changes in constitutional balance (Dawson & de Witte, 2013a). However, this scholarship, despite giving insights into the various ways law has been implicated in the EZ crisis, whether it be constitutionalising or differentiating, there is no scholarship on the professional practices that enable these legal processes. In that way, this thesis attends to this gap to show how through the practices of legal and policy professionals using jurisdictional and constitutionalising logics, deployed at different times during the crisis, enable process of legal integration and fragmentation.

Structure of the Thesis

In the first chapter, I look at the relevant strands of literature that have dealt with the topics of this thesis: the ideational turn in International Political Economy (IPE); the sociological literature on professionals, as I seek to contribute to this literature in terms of the role of transnational legal and policy professionals in EU economic governance; the EU Studies literature on integration-through-law and the role of the CJEU, as one of my key focus areas is how law can shape and change economic governance; and the literature on the Eurozone crisis, as this study seeks to contribute to this literature by showing that there is a gap in terms of studying the role of professionals in enabling solutions to unfolding crises. The chapter is concluded by discussing why we need to know more about the role of professionals, their

socio-historical contexts, and the knowledge and logics they bring to bear on the governing of crises as well as what this means in terms of the legitimization of public sector policy responses to crises.

In the second chapter, the theoretical framework used to answer the research questions is presented. This thesis takes its analytical point of departure in professionals and their practices, but also seeks to account for their trajectories and relations, and thus the various social contexts they traverse need to be conceptualised. To that end, the analytical starting point for this is the notion of fields, which is elaborated first. Then the other key theoretical elements of practices and boundary work, and social networks are presented. In this presentation, the theoretical components are further elaborated in terms of the focus of this thesis. Furthermore, a section is presented on the analytical strategy in terms of applying the specific concepts, and how the theories relate to each other in terms of a set of propositions.

In chapter 3, the research design and methodology is presented. Here I lay out the ontology and epistemology of the theoretical framework elaborated in the theoretical chapter. Moreover, the data and data collection are described as well as the methods used to analyse the data, and justification of the choices are made in that regard. I dedicate a considerable amount of space to the research strategy utilised in this thesis in order to make transparent the way in which the data was analysed using the relational and processually informed theoretical framework, as well as how social network analysis fits with this strategy.

Chapter 4 is the first empirical chapter, although it is built on a fair amount of secondary empirics and scholarship as it is primarily a historical account of the key developments of economic governance in the EU. This chapter is crucial for elaborating the themes that this thesis deals with and are the foundations for asking and answering the research questions. It traces the origins of the EMU and its legal foundations. In so doing, attention is paid to the negotiations of the Treaty on European Union (TUE) at Maastricht, where the political positions of EU Member States were elaborated/reaffirmed and the subsequent struggles arose over how Europe's macro-economy would be governed; after which the role and the particularities of the European Central Bank (ECB) and its position is elaborated, as well as legal and scholarly debates about its perceived independence. Then I look at the legal issues that arose around the Maastricht Treaty and the EMU structure generally in order to see what legal developments had occurred before the EZ crisis. Here, the legal cases and role of the German Constitutional Court (FCC) is looked at given its critical ruling on the Maastricht Treaty, whereby it gave itself a definitional power to interpret EU law if it considered any EU conduct to be in violation of the German constitution. Finally, the dearth of legal activity around EMU in the lead up to the EZ crisis is elaborated in order to illustrate

the lack of legal tools and precedent.

Chapter 5 looks at the initial policy response during one of the most intense periods of the Eurozone crisis in the first half of 2010. Specifically, the construction of first the Greek Loan Facility (GLF), the European Financial Stability Mechanism (EFSM), and the European Financial Stability Facility (EFSF). By following a chronological narrative, this chapter seeks to both illustrate the way boundary work is deployed as practice by the legal and policy professionals of the main EU institutions; but also to show how this boundary work leads to bricolage and in some cases the construction of boundary objects that bridge conflicting political and legal visions on how to legitimize solutions, specifically in terms of the construction of the GLF and the EFSF. Finally, the boundary object construction of the GLF and EFSF leads to external legal professionals from private law firms being brought in thereby expanding the transnational field implicated in the Eurozone crisis.

In Chapter 6, I look at how the legal and policy professionals perceived and dealt with the political struggles over various legal modalities of the ESM, and how Member State preferences are shaped into modalities of the international law treaties, which are still however connected to the EU legal framework. I analyse how this was done in comparison to the EFSF, the ESM's predecessor. The Commission legal and policy professionals had an opportunity to legally and financially construct the ESM in a way that would improve on the flaws of the EFSF, as well as bind the ESM more tightly to the EU legal order. Key here was making the ESM compatible with EU law as well as how this connects to national legal orders, and how the ESM is articulated in EU law, which essentially links two legal orders. Finally, the chapter ends with an analysis of how the legal and policy professionals enabled the Six-pack – the set of EU legislation created to enforce stricter budgetary discipline – with the innovative “reverse qualified majority voting” mechanism, as well as the international treaty – the Treaty on Stability, Coordination, and Governance (TSCG), all of which were created to upgrade the disciplining legal mechanisms on Member States' budgetary behaviour.

Chapter 7 focuses more on the ECB's conduct during the Eurozone crisis, and how it changes its approach while the crisis unfolds. This is specifically in relation to the Greek debt restructuring in 2012, the idea of which ECB President Jean-Claude Trichet had been vehemently against. By illustrating the boundary work connected to the legal manoeuvrings of the ECB, the chapter seeks to show how the law is deployed strategically to enable solutions that even the most ideologically minded are willing to accept. Looking at the process of the Greek Debt Restructuring (GDR) illustrates shows how the ECB goes from being purely a legal rule-anchored institution in terms of the Economic and Monetary Union

structure to becoming more politically oriented, while buttressing this change in orientation with legal constructions.

Chapter 8 and 9 both look at several high-profile court cases that went before the CJEU in connection with the Eurozone crisis policy response. Following the legal construction of the various solutions of economic governance to deal with the EZ crisis, the point of these chapters is to analyse how these solutions are attacked in court, how they are defended by the EU legal professionals, and how the General Court and the Court of Justice resolve the legal conflicts through boundary work. Chapter 8 looks at two key cases: *Pringle*⁷ from 2012, which is connected to the contestation of the European Stability Mechanism, and *Gauweiler*⁸ from 2015, which is connected to the contestation of the ECB's Outright Monetary Transaction (OMT) programme. These cases are analysed together because of how the *Pringle* judgement informs, not only the Court's judgement in *Gauweiler*, but also how the ECB legal professionals defend the OMT by drawing on *Pringle*, thereby illustrating the development of legal doctrine in Eurozone crisis cases. Chapter 9, which is the second chapter on court case, looks at three cases – *Ledra Advertising*,⁹ *Mallis*,¹⁰ and *Chrysostomides*¹¹ - connected to the policy conditionality imposed on Cyprus for its financial assistance from the ESM, and which caused considerable monetary losses for EU citizens. This chapter is also the last one to analyse practices of the legal and policy professionals as boundary work, and serves as an endpoint for the chronological journey that is traced from the discussion of the origins of Economic and Monetary Union in Chapter 4, through the difficulties of the Eurozone crisis, and to the point where we these three key cases before the CJEU seek to resolve the question of where legal responsibility for conditionality should be located.

In chapter 10, the social network analysis is presented and linked to the boundary work analysed in chapters 5 to 9, in order to show how, depending on the outcome enabled by boundary work, network expansion is observed in different ways. Related to this expansion is the process of consolidation of the solutions as they become legally validated and entrenched through contestation, i.e. the process of legal case-making. For mapping interaction, I employ a network methodology in two distinct ways. First, I

⁷ Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756.

⁸ Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400

⁹ Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701

¹⁰ Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:702

¹¹ Case T-680/13, *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others*, ECLI:EU:T:2018:486.

employ a network method that can cater for change by measuring an agent's centrality over time: a temporal network. I use the measure of degree centrality to trace the level of an agents' involvement in the various crisis-solving processes and contestation processes, i.e. creating the various elements of the crisis management framework and defending these in court. In order for this measure of involvement to be conceptually meaningful, I then construct a different type of network: a referral network based on the answers of agents involved in the EZ crisis policy response. In this way, the degree centrality of the temporal network is compared to the degree centrality of the referral network, from which the measure can be used to infer an agent's symbolic capital: i.e. their involvement together with whether they are also seen to know well. From this, I infer a species of symbolic capital unique to being part of the EZ crisis policy response: euro- crisis juridical capital. Given that in the previous empirical chapters, it was shown that the practices of the legal and policy professionals have led to economic governance becoming legally constructed, we now need to see what this means for the *stakes* of European economic governance. In other words, the issue of what is now at stake if the stakes of economic governance have become rendered in legal form. This matters because if those stakes become symbolically legal – in terms of how economic governance becomes *defined* in legal terms – then those with more symbolic capital of the legal kind have more influence over the terms of these stakes.

In the final chapter, the key empirical findings of the analysis are discussed in terms of the assumptions and propositions of the theoretical framework in Chapter 2. Based on this, the chapter elaborates how it has added to the literature on the Eurozone crisis. More importantly, it discusses the observation of specific logics of practice related to the boundary work observed in the analysis: jurisdictional logic, a constitutionalising logic, a logic of refraction, and a recombinatory logic, all of which are discussed in terms of how the literature on the Eurozone crisis has analysed its governance, as well as the implications for the EU legal order. This chapter further presents how the findings of the social network analysis in Chapter 10 speak to the theoretical propositions in terms of how a disrupted transnational field becomes stabilised through network interactions over time, the emergence of a form of juridical capital connected to the Eurozone crisis, and what this means for the weak field of European law (Vauchez, 2008, 2011). This is followed by some critical reflections on the use of Bourdieusian sociological reflexivity in the empirical study of the frontiers of expanding new legal expertise in economic policy (Dezalay & Madsen, 2012), as well as on the implications of the Eurozone crisis for the legitimacy of EU law. Furthermore, an answer to the research question is presented, as well as limitations of this study, the central contributions, and finally further avenues of research that stem from this thesis.

Chapter 1: Literature Review – Locating Professionals in the EU and Eurozone

This thesis is interested in how the practices of legal and policy professionals enable and consolidate solutions to an unfolding economic crisis. Especially in terms of how the political tensions and preferences are accommodated into the legal constructions that are finally laid down into the economic governance frameworks, and the legal and political ramifications of these constructions. In terms of the possible literatures that are relevant to such an enquiry, I take point of departure in four that speak directly to this focus. The first is the ideational turn in International Political Economy (IPE), as this thesis is nourished by key debates regarding the role of ideas in economic crises. The second is the sociological literature on professionals, as this thesis concerns legal and policy professionals and I seek to contribute to this literature in terms of the role of transnational professionals in EU economic governance; the EU Studies literature on integration-through-law and the role of the CJEU, as a key focus here is how law can shape and change governance areas and this study seeks to contribute to this literature in the area of EU economic governance; and the literature on the Eurozone crisis, as this study seeks to contribute to this literature by showing that there is a gap in terms of studying the role of professionals.

My basic query to the relevant literatures relates to the question of what type of agents are observed acting in economic crisis contexts, and what do their practices legitimizing contested solutions to solve the EMU's problems look like. In the following, I critically discuss the literatures related to the themes of 1) governing in a crisis, and the dearth of scholarship on the role of professionals who get mandates to deal with crisis issues; 2) the EU studies perspectives on governance and the role of law, and in particular the scholarship on the Eurozone crisis, and an indication of the scarcity of work on the professionals involved the Eurozone crisis; 3) and the literature on the significant role of professionals and experts in institution-building in the sociology of professions literature and their positioning in transnational fields. The chapter is concluded by discussing why we need to know more about the role of professionals, their socio-historical contexts, and the knowledge and logics they bring to bear on the governing of crises as well as what this means in terms of the legitimation of official policy responses to crises.

1.1 Ideational Institutionalism: Crisis and How Agents Deal with Them

In the ideational turn of IPE and political science, a key issue in dealing with economic crises is how agents deal with uncertainty and the role of ideas therein (Hay, 1999; Blyth, 2002, 2013; Widmaier, Blyth and Seabrooke, 2007; Widmaier, 2016). This literature has often drawn on sociological theorising (Beckert, 1996; Wendt, 1992, 1999), which posits that “identities and interests are constituted by collective meanings” (Wendt, 1992, p. 407); thus, interests are made up of ideas (Wendt, 1999, p.133). Following this line of thought, Widmaier (2016) suggests then that what is most salient in explaining economic policy change broadly conceived as orders are “the ideas that give them meaning” (ibid.: Kindle Locations 335-338). Indeed, Hall’s (1993) policy paradigms demonstrate how ideas are enmeshed in relations of meaning such that they can belong to a paradigm. In order to understand this more concretely in terms of specific economic crises and institutional change, one can look to the ideational turn in historical institutionalism.

Noting that rational choice institutionalism and historical institutionalism were plagued by the inverse problem of each other (Blyth, 1997), Blyth, Helgadóttir and Kring (2016, p. 148) explain that this was because neither school had an endogenous theory of change. Looking to historical institutionalism, ideas scholars suggested that the trajectory of institutional development could be changed by actors if they held “different ideas about their environment” (Blyth et al. 2016, p.148), which would introduce endogeneity into the analysis. This led to another problem however: if institutions were to have a structuring role, then “ideas could only prove transformative in certain moments and under certain conditions” (ibid.), thus necessitating an investigation of the character of said moments and conditions.

Economic crises exhibit such conditions and thus ideas scholars attempt to explain how ideas are drawn on to reduce uncertainty under such circumstances. For example, Blyth (2002) explains that if situations of high uncertainty – economic crises – are conceived of as ‘Knightian uncertainty’, i.e. situations that are considered unique or radical by agents who are unsure about their own interests and how to achieve them, then “agents must argue over, diagnose, proselytize, and impose on others their notion of what a crisis actually is” (Blyth, 2002, p. 9). Ideas are crucial in such an endeavour because they enable interpretation and, as mentioned, give meaning to what actors think is happening, which in this context would necessitate economic ideas (e.g. theories) being able to say something meaningful about the crisis situation.

However, economic theories can be said to “incompletely...map onto the world they strive to describe” (Blyth, 2013, p. 39), thereby opening up gaps which other, partially related ideas may fill, e.g. the turn to

macro-prudential regulation following the 2008 financial crisis (Baker, 2013) or the rise and fall of Keynesian ideas of fiscal stimulus in 2009-2010 (Farrell & Quiggin, 2017). Another example is the evolution in how state actors as well as non-state actors, such as the International Monetary Fund (IMF), saw capital controls following the 1997/98 Asian crisis (Gabel, 2015).

What becomes critical then is how actors decide that an idea is either suitable for their current context or not. If the circumstances of a policy context can change, e.g. go from being seen as stable to being uncertain, it follows that the suitability of an economic idea given a particular context will also vary (Baker 2013; Gabel, 2015). For example, in the early 1990s, staff at the IMF could be divided into the ‘gradualists’ and ‘big bang’ advocates of capital account liberalization (Chwioroth, 2010): in other words, a group of experts where some promote the orthodoxy of the time (big bang liberalization) and others promote more heterodox ideas (gradual liberalization), which indicates a horizon of possible ideas related to a certain expert discourse but promoted by different fractions of that group. Crisis events can expand the aperture of relevance and suitability for the already existing but marginalised heterodox ideas, enabling them to stick (Gabel 2014). In this way, depending on the context, certain ideas – whether ‘orthodox’ or ‘heterodox’ will have definitional power. Just as crucial however are the types of actor, and their differentiation, that are pushing possibly heterodox ideas, e.g. the IMF economists who could be groups as “gradualists” or “big bang” advocates of capital account liberalization (Chwioroth, 2010). Indeed, calls have been made for more focus on professionals and experts in ideational literature on IPE (Seabrooke & Wigan, 2016, p. 361) to understand the sociological dynamics at play. Moreover, in terms of state and global governance, to further our understanding of how crises are dealt with and connected to institutional change, we need to know how ideas get definitional power.

But as Carstensen (2011) notes, it is possible to further specify the relation between agents and ideas to better understand the ‘micro-foundations’ of the change we observe in “macro-historical patterns” (ibid., p.151), which is very relevant to understanding processes of change in the institutional structure of the EU over time, especially during a crisis. Carstensen (2011) points to the notion of bricolage as giving agency to agents in crisis situations as it enables them to recombine heterogeneous elements into new forms. The point is that there are gaps in our understanding of how agents engage in various practices to enable solutions in a crisis context, and by looking at what ideational as well as social, professional and organisational resources they have access to, we can be in a better position to do this. In the next section, I look at the literature on professionals that discusses these various resources and practices, and especially the transnational context that enables them to exploit mobility through professional and organisational networks (Seabrooke & Henriksen, 2017).

1.2 Ideas and Professionals in Transnational Contexts

In this section, I look at how professionals in transnational contexts use ideas. Firstly, crisis situations do not automatically engender the ascendance of the heterodox; social dynamics such as staff politics can play a role (Ban, 2015), and secondly not all heterodox ideas will stick as it depends on adaptations or translations that will enable the economic idea to stick, especially if it is imported by professionals or experts from a different context (Helgadóttir, 2016; Ban, 2016; see also Dezalay & Garth 2002). This is further complicated when expert groups are allied with policymakers. Looking at the short-lived ascendance of Keynesianism to deal with the Great Recession in 2009-2010, Farrell & Quiggin (2017) show how policymakers are not only interested in economists' expertise for its problem-solving potential but also for the legitimacy it provides them in their policy struggles with competitors; struggles between factions of the economic profession are seen to intersect with struggles between factions of the economic policymaking domain. In this example, alliances can be made between different groupings against their opponents, and the link enabling the alliance may offer certain symbolic power by legitimising the proposed policy with expert or academic capital from the economics profession (see also Dezalay & Garth 2002).

In more general terms, sociological-inspired theories of experts and professionals aim to uncover the social dynamics among actors and between groups of actors to understand this process more precisely. As Seabrooke (2014, p.3) asserts, to only focus on ideas “suggest an independence and autonomy of content from the relations that undergird them, as well as implying that those carrying them can legitimate the implications of the ideas by proclamation (Seabrooke 2006: 40–2)”. In this context, it is more suitable to talk about knowledge as opposed to ideas, as knowledge can be understood to be more closely connected to professional groupings, their practices (Seabrooke, 2014) and strategic deployment of professional knowledge (Freidson, 1986, p. 217), instead of ideas that simply circulate and are drawn on haphazardly. This literature includes studies of how professionals make their own markets (Quack, 2007a; Seabrooke, 2014a), how professionals compete transnationally (Dezalay & Garth, 2002; Dezalay & Garth, 2011), how professionals as elites are highly influential in international governance (Dezalay & Garth, 2011; Kauppi & Madsen, 2013), how professionals identify issues (Seabrooke & Tsingou, 2015) and control issues (Henriksen & Seabrooke, 2016, 2017). Moreover, these professionals are seen to be highly mobile in terms of operating in, and leveraging, transnational contexts.

The growing literature on transnational professionals sees their practices as enabling a high degree of mobility, for example, enabling the creation of new transnational markets (Quack, 2007); enabling change

within professions through transnationalisation (Fourcade, 2006); the rise of the global professional service firms (GPSF) that work for globalized consumers of services such as law and finance (Faulconbridge & Muzio, 2011); and the role of wealth management professionals in global institutional change (Harrington, 2015). This literature demonstrates the key role of professionals in the creation, diffusion and change of institutional forms and markets in transnational and global domains.

In the area of transnational and international law, Yves Dezalay and Bryant Garth's work is notable, and builds on previous work of professionals of governance (Dezalay, 1991; Dezalay & Sugarman, 1995). In the area of international commercial arbitration, the struggle between different transnational elites is also seen to be a competition between their respective expertise: an European approach informed by academia versus an American approach informed by Wall Street (Dezalay & Garth, 1996). Other work has looked at the export of legal and economic ideas, such as human rights law and neoliberal economics, to Latin American countries which serve as testing labs for these governance technologies, while also demonstrating the competition between expertises and the various elites that promote them (Dezalay & Garth, 2002). Following along the same lines but with more emphasis on the significance of historical hegemonic battles, they have looked at similar scenarios in Asia (Dezalay & Garth, 2011) and Europe (Dezalay, 2007). In this thin space of transnational contexts (Seabrooke, 2014a), professionals are seen to command authority through their various types governance expertise (Kauppi & Madsen, 2014).

For highly technical and narrow issues, professional tasks and transnational control are often tightly coupled (Henriksen & Seabrooke, 2017). This type of control and authority can be accrued by traversing the transitional space via social networks (Henriksen & Seabrooke, 2016). In sum, it is fruitful to examine the specific ways that professionals engage and interact with their peer networks as well as organizational networks if we want to understand how transnational organizing occurs (*ibid.*). In other words, tracing social networks is well-suited for revealing key actors and crucially the ideas being promoted in such groups, much like how Dezalay & Garth (2002) demonstrate how the dynamics of elite groups moving back and forth from US institutions to Latin American governments diffuse international human rights.

In sum, in the sociological-inspired IR and IPE we see how actors use ideas in policy struggles and competitions to make use of the uncertainty of crises, as well as how ideas are imported via professional linkages to other policy contexts. However, what is missing here is an articulation of the process whereby an economic policy idea is shaped into legal forms and why such a construction matters. This presupposes an important difference between policy and law: if policies are a set of guidelines that government has

proposed to implement, the legal dimension is the degree to which these policy ideas become formalised into law, and thereby becoming more autonomous, concrete and difficult to change, and supposedly more legitimate and credible in terms of commitments to abide by such laws. In terms of governance of the EU, however, this legal dimension and the legitimacy it confers on powerful authorities – as I argue here – before we get to which professionals would matter for shaping economic policy into legal form, and why that matters for this study.

1.3. The Role of Law in the EU

The role of law in the governance of the EU and European integration has been significant, from the constitutionalisation of the Treaties through the CJEU's case law (Weiler, 1991), to the positive feedback loops created by the preliminary reference tool connecting national courts to the CJEU in legal dialogue (Sweet & Sandholtz, 1997; Stone Sweet, 2004). Essentially, this is a story of how law played a role in the institutional construction of the European Union. This ostensible coherence of the EU legal order, although being anchored in the successive EU treaties (Saurugger & Terpan, 2016, p. 159), has largely come about as the result of landmark rulings and subsequent case law of the CJEU, effectively leading to the constitutionalisation of the EU (Weiler 1991; Stein, 1981). Most notably, the doctrine of supremacy – asserting the supremacy of EU law over national law – and the doctrine of direct effect – enabling private actors to assert EU rights and obligations in national courts.

This process cannot be understood by just looking at the treaties and what the CJEU has done, but also needs to be understood in terms of how national courts have reacted to this process of constitutionalisation (Alter, 2001; Craig, 2004). Notably, the reaction of national courts to the doctrine of supremacy has engendered vastly different reactions. For example, Belgium accepted supremacy without a problem. In contrast, the Italian Constitutional Court subsequently denied supremacy at first, but has slowly accepted it, albeit so long as EU law does not violate the Italian constitution (Craig, 2004). The German Constitutional Court (FCC), at a similar pace to Italy, also only accepted EU supremacy gradually as long as “effective protection of fundamental rights” (ibid., p.4) were ensured, however, it has subsequently continued “to exercise a power of review over the scope of Community competence” (ibid., p.5). In other words, it has seemed to give itself the role of final adjudicator of EU law in Europe. Thus, the relationship between the FCC has always been especially uneasy. Thus, the so-called constitutionalisation of the EU legal order did not simply occur at the time of judgement but was rather a non-linear process whereby national courts had to deal with the confrontation of national law with EU

law, and accept the expansion of the EU legal order, the influence of the CJEU, or politely ignore it.

The preliminary referral mechanism is the interactive process through which constitutionalisation has played out. Enshrined in Article 267 TFEU, this mechanism enables (and obligates) national courts to seek the CJEU's clarification when there seems to be a conflict between national and EU law. It is often pointed out that national constitutional courts have generally refrained from making referrals (Saurugger & Terpan, 2016). This indicates a reluctance from national constitutional courts to accept the CJEU's influence on national constitutions; at the same time, other domestic courts have welcomed this mechanism, especially as it has often served to empower the domestic courts in relation to the domestic legislatures, especially strategically (Weiler, 1991). Thus, on the one hand the referral mechanism has been seen as a point of cooperation between the CJEU and some national courts, and on the other its conspicuous absence as a sign of competition (Stone Sweet, 2004). Finally, whether a national court implements the CJEU's ruling and with what reservations indicates whether there is contestation.

Research on the preliminary reference tool has primarily focused on whether it goes against the preferences of the Member States. For example, in environmental protection the CJEU has been seen to rule in opposition to the preferences of member states in prioritizing free trade norms (Cichowski, 1998). A similar trend has been seen in gender equality and free movement of goods (Sweet & Brunell, 1998). Processes of feedback and spillover are instigated by CJEU case law interpretations of the Treaties, whereby non-state actors push litigation in EU policy domains in the national courts. As these relations became more institutionalised (Sweet, Sandholtz, & Fligstein, 2001), EU policy domains were deregulated at the national level and reregulated at the supranational level. Further institutional change is then instigated from below by non-state actors who had previously been at a disadvantage and now have a vested interest in the expansion of the European legal order (Cichowski, 2007). An alternative narrative of integration is forwarded by the intergovernmentalists (Garrett, 1992; Moravcsik, 1991), who asserted the primacy and interests of the Member States, especially powerful states like Germany, suggesting that the CJEU is more likely to rule in accordance with these powerful states' interests (Garrett, 1992), even while it strategically expanded its judicial authority (Garrett, 1995). However, this argument seems to be more based on institutional design as opposed to empirical evidence (Stone Sweet, 2010). Nevertheless, a key point from the more supranationalist perspective is that when the CJEU makes a judgement, it can have the effect of articulating and/or expanding the a governance structure into novel areas (Stone Sweet, 2010), which could have unintended effects.

Although convincing, the supranationalist literature often paints a smoother and more automatic process

between the CJEU and national courts than is warranted. The CJEU case law may introduce novel legal norms following a referral from a national court, but these are not self-implementing at the national level *ex post*, thus allies of the Court are crucial for the Europeanization of national law, especially in the face of national resistance and poor structural fit (Panke, 2007, 2009). Furthermore, both the supranational and intergovernmental literatures tend to smooth over the details of the interactions and interests of the legal professionals and their trajectories between the various legal institutions and organisations of the EU.

1.4 The Field of European Law and the Missing Lawyers in Economic Governance

As opposed to the EU studies literature on law in context and integration-through-law, the specificities of the actors and their relations and interactions are not revealed (Vauchez & Witte, 2013). There is a growing literature on the role of European legal actors conceived in terms of Bourdieusian fields (A. Cohen, 2010; A. Cohen & Vauchez, 2007; Madsen, 2011b, 2015), as well as recent conceptions of ‘weak fields’ of European law and EU studies (Mudge & Vauchez, 2012; Vauchez, 2008, 2011) in the construction of EU governance via theorizations of its essential structure. More fundamentally, the weak fields of EU law have seen legal actors and law take central roles in the palace wars (Dezalay & Garth, 2002, 2011) of Europe building and the construction of various scales of European governance (Mudge & Vauchez, 2012). This weak field of law means that at the EU level, the boundaries between politics, bureaucracy and law are blurred, as EU legal actors fill structural holes (Burt, 1992, 1995) in the spaces between these fields.

Scholars using sociological approaches have looked at the role of European law associations (jurist advocacy movements) in supporting the CJEU and the broader integration of the EU from 1950s to 1970s. From these meetings, association members developed test cases that would forward the legal integration of Europe, national judges referred cases to the CJEU as well as using European arguments in court, and finally professors played a key role in planning conferences and promoting CJEU doctrine to new academics and lawyers (Alter 2009, p.64). The explanation here is that the construction of the legal order succeeded as it had ideological underpinnings that inspired legal actors who were in some way affiliated with political power (Alter, 2009). In other words, the actors have to have a normative intent, and be politically influential via their position in structured fields of European law, politics and legal scholarship. Mudge and Vauchez (2012) further demonstrate the importance of European law associations, namely FIDE – a transnational legal network – involving the European Commission’s legal

advisors, many of the judges of the CJEU, legal scholars, etc., which “sanctioned the far-reaching consequences of *Van Gend en Loos* as an unveiling of the authentic (constitutional) nature of Europe” (ibid., p.468). Thus, the emergence of an EU legal order based on the idea of a constitution has required active construction by actors traversing different fields. This implies that judges do not just sit and wait for cases, as the above supranationalist literature implied, rather they are active in different legal networks that are bound by shared practices and beliefs, notably a belief in the EU’s legal order as having a constitutional nature.

When judgements are rendered that leans towards this more constitutionalising bent, it can be seen as controversial to a more or lesser extent because when it resolves an issue it clarifies, expands or constructs rules, and thus a governance structure (Shapiro 1998) over national states. These decisions can be openings for institutional change or durability, and thus expand or change the EU’s legal institutional constellation, and are thus highly politicised. For example, in the *Laval* case, the CJEU ruled against Swedish labour unions for “blockading all worksites of a Latvian company, Laval, that had won a construction contract to renovate a public school in Sweden. Swedish unions wanted Laval to follow the Swedish collective agreement process of negotiating labour contracts, which would have made its labour costs more equal to Swedish labour costs” (Alter, 2012, p. 86). The CJEU was criticized for its ruling, as it makes the EU governance structure more durable to the detriment of national values (Joerges & Rödl, 2009). The point is that in sensitive national policy areas, such as social policy in the example above, how the constitutionalising discretion of the CJEU judges is used is not foreseeable; but there is nevertheless a practical logic in it, i.e. expanding the institutional structure of the EU legal order so that it resembles a constitutional legal order.

A key point here, however, is that prior to the EZ crisis, economic policy is one of the few areas where legal professionals such as judges and lawyers have not had a role, a result that is connected to the outcomes of the Maastricht negotiations. The vision of EMU that finally arrived saw the European economy to be anchored in the German conviction of ‘stability culture’ (Beyer et al., 2009) that stressed “the vital importance of credibility of policies within the financial markets” (Dyson & Featherstone 1999, p.2). This consensus meant that central bankers’, and especially the German Bundesbank became highly influential in pushing their vision for the European-wide macro-economy, and would lead to the Bundesbank setting the template for what the ECB would become (Dyson & Featherstone, 1999; Gormley & De Haan, 1996; van der Sluis, 2014), when discussions about creating a single currency gained traction. In turn, the economic aspect of EMU would be simply based on economic coordination

between the Member States with an emphasis on budgetary discipline, overseen by the European Commission and in line with Stability & Growth Pact (SGP).

In such a setup, there was very little legal activity, and thus not much for legal professionals to do. In this way, there is not much scholarship on legal professionals in the area of European economic policy prior to the Eurozone crisis, as it was not really an empirical reality. To the degree that it was, two cases that went before the CJEU. With the introduction of the SGP in 1997, specific excessive deficit procedures were laid out. However, these turned out to be unenforceable, especially in terms of the relaxed attitude of Germany and France towards their own excessive deficits and the Pact itself. This issue put the Commission and Council in conflict, with the CJEU having to judge them both right. Notably, in the judgment, the Court gave a very narrow interpretation of its own jurisdiction (Bardutzky & Fahey 2014).

However, with the advent of the EZ crisis, a considerable amount of legal activity appeared as the scope of the crisis unfolded. Moreover, not only was the activity in terms of the creation of EU legislation such as the European Financial Stability Mechanism, the Six-pack, the Two-pack, the Macro-imbalances procedure and more, but a large number of court cases, as both national and European scales arose in contestation to this expansion policy response. In the next section, the literature on the Eurozone crisis is discussed, with a focus on the dearth of the role of legal and policy professionals.

1.5 Eurozone Crisis Policy Response: studying an economic crisis

Since the outbreak of the Eurozone crisis, an enormous amount of scholarship has been written on the various political, legal and economic and solutions issues. In this way, it is not possible here to do a comprehensive accounting of it all. For the purposes of this thesis, I will focus on what is relevant in terms of where a gap is perceived and the possible contribution that could be made there.

The literature on the Eurozone crisis has looked at its origins, framed as the institutional asymmetry of Economic and Monetary Union (Rey, 2013; Hinarejos, 2015), with the response seen as an ordo-liberal economic structure imported from Germany (Matthijs, 2016; Matthijs & McNamara, 2015), and the use of austerity policies being deployed to the detriment of EU citizens (Blyth, 2013), as well as a general push for more integration being pursued (Ioannou et al., 2015). On this note, with the application of EU integration perspectives, we see new differentiations, for example, scholars have pointed to the crisis policy response as ‘executive supranationalism’ (Coman, 2014; Trondal, 2010), with the European Commission being seen to gain influence (Bauer & Becker, 2014). On a slightly different note, Puetter

(2012) draws on the policy-learning stream of institutionalist literature (Hodson & Maher, 2001) which is characterised as the ‘deliberative turn’ (Neyer, 2006), and focuses on the intergovernmental institutions, the European Council and the Council, and coins the notion of ‘deliberative intergovernmentalism’, which he says has been the locus of governance during the Eurozone crisis. In this way, he “shifts the attention from the supranational sphere of law-making to the intergovernmental field of policy co-ordination” (Puetter, 2012, p.163). Despite the central role of these intergovernmental institutions in the crisis, this thesis looks more at the legal and policy professionals in the interstitial spaces between the various governance arrangements (Mudge & Vauchez 2012); namely, in the spaces between intergovernmental formations of the heads of state and ministers such as the European Council, and the Council, the Eurogroup on the one hand, and supranational institutions such as the Commission, the ECB and the CJEU on the other, as well as the IMF and the private sector. Some recent scholarship has look at the more technical aspects of the creation of the ESM (Smeets, Jaschke, & Beach, 2019), indicating a growing interest in the role of policy-level agents and not just the heads of state and the presidents of the EU institutions. However, there still remains very little on the professional practices of these agents.

In terms of legitimation and implications of the Eurozone crisis, it has been studied from a variety of perspectives. Different scholars have sought to explain the origins of ideas related to the crisis (Blyth, 2013; Crespy & Vanheuverzwijn, 2019), the changing modes power afforded to Member States and EU institutions (Carstensen & Schmidt, 2018) the solutions adopted to douse the flames of the crisis (Coman, 2018) and their implications for politics and societies (Afonso, Zartaloudis, & Papadopoulos, 2015) as well as European integration (de Witte, 2015; Hall, 2017; Ioannou et al., 2015), while others devoted attention to the politicisation and contestation of the solutions put in place to save the euro. While these contributions in EU studies and political economy have shed light on the politics of the crisis (Seabrooke & Tsingou, 2019) showing how political actors have sought to legitimize solutions whilst the crisis was in different phases, namely fast- and slow-burning phases, little attention has been devoted to the uses of the law through professional practices to construct the crisis framework, both in the short and long term. Such legitimation process has many layers. This thesis examines one of these layers by looking at the construction of legitimacy through law.

In the legal scholarship, there is a considerable amount of literature that has looked at the Eurozone crisis, for example, the emergence of a large corpus of ‘euro-crisis law’ related to the Eurozone crisis policy response (Beukers et al., 2017), the series of court cases that have gone before both national courts (Fasone, 2014; Hinarejos, 2015b) and the CJEU (Fabbrini, 2014; Fahey & Bardutzky, 2013), the possible implications of the rule of law (Kilpatrick, 2015) and legal certainty (Tridimas, 2019), questions of

constitutional mutation (Martinico, 2014; Tuori & Tuori, 2014) or simply institutional differentiation (de Witte, 2015) as well as changes in constitutional balance (Dawson & de Witte, 2013a), and finally the implications of the de facto power afforded to the Eurogroup (Craig, 2017). Despite these important examinations of the emergence of new types of legal arrangements, their implications for the EU, as well as the impact of the court cases, there is almost nothing on how the legal professionals themselves have conceived of these legal solutions and dealt with the court cases, or indeed how they perceive the construction of the legal solutions in terms of the EU legal order. If the role of law in the Eurozone crisis has been so significant and is so important in legitimating state authority and EU authority, then why do we know so little about how legal professionals enable the construction of legal solutions.

Based on the literature review above, we would expect to see the influence of lawyers and law but it is not clear how this process has unfolded and what it means for the governing of an economic crisis. What was happening in these weak fields of European law when the Eurozone crisis hit? What other fields were they connected to, or became connected to in ways that mattered for the Eurozone crisis policy response? What are the implications of bringing the law and legal field to bear on an economic crisis?

The shaping of economic ideas into legal forms will also entail bringing legal stakes together with economic stakes. The crisis and how it is dealt with – the various economic ideas and how they are formalised – will engender new stakes for the political field, as well as the fields from where the legal and policy professionals come from.

Summary: Professionals in a Crisis

In this chapter, I presented various conceptions of crises as institutional change, as well as the literature on professionals as agents of institutional change and their high level of agency in transnational environments where institution-building can flourish away from the constraints of thick national environments. Furthermore, I looked at the literature on the Eurozone crisis, which has developed more differentiated versions of EU studies perspectives, namely from supranationalism to ‘executive supranationalism’, from intergovernmentalism to ‘deliberative intergovernmentalism’, as well as the more institutionalism inspired literature that posits critical junctures, path-dependency, and leadership. All these literatures give us important insights into the themes that are of interest in this study, namely: legal and policy professionals, institutional change, and the Eurozone crisis. However, in discussing these literatures I have identified an interesting gap. In general terms, there is a dearth of research on *how*

economic policy ideas and political preferences are turned into ‘rationalised’, legal institutional structures, let alone by whom it is done, and moreover, how such an operation is executed while a crisis is unfolding and getting more severe.

I argue that it is legal and policy professionals that enable this process of enabling solutions and consolidating them into novel legal structures, and which they have to defend; in short, the process of how economic policy becomes legally constructed, and the implications therein. Moreover, there is a lack of empirical research on a key gap. The Eurozone crisis ushered in a significant transformation of the Economic and Monetary Union in various critical legal ways (hence the high number of court cases), however, the EMU has always been institutionalised in a very narrow and ambiguous legal sense. How is it then that such a great legal transformation was undertaken and by whom was it undertaken? If professionals have been known to be the preeminent institutional builders of contemporary times (Dezalay & Garth, 2016; Muzio, Brock, & Suddaby, 2013; W. R. Scott, 2008), especially at the transnational level (Kauppi & Madsen, 2014), then it is important to examine the professional practices that have been key to constructing the new macro-economic architecture of Europe during an unfolding crisis, especially with regard to how the most intrusive aspects of it have been legitimated.

Chapter 2: Theoretical Framework – Tracing Disrupted Fields via Practices & Networks

In this chapter, I put forth my theoretical framework which is the basis for the analysis. Following from the gaps identified above in the literature review, this framework aims to reconceptualise methodological and analytical approaches to the weak field of the EU by specifying a network approach to locate legal and policy actors, who are embedded in complex and messy social environments and occupy in-between locations between economics, politics and bureaucracy. It further elaborates a conceptualisation of how to elucidate the ‘translating’ work that legal agents undertake when economic policy ideas take a legal form, by drawing on the concept of boundary work. This is especially in regards to the specificities of legal devices such as jurisdiction, legal competence, and its rationalising power in co-producing EU governance structures.

To that end, this chapter lays out the theoretical framework for this dissertation in which the concepts and their adaptations to this study’s needs are fleshed out. Following theoretical imperatives of a Bourdieusian framework, my theoretical focus is on the emergence of configured stakes in the spaces between two disrupted fields: economic policy and the transnational European legal field. By explaining how these stakes are forged through the practices of legal and policy professionals dealing with a crisis, we need to understand the nature of transnational fields; how fields are affected by crisis; why practices matter for fields; and how we can conceptually capture the process of practices producing effects that reconfigure stakes so that field and habitus structures become re-aligned through a crisis. A key theoretical point will be the implications of the type of capital that becomes effective in acting in the reconfigured field context.

In the following chapter, I will first outline the key theoretical elements of field, practices and boundary work, and social networks. In this presentation, I will put forward the components and how I see these theories in terms of the focus of this thesis. Furthermore, a section is presented on how I plan to apply the specific concepts, and finally a set of propositions based on this theoretical framework are laid out to inform the process of analysis.

2.1 A Theory of Fields & Weak Fields

2.1.1 *The Significance of Field Characteristics*

This thesis takes its analytical point of departure in professionals and their practices, but also seeks to account for their trajectories and relations, and thus the various social contexts they traverse need to be conceptualised. To that end, the analytical starting point for this is the notion of fields, which sees the social contexts of agents as shaped by their striving as if in a game (Martin, 2003). This metaphor is not intended to trivialise their realities; rather it serves to give the basic starting point of the dynamics we expect to see in the agents' various social contexts, and is also the reason for why this theory was chosen: its flexible application to different complex social realities, without simplifying them too much. In this way, field theory has been applied in very different types of contexts, for example, specific national contexts (Sapiro, 2003), broader institutional national contexts (Bourdieu, 1996), specific transnational contexts (Mudge & Vauchez, 2016), broader transitional contexts (A. Cohen, 2011; Spence et al., 2016), as well as social movements (Fligstein & McAdam, 2011) and between organisations (Dimaggio & Powell, 1983; Suddaby & Viale, 2011).

Moreover, there are various strands of field theory, for example, Djelic & Sahlin-Andersson (2006) bring together Bourdieusian field theory and other cultural and spatial views (Mohr, 2005). Fligstein & McAdam (2012) outline an integrated theory to explain how social actors accomplish stability and change in meso-level social arenas – *strategic action fields* (SAF) – which they see as the building blocks of modern societies in terms of politics, economics and organizations. They align themselves with previous work by Fligstein himself (2001), as well as Bourdieu and Wacquant (1992), and DiMaggio and Powell (1983), and Martin (2003). In contrast, the Bourdieusian theory of fields is more akin to “a conceptual tool to explain social change and stability” (Dezalay & Garth, 2016, p. 191) by focusing on dynamics of struggle, albeit with the addition of a number of analytical components that enable the theory to do this, notably, habitus and capital (Bourdieu, 1977), in a framework that seeks to encompass subjectivity and objectivity (Pouliot & Mérand, 2013). Given these different conceptions, it is pertinent to think through what matters in applying the different conceptions that are available.

In a programmatic piece, Krause (2018) has fruitfully looked at the different properties of fields and how they have been applied, with specific focus on how the properties of autonomy, structure and scale matter for our understanding of fields. On the first property, it is pointed out that Bourdieu saw autonomy as a key reason that fields emerged in the first place, i.e. because they gained autonomy, e.g. the field of art

becoming autonomous from political patronage (Bourdieu, 1995), while fields can lose autonomy, which is pointed out in the context of the spread of neoliberal imperatives into politics. For my work, the European transnational context in focus means the field of interest is weak, as Vauchez (2008, 2011) has theorised in that it is highly dependent on other fields, a characteristic that in turn makes it highly influential overall, as it appears in the interstitial spaces between politics, bureaucracy and economics. On the point of structure, Krause elaborates three dimensions that are captured synchronically: “firstly, the degree of consensus and contestation in a given field; secondly, the nature of the symbolic oppositions in a given field; and thirdly the distribution of different types of capital across positions” and referring to Steinmetz (2005), a fourth that is captured diachronically: “settledness” or what Fligstein and McAdam (2012) called field stability (Krause, 2018, p.11). The context of the Eurozone crisis and the uncertainty around it mean that the field is considered to be disrupted (Bourdieu & Wacquant, 1992), an assumption that will be explored in a later section, but more importantly it will be looked at diachronically in order to see how the disrupted state becomes settled through the effects of the practices of the legal and policy professionals. Finally, on the point of scale, Krause (2018) notes that fields are not just found at different scales, but also moving between scales foregrounds whether we can speak of vertical autonomy (Buchholz, 2016), and horizontal autonomy, but as mentioned the transnational scale of the empirical context of this study means that the field in question is weak and thus not autonomous either vertically or horizontally. What is of more interest is that the scale can become a stake in the field, i.e. keeping issues at one scale or enabling them at another scale. In the EU context, stakes moving between scales can impact how the stakes are played over, especially in legal terms, such as whether national courts make preliminary references to the European court or not. Or devising a solution to the crisis within the EU legal order or outside will change how the stakes of the fields involved may be perceived. In this way, the different conceptions of field matter for choosing how to approach the empirical context. In the next section, I elaborate the specific conceptual tools of field theory and explain their application in this thesis.

2.1.2 Bourdieu's Field, Habitus and Capital

Bourdieuian fields are “arenas of struggle” (Swartz, 1997, p. 120), as opposed to strict functional areas of human activity, such as religion or the family. Although these areas of life can certainly be part of a field, the point is that fields do not equate common sense notions of functionality or institutions. They are not totally endogenous and are open to some external influence (Liu & Emirbayer, 2016), i.e. they are only partially autonomous, and not only can fields be decomposed into more, smaller fields (Bourdieu, 2005) but they can be connected to other fields, for example, the links between the legal field to the field

of power in Europe (A. Cohen, 2011).

Fields are analytically differentiated to the degree that: "...each field prescribes its particular values and possesses its own regulative principles. These principles delimit a socially structured space in which agents struggle, depending on the position they occupy in that space, either to change or to preserve its boundaries and form" (Bourdieu & Wacquant 1992, p.17). Thus, the boundaries of a field can be issues of struggle for the actors engaged in that field. More generally however they are searching for social distinction using various resources denoted as capital that actors can accumulate in their struggles and competition for this recognition (Bourdieu, 1984). Finally, habitus is the system of dispositions, tendencies and practical knowledge that enable action in fields (Bourdieu, 1977, 1984).

A crucial aspect is the notion of how fields are reproduced: "fields capture struggle within the logic of reproduction" (Swartz, 1997, p. 121). Thus, they constitute "*a space of conflict and competition*",

"in which participants vie to establish monopoly over the species of capital effective in it—cultural authority in the artistic field, scientific authority in the scientific field, sacerdotal authority in the religious field, and so forth—and the power to decree the hierarchy and "conversion rates" between all forms of authority in the field of power. In the course of these struggles, the very shape and divisions of the field become a central stake, because to alter the distribution and relative weight of forms of capital is tantamount to modifying the structure of the field" (Bourdieu & Wacquant 1992, p.17-18).

The distinction between conflict and competition is important here because, depending on where one is in the hierarchy, or whether they are central or peripheral as per the structure of the field, then agents may be in outright conflict over what the stakes are, or they may be simply in competition over the stakes. An element of this conflict and competition concerns the "doxa" or terms of the field: "commitment to the presuppositions - doxa - of the game" (Bourdieu, 1990, p. 66). Conflict arises when the doxa – which underpins the established order of the field – is challenged by more heterodox views which question this orthodoxy. This is especially in regard to who defines the borders of the field: "To define boundaries, defend them and control entries is to defend the established order in the field" (Bourdieu, 1996, p. 225).

In this way, field agents are often struggling over definitional power over the field and its resources. As Gracia and Oats assert "Each protagonist in the game attempts to impose the definitions that are favourable to their own interests. The game in this sense is not one of benign play, but rather a constant and competitive struggle for power in which tensions are most acutely present at the boundaries of practice" (Gracia & Oats, 2012, p. 307). This means that they entail some level of indeterminacy and that there is a strategic interplay in how agents in the field vie for rewards (Bourdieu & Wacquant 1992, p.18).

In mapping a field, the agents' structured positions are elucidated based on their store and distribution of capital – these are their positions. When agents act vis-à-vis a field, they are said to engage in position-taking, and these positions-takings are seen to be reflections of their field positions (Leander, 2001). In this way, one can assume that “[a]gents are disposed to defend certain ideas or norms, but only insofar as they “fit” with the positions that they hold” (Pouliot & Mérand 2013, p.33), however, there may be deviations, as in position-takings may not align with positions, which Bourdieu refers to as hysteresis (Bourdieu & Wacquant, 1992).

Because agents are seen to generally act in line with their positions in the field, their acts can be considered “interested” (ibid.) insofar as they are interested in the ‘game’ of the field and their position garners resources and rewards, however, because these positions will be differentiated, the field is structured around the battle “between those who remain orthodox and those who commit heresy, those who are elite and those who position themselves against the elite, and so forth” (Pouliot & Mérand 2013, p.33). To win this game, agents will have strategies:

“the strategies of a “player” and everything that defines his “game” are a function not only of the volume and structure of his capital *at the moment under consideration* and of the game chances [...] they guarantee him, but also of the *evolution over time* of the volume and structure of this capital, that is, of his social trajectory and of the dispositions (habitus) constituted in the prolonged relation to a definite distribution of objective chances” (Bourdieu & Wacquant, 1992, p.99).

Agents' strategies will be informed by *habitus*: a “system of lasting, transposable dispositions which, integrating past experiences, functions at every moment as a matrix of perceptions, appreciations, and actions” (Bourdieu, 1977, p.82–3). In this sense, it can be referred to as an actor's dispositional logic (Pouliot & Mérand, 2013). In terms of the field, habitus is a “structuring mechanism” that enables agents to navigate their respective fields and is “an operator of rationality, but of a practical rationality immanent in a historical system of social relations and therefore transcendent to the individual” (Bourdieu & Wacquant, 1992, p.19). This form of rationality is therefore not connected to rational-choice theory, which posits a myopic focus on utility maximization.

To deal with the contingency of social reality, habitus is flexible, it is “a generative spontaneity which asserts itself in the improvised confrontation with endlessly renewed situations, it follows a *practical logic*, that of the fuzzy, of the more-or-less, which defines the ordinary relation to the world” (Bourdieu, 1987a, p.96, seen in Bourdieu & Wacquant, 1992). This is especially so in situations of high uncertainty such as

an economic crisis, and in fact although habitus is very much connected to the field through which it has been structured, in times of crisis, “the routine adjustment of subjective and objective structures is brutally disrupted...” (Bourdieu & Wacquant, 1992, p.131).¹²

Habitus, together with field, construes a social ontology encompassing subjectivity and objectivity, and is the “point of dynamic intersection between” agent and structure (Pouliot & Mérand, 2013, p.29). In other words, it is a “socialized subjectivity” (Bourdieu and Wacquant 1992, p.126). Given that habitus essentially inclines the agent to this or that practice, the agent develops “strategies” so as to keep their position, however these strategies “are neither intentional nor fully determined because they simply come from having a sense of the game, which in turn is generated by one’s habitus” (Pouliot & Mérand, 2013, p.29).

To understand how strategies are specifically deployed entails defining *capital*, which is central to the concept of field and defined as the accumulated material and embodied labour of an agent (Bourdieu 1986) – it is that which affords possibilities, and does not leave the game of social reality open to pure chance (ibid.). Bourdieu has defined three general types of capital: economic, the accumulated wealth of money and property rights; social, the relationships with various types of people that can be mobilised for resources, e.g. one’s social network; and cultural, the accumulated knowledge, skills and experience that grant one access and position in a field, e.g. educational credentials (Bourdieu, 1986, p. 243; Singh, 2016).

Capital matters for one’s position and possibilities in the field, and, depending on the type of capital, “is what is efficacious in a given field, both as a weapon and as a stake of struggle, that which allows its possessors to wield a power, an influence, and thus to exist, in the field under consideration...” (Bourdieu & Wacquant, 1992, p.98). The three types of capital mentioned can to a more or less degree take on this symbolic value depending on the field in which that capital is recognised to have value, thus transforming that particular capital into symbolic capital: “Symbolic capital is any property (any form of capital whether physical, economic, cultural or social) when it is perceived by social agents endowed with categories of perception which cause them to know it and to recognize it, to give it value” (Bourdieu, 1994, p. 8). This

¹² On this note, Bourdieu and Wacquant posit that such a crisis situation can “constitute a class of circumstances when indeed “rational choice” may take over, at least among those agents who are in a position to be rational” (ibid.); that is, because the field is disrupted, some actors may become myopically focused on maximizing their utility. However, IPE scholars such as Mark Blyth would perhaps argue that these agents may not know what their interest and thus utility is, but for Bourdieu, interest is not a utilitarian pursuit of agents; interest is an historically variable and “socially constituted concern for, and desire to play, given social games” (Bourdieu & Wacquant 1992, p.25).

means that capital becomes power when it is recognised and valued in a field. Later, it will be shown that symbolic capital is a bridge between practice and field, and mapping network interactions as a modality of practice can show how symbolic capital accumulates to then partially structure the field (de Nooy, 2003). For now, I will look at an example of how symbolic capital is recognised.

Bourdieu has referred to 'juridical capital' vis-à-vis the state as "that particular form of cultural capital, predisposed to function as symbolic capital, that is juridical competence" (Bourdieu, 1994, p.16), i.e. juridical capital has symbolic value in the field of state power because of the way that law rationalises and makes legitimate the arbitrary and coercive power of the state. In this way, "[s]ymbolic capital is a form of power that is not perceived as power but as legitimate demands for recognition, deference, obedience, or the services of others" (Swartz, 1997, p. 43). In other words, it is symbolic power (Bourdieu, 1986). This further implies that cultural capital will often be seen as symbolic capital because "its transmission and acquisition are more disguised than those of economic capital" (ibid., p.245). Next, I discuss symbolic power and legitimation as well as why it matters in this dissertation.

2.1.3 Symbolic Power and Legitimation

Just to recap how power is understood in Bourdieusian terms. Firstly, the notion of capital denotes power: "these fundamental powers are economic capital (in its different forms), cultural capital, social capital, and symbolic capital, which is the form that the various species of capital assume when they are perceived and recognized as legitimate (Bourdieu 1986a)" (Bourdieu, 1989, p. 17). Drawing on Weber, Bourdieu sees culturally-derived symbolic representations of legitimacy as crucial "to the exercise and perpetuation of power" (Bourdieu & Passeron, 1977, p. 5). However, the power is not simply in the symbols, but is in relation to the field in which belief in the legitimacy of those symbols is engendered:

"... for Bourdieu, symbolic power resides not in the force of ideas but in their relation to social structure. Symbolic power "is defined in and by a determinate relationship between those who exercise this power and those who undergo it—that is to say, in the very structure of the field in which belief is produced and reproduced" (Bourdieu 1977d:117)" (Swartz, 1997, p. 88).

Thus, for Bourdieu simply exercising power over others is arbitrary, and thereby always requires legitimation, which he sees as misrecognised (Swartz, 1997). In order to illustrate this more clearly, he contrasts symbolic power to 'raw' power:

“The chances that the act of recognition will be recognized as legitimate, and that it will be able to *exercise its power of legitimation*, are increased the less it appears to be determined by external physical, economic, political, or affective constraints (hence the more "authentic," "sincere," "disinterested," etc., it appears) and the more it appears to be exclusively inspired by the specific grounds of an elective submission, and thus the greater the degree to which its author possesses the legitimacy demanded by the power in search of legitimation” (Bourdieu 1996, p.383).

There are a number of points that are significant to the topic of this dissertation. The first point is that, as Bourdieu has discussed elsewhere (1987b) and which is also a topic that Weber has looked at extensively, the law and legal agents often appear as disinterested and the practices of law exercise their power of legitimation by appearing to be neutral and able to inspire “grounds of an elective submission” (Bourdieu, 1996, p.383), i.e. the large majority of people accept the law of their land, and indeed submit to it to a large degree.¹³ This act of recognition Bourdieu speaks of is salient to the process of legitimation that this dissertation envisages, as the law exercises its power of legitimation by recognising and translating acts of power (specifically economic power) into a legal form. However, it is not simply a translation of high fidelity; the specific constraints of law and its relations and procedures mean that acts of economic power take on an institutionalised and legal form that has implications (possibly unknown) for those authorities exercising this economic power. Furthermore, in some instances, a legal route may already constitute that exercise of power.

The point on misrecognition means that when law legitimates acts of economic power, it conceals the arbitrariness of the imposition of that power on those who are dominated by it. Also, misrecognition is connected “to Bourdieu’s strong claim that all actions are interested. The logic of self-interest underlying all practices—particularly those in the cultural domain—is misrecognized as a logic of “disinterest”. (Swartz, 1997, pp. 89-90). However, it should be noted that this interest is connected to the notion of the game of the field and the specific stakes for the agents vis-à-vis the field, and should not be thought of as the self-interest of rational-choice theory.

For the purposes of this thesis, symbolic power is a key notion connected to the legitimation of decisions during the Eurozone crisis. In this framework, it is argued practices of legal and policy professionals legitimate the decisions made because these practices rationalise the neoliberal economic ideas into a legal framework. In Bourdieusian terms, this means that they conceal political and financial power relations. In terms of this dissertation, the notion of symbolic power is connected to practices, because before we

¹³ Of course, in the general sense that I am referring to it now, it is arguable if this is actually the symbolic power of law, or social norms inculcated through socialization; regardless, in specific empirical situations, people generally do submit to the law. However, in rule of law democracies, the constitutions of these polities are undergirded by fundamental rights norms, by which I mean it is not just any laws that people electively submit to, but legal systems that have constitutional rights.

can identify symbolic power, we need to identify symbolic capital which is accumulated through practices (de Nooy, 2003) of legal and policy professionals.

2.1.4 *Transnational Fields as Weak Fields*

In recent literature focusing on transnational contexts, conceptions of a weak field have been asserted for example in Vauchez (2008, 2011), and Mudge & Vauchez (2012). Essentially, Vauchez's conceptualization builds on research of transnational settings (Dezalay & Garth, 2002, 2011; Fourcade, 2006) and sets out to trace the socio-genesis of a field, i.e. the relevant actors' "socialization, personal trajectories, and professional careers" as well as revealing the "transnational and cross-sector circulation of ideas and models" (Vauchez, 2011, p. 340). His point of departure is in transnational fields which he sees as weak based on several characteristics: they exhibit a hybrid structure whereby they are both *settled* and *emerging* without being either (Steinmetz, 2008). In terms of "emerging", weak fields are extensively intertwined with adjacent fields and have thin internal differentiation; in terms of "settled", weak fields are distinguished "by densely institutionalized settings populated by established transnational professionals competing upon a commonly valued type of symbolic capital" (Vauchez, 2011, p.342).

The point is that weak fields are highly interdependent and overlap with adjacent fields; transnational fields are often interdependent and overlap with national fields. Weakness is precisely "their *interstitial* position" (Vauchez, 2011, p.342) whereby they mingle with more delineated and densely constituted fields (Topalov, 1994, p. 464, as seen in Vauchez, 2008). Weak fields in transnational settings are further characterised by blurriness - "porous internal and external borders" (Vauchez, 2008, p. 136), and therefore a weak field lacks autonomy, i.e. it is not a self-sufficient social space or sufficiently isolated to be considered on its own.

These elements of a weak field, far from limiting it, actually give it influence, which is indicative in the transnational settings of the European Union. Vauchez (2011) hypothesizes that this weakness enables the transnational fields of the EU to hugely influence the formation of the "EU government's cognitive and normative frames (Mudge and Vauchez 2010; Robert and Vauchez 2010)" (Vauchez, 2011, p.343). Empirically, he has looked at the European legal field and found the ubiquity and influence of EU lawyers is, firstly, due to their ability to take multi-level network positions in both national and transnational networks; for example, "home country networks" such as national political affiliations or university alumni are a source of legitimacy and resources in getting positions in EU institutions, and in

transnational networks for example, European-wide professional associations, are required for exhibiting “one’s expert and neutrality credentials (Sacriste and Vauchez 2007)” (Vauchez, 2008, p. 139). Secondly, due to professional mobility whereby actors move between roles, for example, from lawyer to scholar to judge to consultant and so on. In sum, transnational fields with permeable boundaries are sites favourable to multi-positional and institutional entrepreneurs. This is also clearly seen in the weak field of EU Studies, which is populated by “scholarly avatars” who engage in theory-building efforts such as the *Community of Law* and the *Single Market* and establish these cultural frames in the European political and bureaucratic field where these frames become realized as programmes of action (Mudge & Vauchez, 2012). This is not a new finding in general terms, as the authors themselves note, the contention “that scholarly contests and state building are always interconnected, shaping and informing each other” (ibid., p.456-57) can be seen in the work of Dezalay and Garth (2002, 2011), Abbott (2005), and Fourcade (2006).

The context of my study takes place in transnational fields where internal and external borders are porous and actors have multiple positions in terms of their organisational affiliation, their professional affiliation, possible academic positions, as well as expert groups. Given this ‘weakness’, in a later section, a conceptual approach to capture actors with the ‘capital’ or properties needed to act in the context of the EZ crisis, e.g. the legal and policy professionals I aim to study, using social networks will be elaborated.

2.1.5 *Fields Disrupted by Crisis*

Having presented the components of the field conceptual toolkit, and further elaborated the field we expect to see at the level of the EU, it is crucial to the topic of this thesis to conceptualise what a crisis or shock to a field would entail. Indeed, a key aim of this thesis is to understand how the disruption of objective structures of a field change and become re-structured. As mentioned above, Bourdieu has referred to a crisis as a disruption between the subjective (habitus) and the objective (field) structures of a field (Bourdieu & Wacquant, 1992), and this is a key analytical point of departure that will be looked at in the analysis. In the literature, scholars have certainly looked at how fields change, for example, through displacement whereby field stakes emerge through competition over a symbolic product, whereby new entrants oppose the old guard (Dezalay & Garth, 1996). Although some scholarship has been done in relation to a *context* of crisis, for example, in *Distinction* (1984), Bourdieu notes the May 1968 crisis as a result of struggles,¹⁴ and Dezalay & Garth (2002) note the crises afflicting the Latin countries in their

¹⁴ I thank Christoph Houman Ellersgaard for pointing this out.

study, but there is not so much a Bourdieusian *field* analysis of crisis conditions specifically, where the focus is on how a field changes or emerges through a crisis.

Kluttz & Fligstein (2016) provide some analytical traction when looking at how fields may change due to a disruption or shock of some kind. Although they are primarily talking about ‘Strategic Action Fields’ (SAF) in this regard, their conceptual discussion is helpful in directing our attention to what changes we could expect to see. For them, there are generally two types of change that we see in a field (or an SAF): “(1) continuous piecemeal change, the more common situation in which change is gradual and due to internal struggles and jockeying for position, and (2) revolutionary change, in which a new field emerges in unorganized social space and/or displaces another field” (Kluttz & Fligstein, 2016, p. 199). Indeed, type 1 changes are what we would expect to see in settled fields that still undergo incremental changes over time but are still relatively stable. For the purposes of this thesis, we are primarily interested in type 2 changes where an unorganized social space becomes organised overtime due to crisis-solving practices and thus stabilised. In a sense, unorganized means disrupted. These type 2 changes could be endogenous whereby a transformative change occurs at a tipping point of contention between existing field agents; however, Kluttz & Fligstein (2016) contend that most transformative change occurs exogenously. They outline three versions of this. The first relates to new entrants that are seen to invade the field and whose success “may depend on many factors, including their strength prior to invasion, the proximity (in social space) of their former field to the target field, and their social skill in forging allies and mobilizing defectors” (ibid., 199). The second is a more macro-level event, such as an economic crisis, and which often involves the state. And the third is through the linkages between fields, i.e. a disruption from one field can be transmitted to another through the linkages, especially if the latter field is highly dependent on the former.

For my research purposes, the social space under focus is assumed to be highly disrupted by an exogenous crisis, namely, the EZ crisis, but this does not preclude the possible dynamics of new entrants, nor the role of linkages between fields. Indeed, given that the focus here is on transnational fields, which could be said to be weak because of their dependence on other fields (Vauchez, 2011), we need to be open to what this could mean in a crisis situation. Moreover, in terms of new entrants, given the research puzzle revolves around the question of how the legal and policy professionals enabled solutions within a legal institutional structure that denied the possibility of such a crisis occurring, we can expect that new entrants may be brought in to assist in dealing with the crisis. Finally, we must be open to the possibility of how displacement may occur in transnational field contexts, such as the weak field of European law which is

closely connected to the field of EU politics, in that law as a symbolic system has played a large role in shaping the governance structures of the EU (Mudge & Vauchez, 2012).

In this way, it will be important to understand *how* new entrants enter the space and how this is justified, as well as what it means for the existing agents and whoever else is connected to the crisis space. To do this, I will draw on the concepts of boundary work and bricolage as a way to analyse the processes at play when a social space is disrupted by an exogenous crisis, but also to account for how new entrants may come in and how this space in focus may be linked or become linked to other social fields. Boundary work is argued for based on the notion that in a space under going disruption and change, the boundaries will be contested and in flux, and thus the idea here is to be able to gain analytical traction on how boundaries are struggled over and used in dealing with the EZ crisis. Bricolage is argued for on the basis that it offers analytical traction with regard to how ideas are drawn on in times of crisis.

2.1.6 Bricolage and the Paradigms of EU Studies.

Following on from the above section on contexts of crisis, I will now present the notion of bricolage as it is relevant to such contexts. In the ideas literature in IPE, crisis contexts offer fertile ground for looking at how agents mobilise ideational resources, notably, how ideas not only assist agents in dealing with a crisis, but also help them realise what their interests are (Blyth, 2002). Generally speaking, this literature sheds light on how agents deal with the uncertainty arising in contexts of crisis and the role of ideas in dealing with this (M. Blyth, 2002, 2013; Hay, 1999; Widmaier, 2016; Widmaier, Blyth, & Seabrooke, 2007). But as Carstensen (2011) notes, it is possible to further specify the relation between agents and ideas to better understand the ‘micro-foundations’ of the change we observe in “macro-historical patterns” (ibid., p.151), which is very relevant to understanding processes of change in the institutional structure of the EU and Europe over time, especially during a crisis. To do this, we can draw on the notion of bricolage and its use in institutional settings.

The strand of literature is the institutional scholarship utilising the notion of bricolage (Campbell, 2005; Carstensen, 2011, 2017; McAdam & Scott, 2005). This can help us conceive of the process that would be at play in a crisis situation where the usual integration of dispositional logic (*habitus*) with positional logic (distribution of capital) as manifested in practice would be disrupted. In other words, in a crisis context, we can look at practices through the lens of bricolage to see how agents enable and consolidate solutions.

In order to act in an uncertain context (McAdam & Scott, 2005), “actors must work actively and creatively with the ideas and institutions they use, because the structure within which actors work does not determine their response to new circumstances” (Carstensen, 2011, p.147). Specifically, we could expect to see a process “where bits and pieces of the existing ideational and institutional legacy are put together in new forms leading to significant political transformation” (Carstensen, 2011, p.147). In other work, bricolage has been conceptualised as a “recombinatory logic” in a context of organizational innovation (Stark, 1996). Stark (1996) finds in his study of the recombinant organisation of property in post-socialist Hungary that “What we find are new forms of property in which the qualities of private and public are dissolved, interwoven, and recombined” (ibid., p.1016). Analytically, the construction of new organisational forms that, for example, bridge private and public boundaries as in Stark’s (1996) example, or other types of organisational boundaries can be seen as the construction of boundary objects through the recombining of existing elements, and especially when agents from different “worlds” get together: “As groups from different worlds work together, they create various sorts of boundary objects” (Star & Griesemer, 1989, p. 408). boundary objects arise out of processes, and in this thesis, through practices of bricolage, as defined above.

For the purposes of these thesis, and given that I focus on the practices of legal and policy professionals, I use the lens of bricolage to see whether their practices enable the recombining of different ideational and institutional elements to form something new – as boundary objects – to deal with the EZ crisis

I will now discuss practice theory in more depth and I will look at how field theory connects to practice and interactions, the latter of which are key to showing how practices produce symbolic power which in turn legitimates decisions.

2.2 Professional Practices and Law: Structuring Fields & Co-constructing the State

2.2.1 Why Practices Matter for Fields in Crisis

Practices as a focus of study have gotten a lot of attention in contemporary sociological and organisational literatures. Before focusing on the Bourdieusian conception of practices, Etienne Wenger’s (Wenger, 1998, 2000) work is pertinent to mention here. In Wenger’s ‘communities of practice’ a key point is that social learning in groups through practice leads to definitions of competence (Wenger, 2000). A relevant point here is that his framework sees practices leading to competent benchmarks of performance, with

the implication that when engaging in practices, it is not the case that anything goes. Indeed, in my work it is expected that the legal and policy professionals in focus in this thesis cannot simply do whatever is necessary, especially with regard to the notion of bricolage mentioned above, and especially with regard to the constraints of the legal institutional frameworks. There will be a standard of performance expected in the execution of practices, so what is interesting is how, in an unfolding crisis, these practices will enable solutions while accommodating constraints.

Given the focus of this thesis in terms of not just practices but also how they affect fields, Bourdieu's theory of practices gives some analytical traction: "actors act based on the dispositions that have been crafted over time (habitus) which, at the point of intersect with their socially defined positions (in the field), are actualized in the form of practices" (Pouliot & Mérand, 2013, p.31). In that way, by locating and studying practices, one can get insight into the field (especially if it is disrupted) as well as actors' habitus.

As Adler and Pouliot (2011) assert, practices are performances in the vein of Goffman (1959). Furthermore, drawing on the relational and processual ontological point of Jackson and Nexon (1999), practices are processual in nature and thus are not entities. What is meant by studying practice is "to empirically scrutinize the processes whereby certain competent performances produce effects of a world political nature" (Adler & Pouliot 2011, p.6). In this sense, what is of empirical interest in this thesis are the practices of the legal and policy professionals and the effects produced by their competent performances. Capturing these effects in empirical and conceptual ways is a key aim of this thesis, not only to infer from them an underlying field structure emerging over time via practices, but also how these practices have implications for institutions and politics.

In drawing on practice theory, we are acknowledging that "practice within a field is at least partly responsible for the field's structure" (de Nooy 2003, p.322), otherwise practice would have no relevance in a field. In this way, looking at practices becomes significant when "...interaction, activities, and statements within the current field are able to mediate objective power relations and modify categories of perception... There are empirical results suggesting that interaction within a field affects and is affected by categories of perception" (de Nooy, 2003, p.322). Thus, we have to pay attention to how practices organise fields (Adler & Pouliot, 2011), as well as how they produce effects. Part of looking at practices in a disrupted field will be to see how the practices of legal and policy professionals organise the EZ crisis issues as well as the stakes in political field.

This also means that practices can affect the distribution and type of capital at stake in a field. For example, de Nooy (2003) asserts that symbolic capital bridges field and practice. This is because intersubjective relations and practice are crucial in “the creation and distribution of symbolic capital as pointed out by Bourdieu in his theory of practice. [...] Interaction or intersubjective relations, which have a dynamic of their own, at least mediate and transform the forces of objective relations” (de Nooy, 2003, p.321). Thus, practices offer a lot of empirical opportunities to study how a field is organised, how it mediates the forces of a field, how it enables the accumulation of symbolic capital, and how it produces effects beyond the immediate micro level of practices, e.g. on the macro level of governance structures or authority structures. Later, I will look at how social network analysis can clarify the role of practices in these ways (de Nooy, 2003).

In terms of *professional* practices, the professional aspect needs to be elaborated, as professionals have specific types of practices based on their profession. Crucially, these practices are not just related to the epistemological basis of their profession (Halliday, 1985), which confer on the profession a knowledge mandate, as well as the professional ‘jurisdictions’ which emerge in ecological competitive interactions with other professionals (Abbott, 1988), as well as different audiences (Abbott, 2005); these practices are also related to the social fields in which they arise whereby symbolic capital can be forged through expert practice, such as law, and notions of what is at stake emerge concomitantly (Vauchez, 2010). Moreover, in the field theoretic framework, practices are at the confluence of habitus (dispositional logics) and field (positional logics) (Pouliot, 2013), and thus, are a question of empirical investigation in order to clarify the species of capital at play, the historical struggles of the field, as well as the epistemological basis of the professionals tasks and expertise.

As has already been discussed above, looking at social fields in the midst of crisis means that some or all of these elements may be disrupted, and is of key interest in three ways: a) theoretically – how to conceptualise and understand what happens to fields in an unfolding crisis; b) methodologically – how can we study (transnational) fields in an unfolding crisis; and c) empirically – how do the relevant legal and policy professional fields change in the EZ crisis. Because of this context of crisis and to also attempt to resist professional discourses that have already built in categorization and conceptualisations of the social world, I have chosen to use the notion of boundary work to conceptualise professional practices as a way to illuminate how they enable and consolidate solutions to a crisis. Boundary work also offers the potential to look at social change and construction of social objects in way that at least attempts to

resist the normative underpinnings of the various professional domains from where the actors under study in this thesis have come. Before boundary work is elaborated, I will briefly discuss why the practices of professionals connected to law are significant for state-building and legitimation.

2.2.2 Professional Practices, Law and Legitimation

Practices in the field of politics are important for legitimating authority, which characterise the stakes of the political field (Mudge & Vauchez, 2012). However, as mentioned above, it is that symbolic power of law to recognise acts of economic power as legitimate by concealing its purely economic and political force. In reality, these acts of recognition can be thought of in terms of the practices of legal and policy professionals in how they enable the law to recognise economic power relations and translate them into legal forms that conceal the arbitrary and coercive nature of this power. Addressing the study of global governance, Kauppi & Madsen (2014) paraphrase Max Weber to state the relevance of his theory of bureaucracy as:

“a particular way of rationalizing power and authority. If one is to understand contemporary global governance, it is important to take on board Weber’s basic insight that authority comes in many forms and what makes a certain practice of power legitimate is the process through which an authority justifies its exercise of power and gains social acceptance. In other words, legitimacy should not be understood in essentialist terms but is in practice both relational and procedural” (Kauppi & Madsen, 2014, p.326).

The law and legal processes rationalize power and authority in similar way, hence Weber’s principle of legal-rational legitimacy in the constituting of authority (Weber, 1978). Following Kauppi & Madsen (2014), the practices that will be under study in this thesis are assumed to seek the legitimation of the exercise of power to impose policy conditionality, as well as the source of authority from which that power is purported to be conferred. In the next section, specific conceptions of practices of law will be looked at in order to elaborate the theoretical focus.

Weber’s insight is that we can understand why legal-rationality legitimates authority’s power in modern states, and that the processes of this legitimation rationalises the power of authorities (1978). Bourdieu’s insight is that we cannot take this for granted (Bourdieu & Wacquant, 1992), as some essential part of the state, and we must investigate – using sociological reflexivity when looking at the legal profession (Dezalay & Madsen, 2012) – the genesis of how these processes came about: through the struggles over control of the dominant principle of domination, i.e. state authority, which is legally constituted in the modern democracies that comprise the EU, meaning that this legal element is the legitimate principle of legitimation.

Different professions have furnished governments with knowledge capable of constituting the state. In

other words, the economics profession co-produces knowledge of the state because of the state's role in governing the economy (Dezalay & Garth, 2002; Fourcade, 2006). Similarly, the legal profession co-produces state governance and structures because much of the state is consecrated and constituted by law (Bourdieu, 1987b, 1994). Simultaneously, the state can enable the transformation and expansion of various types of legal professionals depending on how it interacts with these professionals, for example, as Liu has shown in China (2015), or Suleiman's example of notaries and the French state (1987). But what is it about law and the practices of jurists that have enabled it to be so influential in co-producing the modern state, and indeed, the EU governance structure? In what follows, I look at a few elements of law from the sociology of law literature that answers this question, and gives this dissertation some 'legal' focal points that are considered for the analysis. The first is the formal language of law, and the second is the notion of legal jurisdiction.

Dezalay and Madsen (2012) assert that it is the legal field's rhetoric of universality – “trans-subjective values that presuppose the existence of an ethical consensus” – and of neutrality – “use of passive and impersonal grammatical constructions” – which enables “the symbolic power of law as a tool for ordering politics without necessarily doing politics” (ibid., p.438). In dealing with a social problem, especially an economic crisis, different solutions will have different distributional effects, meaning the solutions are politicised. The symbolic power of law, most vivid in its codified form, can often be used to conceal the political considerations underpinning a solution, to the point of making certain solutions seem the most appropriate (denoting a logic of appropriateness engendered by the field), despite the possibility of a variety of solutions. This is what makes the symbolic power of law vital to the functioning of the state and often enables lawyers to be “agents of state expertise”(Dezalay & Madsen, 2012, p. 439).

Legal practices in the political field can “de-politicise” issues because they put policies proposed by governments or authorities into rationalised legal forms. A notable legal mechanism that rationalises political authority is **jurisdiction**, especially in terms of scale (Valverde, 2009), as it sorts the governance of legal governance, i.e. by ordering which issue goes where, and under whose authority. Jurisdiction is by necessity tied to a political community, whether it is in terms of territorial jurisdiction, jurisdictional communities, and jurisdictional governance (Kaushal, 2015). Asha Kaushal (2015) defines jurisdiction “as the moment in which law speaks to itself about the scope and content of its own authority” (2015, p.760), and in this way, it “designates the authority to speak the law and this authority presupposes a separation of the legal from the non-legal” (2015, p.761). In terms of the EU, we can say that EU competence depends on the political community of sovereign states that have essentially pooled their

sovereignty. EU law of course presupposes the EU community of member states, and thus, its jurisdiction is attached to that political community of pooled sovereignty, which justifies EU law's form and existence. Similarly, we can conceive of the EU as a community of states who have given EU law to themselves, based on the idea that their sovereignty is pooled. In any case, the EU member states have decided – in the sovereign sense that each decided for itself – to give themselves EU law, regardless of whether it has developed beyond their individual political desires (Stone Sweet, 2004a). A key element of the EU legal order is that it is autonomous, so in that way it makes more sense to conceive it as its own political community. Thus, we can still follow this point on jurisdiction, that “for the law to come into existence, it must declare itself to be the law of a specific community and attach to a particular polity” (Douzinas, 2007, p. 21).

Because the way that law appears is through jurisdictional modes, it is being invoked “at the limit of its competence. Jurisdiction defines the operations of law, and in so doing, sets the parameters for attachment to the legal order in question” (Kaushal 2015, p.782). In sum, jurisdiction first operates to inaugurate the law as a law of a specific community, and second, to then discern the conditions of said law's attachment to the concrete issue at hand (ibid.). Paraphrasing Cormack (2009), Kaushal (2015, p.782) explains that “jurisdiction sidesteps the question of its original source of authority by re-projecting the problem onto technical questions of scope”; i.e. whether the issue at hand is amenable to law's attachment or the degree to which it can belong to law (ibid.). In this operation, jurisdiction occupies the threshold or boundary between non-law and law where it “sets the conditions for law's attachment” (Kaushal, 2015, p.783). For my work, this spatial boundary is where the legal and policy professionals engage in boundary work – in the threshold between non-law and law, and more importantly non-EU law and EU law.

Finally, a key point of being focused on questions of jurisdiction will be how the above mentioned re-projection of issues or problems “onto technical questions of scope” (Kaushal, 2015, p.782) will be with regard to scale (Valverde, 2009), which have separate and disparate governing logics, e.g. EU vis-à-vis national scales vis-à-vis international scales, and thus will take produce different implications for legitimation based on which jurisdictional scale will end up attaching its law to the issue at hand. This process is assumed to be a part of the practices of legal and policy professionals. In the next section, I look at the notion of boundaries after which I elaborate how I use boundary work concepts in this specific context of this thesis. Here, the boundary work concepts I elaborate are connected to the above discussion of legal jurisdictional in that the boundary work concepts I have elaborated are formed in

confrontation with how the legal and policy professionals have deployed their logics in boundary work processes.

2.2.3 Types of Boundaries and Boundary Work

In order to analytically investigate practices, the concept of boundary work is used. The justification for this is connected to the transnational and weak nature of the fields under investigation. As we saw in the literature review, law has been very invisible in the area of economic policy at the scale of the EU, and thus there is very little research and empirics on what their practices would be, as well as the circumstances in which these practices are then drawn on, namely a time of intense crisis. Because of this complexity, boundary work as a conceptual tool offers some traction in analytically distinguishing the practices involved in sorting out law's attachments, whether EU law or national law or international law, or non-law.

At a general level, we can speak of symbolic boundaries and social boundaries (Lamont & Molnár, 2002). This conception of entities and objects as well as and social differences enables us to see the practices of legal and policy professionals in the vocabulary of a sociological enquiry that resists taking on the loaded, taken-for-granted, vocational vocabulary of the professionals and their practices whom I have studied. Notable here for example is the practice of legal interpretation, which, when studied as a process in this approach means not taking on the legal categories of interpretation as used by the legal and policy professionals themselves; but rather, analysing their practices of interpretation with a sociological concept, in this case boundary work, that can make visible the sociological process of rationalising the boundaries between a legal provision and an issue or object so that the provision can be seen to attach to an issue or object or not. This practice of legal attachment is crucial for locating objects and issues as being governed by a jurisdiction at a specific scale, with implications for how this locating of jurisdiction is legitimate in terms of political authority, i.e. which authority owns the issue or object and is thus subsequently responsible for any action or decision over it.

In terms of symbolic boundaries: "Symbolic boundaries are conceptual distinctions made by social actors to categorize objects, people, practices, and even time and space. They are tools by which individuals and groups struggle over and come to agree upon definitions of reality" (Lamont & Molnár, 2002, p.168). By examining these social boundaries, we gain insight into "the dynamic dimensions of social relations, as groups compete in the production, diffusion, and institutionalization of alternative systems and principles of classifications" (ibid.). Social boundaries, on the other hand, "are objectified forms of social differences

manifested in unequal access to and unequal distribution of resources (material and nonmaterial) and social opportunities” (ibid.).

This presentation of boundaries resonates very much with Bourdieu, and indeed he urges the critical examination of classificatory systems that have been socially constructed through historical struggles, and the fact that these classifications based on symbolic boundaries “are social products that contribute to making the world...[and] do not simply mirror social relations but help constitute them...” (Bourdieu & Wacquant, 1992, p.13-14). The implication is that these symbolic boundaries will simply be accepted as natural or legitimate – i.e. their symbolic power will be unreflectively accepted – without recognising the relations of domination and subordination that underpin their reproduction of the social world. This is made clear when “[s]ocial structures and cognitive structures are recursively and structurally linked, and the correspondence that obtains between them provides one of the most solid props of social domination.” (Bourdieu & Wacquant, 1992, p.14). Thus, systems of classification and the construction of symbolic boundaries are themselves stakes in a given field as they can define and enable the social boundaries that grant access or not to that field as well as other forms of capital such as economic, cultural and social capital.

Boundaries in the context of the EU polity are of critical importance to the stakes of the European political field. Classifications between EU and national or between EU and international will have political and possibly legal implications. Having this definitional power will mean having symbolic power to define the boundaries of the EU and thereby the scales of authority and who gets to hold that authority. In the next section, I will look at how the construction of boundaries is conceived by discussing the notion of boundary work.

In terms of practices, boundary work has been studied in a number of ways. Liu (2015) draws on the notion of boundary work (and exchange) to study the differentiation of the legal profession in China. He creates a typology of boundary work and exchange to problematize the boundaries of professions and regulatory regimes of the state in order to explain the emergence and change of such social structures. In terms of Abbott’s (2005) ecological framework, Liu (2015) points out that conflict over jurisdictions in professions is a particular form of boundary work. In other words, social boundaries are much more “ambiguous and elastic” than what social theorists have previously asserted (Abbott, 1988; Gieryn, 1983). These authors highlighted one form of boundary work, which Liu (2015, p.3) calls boundary making – “a social actor’s self-distinction from other social actors”. He posits that there is also boundary blurring, which is considered the opposite of boundary making, i.e. obscuring distinction. And finally, boundary

maintenance which entails the intervention of a third party “to maintain an elastic balance of the boundary work between conflicting actors” (ibid.: 4). Halliday and Block-Lieb (2017) draw on these boundary work concepts fruitfully to show how legal professionals in the transnational context of international organisations craft and enable legal norms for global markets with varying distributional outcomes for states and market players

What is of interest here is that Liu (2015) is exemplifying the potential of applying the concept of boundary work and adapting it to the specific empirical context that the researcher is confronted with. This gives the concept a great deal of flexibility but also traction because it helps one specify the specific way boundary work is being enacted. Thus it gives more possibilities for empirically substantiating how boundary work occurs in a specific context. In the context of a field, Eyal (2013) illustrates how we can apply the notion of boundary work by relaxing the boundaries between fields so that we do not essentialise the agents practices as only being *of* the field but rather somewhere in between. To that end, Eyal (2013) suggests focusing on the spaces between fields.

This point is raised in light of how Bourdieu’s analytical approach entails deconstructing a field (e.g. literary field) into their constitutive bundles of relations, however, the distinctions between the various fields, e.g. legal field, economic field, political field etc., are not themselves deconstructed as comprehensively in Bourdieu’s work. Thus, the contents of these fields are seen to be bounded and distinct from each other. However, Eyal (2013) draws on Callon’s (1998, p.2) argument that economics “performs, shapes and formats the economy”, and it is by and large through boundary work that this occurs; i.e. separating out that which is economic from the non-economic in an ongoing process. In that way, Eyal can assert that “[n]othing is economic or scientific or artistic by itself. These are also shorthand for bundles of relations” (2013, p.159). In order to investigate this, we need to look at the modality of the tasks in terms of the concept of boundary work, and then “think of actors within the volume of the boundary as at once excluded from the field and yet included in it by virtue of this very exclusion, which apportions them a particular network role” (ibid., p.162).

But following Bourdieu, we have to keep in mind that fields exist because the logic of their reproduction is shaped by struggles over the stakes of the field (Swartz, 1997), and part of those stakes are defining the boundaries of the field as well as the types of capital that matter in competing over it. But if actors are to have any agency at all, they cannot be purely of one field and thereby essentialised in it; they are able to compete because they are only partly *of* the field but also outside it, thus giving them the possibility to

make distinctions; otherwise they would only see categories of one field and it would collapse under an impossible inertia. Indeed, in the field of power which is defined by the state to a large degree, powerful agents come from other fields, and because those agents gained capital from those other fields, they were able to convert it into symbolic capital in the field of power, thereby gaining a position.

Boundary work will conceptually connect back up to the notion of the field in terms of position-takings. In that way, a summation of the types of agent and their position takings vis-à-vis the role of law in the field of European politics during the EZ crisis will be mapped.

2.2.4 Boundary Work Concepts Used for Legal and Policy Professionals in Crisis

In bringing to bear this specific legal sense of boundary work, it is useful to think of a process of rationalisation: “ ‘Rationalizing’ here needs to be understood in the classical Weberian sense of something becoming more formalized and abstract, and not in the neoclassical sense of maximizing efficiency; to rationalize connections is to give reasons why those connections, and no others, should be maintained” (Jackson & Nexon, 1999, p.314). In terms of boundary work, looking at various empirical instances of questions of jurisdiction will involve legal and policy professionals giving reasons for why certain connections, e.g. to EU law or conversely national law, should be maintained, as opposed to others. This will be especially acute in the process of legal case-making, and thus constitutes a part of the empirical focus of this thesis.

During the analysis of the practices of legal and policy professionals, it became clear that there was a need to adapt the notion of boundary work as a social process to the activities that these actors were engaging in. By bringing the notion of legal jurisdiction as establishing legal attachment or not (as shown above) together with the notion of boundary work as a social process that produces boundaries, I specified several forms of boundary work in this legal and policy context. The first was **boundary calibration** to enable or disable legal attachment vis-à-vis EU jurisdiction/competence; **boundary overlapping**, whereby legal or policy professionals enable the boundaries of different legal frameworks to overlap through a legal mechanism. These are used over and above the already articulated boundary work concepts: **boundary blurring** – to purposefully make a boundary ambiguous; **boundary making** – to make a clear distinction between boundaries; and **boundary maintaining** – to seek to maintain an existing boundary (Block-Lieb & Halliday, 2017; Liu, 2015); and finally constructing **boundary objects** (Star & Griesemer, 1989) through **bricolage** (Carstensen, 2011). In sum, these 6 boundary work processes are used to analyse the practices of the legal and policy professionals in Chapters 5 to 9.

How do I justify this boundary work as a social process that produces social boundaries? It relates back to the symbolic power of law and legal jurisdiction to produce boundaries and the processes related to this. If the legal and policy professionals are successful in producing some boundaries (via boundary work) and not others, then these successes and failures will have social consequences. For example, if they are able to show that a certain action is part of EU jurisdiction by showing how it is attached to EU law – in that a boundary of law can extend to that issue – then this issue will be dealt with at a supranational scale as opposed to a national scale, each of which will have different ways of governing the issue at hand, especially in terms of how at a national scale then an issue with 27 national jurisdictions.

Having outlined the specific legal elements that offer promising points of departure, I now turn to the concept of *network* that will be utilised to locate and visualise the types of agents and the patterns of relations between them, which not only matter for establishing their practices, but also enables me to construct a visualisation of who interacted with who, but also meso-level patterns of how social network ties of interaction have connected different fields.

2.3 Networks as Interaction and Referral

2.3.1 Significance of Network Ties

The concept of network conceives of a set of agents connected by ties, with various dynamics being engendered by the specific patterning of the ties between the actors. One of the key purposes of looking at networks is to see how the network patterns, comprising sets of agents and their relations, have consequences both for the agents that make up the network, but also for the network configuration as a whole (Borgatti, Mahra, Brass, & Labianca, 2009). There are many significant network measures to look at when considering how networks matter for agents and vice versa, from the various centrality measures of agents (see Freeman, 1978), how agents cluster in different parts of a network, and so on (for general use of SNA in social sciences, see Borgatti, Mahra, Brass, & Labianca, 2009). For this thesis, however, I will be focusing on one particular measure that is relevant for the Bourdieusian framework outlined above, and that follows the analytical reflections of de Nooy (2003), and Bourdieu's own notion of 'effective agents' (Bourdieu, 2005, p. 99), as well as the conceptions of agents seen to 'know well' (Lazega, 1992; Seabrooke, 2014b). This measure is degree centrality, and looks at the level of connection of each agent in a network; in other words, how many ties an agent has to other agents. The technical aspects of this measure are discussed in Chapter 3, on methods. Suffice it to say, that degree centrality has been

chosen because of its relevance for creating a measure of symbolic capital and locating effective agents.

Conceiving professionals as being embedded in various networks affords understanding their actions and locations in different analytical ways. Henriksen and Seabrooke (2016) look at how professionals located in two-level (organizational and professional) networks use the uncertainty of transnational contexts to control issues beyond “the logic of profession jurisdictions or organizational mandates” (ibid., p.735). Furthermore, structural elements of professional networks, such as the position of the ‘broker’ (Burt, 1992) or ‘the strength of weak ties’ (Granovetter, 1973) afford various benefits: gaining influence in terms of the former, or gaining access to novel information in terms of the latter.

For the purposes of this dissertation, the notion of a *network* is applied in terms of both a concept and a method. On the former dimension of a concept, network forms a basis for capturing the practices of the agents of interest to this study, as it enables me to conceptualise the interactions between them, which forms a part of their practices (de Nooy, 2003). The justification for this is to trace their accumulation of symbolic and social capital, because, given my focus and point of departure in the practices of legal and policy professionals, and my examination of the symbolic power of law to legitimate the EZ crisis policy response, I need to see how engaging in these practices matter for the agents if it is to matter for the field, and especially the political field, as I posit.

In terms of a method, a network approach is utilised to map the agents that were drawn into dealing with the various EZ crisis issues. Specifically, this was justified because, as discussed, there were no formal tools to deal with the EZ crisis in 2009, and thus no formal organizational mandates strictly speaking. In professional terms, this meant that there were very few professional agents with the requisite knowledge in the EU institutions, thereby posing the question of who exactly had the knowledge mandate in terms of EU governance to deal with EZ crisis issues.

2.3.2 *Weak Fields and Effective Agents*

In the section on *weak fields*, it was shown that in transnational settings such as the EU polity, we need to account for different dynamics in contrast with the national scale, and this leads to the notion that fields at the transnational level are ‘weak’ in terms of being both settled and emergent and with porous internal and external borders. Because of these complex dynamics at the transnational scale and the imperative to historically trace the emergence of practices and positions, to study a weak field or the links between fields empirically necessitates an approach that can locate the relevant actors amongst a large number of

possible agents, in this case the legal and policy professionals who negotiated, constructed and defended these legal instruments and mechanisms. In this reading, the European legal weak field itself is not the focus so much as the link between it and the economic policy field: this is the site of contestation, as the struggle in focus is which type (scale) of law (in its various forms) can and should legitimate the new economic governance structure, which is the outcome of the EZ policy response. Because these agents would have been caught between these two fields, a network approach to locate and establish their practices was taken. In other words, tracing the social network ties between the agents over time to establish their interactions, and thus deduce their practices: drafting, negotiating, advising, contesting and defending.

In field-theoretic terms, the reason for locating agents in a network is also tied to Bourdieu's conception of 'effective agents' (Bourdieu, 2005). In Bourdieu's (2005) study of housing policy in France, he clarified what he referred to as those agents that have properties that enable them to be effective in a field: "...the structure of the distribution of forces (or 'strengths') between the *effective agents*, that is to say, between the individuals who had sufficient influence effectively to orient housing policy because they possessed one or other of the active properties in the field" (Bourdieu 2005, p.99, emphasis in original). However, "[t]he limits of the field are situated at the point where the effects of the field cease" (Bourdieu & Wacquant 1992, p.100). In the transnational contexts of the EU, establishing the limit of a field is complicated by the fact that they are weak and have porous internal and external borders. However, a network approach can enable the researcher to at least trace a set of agents who are either considered effective or ineffective by other agents, whom they have interacted with or know of through reputation. This entails a snowball sampling approach (elaborated further in the methodology chapter), where by agents are queried on the involvement and expertise of other possible agents, and by following this through to a saturation point – whereby other agents start to mention the same set of names – one can set the boundaries of a contested social space. In sum, a referral network is constructed, which also encompasses social and symbolic capital accumulated through historical practices.

There is another aspect that makes the use of a network approach of suitable. In a situation of crisis where fields may be disrupted, how can we observe the impact of new entrants into the field and how would this affect practices? Constructing a network can enable the researcher to observe how entrants become connected to the network, who specifically they become connected to, and how it may shape practices, and thus the field. Field studies could possibly have trouble identifying new entrants in such an urgent situation and their impact because of the fast pace of change when a crisis erupts.

By putting together their effective property of capital with their organizational/institutional position, we can then give meaning to their position-takings. These position-takings of the legal and policy professionals will be especially critical to how the EZ crisis has affected the EU legal order as they engage in litigation, especially to defend what was done in the EZ crisis against legal contestation, which demands new terms of legitimation.

2.4 Relationship between Concepts and Research Objectives

2.4.1 Application of Theory and Concepts

Based on the theory of fields and weak fields discussed in the first section, I posit that the case of the EZ crisis presumes a disruption in the structures (objective and subjective) that usually structure a social field. Given this assumption, I further posit that focusing on the adapted and novel practices of legal and policy professionals serves as a useful point of departure to analyse how a disrupted field becomes re-configured around new (legal) stakes, which are the accumulating symbolic capital being produced through said practices. Because these practices are ‘adapted and novel’, I propose that the notion of boundary work serves as a flexible analytical tool to analyse practices in a disrupted field, as well as conceptualise these possibly novel practices. Given the weakness of fields in transnational contexts, I further posit that a social network approach can be utilized to not only locate and map interactions of the legal and policy professionals involved; but it can also be fruitfully employed to conceptualise the accumulation of symbolic capital in terms of establishing who are considered the effective agents. Finally, these practices – analysed through boundary work – will be the basis for examining how the EZ policy response has been legitimated, as well as contested via legal case-making, where some legal professionals demand new terms of legitimation. All in all this framework proposes to establish how the EZ policy response has been mediated, modified and legitimated by various types of legal and policy professional, and what it means for the new economic governance structure of EMU.

Ontologically, this thesis posits that relational processes constitute social reality, and in order to say something about these, we need an epistemological position that foresees the generation of relational and processual data. For the former, I have elaborated a social network approach that utilises a snowball sampling strategy to locate the legal and policy professionals (‘agents’) involved in constructing and defending various parts of the EZ policy response, as well as accounting for their interactions. For the latter (processual), I have elaborated the notion of boundary work to capture how the practices of these

professionals has unfolded during the crisis. The point of also taking point of departure in their practices (which also constitute interactions) is also to make sense of the crisis conditions, which are understood to disrupt the various social fields of EU governance, particularly the political field of economic policy.

2.4.2 Analytical Strategy and Propositions

Because the overall strategy is very much socio-historical and takes a genealogical approach, the theoretical framework is constructed in a way that posits analytical stages based on temporality. This is both a methodological and analytical consideration. Methodological because of the snowball sampling technique used to build up and verify the structure of the network; analytical because it takes the theoretical premise that social networks can be seen to bridge practice and field – it is through practices that field structures are produced, and social interactions – as conceived by network analytic approaches – make up practices (Bottero & Crossley, 2011; de Nooy, 2003; Lunding et al., n.d.).

Based on the above theoretical framework, the following propositions have been articulated in order to guide the analytical investigation, as well as discuss the findings in the final chapter. It should be noted that these propositions also follow a cumulative logic in that they build on each other:

- a) In a social context such as a transnational field, we can expect that the subjective (habitus) and objective (distribution of capital) structures will be disrupted by an unfolding crisis.
- b) If a transnational field is disrupted in a fashion asserted in proposition (a), we can expect that the effects of practices to solve the crisis through boundary work will produce reconfigured stakes that will shape the subjective and objective structures over time.
- c) If interactions between agents are part of practices, then tracing the effects of these interactions as network patterns over time can illustrate how the disrupted transnational field becomes stabilised with the emergence of reconfigured stakes.

By using these propositions to guide the analysis and the relations between the various concepts, I aim to answer the research question posed and fulfil the research objectives. In terms of the research question, the propositions help focus attention on the process by which the legal and policy professionals enable and consolidate solutions to the unfolding crisis in terms of the subjective structures (habitus); while the objective of showing how economic governance becomes legally constructed is sought to be fulfilled by seeing how the stakes of the crisis change the terms of legitimation for economic governance through legal means.

Chapter 3: Research Design & Methodology

The aim of the thesis is to show how legal and policy professionals enable and consolidate the legal construction of economic policy by answering the question: how do legal and policy professionals enable and consolidate solutions in an unfolding crisis? The thesis seeks to answer this question by analysing the practices of the legal and policy professionals, which is done by, first, re-constructing these practices and examining them through the lens of boundary work, and second, connecting these practices to their network positions in the field emerging from the crisis. In this chapter, I account for the methodological choices and reflections that have gone into answering the research question. First, I present the research design of this thesis, after which I lay out the ontology and epistemology of the theoretical framework elaborated in the previous chapter. I further describe the data and data collection as well as the methods used to analyse the data, and justify the choices made in that regard. I dedicate a considerable amount of space to the research strategy utilised in this thesis in order to make transparent the way in which the data was analysed using the relational and processually informed theoretical framework, especially with regard to the use of social network analysis.

3.1 Research Design

This thesis is based on an interpretive research design that utilises a case-study methodology and qualitative data in order to understand a relational process. Therefore the thesis asks ‘how’ questions as opposed to ‘why’ questions in order to unpack a process unfolding in a social context, from which novel insights can be drawn (Sandberg & Alvesson, 2011). This process is constructed in a narrative form based on multiple qualitative data sources in order to reconstruct the practices and relations of the agents involved. Asking ‘how’ questions to the unfolding processes implicated in the EZ crisis is especially relevant given that the EZ crisis as an empirical case has led to a large amount of scholarship dedicated to it, as discussed in Chapter 1 in the literature review. These literatures offer important insights into the EZ crisis, however, there is a dearth of studies on how the practices of the agents involved in constructing a policy response and the social and legal effects of these have unfolded. In this way, an in-depth case study of how the practices unfolded during the EZ crisis can illuminate what is at stake for the agents when economic policy becomes legally constructed.

3.1.1 Case Study

The case study approach can be seen as “inductively developing theory and for exploring the new and

the relatively unexplored” (Vaughan, 2008, p. 70). This is because case studies offer in-depth empirical research, as opposed to more generalised comparative studies or large-n studies. Of course, comparative studies can still be in-depth, such as Dezalay & Garth’s (2002) study of four Latin American countries in the import and export of governance technologies such as human rights and neoliberal economics from the US. Nevertheless, case studies make up much of Bourdieu’s oeuvre, for example, his study of the Kabyle people of Algeria (1962), the French state nobility (1996), as well as housing in France (2005). Similarly, studies drawing on Bourdieusian concepts show much variety, for example, scholars have looked at the emergence international law (Sacriste & Vauchez, 2007), the construction of international human rights (Madsen, 2011a), the boundaries of tax regulation (Gracia & Oats, 2012), wealth management professionals (Harrington, 2017), and the European Central Bank and its field effects (Mudge & Vauchez, 2016). In this way, Bourdieusian theoretic studies reflect a flexibility in defining what a case study can be when using these concepts. This does not mean that anything and everything can necessarily be a case study if one uses a Bourdieusian framework; but rather that the conceptual tools enable the researcher flexible application. One still needs to be rigorous in delineating the case and justifying the empirical object as a case. This thesis offers a case study of legal and policy professionals in the legal construction of economic policy during an economic crisis.

The research design is based on a case-study approach, specifically of the practices of legal and policy professionals. Thus, there is a population of agents, whose practices are the focus of this study. This case-study however is also set over a diachronic period from 2010 to 2020. It focuses on a set of processes which are articulated in the practices of the legal and policy professionals tasked with various issues related to the EZ crisis.

3.1.2 Relational and Processual Ontology

Using a theoretical framework that is anchored in field theory and boundary work necessitates an ontology that has both relational – in terms of fields and networks – and processual – in terms of boundary work – assumptions about social reality. In this section, I will briefly carve out what is meant by relationalism and processualism with regards to this thesis.

The first key point is that relational thinking differentiates itself from more substantialist approaches by focusing on the relations between entities as opposed to the entities themselves (Emirbayer, 1997). Thinking relationally means one does not posit discrete, pre-given entities like the individual or groups or societies as the point of departure in sociological analysis. The individual (norm-following or rational

choice) cannot be separated from the transactional contexts he or she is embedded in (Emirbayer, 1997). As Somers (1994, p. 634) notes: “the classification of an actor *divorced* from analytic relationality is neither ontologically intelligible nor meaningful”. It is not to say that, for example, individuals do not matter, but rather to put the focus on the relations between individuals, as well as on the contexts in which they act.

Following this line of thinking, Jackson & Nexon (1999) similarly argue for the utility of asserting the ontological priority of relations and processes, which they conceive as processual/relationism or p/r. Such an approach can be seen for example in Norbert Elias’s conception of figuration: “By figuration we mean the changing pattern created by the players as a whole...the totality of their dealings in their relationships with each other” (1978, p. 130). In terms of a Bourdieusian theoretical approach, this ontology is well suited as the notion of field presupposes relations and processes, the former in terms of the relations between field positions and the latter in terms of the ongoing struggles and practices (Bourdieu & Wacquant, 1992). Such an ontology allows for more focused attention on conditions of possibility for boundaries to appear and disappear on an ongoing basis, indeed these are often the content of the struggles in fields (Bourdieu, 1996; Gracia & Oats, 2012). Bourdieu has referred to his social theory as having two ontological ‘moments’, the first being “structuralist constructivism,” referring to the objective positions, and the second being “constructivist structuralism”, referring to the subjective positions (Bourdieu & Wacquant, 1992, p.11). The reason I posit my framework as being relational and processual is simply to specify my focus on the type of relations as between field positions, which will be transposed via network positions, as well as the process of boundary work as a practice.

3.1.3 Epistemological Reflections

Having placed the ontological anchor of the thesis, I will briefly discuss the epistemological aspects. Following this relational and processual ontology, and being very much inspired by Bourdieu’s theoretical tools, this thesis attempts to see objective relations knowing that this is ultimately impossible, such as the dichotomy of objective and subjective knowledge, or structure and agent, and even macro and micro analysis. Indeed, the concepts of field, habitus and capital are conceptual tools (Dezalay & Madsen, 2017) created in order to dissolve these dichotomies and that “effectively welds phenomenological and structural approaches into an integrated, epistemologically coherent, mode of social inquiry of universal applicability” (Bourdieu & Wacquant, 1992, p.4). However, based on the point of two ontological moments mentioned above, i.e. there is an objective moment as seen in the structure of efficient social resources, and the subjective as seen in the agents’ perceptions and appreciations, Bourdieu puts more weight or “epistemological priority” on the objective structures element as the subjective views of the

agents are highly informed and thus vary in terms of their position in objective social space (Bourdieu, 1984; Bourdieu & Wacquant, 1992, p.11). In the case of this thesis, the epistemological implications of looking at a situation of crisis needs to be considered as it bears on how we understand or conceive of the relation between the subjective and objective. This is crucial as part of Bourdieu's theory is a foundational hypothesis that asserts "a correspondence between social structures and mental structures, between the objective divisions of the social world — especially the division into dominant and dominated in the different fields — and the principles of vision and division that agents apply to them" (Bourdieu, 1996, p.1). If a crisis disrupts this correspondence, then it means that giving epistemological priority to agents' practices (ontologically anchored as processes), which occur in this crisis context, can give more analytical traction as the structure of the field is assumed to be in disarray.

Moreover, there is an advantage to looking at such a crisis context. If crises can be considered as disrupting the subjective perception from the objective position, they can bring tacit knowledge to the foreground (Kortendiek, 2019) because of the novelty of the situation. In this way, looking at practice in crisis situations makes practical and tacit knowledge explicit in that more explicit reasoning or justification may be needed. Indeed, Bueger (2014) promotes looking at crises and ruptures as a methodological response to getting at the implicit knowledge of practices. Moreover, in terms of the epistemological evolution of law, Quack (2007) has illustrated how legal innovation can occur from either the search for legal loopholes, perhaps at the border of several jurisdictions via jurisdictional arbitrage, or "regulatory voids", both of which may be triggered by a crisis (Kortendiek, 2019).

Before outlining the research strategy and methods, Bourdieu's reflexive sociology should be noted, as it informed his overall approach and posits important reflections to the researcher. In many ways, it is not only about reflecting on one's overall approach, but also in terms of each element involved, as Dezalay and Madsen assert: "Bourdieuian reflexive sociology calls for a sociological engagement that is both conceptual and empirical at the very same time — that is, a reflexive engagement with theory, method and empirical data collection as not only interdependent but also mutually constitutive elements of sociological practice" (Dezalay & Madsen 2017, p.32). In reflecting on this interdependence, I have endeavoured to calibrate my research strategy along these lines so that my overall approach encompasses such a reflexive engagement. Moreover, following this reflexive imperative, looking at this context of crisis in which the frontiers of the legal and policy professions are pushed in terms of elaborating novel solutions to crisis issues enables the researcher to observe how these professional discourses have "neutralizing and naturalizing" (Dezalay & Madsen, 2012) effects on social reality. To ensure this

reflexivity throughout the research process, different accounts of what occurred during the crisis are compared, notably accounts of lawyers on opposite sides of the court room are used, as well as differing accounts between legal professionals from different institutions, namely the Commission, the Council, the ECB and the European Parliament, as well as from private law firms operating at national scales, and finally the accounts of economic policy professionals from the Commission and the Eurogroup working group. In this way, an attempt is made “to turn the logic of field inside out as a means for deconstructing social practices and reconstructing them in terms of field” (Dezalay & Madsen, 2012, p.447).

3.1.4 Interdisciplinary Approach

The approach of this thesis is also informed by interdisciplinarity. The main thrust of this thesis takes its momentum from Bourdieusian theory on fields, but it adds a social network analysis approach which is somewhat unconventional. As will be discussed in section 2.1.2, Bourdieu was sceptical of SNA in terms of its utility in mapping social structures. Suffice it to say that my reflections on this and ways to ensure a suitable fit between a field theoretical approach and SNA are presented later. Nevertheless, reflecting on this interdisciplinary nature of the overall approach means that one has to be aware of the possible inconsistencies that may arise. At the ontological level, I do not think this is a problem in terms of how this thesis is anchored by a relational and processual ontology, as both a field theory approach and SNA are concerned firstly with relations; albeit in different ways, and there one has to be mindful of the fact that relational structures conceived of in field theory are objectivised positions whereas with SNA they are interactions. However, when SNA is put into process, i.e. set-up to look at interactions overtime, then SNA can assist in revealing part of the objectivised structure of the field, as the result of the accumulated interactions of the agents can be illustrated as informing the field over time (de Nooy, 2003). Moreover, this approach brings together EU Studies in the IR tradition and sociology and as the literature review has shown, there is a growing area of scholarship using sociological concepts such as field in the more IR-oriented area of EU Studies (Adler-Nissen, 2013), and in that sense this approach is in good company. However, it is relevant to think through how this sociological approach, which was developed in national contexts, can be applied at this more transnational scale where relations and processes become more nebulous and abstract. To deal with this, by being anchored in the agents’ trajectories has been a way to not let these different scales become monolithic or constraining in terms of how practices of legal and policy professionals can matter for European economic governance.

3.2 Research Strategy

When using a Bourdieusian field-theoretic framework, it is important to remember that it is just as much methodological as it is conceptual, but this is especially clear when using the reflexive sociological approach that Bourdieu, as well as others, such as Dezalay, Garth and Madsen, have explicitly called for: “The field, as used in this sociological approach, moreover, is not something real or fixed but rather a conceptual tool to explain social change and stability” (Dezalay & Garth, 2016, p. 191), which also makes it well-suited for looking at a context of crisis and its aftermath. Moreover, its operationalization needs to follow the relational and processual imperatives that inform this thesis. I have sought to align this operationalization with a suitable Bourdieusian research strategy to ensure overall consistency between theory, method and empirical analysis. To that end, I have drawn on Pouliot (2013) to assist in operationalising my theoretical framework; as he points out: “accounting for practices, whose principle is by necessity both positional [field] and dispositional [habitus], has to combine inductive, interpretive, positional and historical modes of analysis” (Pouliot, 2013, p.45). In terms of the positional and historical aspects, the network attempts to account for the agents’ historical positions and changes in positions (as the crisis unfolded) by not only accounting for a population of agents connected to a disrupted and changing field, but also to substantiate positions by elaborating the types of capital that have emerged in connection with the agents’ involvement in the EZ crisis policy response. Furthermore, it should be noted that the network approach outlined below is further justified by establishing the scope and change of a field, in that “a sociology of the legal field must be deployed simultaneously on a plurality of national fields and spaces, but also on interstitial spaces between these different universes” (Dezalay & Madsen, 2017, p.29). In this way, the specific network approach outlined here is designed to be able to locate agents that come from various fields (national, transnational and supranational) but more importantly the interstitial spaces that exist between these fields (Eyal, 2013) and novel spaces that may open up as a result of disruption.

The research strategy in terms of Pouliot (2013) sees the elaboration of a three-pronged operationalisation of Bourdieu: “first, getting access to practices; second, reconstructing dispositional logics; and third, constructing positional logics” (ibid. p.46). The justification for this three-pronged approach is a result of considering what is involved in following a Bourdieusian approach for empirical research: “traversing a structural space (an analytically derived distribution of resources), a dispositional one (a set of embodied histories and trajectories) and a practical one (situated interactions in the everyday life of muddling through)” (Pouliot 2013, p.46). Moreover, this methodological journey has to be oriented to the types of

ontology implied by the above three elements, which Bourdieu has called structural constructivism (Bourdieu & Wacquant, 1992). This implies an approach that takes account of a social ontology that has both objectivist elements and subjective elements – but where “[t]he relation between the social agent and the world is not that between a subject (or a consciousness) and an object, but a relation of "ontological complicity" [...]" (Bourdieu & Wacquant 1992, p.20). To put it in more practical terms, by using this approach, the researcher is going “beyond the subjectivist apprehension of practical sense to investigate the social genesis of its objective structures and conditions of operation” (ibid. p.20). In my own way, and to answer my research question, the focus is on how the practices – which are the confluence of habitus and field position – of the agents under research enable and consolidate solutions to the EZ crisis. However, there is the added element that the positions emerge over time with the deployment of practices because the empirical context entails a crisis situation where there is a disruption between habitus and field, and thus practices become integral to organising, building up, and stabilising field structure.

Thus, my use of the three-pronged strategy will be adapted and which will be elaborated below. Nevertheless, as should be clear now, the strategy seeks to analyse 1) practices, 2) the habitus or dispositional logics that make practice possible, and 3) the field or positional logic. This translates in practical terms to 1) getting access to practices; 2) reconstructing the dispositional logic (habitus), and 3) constructing the positional logic. I have adapted this so that the sequence starts with the third point: Constructing the positional logic, after which I move to the second point, reconstructing the dispositional logic (habitus), and finally, the first point, practices and accessing them. The reason I present in this sequence is because my use and construction of a network is an encompassing methodological element, with the reconstruction of habitus and revealing practices nested within this overall methodological framework. In other words, it strikes me as more intuitive to present the steps that led to the network construction first, after which I elaborate how I reconstructed the agents habitus and finally how I accessed practices. All of which enables me to answer the research question of how the practices of legal and policy professionals enabled and consolidated the EZ crisis solutions.

As will be more detailed below, the network approach is married to a biographic relational approach where the agents' trajectories have been studied as well. Following their trajectories is not only a crucial way of tracing the historical struggles of the field (Dezalay & Garth, 2002), but also for understanding the agents' strategies beyond organizational and professional logics (Dezalay & Madsen, 2017). More importantly, the methodological approach being outlined here, by tracing these trajectories and collecting

the varying accounts of the agents through interviews and textual accounts, “provide critical data for interrogating the agents and escaping their neutralizing and naturalizing discourses” and in this “turn the logic of field inside out” (Dezalay & Madsen, 2012, p. 447). Again, however, the disrupted nature of the field(s) during a crisis requires the extra element of a network approach to locate the process of how disrupted positions became structured positions.

3.2.1 Constructing the Positional

On this first strategy, Pouliot (2013) mentions three points: a) reconstruct the doxa or rules of the game; b) mapping resource distribution of field; and c) historicising the struggles. Now given the disrupted and complex nature of the empirical context at that is the focus of this thesis – i.e. it is a historical crisis that saw a lot of changes occur in the implicated social fields – an entrance point is needed that can assist me in ordering this complexity. It should be kept in mind that any research focus that has to do with the EU entails a consideration of what the notion of, and the struggles underpinning, the EU and European integration could mean for one’s research, and so one needs to consider the doxa around European integration in terms of the struggles between pro-integration and anti-integration. There are struggles occurring “over the definition of the European Union” (Kauppi, 2003, p. 783), as there were struggles over the definition of EMU during the Maastricht negotiations (Dyson & Featherstone, 1999). These considerations can be refined by the specificity of the research focus, which in this case is the area of EMU and how it relates to law (both EU law, national law, and international law), and so this means that issues of conflict, historic struggles and the relevant doxa relate to questions of integration connected to EMU, which the EZ crisis exacerbates and reframes. Given these considerations, the court cases that arose in the wake of the EZ crisis are a fruitful starting point to see how legal issues might become manifest in terms of the EZ crisis and the governance structure of the EMU. The three most high-profile cases touch on the key elements of the European legal field and the field of European economic policy. Moreover, the cases in many ways reflect the stakes of these two fields, which are foregrounded acutely in the EZ crisis but which also need to be understood more broadly in terms of the project of European integration. For the former, it is the ongoing issues around how EU law actually demarcates itself as an autonomous and legitimate body of law vis-à-vis national law and international law; it is the socio-legal reality that a national constitutional court perhaps really does have the last say in European constitutional law; for the latter, it is the ongoing opposition between having an actual economic government at EU level with political authority versus decentralised economic policy with a technocratic and independent ECB. The court cases reveal the respective oppositional forces at play.

This starting point led to elaborating the historical trajectories of on the one hand, the emergence of the EU legal field; and on the other, the emergence of Economic and Monetary Union. This matters because “[o]ne may historicize the field’s doxa by reconstituting its evolution over time, including its contestations and ruptures” (Pouliot, 2013, p.54). Of course, it should be noted that I am focused on the intersection of these two fields in a situation of disruption. In that way, constructing the positions entailed looking at the spaces of transaction between these fields. Building a historicised network presents itself as a possible avenue in order to deal with the complexity of two fields interacting intensely with the advent of the EZ crisis.

For the purposes of this thesis, I seek to create a framework that can capture relational processes. This gave rise to the notion of creating a network of the legal and policy professionals involved in the EZ crisis policy response. The justification for this is based on the theoretical drive of the thesis which is that first, in times of crisis, practices make sense of disrupted fields thought of as relational processes; practices enable and consolidate the desired solutions; and finally these practices legitimate the exercise of power.

On the first point of disrupted fields. Following my assumption that a crisis such as the EZ crisis would disrupt the relevant fields, I needed to be open to the fact that the agents involved would not necessarily match any institutional or organizational structure or mandate, and the agents could be from different fields. Indeed, the more I read about the EZ crisis and the scholarship on it and especially the various legal court cases that arose in connection with it, it became clear that the legal issues were numerous and heterogeneous. Thus, I could not presume that locating the agents could be done by simply referring to an institutional resource, e.g. the institution responsible for crisis management. Indeed, the agents involved could be . Of course, I did check these institutions, such as DG ECFIN, the economic and financial unit of the Commission, for the sake of being thorough. However, it soon became clear that the court cases had gotten, and were getting, a lot of attention from the media and EU scholarship. I therefore decided to start my search for the agents in the court cases themselves in the hope that they might reveal possible points of conflict that may reflect

Having looked at many of the cases, there were three very high-profile cases, *Pringle*,¹⁵ *Gauweiler*,¹⁶ and *Ledra Advertising*,¹⁷ that stood out in terms of the specific issues and how these related to the broader

¹⁵ Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756.

¹⁶ Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.

¹⁷ Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701.

context of European integration in terms of law and economics. For *Pringle*, it was the notion of financial assistance in the form of the ESM; for *Gauweiler*, it was the controversial policies of the ECB; and for *Ledra Advertising*, it was establishing accountability for policy conditionality being imposed on Member states (specifically Cyprus). By starting my search in these three concrete cases, I traced their emergence and the agents involved to begin the process of examining their trajectories and social worlds.

The first methodological point of tracing the emergence of the case simply means reading the court judgement and locating the documents and events referred therein. In many ways the judgements detail much of the historical context of the cases themselves, so it is a strong starting point to look at the social and historical context from which the case emerged. In any case, it meant that I had to collect the documentation related to the case, e.g. perhaps there was a case that went to the General Court first, and so there was a judgment there to look at; there were the policy documents and Treaty articles referred to by the case, so this meant becoming familiar with the various legal and policy texts, as well as European Council statements, decisions, etc. The second methodological point related to locating the agents who were involved in the case, but also crucially the agents involved in the construction of the various mechanisms and/or policies that were at issue in the case.

Before looking at the court cases, it is important to clarify the various ‘roles’ these agents are seen to undertake in this study: the term “legal professional” is intended to encompass lawyers, judges, jurists, legal scholars, and any professional with formal legal training. It should be noted that an individual working with legislation who has a PhD or Master’s degree in law is considered a legal professional. Nevertheless, legal professionals working for the **legal services** of the Commission, the Council, and the ECB, will be referred to as “lawyers”, as they also go to court. Those who do not work for the legal services are referred to in general terms as ‘legal professionals’, unless they are lawyers from private firms, judges or professors of law. If the individual does not have any legal training, then they are referred to as ‘policy professional’, and this will denote that they work with economic or monetary policy. For example, Agents from DG ECFIN of the Commission who do not have legal training are considered economics policy professionals – or just policy professional for short. Agents from the ECB with no legal training are considered to be economics policy professionals as well, in the way that monetary policy is considered to be a discipline that falls under ‘economics’ broadly conceived. In this way, non-legal agents from the ECB will be considered ECB policy professionals.

3.2.1.1 *The Court Cases that Served as the Starting point*

In the following, I describe how the main empirical themes are delineated by looking at three high-profile court cases that shine a legal light on the implications of the policy response to the EZ crisis. It should be noted that these court cases, do not serve as ‘cases’ in this thesis. They are simply the starting point for elaborating the themes of this thesis, which structure the empirical chapters. The network that was constructed based on the agents’ practices serves as the boundary specification tool in order to circumscribe what could be thought of as the historical emergence of a field but depicted in network form based on capital that was cultivated through network interactions.

The Pringle Case. The content of the Pringle revolved around whether the ESM, and its legal construction, violated EU law. Specifically, it related to the questions of how the ESM was sanctioned by the member states in the first place, as well as whether it violated the “no bail-out” clause (Article 125 TFEU). By querying the emergence of the ESM, it became clear that it was related to the emergence of the other financial assistance mechanisms – the EFSM and the EFSF – as well as the problems associated with them. This is how the empirical focus for Chapter 5 and 6 came about: to make sense of this critical part of the policy response, I had to account for the emergence of the first two mechanisms, which then led me to the very first ad hoc mechanism, the Greek Loan Facility (GLF). Thus, the initial EZ crisis policy response as an empirical object would be to look at the emergence of these four mechanisms and their legal construction. In order to answer the research question, this was a key empirical focus: the emergence of these mechanisms was directly related to the puzzle of figuring out how they emerged in a governance structure that denied a reason for ever needing such mechanisms.

The Gauweiler Case. This case turned on the legal issue of whether the ECB was violating its mandate – and thus EU law – in its announcement of the Outright Monetary Transactions (OMT) programme which amounted to buying the government bonds of specific member states in distress on secondary bond markets. The case was a preliminary referral from Germany’s Federal Constitutional Court (FCC), the substance of which was seen as confrontational – i.e. the FCC was leaning towards declaring it illegal, even though the FCC was technically not in a position to interpret EU law when its meaning was unclear; that was the job of the CJEU. But the FCC had in fact created its own doctrine – the *ultra vires* doctrine – which said that it had the power to examine whether an EU act was ultra vires. This doctrine stemmed back to the FCC’s ruling on the Maastricht Treaty regarding the EMU governance structure (Mayer, 2014).

By tracing the emergence of this case, it becomes clear that the ECB had created a number of policy programmes during the start of the crisis which were all seen as highly controversial. What is of significance was the narrative emerging around this case vis-à-vis the start of the crisis: at the beginning of the crisis in 2009, the ECB was a very reluctant central bank in dealing with the crisis (Blyth, 2014; Lonergan, 2014), and only in 2012 did it act decisively by announcing the OMT programme as well as ECB President Draghi's announcement in connection with the OMT that the ECB would do whatever it took to save the euro. In this way, another empirical puzzle became clear: the ECB was central in the EMU structure, which denied a role for the ECB in intervening in the affairs of imperilled member states, a role which the ECB attempted to sustain for the first three years of the crisis until it reversed its stance dramatically.

The Ledra Advertising Case. The Ledra case dealt with the question of whether the Commission and the ECB were responsible for authoring the Memorandum of Understanding – detailing the policy conditionality – that Cyprus would have to impose on its citizens in order to receive financial assistance. The case was essentially seeking to examine the responsibilities of the Commission and the ECB when working under the ESM Treaty framework and in negotiating the MoUs, especially if these MoUs involved an act that violated EU law. By tracing the emergence of this case, I was led to how policy conditionality as a modality of crisis governance came about in the first place, which was that in order for a member state to receive financial assistance, strict policy conditionality would be imposed on them in the form of reforming various parts of their domestic laws and policies related to pensions, wages, the regulation of professions, social security payments, etc. A key point here was how this modality played out: who exactly was responsible for imposing these conditions on European citizens? In terms of the puzzle, the EMU already had a form of this for the Eurozone member states in the recommendations given to them regarding their budgets. If a country was in danger of violating the budgetary rules, then recommendations would be issued on how that country could stay in line with those budgetary rules. Thus, if the modality of structural reform already existed for the EZ member states in the EMU, how was another version being constructed outside the EU legal order?

By comparing these three court cases to the literature on the EMU, as well as the literature on Integration through law, the points of diachronic struggle around EMU integration could be delineated.

3.2.1.2 Network as Method to Reveal the Fields

When looking at the emergence of these three cases, and more importantly, the empirical themes that they reflect, tracing the agents involved also needs to be done. Following the agents leads to various other social contexts in which these agents are simultaneously embedded, e.g. some of the lawyers are embedded in an EU context in terms of litigating before the CJEU but are from a nationally based law firms, and are also academics at nationally based universities. To this end, contacting the legal professionals involved in the court cases serves as the starting point. To get a full picture of the context of the professionals involved, I use two strategies. The first is simply to trace the agents involved in the crisis through interviews, documents, biographies, scholarship and online media. The second is to build a more targeted strategy that locates those agents who are considered to be ‘effective agents’ (Bourdieu, 2005, p. 99) in this disrupted context. To undertake these two strategies, social network analysis was used.

As discussed in the theoretical chapter, one has to be very clear when using the notion of a network in conjunction with Bourdieusian fields, as it is well-known that he did not see the utility in using social network analysis (SNA), a contention that stems from his differentiation between structure and interaction (Bourdieu & Wacquant, 1992), which leads him to explicitly reject social network analysis (Bottero & Crossley, 2011). Indeed Bourdieu makes his point clear thus:

“the structure of a field, understood as a space of objective relations between positions defined by their rank in the distribution of competing powers or species of capital, is different from the more or less lasting networks through which it manifests itself. It is this structure that determines the possibility or the impossibility (or, to be more precise, the greater or lesser probability) of observing the establishment of linkages that express and sustain the existence of networks” (Bourdieu & Wacquant 1992, p.113-114)

In other words, Bourdieu did not see the analytical value of using SNA in an empirical context, because it was not telling him anything about what he was interested in: the structure of the stakes of a given field and the agents’ positions vis-à-vis those stakes (with the stakes objectivated into forms of capital) and how those positions may afford possibilities and impossibilities to the agents in the field. SNA does not do this per se, although he recognised networks in a sense. If the structure of the field afforded certain linkages to agents and denied them to others, then these linkages could be looked at further to see how they play a role in the emergence and accumulation of a specific type of capital, e.g. social capital and/or symbolic capital (de Nooy, 2003). More specifically, if a field is disrupted and/or undergoing change, then how can one trace this disruption and its effects over time on the agents and the relations between

them in terms of objective structures of capital? For this thesis, look at a disrupted field in an unfolding crisis offers the opportunity to trace how these objective structures change over time as the agents engage in practices to deal with the crisis issues. Using SNA can help us trace how the agents interact, with whom they interact in terms of practices, and finally see what consequences this has for them overtime and in terms of how their practices may come to structure the field.

To that end, I therefore use SNA to construct two types of network. The first is a temporal network to trace the interactions of the agents (i.e. the legal and policy professionals) over time and specifically in terms of the various practices they engage in to deal with issues raised by the EZ crisis. These manifest primarily as enabling solutions to deal with the crisis, and defending these solutions from legal contestation in court. From these temporal networks I aim to get an indication of each agent's level of involvement. The second network that will be constructed is a 'referral network' to locate those agents considered to be effective. To do this, I have taken point of departure in the court cases mentioned above. Several legal professionals appear in all three court cases and their names also appear in connection with the EU institutions in 2016 (in the 2016 EU Directory), as well as legal conferences on the crisis. The method here is to interview them, and seek from them referrals to other agents, who will then similarly direct me to other agents and so on and so forth, until a data saturation point is reached; in other words, a snowball sampling technique (Carroll & Sapinski, 2016; Wasserman & Faust, 1994) is utilised to locate key respondents (or agents). The aim here is to establish a network boundary of an emergent referral network of the key legal and policy professionals involved in creating the policy response and litigating and/or defending in court cases. The approach takes inspiration from the network approaches utilised by Emmanuel Lazega, for example, 'advice networks' (Lazega, 2001), and 'reference networks' (Lazega, Quintane, & Casenaz, 2017), to operationalise and analyse collegial relationship. The network constructed in this thesis is called a *referral* network, as it is based on the respondents referring me to other respondents.

In the construction of my referral network, subsequent agents corroborate the meaningful inclusion of the initial set of agents in this network by naming those initial set of agents, often without me prompting them; in other words, I do not ask subsequent respondents whether they thought a certain individual was a key agent for reasons of confidentiality. As much as possible, the same question is posed to every interviewee: "who would you recommend that I speak to on the issues raised in the interview?" Over and above this, however, the respondents would often talk about their legal opponents or colleagues whom they considered skilled, and in this way, the referral network is constructed from these answers.

The saturation point is considered both in terms of a) receiving the names of people already interviewed; b) either getting no response from an agent (after sending an email, with two follow-up emails systematically) or at least a rejection email from mentioned names. All in all, 35 individuals were directly referred to, the core of which I have interviewed, 17 agents, with 3 not being interviewed but giving a referral by email, thus 20 referrals were obtained. Moreover, another 6 professionals were interviewed based on their acknowledged involvement from other sources, official documents; for example, a key person from the Eurogroup was interviewed given its prominent role, as well as an economic policy professional who was involved in Greece's adjustment programmes, and a lawyer from the European Parliament, however, none of them were referred by agents in the network. The point here, however, is to get possible opposing perspectives to the core of the referral network in order to see if there are emerging oppositions or struggles. More on these networks is explained and the measures used in Chapter 10 where the findings of the networks are presented.

Finally, a brief point on degree centrality. An agent's centrality – or a node – in a network can be conceptualised in terms of degree centrality. This refers to the number of ties – or edges – connecting a node to other nodes (Freeman, 1978). Thus, if a node has three edges, it has a degree of three. If in a network there is a node directly connected to many other nodes and another node connected to only a few, we would consider the former node as having high degree centrality and the latter as having low degree centrality. Furthermore, if the network is directed, i.e. the ties indicate direction e.g. 'gives advice to' or 'gets advice from', then the degree measure takes on a directional property: edges directed towards a node indicate its *in-degree* and edges directed away from a node indicate its *out-degree* (Wasserman & Faust, 1994). As mentioned, the networks constructed in Chapter 10 is a 'temporal network' and a 'referral network'. In terms of the former, degree centrality will be used as a measure to simply indicate how much involvement an agent has in the EZ crisis solutions and court cases; for the 'referral network' the degree centrality will be used to indicate how many times an agent is referred to by other agents (in an interviewee session or on email) and vice versa. Based on this, the degree centrality measures from both networks will be conceptually seen as symbolic capital following de Nooy (2003) in terms of field structure, i.e. an agent's position in a given field based on this type of symbolic capital inferred from the degree centrality of the networks.

3.2.2 Accessing Practices

On the first point of getting access to practices, the obvious go to method is participant-observation so the researcher can observe practices. This is common in for example organisational ethnographies

(Moeran, 2009), where researchers can be embedded in an organisation and thereby observe the employees as they play out their daily activities (Ybema, Yanow, Wels, & Kamsteeg, 2009), or attending trade shows or congresses (Sampson & Turgo, 2018). For my work, this was not an immediate possibility as some of the events of interest had already happened, for example, the creation of the mechanisms in 2010, and the above-mentioned court cases in 2012, 2015 and 2016. I therefore had to find proxies for observing practices. On this note, Pouliot's (2013) recommends asking respondents to recount their practices in terms of these events, as well as asking them about what their colleagues or interlocutors were doing. This is useful in that it "turns the interviewee into a kind of participant observer—although without the reflexivity that generally accompanies scholarship" (ibid, p.49). Moreover, the researcher can perceive the interview situation itself as a performance of an interviewee's practices.

Over and above the interviews, texts are analysed to also reveal practices. The idea here is to treat the discourses being analysed *as* practices. Although this resonates with a Foucauldian inclination, it nevertheless converges with Bourdieu; in *Language and Symbolic Power*, he describes how representations of the social world, often rendered through discourse, enables the transformation of the social world to the degree "that it renders possible practices that conform to this transformed representation" (Bourdieu, 1991, p.133). In other words, Bourdieu acknowledged the performativity of discourse (Pouliot 2013). Following this rationale, I read reports written by the legal and policy professionals on the EZ crisis, for example the XXVI FIDE¹⁸ (2014) report which lay out, first the institutional response in the words of a Commission legal professional, as well as 17 national reports by national lawyers giving summaries based on surveys of national lawyers. This was thus a key resource not just on legal perspectives of various types of lawyer, but also gave insight into the practice of legal justifications. In this way, the interviews and these texts were drawn on to reconstruct the practices of the legal and policy professionals as the EZ crisis unfolded, the analysis of which is presented in Chapters 5, 6, and 7.

Another set of texts which can be construed as performative were the observations written by Commission, Council, ECB and national legal professionals for the court cases.¹⁹ I made requests to the EU institutions for all the observations of the key court cases, except for those on appeal. These texts gave valuable insight into the processes of legal argumentation, especially in a comparative sense, as they all accounted for the same legal and economic issues based on the case, but argued from different points

¹⁸ Fédération Internationale pour le Droit Européen/International Federation of European Law – established in 1961, FIDE "focuses on research and analysis of European Union law and EU institutions, as well as their interaction with the legal systems for the Member States. It unites the national associations for European law of most of the EU Member States and candidate countries, as well as Norway and Switzerland" (FIDE, 2014, p.8).

¹⁹ Please see the section below on documents where I elaborate as to how I accessed these texts.

of view, e.g. national versus EU, as well as from opposing sides. By putting them into relation to each other, I could recreate the sense of the practices of legal litigation as the observations are comprised of the specific legal arguments either contesting or defending the given legal issues, and in this way reflect the mood of how litigation unfolds through contestation and argumentation. This analysis is presented in Chapters 8 and 9 on the court cases.

Finally, fortuitously, I was able to attend a public hearing for a very high-profile case that is connected to the same issue – Cyproit bank bail-in – as the *Ledra Advertising* case. Thus, I got to observe some of the legal professionals (some of whom I had interviewed) in action before the judges of the Court of Justice. This was a three-and-a-half hour long hearing, on which I wrote extensive notes – 15 pages – and which gave insight into the interactions between the lawyers and the judges. Of note here are how the judges challenge the lawyers which push the lawyers to try and refine their arguments on the spot, by either checking documents at the benches or conferring with colleagues, which is presented in Chapter 9.

3.2.3 Reconstructing the Dispositional/the Habitus

In order to reconstruct the agents' dispositions, two elements can be used: the first is the collection of biographical data on the relevant agents; and the second are the interviews. For the biographical data, the agents' CV's have been downloaded from institutional or organisational websites, as well as LinkedIn. Moreover, descriptive biographies of the agents have been collected from institutional websites, notably university homepages and organisational homepages. This data was put into Excel arc and formatted for uniformity for all the agents, some of which is presented in Chapter 10 in an highly anonymised form so as to protect the identities of my respondents. Notable here was observing how past education and job positions can be linked to tacit and practical knowledge needed for the practices, for example, an obvious one is the Master's degree in EU law from the College of Bruges, or a PhD from the University Institute of Florence. Furthermore, many of the agents have been legal clerks at the CJEU, another avenue of tacit knowledge about how the Court functions and its modes of interpretation. To further analyse this biographical data in terms of the field, one can use Multiple Correspondence Analyse (MCA), which can capture the oppositional characteristics between factions of a group of agents. MCA creates an analytical space – a field – and “gives individuals visibility as social agents and is able to grasp the conflicting or cooperative relationships between different fractions in a field” (Bühlmann, David, & Mach, 2012, p.4). For my purposes, MCA was considered but given that I am looking at a disrupted field undergoing change, MCA did not seem well-adapted to track this process over time, as it is very well-suited to capture a stabilised field in a synchronic sense. However, further research could take the findings of this thesis in

terms of capturing oppositions in this emergent field when it is seen as more stable.

Going back to the interviews, in asking them about the EZ policy response, I made note of from what stance they were talking. As Pouliot (2013) notes, the point here is to get at “tacit know-how”. As mentioned above in the section on access to practices, the agents would often reach for a copy of the FEU Treaty or have a copy of a recent judgement on their desk. In point out these legal artefacts and discussing them, they were illustrating the importance of having the physical legal artefacts there on hand so as to refer to them. Often this was for the sake of accuracy, in that they were double checking what an article provision stated specifically. In one instance, a new comer to EU law – he was an international lawyer – took out the ESM Treaty and identified what he believed were mistakes in how it had been drafted.

Why this matters is because the approach taken here seeks to reconstruct their habitus so as to account for the logic of their practices (Bourdieu & Wacquant, 1992) and how it related to this novel crisis situation. They were talking from a legal or policy stance – deploying their practical logic – onto this novel crisis situation. This meant the interview material enabled me access to how these dispositional logics (i.e. habitus) adapted to the crisis situation and the preferences of politicians.

3.3 Data Collection

The data collection includes data that relate to the research strategy outlined above, i.e. the snowball sampling used for the construction of the network, and therefore the data needed to reflect practices, habitus and field positions. For practices data came from interviews and texts; for habitus (dispositional logics) data came from institutional/organisational biographies and CV data; and for field positions, data was based on network data and CV data.

3.3.1 Interviews

When embarking on obtaining interviews, it is always unclear as to what degree individuals will be willing to dedicate time to an interview. It should be noted that these agents were, at the time of data collection between mid-2018 to end of 2019, considered elite agents, many of whom had now risen up their respective organisational hierarchies to director level, over and above the fact that they were busy. It is therefore not a given that any of them would agree to interviews. However, these elite agents have been forthcoming and indicated a willingness to be interviewed. A large part of my data is from interviews: 23

respondents. The interviews were semi-structured and range between 30 minutes to over 2 hours, with a total of 25 hours and 30 minutes. All in all, 17 of the 23 interviews were recorded and fully transcribed, while 6 interviews were limited to note-taking. This amounts to over 236 pages of textual material based on the interviews. (See Appendix 1 for list of anonymised interviewees and dates).

Firstly, in asking for an interview, I endeavoured to craft an email that would be considered professional and precise. As mentioned, given the busy work-life of these elite agents, it was crucial to hit the right tone with the email so that I would not be seen as unknowledgeable or unserious. This was especially critical as I do not have any legal (or policy) training, and so the way I framed my approach in the email could have betrayed a lack of understanding of the legal side, which could have been considered as not deserving of an interview. I therefore put a great deal of thought into this and had it proofed by a colleague that had a flair for articulation. In any case, the point is that I believe the email went quite far in securing interviews (see Appendix 2 for an example of the email).

In creating the semi-structured interview guides (Kvale & Brinkmann, 2009), I follow a general structure that can be conceived as two parts: relevant issues related to the EZ crisis; and the practices of the legal and policy professionals. For the former, I take point of departure in the following themes which are drawn from the court cases: the emergence of the mechanisms; the ECB's change in conduct and policies; the authorship of the MoUs (policy conditionality), and the court cases themselves. For the practices part of the interview, questions are related to the following: the policy process during the crisis, negotiations during the crisis, legal drafting, who they worked with, their positions and attitudes on what had occurred during the crisis, as well as practices related to litigation in terms of the cases. This also raised questions related to their careers, such as whether they had worked at the CJEU, or other legal or policy positions, which could be in finance, economics or banking. Of course, the respondents often brought in new angles and information which spurred the research investigation. (See Appendix 3 for a composite interview guide).

When interviewing elite professionals, a few reflections are in order. This is especially important when information may be sensitive or privileged and gaining trust and gauging the tone of the interview become significant. As Harvey (2011, p.434), gaining trust is key "in order to collect high quality data". Of course, using a Bourdieusian approach entails going beyond what has been said (position) and to excavating what lies in the unsaid (disposition), nevertheless, gaining trust can ensure a certain level of candidness, and this trust needs to be respected. To that end, all interviewees were given the chance to read and sign an

informed consent document (see Appendix 4), in order to reassure their preferred level of anonymity and confidentiality would be respected. Moreover, given that referrals are needed in order to construct the referral network, the interviewee needs to trust and be comfortable enough to refer me to colleagues and possibly opponents. This also speaks to the importance of the email described above in reflecting professionalism and forethought, which is similarly important in building a certain level of trust over time, i.e. from the point of contact (Ostrander, 1993).

The reason there are no interviews with judges was essentially a practical problem, but could be argued for on conceptual grounds. The practical reason is that they are very difficult to get access to. Initially, I did attempt to contact some to test the waters, but either got a rejection email or no answer. However, there is a conceptual reason for not interviewing judges for my project. Given the CJEU has no dissenting opinions and deliberations are highly confidential – so as not to put a judge in the bad graces of their national government or that of another government – the CJEU is seen as speaking with a single voice. Thus, secrecy is highly valued. In that way, the judgement should be taken as the key data source to be analysed vis-à-vis my other data sources. Furthermore, I have gained much insight into the workings of the court, as some of my interviewees had previously worked as legal clerks for the judges of the court. Thus, they explained how the court functions, the process of drafting judgements (often initially done by the clerks themselves), and the process of deliberation in the various chambers. Furthermore, I asked some of my respondents whether they thought my not having interviewed judges would be a problem for my research, to which they said it did not matter. In that way, I was satisfied that this would not constitute a critical methodological issue for the research.

3.3.2 Documents

Documents are a key data source in this thesis, and all relevant documents include the relevant policy documents produced by the EU institutions during the crisis; the legal observations submitted to the CJEU for all the major court cases, which are written by lawyers, many of which are part of the referral network; legal scholarship written by lawyers from the referral network; and legal analysis written by lawyers for their professional associations. For the submissions to the CJEU, I had to make document access requests through the website: www.askeu.org, where all my requests, as well as the documents granted to me are publicly available.²⁰ The successful requests encompass submissions for *Pringle*,

²⁰ It is a considerable amount of documentation and they are freely available at https://www.asktheeu.org/en/user/nicholas_haagensen

Gauweiler, Ledra Adv., and *Malli*. The unsuccessful requests were made for cases which are on appeal and still in progress, and were thus denied, notably, *Chrysostomides*. Finally, another set of documents that illuminate the legal issues of the EZ crisis are the FIDE - *Fédération Internationale pour le Droit Européen/International Federation of European Law* – documents from the 2014 Congress, where a key topic was “EMU: Constitutional and Institutional Aspects of the Economic Governance within the EU”, and where national and EU legal scholars and practitioners (judges and lawyers from all over Europe) wrote extensively about the various perceptions of the EZ crisis legal and policy response, as well as the court cases. In that way, this documentation provided all of insight, especially into the national views of the EZ crisis.

3.4 Data Analysis

Once data had been collected, I used the software programme NVivo to organise and manage the data. Given the large amount of textual documents, this was crucial to keep track of the various documents and their source. Moreover, NVivo enables the creation of coding schemes that are both inductive and deductive, for example, in terms of the former, as the data is being analysed codes can be created based on the data, while for the latter, codes can be created based on theoretical concepts. Based on my theoretical framework, I needed the flexibility that both occurrences would arise, because, given that it is anchored in a Bourdieusian framework, the empirical material requires a lot of space to breath. In this way, I followed what Bourdieu himself said: “scientific theory as I construe it emerges as a program of perception and of action—a scientific habitus, if you wish—which is disclosed only in the empirical work that actualizes it. It is a *temporary construct which takes shape for and by empirical work*” (Bourdieu & Wacquant 1992, p.161). In this way, the analytical strategy for coding needed to allow the empirics to shine and dazzle in the illumination of the theoretical gaze. Indeed, Bourdieu’s concepts of habitus, field and capital arose themselves in “the practicalities of the research enterprise” (ibid.).

But this does not mean one should dispense completely with a structured approach; empirical material still requires some organization and forethought. I organised the data collected in terms of on the one hand, interview transcripts and notes and observations of the public hearing, and on the other, all the relevant documents. These had to be ordered more strictly, and so they were indexed based on institutional authorship, namely, Commission, Council, European Council, ECB, CJEU, Private legal firm, and so on, and then broke down further where applicable, for example, CJEU was broken down into Court of Justice and the General Court. In terms of the coding, NVivo enables the use of a system

of “nodes”, which can be set-up in terms of parent and child nodes, ‘node’ refers to the codes that are based on one’s concepts. I used both codes based on the theoretical framework deductively, and inductively created nodes which came through the empirics. I initially I created three main parent nodes that followed the three main above-mentioned research strategy elements: “situational” (operationalised from for practices), “dispositional” (operationalised from habitus), and “positional” (operationalised from field). These are elaborated more below.

3.4.1 Coding and Analysis

“Situational”

This parent node refers to practices, and nested within, I added the codes: drafting, negotiating, advising, interacting. There were more specific types of legal practice related to legal analysis, for example, ‘issue spotting’ when identifying a legal issue at the intersection of policy domains. I added boundary work as a child node in ‘situational’, and within it I coded for the various types of boundary work I observed in the data, based on the analytical understanding of the concept as described in the theoretical framework. In this case, it was any social process where a boundary was made to appear, disappear, move, etc. Thus, in some instances, there was boundary making – self-distinction by some agents – such as how EU law and lawyers are distinct from international law and lawyers. But more significant were the specific types of boundary work that I observed and called for the development of novel concepts for this empirical context, which has been elaborated in the previous chapter on the theoretical framework. See the process diagram below as an example of the coding setup utilised in NVivo.

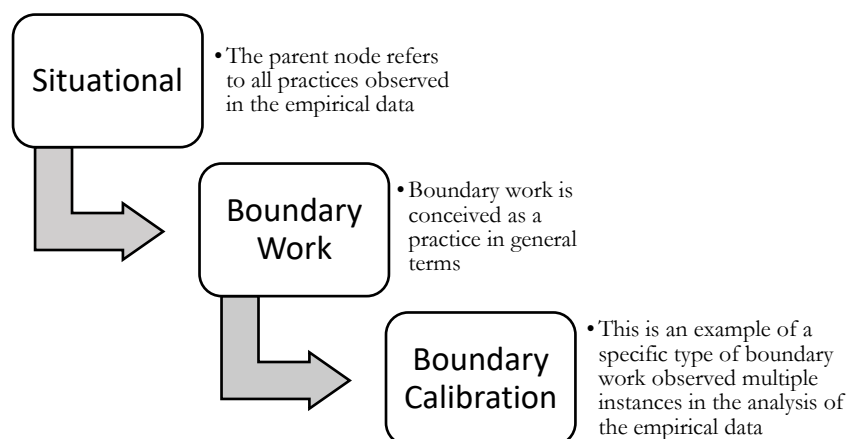


Figure 1: Situational Coding Process. An example of how the coding nodes look in NVivo and the relationship of parent node, sub-node, and then to a sub-sub-node. Here the parent node of ‘situational’ for practices is shown with the sub-node

of boundary work, referring to the general umbrella term, under which a sub-sub-node of ‘boundary calibration’ has been made. In this way, boundary calibration is a type of boundary work – and a practice – that is observed in the empirical data.

“Dispositional”

In order to code for instances related to habitus, I created a parent node called dispositional under which I put the sub-parent nodes: “categories of perception”, and “biographical”. Under the first, I coded for all instances relating to the categorization of the crisis situation or issues in specific ways, for example, early on I made a node called ‘intergovernmental/supranational’, as agents would often explicitly or implicitly refer to issues in terms of these categories, under a parent node called EU governance. For ‘biographical’, I coded any biographical details revealed in the interview. These were later put into an Excel arc with all the respondents (and the agents in the network) biographical data. See the process diagram below as an example of the coding setup utilised in NVivo.

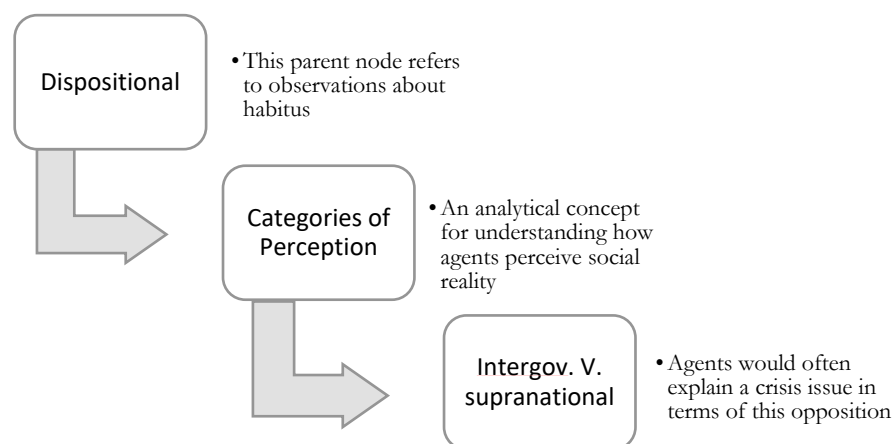


Figure 2: Dispositional Coding Process. An example of how the coding nodes look in NVivo and the relationship of parent node to sub-node. Here the parent node ‘dispositional’ is shown with its sub-nodes of ‘categories of perception’ and then a sub-sub-node of ‘intergovernmental v. supranational’ as an oppositional perception that some respondents deployed when talking about the legal issues of the EZ crisis.

“Positional”

Finally, for this element which refers to the ‘field’, I created the parent nodes ‘rules of the game/doxa’, ‘struggles’ and ‘capital’. For the first node, I coded for instances where social rules related to a field, which are often implicit, were made more clear, for example, a lawyer who had worked at the Court of Justice explained in an interview how the judges, when adjudicating a case, are generally “conservative with a small ‘c’” in that they primarily concern themselves with the legal question being asked before them, and are wary about going beyond that specific question. However, it is also clear from other interviews that

this rule is broken sometimes when the judges decide to “surprise” their interlocutors and interpret beyond the immediate question, often going into more substance, thereby breaking this rule. The game here is that the Court of Justice judges are aware of the delicacy of interpreting in an activist way that can lead to controversy, which is precarious for a ‘supranational’ court that has claimed constitutionalism compared to a national constitutional court whose basis of constitutional legitimacy is not in question. Another empirical element that came up in doxa a lot was around the ECB and its credibility with financial markets, which its representatives always seemed to be struggling for during the crisis, and re-iterating in various ways, for example, stating that its solutions were ‘credible’. This needs to be interpreted with regard to the general doxa about central bank independence and why that is seen as credible for market agents.

For struggles, I made two sub-nodes of diachronic and synchronic in order to place the struggles in a suitable time frame. For my purposes, diachronic generally referred to struggles that occurred prior to the EZ crisis but were still relevant, while synchronic referred to struggles that came up during the EZ crisis. This was just to make a distinction that I could work with in the analysis. So for example diachronic struggles were the ongoing contentious relationship between the German Federal Constitutional Court and the Court of Justice, in terms of how the FCC went out of its way in historical cases, such as the Maastricht cases in 1993, to demonstrate that it had final say on whether it saw an EU action as being *ultra vires* (beyond one’s legal power), a topic which came up often in light of the EZ crisis. Another example, would be the historical struggle for the ECB to claim autonomy even from EU law, which became the content of the court case *OLAF* in 2004. Synchronic struggles would be related to the EU legal professionals trying to prevent EU law being undermined by the extra-EU law solutions during the EZ crisis.

Finally, for ‘capital’, I coded for instances where a ‘property’ was seen to afford influence or power in some way, but which was relational. For instance, being a lawyer from the European Parliament was seen as not as prestigious as being a lawyer for the Commission or the Council. And generally the European Parliament was seen in a subordinate light, especially on technical issues, where agents from the Parliament wanted to be involved but were seen as not being competent. Another property was having some background in finance and law which meant that one was perceived as having dual knowledge relevant to the crisis issues. Finally, an emergent property was connected to the referral’s made in the interviews, and which structured the network, namely the property of being directly involved in constructing the legal elements of the EZ crisis policy response, which I coded as ‘crisis capital’.

“Case-Based”

All throughout the coding process, I also coded in terms of empirical events and objects, e.g. the EFSM, or Pringle case, or ECB. This meant that I had a whole set of case codes which related to references of each event and object. This was crucial when for writing out the analysis because I could compare these case codes in terms of the conceptual nodes – the situational, the dispositional and the positional, to see how the events and objects were ‘constructed’. For example, when writing about the EMU structure for Chapter 4, I checked both the case codes on EMU, as well as the conceptual codes related to ‘struggles’, ‘doxa’, as well as the ‘situational’ codes relating to practice, in order to write out an analysis that illustrated how the conceptual tools foreground the EMU in a specific way, which brings me to a key point and the last crucial step to analysing this data.

3.4.2 Analysis Through Writing

Given the relationality and processual nature of the theoretical framework, the data – once it had been coded and organised had to be analysed relationally, that is, comparing the three elements of situational, dispositional and positional, but in terms of the unfolding events of the crisis, in order to see how these relational elements came through the empirics. I therefore wrote out the analysis by writing out the events of the crisis in chronological order. I started my written analysis by looking at the practices of the legal and policy professionals before the EZ crisis and in terms of the EMU as a policy domain. For the EZ crisis analysis, I started by reconstructing the events of the two weekends when the GLF, the EFSM and the EFSF came about, and in writing about these events, I referred to first the case codes for these objects, the analytical codes I had created to analyse the textual data, as well as the network I had created to see who was involved. In this way, I triangulated the events with the codes and the network, and then wrote up how the analytical codes informed the unfolding of the events in reconstructing the chronological narrative. This was done in order to bring to the foreground the way in which the practices (together with the dispositional codes and positional codes) were brought to bear on the crisis events. This approach was applied to all the empirical chapters, so for the construction of the ESM, the conduct of the ECB and the Greek debt restructuring, and then finally for the Court cases.

Initially, this reconstruction through writing led a large amount of written analysis, from which I later created the highly edited versions for the final written thesis. The methodological and analytical point I

wish to stress here is that the analysis has required a highly iterative process between checking codes, case events and objects, and the network, as well as the reconstruction through these methodological elements via writing.

Now that the methodological approach has been elaborated, the next chapter will set the thematic baseline in a historical sense by looking at the political construction of the Economic and Monetary Union, starting with some of the struggles related to the Maastricht negotiations, and then looking at the EMU's subsequent structure, especially in terms of the dearth of legal activity following the ratification of the Maastricht Treaty, except for a few key legal points, thereby setting the starting point from which I can then show how European economic policy became legally construction as the EZ crisis unfolded.

Chapter 4: The Political Construction of EMU and its Legal Ambiguities prior to the Crisis

To understand how the crisis re-configured not only the institutional structure of economic governance in Europe, but also the fields tied to it, the political struggles over the Maastricht Treaty and EMU pre-crisis need to be sketched. This will form the thematic baseline of the dissertation so that in the analysis it can be shown how the practices of the legal and policy professionals enable and consolidate solutions during the Eurozone crisis and lead the political construction of EMU to become legally constructed. This is specifically in regards to the institutional and legal ambiguities of EMU, which were not only outcomes of the Maastricht negotiations, but also developments of EMU leading up to the Lisbon Treaty and the subsequent outbreak of the EZ crisis (Matthijs & Blyth, 2015). To that end, this chapter will start with a relatively broad scope of the Maastricht negotiations and the beginnings of EMU, and then gradually narrow the scope by zooming in on specific elements that are relevant to the aims of this thesis.

In the following, the negotiations and outcomes of the Maastricht treaty will be outlined in order to present the governance logic of the EMU. Following this logic, I will then discuss the components of monetary policy and the contested legal status of the ECB as well as its role in financial integration. Then I will look at economic policy, as well as the ECOFIN Council and the evolution of the Eurogroup and the Stability and Growth Pact (SGP). On economic policy, I will discuss France's failed attempt to balance Germany's strict stance on stability and monetary policy with a formal economic government, something which the Commission also promoted, as well as the Commission's failed attempt at formalising in the Treaty a financial-assistance mechanism in the case of asymmetric shocks. These failures essentially led to the realisation that at least the Eurozone Member States would need to have a forum to coordinate, and thus the Eurogroup was borne in the late 1990s, and formally recognised in the Lisbon Treaty, albeit as an 'informal' group. The point of sketching out this history is to show the logic of struggle that has reproduced these same positions during the EZ crisis, albeit in a modified form that appears legally dubious (De Witte, 2015).

It will be argued that this asymmetry meant that the logic of monetary policy and how it should govern an economy led to ingrained beliefs about the euro and its place in financial markets, which enabled a high level of financial integration especially in sovereign debt markets. These beliefs – or doxa – would prove difficult to overcome in dealing with the Eurozone crisis, which necessitated abandoning these beliefs in order to save the Euro.

Part of this recent history requires looking at the legal contestation against Germany's participation in EMU, which is crucial in order to show how the German Constitutional Court was activated to set limits, and essentially achieve definitional power over what stability in the EMU would mean vis-à-vis Germany's acceptance of it.

Finally, drawing on original empirical data, I will outline the practices of legal and policy professionals prior to the EZ crisis in order to illustrate the dearth of legal activity. By undertaking this more historical analysis we can understand better that the “[s]truggles are sedimented and institutionalized, eventually forming part of the objectified and materialized social unconscious”, which will also put us in a more informed decisions to understand how “each political organization develops its own esoteric culture that is alien to outsiders” (Kauppi, 2003, p.779). This is especially significant with regard to the historical processes that have led to the specific characteristics of the institutions implicated in EMU, especially the ECB, the Eurogroup and the European Council, and how with the EZ crisis, legal professionals had to take a much more significant role than before.

4.1. The Maastricht Negotiations: Political Tensions between Economic Visions

Given the turmoil created by the Eurozone crisis, many have questioned the economic logic of having a monetary union and a single currency (Blyth, 2013), but back when ideas about a monetary union started to circulate, the international Bretton Woods system created after World War II was breaking down and there was much monetary and economic disruption globally (Mcnamara, 2006). Hence, much of the impetus for EMU came about in the context of this turmoil in the 1970s, when, in response to what Germany saw as ‘dollar hegemony’, especially with US macroeconomic policy having detrimental effects on European currency stability, the members of the European Community (EC)²¹ attempted to agree on a common position by first jointly floating their currencies against the dollar, which failed initially but then eventually the EC members took a stronger stance against the US and restricted this fluctuation by “creating the so-called snake in the tunnel” (Henning, 1998, p. 555), a stricter joint flotation of European currencies.

Thereafter the tunnel fell away, leaving the snake, but dollar instability and changing US monetary policy

²¹ European Community as the name of the European Union before Maastricht and Lisbon Treaties.

led to a more coordinated effort by the EC members to create the European Monetary System (ESM), which was more coordinated, with measures stipulated around central rates, and comprehensive in terms of intervention (Henning, 1998). This turmoil was crucially also pinned to a political impetus for EMU from especially France and Germany, the success of which was far from determined, and in fact got off to a very rocky start before it was eventually decided on (Dyson & Featherstone, 1999). Nevertheless, by the late 1980s, France had become dissatisfied with the asymmetrical nature of EMS, which centred on the deutsche mark and meant that as it appreciated, the EC currencies appreciated in concert, which was economically undesirable for Europe's economies. With Italian support, the French proposed "the monetary construction of Europe" (Gros & Thygesen, 1992, p. 312), to which Germany countered with its own proposal, followed by the commission by the European Council of a report on EMU chaired by Commission President Jacques Delors; and thus the foundations of EMU had begun in earnest (Henning, 1998).

Critically, this particular political project would become wedded to an economic vision that favoured financial liberalisation and dominance over anything else and thus the impetus for EMU was not simply the pressures of economic convergence, but also a political vision of the economy. Conceptually, the key element here was the ascendancy of supply-side, neoliberal economic ideas that privileged the credibility of central bankers and the efficiency of financial markets over more Keynesian-style demand driven ideas focused on stimulating the economy and intervention (McNamara, 1998), which many believed had led to 'stagflation' in the 1970s and 1980s. The agents pushing the more neoliberal orientation were able to largely shape the institutional framework of EMU as a new consensus emerged 'sound' money (Matthijs, 2016), which meant price stability and strict budgetary discipline

This technical economic consensus formed the basis for the European economy to be anchored in the German conviction of 'stability culture' (Beyer, Gaspar, Gerberding, & Issing, 2009, p.15) that stressed "the vital importance of credibility of policies within the financial markets" (Dyson & Featherstone 1999, p.2). This consensus meant that central bankers', and especially the German Bundesbank became highly influential in pushing their vision for the European-wide macro-economy, and would lead to the Bundesbank setting the template for what the ECB would become (Gormley & De Haan, 1996; van der Sluis, 2014), when discussions about creating a single currency gained traction. However, it is crucial to note that although there was a growing technical consensus of the failings of Keynesianism, there was not necessarily consensus about the political way to govern Europe's economy, and as Cohen (1998) notes: "political factors must weigh at least as heavily as economic issues in the calculations of

governments" (Cohen 1998, p.84). And in fact, there was very little evidence of the economic advantages from a single currency union, meaning that there had to be a strong political impetus as well, but this was driven by two competing political visions – or “master frames” – about how EMU should be structured.

The notion of master frames, elaborated by Parsons (2003), denotes political visions that are essentially anchored by one idea that leaders use in political contests to lay down ‘constitutive rules’ for their visions of Europe as an entity, .e.g. a “community” (ibid., p.9). The political struggles during the Maastricht negotiations over EMU could be said to be contests between political economy ‘master frames’ about how EMU should be structured, but these master frames, anchored by a single overall idea that lay down the ‘constitutive rules’, either leave detailed legal elements of the institutional structure ambiguous or lacking in substantive content and thus left open; in other words, degrees of constructive ambiguity.²² In the case of EMU, during the negotiations there seemed to be two competing master frames: France’s notion of *Gouvernement économique*, which saw a more political and socially-oriented economic government, that sought to resist Germany’s rigid anti-inflation approach, and Germany’s *Stabilitätsgemeinschaft* or “stability community” that saw a highly independent central bank with a rigid focus on price stability and strict rules of budgetary discipline for the member states, all in the name of market credibility. In the end, the ‘stability community’ vision would come out on top because it enabled the existing master frame of European community, already accepted in France (Parsons, 2003), to simply absorb the reigning financial market ideas of the time. In the next section, these ideas are presented.

4.1.1 *The Political Power of Finance and Central Bankers*

As Dyson and Featherstone (1999) note, the economic rationale for EMU did not arise from logic or necessity, but were connected to economic beliefs: the key element was that the Maastricht “negotiations were structured around, and informed and legitimated by, a new set of shared economic policy-beliefs. Their emergence was explained by the discrediting of Keynesian orthodoxy with the economic shocks of the 1970s and the subsequent opportunity for ideas that were more relevant to the problems of inflation and competitiveness” (ibid. p.752). In this way, it was the interpretation by policy makers of these developments and conditions in the global economy that enabled shared beliefs around monetary cooperation (McNamara, 1998).

This consensus around sound money and public finance was reinforced by a key development in the

²² This term is attributed to Henry Kissinger, see Mitchell (2009) for an explanation.

global economy: the increase of capital mobility. The policy elites advocating sound money saw advantages in this development: “the disciplinary effects of financial markets on national budgets; and as a source of allocational efficiency” (Dyson & Featherstone, 1999, p. 752). In this way, the financial markets were recognised and acknowledged for the ability to structure and discipline the behaviour of governments in fiscal and monetary areas (ibid.). Once capital controls had disappeared with free capital movements, national budgets were put under pressure. This speaks to a key element of neoliberalism vis-à-vis policy makers: seeking credibility from financial markets (Ban, 2016). More critically, it also speaks to how the structural power of financial markets is not natural or inevitable but rather enabled by economic policy beliefs of politicians, and with the Treaty of Maastricht the disciplinary forces of global financial markets were going to be mobilized through the structure of EMU (Apeldoorn, Overbeek, & Ryner, 2003).

Politically, German’s hegemonic position in terms of its currency and central bank was aligned with financial market perceptions of state credibility in market governance. Moreover, these ideas were informed by “transnational fora” such as the EC Monetary Committee, and the Committee of EC Central Bank Governors in which the key negotiators were embedded (Dyson & Featherstone, 1999). Another notable forum was the Delors Committee, which brought together central bankers and financiers and laid down much of the conceptual and institutional foundations for EMU (Sacriste & Vauchez, 2019). Thus, the dominant vision was neoliberalism, which can be characterised as “institutionalized trade/financial openness, public finances benchmarked by financial market credibility, and growth strategies based on the relative competitiveness of the national economy” (Ban, 2016, p. 10), with the role of the central bank to simply be the maintenance of price stability.

As noted, this consensus around sound money and public finance pointed to the structural power of finance, not only in Europe (Apeldoorn et al., 2003), but also in the global economy: gradually sovereign states had to orient their fiscal and financial policy around the notion of market credibility, as opposed to more economically distributive policies. Moreover, this power was very much hierarchical (Mehrling, 2013), e.g. the dollar had been the reigning currency, but with the advent of the euro, Europe was bequeathed a currency that would enable its ascent up the money hierarchy, leading to a rigid doxa within financial and central bank circles about the prestige of the euro, as will be shown in Chapter 7. This ascendancy further nurtured a perception of Eurozone government debt as essentially risk-free, a phenomenon which the Commission and the ECB would later use as a strategy to spur European financial integration in the 2000s (Gabor & Ban, 2016), which would in turn come to characterise one of

the key Gordian knots of the EZ crisis: the critical linkages between banks and sovereigns.

4.1.2 *The loss of *Gouvernement économique* to German *Stabilitätsgemeinschaft**

Even though the EMU negotiators were able to bridge certain belief systems (Featherstone & Dyson, 1999), the formulation of economic governance in the Treaty did not do away with different economic policy visions. A notable example was the notion of a *gouvernement économique* institutionalised at the EC level, which was being advocated by the French government, together with the Commission and Belgium (ibid.). This idea put emphasis on the need for political leadership in economic policy, based on the premise “economic and monetary-policy technocrats must be subordinated to political leadership and that political leadership needed to retain discretion over policy [...]” (Dyson & Featherstone 1999, p.31). The specifically French nature of the idea stemmed from the republican belief that “[t]he principle of the sovereignty of the people was hostile to the idea of depoliticized decision-making, represented by an independent ECB” (ibid.).

In contrast, the German stance was predicated on its difficult history, in particular the hyperinflation of the early 1920s and 1930s, which not only “sits deep in the national psyche” but is also connected to the ascendance of Fascism (Grimm, 2015, p.270). Moreover, Germany had “experienced several currency changes in living memory: the Reichsmark, the East German Mark, the Deutsche Mark and finally the Euro”, which are primarily “associated with a fear of wealth destruction” (Grimm, 2015, p.270). In this way, there is a strong aversion to inflation and a strong inclination towards stability, and hence the German expression “stability community” (Beyer et al., 2009). At a deeper level, this vision of stability has been said to stem from “the ordoliberal ideology in which the German political elite was born and raised” (Krarup, 2019, p. 318).

This conviction for stability informed the German government’s approach, which saw it prioritize “depoliticised technocratic (rule-based) economic policy” (Krarup, 2019, p. 318), which would be made manifest in the high level of independence of the ECB, away from the unstable inclinations of politicians (van der Sluis, 2014). Thus, the idea of *gouvernement économique* was looked at with a huge amount of scepticism, as it amounted to handing over the stability of the currency to short-term political prerogatives. In sum, “two powerful ‘stories’ confronted each other in the EMU negotiating process. One stressed the danger from faceless and irresponsible technocrats; the other from the fecklessness of politicians” (Dyson & Featherstone 1999, p.31-32). This oppositional logic would continue to inform the

evolution of EMU and speaks to the theoretical underpinning of this thesis that the reproduction of a social field is obtained through a logic of struggle or opposition. In the field of European macroeconomic governance, this oppositional logic would drive the developments of EMU. Nevertheless, the French notion of “*gouvernement économique*” lost out to the German vision.

Within the French political establishment at the time there was an indication that the French would go along with the German vision, because *within* France there was a similar contest between master frames (Parsons, 2003), with some, such as the head of Banque de France, Jacques de Larosière, French Finance Minister, Pierre Bérégovoy, and former Finance Minister, Édouard Balladur, being resistant to any vision of EMU anchored by a strong monetarist – or Bundesbank-like – approach, while others, such as policy-makers in the Finance ministry, as well as the Trésor Director, Jean-Claude Trichet and Former President Valéry Giscard d'Estaing, accepted that the EMU vision with a strong central bank would be the optimal way for France's economic future (Parsons, 2003, p.213). In that way, any French resistance to the German master frame or vision would be far from insurmountable. And it was not just here where the German vision had overtaken but also with regard to some of Commission President Delors' ideas.

Although Delors very much accepted the resource allocation role of the market and the centrality of stability, he still desired a more political and social stance toward EMU, and he sought to create “collective bargaining at the European level; to an EC industrial policy; to the development of fiscal transfer mechanisms; and to ‘economic government’ via the European Council and ECOFIN to ensure a co-ordinated approach to growth, employment, and stability” (Dyson & Featherstone 1999, p.696). Of these, the most ambitious Commission proposal was a ‘financial assistance-mechanism’, the justification of which was to assist states that were affected by asymmetric shocks, and the point would be to stabilise them, as opposed to ‘redistribute’ resources. There was also the issue of “overcoming the painful effects of rapid convergence” (Dyson & Featherstone 1999, p.732) so in that way, it could be perceived as a device for sustaining the “political consensus” needed for continuing to the third stage of EMU, as some member states were going to have to tighten their budgets acutely. However, the Commission was unable to get its initial vision through and gave into oppositional pressure from the Germans, the British, and the Dutch (ibid.). In the end, the financial assistance would only be activated on a very narrow conception of shocks, would only function in stage 3 and unless it was a natural disaster, it would require unanimity on the basis of “difficulties caused by exceptional circumstances” (Dyson & Featherstone 1999, p.732). Thus, it was significantly watered down.

In the end, monetary policy dominated the EMU framework with the ECB getting a high level of independence in the form of institutional autonomy, and with economic and fiscal policy being subordinated in the sense that states would have to keep a tight check on their budgets and simply coordinate their economic policies. This meant no economic tools if there were any asymmetric shocks. When the crisis started in 2009, the ECB tried to keep this independence going in the sense that it signalled to financial markets that the debt problems starting to engulf Greece in later 2009 did not justify any form of central bank intervention or EU intervention for that matter (Loneragan, 2014). More generally, the outcomes of the Maastricht negotiation show how financiers and central bankers with shared ideas of neoliberal economic views had achieved a definitional monopoly over economic and monetary policy, and how these ideas could be absorbed in the master frame of Germany's 'stability community' which was based on the foundations of ordo-liberalism (Krarup, 2019). However, in putting these ideas into a legal text, the political compromises would engender legal ambiguities. Notably, Delors' initial push for a more social policy angle, especially with a financial assistance mechanism, was dominated by a harsher and stricter vision which meant financial assistance would only be available in the case of a natural disaster or in terms of the highly ambiguous "difficulties caused by exceptional circumstances",²³ which would require unanimity. In the next section I look at the legal status of the ECB and the evolution of its position in the economic and monetary integration of Europe.

4.2 Legal Ambiguities of EMU and the Role of the ECB

The EMU was designed to deliver economic growth and price stability, but as shown above, the master frame informing EMU, although anchored by the key notion of stability, was also quite legally vague. These two policy targets would be achieved with an asymmetrical institutional structure whereby monetary policy moved to the supranational level and was centralized at the European Central Bank (ECB) and the European System of Central Banks (ESCB), and fiscal and economic policy stayed at the national level, albeit with the Member States coordinating their economic policies in a decentralized system of governance (Hinarejos, 2015a). This asymmetry meant fiscal integration would be substituted by financial integration (Rey, 2013), but also meant having the tension of fiscal constraints coming from the supranational level together with democratic sovereignty at the national level. More critically, this asymmetry meant that, not only were there legal institutional ambiguities, but the evolution of EMU would require certain adaptations (Dyson & Featherstone, 1999).

²³ As it now appears in Article 122(2) TFEU.

In this section, I outline the development of the ECB and the legal ambiguities around its legal status, after which I turn to economic policy and the coordinated governance style, as well as the evolution of this governance arrangement in terms of the Eurozone Member states.

4.2.1 The ECB and Monetary Policy: The most independent, independent central bank

Monetary policy was centralized at the supranational level with the European Central Bank (ECB) coordinating the European System of Central Banks (ESCB) with the objective of price stability through inflation targeting. It should be noted that before the Maastricht negotiations and the actualisation of EMU, the monetary system of Europe was being conducted through the ‘European Monetary System’ (EMS), which essentially left primary monetary policy decision-making power to the Bundesbank. The bank’s monetary behaviour was “closely shadowed by other states” and “[w]ith the D-Mark as the anchor of the system, the asymmetrical nature of the EMS therefore did not challenge German stability culture” (Bulmer, 2014, p.1246). Given the Bundesbank’s performance and monetary authority, as well as its emulation by others, it became the template for the ECB.

The Bundesbank has been highly influential in Germany, and has been able to topple German government administrations by raising interest rates, which would hurt a fiscally profligate government: “Monetary policy is most effective when it is credible and in conformance with fiscal and economic policy” (van der Sluis, 2014, p.111), so the Bundesbank has been aware of bowing to the German government when necessary and when government supported by the German public. This means that strict monetary policy was not always striven for by the Bundesbank as it knows that a balance needs to be struck when going for best monetary and economic policy. In this sense, its ‘independence’ is somewhat open to interpretation.

More significant is its legal nature in German law. The German constitution – the *Grundgesetz* – did not constitutionalise bank independence, and only says that there must be a federal bank, so the legislature had more freedom when it came to the Bundesbank. Indeed, the German legislator has the possibility “to attribute or withhold competences, to organize the appointment procedure, to determine the institutional structure and to regulate the relations with the federal government” (van der Sluis, 2014, p.107). In this way, the Bundesbank was not as independent as the ECB. An alternative for how the Bundesbank came to be so independent, not just notionally, but also in the perception of the public, is no doubt connected to its long history and culture, of which the law plays a role (ibid.).

However, with the Maastricht Treaty and specifically the legal nature of the ECB, “a new dimension to European economic constitutional law” was created. Essentially, it was “an exercise in constitutional and institutional engineering” (van der Sluis, 2014, p. 105), as opposed to a more long-term historical path informed by culture and traditions, as seen with the evolution of the Bundesbank. This matters for how we understand the rigidity of EMU, especially when the crisis hit, as its institutional memory was very shallow. And this is more so with how the ECB was perceived and how it was seen in legal terms.

In 1999, two lawyers – deputy General Counsel of the ECB, and a former ECB lawyer, asserted that its legal nature was in fact even beyond the purview of the EU legal framework. In an academic article for the *Common Market Law Review*, totalling a massive 77 pages, the authors argue that:

“the ECB – in contrast with the Commission or the Council – is not a Community institution, but a separate and autonomous entity which, though linked to the Community by its task to define the monetary policy of the Community (Article 105(2), first indent EC) and a number of cooperating procedures (Article 109b EC), rather constitutes a “Community of its own”, a “Community within the Community”, having legal personality both in the Member States and externally. This makes the ECB an autonomous specialized organization of Community law and thus gives it the potential to be, within its field of competence, an independent actor at the international level”(Zilioli & Selmayr, 1999, pp. 285–286).

They based this argument on their interpretation of the Treaty text: “The Treaty itself speaks in Art. 177(1)(b) and 109(3) of “the institutions of the Community” and of “the ECB” – a wording which presumes that the ECB is not included among the institutions. This interpretation is now practically undisputed in legal doctrine...”, after which the name several legal articles. However, this paper sparked an intense scholarly debate about what exactly the legal status of the ECB was, with many refuting this Community within a Community (Torrent, 1999; Smits, 2003).

Why does this matter? Because it preceded a case whereby the ECB could test this extremely high level of autonomy and independence. In the *OLAF*²⁴ case revolved around the ECB’s attempt to make its own internal fraud prevention system, in violation of an already existing Commission Regulation regarding the Commission’s anti-fraud agency, OLAF (Office Lutte Anit-Fraud). The ECB’s main claim was reminiscent of the above-mentioned article by Zilioli & Selmayr (1999), and basically stated that the ECB should be regarded as “a legal personality distinct from the EC” (Goldoni, 2017, p. 603). Following the Advocate General’s opinion, “the ECJ basically rebutted the ECB’s attempt to expand its independence in a way completely unrelated to its functions. In this way, the ECJ defined both the nature of the ECB and its constitutional role” (Goldoni 2017, p.606). Indeed, the Court was very clear:

²⁴ Case C-11/00, Commission of the European Communities v European Central Bank, ECLI:EU:C:2003:395.

“recognition that the Bank has such independence [in executing its tasks] does not have the consequence of separating it entirely from the European Community and exempting it from every rule of Community law. There are no grounds which *prima facie* preclude the Community legislature from adopting, by virtue of the powers conferred on it by the Treaty and under the conditions laid down therein, legislative measures capable of applying to the European Central Bank”.²⁵

The *OLAF* case was one of the very few cases under EMU law before the EZ crisis, the other being regarding the Stability & Growth Pact,²⁶ which is discussed further below. This is indicative of the short and shallow institutional history of EMU (and the ECB) and would mean that there were a large number of ambiguities in the text of the Maastricht Treaty, which would become acutely apparent when the crisis hit. Thus, in the area of EMU, the CJEU would have to clarify these ambiguities and at least partially inform the legal developments of EMU, as solving the EZ crisis raised legal issues of the ambiguous structures of EMU and pushed beyond its institutional constraints.

In this section, I have briefly discussed the ECB’s genesis with regard to the template it was originally based on: The German Bundesbank. The point of doing this is to show how the ECB became a more independent version of even the Bundesbank, with the ECB’s independence being more strictly enshrined in the Treaties, i.e. a legally constitutional nature, that is very difficult to change. Moreover, in this arrangement vis-à-vis economic policy and politicians, monetary policy is highly insulated, and thus a technocratic and “depoliticised” endeavour. However, as mentioned regarding the Bundesbank, this has posed a danger for the ECB: because of the asymmetry of EMU – i.e. no economic government to balance monetary policy – the ECB became the sole authority of the macro-economy of Europe. Furthermore, already in the early 2000s, the legal status of the ECB was ambiguous until the CJEU clarified that it was indeed of European Community law. During the EZ crisis, the CJEU would be called on again, this time to clarify the mandate of the ECB, as well as the distinctions between economic and monetary policy.

4.2.2 Financial Integration and the Europeanization of Sovereign Bond Markets

The next key development that occurred before the EZ crisis were the large-scale changes engendered in global European financial markets with the arrival of the single currency, the euro. The euro ushered in two major developments. The first is how being essentially based on the German currency, the D-Mark, the euro would enable downward pressure on the interest rates of all Eurozone sovereign debt

²⁵ Case C-11/00, paras. 134-136.

²⁶ Case C-27/04, *Commission of the European Communities v Council of the European Union*, ECLI:EU:C:2004:436.

(De Grauwe & Ji, 2012). There were already downward trends prior to the introduction of the euro, as the EZ Member States were attempting to meet the convergence criteria for stage 3 EMU. With the arrival of the euro in non-physical form in 1999, these interest rates stabilised and converged quite dramatically around the German rate (see Blyth, 2013, p. 79). This led to all EZ sovereign bonds becoming perceived as essentially a risk-free asset, in that market participants acted as if it was (Boy, 2014). Because of this perception, policy professionals from the Commission saw opportunities for financial integration (Jabko, 2006), as did the ECB, which would enable the ECB to conduct monetary policy more optimally in terms of its transmission to financial markets (Gabor & Ban, 2016). The key point here is that in order for the ECB to achieve its mandate of price stability, and thus legitimate its authority and position, would require a more integrated financial space (ibid.), which was not a given in the EMU structure.

A key element in engendering the specific conditions for the EZ crisis was the particular nature of financial integration that occurred following the third stage of EMU. The Commission had been a crucial driving force since the 1980s in transforming the institutional architecture of Europe's financial markets (Gabor & Ban, 2016; Jabko, 2006). This financial integration had put the Commission and European banks in an alliance, and the political strategy to achieve a high level of integration appeared in the form of repo markets, following a 1996 report that the Commission had requested.²⁷ This Commission initiative was strongly supported by the ECB because it would be given a chance to improve its policy mandate by enabling the realisation of a more integrated European financial market (Gabor & Ban 2016, p.624).

Another key element here is that, as mentioned, the credibility of financial markets was part of the way fiscal policy would be conducted, i.e. market discipline would be effected through yield prices on sovereign bonds, and would inform member states' borrowing conditions. This section has shown that the critical linkages that were created between sovereigns and banks was an unintended side-effect of a political strategy to integrate financial markets (Jabko, 2006). Moreover, this fateful interlinkage would need to be severed in the depths of the crisis by legal and policy professionals, analysed in Chapter 7, when these linkages reveal how much Greek government bonds had been bought by especially French and German banks, as well as many others, and thus led to the systemic fragility of the Eurozone (M. Blyth, 2013). At the same time, the only way to cut this link – through a restructuring of sovereign debt

²⁷ The Giovannini Group Report, 1999, EU Repo Markets: Opportunities for Change (European Commission: Directorate-General for Economic and Financial Affairs).

– would entail overcoming some financial elites’, such as ECB President Trichet’s, ideological perception of the euro’s prestigious status in the world of finance.

4.2.3 Fiscal and Economic Policy, ECOFIN and emergence of The Eurogroup

Economic policy was largely left to the Member States and was based on three elements: Member States had to ensure coordination of their respective economic policies, they had to be subject to multilateral surveillance of these policies, and they had to be submitted to financial and budgetary discipline. Exchange rates would be irrevocably fixed, the common market would be completed and a single currency introduced. As such EMU was not simply an area of policy, but was considered a stage of significant European integration (R. M. Lastra & Louis, 2013). Moreover, the level of integration implied by this common monetary policy required “a high degree of compatibility of economic policies and consistency in a number of other policy areas, particularly in the fiscal field”.²⁸

Ensuring this high level of convergence and compatibility required specific targets for deficits and debts. For the former, it would be “3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices” and for the latter, it would be “60 % for the ratio of government debt to gross domestic product at market prices”.²⁹ The justification for these specific numbers was apparently not based on economic theory per se:

“The German preoccupation with 3.0 per cent seemed to many theological and artificial. No theory supported such a precise figure which could in principle be adapted in the light of fiscal and economic trends. This figure and the public debt figure functioned not as immutable economic truths but had ultimately a political foundation” (Dyson & Featherstone, 1999, p.9)

In any case, these numbers would be basis for disciplining member states’ fiscal policies in order to ensure stability. In terms of economic policy, its formal source of political authority in EMU is the ECOFIN constellation of the Council, however, “the Council can further regulate policy co-ordination through secondary legislation” (Puetter, 2004, p. 856). However, ECOFIN accounts for all the EU’s member states, many of which do not have the Euro as their currency. The Eurozone member states made up a large part of the ECOFIN but there was no official grouping of these member states. Occasion rose for such a possibility when Germany started pushing for a stability pact, which would be called the Stability

²⁸ Committee for the study of Economic and Monetary Union, Report on economic and monetary union in the European Community (OPEC: Luxembourg, 1989), No 16, p 17. 7

²⁹ See Article 1 of the Protocol on the Excessive Deficit Procedure of the Maastricht Treaty.

and Growth Pact (SGP).

The SGP has its genesis in German efforts “to enforce the stability culture that Germany had been living up to and was professing as the basis of successful monetary policies” (Heipertz & Verdun, 2010, p. 24). It had been proposed by Theo Waigel – the German Finance Minister – initially as an international treaty outside the EMU, but this was dropped early on, which according to Heipertz & Verdun (2010, p. 27), “delineates the loss of bargaining power that Germany experienced after having signed up to Maastricht”. Thus, the SGP was enabled by Council Regulations. Mr Waigel was keen “was preoccupied with reassuring Germans that the single currency would be at least as stable as the D-mark” (Dyson & Featherstone 1999, p.9)

More specifically, the SGP was intended to ensure stability in terms of fiscal policy generally, and fiscal sustainability specifically, and sought “to ensure that the prohibition of excessive deficits by the Treaty could be enforced through strict rules and sanctions and to introduce an EU-wide medium-term objective of budgetary balance or light surplus for the Member States” (R. M. Lastra & Louis, 2013, p. 95). The German concern was that other Member States would deviate from the convergence criteria required for the third stage of EMU, set to begin in January 1st 1999, and so the SGP was seen as a way to “safeguard the rules” of the third stage (Heipertz & Verdun 2010, p.27). In some ways, the SGP represents a more legal turn in the development of EMU: “once the SGP was approved, it was a very detailed legalistic text containing considerably more than the minimalist Stability Pact that the Germans proposed. In other words, the SGP rules and regulations became firmly embedded in the legal framework set out at Maastricht” (Heipertz & Verdun, 2010, p. 41).

This pursuit of more control over member state budgets however gave occasion for the French government to propose more coordination structures, and so with the push by the German government for the SGP, there was a concomitant effort by the French government “to revive the debate under the term ‘gouvernement économique’” with the notion that this could be “a political counterweight to the ECB” (Puetter, 2004, p. 856). However, it was similarly rejected, just as it was during the Maastricht negotiations, because of a concern that such a political economic entity may “compromise the independence of the ECB” (ibid.).

Nevertheless, there was generally agreement that there should be a Euro-area focused forum over and above ECOFIN. However, not everyone was on board, mainly the British, who opposed such a forum, which was not unfounded as ECOFIN’s authority as officially recognised in the Treaties was not

supposed to be divided, and certainly its authority should not be undermined by an informal group not recognised by the Treaties. Thus, the Luxembourg European Council issued conclusions giving permission for the Eurozone ministers to meet informally were strongly worded and apparently: “reflected the immense opposition from the out-group against an exclusive euro area forum”(Puetter, 2004, p. 857). It stated that:

“the ECOFIN Council is the *only body empowered* to formulate and adopt the broad economic policy guidelines which constitute the main instrument of economic coordination. The defining position of the ECOFIN Council *at the centre* of the economic coordination and decision-making process affirms the unity and cohesion of the Community. The Ministers of the States participating in the euro area may meet informally among themselves to discuss issues connected with their shared specific responsibilities for the single currency” (European Council 1997, emphasis added)³⁰

It is clear from the statement that ECOFIN was the only economic authority empowered to make decisions, and so the Eurogroup was purely recognised as an informal meeting and had no formal decision-making authority (Puetter, 2004). Indeed, there was concern over institutional balance or rather institutional competition, however, at the same time “[m]any EU governments thought that Denmark, Sweden and the United Kingdom should finally pay for opting out of the single currency” (Puetter, 2004 p.856).

However, just because the Eurogroup did not have official decision-making competences did not rule out the possibility of them having a *de facto* powerful influence (Craig, 2017; Hodson, 2011), especially given the fact that they were the Finance Ministers of the Eurozone member states. Nevertheless, as Puetter (2004) quotes a Eurogroup participant: “Oh yes, by lack of the Eurogroup the evolution of EMU probably had been more disruptive. It is really a question of governance. We can say that the Eurogroup is the core of EU economic governance” (quotation from Puetter, 2004, p.867)

The Eurogroup was here to stay, and at the same time as it became recognised the SGP had become a reality. Despite this evolution in EMU, i.e. more economic coordination and more strict rules for budgets and excessive deficit procedures, sticking to the convergence criteria for the third stage of EMU turned out to be a challenge for many of the member states, including Germany and France. This led to not only a legal case before the CJEU, but the politicisation of the SGP, and a clear sign that it would not be the iron-clad disciplining instrument that Waigel envisaged. In the last section, I will touch on the court case

³⁰ See European Council (1997) Presidency Conclusions, The Luxembourg Summit, Luxembourg: Press Release Nr: SN400/97.

regarding the SGP, but before that, the legal contestation of Maastricht Treaty in Germany will be discussed in order to show how German legal definitional power emerged before the crisis and would come to play a part in dealing with the crisis.

4.2.4. *Post-Lisbon Treaty: Is Eurogroup the EU's unofficial 'gouvernement économique'?*

As shown in section above, the Eurogroup started out as a very informal meeting between the Eurozone ministers at the margins of ECOFIN, however, it has undergone a 'creeping institutionalization' (Chang, 2009, p. 80). The Luxembourg European Council statement made it clear that the Eurogroup was simply an informal meeting, however, with the Lisbon Treaty, the status of the Eurogroup started to change. As Hodson (2011) points out:

"Since its first meeting in June 1998, the Eurogroup has been progressively formalized, acquiring a permanent secretariat, a fixed-term presidency, and a legal status under the Lisbon Treaty. The fact that the Treaty also allows member states that share the euro to adopt provisions specific to EMU [...] and excludes non-euro countries from some decisions that are of particular relevance to euro area governance (Article 139 TFEU) confirms the Eurogroup's de facto decision-making powers, even if formal authority in this field still rests with Ecofin" (Hodson, 2011, p. 38).

In this way, before the EZ crisis, there was an evolution in the Eurogroup's status, from very informal and not recognised by the Treaties before Lisbon, to being formally recognised by the Lisbon Treaty in Article 137 TFEU and Protocol 14,³¹ which is annexed to the Treaty, albeit recognised as an informal forum, which is perhaps paradoxical, given that it is difficult to get more formal than being recognised in EU primary law. Nevertheless, this evolution speaks to the tensions inherent in the different visions of economic governance held by the Member States, as surely this evolution of the status of the Eurogroup reflects the need for more political leadership in the form of an economic government at the EU level, yet in order to satisfy the more orthodox view of EMU being primarily based on a technocratic vision of strict monetary policy and market credibility, this economic government must be categorised as 'informal'. The urgency and difficulties of the EZ crisis would see this pretence become increasingly difficult to maintain.

The Eurogroup functioned as a forum for coordination and face-to-face policy debate. The emergence

³¹ "The Ministers of the Member States whose currency is the euro shall meet informally. Such meetings shall take place, when necessary, to discuss questions related to the specific responsibilities they share with regard to the single currency. The Commission shall take part in the meetings. The European Central Bank shall be invited to take part in such meetings, which shall be prepared by the representatives of the Ministers with responsibility for finance of the Member States whose currency is the euro and of the Commission" (Protocol 14, TFEU).

of such informal working methods goes back to the Helsinki European Council conclusions of 1997, which clearly acknowledged the significance of such working methods (Puetter, 2014), and in fact, these conclusions were an attempt to regulate them somewhat. The point here is however to show how they delineate from legislative decision-making, which was the main method for the ECOFIN Council. As Puetter describes:

“A key function of informal working methods is to allow for excluding not only the wider public but also officials, who would otherwise assist ministers during Council sessions. Informal formats instead emphasize face-to-face exchange between ministers. They typically involve the minister plus one senior advisor, or just the minister. Officials are not allowed to follow the conversations in a separate room and no minutes are circulated among member state officials or the diplomats of the Permanent Representations. Informal meeting formats limit the risks of leaks, and ministers are encouraged to conceive of discussions as an occasion for reaching direct agreement among them or for having a more open debate about alternative policy options. This is a precondition for consensus generation within the context of intergovernmental policy coordination” (Puetter, 2014, p. 153)

In this way, the ECOFIN Council decision-making process on legislative issues is much more formal and requires more officials, as well as more records in the form of minutes and decisions, and as will become clear in the empirical chapters, the ECOFIN Council decision-making process was side-lined to a large degree under the pressures of the crisis, as will be shown in Chapter 5.

Following the theoretical assumptions of this thesis, this evolution very much reflects the logic of reproduction of a field obtaining through struggle (Swartz, 1997). As seen in the Maastricht negotiations, the same struggle was present: strict monetary stability versus ‘*gouvernement économique*’; and again when the push for the SGP came up and thus the possibility to discuss more coordination, with the French pushing again for a form of ‘*gouvernement économique*’, but the compromise of an informal grouping – Eurogroup – emerging. In the subsequent chapters, the Eurogroup’s trajectory to the centre of economic policy gravity in the EZ crisis will be illustrated, especially as its accumulation of de facto power and political authority becomes a key point of legal contestation (Craig, 2017) posing a crucial constitutional question for the CJEU on the Eurogroup’s legal status in Chapter 9.

4.3 Locating the Law in Economic Governance Before the Crisis

Having discussed the Maastricht negotiations, as well as the general institutional structure and development of EMU, I will now sketch out the location of law and legal practices in relation to European economic governance. This is crucial in order to show how before the EZ crisis, the role of law and legal practice generally speaking was not very prominent in European economic governance and thus EMU,

especially at the EU scale, however, there were several legal cases in Germany regarding German participation in EMU going all the way back to 1993 at the signing of the Maastricht Treaty. In what follows, these German cases will first be briefly discussed as they enabled the German Constitutional Court (FCC) to advance a novel doctrine it created as a condition to Germany joining the EMU (Mayer, 2014), and is a key issue that comes up in the EZ crisis, putting the FCC and the CJEU into opposition, which is analysed in Chapter 8. Second, I will then briefly outline the practices of the legal services of the EU institutions in general terms and then third, these practices will be looked at in terms of EMU before the crisis to show sparse legal activity was in the area of economic governance.

4.3.1 Legal contestation of Maastricht: the German Constitutional Court Asserts Itself

Legal contestation toward the Economic and Monetary Union and the Euro has existed in Germany for many years, and because of this, the legal conception of EMU created in Germany is important for understanding the evolution of EMU, especially with regard to the EZ crisis: “[t]he German constitutional understanding of the economic and monetary union is fundamental to understand the architecture of the euro area assistance construction and of its future evolution” (Merino, 2012, p. 1641). This understanding has its roots in 1992, when after the signing of the Maastricht Treaty, a constitutional complaint was filed at the German Federal Constitutional Court (FCC) to try to prevent Germany ratifying it (Grimm, 2015). The complaint was inadmissible, but this action still gave the FCC the opportunity to influence Germany’s participation in the Treaty. Crucially, it gave the FCC the possibility to define precisely the conditions on which Germany could be part of the EMU – as long as it maintained and sustained its economic character as a “stability community”.³² This would have fateful ramifications as it would give the FCC possible definitional power over developments in EMU if anything threatened this “stability community”, both in terms of the shadow of the court over German government actions, but also in terms of alliances between claimants, who, wanting to stop German participation in the 3rd stage of EMU or anything related to the Euro for that matter, could activate the FCC and give it the possibility to expand its jurisdiction, which could lead to a judicial power struggle with the CJEU in taking the position of final adjudicator over EMU matters.

Generally, support for the EU until the 1990s had been widespread in Germany (Teschner, 2000). However, pro-EU sentiment changed in the run up to the Maastricht Treaty. Anti-Euro sentiment became clearly manifest in the establishment of the Eurosceptic political party Bund freier Bürger (BfB)

³² Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 89, 155, (Oct. 12, 1993) (*Maastricht Decision*).

in 1992 by founder Manfred Brunner, and co-founders Karl Albrecht Schachtschneider, a public law expert, and a well-known economist Joachim Starbatty (Grimm, 2015).

Manfred Brunner had been chief of staff to Commissioner Martin Bangemann in the European Commission between 1989 and 1992. In the run-up to the Maastricht Treaty, Brunner was increasingly concerned about the European Community's institutions would be accruing ever greater power without "democratic legitimation" (Mazzucelli, 1997, p. 270). According to Brunner, member state government heads could bypass their parliaments. These concerns about Maastricht led to him being fired from the Commission in September 1992 (Roberts, 1995).

Brunner, together with his legal representative Karl Albert Schachtschneider, filed their appeal with the German Federal Constitutional Court (FCC) against Germany ratifying the Maastricht Treaty. President Richard von Weizsäcker could not sign the German ratification law as the FCC had sent the constitutional appeals made by Brunner, amongst others, to the federal government (Mazzucelli, 1997). The FCC focused on Brunner's main argument which was that the Treaty transgressed Article 38 (1) of the Basic Law, Germany's constitution. Article 38(1) states that the German Parliament is elected in democratic elections and they represent the citizens, with Article 20(2) of the Basic law asserting that the citizens are the source of all state power.³³ Brunner asserted that because the Treaty transfers certain competences from parliament to the European institutions and have the power to increase its competencies, his rights as a citizen to take part was reduced significantly (Mazzucelli, 1997).

The complaint failed to prevent the ratification of the Maastricht Treaty. However, the FCC emphasized the absolute importance of democratic legitimation via parliament, as well as reaffirming its right to "examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits".³⁴ Thus, Brunner, who was a lawyer by education and profession before his position in the European bureaucracy, together with Schachtschneider, had not entirely failed in their complaint, as the FCC had now given itself jurisdiction to review the legality of European Community/Union acts, a move which itself was not without controversy as many saw this as a route that would lead to the FCC eventually coming into conflict with the Court of the Justice of the European Union (Ress, 1994).

³³ BVerfGE 89, 155, (Oct. 12, 1993).

³⁴ Headnote of BVerfGE 89, 155, (Oct. 12, 1993) see English translation by Wegen et al., 33 I.L.M. 388 (March, 1994).

What was really striking about the Maastricht judgement was that it saw the FCC promulgate an ‘ultra vires doctrine’ (Mayer, 2014), which essentially meant that the FCC was giving itself the competence to independently review EU law so that, in terms of EU integration and German law, “the EU Treaties cannot be substantially altered later on by European ultra vires acts. In such a case, the substantially altered plan of integration would no longer be considered to be empowered by the [German] Act of Assent” (Mayer, 2014, p. 117). Thus, the FCC was giving itself review power over the CJEU – the Court that under the EU Treaties was the legally competent authority to interpret later EU law’s compatibility with the Treaties.

Despite losing the case, the lawyer Schachtschneider got another opportunity to continue their anti-euro project by filing a constitutional complaint in 1998 when the Euro was set to be introduced.³⁵ They were joined in the lawsuit by Wilhelm Hankel, an economics professor; Wilhelm Nölling, an economics professor and former finance senator for Hamburg city-state for the SPD (Social Democrats), as well as a former member of the Bundesbank; Dieter Spethmann, a renowned industrialist; and Bruno Bandulet, a journalist for various right-leaning publications (such as *Junge Freiheit*) and who had also been a member of the BfB. Here we see the alliance between ordo-liberal academic economists, a well-known industrialist and former members of the BfB. It is significant to note that these actors were not ‘outliers’ so to speak. As mentioned already in regard to the Maastricht negotiations, the trauma of hyperinflation and multiple currency regime changes meant that Germans had a deeply-held aversion to wealth destruction through inflation and currency changes (Beyer et al., 2009; Grimm, 2015). This was a doxic belief, and by engaging the FCC via legal complaints, these actors were getting the FCC to deploy a legal limit on, and definition of, developments in economic governance in Europe, and this definitional power was assured because of Germany’s hegemonic position in terms of economic power – it was (and still is) the largest economy in Europe; in other words, the FCC was in a position to put legal limits on the German government, which could translate into the German government putting limits on economic developments at the EU level, this giving the FCC and its interpretations of the German constitution symbolic power over developments in the EU legal order. In the next section, I look at how there was very little EU legal activity before the EZ crisis in terms of economic policy under the EMU.

4.3.2 Practices of Legal and Policy Professionals under EMU before the Crisis

In this section, a more empirically situated demonstration of the legal activity of the EMU will be

³⁵ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], BVerfGE 97, 350 (Mar. 31, 1998).

presented in order to show how the EU lawyers saw EMU as well as how economic policy actors saw EU law. Moreover, this will add to the already illustrated ambiguous legal dimension of EMU and indicate the practices and positions of the legal and policy professionals relative to EMU policy-making before the crisis. But first, a short description of how the legal professionals work in their role as advisors to the institutions and as agents before the courts.

Given this study's puzzle as being connected to the fact that there was little legal activity and few legal professionals involved in specifically economic policy of the EMU prior to the EZ crisis, it is important to show how legal professionals are ubiquitous in the general functioning and governance of EU policy areas. The agents of the legal services of the EU institutions, as well as the member state governments, are implicated in not only the structure of the legal field but also the construction of the EU legal order, specifically through the social relationships between them. These actors' "multidimensional activity" include engaging with the CJEU both cooperatively and competitively; engaging and mobilising academic fields as well as other legal communities; and participating in Treaty reform procedures (Georgakakis & de Lassalle, 2013, p. 137)

In Brussels, the dense inner circle of legal professionals working for the EU legal services of the Commission, the Council, the Parliament and the legal agents of the permanent representatives of the member states number just under 200 people who are very familiar with each other and, more importantly, work together often (Jacque, 2013). The outer group has more sporadic interaction with the inner group, and are made up of actors that are external to the EU institutions, e.g. lawyers employed by Member States or working for lobby groups (ibid.). In the context of the CJEU in Luxembourg, Zhang (2016) has demonstrated the relative closure of the social networks of the law clerks at the CJEU, their influence on the judges they work for and their movements between EU-based institutions.

In terms of EMU, the legal service of the Council gives advice to ECOFIN Council, and the Eurogroup, as well as the preparatory bodies, respectively, the Economic and Financial Committee (EFC), and the Eurogroup Working Group. Today, this is normal practice, but before the EZ crisis there was very little in the way of giving legal advice to these groupings (E3 interview – Council lawyer). In any case, in general terms these legal professionals have a double function:

“we are the legal advisors to the Council and to the preparatory bodies of the Council, we sit in reality in all the meetings of the Council of Ministers in all the different formations, and in all the meetings of the preparatory bodies of the Council. And we provide both oral and legal [written] in respect of typically legislative proposals, but not only, which land on the Council, and which are discussed by the Council. These are our first field of action,

and the second one is to defend the Council before the EU courts whenever the legality of an act of the Council has been into question. Typically, it is that sometimes we act actively against acts of other institutions. But this is extremely rare” (E1 interview – Council lawyer).

Member States had to ensure coordination of their respective economic policies, they had to be subject to multilateral surveillance of these policies, and they had to submit to financial and budgetary discipline. Here DG ECFIN of the European Commission was responsible for economic surveillance of the Member States, and rarely made legislative proposals. As one policy professional puts it:

“Prior to the crisis [...] we adopted one piece of- two pieces of primary legislations back in 1999 and maybe we adjusted this in 2005 or whatever, whenever we did it, but okay then of course we were issuing policy recommendations, what we call country specific, but to be honest it’s an annual process, it’s internal cuisine of the Commission, you didn’t need lawyers, right” (C4 interview – ECFIN policy professional).

Because DG ECFIN was primarily engaged in producing policy recommendations, the Commission lawyers saw it as being very separate from EU law and legal issues: “...EMU law was for [the] economics’ side [...] nearly nothing before [the crisis]. I mean ECFIN was a big think tank producing reports [...]” (A1 interview – Commission lawyer). In practice terms this also meant that the economics and financial officials had little experience with the legislative process of the EU: “DG ECFIN was not used to negotiating legislation, drafting legislation, proposing it, negotiating it in the Council and the Parliament, they were simply not...” (A5 interview – Commission lawyer).

In the above quotations, it becomes clear how little legal activity there was in the area of EU economic policy, a legal vacuum in many ways. DG ECFIN had little experience with the law in comparison to other policy areas and DGs, such as DG COMP with EU competition law and state aid law (A4 interview – Commission lawyer). This lack of dealing with EU law also meant that the categories of governance for European economic policy were in an operational sense from a specifically economic and financial view, and this was similarly the case at the outbreak of the crisis. One of my respondents, a lawyer specialized in international law (C2 – ECFIN legal professional), was brought in to work at ECFIN at the early stages of the crisis and when he arrived at the Commission he was somewhat shocked at how few lawyers were involved in setting up the regulations regarding the funding mechanisms; he felt that the economists and finance officials were playing an outsize role in drafting some of the legal texts and driving the policy, which would result in legal texts being too open to interpretation because they had not been drafted in a legally concise manner.

This lack of law in economic policy also meant that the lawyers of the Commission and the Council had

equally little experience with the economic and financial issues of EMU. For example, this Commission lawyer explains their responsibilities for EMU thus: “In 2008, I was alone dealing with these issues [EMU] in a team which was doing ten different things. And myself I was doing four or five different files and EMU issues were supposed to be one/tenth of the time of one lawyer [...]” (A1 interview – Commission lawyer). This illustrates how EMU issues were a rather insignificant policy area for the Commission Legal Service. Similarly for the Council Legal Service, there was not much legal activity in the area, as one of them explains regarding the ECOFIN Council and the Eurogroup:

“[...] in the early years of that period there were very few legal questions in the ECOFIN, and we didn’t even go, we weren’t even full-time participants in the Eurogroup, [...] because I think the Eurogroup didn’t feel they needed fulltime legal service support, and we didn’t think that it was- it wasn’t a formal part of the Council at the time and we went- I went to the Eurogroup meetings from time to time when needed” (E3 interview – Council lawyer).

Again, it becomes clear that EMU issues were not of a formal legal nature. Of course, EMU procedures are stipulated in the Treaties, so there is a legal dimension, but it had not been the substance of any legal issues for the most part. The one big case that came up in the area of economic governance prior to the crisis was the budgetary discipline on the part of the Member States, which subsequently became the substance of a court case before the Court of Justice of the European Union (CJEU).³⁶ In the early 2000s, Germany and France had run excessive deficits and they took a rather relaxed position toward the Stability & Growth Pact (SGP), as did other member states. This issue put the Commission and Council in conflict in a 2004 legal case.³⁷ The Council was essentially in the wrong in their attempt to be flexible regarding France and Germany:

“[...] at Council level, ministers don’t normally want to be involved in legal discussions. They are there for the politics, but here I had to advise them that what they were proposing to do was in conflict with the Treaty. The Treaty laid down a procedure for member states that were in an excessive deficit, and if there’s a Treaty procedure, you have to follow it. And so it was wrong to adopt conclusions, and they adopted conclusions” (E3 interview – Council lawyer).

This quotation not only tells us how the Council ignored their lawyers’ advice but also how the ministers were not particularly interested in legal discussion. From the Council lawyers’ point of view, this was simply an example of how the SGP was politicized early on, in that the Council could not enforce the SGP, and when countries did not display budgetary discipline, they simply helped each other out by relaxing the rules (E1 interview – Council lawyer).

³⁶ Case C-27/04, *Commission of the European Communities v Council of the European Union*, ECLI:EU:C:2004:436.

³⁷ Case C-27/04.

Finally, dealing with legal issues in finance and economics was new for many of the politicians and finance ministers in the various Council constellations, such as the Economic and Financial Committee (EFC), ECOFIN and the Eurogroup, showing the novelty of dealing with the Treaty and EU lawyers when the crisis finally hit:

“[...] they were having to learn that there were things they couldn't do, [inaudible], I think at first they thought that we could always find a way out and that, and they weren't used to working with the Treaty, with the legislation, although they created it, they created the EU regulations in their field, as the ECOFIN Council, but they weren't used to being in a situation where lawyers were saying that, 'no, the Treaty doesn't allow you to do that, the Council doesn't have that power', and so on [...]" (E3 interview – Council lawyer).

Here we see how because economic policy was mainly about coordination and surveillance within the Council, the ministers were very unfamiliar with really working with the Treaty and getting legal advice. Thus, economic and financial concepts, before the crisis, were not often considered in a legal dimension, besides the specific budgetary rules stipulated in the Maastricht Treaty.

There are a number of implications of this legal vacuum of economic policy in EMU. The first is that it shows us that the master frames of EMU were anchored by basic notions of 'sound money and public finance' which informed the finance ministers' perceptions, and in this way, the ministers were neither that aware nor concerned about the legal details or legal implications of these master frames for the governing of the European economy. And, indeed, it seems that they did not need to be aware because no legal issues had really come up in terms of economic policy. The second point is that economic policy was perceived in non-legal categories, unlike most parts of the EU governance structure. For example, in the Chapter of the TFEU (Articles 120-126) that deals with economic policy, notions such as "surveillance and monitoring" are used, denoting practices and categories of discipline, and "reference value, budget, debt and deficit" which are categories of calculation, and finally, "broad guidelines" and "recommendations", which are soft norm interventions. All in all, these concepts and notions lend themselves to processes aimed at convergence to reference values and the open method of coordination. This is far from a concrete legal framework to produce economic legislation with clear legal categories and modalities.

Secondly, the lack of interaction between the EU legal professionals on the one hand, and the economics and financial policy officials and ministers on the other, meant that working together to deal with the crisis would constitute novel interactions and constellations of actors, in filling the legal gaps and clarifying the legal ambiguities on the go and under the pressure of a crisis. This would at the very least entail a process of adaptation between the actors, if not outright struggles, over how the EZ crisis

economic policy response should be constructed. Interestingly, it seems that most of the solutions proposed during the Eurozone crisis were indeed based on legal categories. The critical issue however was that some of them were based on *non-EU* legal categories, thereby producing a different legal framework, which would have to work in parallel to the EU legal framework. In some ways, conceiving of EZ crisis issues in legal categories reflects the success of EU law in co-producing the structures of EU governance (Mudge & Vauchez, 2012); therefore even the intergovernmental approach made use of legal procedures and constructs to deal with the crisis, albeit outside the Union framework in terms of private financial international law, domestic law and public international law. However, from an EU law perspective, the legitimacy of such an approach was highly dubious, and thus struggles occurred between the various professionals, with the EU legal professionals being very concerned with connecting EU law jurisdiction to as many parts of the intergovernmental legal constructs as possible. The legal and economic policy professionals dealing with the crisis therefore engaged in boundary work in their attempts to connect, and in some ways, disconnect legal jurisdiction over the various crisis issues in order to gain authority over the management of them, which will be analysed in the following empirical chapters.³⁸

Summary

In the above chapter, I have outlined the historical developments and origins of EMU from the negotiations of Maastricht in 1991 to the entering into force of the Lisbon Treaty in 2009. It serves to elaborate the political construction of economic policy as envisaged by EMU. The political considerations and compromises that made it into the Maastricht Treaty text can be said to take a legal form, however, I have argued that it was still very much a political construction in that the principles underlying economic policy were based on more intergovernmental forums. The connected developments of legal contestation against EMU in Germany in the 1990s as well as the financial market developments enabled by the ECB and the Commission in the 2000s were presented as this history sets the ground for the legal and institutional conditions in which the Eurozone crisis was engendered. Crucial here, as will be shown, was how these developments of the sovereign bond markets were spurred by a re-regulation of repo markets at the supranational level, thereby enabling the existential linkages via sovereign debt markets between European banks and Member States' fiscal health.

³⁸ It should be noted that in EU legal speak, the notion of competence is used to denote whether EU institutions have the legal authority to act or not, and whether this is a sole competence or shared with the member states; the notion of jurisdiction is used to refer to the scope of the CJEU's legal authority. For clarity, I use jurisdiction analytically to refer to both EU competence and the scope of the CJEU's authority.

A key point of this chapter has been to flesh out the political struggles around Maastricht and the development of EMU leading up to 2009. These struggles took the form of opposing visions of how Europe's economy should be governed, namely between a politically oriented economic government that could be socially engaged versus the highly independent ECB with a myopic focus on price stability, strict budgetary discipline, all for the sake of market credibility. The stakes around control of Europe's macro-economy developed as the SGP was introduced with the emergence of the Eurogroup for the sake of policy coordination. This oppositional logic would be reproduced throughout the crisis, albeit in a modified form as legal and policy professionals had to rationalise the EZ policy response while introducing new legal stakes into the system of economic governance.

The themes that have been taken up in this chapter will be revisited as they connect up with specific crisis issues which I have analysed in the empirical chapters.

Chapter 5: Legal Contests over Stabilizing the Euro-Area

*A loss of confidence usually starts with the weakest link and then spreads,
through repeated episodes of fear, to bring down the strongest.*

Eric Lonergan

In this chapter, I reconstruct the practices of the legal and policy professionals in the initial response to the EZ crisis in 2010, and analyse how these practices can be understood as boundary work from which bricolage can then be engaged in to produce solutions in the form of novel legal instruments. By following a chronological narrative, it is possible to both illustrate the way boundary work is deployed as practice by the legal and policy professionals; but also to show how this boundary work leads to bricolage and in some cases the construction of boundary objects that bridge conflicting political and legal visions. Finally, the boundary object construction leads to network expansion and transformation as new legal and policy professionals are brought into the fold, which is also described here. However, it should be noted that the network analysis proper in terms of tracing expansion and interaction is done in Chapter 10 in order to keep the focus on the analysis here on the practices in terms of the more subjective structures of the agents.

In order to illustrate the boundary work of the various actors in the legal vacuum of economic policy during the fast moving phase of the crisis, I will analyse the construction process of the financial assistance mechanisms: the Greek Loan Facility (GLF), European Financial Stability Mechanism (EFSM), and the European Financial Stability Facility (EFSF). The aim here is to show how, under the crisis conditions, the respective dispositional logics (*habitus*) of the actors involved – legal professionals and policy professionals as well as the politicians and ministers – operate to draw and re-draw boundaries of inclusion and exclusion when pushing solutions to the economic issues, spreading authority across jurisdictions of international law, private law and EU law.

In what follows, I will first outline the construction of the Greek Loan Facility (GLF), following the realisation of the Heads of State that Greece would need financial help. Given that Greece was the only Member State in need at that point, the construction of the GLF occurred over a few months, however, by the end of April there were signs of contagion to other Member States, and this emergence of contagion will be detailed in the second section of this chapter in order to show the dramatic change

from the GLF to the creation of the subsequent two mechanisms, the EFSM, and the EFSF. In the third section, the specific interactions and the sequence of events entailed in the creation of those two mechanism will be broken down for analysis. Here I look at the mechanism that was first enabled through EU law, and then an analysis of how the second mechanism came to be done outside EU law. Finally, the findings of this chapter are summarised in terms of the practices analysed.

5.1 The Rise of the Mechanisms

5.1.1 *A First Step into the Unknown: Constructing the Greek Loan Facility*

By February 2010, the Greek government's debt was ballooning and causing concern in financial markets.³⁹ This galvanised the European Council to issue a statement clarifying that they would take action: "Euro area Member states will take determined and coordinated action, if needed, to safeguard financial stability in the euro area as a whole" (European Council 2010). But as van Middelaar has noted, there was nothing in the statement clarifying "[w]ho would do what and when to secure financial stability?" (2019, Location No. 647). Around the time when financial assistance to Greece started to become a serious consideration, the task-force on coordinated action (TFCA) was set up to look into how this modality could be done: "first a confidential task-force in the Euro working group was created to work on financial assistance [...] so we worked first on creating the Greek Loan Facility, which was a system of pooled bilateral loans..." (C1 interview – DG ECFIN policy professional). The TFCA was set-up in March 2010 on the request of policy professionals who desired an arrangement through which they could coordinate a response to the problems in Greece (for a thorough analysis of the TFCA, see Smeets et al., 2019). At that point, there was not any signal that it would spread.

In terms of legal advice, the Council legal service was key as the GLF was an intergovernmental arrangement, and essentially resembled an intergovernmental conference, as one of the Council lawyers recalls:

"Let's say that there was an intergovernmental conference of the creators which drafted the Loan Facility agreement at the time, and the Legal Service of the council was the legal advisor to the IGC [intergovernmental conference], that's typical. [...] So we get out of our realm, which is an institutional one, the Council, and we go to an intergovernmental composition, but yet we are perceived as the legal advisor to the Conference actually

³⁹ See "Wall St. Helped to Mask Debt Fueling Europe's Crisis", 13 Feb. 2010, by Louise Story, Landon Thomas Jr. & Nelson D. Schwartz, The New York Times at <https://www.nytimes.com/2010/02/14/business/global/14debt.html?auth=login-email&login=email> (accessed 18 April 2020).

because we are in a position, I could say, of impersonal objectivity, we are not the lawyer of any particular member state and we are not the lawyer of any other institution, so member states tend to give some trust and credibility to this legal service” (E1 interview – Council legal professional).

What is notable here is how this Council legal professional points out that they leave their institutional realm and take on an ‘intergovernmental composition’, so that they are legal advisors to the conference as a whole. In this context, he was sure to point out that the Commission legal service was not seen in this same objective way because of their connection to the Commission, thereby positioning the Council legal professionals as seemingly the most objective, indicating the differentiation between the EU legal professionals, and that it cannot be assumed that all EU legal professionals think in similar ways just because of their training as EU lawyers. In terms of concrete legal issues, apparently at that stage the only one was whether the bilateral loans to Greece would be seen as a violation of Article 125 TFEU – the “no bailout” clause – and so the Commission sent its DG ECFIN legal professional to assuage any Member State fear:

“...during this first stage my main role was to explain and convince member states that something could be done, since we had a large group of member states around Germany [...] making a weird reading of the Treaty, they were reading article 125 of the Treaty as prohibiting the possibility to give financial assistance, while this article says 125 that member states cannot assume the liability of another member state, but if you make a loan to someone then you’re not assuming his liability, it’s just adding liability on top of other ones” (C1 interview – DG ECFIN legal professional).

Figuring out what Article 125 actually did prohibit would come up later with the establishment of the ESM; suffice it to say that it was not a legal obstacle at this stage. And so the GLF comprised pooled bilateral loans of the Euro-area member states and was managed by the Commission. A DG ECFIN policy professional, who, at that time was still connected to a national finance ministry, referred to it as being similar to a syndicated loan but with “official sponsors” (C3 interview – ECFIN policy professional); a syndicated loan is when a group of banks or lenders get together to offer funds to a single borrower. But because of this loan structure, a component needed to be added called ‘composition for higher funding costs’ because at that point some member states had to pay higher interest rates on their funding costs than others, e.g. Italy had higher funding costs than Germany, so an annex had to be made stating: “if a contributing Member State “A”, at the time when the decision of the Parties in accordance with Article 4(2) concerning the disbursement of a Loan is taken proves to the satisfaction of the other Parties that its own funding costs are higher than the Interest Rate of the Loan” then a whole process of deciding how to plug the gap would be initiated. According to respondent C3, the legal technicalities of this proved to be highly complex and difficult to negotiate. The instrument would be governed by

English law, and therefore the Commission needed the legal assistance of a private law firm. Initially, the policy professionals from DG ECFIN who were tasked with setting up the GLF used the EU's Balance of Payments (BoP) legal documentation as a template, however, it was soon realised that it required so many changes that lawyers specialised in private contract law would be needed to create the agreement, and so Clifford Chance, a global law firm, was brought in, which apparently made the process go much quicker (C3 interview – ECFIN policy professional). Here we see how the Commission attempted to construct the GLF in terms of EU law categories and modalities by using the BoP documentation as a template, but the policy professional in charge of the process at the time said that even though he was not a lawyer, he believed that it would not work (C3 interview).

In this first step to dealing with the crisis, we see how the policy professionals engage in a process of bricolage, as it involves taking existing elements and recombining them (Carstensen, 2011), and constructing something new. What is interesting is how the policy professionals first tried to use the EU's BoP documentation but realised it would not work, as it requires too many changes. This leads to a change of direction in using an external law firm, who bring in their own expertise and knowledge to construct the GLF agreement as 'syndicated loan with official sponsors' based on English law; however, it had provisions in it that connected it to elements of EU law, and in this way was a mix of elements, for example, Articles 4(1) and (2) of the GLF inter-creditor agreement require that any conditionality measures imposed "must be compatible with measures of economic coordination under the EU Treaties" (Merino, 2012, p.1635), which refers to Articles 126 and 136 TFEU. In this way, the GLF is the initial boundary object and is constructed using bricolage by combining existing elements into a novel object that connects the boundaries of different legal jurisdictions, namely, EU law, and national law, i.e. the national jurisdiction of the Member States signing the agreement.

Once the national parliamentary approvals had started to arrive for the GLF in the week starting 3 May 2010, however, the situation on financial markets changed quite dramatically, and suddenly the GLF was not going to be enough to deal with the emerging crisis. In the next section, I give a brief empirical description of the intensity of the weekend of 7 May 2010, in order to show how the situation changed and how it galvanised action on the part of the legal and policy professionals.

5.1.2 The Weekend of Contagion in May 2010

"...on a Friday evening, I came back home, I got a call at 21:00, 'you have to come back, the situation is really getting weird'." (A1 interview – Commission lawyer).

In this quotation, ‘weird’ is referring to indications that contagion in the market was occurring, i.e. not only was there an increase in yield spreads between the 10-year Greek and German government bonds by about 6.5 %, but for the Spanish, Irish, and Portuguese bonds, the yield spreads had gone up by approximately 0.9 %, 1.5 %, and 2.3 % respectively” (Bini Smaghi, 2010). In other words, risk in sovereign bonds was spreading across the Eurozone. Up until the weekend of 7 May 2010, the Eurozone member states had already committed to coordinated bilateral loans to Greece, under the ‘Greek Loan Facility’ (GLF), which was overseen by the Commission. The capacity of these loans amounted to EUR 80 billion, with a stand-by assistance from the IMF of EUR 30 billion, all of which was agreed on 2 May 2010,⁴⁰ with the last parliamentary approvals arriving on 7 May 2010 (C3 interview), however, this financial assistance combining EUR 110 billion was not enough to calm financial markets, which started to panic over contagion effects (C3 interview – ECFIN policy professional), precipitating a very intense weekend which culminated with “probably [the] quickest adopted regulation in the history of the European Union”: the Council Regulation (EU) 407/2010 establishing the EFSM (C1 interview – ECFIN legal professional).

Already by 7 May 2010, the Commission realized that contagion was a problem and was instructed by the European Council to outline a “European stabilization mechanism” that would “be submitted for decision to an extraordinary ECOFIN meeting” (European Council, 2011, p.29) on Sunday 9 May 2010. An official from DG ECFIN together with lawyers from the Commission Legal Service quickly got to work on the evening of Friday 7 May drafting a regulation from midnight to 04:00 am (C1, A2 interview). The draft regulation was sent to President Barroso of the Commission, who gave permission for it to be sent to the Economic and Financial Committee (EFC). On the Sunday there was an extraordinary meeting of the College of Commissioners, who voted on it and finally it went to the ECOFIN Council. When drafting the original regulation, the Commission legal actors were aware that the EU budget ceiling would only allow EUR 60 billion, which, as one of them said “would be too limited to impress the markets” (C1 interview – ECFIN legal professional), and thus they proposed that the Commission would make back-to-back loans on the market but guaranteed by the Member States, which would have been theoretically unlimited. On Sunday, when the ECOFIN meeting commenced, the Council legal service immediately said that this would be a problem: “The financial responsibility of the Union cannot go above a certain threshold, which is the own resources ceiling – what the member states have constitutionally agreed to provide to the Union” (A1 interview – Commission lawyer; and see Article 2(2)

⁴⁰ See https://ec.europa.eu/economy_finance/articles/eu_economic_situation/2010-05-03-statement-commissioner-rehn-imf-on-greece_en.htm (accessed on 15 January 2019).

of Regulation 407/2010 for the EFSM). Essentially, the Commission's draft regulation was seen by the Council legal services as "circumventing the MFF [Multiannual Financial Framework] by creating a direct obligation on the states' budget in an EU text, not foreseen in the MFF framework" (C1 interview – ECFIN legal professional). Thus, it was decided that the EFSM would have to be capped at EUR 60 billion, in line with the MFF, and that another EUR 440 billion would have to be setup outside the Union framework.⁴¹ At first the idea of doing bilateral loans, as they had done with the GLF, was pushed by Germany but many of the other countries refused this because bilateral loans would negatively affect their own borrowing conditions. Another idea was guarantees, whereby money would be raised on the markets by, for example, the Commission, and then the member states would just guarantee the loans (C3 interview – ECFIN policy professional). However, Germany seemed adamant about the bilateral loans, until a solution was found after midnight on Monday morning. A national finance official came up with the idea of a Special Purpose Vehicle (SPV) – a separate legal entity established as a corporation that can be used for funding purposes⁴² – after he had spoken to the German officials and realised that it was not the idea of guarantees that they were against but rather the Commission having responsibility for the guarantee.

The outcome of the weekend of 7-9 May 2010 was first the final approval of the GLF, then the establishment of the EFSM under Council Regulation (EU) 407/2010 with a capacity of EUR 60 billion; and finally the decision to create the EFSF as an SPV under private law with a capacity of EUR 440 billion; and finally the decision by representatives of all 27 EU member states to task the Commission with setting up the EFSF but not to operate it.⁴³ The disbursement of any financial assistance would be based on "strong conditionality".⁴⁴ How did the negotiations of that weekend end in the above outcomes and what is their significance for the legal and policy professionals involved?⁴⁵ Analysing the way these outcomes were achieved offer significant illustrations of the process of boundary work involved in expert contests in the spaces between different fields: the European legal field, the field of political power, and the field of economics.

⁴¹ There is a possibility that a solution under the Union framework could have been made but this would have to involve the European Parliament, since it shares budget responsibility with the Council, but under the time constraint that weekend, it would not have been feasible to assemble the Parliament (E3 interview – Council legal professional).

⁴² "A special purpose vehicle (SPV) is a subsidiary of a company which is protected from the parent company's financial risk. It is a legal entity created for a limited business acquisition or transaction, or it can be used as a funding structure. It is sometimes called a special purpose entity (SPE)" (see <https://www.upcounsel.com/special-purpose-vehicle>)

⁴³ Extraordinary Council Meeting (Economic and Financial Affairs), 9-10 May 2010: Council document 9596/10.

⁴⁴ *Ibid.*

⁴⁵ Scholarship relating to this specific weekend has illustrated the path-dependency produced by the sequencing in the creation of the EFSF, which led to the intergovernmental arrangement of the ESM (Gocaj & Meunier, 2013).

5.2. Working the Boundaries of the EU legal order

The first point to address is the source of the urgency of the events of this weekend: the fear of market reactions in the form of contagion. In the interviews, the respondents mention that these decisions had to be taken so that an official announcement could be made “before the markets” open on the Monday (E3 interview – Council lawyer). This indicates the symbolic power of financial markets to not only inspire urgency and engender action, but also to induce EU actors to view their policy response through a market lens, most explicitly manifest in choosing a number “big enough” to “impress the markets”, in this case EUR 500 billion (C1 interview – ECFIN legal professional). This is further confirmed by the fact that many of the policy and legal actors involved did not believe that any instruments of financial assistance would need to be activated: “[...] all these instruments [the EFSM and EFSF] were not created to be used, they were created to reassure the markets” (A1 interview – Commission lawyer). They expected an announcement of assistance in the amount of EUR 500 billion would have the performative effect of calming the financial markets and stopping any contagion from Greece.

The Commission legal services’ first attempt at a solution involved rendering the issue through the legal categories and representations that the Treaties could offer, and therewith they would maintain the boundary of the EU legal framework, i.e. keeping the path of financial assistance through the Commission, and inside the Union, even if these loans were guaranteed by the Member States. In terms of their expertise, they look at the Treaties and see whether the EU has legal competence to act in this scenario: “it’s the major question from any EU lawyer, it’s the question of the competence, of the legal basis” (A1 interview). Specifically, establishing competence is about credibly representing the issue at hand through the modalities and categories of EU law. In other words, does the EU have jurisdiction. This is not as simple as checking the Treaties, as one would check an instruction sheet, and then decide on whether legal competence exists. Establishing competence requires legal interpretation, which is multi-dimensional in that it can be done from a variety of perspectives. I asked EU lawyers what forms of interpretation they used, and they said they follow the CJEU’s general forms:

“that’s the game line, how the Court interprets things, the technique that the Court uses in its interpretation, then you use it [...] and the lawyers in the unit [the Commission] have an excellent knowledge of the Court, and that’s also, you know, is that many of them have worked at the Court, so they know very well, especially [A1], as I remember he knows very well how the Court works from the inside, [...]” (A6 interview – Commission lawyer).

Not only do we get an indication of the weak field, e.g. that Commission lawyers have often held positions as legal clerks at the CJEU, but that they employ a logic that extends what the Court would consider legal. There are generally six types of interpretation when looking at the Treaties: purposive (more formally

referred to as teleological), functional, systemic (also referred to as contextual), consequentialist, historical, and textual (also referred to as literal) (Saurugger & Terpan, 2016). Often a blend of these various forms of interpretation are used. That weekend, the lawyers were faced with a novel situation where “[...] the big new ground was the question whether the legal base of Article 122 paragraph 2 could at all be used for this kind of thing [...]” (A5 interview – Commission lawyer), and a blend of legal interpretation would be needed in the end. The legal basis for the EFSM is Article 122(2) TFEU, but when first deciding about how to interpret it, the lawyers had to consider a number of factors related to its wording.⁴⁶

Firstly, it is significant to note the legal reasons for why Article 122 was not used for the first Greek loan – the GLF – finalised the weekend of 2 May 2010. There were two issues here according to a Council lawyer: the first issue was “the nature of the event that can trigger the use of the provision”. He explains from a textual perspective:

“It is true that the description of the triggering event is preceded by the words “*in particular*”, and that further specification of the event is preceded by “*notably*”, so that in each case the description is by way of example and not exhaustive. But the Greek problem was budgetary [...]” (Middleton, 2012, p. 6).

Middleton (2011) goes on to say, that from the reading of the Treaty, notably Articles 120, 121 and 123-126 TFEU, as well as the advice of the Monetary Committee from 1990 during the Maastricht negotiations, that the member states are solely responsible for their budgets, and thus “budgetary difficulties in a member state are regarded by the Treaty as matters within, not beyond, the control of the Member State” (ibid., p.6). Similarly, a Commission lawyer, writing for the 2014 FIDE⁴⁷ institutional report asserts: “Article 122(2) was inserted into the Treaty together with Articles 120 to 126 whose objective is to make sure that, even within a monetary union, Member States remain fully responsible for their economic policies and subject to the discipline of the market” (Keppenne, 2014, p. 185). So how to establish legal competence using Article 122(2) to provide financial assistance? A key interpretive move

⁴⁶ Article 122 TFEU states:

1. Without prejudice to any other procedures provided for in the Treaties, the Council, on a proposal from the Commission, may decide, in a spirit of solidarity between Member States, upon the measures appropriate to the economic situation, in particular if severe difficulties arise in the supply of certain products, notably in the area of energy.
2. Where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. The President of the Council shall inform the European Parliament of the decision taken.

⁴⁷ Fédération Internationale Pour Le Droit Européen (FIDE) or the International Federation of European Law brings the national associations of the Member States together to discuss matters of European Union law.

in the boundary work of the legal actors is in how they specifically *include* that which a possible legal basis, in this case Article 122, does *not* include, and thereby offers interpretive legal space to establish competence:

“The *first condition* for having recourse to Article 122(2) is that the Member State is in difficulties or is seriously threatened with serious difficulties. This second possibility allows a preventive intervention of the Council in order to avoid the appearance of the difficulties at least if the threat is sufficiently proven. **The provision does not specify the nature of these difficulties.** They should logically be of an economic nature: budgetary problems, liquidity crisis (possibly because of a balance of payment disequilibrium), severe macro-economic problems, etc.” (Keppenne, 2014, p.185, emphasis added in bold)

Here we see from a Commission lawyer’s point of view that the character of the difficulties is not specified, but logically, because Article 122(2) is about *providing financial assistance*, the difficulties must have “an economic nature”, but there is space to interpret the substance of this economic nature.⁴⁸ He continues:

“The *second condition* of Article 122(2) is that these difficulties (or threats) must be caused by natural disasters or exceptional occurrences beyond the control of the concerned Member State. **The notion of exceptional occurrences is not defined**” (Keppenne, 2014, p.185 emphasis added in bold).

Again, we have an undefined situation – “exceptional occurrences” – which leaves room for legal interpretation. In this way, the legal logic via boundary work is about establishing what is included and excluded to maximise (or in other situations minimise) the scope to establish legal competence or legal attachment and thereby take action. A final interpretation is required to ensure a secure legal framework through which assistance can be executed as a legislative process:

“By creating the EFSM the Council considered that the adoption of a general legal framework, albeit temporary, was indispensable as a first step before individual decisions. **Such a two-step approach is not explicitly envisaged** by Article 122(2) TFEU, **but nothing in the wording of this Article prevents it.** It should be considered as justified taking into account the prevailing market conditions at the time” (Keppenne, 2014, p.187, emphasis added in bold).

Again, we see another example of establishing that which is not excluded from the wording of Article 122(2). Of key importance here is the expression “nothing...prevents it”; establishing what a provision explicitly denies is crucial for a lawyer. One cannot just read one’s preferences into undefined or unspecified occurrences or characteristics. The indeterminacy of what one can read in has to be reached

⁴⁸ It is significant to note that the Council lawyer above, Middleton (2011) interpreted in a way that meant budgetary difficulties were within the control of the Member States, according to the Treaties.

via various credible modes of interpretation. A textual interpretation would not work because as mentioned the very wording leaves the definition and specification open and ambiguous, meaning a textual interpretation would be pointless. Before looking at the interpretation used to finally specify and define the difficulties and occurrences which would allow the provision to be utilised as the legal basis for EFSM, I queried a lawyer from the Commission on how they dealt with the issue of the indeterminacy of legal language and law – i.e. ambiguity related to the meaning or application of a legal rule.

“I think I work on the basis that law can be indeterminate in the sense that it is rare that there is a unique right answer. But I would also not want to exaggerate the indeterminacy of law because there are also definitively wrong answers. It is not the case that everything is legally possible, but- and this notion about not being a unique right answer, there can also be in some situations a unique right result but the steps of reasoning that take you there are unlikely to be predestined, as having a single shape, but radical indeterminacy, no...” (A4 interview – Commission lawyer)

This lawyer is acknowledging that there is a level of indeterminacy in finding a unique ‘right’ answer, but it can be whittled down by approaching the legal text from the point of view of what it definitively disallows. It is also significant that he says ‘right result’, which points also to the fact that the law does not simply say what is wrong and right, but also produces a *result*, in this case, whether the EU can offer financial assistance without violating other legal provisions, notably Article 125 (‘the no bailout clause’). Thinking about how the law can have results or consequences helps us to understand how the lawyer logic is very much concerned with what a negative result means:

“[...] but I think that that’s just an observation that if you speak at all to lawyers in practice, they say simply, “we don’t care from a certain point of view what the answer is, obviously we have our client’s preferences”, but the main thing we want to know: we don’t want to discover that we’ve inadvertently gone over lines” (A4 interview – Commission lawyer)

This is crucial, because not only does it illustrate the logic of establishing the limits of legal competence, but it also pushes the lawyer-client relationship to the foreground, and thus the position of appearing neutral, which is a key element of law’s symbolic power. The Commission (and thus the various DGs) is the client of the Commission lawyers and they have a duty to advise their client regarding the correct course of action, and thus also what is the incorrect course of action. What would going “over lines” be in the case of Article 122(2)? Firstly, another Commission lawyer states:

“Article 122(2) was inserted into the Treaty together with Articles 120 to 126 whose objective is to make sure that, even within a monetary union, Member States remain fully responsible for their economic policies and subject to the discipline of the market. Therefore, Article 122(2) cannot be interpreted in a way that would go against this constitutional framework” (Keppenne, 2014, p.185)

Thus, it cannot be interpreted in a way that would lead to member states not being responsible for their budgets and circumventing the discipline of the market. In other words, enabling moral hazard, because as Keppenne (2014, p.185) states: “It could have been considered that the budgetary difficulties of the Member States were at least for a large part nothing else, but the consequence of the inadequate management of their public finances in the past”. So here we see that going over the line would be related to enabling moral hazard in the case of “inadequate management of their public finances”. It should be noted that some nationally-based (Swedish) lawyers did not seem convinced that Article 122(2) could be used for the EFSM exactly because these lawyers saw the budgetary issues some member states were facing as fiscal mismanagement:

“...the serious debt crisis in most countries was a man-made financial disaster. The crisis was created by their failure to respect the SGP. It was pure fiscal mismanagement which culminated in the debt crisis. The serious deterioration in the international economic and financial environment in the relevant period was invoked as an exceptional circumstance to justify the invocation of this Treaty provision” (Bernitz, Seyad, & Nergelius, 2014, p. 576).

Another example of national legal actors disagreeing comes from a Polish legal scholar:

“art. 122 TFEU is not a reliable basis for establishing financial rescue schemes. In this context it could be argued that it was used for setting up the European Financial Stabilisation Mechanism only because no better legal anchorage existed [...]” (Adamski, 2014, p. 487).

These two quotations indicate that some believed that invoking the contextual aspect of deteriorating global economic conditions was somewhat of a stretch. Going back to Keppenne (2014) quoted above, we see that he is explicit about what the provision does and does *not* say, and when comparing what it does *not* say in Article 122(2) to the other provisions relevant in this area (Articles 121, 123-126) and, given those provisions do not explicitly prohibit certain interpretations, then that which is neither included (“defined”, “specified”) nor prohibited (“going over lines”) can be seen as a space for a certain amount of legal construction. Hence, there is space to read into the provision where it does not specify “the nature of these difficulties”, nor “the notion of an exceptional occurrence”, and finally, nothing in the wording prevents a two-step approach in adopting a legal framework in the form of EFSM before making individual decisions of financial assistance to Euro-area member states in need.

It should be further noted that the Treaties themselves have provisions which are outcomes of political bargaining over economic and monetary policies. In fact Article 122(2) was specifically a political compromise back when the Maastricht Treaty was being negotiated, as was described in Chapter 4: the Commission had proposed a financial assistance “for Member States that could suffer problems of budgetary insolvency, to be introduced in the Treaty. [...], however, the compromise between those Member States that feared that the establishment of mechanisms of financial assistance would amount

to a transfer union” (Merino, 2012, p.1633). In this way, the Article provision themselves are outcomes of political compromises and are therefore written in a way that often leaves out context. This does not mean that the lawyers would simply do anything their clients wanted; they would advise them on what is legally possible and what is not, but still respect their client’s course of action (this latter issue will be taken up later).

“[...] so from that point of view, even those who are seeking to be creative also want a relatively high level of assurance that the path that they take will have particular consequences, so in fact they are very resistant to the notion of indeterminacy, because that translates in an operational point of view into a level of insecurity which is ultimately quite de-stabilising” (A4 interview – Commission lawyer).

So the lawyers will seek ‘a relatively high level of assurance’ when considering the outcomes of a particular course of legal action. This can be illustrated by going back to the original draft of the EFSM, which proposed unlimited guarantees from the member states beyond the own resources ceiling and which was rejected by the Council lawyers; as one of them said regarding exactly that issue: “It’s our job to protect the Council, and if the Council was going to adopt something that night which it did, it adopted a recommendation, it’s our job to do what we can to protect it from successful legal challenge, that’s what we do” (E3 interview – Council lawyer). However, as will be shown later, indeterminacy will become an issue when part of the Eurozone crisis policy response is constructed outside the EU’s legal framework, under international and private law, while still being connected by ‘hooks’ between the EU legal regime and the intergovernmental regime.

Going back to the quotation of A4, “de-stabilising” is an interesting word here as it invokes the systematic nature of a legal order vis-à-vis the practices of the lawyers: he is reflecting over practices that could be de-stabilising because they engender insecurity about the legal outcomes of the paths suggested by the lawyers. This further reflects the way the lawyers work with the Treaties and the materials of the past inter-governmental conferences that resulted in the Treaties. They do not look at provisions as a legal basis in isolation, but as part of a whole system. Thus, by using a blend of historical (the Maastricht negotiations), contextual (deterioration of economic and financial conditions globally) and textual interpretation (the phrases “severe difficulties” and “beyond its control”), Article 122(2) can be seen as empowering “the legislator to assist Member States suffering budgetary problem” (Merino, 2012, p.1633).

Here, we can see how the lawyers examine whether a legal basis can be found by systematically looking at the text as a whole, the context of the issue, and the historical aspect of the issue, illustrating the systematic logic of the EU lawyer. Crucially, this logic is anchored in the lawyers reflecting over whether

a legal challenge could be made before the CJEU (A6, E3 interview). The Council lawyers found that there was a limit of how far the EU legal framework could go, and therefore, for budgetary reasons regarding the MFF, the EFSM was capped at EUR 60 billion. In that sense, the overall boundary of what is legally possible is maintained at the point where a boundary is made regarding the level of financial assistance that the Union can offer based on Article 122(2) and the Union budget. In this instance, I conceive of the logic of looking for legal competence as form of jurisdiction expansion. Moreover, the EU lawyers feel legitimated in their expansion of that jurisdiction; thus for them, the EU logic of establishing competence is self-legitimizing because its premised on a legal system of distributed powers, which has symbolic value in mediating member state relations, as opposed to intergovernmental arrangements where political and economic power is wielded more explicitly.

From a market logic, EUR 60 billion was not enough to “impress the markets”, thus another mechanism of assistance had to be setup. In the above analysis of the process of finding a legal basis for EFSM, I have focused on the EU legal actors when representing economic crisis issues with EU law, the point being to show how their systemic logic is deployed in making boundaries (sorting out that which is included from that which is excluded) to establish legal competence. In the next section, I look at the creation of the GLF and the EFSF, which gave more prominence to the logics of the financial and economic officials as well as the politicians themselves.

5.3. Making the EFSF: Like Pulling a Rabbit From a Hat

5.3.1 The GLF Template

When policy was being created outside the EU legal framework, the economists imported financial market concepts into the public realm, which lead to problems for some of the member states because of how these market concepts had to be adapted to the public context. To understand the approach to the EFSF, it is relevant to discuss the approach to the GLF, because that had already been setup outside the Union framework and was thus a possible template for the financial and economic officials tasked with setting up the funding mechanisms. In this private financial domain, the EFSF quickly becomes a source of prestige for Clifford Chance: it is advertised proudly on their website, where it is claimed that the firm has been given a ‘strategic role’. Furthermore, the firm won two awards – ‘bond deals of the

year’ – related to the work it did for the EFSF’s bond issuances.⁴⁹

Consequently, setting up the EFSF was to a certain degree “made easier” because many of the relevant financial and political discussions that came up in the context of the EFSF had already been raised during the setup of the GLF, which gave the financial officials the possibility of shutting down debate by integrating decisions that had already been made under the GLF as components in the EFSF (C3 interview – ECFIN policy professional). During the creation of the GLF, respondent C3 explained that they knew that Greece would be bankrupt by mid-May 2010, so he was not open to a lot of debate about the parameters. Thus, they imported the pricing methodology and the conditionality logic from the IMF, and the member states contributions to the bilateral loans was based on their respective capital allocation key for the ECB. A recombinatory logic is deployed, using bricolage, but also political expedience: Bring existing and well-known components together that have already been used so that no political debate resurfaces.

With the EFSF, this practical approach continued. The idea was to create a Special Purpose Vehicle (SPV) established by private law in Luxembourg – “[...] Luxembourg offers all this flexibility in [the] creation of financial entity that other member states would have offered less” (F1 interview – ECB lawyer) – but with its governing law and jurisdiction based on English law. This made a clear boundary that not only would this mechanism – the EFSF – be outside the Union framework but it would also be based on a very different type of knowledge. It exemplifies the more practical logic of the economics actor that underlies the representations and categories by which the issue and solution are framed: the GLF is a ‘syndicated loan’; Luxembourg law offers financial flexibility; the most attractive law for investors is English law; a special purpose vehicle can be used as a funding mechanism based on guarantees and transferring risk. More tellingly, the technical nature of these representations meant that when he told the ministers about using an SPV, they apparently did not quite understand what it was (C3 interview – ECFIN policy professional).

If one again looks at the solution of an SPV, there is a political logic at play as well. According to the same economics official (C3), as well as Gocaj & Meunier (2013), German officials were pushing for a bilateral-loan setup because it was weary of the Commission being responsible for a guarantee mechanism

⁴⁹ See the following link for more details:

https://www.cliffordchance.com/news/news/2013/02/strategic_role_forcliffordchanceineurodebtcrisisresolution.html
(Accessed 10 June 2019).

– in fact a lack of trust in the Commission was repeated by multiple respondents; specifically, the institutional balance would be too much toward the Commission and apparently Germany did not want this. The other member states were willing to accept that the Commission would not be responsible for operating the SPV, as long as it was based on guarantees (C3 interview – ECFIN policy professional). Unfortunately, no one was prepared for how this structure would turn out in the end because they underestimated the higher standards that member states are held to when stating their national accounts, in comparison to private market actors, for example, who use SPVs to transfer risk off their accounts. What is ironic is that SPV arrangements became famous in the wake of the 2008 financial crisis because of their use in the securitization of sub-prime mortgages to delink credit risk from whoever (usually investment banks) created the SPV (Fender & Mitchell, 2009).

5.3.2 The Mistake of Going Intergovernmental

The EU legal professionals had many concerns about this intergovernmental approach. For example, one legal actor said that a major concern was that the intergovernmental method would deconstruct EU law (E1 interview) – an issue that is covered in Chapter 6 – while another legal actor was more explicit: “to go intergovernmental [...] has been probably one of the biggest mistake[s] strategically of the whole crisis. But so be it, so we operated in the intergovernmental format and it appeared very clearly, very quickly that the EFSF had major flaws” (C1 interview – ECFIN legal professional). Here we see that this actor is making a boundary by connecting the flaws of the EFSF with the style of intergovernmental governance.

Even though the very point of an SPV is that you have an independent entity to transfer risk from the parent organization, the EFSF was not seen as autonomous from the Euro-area member states by Eurostat, the statistical unit of the Commission: “[...] EFSF operations must be partially consolidated in national accounts tables with the institutional units to which it belongs, in this case, the governments of euro area Member States”⁵⁰. It seems that when ECOFIN agreed to establish the SPV, the member states did not know that when providing assistance through the EFSF it would translate into their own debt levels going up: “You can imagine with countries having high debts levels and struggling themselves, like Italy, how happy they were to see their own debt level increase each time they provided financial assistance” (C1 interview). Similarly, the member states did not realize what getting a triple-A rating from the credit rating agencies for the EFSF would entail:

⁵⁰ Eurostat Decision STAT/11/13 (27 January 2011) “The statistical recording of operations undertaken by the European Financial Stability Facility”.

“So we thought naively that with 440 billion we could grant 440 billion and we got a lot of cold water from the credit rating agencies, and it was clear that to be able to provide 440 billion, the Member States needed to provide almost double in guarantee – would need 800 billion of guarantee, so as to have a high proportion at all times which is covered by the triple A countries, if we want serious rating for the EFSF [...] which was problematic in some countries, because in some countries they have to annex to their budget the volume of guarantees they give, so it’s a large volume, as you can guess” (C1 interview – ECFIN legal professional).

Another way of understanding this is that a guarantee from Italy is not the same as a guarantee from Germany, so with the EFSF, they had to engineer an ‘over-guarantee’ by a factor of 1.6 (and later by a factor of 2) in order to get a triple-A status from the credit rating agencies (C3 interview – ECFIN policy professional). Already, it should be clear how the categories of international finance have technified the solution of financial assistance so that it becomes esoteric and almost inscrutable. This was further noted by the ECFIN legal professional when asked about the Framework Agreement of the EFSF that Clifford Chance had drafted: “The result is that Clifford Chance is very gifted in ensuring that no one else but themselves understand the text [laughs], which is a masterpiece of obscurity” (C1 interview – ECFIN legal professional), whereas an economics policy professional, C3, who at the time was nationally based, said that it was drafted well and served its purpose, i.e. to be understood by investors who buy ‘paper’, e.g. bonds. The EFCIN legal actor, C1, went on to draft the first version of the ESM Treaty, which he said he was determined to make understandable to everyone in contrast to the EFSF framework agreement (C1 interview). Here we see how the EU legal actor makes a clear boundary between the ‘obscurity’ of the EFSF legal agreement and the clarity of the ESM Treaty, illustrating the importance of legal clarity for the EU lawyers. Financial lawyers represent contracts in highly technical and esoteric formats, which nevertheless serve a market function – contracts – in the form of a financial relationship that can be adjudicated in a commercial court; this is very different to how EU lawyers see EU law, and thus it is a fundamentally different legal approach and understanding from their point of view.

Politically, Germany’s influence in this is significant because it did not seem to have a problem with bilateral loans, which means it did not have a problem with its debt going up; it just had a problem with the Commission operating the EFSF. Although, it is not clear whether the German government was satisfied with how the EFSF structure ended up, it seems that in the end the German government got what it wanted politically, while some other member states were left frustrated – what was of most importance to them was a guarantee structure to avoid taking on *more debt*, but the EFSF ended up putting more debt on their national accounts. Furthermore, the EFSF was getting technical assistance from Finanzagentur, the German public debt agency, and its managing director, Klaus Regling, is German and

previously worked for the German Ministry of Finance, the IMF and DG ECFIN (ESM, 2019), thereby ensuring a high level of economic-technocratic control.

What is of analytical interest here is how the legal and policy professionals have to take the political preferences of the member states and put into a novel legal arrangement. Boundary work is at play in a number of different ways but analytically it stems from the dispositional logics that these actors deploy. In this crisis context, the dispositional logic seems to take on recombinatory characteristics, i.e. a recombinatory logic (Stark, 1996), but in the process of boundary making, the practical logic becomes a recombinatory logic. This is illustrated by the national policy professional first deploying a practical logic that is focused on closing down possible political tensions by simply considering what the *easiest* path to consensus would be among the member state representatives. For example, from the moment the idea of a bilateral loan facility for Greece was proffered, he figured that to avoid conflicts around member states' contributions, they should follow their respective capital allocation key for the ECB. When deciding on the jurisdiction of the bonds being issued by the EFSF, he said it should be English law because investors know it well, and because it avoids deciding by which Euro-area member states' jurisdiction the bonds should be governed, e.g. if they went with German jurisdiction, other member states such as France would be weary.⁵¹ In the process of considering these boundaries, i.e. the loans cannot be done inside the Union framework, so it will be outside the EU boundary, but the same distribution of resources as the ECB capital allocation key should be used, but then for the EFSF guarantees are considered more optimal than loans for most member states wanted, but without the Commission having responsibility over it (what Germany wanted), and using an SPV structure based in Luxembourg law – the easiest jurisdiction to setup a company – and finally to use English law to attract investors for both. In this way, the practical logic becomes a recombinatory logic as it seeks to close down conflict – the easiest path – and in doing that seeks out existing elements that can be recombined to produce a new object that has both political consensus as well as legal and financial features that give it credibility. In this way it is a boundary object created through bricolage. The implication is here is that the legal jurisdiction is being used instrumentally to achieve political and financial goals. In the next section, I look at how the EU legal professionals dealt with this move into intergovernmental arrangements.

⁵¹ Interestingly, neither Jean-Claude Juncker, Chairman of the Eurogroup at the time, nor Christine Lagarde, French Finance Minister at the time, liked the idea of using English law, but they accepted it (C3 interview – ECFIN policy professional).

5.3.3 What about Bangladesh? – Going Intergovernmental with the Commission

One of the jurisdictional issues that came up with the decision to create the EFSF intergovernmentally was to what degree could the Commission be tasked with setting it up. How could they justify using the Commission and its resources, so extensively for setting up an intergovernmental arrangement based on international law between the Euro area member states? The Council lawyers were pondering this question on the margins of the meeting to decide on the EFSF:

“There’s the Treaty structure for EMU, can the Member States just go off and do something outside that structure? In the end, we came to the view that probably they could, and anyway who is likely to challenge them? That also can sometimes be an element in legal thinking, but we tried to make it secure in little ways that are probably less perceived and probably to the extent to that they were noticed, might’ve been thought to be lawyers being picky” (E3 interview – Council lawyer).

The point here is ‘make it secure in little ways’. This is again about dealing with legal indeterminacy; in this case, the Council lawyers want to minimise the legal indeterminacy around whether the Commission could be used by the Euro-area member states to undertake tasks outside the EU framework.

“The Commission is an institution of the Union, it doesn’t belong to the member states as such, it belongs to the member states of the European Union, not as individual sovereign states, and we remembered, I don’t how we remembered this in the pressures of the day, but we remembered that there had been a court case, a judgement where [...] the power of the Commission to manage a fund that was not a Union fund had been challenged, somebody had taken them to Court [...] and the Court found that the member states could do that, acting together they could confer powers on the Commission that are not strictly under the Treaty, but of course there are conditions [...]” (E3 interview – Council lawyer).

This Council lawyer is referring to a 1993 case, *Parliament v. Council and Commission*,⁵² in which the Parliament sought to annul an act of the Council granting aid for Bangladesh, the coordination of which would be entrusted to the Commission. The argument was that the Council’s adoption of this act was an infringement of the Parliament’s prerogative in budgetary matters. The reason why this case could be legally significant was because the CJEU recognised that, although the Council was adopting an act which did not fall under the exclusive competences of the EU (at the time it was called the European Community), the act was not an act of the EU, regardless of it being adopted during a Council session or that it was based on a Commission proposal. Thus, the Member State heads of state could adopt acts, which were not the exclusive competence of the EU. The judgement reads thus:

“acts adopted by representatives of the Member States acting **not in their capacity** as members of the Council but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court. A decision of the representatives of the Member States on humanitarian

⁵² Joined cases C-181/91 and C-248/91. Judgment of the Court of 30 June 1993. - European Parliament v Council of the European Communities and Commission of the European Communities.

aid for a non-member country [Bangladesh], a field in which the Community does not have exclusive competence, is thus not a Community measure against which an action may be brought. It makes no difference that the decision refers to a proposal from the Commission...”⁵³

There was therefore CJEU legal doctrine enabling the Member States to act outside the EU framework in an area that is not the exclusive competence of the EU, which economic policy is not, and the Commission could thereby undertake tasks in such an area. However, the Council lawyers were still concerned that this legal doctrine did not necessarily cover them entirely: the arrangement in question that weekend encompassed the *Euro-area* member states, and not all the Member States. Thus, a legal question could be raised: could 16 of the 27 Member States (Croatia had not joined at the time) entrust tasks to the Commission, using “the Commission’s time and resources and people whose salaries are paid by the 27 [Member States]” (E3 interview). Under the pressure of that weekend before markets were to open, the Council lawyers came up with a quick solution:

“[...] so we said well this has got to be formalised and we got the Council to adopt that, what they adopted was written out by hand, in Jean-Claude Piris’s [then Head of the Council Legal Service] handwriting, a declaration from the Council authorising the Euro-area member states to entrust tasks to the Commission in connection with [inaudible], so that’s perhaps one of the little bit more quirky or esoteric things we dealt with, but in a way hugely important [...]” (E3 interview)

This was of course highly unconventional given that acts that are under adoption before the Council take months of negotiation and drafting; in this instance, we have an act written out in hand and adopted over a weekend, which read (in its final printed form): “The 27 Member States agree that the Commission will be allowed to be tasked by the euro area Member States in this context [setting up EFSF]”.⁵⁴ The ceremonial aspect of writing it down quickly and getting the Council to agree shows the symbolic power of law to sanctify an agreement that would have otherwise been on much less stable ground if legally challenged. What is further interesting is the fact that the lawyers remembered that there was possible legal doctrine from a CJEU case that could act as precedent, i.e. giving a more stable legal basis to act, in the instance that a challenge could be raised against the establishment of the EFSF by the Euro-area member states, the setting up of which would be entrusted to the Commission outside the EU legal framework.. What is significant about this instance is that it puts the focus on one of the primary professional concerns of the EU lawyers: ensuring that their client, in this case the Council, is in the strongest possible legal position to face a challenge, which would be done via the CJEU. The boundary work of ascertaining the jurisdictional issue here is first whether the Euro-area member states can venture

⁵³ Joined cases C-181/91 and C-248/91 para.12.

⁵⁴ Council of the European Union, Decisions taken in Brussels, 10 May 2010, 9614/10.

outside the Treaty framework of EMU to engage in an activity of economic policy; and second, to entrust the Commission with tasks outside EU jurisdiction. Fortunately for them, the first jurisdictional issue can be settled with the legal doctrine of the Bangladesh case, whose precedent states in the affirmative – Member states can undertake an activity outside the jurisdiction of the Treaties in areas that are not the exclusive competence of the EU. The second jurisdictional issue is similarly covered by the Bangladesh legal doctrine. However, there was still the issue that it was the Euro-area member states and not all the member states; thus, having the Council adopt the act – written out by the Head of the legal services – added more legal certainty that it was adopted according to the correct procedures. In that way, the lawyers reflect over how the court would perceive the challenge and minimise any risk of losing a legal challenge as much as they possibly can.

Summary of Findings

In the above analysis, it was first shown how the GLF was created through **bricolage**, after which it was shown how the process of boundary work first was used to enable the EFSM through **boundary calibration** of Article 122(2) so as to keep the solution inside the EU legal framework. However, because of the budget ceiling, the EU council lawyers said it would be a violation of EU law. Thus, the policy professional came up with the idea of an SPV – which I argue is a boundary object – that would bring together elements of EU law and national Luxembourg law, as well as the use of English law for the governance of the bonds. The process of constructing the SPV, which was dubbed the EFSF, was through bricolage, as the policy professional (C3 interview – ECFIN policy professional) draw on existing elements from comparable policy contexts, for example, the IMF's pricing methodology and the Member State contributions being based on their respective ECB capital key contributions. By contrasting the different solutions enabled by the EU legal professionals on the one hand, and the policy professionals on the other, we can also see the contrast in their habitus or dispositional logics: for the EU legal professionals it is argued that they use what could be termed a jurisdictional logic when thinking through how a legal jurisdiction, namely the EU jurisdiction can be enabled to attach to an issue (Kaushal, 2015) and thereby proffer a solution within the boundary of the EU legal order. The policy professional on the other hand deploys a recombinatory logic (Stark 1996) in line with the process of bricolage: combining existing elements to construct a novel **boundary object** - the EFSF - that bridges existing boundaries as well as conflicting perspectives.

Chapter 6. The Crucial and the Useless: The ESM and the Fiscal Compact

In the previous chapter, I analysed the initial boundary work and bricolage around dealing with the Eurozone crisis. This ended with a clear manoeuvre outside the EU legal framework. Following this initial step into the intergovernmental, certain politicians, especially Chancellor Merkel, started to already promote in late 2010 the establishment of a permanent financial mechanism to stabilise the Eurozone area, which would become known as the European Stability Mechanism (ESM). At the same time, the European Council President had formed a task force in May 2010 to look into making stricter rules for fiscal governance, which would eventually come in the form of the Six-Pack regulation under EU law in 2011 (Puetter, 2015). Finally, to add an extra legal avenue of budgetary control, the Treaty on Stability, Coordination and Governance, (hereafter the Fiscal Compact) was being created at the urge of Germany. Essentially, the Fiscal Compact duplicates the EU law Six-Pack regulation but adds, *inter alia*, the ‘golden rule’: a balanced budget amendment (Fabbrini, 2013). In this way, with the ESM and the Fiscal Compact, the “crisis management” framework was becoming more and more comprehensive and permanent leading into 2011. Continuing the analysis, this chapter will look at these two developments: first, the construction of the ESM, as well as the legal issues related to EU law, and, second, the Fiscal Compact, and its related EU legal regulations, as well as how the Fiscal Compact contrasts with the perceived success of the ESM by its failure.

In this chapter, I look at how the legal and policy professionals perceived and dealt with the political struggles over various legal modalities of the ESM, and how member state preferences are translated into modalities of the international law treaties, which are still however connected to the EU legal framework, through boundary work and bricolage. I will first analyse how this was done in comparison to the EFSF, the ESM’s predecessor. The Commission legal and policy professionals had an opportunity to legally and financially construct the ESM in a way that would improve on the flaws of the EFSF, as well as bind the ESM more tightly to the EU legal order. This latter point will be the subject of the second part of the analysis: making the ESM compatible with EU law as well as how this connects to national legal orders. The third part of the analysis will then look at how the ESM is articulated in EU law, which essentially links two legal orders. Finally, the chapter ends with an analysis of how the legal and policy professionals enabled the Six-pack with the innovative “reverse qualified majority voting” mechanism, and finally another international treaty – the Treaty on Stability, Coordination, and Governance (TSCG, hereinafter

referred to as the Fiscal Compact), all of which were created to upgrade the disciplining legal mechanisms on Member States' budgetary behaviour.

6.1 Sorting out the Boundaries of the ESM: re-iterating recombinations

6.1.1. *The Deauville Debacle*

Once the EFSM and the EFSF had been created, it was decided that a permanent solution to financial assistance was needed; the EFSF was established as a temporary solution and would only be active for 3 years⁵⁵ while the EFSM had very limited capacity (€60 billion). There is a specific event that precipitated the announcement of a permanent mechanism, an event which, according to one respondent “is a day that will live in infamy for the result” (C1 interview – ECFIN legal professional): the Deauville Summit of 18 October 2010.

According to some of my respondents, Germany was keen on the creation of a permanent mechanism (A5 interview – Commission legal professional). However, in the media it became clear that Chancellor Merkel needed President Sarkozy's backing to pursue a permanent mechanism, on the condition that Germany took a more relaxed and political approach to “near-automatic fines against persistent debtors”,⁵⁶ a position which angered Germany's northern allies, Sweden, Netherlands and Finland, who were pushing for the sanctions. In any case, Merkel and Sarkozy made the following declaration in October 2010:

“The establishment of a permanent and robust framework to ensure orderly crisis management in the future, providing the necessary arrangements for an adequate participation of private creditors and allowing Member States to take appropriate coordinated measures to safeguard financial stability of the Euro area as a whole” (Deauville Declaration by Germany and France 2010)⁵⁷

Specifically, the political bargaining being done by Germany and France here is about France backing the amendment of the Treaties to enable a permanent crisis mechanism (which would become the ESM), for more national government involvement in the sanctions as part of a renewed SGP (Emmanouilidis, 2010), which would come in the form of the Six-pack legislation and the Fiscal Compact. Secondly,

⁵⁵ Extraordinary Council Meeting (Economic and Financial Affairs), 9-10 May 2010: Council document 9596/10.

⁵⁶ See Financial Times, “Franco-German bail-out pact divides EU”, Joshua Chaffin and Peter Spiegel in Brussels OCTOBER 24, 2010, at <https://www.ft.com/content/56984290-df96-11df-bed9-00144feabdc0> (Accessed 10 April 2020).

⁵⁷ Franco-German Declaration Statement for the France-Germany-Russia Summit Deauville – Monday, October 18th, 2010.

Germany was not only concerned about signalling to domestic political audiences that private sector involvement (PSI) would be a pre-condition for getting assistance via a permanent mechanism, but Chancellor Merkel wanted President Sarkozy's support to amend the Treaty in order to establish the ESM (*ibid.*).

The announcement caused controversy, as it was done behind the backs of other Heads of State. For example, Austria and the Netherlands were apparently not keen on the notion of a permanent mechanism such as the ESM, as it could undermine lead to a 'transfer union' (Emmanouilidis, 2010). Despite this political controversy, the EU legal and policy professionals saw an opportunity with the announcement of a permanent mechanism. Recalling the previous chapter, the DG ECFIN legal professionals perceived the EFSF as highly problematic, not just because it was based on private law, but also because of its complex financial structure, which in the end gave member states more national debt. In any case, the political project of a permanent mechanism, being pushed by Chancellor Merkel, became a hinge for the Commission legal and policy professionals to essentially make a much better version of the EFSF, but also strategically make it more connected and bound by EU law. In the following, I deconstruct and analyse the professional and political issues that were at stake in the creation of the ESM Treaty.

6.1.2 How to Draft an International Treaty: Consolidating a Boundary Object

Following on the idea that the EFSF is a boundary object, the ESM is similarly a boundary object, but it is permanent and therefore was given a more delineated authority structure. As a permanent boundary object it has to credibility link two modes of governance: international financial institution (international law) and the EU legal order. In the follow, the way that this boundary object becomes a blend of different elements will be analysed, as well as how the past experience of the EFSF boundary object enables innovation.

Following the Deauville controversy of 18 October, the European heads of state agreed on the need for a permanent mechanism at the European Council summit of 28-29 October.⁵⁸ The Commission – specifically DG ECFIN – got the mandate to write the first draft of the ESM (C3 interview – ECFIN policy professional), specifically, respondent C1 drafted it:

⁵⁸ European Council. (2010) Conclusions of the European Council, Brussels, 28-29 October 2010.

“So I started to push for something different, which was creating a permanent institution, which we would construct in public law, and in such a way that we avoid this rerouting of the debt. So basically I started to push for creating the ESM, and at the end of 2010, we got a mandate, and I’m the happy person who had to draft, and negotiate the ESM treaty” (C1 interview – DG ECFIN legal professional).

In the above quotation, we see firstly that the legal professional now saw the political project of a permanent mechanism as an opportunity to improve on the EFSF, especially the rerouting of state debt. Another policy professional – C3 – had a similar strategy, and when the political push for a permanent mechanism came up, he said that because he had been highly involved in the creation of the EFSF, which was done in a rush, he now wanted to do things “right” given that there was more time to negotiate the ESM Treaty (C3 – ECFIN policy professional). At this point we can see how their professionalism is engaged in the task of creating financial assistance mechanisms, first working on the EFSF and then working on the ESM, particularly in the way that their stated aims are to improve on the structure of the EFSF. In that sense, the political project of creating the ESM becomes linked to the professional project of making an improved assistance mechanism, as well as improving on the actual legal agreement. On this latter point, the legal professional was strategic in keeping the ESM Treaty subordinate to EU law.

“so since the Commission was holding the pen of the ESM, obviously I made sure that the ESM is constructed in such a way that it does not harm the competences of the European Union or of the Commission. So I constructed as a mere funding arm, nothing more, everything that is related to, that is even remotely political within the hand of the Commission, the MoU, even the ESM MoU is signed by the Commission, and I enshrined in the ESM treaty very clearly the superiority of Union law” (C1 interview – ECFIN legal professional).

Firstly, how exactly would the ESM be constructed as a mere funding arm? The first thing that C1 did was to print out all the statutes of every International Financial Institution (IFI) he could think of and lock himself in a room for 48 hours, thus producing the first draft of the ESM (C1 interview, C3 interview). What was of significance for C1 and C3 was how the financial structure of the ESM should improve on the EFSF. The two big successes for them were getting paid-in capital – €80 billion – and the capital call structure, which was almost automatic, i.e. as close to a guarantee structure they could get, which would grant the ESM the much vaunted triple-A rating. This was seen as two big “innovations”, especially the callable capital structure, which according to C3, was the first of its kind at the time, in 2011. In this way, the legal and policy professional were gaining competences in creating financial mechanism as they found ways to innovate, having started with the overly cumbersome structure of the EFSF, to the innovative structure of the ESM. As mentioned above, the EFSF was simply based on guarantees according to each member state’s capital contribution key for the ECB, but they had to engineer an over-guarantee because a guarantor of the EFSF could become a beneficiary, thus vulnerable

member states' guarantees had a reduced value (Tuori & Tuori, 2014). Paid-in capital was simple and clean: cash from Germany is the same as cash from Italy, so there would be no over-guaranteeing (C3 interview). Furthermore, the ESM's callable capital structure was much more streamlined: The Managing Director of the ESM would be authorised to make capital calls:

“When a potential shortfall in ESM funds is detected, the Managing Director shall make such capital call(s) as soon as possible with a view to ensuring that the ESM shall have sufficient funds to meet payments due to creditors in full on their due date. ESM Members hereby irrevocably and unconditionally undertake to pay on demand any capital call made on them by the Managing Director pursuant to this paragraph, such demand to be paid within seven days of receipt” (ESM Treaty, Article 9(3)).

This means that the Managing Director does not have to seek approval from the Board of Governors of the ESM, which would have taken considerably longer. Thus, it ensures an overall smoother operation, and in the end, this overall structure ensures very high quality from an investors' point of view. In that way, the ESM was 'a mere funding arm'. Of course, in the end the ESM has become much more institutionally autonomous as its tasks have grown (Smeets et al., 2019). In any case, the financial structure of the ESM was seen to be an improvement on the EFSF, and the legal and policy professionals from ECFIN evinced a sense of achievement (C1, C3 interviews).

6.1.3 The Role of the Eurogroup and Lines of Blurred Responsibility

In terms of the ESM, the members of the Eurogroup would now also be the ESM Board of Governors. This is critical point, as it would become the content of legal issues in the court cases related to policy conditionality, which are analysed in Chapter 9. What is interesting here, is that, seen in the light of the Maastricht negotiations, where France and the Commission had been pushing for an economic government at the scale of the EU to act as a political counterweight to the ECB, the establishment of the ESM with the Eurogroup ministers as the Board of Governors is an interesting development. These are the same ministers that are recognised by the Treaties in terms of coordinating the economic policies of the Eurozone member states, so in that way, the economic responsibilities for these actors could be said to be growing. Critically, however, is that under the ESM framework, they are separated from the EU legal order and are thus not legally accountable.

In line with their role as the Board of Governors, the members of the Eurogroup are also given a somewhat ambiguous role in terms of how the modality of policy conditionality is enabled. If a Member State is granted financial assistance, then:

“the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (an “MoU”) detailing the conditionality attached to the financial assistance facility. The content of the MoU shall reflect the severity of the weaknesses to be addressed and the financial assistance instrument chosen.” (Article 13(3) ESM Treaty).

Moreover, the policy conditionality needs to be compatible with EU law, and will be signed by the Commission:

“The MoU shall be fully consistent with the measures of economic policy coordination provided for in the [FEU Treaty], in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned. The European Commission shall sign the MoU on behalf of the ESM, subject to prior compliance with the conditions set out in paragraph 3 and approval by the Board of Governors” (Article 13(4) ESM Treaty).

First, in paragraphs 3 and 4 of Article 13, it is not really clear who is responsible for policy conditionality. The Commission’s role here is said to be like a ‘political trustee’ for the Eurozone Member States in its tasks under the ESM, according to an ECFIN legal professional (C1 interview), but it is also responsible for ensuring the MoU’s compatibility with EU law, and finally, it signs on behalf of the ESM. In this way, the ECFIN professionals have legally constructed the modality of policy conditionality in a way that seems to blur the boundaries of responsibility as it is not clear where the lines of responsibility actually lie. Nevertheless, the fact that the Commission could ensure that the MoU is in line with EU law was a crucial element for the EU legal professionals, some of whom were very sceptical of having an international financial institution like the ESM being established at the doorstep to the EMU governance framework. In the next section, I look at how the EU legal professionals dealt with this development within the boundaries of the EU legal order.

6.2 The Sacred and the Profane: EU law and its Superiority

6.2.1. Protecting the EU Legal Order

Once it had been decided that the EFSF would be established outside the EU legal framework, the EU lawyers noted a number of issues: “So I think one of the most interesting things we’ve had to face as lawyers, as EU lawyers, has been to try to avoid that EU law is deconstructed by using an intergovernmental method [...]” (E1 interview – Council lawyer). The issue here is not just the creation of a competing system, but also the difference of the logic of international law vis-à-vis EU law. The same Council lawyer explains how public international law, the legal basis of the ESM, is founded on principles of reciprocity and unanimity, which operationally translates into the efficiency of a legal act

depending on a member state's acceptance of that act (E1 interview – Council lawyer). With an EU legal act legislated through the Ordinary Legislative Procedure, the acceptance of all member states is not needed, just its approval in Brussels via the Council and Parliament, and it has direct effect in the member states and primacy over national law:

“That logic is completely different to the logic of international law, so one of the fears of EU lawyers was that the birth of this method could lead to a new paradigm, which deconstructed some of the most sacrosanctus principles of EU law, which is not international law, it is an EU law, which is autonomous with its own sources and effects, and that's not dependent on the will of member states” (E1 interview – Council lawyer).

In the above quotation, not only is the difference in logic made explicit, but the almost religious deference towards the 'sacred' EU legal principles is reflected. The Commission lawyers displayed a similar respect, praising “the beauty of the Community method” (A1 interview – Commission lawyer). More curiously, however, is the fact that the framework agreement between the parties – member states – to the agreement of the EFSF does not seem to be public international law strictly speaking. One of the Council lawyers explained:

“the parties agreed on the general terms of how they were going to structure the loans and conditionality etc., for which there were several discussions on whether it was a treaty of international law or not. We were quite involved in the drafting of this framework... the problem was member states were saying, do we have to ratify this or not? Do we have to go through national procedures or not? So we for example as legal service, we were extremely agnostic on this, we say it's your judgement as contracting parties of this to see whether this is an international treaty or not. [...] it's a question of domestic law, and I think most of them ultimately, including Germany, didn't consider this as an international treaty” (E1 interview – Council lawyer)

This adds another dimension to how international law is perceived: through the lens of domestic law, and thus sovereignty. International law is defined by sovereign states; while EU law is considered a *sui generis* legal system and is autonomous from the will of any single sovereign state. But regardless of whether the Euro-area Member states who were party to the EFSF agreement saw it as international law or not, they were still pursuing a construction outside the Union, and now with the ESM Treaty, they were establishing a permanent international financial institution based on international public law, thereby committing to a permanent legal arrangement outside the EU legal order.

Similarly, the sole legal actor at the time from DG ECFIN, who also had a background in finance, said that “[...] the concern of union law, of protecting Union law, I had it day one, from the first moment, it has been my first discussion when we created the Greek Loan Facility with my own director general, and my colleagues [...]” (C1 interview – ECFIN legal professional). There was a jurisdictional struggle between what could be part of the Union legal framework and what would be outside in the

intergovernmental arrangements. This was apparent when the EFSM was proposed – as described in Chapter 5 – and the Commission lawyers had made the financial assistance guaranteed by the EU budget, and the Council lawyers said that would be illegal and said it had to be capped (E3 interview – Council lawyer). This process unfolds in the form of boundary work of sorting out EU law’s attachments to the crisis issues, i.e. what is exclusive EU competence, and what is not, and where there is EU legal basis, establishing the scope of that basis through legal interpretation. But in sorting out these jurisdictional issues there was both a concern about the undermining of EU legal principles, and there was concern about who would specifically control policy conditionality.

Given that the Commission would not be in charge of operating the EFSF, the same official said: “‘imagine the EFSF, the EFSF was a private company, can you imagine a private company adopting policy conditions [laughs] on a member state! It would’ve been crazy!’” (C1 interview – ECFIN legal professional). He told his superiors and colleagues that to protect Union law, they should insist on putting the policy conditionality for financial disbursements into Council Implementing Decisions (CIDS). He recounts their reaction:

“[...] And they were saying, well, why do you want this? This is just bureaucracy. And I said, ‘no no, it’s not bureaucracy, it’s about making sure that we anchor all this in the Union framework’. I convince them, so we did it, and since then you have dozens and dozens of Council decisions with the policy condition on member states etc. so it has become standard regular practice” (C1 interview).

Here we see how what could be considered ‘bureaucracy’ – in that it is many lines of detail on national reform put into Council decisions – is also equated with protecting the EU legal framework. Moreover, it became practice, with Council implementing decisions being produced every time an MoU was negotiated between a member state and the Commission. The way that boundary work becomes entrenched is via ‘regular practice’, the systematic sorting of what is inside from what is outside, in this case the national policies of a member state receiving financial aid, which would be incredibly intrusive on the part of the EU, into what was before considered entirely sovereign space. How did they do this?

The EU lawyers found a legal basis for policy conditionality in Article 136(1) TFEU, and this meant that, as one lawyer said, EMU law “exploded” in size (A1 interview – Commission lawyer). In many ways, it can be seen as one of the most expansive forms of boundary making: utilising Article 136(1) as a legal basis. It has been used in the Excessive Deficit Procedure as part of the framework of Article 126; in the Macroeconomic Imbalances Procedure (MIP) as part of the framework of the ‘Six-Pack’; and the

Medium-Term Budgetary Objective Procedure as part of the framework of Article 121 (Beukers, 2013, p.5). So how can Article 136(1) be utilised in so many ways? Firstly, Article 136(1) reads:

“In order to ensure the proper functioning of economic and monetary union, and in accordance with the relevant provisions of the Treaties, the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro: (a) to strengthen the coordination and surveillance of their budgetary discipline; (b) to set out economic policy guidelines for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance”

Using it was highly controversial as many legal scholars did not believe that it offered a base for expanding “EU powers in details of domestic economic policy through conditionality”, (Ioannidis, 2016, p. 1271) and Tuori and Tuori (2014, p. 171) similarly asserted that “Art. 136(1) [...] has been interpreted in a way which seems difficult to justify in the light of its wording and scope”. And indeed, legal professionals from the Commission have acknowledged that Art. 136(1) is not straightforward in what its scope potentially permits:

“It is drafted in a very tortuous and ambiguous way, probably reflecting opposite views expressed during the works of the Convention [in terms of the Maastricht negotiations]. For these reasons a literal interpretation does not allow us to fully grasp its scope. The determination of its scope raises fundamental issues related to the very nature of the euro area: Is Article 136(1) TFEU only a modality of the usual method of open coordination envisaged in Article 121 TFEU? Or does it confer more intrusive competences to the Union as regards the euro area Member States? In the affirmative, how far can the Union intrude into national sovereignty?” (Keppenne, 2014, p.189-190).

As Keppenne – a Commission lawyer – notes, legal scholarship on this provision has interpreted it restrictively (Ruffert, 2011) but, according to him, this would render it “without much added-value” (Keppenne, 2014, p.190). Recalling what C1 stated, the Union has given itself the competence to be highly intrusive into the national policies and regulations of Euro-area member states in order to “protect EU law”. In terms of boundary work, the lawyers had expanded greatly the jurisdiction of what Article 136(1) encompasses. In conceptual terms, this is an example of **boundary calibration** of the scope of Article 136(1) to attach to a number of procedures, for example, the MIP and the Medium-Term Budgetary Objective Procedure, but more critically this boundary calibration enables ‘strict conditionality’ to be rendered within the EU legal framework on the basis of Article 136(1) which broadened the boundary of that provision’s scope much more than would have been thought before the EZ crisis – as Keppenne (2014, p. 189) states “a literal interpretation does not allow us to fully grasp its scope” and thus the scope could be more easily calibrated.

The next point is to look at why the above boundary work would be seen as protecting EU law. When it

became clear that a permanent mechanism – the European Stability Mechanism – was desired, some Member States sought to marginalise the Commission:

“well, we had a group of member states, led by Germany, which wanted to enshrine, or entrust rather, the policy conditions to the ESM for a number of reasons [...] They didn’t trust the Commission, they thought the Commission was too close with the recipient countries, and not enough with the creditor countries, so it wanted to entrust the ESM. But that I could not accept, and actually during one of the session of the negotiation, I even, when Germany held its line with a group of member states following Germany, I even said that if member states were following Germany and would sign such a treaty, the Commission would bring any state signing the Treaty to the Court” (C1 interview – ECFIN legal professional).

In this way, not only had the Commission legal professionals established a legal framework for policy conditionality, which the member states had accepted; but from this perspective the economic policy part of the TFEU stipulates certain competences to the Union framework, which the Commission legal professionals wanted to protect. On this the Council lawyers were a little more ambiguous on their position here. One Council lawyer wrote:

“the principle of sincere cooperation does not prevent Member States from agreeing in an intergovernmental way conditionality measures that correspond in substance to those that the Union may adopt under its existing competences of economic coordination – particularly pursuant to Article 136(1) TFEU – nor from agreeing on measures of economic conditionality for whose adoption the EU Treaties do not provide the necessary competences for the Union to act” (Merino, 2012, p. 1636).

This does not mean that the Council lawyers were not concerned about the possibility of a “rival universe of economic coordination” (ibid., p.1635) emerging outside the Union framework, but the Commission legal actors seemed to be very intent on keeping all policy conditionality within the framework of the Union. This was easier said than done, and the key to making it would be for the Commission to introduce a degree of automaticity. Since Greece asked for financial assistance the first time, a practice had developed that was essentially on a case-by-case basis: assistance had been agreed with Greece on the basis of Article 136(1) in the form of Council Decision 2010/320 of 10 May 2010. For Portugal and Ireland, assistance had been agreed on the basis of Regulation 407/2010 of the EFSM in the form of Council Implementing Decision 2011/344 and Council Implementing Decision 2011/77 respectively. When a permanent mechanism in the form of the ESM was to be created, the Commission legal actors wanted to legally articulate policy conditionality in both EU law and in the ESM treaty, so that it would be absolutely clear that conditionality was in conformity with EU law *and* protected EU competence in the area of economic policy. Otherwise, from the Commission’s point of view, having conditionality outside the EU framework would violate the competences of the EU: “We do not want member states to start imposing policy – economic policy conditions – on other member states outside of the Union

law framework, which would have completely emptied the EMU chapter” (C1 interview- DG ECFIN legal professional); in other words, Articles 120 to 126 and 134 to 138 TFEU would be rendered legally meaningless. In order to articulate this in EU law, the ‘Two-Pack’ regulation was proposed in 2011 (ratified in 2013), in which the EU legal professionals – C1 among them – has articulated the relationship between the intergovernmental framework of the ESM (and the EFSF) and the EU legal framework. Another Commission lawyer characterised it as “a kind of a docking mechanism or interlocking mechanism between the systems” (A4 interview – Commission lawyer). The drafting of the Two-Pack is very explicit on the relationship between the two ‘systems’. For example, Article 7 (1) states:

“Where a Member State requests financial assistance from one or several other Member States or third countries, the EFSM, the ESM, the EFSF or the IMF, it shall prepare, in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment programme...”

Here the EU legal actors had to be all-encompassing regarding the source of the financial assistance because “some member states [were] receiving financial assistance from third countries, for instance, Cyprus got a loan from Russia” (C1 interview – ECFIN legal professional), and of course this could become problematic if Russia started to impose certain policy conditions on Cyprus that contravened EU law. Furthermore, Article 7(2) states:

“The Council, acting by a qualified majority on a proposal from the Commission, shall approve the macroeconomic adjustment programme prepared by the Member State requesting financial assistance in accordance with paragraph 1. The Commission shall ensure that the memorandum of understanding [MoU] signed by the Commission on behalf of the ESM or of the EFSF is fully consistent with the macroeconomic adjustment programme approved by the Council” (Article 7(2) Regulation (EU) No 472/2013).

One of the Commission lawyers referred to this as a ‘screening mechanism’ to ensure that what is in the MoU is fully consistent with EU law (A4 interview). In this way, Regulation (EU) No 472/2013, as well as its legal bases of Art. 136 and Art. 121(6) has become the legal construction of economic policy conditionality, and it was enabled through the boundary calibration of the scope of these provisions. This was a significant step in taking control over policy conditionality considering that, under the intergovernmental mechanisms, no funding was coming from the EU, but “the Union was giving itself the power to adopt by qualified majority the decision with 40, 50 binding requests on a member state, covering things ranging from reform of the hospitals, to opening up regulated professions by QMV” (C1 interview – ECFIN legal professional). Here the EU legal actors had been successful in getting the member states to agree to anchor the conditionality in EU law. To further concretise this, EU law’s superiority is enshrined in the ESM treaty, i.e. in an international public treaty, *and* in the Two-Pack

regulation, i.e. the Union legal framework, creating a link between the two. Making the legal articulation of this clear was of paramount importance: “Because it was a very dangerous threat for us to have the creation of a permanent body under international public law, if it was not properly articulated within Union law under the Treaty” (C1 interview – ECFIN legal professional). But having such a tight link between the intergovernmental framework and the EU legal framework leads to **boundary blurring**, which becomes more explicit when the CJEU is needed to adjudicate on the ESM’s compatibility with EU law in the *Pringle* case. Before I look at the issues of boundary blurring – or which could be said to be legal indeterminacy about boundary differentiation – I will look at how the EU lawyers deal with questions of compatibility.

6.2.2 *The ESM’s compatibility with EU law*

6.2.2.1 *Adding a Paragraph to Article 136 TFEU*

Once the political decision was made for a permanent mechanism, a concern was raised by Chancellor Merkel as to the ESM’s compatibility with EU law: “The Germans came up and said in the European Council, Chancellor Merkel said that, I will need to have a treaty change because otherwise there is too much of a risk that the ESM would be declared *ultra vires* by the [German] Constitutional Court” (A5 interview – Commission lawyer). Thus, the following paragraph was added to Article 136 of the Treaty:

“The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”⁵⁹

Adding a paragraph to the Treaty without an inter-governmental conference requires the use of Article 48(6): the simplified revision procedure. This was the first time this procedure would be utilised, as it had been added under the Lisbon Treaty, which had recently entered into force – 1 December 2009.⁶⁰ The first question that arose was whether it was actually necessary to add paragraph 3. As mentioned, Chancellor Merkel insisted that it was necessary because there were fears in the German government that their Constitutional Court would find a problem with the ESM Treaty vis-à-vis the EU legal order. It seems that using the German Constitutional Court (FCC) as a pretext to possible constraints as to what Germany could do had become an issue, in that some EU lawyers sometimes wondered whether the German government was being disingenuous about whether there was in fact a constitutional constraint coming from the FCC.

⁵⁹ Article 136(3) TFEU.

⁶⁰ See <http://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>.

“you never know whether it’s a real constraint or they are using that as another argument, which with the Germans was very much the case, very often. They say don’t do that, and that we cannot commit because our constitutional court would not agree, which was the typical argument; for some other member states was a bit annoying you know because sometimes you could see that they were using it” (A1 interview – Commission lawyer).

This offers a significant insight into what the lawyers’ see as the use of the constitutional court or constitutional law as a political bargaining strategy, or a ‘scarecrow’ as another legal professional called it (C1 interview – ECFIN legal professional). What is of interest here is the possibility of political actors using the court as I asked the same EU lawyer whether, in order to check whether member state representatives were being disingenuous about the actual constitutional issues that they may face, they were knowledgeable about member state constitutional legal requirements:

“I don’t read German and not an expert in German law. But in a way for me it was an advantage because we have our own logic, which is based on EU law, and we try not to be bullied by the national perspectives, because if we do that, then we have 28 contradictory positions possibly. [...] so the way we have built all the safeguards and all the mechanisms was without taking into account the national case-law or national approaches. It is for the political level I think to see what’s possible, but as lawyer we stick to the, we have our primacy, ...and then we build everything on that basis” (A1 interview – Commission lawyer)-

This certainly speaks to the autonomy of EU law, especially as a mode of knowledge that is separate from national legal traditions. What is further significant is he mentions the “political level” as the forum for where issues about national constraints should be discussed. Thus, Chancellor Merkel came with the constraint of the FCC possibly asserting the ESM as ultra vires, thereby necessitating a Treaty amendment. However, it seems that in fact it was not specifically Chancellor Merkel, but the German Finance Ministry that was pushing this argument:

“From since the German finance ministry was convinced that to create the ESM, you need a new article in the Treaty. Everyone was telling them this is nonsense, this is intergovernmental, it does not add a new competence to the EU, you absolutely don’t need to change the Treaty. But they [inaudible] so we created the new article 136, the Treaty was modified during the crisis, which almost no one noticed” (Interview C1 – ECFIN legal professional).

Why would the German Finance Ministry be so concerned about the finer details of EU Treaty law, when the EU lawyers themselves did not really see the need for an amendment? It turns out that the German Finance Ministry is largely populated by lawyers (A2, A3, C1 interviews). One of the Commission lawyers said in the worst cases, the finance lawyers from German Finance Ministry, use their constitution and FCC as a weapon (A3 interview – Commission lawyer). Another legal professional said:

“at each and every step we had a battalion of people coming from the German BMF [Finance Ministry] saying ‘this is against the Treaty’. It was based on fantasy reading of the Treaty, [...] but we were wasting a lot of time to explain why they were wrong. It’s very strange [the BMF], it’s packed with lawyers, hardly anyone has an economic or financial background. But lawyers almost systematically with an odd reading of the EU treaty” (C1 interview).

Despite the frustration over the conflicting readings of the Treaty, this could still be considered a professional dialogue between the lawyers, and considering the German Finance Ministry lawyers wanted to err on the side of caution, this was the legal path to be taken. And in any case, given that the EU legal professionals did not overly concern themselves with national legal perspectives, they could not really make a claim as to the significance of the amendment of Article 136 TFEU from a German legal perspective. Thus, based on a proposal for amending Article 136 sent by the Belgian government to the European Council on 16 December 2010, the decision was taken to amend the Treaties. As mentioned, the Treaty procedure that enables Decision 2011/99 is Article 48(6) TFEU, the scope of which encompasses only Part Three of TFEU, e.g. the EU’s internal policies and actions, and thus economic policy:

“The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements. **The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties**” (Article 48(6) TFEU, my emphasis in bold).

The question is, does establishing a permanent stability mechanism constitute adding a competence to the Union? According to the Commission lawyers, paragraph 3 is not constitutive and simply declaratory (A4 interview), and the Council lawyers assert that:

“It recognizes the power of Member States whose currency is the euro to establish *inter se* a mechanism of assistance, namely the ESM. Article 136(3) TFEU *provides legal certainty* as to the fact that mechanisms of assistance referred to therein (the ESM) are compatible with Article 125 TFEU, as all provisions of the Treaties must be consistent with each other” (Merino, 2012, p.1629, my emphasis).

The statement, “provides legal certainty” is key here. It speaks to the issue of legal indeterminacy as to the ESM’s compatibility with Article 125 TFEU. Because even if it was clear to some that adding a paragraph to Article 136 TFEU was unnecessary, it is by what that paragraph achieves, as one Commission lawyer put it, in “eliminat[ing] what would arguably have been a point of doubt” (A4 interview – Commission lawyer). In terms of legal indeterminacy from the legal professional point of view, high levels of indeterminacy are a problem as points of doubt in a legal framework can be used for litigation purposes, thus leaving it to the courts to clarify, and thereby increasing their power. In this case, the German Finance Ministry, as well as Chancellor Merkel, wanted this point of doubt eliminated in

order to minimise the chances for the FCC to declare the ESM Treaty ultra vires within the meaning of EU law matters as represented in the German Basic Law, i.e. the German constitution, which articulates the legal relationship between Germany and the EU.

On this issue, it should be noted that some EU lawyers, especially from the Council, believed that the concern was genuine:

“there has been a dialogue between lawyers, suggested by the German government, on these issues to clarify respectively the positions. So I’m convinced that the German Constitutional Court had a genuine problem of the constitutionality, especially the no-bailout clause with Article 125. It is to say, “we do not want a transfer Union, and it was in our Maastricht judgement of the 1990s, it was a limit. Our consent to the Treaty of Maastricht was based on the condition that you would always respect the no-bailout clause. If you don’t respect it anymore, then our consent is not valid anymore.” So I think it was an authentic and genuine concern shown by the Germans, which led to include that clause in the Treaty, which actually reconcile the ESM and the EFSF and assistance to member states with the no-bailout clause [Article 125], especially with the idea of conditionality” (Interview E1 – Council lawyer).

However, Article 136(3) is not as clear as it could be. When referring to the two conditions for creating a permanent mechanism – i.e. ‘to preserve the stability of the euro area as a whole’ and ‘strict conditionality’, a Commission lawyer notes that in paragraph 3, it says “the provision of financial assistance will be linked to strict conditionality. The use of the future simple ‘will’ and not ‘shall’ (»wird« in German, «sera» in French) seems to indicate that these are simple modalities and not indispensable conditions” (Keppenne, 2014, p.201). This is a significant point, because this wording does not make clear that ‘strict conditionality’ is in fact the basis for which financial assistance may be given. In a sense this could be considered a point of doubt (in fact the CJEU would later qualify this in order to be able to interpret the ESM Treaty as being compatible with Article 125 TFEU). Nevertheless, it was decided that Article 136 would be amended, and so European Council Decision 2011/99 was adopted on 25 March 2011. However, there was still no clarification on what exactly the Euro-area member states were doing when they went outside the EU legal order to create a permanent stability mechanism, that will obviously affect the economic policy of the EU. This is where again the boundary between what is EU law and what is non-EU law comes up, and goes back to the operation of jurisdiction: sorting out EU law’s attachments at the threshold. Can the Euro-area member states’ setting up of a permanent stability mechanism be seen to be attached to the legal order of the EU? This is a crucial question if the ESM were to be legally challenged before the CJEU; however, we have not yet arrived at the point when it does get challenged. For now, we could say two things: first, as mentioned in the section above, there

was at least CJEU legal doctrine – the *Bangladesh* case⁶¹ – which recognised the ability of the member states to act outside of the EU framework in an area of non-exclusive EU jurisdiction/competence. But because this was just the Euro-area member states, and because economic policy was a coordinated competence, there could still be some doubt. In the next section, I look at the legal issues surrounding Article 125 TFEU, the ‘no bail-out clause’, which was largely the compatibility issue that necessitated amending Article 136 TFEU.

6.2.1.2 *Tis’ but thy name that is my enemy – “The No Bail-Out Clause”*

The so-called No Bail-out Clause (Article 125 TFEU) states the following:

“1. The Union 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 any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. 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.”

Article 125 has been referred to as part of the market logic paradigm enshrined in the Treaties (see the *Pringle* case), together with Article 123, which prohibits monetary financing by the ECB, and Article 124, which prohibits privileged access to financial institutions. This market logic is associated with the political negotiations however of the EMU during the Maastricht negotiations (Dyson & Featherstone, 1999), as discussed in Chapter 4: the Germans were especially concerned to have the logic of market discipline entrenched in the Maastricht Treaty, hence the objective of Article 125 and 123 TFEU is to discipline the budgets of Member States so their fiscal behaviour ensures market access.

For the EFSM, Article 122(2) had been used as the legal basis, but because it was recognised that the EFSM was temporary and justified based on the exceptional state of the global financial crisis, then Article 125 was not too much of an issue. With the proposal of a permanent mechanism, Article 125 could pose a more fundamental legal hurdle because to some of the lawyers, it was very ambiguous if a permanent mechanism of financial assistance could be established, at least on a pre-crisis reading of the provision as these questions had never been asked before, thus the EU lawyers were now confronted with the question of what Article 125 TFEU really meant by its wording (B1 interview). However, other EU legal actors were quite sure of its meaning:

⁶¹ Joined cases C-181/91 and C-248/91. Judgment of the Court of 30 June 1993. - European Parliament v Council of the European Communities and Commission of the European Communities.

“we had a large group of member states around Germany which making a weird reading of the Treaty, they were reading article 125 of the Treaty as prohibiting the possibility to give financial assistance, while this article says that member states cannot assume the liability of another member state, but if you make a loan to someone then you’re not assuming his liability, it’s just adding liability on top of other ones” (C1 interview – ECFIN policy professional).

Although the above quotation seems to be common sense, i.e. giving a loan to someone is not taking on the liabilities of another person, one is still being exposed to the risk of default, and many of the lawyers took a more cautious approach:

“...at that time maybe we were listened to – we the lawyers – even more than sometimes now because it was clear to everyone that whatever was going to be done in the ESM framework, in the EFSF framework, would be closely scrutinized [...] especially in Germany by the courts, by the government, and so we would have to have a credible legal reasoning to show that this is not about, this is not a violation of 125, so this kept us busy” (A5 interview – Commission lawyer).

The above quotation hints at why a cautious approach would be sensible: there would be some legal actors looking very closely at whether the compatibility of the ESM with Article 125 TFEU was legally credible in terms of the Treaties, especially the German Constitutional Court (FCC). There is an historical reason for this, on which I will elaborate further, but first it is instructive to look at how the lawyers perceived Article 125 TFEU before it was interpreted by the CJEU. In the EU legal scholarship on Article 125 pre-crisis, it seems that its interpretation was broad, i.e. no financial assistance of any kind:

“It was traditionally interpreted as preventing Member States and the Community from providing financial assistance to other Member States that are facing rising public debt. It appeared indeed as designed to prevent Member States in the eurozone from relying on the possibility of a bail-out from another Member State” (Lastra & Louis, 2013, p.98).

Similarly, an EU lawyer from the Council stated that pre-crisis, if you take a textual interpretation of the provision, then you will find that you cannot do financial assistance of any kind:

“when you look at the wording of 125, it’s very straight forward, “no financial assistance”, but then you’re in a crisis situation; can the drafters of the Treaty really have intended that we couldn’t create some sort of loan scheme?” (E3 interview – Council lawyer).

What becomes clear in the above quotation is that context will affect legal interpretation. Here the boundary work being done is about circumscribing the legal meaning of Article 125 TFEU to have a narrower scope in that financial assistance is interpreted as not including ‘a loan scheme’. This interpretive move is about working the boundary between what the provision includes and excludes: Article 125

explicitly includes within its scope the prohibition of financial assistance, but excludes the concept of a loan, according to many of the EU lawyers, especially following the outbreak of the crisis:

“[...] many would have taken a categorical position earlier on [pre-crisis], and then when the needs became evident, then people would start being more creative and looking at what was really said, so that is...and certainly also with the understanding of the member states economic policies and the limitations of what the Union can do” (B1 interview – European Parliament lawyer).

Furthermore, purposeful interpretation matters here as well. Each provision will have a specific purpose, and sometimes this may be ambiguous given the fact that the Treaties are essentially the outcome of political compromise. Nevertheless, these specific provisions are part of a larger purpose of the Treaty establishing a Union of nation states. Therefore, as one of the Commission lawyers said, the Treaties are interpreted to ensure their *overall* effectiveness. It is doubtful that the Treaties were made in such a way that a certain interpretation of them would lead to the dissolution of the Eurozone or EMU (A3 interview – Commission lawyer). Again, this does not mean that one can simply use such an overall reason to justify whatever path is most politically expedient; the credibility of the legal reasoning will still matter. Regardless of this, the EU lawyers had to take seriously possible legal challenges to the ESM Treaty in terms of Article 125. Historically, there was a very strong reason to be cautious.

In Germany, the German Constitutional Court (FCC) had long been involved in adjudicating on issues related to EMU. Often, German legal and economic academics have made constitutional complaints before FCC to prevent German integration into EMU, which resulted in many court cases. This was the reason why it would be relevant, particularly in the eyes of the German government, to add paragraph 3 to Article 136 TFEU in clarifying the compatibility of a permanent mechanism with Article 125 TFEU.

Since the establishment of the Maastricht Treaty in 1993, the FCC has created its own definition of the type of economic governance outlined in Maastricht Treaty, arguing that it constitutes a stability community in terms of the provisions that are to ensure Member States' market discipline, i.e. Article 123-125 TFEU, and is a basis for Germany participating in EMU. As one German lawyer who worked for the Commission said:

“[...] in the Maastricht judgement of the German Constitutional Court, there were passages about the EMU as a stability community and Article 125 was noted, highlighted, like Article 123, as constitutive, and then in the German political debate and the public opinion, there was this widespread view that Article 125 really prohibits any kind of assistance, which of course is wrong, legally [...]” (A5 interview – Commission lawyer).

In other words, the FCC had set a legal limit on Germany's participation in EMU, which, if violated, would see Germany's consent to participating in EMU evaporate:

“This concept of the monetary union as a community of stability is the basis and object of the German Act of Consent. If the monetary union were not able to continually develop that stability existing upon transition to the third stage as provided by the mandate of stability which has been agreed upon, it would move away from the concept upon which the Maastricht Treaty is based”.⁶²

Thus, within German jurisdiction, the EMU is anchored by a stability mandate that is ensured by adherence to Article 123 to 125 TFEU. Therefore, given that Article 125 TFEU was constitutive of “a community of stability” in the Euro-area, it had to be legally clear that the establishment of a financial assistance mechanism such as the ESM could be reconciled with the meaning of Article 125 TFEU, i.e. legally determinate. The legal path to do this would be by adding paragraph 3 to Article 136.

The above analysis illustrate the legal work that went into clarifying points of legal doubt in terms of the ESM's status vis-à-vis EU law, however, the fact that several complaints were lodged against it at national courts put it in a liminal legal status, in the threshold where its legal status was indeterminate, until such time as the Court of Justice could validate its legal status vis-à-vis EU law; as a Commission lawyer stated: “opinions on the precise scope of the prohibition, *ex* Article 125(1) TFEU started evolving, but it was only the ECJ's judgment in the *Pringle* case at the end of 2012 that brought the necessary clarification and thus legal security in this respect” (Keppenne, 2014, p.195). The court case, *Pringle*, which was a referral from the Irish Supreme Court to the Court of Justice, became the first key case to sorting out the ESM's legal status. We know the ESM's legal status in terms of EU law was indeterminate because the Irish Supreme Court referred the case to the Court of Justice, as the Irish court could not clarify the issue. In the next part, the Fiscal Compact and the Six-pack regulation are analysed.

6.3 Innovations of Regulations: Upgrading the SGP with a Six-Pack, and a Fiscal Compact

In this section, an analysis of how the legal and policy professionals created the legal construction of the disciplining dimension of economic policy will be undertaken, primarily with regard to the Six-Pack and the Fiscal Compact, both of which were seen as a desperately needed upgrade to the weaknesses of the SGP. As noted in Chapter 4, the SGP's weaknesses were seen to be related to the politicised nature of

⁶² See page 29 of English translation of BVerfGE 89, 155, (Oct. 12, 1993) by Wegen et al., 33 I.L.M. 388 (March, 1994).

the ECOFIN Council decided on how to apply the SGP's rules, i.e. political discretion was emergent in this design, which became obvious in the court case related to this exact problem. In *Commission v. Council*,

a brief analysis of the emergence and ultimate failure of the Fiscal Compact will be undertaken. Particular focus will be on its ambition, as well as how that ambition and innovativeness has been seen to utterly fail, not only because of the flexibility in transposition of the so-called Golden rule – balanced budget amendment – by the Member States, but also because of the expectations put on the Fiscal Compact to discipline the Member States' budgets through legal rules.

The impetus for the Fiscal Compact came about it seems because Germany did not believe the existing tools of budgetary discipline were working, and they wanted something that was very hard law: national constitutional debt brakes. The key point would be that if it is constitutional, then a constitutional-like court or tribunal would be able to ensure its application. Moreover, in the Fiscal Compact itself, there is provision for the Court of Justice to be involved, and in this way the budget disciplining becomes justiciable. But as a Commission legal professional said: this is a cultural perception of what the law can be expected to do when it comes to such sensitive political areas as Member States' budgets:

“The Germans, they think if there is a judge, it's enough. The whole Fiscal Compact is a German idea. They say, oh we have that in Germany, we have institutional goals, we have golden rule [debt brake], and that's the end of the problem. You just say the budget has to be balanced and the constitutional judge ensures that. [...] “Let's just transpose that at the Union level, let's agree between ourselves, we'll integrate that, that'll be much more efficient than all these external controls by the Commission and the Council”. It's a joke because in Italy or Greece to think that you can block a national budget by the constitutional court, it doesn't work. There is a cultural divide...” (A1 interview – Commission lawyer).

Here we can see how this quotation resonates with the notion of stability community in Chapter 4 on EMU, that there are cultural elements at play when it comes to perceptions of how to construct economic governance and in this case especially fiscal governance. But what is interesting is the expectations put on what the law, and particularly what a legal framework on state conduct, can be expected to achieve when it comes to political economy prerogatives of how states should decide their budgets.

And indeed, with the Fiscal Compact, the Commission legal professionals had to be innovative to get a role for the Court of Justice in the Treaty, as was apparently desired by Germany (A1 interview – Commission lawyer). Another Commission lawyer explains it:

“the funny thing was that for once some member states, namely, the Germans, had asked for a very strong role of the Court of Justice, and we as the [Commission] legal service, also the Council legal service, we had to tell them, it’s not possible, because it is outside the Union legal order and so we came up with a construction under which, it’s not the Commission itself that brings an action, but you know, it’s very complicated, but if the Commission were to conclude in its report that a member state is in breach, then under an automatic mechanism, three other member states would sue that member state, [laughs] and the Court could in a second time inflict penalties, so it is provided for, it’s very innovative. But of course it was never used” (A5 interview – Commission lawyer)

The Commission and Council lawyers created an innovative mechanism so that the Court of Justice could have a role in the Fiscal Compact, and thereby the mechanism enabled **boundary overlapping**, as the EU legal order overlaps with the Fiscal Compact when the mechanism is engaged so that the Court could “inflict penalties”. Another innovation was the reverse qualified majority voting mechanism which is both in the Fiscal Compact and part of the Six-pack legislation (specifically, Regulation 1174/2011). In the Fiscal Compact it is under Article 7, where it states the EZ Member States: “commit to supporting the proposals or recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure”, and in order to oppose a proposed decision or recommendation, the EZ Member States would have to form a qualified majority to vote against it, i.e. reversed qualified majority.

As a Commission lawyer who had a key role in creating it said: “we have created this reverse QMV in Council, which completely changes the balance between the Commission and the Council. The Commission only proposes but the with reverse QMV, it’s nearly impossible for the Council to block, and reverse QMV now has been used here and there, so it’s a big trend” (A1 interview – Commission lawyer). What is notable here is not just the point that it changes the balance, but also that it has become a trend, i.e. it is being used in other areas of EU law, for example, this Commission lawyer said they have proposed to use it in the area of Social and Cohesion (A1 interview – Commission lawyer).

But there is another more fundamental implication that comes with the creation of the RQMV in legally constructing economic governance. The point was to create a legal mechanism that would depoliticise the voting in the Council, as a Council lawyer explains:

“in 2010 and 2011, the principle – the six-pack and all these things – was let’s give more tasks to the Commission and less to the Council because the Council has shown to be a very political institution when applying the Stability & Growth Pact, [...] and the German approach is the Stability & Growth Pact is not a matter of politics, it’s a matter of law, it’s this ordoliberal approach which is these are rules and you have to respect the rules, and we don’t trust the Council because it has proven to be very differential – ‘today I helped you and tomorrow you will help me’. It was the case with Germany and France in 2004” (E1 interview – Council lawyer).

Here the Council lawyer is referring to the case that went before Court of Justice regarding how the

Council had violated the SGP rules by not applying them, as mentioned in Chapter 4. The Council lawyer continues his explanation with regard to the EZ crisis:

“So the approach was to say let’s give more powers to the Commission because it’s a technical institution or less political institution and they will apply the law of the Stability & Growth Pact. This is why we have reverse qualified majority. Now I think the crisis has shown that this has proven completely false, because I always say that by giving a political task to a more technical institution as the Commission, you don’t “technify”, you politicise the institution. And actually, this has happened, the Commission has become an extreme political body in the Stability and Growth Pact. Now I help France, while I want to be extremely careful with Italy because there are elections, no fine against Spain because it would be very detrimental to Spain at this point in time” (E1 interview – Council lawyer).

The point is that the notion of technifying using legally construction does not necessarily translate into less politicisation, but could actually be more politicisation for the ‘technical’ institution. With RQMV, by forcing the Council to mobilise a qualified majority against the Commission’s decision, the Commission is coming under more pressure with regard to when to use it, especially under the circumstances of the EZ crisis: “under the Fiscal Compact and the six-pack rules, you know, reverse qualified majority, in EMU, once the Commission does it, the member states have to mobilise a qualified majority against, which is very hard for them to do. But that only really means that the Commission is put under so much pressure, not even to start doing it” (A5 interview – Commission lawyer). That is why, for example, the Commission chose to not fine Spain and Portugal in 2016, even though the Member State had technically not complied with the rules.⁶³

Initially the Fiscal Compact was actually going to be inside the EU legal order, however, because the UK and Czech Republic chose not to participate, the Treaty had to be concluded as a public international treaty. Because of this, one of the another issue was how closely it resembled existing provisions of EU law. As one legal scholar pointed out in the 2014 FIDE report on EMU:

“The effect of the Treaty on Stability, Co-ordination, and Governance is that a parallel procedure will be created vis-à-vis Articles 121 and 126 TFEU, and that Article 126(13) TFEU will lose its original meaning due to the fact that reversed qualified majority voting will be used. Furthermore, contrary to Article 126(10) TFEU, there will be a possibility to bring a Member State to the Court of Justice of the European Union (ECJ) under Article 8 of the Treaty on Stability, Co-ordination, and Governance. Therefore, the problem with this Treaty is that its legal certainty is questionable as its provisions co-exist with the provisions of TFEU, while provisions of the latter will prevail in case of conflicts” (Tupits, 2014, p. 309).

In this way, the EU legal professionals were aware of the uncertainty of having a parallel system of economic governance outside yet connected to EU law. However, the element of the Fiscal Compact

⁶³ See <https://voxeu.org/article/mixed-success-stability-and-growth-pact> (Accessed 19 April 2020)

which ensured some certainty was that it has a clause whereby it would be unionised, i.e. become incorporated into the EU legal order after 5 years from its ratification, as per Article 16 TSCG. Although the process has been set into motion, it is still ongoing and not clear when it will be concluded.⁶⁴

Following the creation of the Fiscal Compact, the Commission was mandated to do a report on the transposition of the balanced budget amendment into national legal frameworks. The general opinion of the Commission legal professionals was that it was that the transposition parameters were so broad that in the end, all interpretations were effectively accepted, calling into question whether these transpositions were actually at the level that the Germans desired, i.e. constitutional. As one of the Commission legal professionals commented on the report:

“report shows how generous the Commission was in accepting legal constructions of the member states, so whereas the Germans in their naivety had imagined all subscribing member states would change their constitutions or almost, or a sort of a cardinal law, *loi organique*, above the ordinary laws to enshrine this discipline, and to create an auto-correction of budget laws that create too much deficit, in reality this is very few states have done that, and the others have submitted to the Commission you know legal constructions, interpretations, and the Commission in the end accepted it.” (A5 interview – Commission lawyer).

Again, the point is that there is an expectation that legal frameworks can enable the desired behaviour in such sensitive political areas, and what the law is capable of. In this way, because so many expectations are put on the law, there is a danger that it renders the law rather weak or enfeebled; if it is expected to do everything, then it ends up achieving nothing. In this way, its legitimisation capacity is weakened. As respondent A5 says, in the end the Commission accepted a wide variety of legal constructions, and in the end there were “too high expectations to that tool, and a misunderstanding on the content of that law” (A5 interview – Commission lawyer). Similarly, another Commission lawyer who worked on the report confirmed the wide variety of legal constructions of debt brakes accepted by the Commission, and thus boundary blurring is enabled as all manner of national legal constructions are accepted, meaning it is unclear whether these national legal constructions are actually at the ‘constitutional’ level.

This section has served to show how the legal and policy professionals attempted to create legal instruments to fulfil the preferences of the Member States with regard to having another Treaty – the Fiscal Compact – and the Six-pack EU legislation that would upgrade the budgetary discipline on the Member States following not just the failings of the SGP, but also the fiscal issues brought to light during the EZ crisis. The boundary work seen in terms of the practices of the legal professionals, was to

⁶⁴ See the legislative schedule at <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-economic-and-monetary-union/file-integration-of-the-fiscal-compact-into-secondary-eu-law> (Accessed 19 April 2020).

innovate, for example, by enabling a mechanism for the Court of Justice to serve penalties on Member States. From the legal professionals point of view, it seems that these legal constructions, far from making more technical avenues of budgetary discipline, have served to politicise the Commission by giving it more discretion, and thus points to the implications of the legal construction of economic governance.

Summary of Findings

In this chapter, boundary work was observed in a number of ways. First, in the terms of the creation of the ESM. Notably, the way that the modality of policy conditionality has been constructed in the ESM Treaty is an example of **boundary blurring** in terms of how it blurs the lines of responsibility between the various institutions it engages, as well as how the Commission is responsible for negotiating the MoU with the Member State requesting assistance, and the Commission signs the MoU on behalf of the ESM, which needs approval from the ESM Board of Governors, who are the same natural persons as the Eurogroup. In terms of EU law, **boundary calibration** of the scope of Article 136(1) to attach to a number of procedures, for example, the MIP and the Medium-Term Budgetary Objective Procedure, but more critically the boundary calibration enables ‘strict conditionality’ to be rendered within the EU legal framework on the basis of broadening the scope of Article 136(1) so the Council Decisions could be made for every MoU that was negotiated and approved, thereby enabling EU law to “screen” the MoU and ensure compatibility. In terms of the Fiscal Compact, the Commission and Council lawyers created an innovative mechanism so that Court of Justice received a role, and thereby the mechanism enabled **boundary overlapping**, as the EU legal order overlaps with the Fiscal Compact when the mechanism is engaged so that the Court could “inflict penalties”. And finally, we saw boundary blurring with commitment of the Member States who signed the Fiscal Compact to incorporate a debt brake at constitutional level, as the Commission allowed all manner of national legal constructions to be accepted, meaning it is unclear whether these national legal constructions are actually at the ‘constitutional’ level which Germany sought when it pushed for the debt brake.

With the ESM Treaty, the Fiscal Compact, and together with the EU legislation in the form of the Six-Pack for budgetary discipline and the Two-Pack regarding macro-economic adjustment programmes, the EU legal and policy professionals had now come up with a crisis management framework, which is seen as the legal construction of economic governance. The practices of the legal and policy professionals, analysed through the lens of boundary work, led to this legal construction. In other words, economic policy is now highly informed by legal stakes, as opposed to more political stakes. Thus, we see the movement of economic policy from a political construction, as shown in Chapter 4 on the origins of

EMU, to a legal construction that is now informed by legal stakes. This means also that there are new terms of legitimation – it has to be legally legitimated, as well as contestation via litigation, i.e. actors can find legal means of attachment to this legal construction and thereby possibly challenge it, as will be shown in Chapter 9 and 10 on the court cases. In the next chapter, the focus moves to the actions of the ECB policy and legal professionals.

Chapter 7. Controversies of Restructuring

Recalling the events of May 2010 analysed in Chapter 5, the EU member states, the IMF and the ECB had made the decision to give Greece financial assistance in return for strict policy conditionality. It is important to remember what much of that financial assistance was being used for: it was so the Greek government could pay maturing Greek government bonds, i.e. its private sector creditors, on time and in full,⁶⁵ and thus equated to bailing out creditors who had lent to Greece, which sent a specific message to the financial markets that they would be bailed out via this avenue of assistance (Blustein, 2015; Buchheit, 2016). A different way of dealing with Greece's problems going back to May 2010 could theoretically have been via a debt restructuring, but as we saw in Chapter 5, there was a fear of contagion to other periphery sovereign debt. More problematic was the fact that large German and French banks, among others, had large holdings of Greek debt, and as such, might fail or at least need a bail-out from their own governments (M. Blyth, 2013, 2014). Finally, there was a more ideological fear: "there was the fear in some quarters, most prominently at the ECB, that tolerating a sovereign debt restructuring in the European Monetary Union could indelibly stain the reputation of the euro as an international reserve currency" (Buchheit, 2016, p.47).

Moreover, as mentioned in the previous chapter, in October 2010, Chancellor Merkel and President Sarkozy, behind the backs of other heads of state, announced that as part of a permanent financial mechanism, there would be a modality for private sector involvement (PSI), in other words, bondholders would now take losses on their holdings if a member state asked for assistance. Having totally rejected the idea of restructuring, how did the ECB eventually come around to overseeing the largest debt restructuring in history? In this chapter, I will show that the ECB President strategically used ECB involvement in the Greek Debt Restructuring (GDR)⁶⁶ as a bargaining chip to considerably water down the notion of having a mechanism enabling private sector involvement, which Chancellor Merkel and President Sarkozy had originally agreed on. This strategy relied on the construction by private legal professionals of a boundary object that could fulfil multiple policy roles (Gelpern & Gulati, 2013): the creation of Eurozone collective actions clauses (CACs), which are a contractual device to enable debt restructuring inserted into government bonds. Again, creating this boundary object is done through

⁶⁵ See IMF Country Report No. 13/156, June 2013, "Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement", International Monetary Fund, Washington, D.C.

⁶⁶ See Zettelmeyer et al. (2013) for a thorough breakdown of all the components related to the GDR.

bricolage: taking components from elsewhere and creating an object that can bridge conflicting policy views. It is not necessarily efficient or functional at all, it is just a process of overcoming political conflict that is perceived as credible by multiple audiences. Chancellor Merkel and other politicians could claim that there is now a regime for PSI; President Trichet had gotten rid of an automatic mechanism; bondholders would be confronted with a legal contract device that was of the international finance field; and the policy networks of this field, of which Trichet and other financial policy professionals were connected, could claim that their perspective and practices were successful.

Looking at the process of the GDR illustrates how practices organise crisis situations through attempts to make sense of the disruption caused therein. The GDR offers particular insight because the notion of debt restructuring in the Eurozone at the beginning of the crisis in 2010 was perceived as unthinkable, especially by ECB policy professionals. Moreover, it shows how the ECB goes from being purely a legal rule-anchored institution to becoming more politically oriented, while having to buttress these developments with legal constructions. As was shown in Chapter 4, in this political construction of the EMU, the ECB's position was created as a highly technocratic and de-politicised institution with an unheard of level of independence, which some ECB legal professionals even tried to argue was independent from EU law (See Zilioli & Selmayr, 1999, p.285-286). However, the conduct of the ECB in the crisis reflects the impossibility of remaining 'de-politicised', which is acutely illustrated in a financial and economic crisis. This position during the crisis is ultimately untenable and forces the agents of the ECB to engage in highly political strategizing (Torres, 2013) as well as legally ambiguous conduct which leads to a number of court cases. This chapter looks at the controversies and conflicts – both inside and outside the ECB – surrounding the notion of debt restructuring, and why its eventual occurrence illustrated a change in strategy for ECB policy professionals,⁶⁷ as well as the wholesale legal reconstruction of Eurozone sovereign debt markets.

7.1 Sticking to the Doxa of Economic and Monetary Union

7.1.1 The ECB differentiates itself as most independent

Much like central banks the world over, the ECB enacted both conventional – calibrating key interest rates – and nonconventional – measures which are considered unusual and only deployed in relation to a crisis. In the first instance, the ECB was praised for its reaction to the financial crisis, when it provided easily available credit to banks via overnight lending already in 2007 (Verdun, 2017) and enabled “large-

⁶⁷ For the purposes of this thesis, all non-legal ECB agents are conceived of as ECB policy professionals, including the ECB Presidents.

scale short-term and longer-term refinancing operations” (Drudi, Durré, & Mongelli, 2012, p.886). However, following this initial response in 2008, ECB action was seen by some to be, at best underwhelming (De Grauwe, 2012) and at worst, the trigger for contagion (Loneragan, 2014). This was related to how ECB policy professionals,⁶⁸ such as President Trichet, communicated to the markets in 2009 and 2010. In 2009, the ECB made it clear, in stark contrast to other central banks like the US Federal Reserve and the Bank of England, that it would not engage in any form of quantitative easing or QE, which is essentially buying government bonds on both first and secondary markets (Loneragan, 2014). Central banks do this to drive economic activity in the face of falling inflation, which may signal a slowdown in economic growth. But the ECB took a clear stance on QE, a resistance that could be said to stem from doxic beliefs about the ECB’s independence and the credibility of its mandate regarding the euro and price stability. As a DG ECFIN legal professional explained:

“The Eurosystem was based on an extremely Bundesbank like approach. And the idea that you could intervene to help indirectly a state – to put it bluntly – was very foreign to their thinking [...] they see central bank intervention, central bank increasing the mandate, as an absolute evil. Because it could lead to inflation” (C1 interview – ECFIN legal professional).

Indeed, from the ECB’s perspective at that point in 2009, QE in terms of buying government bonds could be perceived by market participants as leading to inflation and thus against the ECB’s strict mandate of price stability, as well as undermining the orthodoxy of financial market credibility. Following the collapse of Lehman Brothers during the 2008 financial crisis, at an ECB press conference in May 2009, President Trichet stated that, to deal with the financial market turmoil engendered by the financial crisis and the slowing economic activity in the Eurozone, the ECB Governing Council was going to engage in a covered bond-buying programme of €60 billion, which refers to a relatively unimportant financial instrument issued by banks (Loneragan, 2014). What was of more significance was what else Trichet said without explicitly being prompted: in response to a question asking why the ECB was buying covered bonds, Trichet stated that “the idea is to revive the market, which has been very heavily affected, and all that goes with this revival, including the spreads, the depth and the liquidity of the market. **We are not at all embarking on quantitative easing**” (Trichet & Papademos, 2009, p.7 emphasis added). Why was Trichet so explicitly rejecting quantitative easing without being prompted?

The reason this mattered was because, as Blyth (2014) puts it, quantitative easing was considered a

⁶⁸ ECB policy professionals refers to all ECB agents who are part of the Governing Council or the Executive Board. They are educated economists; ECB legal professionals refers to the lawyers working at the ECB.

successful way to deal with the financial crisis by central banks in America and England to stabilise those banking systems, so “[i]n saying that QE was not on the cards for Europe since the ECB as a transnational central bank had no mandate to back national bonds, Trichet just told global financial markets that the ECB did not stand behind banking-book asset values, even of AAA sovereign assets, and they would not act as a classic lender of last resort” (Blyth, 2014, p.12). Here, the point is that many banks had sovereign debt – i.e. government bonds – on their balance sheets in significant amounts, and up until that point, government bonds, especially euro-area government bonds had been considered almost risk-free assets – as was shown in Chapter 4 in the section on the integration of financial markets. Indeed, government bonds from all euro-area member states had been a key asset in the ECB’s collateral framework and in driving financial integration in the 2000s (Gabor & Ban, 2016). In 2009, in such an uncertain economic and financial environment, Trichet was seen to be sowing doubt about the degree to which the ECB would intervene if banks had a problem selling assets such as government bonds, which for some was seen as highly irrational “because actively introducing credit risk to the sovereign bond market is an act of economic suicide” (Loneragan, 2014, Kindle location 2436). More importantly, it reveals how doxic beliefs, based on ‘rational’ choice assumptions of market actor behaviour, can be so deeply entrenched via habitus that even while disruption is occurring and other agents are changing, key policy professionals such as Trichet seem to ignore the disruption.

It should be noted that market speculation on government bonds in the Eurozone was not unheard of, and in fact, in 2005 when the EU was attempting to formulate the European Constitution, the political tensions around the referendum in France brought this issue to light in the form of ‘spread widening’ or ‘euro-break up’ trades, which speculated on whether the Eurozone could break up and “[...] such pressure could only be addressed by the ECB” (Gabor & Ban, 2016, p.624).

In other words, market participants could instigate the short-selling of peripheral Eurozone government bonds, and only the ECB could stop this. Nevertheless, in 2009, the ECB did not seem to be concerned about such an issue, and hence its explicit rejection of quantitative easing. At the same 2009 press conference, Trichet re-iterated that their “credibility was totally intact” (Trichet & Papademos, 2009, p.7), and again the point was to remind the ECB’s interlocutors that it was sticking to its mandate. Trichet was clearly **making a boundary** between it and any central banks engaging in QE, which at least the Federal Reserve and the Bank of England had engaged in massively (Blyth, 2014). In line with the doxa of maintaining credibility in the eyes of market participants, the ECB was continuously re-iterating its commitment to inflation targeting, price stability and independence.

The ECB carried on this position and when it came to the Eurozone Member States giving financial assistance to Greece in 2010, the ECB was apparently very reluctant: “In 2010, in the first months we created Greek Loan Facility, the ECB was amongst the hardliners. The ECB was reluctant to see the member states going into financial assistance” (C1 interview – DG ECFIN legal professional). It however shifted its position “and accepted that it was a necessary evil” (ibid.), and in fact the ECB created its own programme called the Securities Markets Programme (SMP). Launched on 10 May 2010, the SMP involved buying government bonds on secondary markets and not directly from governments, which would be in violation, according to Trichet (2010), of the prohibition on government monetary financing (Article 123 TFEU)⁶⁹ and thus their independence. Foregrounding the legal dimension of the ECB’s position added the weight of what was legal and what was not. In other words, emphasising the legal boundary, i.e. Article 123 TFEU, made the ECB’s conduct more authoritatively constrained because of its legal boundaries.

This legal boundary work was also seen in technical terms. An ECB lawyer explained that, in terms of their input on the construction of the EFSF and ESM, their legal independence was maintained in that “the legal input was an independent one in the sense of trying to have the best technical result” (F1 interview – ECB lawyer). In other words, for this legal professional by constantly focusing, and making a boundary between the technical and the political, the legal boundary is being upheld. This is made more clear with a comparison: “we wanted to contribute to the technical good of what was being produced and from that point of view there was no interference of anyone in trying to get the legal-technical best results [...], but you can say that the Commission had an extra ambition, which was the political one, because the Commission is by nature a political body that the ECB is not” (F1 interview – ECB lawyer). In this way, the legal and the technical are seen to be mutually constituting the ECB’s independence, and are put to work in separating the ECB from the political. When it comes to the ECB’s programmes during the EZ crisis, ECB policy professionals constantly re-iterated this boundary between what it was doing – as an independent technical agency – and what it was not doing.

In a speech clarifying the details of the SMP at the end of May 2010, Trichet emphasised again the rejection of QE: “Precisely in order to guarantee that the stance remains unaffected, we sterilise our

69 Article 123(1) TFEU states: “Overdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States (hereinafter referred to as ‘national central banks’) in favour of Union institutions, bodies, offices or agencies, central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of Member States shall be prohibited, as shall the purchase directly from them by the European Central Bank or national central banks of debt instruments”

interventions, as I have explained. The Securities Markets Programme **should not be confused with quantitative easing**. In simple words: We are not printing money. This confirms and underpins our commitment to price stability” (Trichet 2010, p.3, emphasis added). The boundary work being done here is again related to **making a boundary** between the ECB’s conduct and anything resembling QE in order to maintain its credibility regarding price stability. Trichet then re-iterates its dependence: “A second key principle guiding our action is central bank independence. We were fully independent in our decision to act as we have done. We have never hesitated to take the decisions needed to ensure price stability” (ibid., p.4). By consistently making a boundary between its conduct and QE, it is purporting to maintain its independence, as well as indicating that QE is implicitly a violation of Article 123 TFEU, which it is in the instance of *direct* purchases from governments, but not on secondary markets. The ECB’s head of legal counsel further re-iterated that “the ECB has emphasised its [SMP] character as a pure monetary policy instrument, to counter media allegations that the SMP represented some kind of quantitative easing along the lines of programmes conducted by the Fed, the Bank of England and the Bank of Japan” (Vicuña, 2013, p. 112).

In any case, from a market perspective, the SMP was not seen as particularly useful, and “was doomed to fail [...] because they would buy on secondary markets, but very small amounts and during a very short period of time, and they would sterilise it, so all the narrative was self-defeating [...]” (C1 interview – ECFIN legal professional). More interestingly however is that Braun (2014) has shown how this constant signalling of ‘sterilisation’ was a symbolic performance by Trichet “to appease Political Monetarists (primarily in Germany) who feared the inflationary consequences of ‘newly printed money’” (Braun, 2014, p.215). In this way, the boundary work of Trichet is about constantly signalling to its interlocutors the ECB’s myopic focus on price stability vis-à-vis inflation in accordance with its mandate. This was to such a degree that one of Braun’s (2014) respondents – a senior ECB economist – explained that some accused Trichet of being “an inflation Taliban” (ibid., p.165). In other words, the boundary work, as boundary making, served to constantly distinguish the ECB from others central banks by rejecting QE, as well as re-affirm the doxa of market credibility. However, it cannot be rejected that Trichet was engaging in a strategy of appeasement towards the anti-inflation monetarists in Germany, and as such, perhaps did not necessarily believe in the substantive content of the signals he was sending.

This serves to illustrate how Trichet was adamant about holding onto the perception of market credibility which he tried to maintain in his focus on price stability and re-iterating its independence as well as the symbolic performance of sterilisation. However, despite Trichet’s constant public assertions of ECB’s credibility and commitment to its mandate, conflict was brewing within the ECB over programmes like

the SMP. This was made clear when in 2011 two very prominent German economists from the ECB resigned. The first in February 2011, Axel Weber, the president of the Bundesbank, apparently because “he felt isolated as a result of his strict, anti-inflation policies, and that he was practically alone in his views within the European Central Bank (ECB)”⁷⁰ and the second Jürgen Stark, from the ECB Executive Board, in September 2011, because he was against “ECB’s purchase of Italian and Spanish bonds” (O’Callaghan, 2013, p. 187). This further points to the fact that the deeply entrenched anti-inflation doxa was becoming a point of tension as Trichet had to grapple with events in the EZ crisis and how to position ECB monetary policy accordingly. Indeed, Stark put the reasons for the EZ crisis squarely on the shoulders of Member State governments:

“In my view solving the current sovereign debt crisis is primarily in the hands of governments. Its root cause lies in lax fiscal policies and associated deteriorating public finances in some euro area countries. Stability criteria were violated, fiscal rules ignored and statistics tweaked. [...] These developments have raised doubts in financial markets on the political will and capacity to live up to their commitments and to do whatever is needed to comply with the rules of the game within a monetary union” (Stark, 2011, p.1).

Not only are governments blamed, but Stark positions financial markets as being the credible judges of government behaviour, i.e. the reason why there is a crisis is because financial markets doubt the ability of governments to comply with the rules of EMU, particularly the SGP, which is ostensibly the disciplining mechanism par excellence for European economic policy, and which apparently financial markets keep an eye on. This implies that financial markets play a governance role in judging who does and does not abide by the rules – this is a strong belief in the rational behaviour of markets, which does not mirror economic reality but is simply the repetitive hum of orthodoxy. The point here is that the ECB and its policy professionals were not just trying to maintain the belief in their ability to target inflation, stay independent, etc., but to maintain the belief that financial market participants are credible governance actors, a key element of neoliberal doxa. The fact that Weber and Stark quit is testament to the changing reality the ECB and its President were confronted with, and which illustrated that ECB policy was indeed having to change.

The conflict over the SMP however also points to the difficulties of dressing up a bond-buying programme in technical and legal symbols: by claiming that the very technical sounding ‘sterilisation’ will ‘protect their stance’, (Trichet, 2010) i.e. the ECB’s legal independence. However, inside the ECB, for

70 See Spiegel International, “Weber's Exit Highlights Merkel's Euro Problem”, 14 February 2011, by Christian Reiermann und Michael Sauga <https://www.spiegel.de/international/germany/enormous-damage-weber-s-exit-highlights-merkel-s-euro-problem-a-745377.html> (Accessed 10 March 2020).

very orthodox policy professionals like Stark and Weber, it seems that buying bonds of a government in crisis is utterly political and goes against ECB independence. Thus, in terms of the SMP, making a boundary between the legal-technical on the one hand, and the political on the other, proves impossible when by its very nature, the act is perceived as political internally.

Having outlined the ECB's changing policy position in regards to the EZ crisis, I will now look at how ECB policy professionals saw the notion of debt restructuring and the Deauville declaration of 18 October, after which I will look at how, in the shadow of an impending Greek Debt Restructuring (GDR), the ECB policy professionals change their stance as a concession for a political commitment by the Eurozone heads of state to avoid another restructuring from happening.

7.1.2 Never Restructuring!

If ECB policy professionals had serious reservations in terms of financial assistance and quantitative easing, when it came to restructuring some – especially Trichet – were in direct opposition to the very notion. However, this opposition was not initially borne by the German ECB economist Jürgen Stark. Apparently, in spring of 2010, he “argued that Greece’s debt was unsustainable, and that therefore the solution should include losses for private creditors. The ECB president “blew up,” according to one attendee. “Trichet said, ‘We are an economic and monetary union, and there must be no debt restructuring!’” (Blustein, 2015, p.11). This suggestion of restructuring would come again in the guise of PSI, but this time from member state politicians in a political declaration.

Once the EFSM and the EFSF had been created, it was decided that a permanent solution to financial assistance was needed; the EFSF was established as a temporary solution and would only be active for 3 years⁷¹ while the EFSM had very limited capacity (€60 billion). As already mentioned, the announcement of a permanent mechanism came with the notion of Private Sector Involvement (PSI) at the Deauville Summit of 18 October 2010.

“The establishment of a permanent and robust framework to ensure orderly crisis management in the future, providing the **necessary arrangements for an adequate participation of private creditors** and allowing Member States to take appropriate coordinated measures to safeguard financial stability of the Euro area as a whole” (Deauville Declaration by Germany and France 2010, emphasis added)

71 Extraordinary Council Meeting (Economic and Financial Affairs), 9-10 May 2010: Council document 9596/10.

Moreover, it is notable that Chancellor Merkel and President Sarkozy went behind the backs of the Euro-area finance ministers. Indeed, apparently the finance ministers were highly vexed to learn from Jörg Asmussen – standing in as German Finance Minister – that, while the finance ministers were discussing stricter and more automatic rules for Member State deviations on deficits and debts on 18 October, Chancellor Merkel and President Sarkozy had just struck a deal in Deauville, for more relaxed automaticity in exchange for a permanent mechanism with PSI (Emmanouilidis, 2010). For President Trichet, the notion of PSI was a serious problem and a few days after the Deauville declaration, he “expressed public concern that forcing bond holders to take losses would drive up borrowing costs” (Porzecanski, 2012, pp. 5–6).

If the announcement was bad enough, the modality of how private sector involvement would be done – on the basis of whether a member state would be entering an economic adjustment programme – presented the problem of creating risky dynamics in the Eurozone. A policy professional from DG ECFIN explained that the issue with how PSI was announced at Deauville, from a financial market point of view, was that every time a Member State entered a programme for assistance, there would be PSI of some sort: such an announcement becomes destabilising in itself as market participants will start to look at the probability of whether a Member State will enter a programme, and create self-fulfilling prophecy dynamics by simply speculating on this probability (C3 interview – DG ECFIN policy professional). This was an extremely problematic situation for the ECB, and as will be illustrated below, its policy professionals made that publicly known.

By 2011, all ECB policy professionals were aligned around the message that debt restructuring in the Euro-area should be avoided. Lorenzo Bini Smaghi from the Executive Board of the ECB said in an interview with Financial Times: “A debt restructuring, or exiting the euro, would be like the death penalty – which we have abolished in the European Union”.⁷² Similarly, Jürgen Stark also from the Executive Board said: “A restructuring would be short sighted and bring considerable drawbacks,” [...] “In the worst case, the restructuring of a member state could overshadow the effects of the Lehman bankruptcy”.⁷³ In June 2011, Bini Smaghi doubled down and stated that talk of restructuring Greek debt had “produced an immediate spike of the spreads on Greek bonds, with strong contagion effects to other euro area countries” (Smaghi, 2011), after which he says that [c]ontinuing to pursue it suggests strong

⁷² See Financial Times, “Interview transcript: Lorenzo Bini Smaghi”, 29 May 2011, Ralph Atkins, at <https://www.ft.com/content/91f52140-89e2-11e0-beff-00144feab49a> (Accessed 12 March 2020).

⁷³ See Reuters, “UPDATE 1-Euro restructuring could overshadow Lehman-ECB's Stark”, 23 April 2011, at <https://mobile.reuters.com/article/amp/idUSLDE73M02W20110423> (Accessed 12 March 2020).

masochistic tendencies” (ibid.). Finally, when asked by the Financial Times “[w]hy is the ECB still resisting such a move [private sector involvement]?” Trichet stated more euphemistically, “all over the world, the best private sector involvement is foreign direct investments, privatisation and going back as soon as possible to spontaneous market financing”.⁷⁴ In fact, according to one of the private lawyers directly involved in the GDR, Trichet was vociferously against a restructuring:

“I have come to believe that Trichet’s reaction to the prospect of a Eurozone sovereign debt restructuring was almost theological [...] his view was that if you allowed one euro of Eurozone sovereign debt to be restructured, it would indelibly stain the reputation of the Euro, no one would want to own euros, borrow them, lend them, and that, destroy the Euro and you have pulled out one of the most important pillars of European integration, and the argument goes on, undermine perhaps lethally the predicates of the European experiment, and you cast that continent back into its habitual belligerency and all the rest of it, and I think he genuinely believed it, I think he probably still does...” (G1 interview – private lawyer).

Indeed, other actors involved in the restructuring re-iterated this view, with one finance professional, who was acting as a negotiator for the banks in the GDR said that the ECB, and apparently even the Commission, were against the restructuring because it would affect the credibility of the euro and would be seen as a “shame” on the single currency (H1 interview – finance professional). As seen in the Maastricht negotiations, having credibility in the eyes of market actors was crucial to the governance structure of the EMU and was connected to the ECB’s credibility. In other words, restructuring a Eurozone member state’s debt was boarding on heresy. Analytically, these positions of the ECB policy professionals show a deeply entrenched orthodoxy about how debt restructuring was not an option for a reputable currency such as the euro, and going along with a restructuring would tarnish its reputation.

It should be noted that Trichet, during his tenure as Head of the French Treasury, had been involved in the Paris Club as a result of his position as its chairman from 1985 to 1993,⁷⁵ and the Paris Club had been one of the primary coordinators of sovereign debt problems for emerging markets and their creditors for many years.⁷⁶ His perception of what sovereign debt restructuring meant was a result of his position in the world of international finance and the fact that it only happened to emerging market countries; not advanced economy markets in western Europe. In that way, this past experience informed the perception of how a debt restructuring in the Eurozone would be viewed in the field of international finance.

⁷⁴ See Financial Times, “Interview with Financial Times Deutschland”, 14 July 2011, Wolfgang Proissl, at <https://www.ecb.europa.eu/press/inter/date/2011/html/sp110718.en.html> (Accessed 10 March 2020)

⁷⁵ See Trichet’s biography here: https://group30.org/members/bio_current/trichet (Accessed 10 March 2020).

⁷⁶ “The Paris Club is an informal group of official creditors whose role is to find coordinated and sustainable solutions to the payment difficulties experienced by debtor countries. As debtor countries undertake reforms to stabilize and restore their macroeconomic and financial situation, Paris Club creditors provide an appropriate debt treatment” (see <http://www.clubdeparis.org/en>)

Thus, the ECB, and specifically Trichet, were extremely reluctant to accept debt restructuring, and especially the notion of automatic PSI. However, while the Deauville declaration was seen by many as destabilising in its execution (C1, C3, C4 – all DG ECFIN policy professionals), the ECB’s position was on the other extreme of *never* allowing private sector involvement/restructuring and was therefore also quickly becoming an untenable position given the circumstances (C3 interview – DG ECFIN policy professional). In particular, IMF staff were finding it increasingly difficult to justify any financial assistance to their Board with Greek debt spiralling (G1 interview – private lawyer). The IMF staff had already been seen to engage in “legal acrobatics” (Blustein, 2015, p.2) as they had amended their rules on lending terms for exceptional access in order to accommodate Greece based on the premise that there were associated systemic risks (IMF, 2013). Thus, there was a serious conflict in perception between the policy professionals of the ECB on the one hand, and IMF staffers on the other, which went down to their differing positions regarding how to deal with sovereign debt in a crisis.

Notably, IMF practice is to run debt sustainability analysis (DSA) on countries seeking assistance, and in the event that debt is not seen as sustainable with ‘high probability’, then some form of restructuring of its debt held by creditors is recommended. It is portrayed as a technical process: “A DSA provides a thorough examination of the structure of debt and projections for debt burden indicators in baseline, alternative, and stress test scenarios over the medium term (IMF, 2013a, p.10). From the ECB’s perspective, debt restructuring was seen as political, as Jürgen Stark from the ECB Executive Board said, private-sector involvement is “a political issue for political reasons, not for economic reasons.”⁷⁷ This was based on the idea, especially in light of the Deauville Declaration, that debt restructuring or PSI was being used to placate northern European citizens who were concerned about financial assistance to southern European states, i.e. it was for political signalling. However, according to one of Greece’s lawyers, the IMF staff could no longer certify that the Greek debt stock was sustainable to the IMF Board (G1 interview – private lawyer). Either way, this conflict in perception would have to be bridged, especially with President Trichet, who had been extremely opposed to it (ESM, 2019; Porzecanski, 2012).

By summer 2011, a debt restructuring for Greece was becoming increasingly likely, but in order for the President Trichet to agree, there needed to be reassurances. The concern for Trichet was that “as long as the Deauville agreement was in the air, any such event would be interpreted by market participants as the

⁷⁷ See Wall Street Journal, “Rift Over Greece Deepens In Europe”, 11 June 2011, By Patrick McGroarty and Brian Blackstone, at <https://www.wsj.com/articles/SB10001424052702304259304576376831013567072> (Accessed 13 March 2020).

first in a sequence that could touch all vulnerable countries in the euro area, risking its dismantling” (ESM, 2019, p. 147). in other words, the Greek debt restructuring had to be seen as highly unique and not a new practice in the crisis management regime. And so Trichet agreed “on behalf of the ECB, in July 2011 to debt writedowns for Greece, as long as the euro area agreed to certain conditions” (ibid.). He was able to get these conditions put into a statement by the Eurozone heads of state on 21 July 2011, which read:

“As far as our general approach to private sector involvement in the euro area is concerned, we would like to make it clear that Greece requires **an exceptional and unique solution**. All other euro countries solemnly reaffirm their inflexible determination to honour fully their own individual sovereign signature and all their commitments to sustainable fiscal conditions and structural reforms” (emphasis added).⁷⁸

In other words, the ECB had lost the battle of preventing a Greek debt restructuring (GDR), but it had won the war against a permanent PSI mechanism, and in this way it had been become more strategic in how to deal with the Member States. The PSI mechanism would now simply be in the form of “Euro-area” collective action clauses (CACs), as was decided by the Eurogroup in November 2010. But these proposed CACs would only be implemented in 2013, and so would not be of any use to the restructuring of Greek debt. The GDR required the specialty expertise of legal professionals who had undertaken sovereign debt restructurings before, and it would similarly raise some legal issues for the ECB, especially as it now owned a sizeable amount of Greek government bonds as a result of the SMP policy. I now turn to these legal professionals and analyse their practices in this empirical case.

7.2. The Greek Debt Restructuring

7.2.1 PSI 1: Restructuring as ‘Voluntary’ - A Light Dusting

As mentioned, when it came to Greece, Trichet had been very reluctant to engage in anything with an R, as one legal professional stated: “One of the causes of the delay was the time it took in the Trichet regime, for the Eurozone to contemplate something beginning with the letter ‘r’, restructuring, re-profiling, re-financing, whichever you want to call it, restructure European sovereign” (G4 interview – private lawyer). And so initially, it seemed that there would be no restructuring at all. As another legal professional recalled: “The message came down from on high in the ECB, that there was to be no restructuring, and

⁷⁸ Statement by the Heads of State or Government of the Euro Area and EU Institutions 21 July 2011.

I simply didn't see how it was possible that the situation could be addressed without a debt restructuring. Eventually Trichet said, okay well there can be a restructuring but it must be *voluntary*' (G1 interview – private lawyer). This point of it being voluntary was key, as it meant that the banks and investors holding Greek debt – the creditors – would get the initial assignment of outlining the parameters of a possible restructuring.

As could be expected, the private creditors' parameters – known as PSI 1 – that were drawn up were very soft, as it translated to a “21 percent Net Present Value (NPV) loss for investors” (Zettelmeyer, Trebesch, and Gulati 2013: 7). The July 2011 debt exchange, together with the official sector financial assistance, failed to materialize and it was later acknowledged that Greece needed a larger debt reduction (Zettelmeyer, Trebesch, and Gulati 2013). As one of the private lawyer's stated in connection with the failed PSI 1: “The phrase ‘voluntary sovereign debt restructuring’ is an oxymoron, up there with things like ‘clean coal’, and it was that adjective ‘voluntary’ that gave rise to PSI 1, that's why PSI 1 was such a light-dusting in terms of what it did to the debt stock” (G1 interview – private lawyer). Moreover, Trichet had a reason for asserting that the debt restructuring be ‘voluntary’: it needed to look like, in the perception of financial markets, there was no coercion, and that the Greek debt restructuring was *not* indicative of any concrete economic policy position based on the Deauville declaration. However, a restructuring of Greek debt still needed to be executed, and thus a second attempt was made, dubbed PSI 2.

7.2.2 PSI 2: *We Sharpened the Knife (and invited them to slit their own throats...)*

And so the tone changed dramatically when it came to PSI 2. As one of the lawyers who was present recounted: “There was a meeting on October the 25th [2011] that lasted into the early morning of the 26th in Brussels, in which everyone was there. And the IMF [Christine Lagarde], Mrs Merkel, Mr Sarkozy, had come to the conclusion, I think largely because the IMF was insisting on it, that the debt stock [...] had to be cut by at least 50% nominal hair-cut” (G1 interview – private lawyer). This was a very large amount for the creditors to lose, and so the question was, would the private creditors accept such a large cut? However, it seems that the negotiators for the creditors would simply have to accept it: “But there were two representatives of the IIF group [private creditor negotiators] wondering around the halls that night, and they got called into a meeting with Lagarde and Merkel and Sarkozy, and they were told, this was what the official sector would insist on. And it was pretty much - as Humphry Bogart used to say ‘you're gonna take it, and you're gonna like it!’ [laughs]. And they managed to get the word ‘voluntary’

into the press release that was issued that night.”(G1 interview – private lawyer).⁷⁹

And in fact, the value grew to 53% which was an incredibly high notional value would have raised concern over the problem of holdouts. In any debt restructuring, if some of the creditors do not like the deal and there is the possibility of taking a blocking position, they can simply refuse to participate and wait to get their bonds paid out unless the state defaults, and in some cases they can take the sovereign government to court. This problem of holdouts could have been exacerbated by the fact that since the EZ crisis started, private creditors *had* been getting paid out on their government holdings from countries like Greece via official sector assistance – EFSM or EFSF programmes – while at the same time ECB policy professionals had been saying to financial markets that debt restructuring would not occur in the Eurozone, as shown in the previous section. However, there was a key reason that a holdout problem could be avoided, which had to do with the law governing those Greek bonds.

The lawyers (G1, G4 interviews) for Greece came from the private global law firm Cleary Gottlieb Steen & Hamilton (hereafter Cleary Gottlieb), and were well known in the world of sovereign debt restructuring, having worked for the Ivory Coast, the Republic of Congo, and Argentina.⁸⁰ These countries are either emerging market economies or least developed countries, and thus, their sovereign bonds are generally governed by foreign law jurisdictions that are welcomed by investors, namely New York and English jurisdiction, presumably to garner market credibility. In terms of Greece, a Cleary Gottlieb lawyer (G1), had in 2010 already looked at the possibility of restructuring Greek debt, and had noted the advantage Greece had, in contrast with emerging market economies: Nearly all its sovereign debt – around 93% - was governed by Greek law, and thus the Greek Parliament could amend the law so as to facilitate a restructuring, which would be respected by commercial courts in New York and London. Making this boundary was however a very delicate operation, as this lawyer said: this advantage “could, in political hands, be turned into a thermal nuclear weapon” (G1 interview – private lawyer). And moreover, the Greek constitution as well as the European Convention on Human rights had provisions on the right to protection of private property, and more critically, “there was no way that the official sector - the IMF, and the EU - were going to accept a use of the local law power in a way that would

79 On 26 October 2011, a Euro Summit statement invited “Greece, private investors and all parties concerned to develop a voluntary bond exchange with a nominal discount of 50 percent on notional Greek debt held by private investors” (See Euro Summit statement dated 26 October 2011 at

https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf)

⁸⁰ See “Argentina debt battle puts NY law firm in spotlight” by Andrew Longstreth and Daniel Bases, Reuters, 5 December 2012, at <https://www.reuters.com/article/argentina-debt-cleary/argentina-debt-battle-puts-ny-law-firm-in-spotlight-idUSL1E8MTFH920121205> (Accessed 01 April 2020).

unsettle all financial markets, because Greece was not alone in this, many other – not all – but many other European countries borrowed under debt instruments that were governed by their own law and potentially to use that power arbitrarily to write off a significant portion of the debt stock would have eroded everyone’s confidence in European sovereign debt generally” (G1 interview – private lawyer). Therefore, the lawyers of Greece had to find a delicate way to enable Greek law to retroactively bind the majority of bondholders so that it did look like an arbitrary use of force. This is why they based the constructed law on the notion of CACs. CACs refer to a variety of clauses, but the specific ones that are commonly promoted fall into two categories: a collective modification clause, enabling a certain portion of the bondholders to accept a debt restructuring such that the whole group is bound; and a collective acceleration clause, preventing demands for full payment by a single bondholder following a default and instead requiring approval via a minimum bondholder vote (Weidemaier & Gulati, 2013). For the purposes of the Greek case, they translated the idea of a CAC and made a law “that retrofit a collective action mechanism on the Greek debt stock” such “that the holders of Greek government bonds would vote as a class on whether to restructure them or not” (G1 interview – private lawyer).

In persuading the official sector – the ECB, IMF and Eurozone heads of state – the lawyer’s position was that “the Eurozone finance ministers in November 2010 had taken a decision to require Collective Action Clauses in all Eurozone sovereign bonds [...]. So my argument was philosophically, Eurozone officialdom has already embraced the notion that a supermajority of creditors of a sovereign can control the debt restructuring process and their decision will bind any dissenting minority [...], we are simply accelerating that process in the case of Greece because we were in the middle of this crisis” (G1 interview – private lawyer). And thus, the Greek Bondholder Act⁸¹ was created in order to enable the debt restructuring by allowing a two-thirds majority of the bondholders to bind them all.

But this was still highly controversial: by amending the Greek bonds via Greek law, they were introducing an *ex post facto* law, on which he said, “all lawyers break out in hives when you talk about *ex post facto* laws” because it is a very precarious precedent to set, but as the lawyer stated “my assessment was unless we did this thing, the debt restructuring would fail. And if it failed then there was a very high chance that Greece would have to leave the Euro and probably the EU and the consequences of that were almost unthinkable” (G1 interview – private lawyer).

Going along with this retrofitting mechanism was highly controversial: “At a large law firm gathering in

⁸¹ See Greek Bondholder Act at <http://www.pdma.gr/greekbonds/index.php/2012-05-28-15-51-31/2012-05-28-15-52-09/2012-05-28-19-19-51/category/2-act-of-the-ministerial-council-approving-bondholders-decision>.

London several months after the Greek debt exchange, the air was thick with outrage: over and over again, participants were asked whether retroactively amending Greek bond contracts undermined the Rule of Law. Some called the move “heinous,” others foretold quick retribution from the markets (Int.A40). Yet for others, the abusiveness of the Greek “retro-CACs” conclusively demonstrated the need for common rules, now...” (Gelpern & Gulati, 2013, p. 377).

For their part, the private creditors, represented by two members of the IIF, wanted to get elements into the agreement. A “key feature” was a “co-financing” option which bound the public creditors (Euro-area Member States) with the private creditors (H1 interview – private finance), as the financing for the debt exchange came via the European Financial Stability Facility (itself funded by the Euro-area Member States) in the form of €30 billion worth of new bonds for the private creditors. Essentially, the “co-financing” element meant that if Greece defaulted on its payments to the private creditors, it would also default on the loan from the EFSF and thereby to the public creditors. This component was apparently critical in getting the private creditors to agree to the deal, as it put them on a more equal footing with the public creditors.⁸² However, according to the legal professionals from Cleary Gottlieb, the co-financing was not really that crucial at all, but was rather another symbolic element to show financial markets that this deal was not being unilaterally decided by the official sector – the ECB, the Eurozone member states, and the Commission.

“I’m sure that for certain constituencies, there would’ve been an effort to sell this as being very significant, but the reality was that if Greece defaulted again, it would just be defaulting on everybody. In my parlance, if you’ve defaulted once, you might as well default everywhere [laugh]. I mean, having two defaults is not really much worse than having one default. And I never had a lot of belief or faith in it as a useful mechanism, but I was happy to go along with it to- it’s the people advising the French banks and the other people who were seemed to be driving the vote for the restructuring thought it was going to help, then I’m happy to accommodate that, because we needed the vote to be passed” (G4 interview – private lawyer).

But from the point of view of the representatives, this was a negotiation and would be based on good faith (H1 interview – finance professional). However, there seemed to be some mistrust, as there was a rumour that Greece’s lawyers had been attempting to pursue bilateral discussions with creditors, i.e. one-by-one, but the IIF representatives say this was not just a waste of time but also a waste of credibility (H1 interview – private finance). The point of view compared to the lawyers was in stark contrast: They claimed that they negotiated directly with Merkel and Sarkozy (who had a mandate from Council). What was absolutely key in debt restructuring is IMF and their DSA and once parameters of the DSA are

⁸² See <https://www.bloomberg.com/news/articles/2012-04-19/a-lazard-banker-is-the-greeks-financial-goddess>, (Accessed 20 October 2019).

agreed, then you know what to do, and you speak about money – not law! Lawyers are simply advising.

To compare how the legal professionals saw the savageness of the debt restructuring, it is salient to look at how the more policy and financial professionals attempt to keep up a pretence of how their ‘voluntary’ and more market-friendly approach worked by producing a report on the GDR. Essentially, the report attempts to frame the eventual success of the Greek experience as being tied to a market-based approach, for example, by stating that the Greek experience “has clearly demonstrated that a voluntary, market-based approach is more effective and appropriate than a unilateral, top-down approach to debt restructuring” (IIF, 2012, p.4). This is misleading. As mentioned, the first PSI attempt failed because there was not enough debt relief, and it was also mainly a private initiative as the French banks had drafted it. Furthermore, the second PSI was said to be far from voluntary as asserted by Greece’s lawyers (G1, G4 interviews – private lawyers). Finally, the deal was ultimately a success for Greece because it could change its domestic law to include a collective agreement mechanism in domestic law Greek bonds – an obviously unilateral action. On this, the report states “[r]etroactive legal changes to unilaterally modify the terms and the conditions of financial contracts may undermine the integrity of financial markets and the sanctity of contracts and should be avoided” (IIF, 2012 p.15), although they do say it may be warranted in exceptional cases. The report further criticizes the fact that the ECB’s portion of Greek bonds were not part of the restructuring, which indicates the ECB having preferred creditor status over private creditors. However, as ex-ECB Head legal counsel has asserted, this would have been against Article 123 TFEU (Vicuña, 2013).

The point is here is that despite the key elements that enabled PSI 2 to become workable and indeed be executed, in this report (IIF, 2012) the policy and financial actors **make a boundary** between what works – which is the ‘voluntary’ aspect, the negotiations, the credibility of their market-based approach – and what is considered dubious: the retroactive insertion of the collective mechanism and the preferred creditor status for the ECB. In the end around €206 billion was restructured with a writedown of €100 billion: “when it was finally implemented inflicted something like a 79% net-present value loss on the creditors - the idea that any creditor walks into a 79% net-present value loss or a 53,5% principle loss, voluntarily, is just fatuous” (G1 interview – private lawyer). And indeed, many creditors took the Greek government to court, for example, in Germany, and others have tried to put liability on the ECB.

7.3 Making CACs for the Eurozone: Boundary Object as Policy Panacea

7.3.1 CACs as Boundary Object

Now if Trichet had gone along with the GDR, and in return got the concession that this would be a unique situation not to be repeated by other Eurozone member states (ESM, 2019), how would PSI as a modality be dealt with going forward? Conceptually, the various conflicting perceptions had converged around CACs. As mentioned, at a Eurogroup meeting dated 28 November 2010, CACs were mentioned as being a possible element of a future permanent mechanism. According to one source from Gelpern & Gulati (2013), there was an indication that Trichet had been trying to surreptitiously get CACs into the discussions on a permanent mechanism:

“Trichet drew on his experience overseeing official debt restructuring decades earlier, and used CACs to diffuse German radicalism: On November 28th, at that meeting, Trichet was there. He had been [head of] the Paris Club. He is a gifted technocrat. That was a high level meeting and the others there might not have known what they were signing off on when they agreed to CACs. But Trichet knew. (Int.B10)” (Gelpern & Gulati 2013, p.375).

Whether or not this is true, the policy professionals of the ECB had indeed mentioned CACs in the context of the crisis. Lorenzo Bini Smaghi had brought up the notion of CACs in September 2010, before the Deauville declaration, before the Eurogroup meeting and before the prospect of restructuring Greece's debt. At an Economic and Monetary Affairs (ECON) Committee Hearing at the European Parliament, he stated that:

“If some form of rescheduling or re-profiling of the debt over time turns out to be necessary, for the debt to be sustainable, this can be achieved in an orderly way only through an agreement between creditors and debtors. Other forms of constrained action, on the creditor or on the debtor side, are bound to lead to litigations and produce disorderly effects on financial markets. In this respect, **the adoption of collective action clauses by the euro area member states** would make it easier for creditors and debtors to agree on a fair burden sharing. This was the conclusion of the discussions in the context of the IMF and can be further explored **at European level**” (Bini Smaghi, 2010, emphasis added).

In this way, the notion of CACs seemed to have been circulating and could well have been the boundary object that the ECB policy professionals could rely on to water down any political desire for an automatic or statutory restructuring mechanism.

This is an example of boundary work in that a boundary object was created via the notion of CACs because it could absorb the tensions of conflicting points of view (Star & Griesemer, 1989), namely between the desire from consistent private sector involvement on the one side, and the rejection of private sector involvement. The CAC enabled the possibility that creditors could agree to a debt restructuring if it came up, but it was in no way a sure thing as it would theoretically be based on the

negotiations between the creditors and the debtors. Furthermore, this boundary object was constructed through a process of bricolage, as the elements of its construction come from existing notions elsewhere: CACs were a contractual legal device that had been around for decades at that point, and sovereign market actors were familiar with them; they were seen as relatively benign and even fashionable (Weidemaier & Gulati, 2013).

The rise to policy prominence of CACs in the world of international finance was in a similar context to that of the EZ crisis. CACs become of policy interest when the IMF attempted in 2002 to introduce a Sovereign Debt Restructuring Mechanism (SDRM) as statutory option. Essentially, the IMF wanted to create “a predictable legal mechanism” (Krueger, 2002, p.4) with the most crucial element being a provision that binds all creditors to a debt restructuring agreement via the acceptance of a qualified majority of creditors (*ibid.*). The SDRM was not well-received by market players and some emerging market sovereigns, who worried that any interaction with such a mechanism would signal default and lead to a self-fulfilling prophecy (Gelpern & Gulati, 2006). Furthermore, many were worried about the politicization of what they saw as a market function and even saw a conflict of interest for the IMF as it was often a distressed sovereign’s largest creditor (*ibid.*). As an alternative to the SDRM, CACs were then heavily promoted by notable US Treasury officials like Under Secretary for International Affairs, John Taylor. Subsequently, the IMF acknowledged the lack of feasibility relating to the SDRM (Ritter, 2010), and the market-based approach started to gain traction. In 2003, Mexico issued New York-law bonds with CACs (Drage & Hovaguimian, 2004; Weidemaier & Gulati, 2013) and other emerging markets following suit (Weidemaier & Gulati 2013). In sum, until the IMF made a serious attempt to introduce a statutory mechanism, market actors and emerging market sovereigns had not really attempted to promote CACs.

In this account, as well as in the context of the Eurozone, CACs are used strategically to undermine the counter proposal of a statutory or automatic mechanism of debt restructuring. In terms of bricolage, the history of CAC as a way to undermine the IMF’s proposal of the SDRM serves as a template for deploying the idea of Euro-area CACs as a way to involve private creditors, but which waters down Merkel’s original desire. Nevertheless, by putting CACs into the ESM Treaty, it becomes a boundary object in the sense that it is a permanent arrangement by being part of a binding Treaty, but it is a market contract device that both has legal credibility as a contract, but has market credibility as a way to enable collective agreement between creditors. The bricolage aspect is based on the retrospective use of the notion of CACs to bridge policy conflicts. Taking legal and institutional elements from past policy experiences and rearticulating them in novel policy arrangements. Again, Cleary Gottlieb lawyers were used to assist in

creating the documentation for the Euro-area CACs (G4 interview – private lawyer).

However, following the GDR and now with the ESM Treaty establishing that Euro-area bonds would get CACs from January 2013, the ECB policy and legal professionals would have to engage in their own legal acrobatics, as there were a number of legal ambiguities created by these two developments.

7.3.2 ECB Legal Ambiguities and Boundary Blurring

In the end, the GDR raised a number of legal ambiguities that the ECB policy and legal professionals were going to have to deal with, and went to the heart of the impossible boundary it was trying to maintain – i.e. its independence – when dealing with technical operations that were unmistakably politicised: the buying of sovereign debt. The first issue was the de facto preferred creditor status that the ECB and the Eurosystem central banks (ESCB) were able to get during the GDR. As mentioned, many private creditors thought this was unfair, but the ECB policy professionals as well as the head of ECB legal counsel, had made clear that if the ECB allowed its sovereign debt holdings to be exposed to a restructuring, then it would violate Article 123 TFEU (Vicuña, 2013) which prohibits monetary financing of governments. This did not stop Italian bondholders taking the ECB to court over the matter which was the subject of the *Accorinti* case.⁸³

In the *Accorinti* case, the applicants complained that the principle of equal treatment was violated as per the Articles 21 and 22 of the EU's Charter of Fundamental Rights. Specifically, the applicants claimed that, as buyers of Greek government bonds, they and the ECB, together with the ESCB, were “in a comparable, or indeed identical, situation, for the purposes of the application of the general principle of equal treatment”.⁸⁴ And generally, the principle of equal treatment of creditors is recognised as an international customary principle. This is similarly the substance of the clause “pari passu” which assumes the equal treatment of creditors and which is often stipulated in bonds. But the General Court found that the private creditors were not in a similar or identical position as the ECB and ESCB, as the latter held Greek bonds in light of their monetary policy mandate, and not as investors. To be sure, private law construes the investors and the central banks as creditors when buying government bonds, however, the General Court asserts that this vision of private law does not negate the legal system of the ESCB and its monetary policy responsibilities. And again, if the ECB voluntarily took a haircut it would

⁸³ Case T-79/13, *Alessandro Accorinti and Others v European Central Bank*, ECLI:EU:T:2015:756.

⁸⁴ Case T-79/13, para.88

be illegal under Article 123 TFEU. However, this defence of the ECB's creditor status would lead to another legal issue in the wake of the announcement of the ECB's next programme in September 2012: the Outright Monetary Transactions (OMT) programme

When the OMT was announced, the ECB clarified that it would respect the *pari passu* clause and *not* have preferred creditor status in the case of a debt restructuring in order to increase the effectiveness of the programme. Moreover, given the now stipulated inclusion of CACs in Eurozone bonds as per the ESM Treaty, this means that the ECB could find itself in a position where it has to vote either in support of or against a debt restructuring as per the CACs voting mechanism. However, as the *Accorinti* case confirmed, the ECB could not accept a debt restructuring whereby its own holdings of government bonds would be exposed to a loss, as it would be a violation of Article 123 TFEU,⁸⁵ but given its relinquishment of preferred creditor status under the OMT programme, if that programme were activated, it would not be able to protect its bond holdings from a possible debt restructuring if a majority of bondholders voted in favour (Martinelli, 2016). This legal conundrum came up in the litigation over the OMT programme in the *Gauweiler* case.⁸⁶

In order to overcome the legal conundrum, the ECB stated that it would systematically vote against a debt restructuring in order to maintain its independence.⁸⁷ But this would put a successful debt restructuring, which may be needed as per the IMF's view, at risk of failure if the ECB held an amount of bonds that equated to a blocking minority position. In order to ensure that the ECB and ESCB would not be an obstacle in such a situation, it came up with bond-buying thresholds for its subsequent programme, the PSPP. The OMT was never activated so the reality of buying bonds under that programme could be put aside. However, the PSPP was activated and thus the ECB having a blocking position could become a distinct reality. In accordance with the Euro CAC voting mechanism, the ECB first set a threshold of 25 % on its holdings of any given debt security in order to avoid it having a blocking minority in the event of an agreed debt restructuring. However, in order to properly “promote the full and smooth implementation of the PSPP”, it increased the issue share limit to 33 %, “subject to verification on a case-by-case basis that a holding of 33 % per ISIN would not lead the Eurosystem central banks to reach blocking minority holdings in orderly debt restructurings”.⁸⁸

⁸⁵ Case T-79/13, para.114

⁸⁶ Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag* (16 June 2015). (ECLI EU:C:2015:400).

⁸⁷ Bundesverfassungsgericht, Order of 14 January 2014 - 2 BvR 2728/13, para. 8; Case C-62/14 *Peter Gauweiler and Others v Deutscher Bundestag* (16 June 2015). (ECLI EU:C:2015:400)

⁸⁸ Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33)

However, as a legal professional from DG ECFIN pointed out, this means that in order for a debt restructuring to be successful, the majority voting in favour would have to be 100 % of *all* the other bondholders, i.e. the remaining 66 %, which is apparently unlikely. In other words, the ECB's conduct in this case makes a market based negotiation very difficult to achieve. His point here was that there is a difference between legal blocking, what the ECB is stipulating with the thresholds, and effective blocking, what could happen because now a vote in favour requires *all* other bondholders, which apparently does not happen even in successful debt restructurings (C2 interview – ECFIN legal professional).

What is interesting is that many saw the dissipating of the EZ crisis at that time, late summer of 2012, as the result ECB President, Mario Draghi's announcement to do whatever it takes, and which was in conjunction with the announcement of the OMT. The statement, "Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough",⁸⁹ was perceived by the markets as the ECB's commitment to stand behind the euro no matter what. And indeed, all my respondents commented on this, confirming that this was the turning point. But given this notion that Draghi's statement was the key, puts the legal manoeuvring of the ECB's conduct in a specific light. The legal-technical differentiation to constantly prevent it violating Article 123 TFEU is used to show that it is not engaging in quantitative easing, as understood to be a violation of Article 123; however, it is certainly coming very close to it.

The point is that the increasingly technical intricacies of the ECB's manoeuvring in order to keep the Eurozone together by buying government bonds becomes increasingly legally difficult or at least legally ambiguous as it is seen to violate Article 123 TFEU, but by drawing more and more technical boundaries to show that it does not in fact violate it. This is an instance of **boundary blurring** because OMT is never activated and so remains hypothetical and thus the CJEU was able to put technical conditions down so that the ECB, together with the CJEU could keep the boundary between legal and illegal separate, while the boundary between legal and technical becomes blurred: if legality is just a matter of technicality, then one simply has to find technical solutions to one's legal issues.

⁸⁹ See Speech by Mario Draghi, President of the European Central Bank at the Global Investment Conference in London, 26 July 2012, at <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html> (Accessed 22 October 2019).

Summary of Findings

In this chapter, I have looked at the boundary work being done by the ECB legal and policy professionals in their efforts to maintain the doxa of market credibility that underpins the Economic and Monetary Union governance structure. However, as the crisis became more severe, particularly the fears of contagion, the ECB legal and policy professionals are pushed to engage in conduct that, for some ECB actors, is against their mandate. In order to overcome this, technical modalities, such as ‘sterilization’, are enabled that are purported to maintain the legal boundary of its independence. This legal-technical **boundary making** is used to differentiate the ECB from other central banks that are engaging in quantitative easing, such as the US Fed and the BoE, which the ECB policy professionals connect with a prohibition of monetary financing. This boundary work whereby the legal-technical is differentiated from the political is crucial for the ECB actors to maintain the market credibility doxa that EMU is built on.

Moreover, when it came to the Greek debt restructuring, the top ECB policy professionals, such as President Trichet, Lorenzo Bini Smaghi, and Jürgen Stark, were very much opposed to it, but as the IMF became more insistent on the need for a restructuring, Trichet capitulated on the condition that it be a one off event, and that notion of a regular mechanism of Private Sector Involvement, as communicated by the Chancellor Merkel and President Sarkozy’s declaration at Deauville in October 2010, is watered down to something that financial markets will perceive as credible and non-threatening: and so the notion of CACs was given the role, with a provision inserted into the ESM Treaty stipulating that all Euro area bonds include CACs from 2013. In this way, I have argued that in this instance Euro area CACs are a **boundary object** used to bridge the conflicting views about PSI, which is enabled by a process of bricolage: taking known elements – CAC legal documentation – to enable agency in overcoming conflict. In terms of this thesis research question, the above findings speak to how practices such as the construction of **boundary objects via bricolage** enable the legal construction of economic policy in an unfolding crisis, and how the ECB policy professionals enable their controversial solutions, such as SMP and the OMT, by deploying legal-technical boundaries that are said to contain any undesirable effects, i.e. any effects that undermine the perception of ECB independence. Finally, in terms of violating Article 123 in terms of OMT, by enabling technical conditions to prevent Article 123 being violated by the OMT, the ECB deployed **boundary blurring** as the boundary between legal and technical becomes ambiguous.

Chapter 8: Unfolding a Crisis in Court

I think the ESM is being setup in a way that may divide and in the end destroy the European Union.

Thomas Pringle

Through the empirical analysis of the EZ crisis policy response, I have attempted to show how the urgency of the crisis, together with the EMU's governance blind spots, meant that the legal and policy professionals had to construct a haphazard and awkward legal and institutional framework to deal with the crisis. This framework traversed various legal jurisdictions and encompassed several institutions. From the beginning of 2010 with the creation of the GLF to the announcement of the OMT in 2012, a technical and legal construction was erected that had, concomitantly, raised serious concerns as to its legality, and indeed the fundamental rights it was said to have infringed. These concerns arose in the form of litigation before multiple courts, at different scales of European law. For the purposes of this thesis, I will focus on the cases that specifically target the actions of EU institutions, as well as the creation of the mechanisms, during the EZ crisis, and ended up before the Court of Justice.

In this chapter, using the concept of boundary work, I will look at how the various actors involved in the court cases legally construct economic policy, not just in and of itself but also vis-à-vis monetary policy, in litigation proceedings before the CJEU. Litigation proceedings are a key part of legal professionals' practices, and the outcomes of these cases can impact both legal and policy professionals' practices going forward. Moreover, litigation can lead to doctrine whereby a court produces interpretive frameworks that enable subsequent interpretation. Alec Stone Sweet (2004a) has called these "argumentation frameworks", which "are formalized analogies, assembled from materials found in past decisions, on related cases" (2004b, p. 4). In this way, legal case-making is a key part of the legal construction of a policy domain, particularly when a chain of cases builds on each other sequentially, thereby carving out new legal and policy terrain, for example, constructing the European common market (Sweet & Brunell, 1998). By looking at some of the most high-profile court cases of the EZ crisis, I analyse how all the legal professionals involved – lawyers, applicants (the actor bringing the case), judges, advocate generals (legal experts of the CJEU) – engage in various forms of boundary work with a view to either attach or detach to the issue (or entity) a legal jurisdiction, that is, a scale of governance such as the national or EU scale.

In the following, I look at two key cases: *Pringle*⁹⁰ and *Gauweiler*.⁹¹ First, the emergence of the *Pringle* case and the legal issues connected to it are elaborated, after which I analyse the boundary work of the legal professionals involved. To that end, I have looked at the arguments which illustrate examples of boundary work. In the second part of the chapter, I look at the emergence of the *Gauweiler* case in the wake of the OMT announcement by the ECB, and the legal issues connected to it are elaborated, after which I analyse the boundary work of the legal professionals involved. Here I also discuss how the *Pringle* case connects up with the *Gauweiler* case in elaborating the legal framework set up by *Pringle* on differentiating economic and monetary policy. Before moving to the analysis, it should be noted that the empirical material analysed in this chapter comprises the court judgements, which are referenced in the footnotes, as well as the legal observations made by the lawyers of the applicants and the EU institutions. These documents were made available to me through a request made to the Legal Service of the Commission via my profile on asktheeu.org.⁹² These documents are publicly available at this website, I therefore cite the title of the documents as they appear there, as well as page numbers, so that the reader can see where the original source is located. Moreover, Mr Pringle's legal team created a website⁹³ with their oral pleadings. This document is also referred to and cited in the footnotes.

8.1 The ESM Treaty before the Court: Pringle's Lament

As the crisis unfolded, the processes of dealing with it involved first haphazardly constructing a bilateral loan agreement – the GLF – and then a heterogeneous framework, the EFSM and the EFSF, within which to deal with the issues of not only giving financial assistance but preventing contagion to other Member States, as well as preventing ‘moral hazard’ (Emmanouilidis, 2010). Finally, with the establishment of the ESM, the EU had now constructed a permanent crisis management framework. With this development came questions about the relationship between the ESM's legal framework and competences vis-à-vis that of the EU legal order (Dawson & de Witte, 2013b; Gocaj & Meunier, 2013; Tuori & Tuori, 2014). As shown in Chapter 6, I conceive of the ESM as an instantiation of a boundary object that has to credibly link the ESM Treaty framework and the EU legal order, in that it has to be a credible financial market institution that can get a triple AAA rating and massive subscription when it issues bonds; *and* it has to be compatible with the EU legal order's large corpus of law including fundamental rights.

⁹⁰ Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756.

⁹¹ Case C-62/14, *Peter Gauweiler and Others v Deutscher Bundestag*, ECLI:EU:C:2015:400.

⁹² See https://www.asktheeu.org/en/request/submissions_made_in_c_6214_gauwe#incoming-19103.

⁹³ See <https://taleof2treaties.tumblr.com/>

Going back to the chapter on EMU, in the Maastricht Treaty negotiations, the Commission had proposed a similar notion of a financial mechanism, but it ended up becoming the much watered down instrument of Article 122 TFEU, which is seen to be temporary (add here also references to the literature to show how other examined this). Now the ESM had ushered in a permanent legal reality where financial assistance in terms of an economic shock would be enabled, however, many believed that it violated the competences of the EU and at the very least it violated the no-bail out clause (Beck, 2014; Tomkin, 2013). This was the substance of the *Pringle* case that went before the CJEU, and in adjudicating these legal questions the Court made a number of significant legal constructions that would go on to inform subsequent cases such as *Gauweiler*. Specifically, the Court engages in boundary work that would seem to consolidate the dual framework of the EU legal order on the one hand, and the ESM crisis management framework on the other.

8.1.1 *Thomas Pringle and the Subversion of the EU Legal Order*

The ESM Treaty went under judicial review before 5 constitutional courts (Fabbrini, 2014), each of which reviewed different norms related to the establishment of the ESM (Fahey & Bardutzky, 2013), with only the Irish Supreme Court making a preliminary reference to the CJEU in the *Pringle* case. The other courts that reviewed the ESM were the German Federal Constitutional Court (FCC), the Austrian Constitutional Court, the Estonian Constitutional Court, and the Constitutional Tribunal of Poland, with all courts validating the ESM (Bardutzky, 2015). Despite this, the fact that only the Irish Supreme Court made a reference to the CJEU could be seen as a “suboptimal” outcome in terms of judicial dialogue between European courts. However, as Bardutzky (2015, p.1771) has pointed out, one reason for this is certainly related to the esoteric nature of the ESM itself in how it mixes international law, EU law as well as giving responsibilities to EU institutions outside the EU legal order; indeed, “the ESM serves as a good example of how awkward the relationship of the new form of law is, on the one hand, with the nation state, and on the other hand, with supranational EU treaty law” (Bardutzky 2015, p.1775). This speaks to the ESM’s boundary object nature, analysed in Chapter 6, and which blends different legal jurisdictions into one legal personality, thereby positioning it in at the intersection of different jurisdictional scales, engendering challenges as to which parts can, and should, be adjudicated on by which jurisdiction.

The *Pringle* case was the first high-profile, and some say critical case, during the EZ crisis, as it set much of the legal groundwork for subsequent cases, such as *Gauweiler*, *Ledra Advertising*, and *Chrysostomides*, and in that way, illustrates the judicial avenue of the legal construction of economic policy. Indeed, the legal

professionals involved, from the lawyers, to the judges to the advocate generals, interact through their practices and enable new legal constructions of how EMU and the crisis framework are to be understood. The *Pringle* case serves as the first step, both chronologically and conceptually in understanding this process of legal construction via the judiciary (Ioannidis, 2016).

The applicant, Thomas Pringle, an MEP at the time, had brought the case before the High Court of Ireland in the context of both the ESM Treaty and the Fiscal Compact Treaty requiring ratification in Ireland.⁹⁴ Mr Pringle was claiming that the Irish Government was unlawfully ratifying the ESM Treaty, as well as the amendment of Article 136 TFEU, without holding a referendum, as is the constitutional process in Ireland. Indeed, a referendum was held for the Fiscal Compact Treaty.⁹⁵ Moreover, he was arguing that the ESM Treaty and the amendment were in violation of EU law and Irish constitutional law.⁹⁶ The High Court rejected his claim, where after he appealed, and so the case went before the Irish Supreme Court,⁹⁷ at which point the Supreme Court made a preliminary reference to the EU Court of Justice under Article 263 TFEU, as the questions brought by the claimant turned on issues of EU law, the clarification of which can only be done by the Court.⁹⁸

In Mr Pringle's observations to the Court, he puts much focus on the principle of the rule of law, and how this principle would be violated if the ESM Treaty were ratified by the Euro-area member states. To this end, his observations make use of vivid language: "It is his belief that these challenges can and must be addressed without doing violence to the Union, its structures and governing principles".⁹⁹ According to Mr Pringle's lawyers, Joe Noonan and Mary Linehan, his specific concerns were:

"that the ESM's stated purpose of protecting the euro would infringe on EU monetary policy which is reserved as an area of exclusive competence for the EU. He argued also that the narrow focus of the ESM on the protection of the currency could run counter to the broader objectives of the EU as set out in Article 2 TEU. He was also concerned at the fact that the ESM would not be subject to the checks and balances carefully stitched into the EU Treaties and that it would not be answerable to the CJEU in the same way as the EU institutions" (Noonan & Linehan, 2014, p. 133)

Essentially, their argument asserts that the functions of the proposed ESM can, and have to, be done

⁹⁴ *Pringle v The Government of Ireland & Ors* [2012] IEHC 296

⁹⁵ See this website set up by Mr Pringle's lawyers with all relevant information and Court documentation at: <https://taleof2treaties.tumblr.com/ECJCase> (Accessed 20 January 2019).

⁹⁶ See Irish Times, "Independent TD takes legal action over EU treaties", 17 May 2012, at <https://www.irishtimes.com/news/independent-td-takes-legal-action-over-eu-treaties-1.520849>.

⁹⁷ *Pringle -v- Government of Ireland & ors* Neutral Citation: [2012] IESC 47.

⁹⁸ Although this does not mean that national courts will not attempt to interpret EU law vis-à-vis their own national laws

⁹⁹ See "Obs ecrites Thomas Pringle", 2012, p.6 at https://www.asktheeu.org/en/request/submissions_made_in_c_6214_gauwe#incoming-19103 (accessed 26 July 2018)

through the EU legal framework. *Otherwise*, the ESM violates EU law in a number of ways.

8.1.2 Starting with Monetary Competence: The Euro is the Object!

One of the first issues for the applicant is that the EU's exclusive competence in the area of monetary policy is violated by the ESM Treaty. According to the applicant, the ESM Treaty is in violation here because it has as its primary objective: to safeguard the financial stability of the euro area (Article 3 ESMT). The euro is the currency of the Eurozone member states, and according to the appellant, "It is manifest from this last sentence that stability support is the *means*; the safeguarding of the financial stability of the euro – or the propping up of the euro – is the object".¹⁰⁰ Here stabilising the euro area is being equated with the stabilising the euro itself, which poses the question: is there a difference between the stability of the *euro area* and the *euro*?¹⁰¹ Mr Pringle implies that there is no difference, and so the "the fundamental and defining purpose of the ESM is rooted in Union monetary policy. The ESM Treaty is intended to safeguard the stability of the euro currency".¹⁰² In this reading, stabilising the euro area via financial assistance entails stabilising the euro currency, and is thereby within the competence of the EU, as stabilising the euro amounts to price stability, which is monetary policy and an exclusive competence of the EU and falls within the mandate of the ESCB. Here the boundary work is **boundary blurring**, as Mr Pringle's lawyers are making the difference between stabilising the euro and stabilising the euro area purposefully ambiguous or opaque. Arguably, as discussed in Chapter 6, the initial formulation by the EU legal and policy professionals who drafted the ESM Treaty was already ambiguous. Nevertheless, the ambiguity was being leveraged by the Pringle legal team.

There are a number of implications that arise from this legal argument. Firstly, it enables Mr Pringle's lawyers to then argue that it violates the principle that the EU has exclusive competence in monetary policy, specifically they point to Article 3(4) TEU which states: "The Union shall establish an economic and monetary union whose currency is the euro", and further point out that "[p]ursuant to Article 3(1)(c) TFEU and Part Three, Title VIII TFEU the Union has exclusive competence over monetary policy for the Member States whose currency is the euro. Consequently, Member States must refrain from acting in that field."¹⁰³ Secondly, if the ESM falls within the exclusive competence of the EU, then the amendment to Article 136 TFEU is also a violation of EU law, as it was done using the simplified revision

¹⁰⁰ See Ibid. p.22 author's emphasis.

¹⁰¹ "The euro area consists of those Member States of the European Union that have adopted the euro as their currency" (See the https://ec.europa.eu/info/business-economy-euro/euro-area/what-euro-area_en accessed 01 April 2020).

¹⁰² See "Obs ecrites Thomas Pringle", 2012, p.22, author's emphasis

¹⁰³ See "Obs ecrites Thomas Pringle", 2012, p.20.

procedure – Article 48(6) TEU – which can only be used for areas of non-exclusive competence (see Article 48(6) TEU).

8.1.3 Focusing on Article 125: the Art of Alternative Arguments

One of the crucial questions of the *Pringle* case was whether the ESM violated the no-bailout clause – Article 125. As mentioned in Chapter 6, the EU legal and policy professionals had attempted to at least confirm legally that the ESM was not in violation of the Treaties by amending Article 136 TFEU to declare that the Eurozone member states could establish a stability mechanism in order to safeguard the stability of the Euro area as whole and subject to strict conditionality. In that regard there was concern, especially from the German government, that the German Constitutional Court (FCC) could pose an issue, but by amending the Treaties it was apparently less likely that this would occur. Nevertheless, in the *Pringle* case, the applicant asserted that it was indeed a violation of Article 125 TFEU, however, this was done in particular way.

A key aspect of boundary work in the area of law is how legal professionals create *alternative* boundary arguments: introduce one legal argument on one side of the legal boundary, e.g. “this action is illegal”; and then have a conditional and alternative argument as well: “if this action is not considered illegal, then it must be done in this alternative way”. This enables the lawyer to be on both sides of the legal boundary. A clear example is from Mr Pringle’s lawyer’s oral observations: “[1] Participation by Member States in the ESM Treaty is incompatible with their obligations under Article 125 TFEU. Were this Court to consider Article 125 as permitting bail-outs to safeguard the euro, then to preserve the Union legal order such bail-outs must take place *within* the Union”.¹⁰⁴ In other words, the argument runs along alternative tracks to increase the probability of achieving one of Mr Pringle’s aims. In this case, if he cannot get the ESM invalidated, then at least he can get the ESM put inside the EU legal framework.

In terms of boundary work, the way the argument is deployed is to use one theory whereby **boundary calibration** is used to maximise the scope of the provision. In this case it is Art. 125 TFEU. In the oral proceedings, Pringle’s lawyer first presents the Commission’s perception of Article 125, which is that “guarantees may not be given to lenders for the debt of a Member State nor are other Member States or the Union allowed to take over a debt and commit themselves directly vis-à-vis the lenders to reimburse

¹⁰⁴ See “Pringle Oral Submission ECJ”, 2012, p.3 at <https://taleof2treaties.tumblr.com/>

them”.¹⁰⁵ Mr Pringle’s lawyer rephrases it as the Commission suggesting “that Article 125 (second sentence) is an exemption clause, warning creditors that Member States cannot be held collectively liable for default by one of them”.¹⁰⁶

Mr Pringle’s lawyer then contends that this is incorrect based on the interpretation of Article 125’s wording or objective: “125 is expressed broadly – it certainly prohibits guarantees and the taking on of ‘liability’, but it also precludes the assumption of ‘commitments’ more generally. These terms are used to catch not only direct, but also indirect, forms of assistance”.¹⁰⁷ The **boundary calibration** he is doing is the exact opposite of the Commission; I argue that he is maximising the scope of the provision to attach to any form of assistance. Critically, he then makes a boundary between Article 125 and Article 122, in order to show that the reason why Article 125’s boundary can be calibrated as such is precisely because it is connected to the specific type of assistance that the Treaty *does* allow, as stated by Article 122: “This is corroborated by the fact that Article 122 permits financial assistance only in limited stated circumstances”,¹⁰⁸ that is, circumstances beyond the control of the Member State.

He further differentiates another form of assistance, the Balance of Payment (BoP) assistance allowed under Article 143 TFEU for non-euro area member states, and finally another form of prohibition under the Treaties: Article 123 TFEU, which prohibits “[o]verdraft facilities or any other type of credit facility with the European Central Bank or with the central banks of the Member States” (Article 123 TFEU). This **boundary making** work that differentiates what is and what is not allowed in regard to financial assistance under the Treaties means Mr Pringle’s lawyer can construe a legal reality which is detailed enough to not only be coherent in accounting for various instances of *when* assistance can and cannot be done; but also means he is maintaining the boundary between the EU legal order and its potential avenues of recourse on the one hand, and the ESM’s form of financial assistance on the other. On which he can conclude that this latter form of financial assistance be seen as illegal by the fact that it is *excluded* as a possibility under the Treaties: thus, the distinction makes it a violation of EU law.

To that end, he makes boundary between Articles 122, 123, 125, and 143 to show that the existence of the ESM as a financial assistance mechanism violates Article 125 based on 125’s connections to exempted

¹⁰⁵ See “Written Observations”, European Commission, 13 September 2012, p.20.

https://ec.europa.eu/dgs/legal_service/submissions/c2012_370_obs_en.pdf

¹⁰⁶ See “Pringle Oral Submission ECJ”, 2012, p.4-5 at <https://taleof2treaties.tumblr.com/>

¹⁰⁷ Ibid., p.5

¹⁰⁸ Ibid., p.5

forms of assistance (Articles 122 and 143), i.e. cases when assistance is allowed, and cases when it is not allowed (Articles 123 and 125). Overall, this is to **maintain the boundary** of EU legal jurisdiction, as it shows how this jurisdiction accounts for various instances of financial assistance so as to prohibit others: guarantees and commitments. To tie this up, he ends with: “Member States may not step outside the Union legal order to set up an institution to perform tasks within the scope of Union law but which are expressly prohibited by the Union Treaties. If bail-outs are prohibited within the Union, they must also be prohibited outside the Union”.¹⁰⁹ This is said to be within the meaning of CJEU case-law, specifically the case-law of *Amsterdam Bulb*: “Member States may not [...] either directly or through the intermediary of organisations set up or recognized by them, authorize or tolerate any exemption from Community law”.¹¹⁰

The Council legal service countered this with an argument that was premised on the notion that the Treaties envisaged an economic constitution.¹¹¹ In the legal analysis of the Council lawyers, they point out that, in terms of the text of Article 125 TFEU – namely, that states and EU institutions “shall not be liable for or assume the commitments” of other Member States – there is no definition of these terms in either Article 125 TFEU or secondary legislation and thereby poses the question “Do they prohibit all kinds of financial assistance?” (Council, 2012, p.19).

The Council lawyers simply point out what is not in the textual definition of Article 125 TFEU: “This prohibition does not extend to types of financial assistance, such as loans or credits, which are not included in the letter of Article 125(1) TFEU. The granting of a loan or a credit, where the lenders assume a limited liability or risk and the beneficiary Member State is held to pay back the principal and interest, does not amount to *[being] liable for or [assuming] the commitments of*” other Member States [...] assistance in the form of loans must not circumvent or defeat the objective of budgetary discipline that the provision is intended to ensure” (Council 2012, p.19). Here the lawyers are engaging in **boundary calibration** whereby they narrow the scope of Article 125(1) TFEU to not include ‘loan’ or ‘credit’. Moreover, they are sure to make clear that such a form of assistance must still follow the objective of budgetary discipline.

The Court followed the Council lawyers on this and stated that based on “the wording used in Article 125 TFEU, to the effect that neither the Union nor a Member State are to ‘be liable for ... the commitments’ of another Member State or ‘assume [those commitments]’, that that article is not intended

¹⁰⁹ See “Pringle Oral Submission ECJ”, 2012, p.7 at <https://taleof2treaties.tumblr.com/>

¹¹⁰ Case 50/76, *Amsterdam Bulb BV And PRODUKTSCHAP VOOR SIERGEWASSEN* (Ornamental Plant Authority).

¹¹¹ The notion of an economic constitution of the Treaties has been the subject of scholarly debate, for example, Tuori & Tuori (2014).

to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State”.¹¹² It further interpreted the objective by referring to the Maastricht Treaty preparatory work that the Article “ensures that the Member States remain subject to the logic of the market when they enter into debt, since that ought to prompt them to maintain budgetary discipline”.¹¹³ And then the Court ties this interpretation of Article 125 to the aim of the ESM by stating: “the activation of financial assistance by means of a stability mechanism such as the ESM is not compatible with Article 125 TFEU unless it is indispensable for the safeguarding of the financial stability of the euro area as a whole and subject to strict conditions”.¹¹⁴ In this way, the boundary work draws together the type of assistance allowed (loan or credit), the conditions under which it is allowed, and how the ESM objectives align with the Court’s interpretation of Article 125(1) TFEU. Crucial for assistance to be compatible with Article 125 is strict conditionality as it is seen as the way to ensure budgetary discipline. In the next section, I look at how the conditionality is legally constructed.

8.1.4 Establishing Economic Competence: Your Objectives Define What You Are

The next move is then to show that if the ESM’s form of assistance is not prohibited by EU law, then it must be because it is included under EU competence: “Were this Court to consider Article 125 as permitting bail-outs to safeguard the euro, then to preserve the Union legal order such bail-outs must take place within the Union”.¹¹⁵ In other words, he then attaches EU jurisdiction to the form of financial assistance suggested by the ESM, as its objective is to safeguard an object of EU competence: the euro.

“This case is not about ‘economic competences’ in the abstract. It is specifically about economic coordinating competences involving the provision of financial assistance for the purpose of saving the single currency. **The euro is a core element of EMU.** The euro is intrinsically and fundamentally a part of the Union Treaties – it is a matter for the Union.”.¹¹⁶

As Mr Pringle’s lawyer argues, the ESM Treaty has Article 13(3) asserting that the ESM has to be in compliance with the economic policy of EU. Then if it is compatible, and relating back to the argument made above about which types of assistance the Treaties allow in terms of economic policy, then this should be under the Treaties as well. Indeed, he refers to the opinions on this matter of the ECB and the European Parliament, who both point to the ESM’s form of assistance being possible within the Union,

¹¹² Case C-370/12, para. 130.

¹¹³ Ibid. para. 135

¹¹⁴ Ibid. para. 136

¹¹⁵ See “Pringle Oral Submission ECJ”, 2012, p.3

¹¹⁶ Ibid., p.9, author’s emphasis.

if not at that time, then in the future.

In order to carve out exactly what is meant by Article 136(3) TFEU so as to show that it does not add a competence to the Union and is not related to an exclusive competence of the Union, the Council lawyers focus on the language used: “its first sentence recalls the capacity (but not the obligation) of euro area Member States to create a mechanism of financial assistance, to be activated if indispensable to safeguard the stability of the euro area as a whole; its second sentence describes that the granting of assistance “will” (but not “shall”) be made subject to conditionality”.¹¹⁷ The emphasis of the language points to their strategy to show that there is no obligation to make a stability mechanism.

The Court however concerns itself with the questions asked by the referring court and may take the observations into consideration. In the judgement, the Court first looks at “whether Decision 2011/199, in so far as it amends Article 136 TFEU by adding a paragraph 3 which provides that ‘[t]he Member States whose currency is the euro may establish a stability mechanism’, grants to Member States a competence in the area of monetary policy for the Member States whose currency is the euro”.¹¹⁸ One of the first things the Court notes is that there is no definition of monetary policy in the FEU Treaty, and simply refers to the objectives of monetary policy. By this, it makes its examination based on “whether or not the objectives to be attained by the stability mechanism whose establishment is envisaged by Article 1 of Decision 2011/199 and the instruments provided to that end fall within monetary policy”.¹¹⁹

It thereby looks at the purpose of monetary policy, and defines it by its objective of price stability. By doing this, it can look at the objective of the stability mechanism envisaged by Decision 2011/199, and assert that, because its objective is to ‘safeguard the stability of the euro as a whole’, it is “clearly distinct from the objective of maintaining price stability, which is the primary objective of the Union’s monetary policy”. It further qualifies that “[e]ven though the stability of the euro area may have repercussions on the stability of the currency used within that area, an economic policy measure cannot be treated as equivalent to a monetary policy measure for the sole reason that it may have indirect effects on the stability of the euro”.¹²⁰ This is notable because with this point, the Court has implicitly defined the ESM as an “economic policy measure” by the possible indirect effects of the ESM with the effects of an economic policy measure, without actually having defined it yet; indeed, the Court will go on to define

¹¹⁷ See “Obs écrites Conseil”, 2012, p.13 at

https://www.asktheeu.org/en/request/submissions_made_in_c_6214_gauwe#incoming-19103

¹¹⁸ Case C-370/12, para. 52

¹¹⁹ Case C-370/12 para. 55.

¹²⁰ Case C-370/12, para. 56.

the mechanism as falling under economic policy later, but here it has already made the link: safeguarding the stability of the euro area as a whole is economic policy if we follow the **boundary making** logic here.

The Court then notes all the regulations taken under the Council and the European Parliament which aim to ‘strengthen economic governance’ as these fall under the coordinated economic competence of the Member States and the Union with the intention of consolidating “macroeconomic stability and the sustainability of public finances”.¹²¹ In other words, it is further clarifying objectives for the sake of delineating out how the ESM, as envisaged in the contentious Decision, can be defined.

It further explains that this new regulatory framework as well as “the provisions in the chapter of the FEU Treaty relating to economic policy, in particular Articles 123 TFEU and 125 TFEU, are **essentially preventive**, in that their objective is to reduce so far as possible the risk of public debt crises, the objective of establishing the stability mechanism is **the management of financial crises** which, notwithstanding such preventive action as might have been taken, might nonetheless arise”.¹²² Thus, it has now made a boundary between objectives, i.e. preventing public debt crises versus managing financial crises, with the former being under the Union jurisdiction. However, based on this it further states:

“the instruments provided in order to achieve those objectives and the close link between that mechanism [EMS], the provisions of the FEU Treaty relating to economic policy and the regulatory framework for strengthened economic governance of the Union, it must be concluded that the establishment of that mechanism falls within the area of economic policy”.¹²³

The ESM is thus defined by a specific objective of managing financial crises, but because of its ‘close link’ to the EU provisions, it falls within economic policy. This is simply to make a clear boundary between the ESM and monetary policy.

It further delineates the assistance mechanisms mentioned under the Treaties, as well as by Mr Pringle’s lawyer, namely Art. 122(2) TFEU and Art. 143(2) TFEU. For the former, the Court notes that it “confers on the Union the power to grant *ad hoc* financial assistance to a Member State which is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control”, but that it “does not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that decision”¹²⁴ because of its permanent nature. Finally,

¹²¹ Ibid. para. 58.

¹²² Ibid. para 59, emphasis added.

¹²³ Ibid. para. 60.

¹²⁴ Case C-370/12, para.65.

for Article 143(2), the Court asserts that it indeed “enables the Union, subject to certain conditions, to grant mutual assistance to a Member State, [but] that provision covers only Member States whose currency is not the euro”.¹²⁵ Thus, the ESM as envisaged by the contested Decision is unique by way of its different objective to that of the objectives of the mechanisms of Art. 122(2) and Art. 143(2), however, because of its ‘close links’ to Union economic policy, it is still economic policy, meaning that the Decision does fulfil the criteria of Article 48(6) TEU that it only concerns Part Three of the FEU Treaty and its proposed revision can be done via the simplified revision procedure.

This is where the legal construction of economic policy becomes more observable, as the Court has to show legally how objectives of economic policy, vis-à-vis monetary policy are defined by legal competence, coordinated for the former, but exclusive for the latter. The boundary work here is about showing how, because the objective of the ESM can be said to be managing financial crises, nothing in the Treaties enables legal attachment to the ESM, as assistance mechanisms under the Treaties have different *objectives*. Thus, it is economic policy because of its close links to the EU provisions of economic policy, so it cannot be monetary policy, but it cannot be under the EU Treaties, because of its objective: to safeguard the financial stability of the euro area. This boundary work seems to place the ESM in a grey-zone which indicates **boundary blurring**; the ambiguity here is that it is both of the EU in a sense, as it is economic policy and it concerns the Eurozone or euro area, but it is outside the EU legal order. Moreover, this **boundary making** by way of objectives has implications for the high degree of discretion that can be given to technical entities, for example, the ESM. This will be more clear in the *Gauweiler* case discussed later on, when the legal point is applied to the ECB in its OMT programme.

8.1.5 Constructing the Boundaries of Conditionality

The next crucial question raised by *Pringle* was on whether the ‘strict conditionality’ which is provided for under the ESM Treaty, is “equivalent” to the Council recommendations which are issued under Article 126 TFEU and confer on the Commission and the Council specific roles; for the former it is monitoring compliance with Treaty criteria national budgets, and for the latter it is making recommendations with the aim of remedying excessive deficits, after which sanctions can be brought. The point of equivalence is that the “Council recommendations would impose requirements on a Member State running an excessive government deficit to adopt such economic and budgetary measures as necessary to ensure

¹²⁵ Ibid., para. 66.

reduction of the government deficit”,¹²⁶ which Mr. Pringle’s lawyer argues is equivalent to the notion of conditionality, i.e. imposing conditions in order to get financial assistance.

On this question, the Court recognises that while the ESM Treaty provides for conditionality, it maintains that conditionality “does not constitute an instrument for the coordination of the economic policies of the Member States, but is intended to ensure that the activities of the ESM are compatible with, inter alia, Article 125 TFEU and the coordinating measures adopted by the Union”.¹²⁷ In order to legally ensure that conditionality – as set down in an MoU – is compatible with EU law, the Council adopts decisions under Article 136 TFEU. In any case, the point is that the notion of conditionality is intended to ensure compatibility with Article 125.

The Court continues that the aim of “strict conditionality to which all stability support provided by the ESM is subject is to ensure that the ESM and the recipient Member States *comply with measures adopted by the Union in particular in the area of the coordination* of Member States’ economic policies, those measures being designed, inter alia, to ensure that the Member States pursue a sound budgetary policy”.¹²⁸ Thus, the Court sees conditionality as being a modality that ensures that the ESM’s granting of financial assistance is compliant with EU law and specifically the measures adopted in the area of economic policy. It further states that “the conditions to be attached to the grant of such support to a Member State are, at least in part, **determined** by European Union law”.¹²⁹

Conditionality as perceived by the Court seems to be as a way to ensure compatibility with EU law, and further that EU law partly determines these conditions. Thus, the boundary work being done here link conditionality to the EU legal order but it is excluded from the EU legal order in that the ESM as an entity seems to be responsible for it, which according to legal scholars creates indeterminacy (Kilpatrick, 2017; Tridimas, 2019). As the Court states: “the conditionality prescribed nonetheless does not constitute an instrument for the coordination of the economic policies of the Member States”,¹³⁰ so it does not fall under economic policy of EU. However, to enable policy conditionality via the EU, Article 136(1) is used as a legal basis, because the conditions, as stipulated in an MoU between the ESM and a Member State are put into a Council Decision (and later a Council Implementing Decision) to ensure consistency with EU law, and as stated by a respondent in Chapter 6, to protect EU law and the contents of EMU.

¹²⁶ See “Obs ecrites Thomas Pringle”, 2012, p.25 at

https://www.asktheeu.org/en/request/submissions_made_in_c_6214_gauwe#incoming-19103

¹²⁷ Case C-370/12, para. 111.

¹²⁸ Ibid., para. 143, emphasis added.

¹²⁹ Ibid., para. 174, emphasis added.

¹³⁰ Case C-370/12, para. 111.

However, this was noted as a “screening mechanism” (A4 interview – Commission lawyer) and thus is not the origination of policy conditionality, from what can be understood in the Court’s interpretation, as well as how the Commission legal professionals see it.

In *Pringle*, policy conditionality as a governance modality is seen to arise outside EU law and is only included to the degree that it defines how the ESM as a financial assistance mechanism is compatible with Article 125, as well as other provisions of economic coordination under the Treaties. The Court further stipulates that conditionality has to be in line with EU law generally speaking and that the Commission must make sure of this,¹³¹ but the overall effect is that conditionality is not anchored to a jurisdiction. In sum, the judgement constructs conditionality as a modality of compatibility the existence of which lies outside EU law in the sense that its source is in the ESM Treaty framework and presumably the responsibility of the ESM. However, as mentioned previously, the ESM Treaty simply states that “the Board of Governors shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of **negotiating**, with the ESM Member concerned, a memorandum of understanding (an “MoU”) detailing the conditionality attached to the financial assistance facility” (Article 13(3) ESM Treaty), and Article 136(1) TFEU is apparently used as legal base to ensure compatibility with EU law, that is, like a screening mechanism. Thus, policy conditionality is in one way or another rendered in both jurisdictions, yet it does not seem to be substantially anchored in either: perhaps it is in a recombinant zone where the ESM framework and the EMU dissolve into each other (Stark, 1996).

The result is that policy conditionality cannot be attributed or imputed to any entity in terms of EU jurisdiction or indeed the international law realm of the ESM. This perhaps implies that conditionality is attributed to the Member State that has to implement it in order to receive financial assistance, and is thus at the national level. In any case, the legal construction of conditionality is an example of **boundary blurring**, as its specific authorship is made purposefully opaque. This issue will come up again, when citizens who are directly affected by conditionality measures seek remedies for their losses. Then, the lawyers representing them will attempt to attribute the conditionality measures to various institutions and groups, the details of which will be analysed in the next chapter. In the next section, I look at the *Gauweiler* case, which brings up issues of economic and monetary distinction from *Pringle*.

¹³¹ The Commission has to check the compatibility: “it is apparent from Article 13(4) that the Commission is to check, before signing the MoU defining the conditionality attached to stability support, that the conditions imposed are fully consistent with the measures of economic policy coordination” (Pringle para. 112).

8.2 From Pringle to Gauweiler

Having analysed the boundary work related to the Pringle case, in this section I will now look at the *Gauweiler* case.¹³² What is interesting about this case is not just the controversial nature of the ECB's announcement of the OMT, but also the German Constitutional Court's (FCC)¹³³ conduct in making its very first preliminary reference to the Court of Justice, and the concerns of the German lawyers litigating for the applicants, which the EU legal professionals take seriously and deploy the technical capacity of the ECB's economists so as to defend the OMT programme (F2 interview – ECB lawyer). Moreover, the Court of Justice (the Court) engages in boundary work that follows on from the Pringle case in the differentiation of economic and monetary policy, which confers a lot of discretion to the ECB in the interpretation of its mandate, while the Court still confirms judicial control over the ECB.

8.2.1 *The Gauweiler Preliminary Reference*

On September 6 2012, the ECB sent out a press release regarding the technical framework conditions for their Outright Monetary Transactions (OMT) programme: “regarding the Eurosystem's outright transactions in secondary sovereign bond markets that aim at safeguarding an appropriate monetary policy transmission and the singleness of the monetary policy”.¹³⁴ It was further stipulated that there would be no quantitative restriction on the size of the transactions. Many saw this as the moment when markets started to respond to EU policy responses to the crisis – it was dubbed “Draghi's Bazooka” (Comments, 2014). At the subsequent press conference, a journalist asked the following question:

Question: Mr Draghi, you repeated that the euro is irreversible. What gives you the democratic legitimization, the authority to say that? Because I have looked it up in the Treaty. It does not say anywhere that it is the role of the ECB to decide what kind of currency the European countries have. Thank you.

President Draghi: What I said exactly is that – and I repeat what I said in London the first time – we will do whatever it takes within our mandate – within our mandate – to have a single monetary policy in the euro area, to maintain price stability in the euro area and to preserve the euro. And we say that the euro is irreversible. So unfounded fears of reversibility are just what they are: unfounded fears. And we think this falls squarely within our mandate.¹³⁵

What is notable about this answer by President Draghi is that he **makes a boundary** between the notion

¹³² Case C-62/14, Peter Gauweiler and Others v Deutscher Bundestag, ECLI:EU:C:2015:400.

¹³³ Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 2728/13, (Jan. 14, 2014)

¹³⁴ See ECB, “Technical Features of Outright Monetary Transactions Framework”, 6 September 2012 at https://www.ecb.europa.eu/press/pr/date/2012/html/pr120906_1.en.html

¹³⁵ ECB Press Conference with ECB President Mario Draghi, 6 September 2012, see at conference proceedings <https://www.ecb.europa.eu/press/pressconf/2012/html/is120906.en.html> (Accessed 20 March 2020).

that euro can be reversed and the notion that euro is irreversible. The symbolism behind this is poignant: the possible dissolution of the Eurozone on the one hand; or its monolithic maintenance on the other. By making this boundary, President Draghi is enabling a rather broad justification for action: if it seems at all as if the singleness of the monetary transmission to the Eurozone is fractured, then the ECB will do anything to stop this from happening. However, many were concerned at the legal implications despite its success at calming markets. Jens Weidmann, the Bundesbank president, had publicly criticized any bond buying practices by the ECB, and Jürgen Stark, German chief economist left his position on the ECB's executive board in an act of protest in September 2011 (Grimm, 2015). As discussed in Chapter 4 on EMU, two German ECB policy professionals had quit over the ECB's bond buying programmes, and now the new Bundesbank president was publicly criticising it. Peter Gauweiler, his representatives, as well as Schachtschneider and his clients, filed complaints together with members of the German parliament, on the illegality of the OMT and to prevent German government participation.

In many ways, this was an opportunity for the FCC to deploy its *ultra vires* doctrine, as first established in the Maastricht judgement of 1993 (Mayer, 2014). Indeed, according to a Commission lawyer present at the FIDE congress in 2014, the FCC judges were not shy about their stance:

A1: the fact that the judges of the FCC were very open in the expression of their views in the press, that was for us incredible. And we had for instance, in 2014, we had the FIDE conference in Copenhagen [...] and the President [of the FCC], and I think two judges of the FCC, were in the room when we had three or four days of discussion, they were in the room and they intervened openly to express their position, to say, you know this [the OMT] is completely illegal...

N: Illegal?

A1: Illegal! In a way they were anticipating... it was really striking because the judges from the EU court were there as well, much more careful, and von Danwitz couldn't resist, if I remember correctly, to say a bit more, but the others, especially President Skouris, they were very careful not to anticipate...

It is perhaps an illustration of the different types of legal cultures between the national level in Germany and the legal culture in the EU. In terms of the former, it is being more open about one's legal stance; while in the latter, it is about being more guarded. In any case, during the trial in Germany, Jens Weidmann, the Bundesbank president, testified as an expert witness and said that OMT would amount to the financing of government debt, which is illegal under EU law per Article 123 TFEU.¹³⁶ The concern from the national view was that it threatened the overall budgetary responsibility of the German parliament. However, given that the prohibition of monetary financing of member states was an EU legal

¹³⁶ See BVerfG – Federal Constitutional Court, 2 BvR 2728/13, (Jan. 14, 2014) at para. 13

issue, a referral had to be made by the FCC to the Court of Justice. And in fact, in the *Honeywell* judgement of the FCC, and had modified its ‘*ultra vires*’ doctrine to be conditional on whether the CJEU would invalidate a contested EU act or not, thereby anticipating a preliminary referral (Mayer, 2014).

Thus, regardless of what the CJEU could have ruled, the FCC had reserved the right to reject a CJEU ruling. In any case, one of the contentious issues of the case concerned whether judges were at all in a position to rule on monetary policy and what central banks should be allowed to do. Some economists argued that having the FCC weigh in on monetary policy transmission mechanisms undermines the independence and credibility of the central bank to act.¹³⁷ In fact, in a dissenting opinion, Justice Gertrude Lübke-Wolff of the FCC asserted her belief that her colleagues were exceeding their “judicial competence”.¹³⁸ Justice Gerhardt also issued a dissenting opinion, asserting the complaints as inadmissible.

Moreover, the content of the preliminary referral was derided both in terms of its tone as not sincere and conflictual (A3 interview – Commission lawyer), others called it “the convoluted preliminary question” (F1 interview – ECB lawyer). Specifically, it was the conditions that the FCC had put down in the referral: “after having said all the bad things about OMT and how illegal it is, then they said, well simply OMTs could be considered compliant with EU law, if the following 3 conditions were fulfilled. Problem was that those conditions were badly thought through, and they were not the right ones. And so the Court of Justice did not accept those, and we didn’t either” (A5 interview – Commission lawyer). Nevertheless, the *Gauweiler* case was considered extremely serious:

“It was- and it was I would say together with the *Pringle* case, it was probably the single case in the Court of Justice that, here in the legal service, we took most seriously. So I invested incredible amount of time in preparing it, together with [A1], and also with [A2] at the time, and with the ECB people, many, many meetings and video conferences. Yeah, we took it very, very seriously” (A5 interview – Commission lawyer).

But what exactly were the applicants arguing in the case before the FCC? According to the German lawyers involved, it was at principle about democratic legitimation, just as the Maastricht judgement and Lisbon Treaty case were about. Specifically, in the case of OMT, the lawyers were arguing that the ECB as such has no democratic legitimation, but rather it has expert legitimation, and because of this its power must be carefully considered and limited, especially when it is found to be in violation of its mandate,

¹³⁷ See VoxEU, “The wisdom of Karlsruhe: The OMT Court case should be dismissed”, 12 June 2013, Giavazzi et al., at <https://voxeu.org/article/wisdom-karlsruhe-omt-court-case-should-be-dismissed> (accessed 10 January 2020).

¹³⁸ BVerfG, 2 BvR 2728/13 (Lübke-Wolff, dissenting at para. 1).

which the applicants argued was the case for the OMT.

In what follows, I will look at three areas of interest that the case deals with which are of relevance to this thesis and the notion of legal construction. First, I look at the argument of the applicants and how this is connected to German historical and cultural perspectives of economic governance and why legal control is salient in that regard and how the EU lawyers and the Court of Justice deal with it. Second, the issue of technical evidence is discussed with regard to the ECB's defence of the OMT, which also speaks to the theme of how the technical and the legal are married together in monetary policy.

8.2.2 *Full Judicial Control*

According to one of the German lawyers involved, democratic legitimation means that if a decision can be taken that has great impact on policy, then it is only democratic if there is responsibility linking it to parliament. The special characteristic of the ECB is that it is politically independent, and according to one of the lawyers for the applicants (G3 interview – private lawyer), this is a good thing in his view, as it ensures that the ECB is not under the political interests of any member states. As discussed in previous chapters, the ECB has a very high level of independence so that it can concentrate on its mandate of price stability. That is why the EU treaties guarantee ECB said independence. In this way, there is no democratic legitimation for the ECB, because it is justified by its special independent characteristic, according to one of the lawyers of the applicants (G3 interview – private lawyer). In other words, as a non-majoritarian institutions, it arguably has legitimacy in terms of the outcomes it can ensure, i.e. *output* legitimacy (Schmidt, 2016). The lawyer's point is that this justification has consequences for how the ECB handles its mandate: if the ECB is found to be *ultra vires* in its conduct, then the justification of lack of democratic legitimation based on independence does not hold and it becomes a constitutional problem, in that overstepping its mandate becomes a problem for democracy: the principle of democracy being infringed (G3 – German private lawyer). However, it should be noted that this argument is coming from a German constitutional law perspective, as it follows a doctrine created by the FCC called constitutional identity control (Schorkopf, 2009), which can appear together with its 'ultra vires' doctrine.

Another key element was the fact that some of the legal and policy professionals involved in pushing the case, i.e. the applicants and their lawyers, were the same group of actors involved in the Maastricht case

in 1993,¹³⁹ the case against the Euro in 1998,¹⁴⁰ the Lisbon case in 2009,¹⁴¹ and the cases against the EZ crisis policy measures, the OMT included, all of which came before the FCC. As a DG ECFIN legal professional commented, this group of German lawyers seemed to be “specialising in bringing anything to court” (C1 interview). However, there were particular historical and cultural reasons for this, which were not lost on the German lawyers who worked for the EU institutions:

“in the end, it’s this German approach, constitutional approach, we think a lot about limits, you know why? This is historically driven, limits of power, limits of state power, you know, after the second World War, that was the crucial principle which characterises our constitution and many- our general thinking in law as well, limits is always a very formal, strict, approach, you find it in competition law and other areas as well [...] I think on the Union level there’s not so much of a- there is a principle of restrictive competences, but it’s more functional, the interpretation is more functional than we are used to in Germany” (F2 interview – ECB lawyer).

Indeed, as another lawyer said, the FCC is a post-World War II institution that pays tribute to Germany’s historical trajectory (G5 interview – private lawyer). In this way the limits of government power and the importance of democratic legitimation are very salient in the German context, and as mentioned in Chapter 4, the issue of price stability – in terms of the notion of stability community – in light of the hyper-inflation and currency changes that have occurred in Germany, mean that ECB conduct is taken very seriously. This is reflected in the way that the CJEU re-states the complaints: “the applicants in the main proceedings submit (i) that the OMT decisions form, overall, an *ultra vires* act inasmuch as they are not covered by the mandate of the ECB and infringe Article 123 TFEU and (ii) that those decisions breach the **principle of democracy** entrenched in the German Basic Law (Grundgesetz) and thereby impair **German constitutional identity**”.¹⁴²

And given the tone of the reference from the FCC – i.e. indicating its serious doubts about the legality of the OMT, the lawyers of the ECB and the Commission knew that they had to take the situation very seriously. One of the Commission lawyers explained that they were very sure to make observations to the CJEU that took the concerns of the FCC seriously, because they knew that they had to show that limits to power do indeed exist at the EU level and are taken seriously:

“You know, in making a judgement that shows that the Karlsruhe [the FCC] concerns were taken seriously. And that there are legal limits flowing from EU law for ECB action and that there can be judicial control, credible judicial control. That was the challenge. For example, the Italian government in those proceedings pleaded that it was all inadmissible, and the Court should just dismiss the Karlsruhe reference as inadmissible. Others pleaded

¹³⁹ Karl Albrecht Schachtschneider, a public law expert;

¹⁴⁰ Karl Albrecht Schachtschneider, Joachim Starbatty, Wilhelm Hankel, Wilhelm Nölling

¹⁴¹ Peter Gauweiler, Dietrich Murswiek, and Wolf-Rüdiger Bub.

¹⁴² Case C-62/14, ECLI:EU:C:2015:400, para. 6 emphasis added.

that because of the independence of the central bank, there is no control. I mean, I'm simplifying a little bit but only a little bit, and we stayed far away from that and we instead pleaded that, despite the ECB's independence, there's full judicial control, full, we said full judicial control over Article 123 and over the limits of the competence. And we invented, or we developed this approach of the guarantees and the safeguards that an ECB programme has to have, and we developed all kinds of safeguards that we said that OMTs have, and that's what the Court followed, and that allowed the Constitutional Court [Karlsruhe] to basically accept" (A5 – Commission lawyer)

And indeed, the Court made clear that it had judicial review power: "[i]n order to ensure that the principle of conferral is complied with, the acts of the ESCB are, on the conditions laid down by the Treaties, subject to review by the Court (see, to that effect, judgment in *Commission v ECB*, C-11/00, EU:C:2003:395, paragraph 135)".¹⁴³ Notably, the case-law being referenced here is the OLAF case, which was discussed in the Chapter on EMU. Recalling OLAF from 2003, the ECB lawyers had attempted to argue that it was a legal community in and of itself, within the EU legal order, and thus its independence was absolute, to which the Court asserted that it did in fact have review power over the ESCB.

In this way, the Court was consolidating the legal construction of the ESCB position in the economic governance structure by asserting that there was full judicial control over ESCB acts, which would limit its power. In this way, no technical agency, even one as independent as the ECB, can be beyond legal control. In this way, technical modalities are seen to be subordinate to legal principles, such as judicial review. Nevertheless, the ECB's high level of independence is predicated on its specialised technical capacity to make monetary policy with the objective of price stability. In the next section, I will look at how the Court legally constructs a distinction between economic and monetary policy.

8.2.3 *Distinguishing Economic and Monetary Policy*

The next issue was how to differentiate economic and monetary policy. As mentioned, the Court had established jurisprudence in *Pringle*, which meant the lawyers of the EU institutions and especially the ECB could draw on the *Pringle* judgement in making their observations for the OMT. As one of the ECB lawyers said: "*Pringle* was one of the main authorities for our case" (F2 interview – ECB lawyer). Indeed, recalling the *Pringle* judgement, the Court had said that the objective of the ESM, which was financial assistance, dictated that it was an economic policy objective, regardless of whether this may have had effects on monetary policy. Similarly, the ECB lawyers could argue that the objective of OMT was purely monetary policy, i.e. it was to ensure the singleness of monetary transmission. Its having effects on economic policy, or fiscal policy in terms of affecting the budgetary position of the state, did not change

¹⁴³ Ibid., para. 41.

the nature of the OMT.

Indeed, the Court referenced *Pringle* case-law on this point: “It must be pointed out in this regard that the FEU Treaty contains no precise definition of monetary policy but defines both the objectives of monetary policy and the instruments which are available to the ESCB for the purpose of implementing that policy (see, to that effect, *Pringle*, C-370/12, EU:C:2012:756, paragraph 53)”.¹⁴⁴ It is clear that *Pringle* has certainly set the ground for questions of distinguishing economic and monetary policy in that it seems to be the standard for judging whether a policy is economic or monetary, namely in terms of its stated objective: “in order to determine whether a measure falls within the area of monetary policy it is appropriate to refer principally to the objectives of that measure. The instruments which the measure employs in order to attain those objectives are also relevant (see, to that effect, judgment in *Pringle*, C-370/12, EU:C:2012:756, paragraphs 53 and 55)”.¹⁴⁵ In the case of OMT, its stated objective is of course to ensure ‘an appropriate monetary policy transmission and the singleness of the monetary policy’, as mentioned above.

In this way, during the crisis, we have seen two instruments constructed, both of which were accused of being the opposite of their stated objective; namely, the ESM was accused of having a monetary policy role, and the OMT was accused of having an economic policy role. In the end, it seems that resolving this issue was left to the Court, which is not necessarily a logical outcome. When asking a Commission lawyer whether it made sense that judges decide the difference between monetary and economic policy, he said:

“but they have to be separate, because under the law, they are separate, and it’s even a founding feature of the Treaties that you have to distinguish between monetary policy, which is for the ECB, and economic policy, which is not for the ECB, and which is for the democratically-elected members of the Council of the national governments. Yeah, so we had to devise a test of distinguishing. And yeah, the Court followed it” (A5 interview – Commission lawyer)

This is fairly undramatic, however, it leads to perhaps a more critical question about what the law can be expected to address in crisis conditions. As noted by dissenting FCC judge Lübbe-Wulff in the Gauweiler case before the FCC, should judges be in a position to “make a decision with incalculable consequences for the operating currency of the euro zone and the national economies depending on”; an issue which she believes “appears as an anomaly of questionable democratic character. No such anomaly would

¹⁴⁴ Case C-62/14, ECLI:EU:C:2015:400, para. 42

¹⁴⁵ Ibid., para.46

impend if the present decision were to be read as not envisaging any serious consequences”¹⁴⁶

This is an interesting point, and points to the difficulty of raising perceived legal issues in the face of ‘incalculable consequences’. And surely the break-up of the Eurozone would have an incalculable cost? This poses an interesting question on boundary work in terms of law, in that it poses the issue of whether there are some critical issues that cannot be dealt with in terms of a legal question, e.g. that a monetary policy instrument may infringe democratic legitimation and thereby the rights of citizens, because the consequences that answering that legal question – which the FCC certainly *wanted* to answer – could unleash a catastrophe. In this way, the judge was **making a boundary** between what the law can normatively be asked to address, and what it cannot be asked to address, e.g. the possible break-up of the Eurozone. Nevertheless, a reference was made to the CJEU, and it gave its answer. However, given the above analysis of what the Commission and ECB lawyers knew to be the salience of the limits of power in Germany, especially the limits of power that constitutional law is expected to set in terms of Germany’s post-war constitutional court, means that this question of how to show that there is a limiting factor to agency power at the EU level has to be answered. In this case, it is by judicial review by the Court of Justice.

Summary of Findings

In this chapter, I look at two high-profile case that went before the Court of Justice. In Pringle, the Court validated the creation of the ESM as not violating EU law, but this judgement raises more legal questions than it answers. It still leaves the connection between the EU legal order and the ESM framework legally indeterminate (Tridimas, 2019), with the policy conditionality stuck in a ‘liminal’ space between non-EU law and EU-law (Kilpatrick, 2017), and does not clarify what the role of the Eurogroup entails, as an entity acknowledged by the EU Treaties in Article 137 TFEU, when the Eurogroup members act as the ESM Board of Governors, what type of power are they exercising here (Craig, 2017). If the ESM is not a violation of Article 125 or Article 123, why could it not have been done through the same mechanism, but within the Union? As the Court stated, its objective is to manage financial crises, and specifically safeguard the stability of the euro area as a whole; however, as, for example, Borger (2013) argues, there is still no decisive legal reason why this form of financial assistance cannot be done through Article 122(2), where it permanence does not have to preclude a notion of temporary access to a Member State in need. In this way, the Court was seen to work hard to make the legal argumentation enable the political

¹⁴⁶ BVerfG, 2 BvR 2728/13 (Lübbe-Wolff, dissenting at para. 28)

will for the ESM to succeed (Borger, 2013), while some legal scholars saw it as an ‘illegitimate judgement’ for veering to close to political expediency (Beck, 2014).

Nevertheless, a key issue of the *Pringle* ruling is perhaps with regard to what is *not* in the judgement; the Court does not take “a position on the reach of Art. 136(1) TFEU and thereby clarified the existing constitutional possibilities of erecting a specific regime of economic governance for the Eurozone” (Tuori & Tuori 2014, p.171). As analysed in the Chapter detailing the ESM’s construction and conditionality, the scope of Art. 136(1) was greatly expanded to enable amongst other modalities, the strict conditionality that is required of Member States receiving financial assistance. Moreover, the Court confirmed that this conditionality is what makes the ESM compatible with Art. 125. However, there is nothing on whether there is a legal limit on this expansion of EU power into domestic policy.

In terms of boundary work, we see how Mr Pringle’s lawyers engage in boundary blurring by making the difference between stabilising the euro and stabilising the euro area purposefully ambiguous or opaque when arguing that the ESM is violating the competences of the Union. In terms of boundary calibration, we saw how Mr Pringle’s lawyer created an *alternative* boundary argument: introduce one legal argument on one side of the legal boundary, e.g. “financial assistance is illegal as per Article 125”; and then have a conditional and alternative argument as well: “if this action is not considered illegal by the Court, then it must be done under the EU legal framework”. First, the boundary of Article 125 is calibrated to maximise its meaning in terms of prohibiting all forms of financial assistance. Then, if the Court considers the ESM’s form of financial assistance to not be illegal, Mr Pringle’s lawyer calibrates the boundary of the EU legal order to include this precise form of financial assistance so that the ESM is at least created under the EU legal order. Another notable example is the **boundary making** Mr Pringle’s lawyer does between Articles 122, and 143, on the one hand, and Articles 123, 125, on the other, to show that the existence of the ESM as a financial assistance mechanism violates Article 125 based on 125’s connections to the exempted forms of assistance (Articles 122 and 143), i.e. cases when assistance is allowed, and cases when it is not allowed (Articles 123 and 125). Overall, this is to **maintain the boundary** of EU legal jurisdiction, as it shows how EU jurisdiction already accounts for various instances of financial assistance in order to prohibit others: guarantees and commitment.

In *Gauweiler*, the Court of Justice **makes a boundary** between economic and monetary policy by anchoring the distinction in the objectives of the programme, in this case the OMT. Even though the OMT may be seen to impact economic policy of the Member States in that it foresees the buying of government bonds of specific Member States in fiscal distress, which would affect that Member State’s

economic policy, the OMT is still a monetary policy instrument because its stated objective is to maintain the singleness of the monetary transmission mechanism. The implication of this is to give the ECB a large margin of discretion within which it can decide its mandate.

Chapter 9. Pointing to the Source of Power

*If you think an economic crisis is a bad thing, wait and you will see
the sort of crisis that happens if you abandon the rule of law.*

Professor Paul Kirchhof

Following on from the previous chapter, this chapter continues looking at court cases but specifically related to the Cyprus banking crisis. These cases, although having their emergence in the specific issue of people losing their deposits in a bank resolution action, raise significant institutional and constitutional issues (Tridimas, 2019). Institutionally, this goes back to the theme from Chapter 4 on EMU regarding economic government and the emergence of the Eurogroup as the centre of de facto decision-making during the EZ crisis (Craig, 2017). For the latter, these cases touch on constitutional issues related to the “system of legal remedies and procedures”¹⁴⁷ that were envisioned by the Court in its well-known *Les Verts* judgment from 1986 (Repasi, 2017). In this case, the Court foregrounded the “constitutional” nature of the Treaties with a view to enable its completeness for the sake of protecting legal and natural persons, the assurance of which rests on reviewing whether measures adopted by the EU institutions or the Member States are in conformity with the Treaties.¹⁴⁸ With regard to the Cypriot bank bail-in, the issues here are on whether the imposition of policy conditionality for financial assistance is justiciable (Karatzia, 2016).

This chapter is the final chapter in the analysis of the boundary work and practices of the legal and policy professionals, and serves as an endpoint for the chronological journey that has been traced from the discussion of the EMU in Chapter 4, through the uncertainties and difficulties of the EZ crisis, and to this point where we look at three key cases before the CJEU that seek to resolve the question of, first, what exactly the Eurogroup is within the EU legal order, and second, where responsibility for conditionality should be institutionally located. In this way, the chapter serves as the endpoint to the narrative arch created to analyse how economic governance becomes legally constructed through the navigation of an economic crisis by legal and policy professionals’ practices and what it means for the legitimacy of the crisis solutions.

¹⁴⁷ Case 294/83, *Les Verts v. Parliament*, EU:C:1986:166, para 23.

¹⁴⁸ *Ibid.*

9.1 Overview of Cases on Conditionality

In the following, I present the three cases – *Ledra Adverising*¹⁴⁹ *Mallis*¹⁵⁰ and *Chrysostomides*¹⁵¹ – that revolve around the issue of the imposition of policy conditionality during the EZ crisis and the challenges of attributing responsibility for it in terms of the Cypriot bank bail-in. These cases follow along the chain of cases that started with *Pringle*¹⁵² and dig further into the legal issues brought up therein. It is worth repeating that one of the reasons that I have analysed these cases is because of the stakes that the cases represent for the legal and policy professionals I have interviewed. In other words, in the interviews, they spoke about these cases as being critical for delineating the legal issues engendered by the EZ crisis and how these should be resolved; but in terms of my theoretical framework the way the legal and policy professionals spoke about the cases implied that these cases had not only engendered stakes for them professionally, but also for their organisations, the legal field, and finally for economic policy governance. And indeed, there are institutional and constitutional issues at stake with how the Eurogroup could come to be defined within the EU legal order.

The *Pringle* case showed how the conditionality was legally constructed as being a modality to ensure that the ESM's financial assistance was compatible with EU law. This was seen as an example of boundary blurring in that conditionality is tightly linked to EU law – partly “determined” by it – and yet not of it, as it is still outside the EU legal order and part of the ESM framework.¹⁵³ The next set of cases that arose attempted to locate attribution of policy conditionality to an ‘author’ at the EU level. The first cases were *Ledra Adverising* and *Mallis*. Firstly, it should be noted that in instances of conditionality, the IMF – which is well known for its imposition of conditionality for financial assistance – and now the ESM – enjoy immunity from national prosecution, as stated in their respective charters.¹⁵⁴ Therefore, citizens of Europe who have been affected by conditionality will not find remedies through these international financial institutions directly, which means that they will have to either go the route of remedies on a national scale, i.e. sue their own governments, or on an EU scale.

¹⁴⁹ Joined Cases C-8/15 P to C-10/15 P, *Ledra Advertising Ltd and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:701

¹⁵⁰ Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:702

¹⁵¹ Case T-680/13, *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others*, ECLI:EU:T:2018:486

¹⁵² Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756

¹⁵³ Case C-370/12, para.174.

¹⁵⁴ For the IMF, see Article IX: Status, Immunities, and Privileges in the IMF's Articles of Agreement. For the ESM: see Article 35 of the ESM Treaty.

9.2 The Cypriot Bank Bail-in

In 2012, Cyprus was going through a banking crisis, which was fatefully triggered by the Greek debt restructuring and meant that there was “significant bank exposure to Greece, which resulted in sizeable losses following the Greek debt restructuring”; indeed it amounted to over €4 billion in losses for Cypriot banks.¹⁵⁵ Incredibly, the two largest banks comprised 80 percent of the Cypriot banking sector and “400 percent of GDP in assets”.¹⁵⁶ These two banks were Cyprus Popular Bank Public Co Ltd (Laiki) and Trapeza Kyprou Dimosia Etairea Ltd (Bank of Cyprus or BoC) (I will refer to Laiki and BoC from now on).

Based on these events, the Cypriot government sought to recapitalise them by requesting financial assistance from the EFSF or ESM via the President of the Eurogroup, which it did in the summer of 2012, but it was only in March 2013 that “a political agreement on a draft MoU” was actually reached. From there the Eurogroup “welcomed that agreement and referred to some of the adjustment measures envisaged, including the introduction of a levy on bank deposits”,¹⁵⁷ and thus, the Eurogroup indicated that financial assistance would be warranted “in principle”. The nation-wide levy was however rejected by the Cypriot Parliament on 19 March 2013, after which the government apparently made a plan to restructure the two large banks, Laiki and BoC. The nature of this restructuring would give the Central Bank of Cyprus the authority by decree to restructure the banks in a way that would pose losses on depositors with the exclusion of insured deposits of and below €100 000.¹⁵⁸

Following this, the Eurogroup as well as the Troika indicated their confirmation with the Eurogroup statement of 25 March 2013, where it indicated its agreement with the Cypriot authorities on a macro-economic adjustment programme, which was further supported by the Commission, the ECB and the IMF. Specifically, “the Eurogroup welcomed the plans for the restructuring of the financial sector mentioned in the annex to that statement”.¹⁵⁹ After which the Governor of the Cypriot Central Bank put the two banks into resolution. Only a month later was the MoU, which outlined this action, signed by the Cypriot government and the Commission. In terms of signing the MoU, the process is explained thus:

¹⁵⁵ See page 3, IMF Country Report No. 13/156, June 2013, “Greece: Ex Post Evaluation of Exceptional Access under the 2010 Stand-By Arrangement”, International Monetary Fund, Washington, D.C.

¹⁵⁶ See footnote above.

¹⁵⁷ Case T-289/13, *Ledra Advertising Ltd v European Commission and European Central Bank (ECB)*, ECLI:EU:T:2014:981, para.11.

¹⁵⁸ Case T-289/13, para. 14.

¹⁵⁹ *Ibid.* para. 15.

“At its meeting on 24 April 2013, the ESM Board of Governors: decided to grant stability support to the Republic of Cyprus in the form of a financial assistance facility (‘the FAF’), in accordance with the proposal by the Managing Director of the ESM; approved the draft MoU negotiated by the Commission (together with the ECB and the IMF) and the Republic of Cyprus; mandated the Commission to sign the MoU on behalf of the ESM”.¹⁶⁰

This indicates the complexity of this governance process and the various types of entities it involves: the Eurogroup, the ESM Board of Governors (who are the same persons as the Eurogroup), the Commission, the IMF, the ECB, and of course the Cypriot Government. This is the governance framework for constructing policy conditionality and each entity has been delegated a role (based on the legal documents, i.e. the ESM Treaty and EU regulations such as the Two-Pack), and in specific instances of negotiating and deciding on a financial assistance programme the various roles are engaged in; however, through this process it becomes opaque as to who is responsible for policy conditionality as such.

9.3 *Ledra Advertising I & II*

9.3.1 *Making a Boundary between the Who’s Who of the ESM*

The first *Ledra Advertising*¹⁶¹ case arose in the aftermath of the Cypriot bank bail-in of 2013. Based on the facts of the case outlined above, the applicants wanted to legally show that it was the Commission and the ECB who were responsible, specifically, for their losses related to the resolution of the banks. The initial case brought before the General Court sought to attribute authorship of the disputed passage of the MoU (paragraphs 1.23 to 1.27) to the Commission and the ECB so as to seek compensation in the amount of the applicant’s losses, and/or sought the passage’s annulment.

The General Court, however, found that the Commission and the ECB could not be attributed such authorship or responsibility, and referred to the *Pringle* case specifically as specifying the Commission and the ECB’s lack of power to *decide* under the ESM framework. This was related to the ambiguous governance process for constructing policy conditionality as outlined above and that in terms of the ESM Treaty:

“the Commission is to sign the MoU **only on behalf** of the ESM. It must be added in that regard that although the ESM Treaty entrusts the Commission and the ECB with certain tasks relating to the implementation of the

¹⁶⁰ Ibid. para. 20.

¹⁶¹ Case T-289/13.

objectives of that Treaty, it is apparent from the case-law of the Court of Justice that the duties conferred on the Commission and the ECB within the ESM Treaty do not entail any power to make decisions of their own and, moreover, that the activities pursued by those two institutions within the ESM Treaty **solely commit the ESM** (Case C-370/12 *Pringle* [2012] ECR, paragraph 161)".¹⁶²

Here the General Court, drawing on the *Pringle* case, **makes a boundary** between the ESM on the one hand and the Commission and the ECB on the other, in terms of *who* is being committed to an action. What is notable however is that even though this boundary is made, the two EU institutions' conduct still has the power to commit the ESM to an action, but then the ESM is seen as the decision-maker. The ESM is of course under the authority of its Board of Governors who are the same persons as the Eurogroup. As was shown before, the General Court indicated the source of decision-making power when it stated that "the ESM Board of Governors: **decided** to grant stability support...**approved** the draft MoU negotiated by the Commission (together with the ECB and the IMF)...[and] **mandated** the Commission to sign the MoU on behalf of the ESM".¹⁶³

Here the General Court has legally constructed the source of authority as the ESM in its judgement, which is based on its reading of the ESM Treaty. In this treaty, there is no recourse to any remedies for citizens affected by the ESM's actions, and in fact the Board of Governors has immunity as per Article 35 of the ESM Treaty. But given that the EU legal order has well-defined avenues for citizens and actors affected by EU conduct, it becomes clear why these applicants went the route of the EU legal order. The ESM is essentially immune to being held accountable for anything. However, there are legal scholars that assert that "there is a legal obligation to adjust the MoU with the ESM following a ruling by the CJEU on the validity of the relevant Council Decision" (Markakis & Dermine, 2018, p.655). But as noted in *Pringle*, the Commission has to ensure that the MoU is in line with EU law. Here, it is important to recall that during the construction of the mechanisms – GLF, the EFSM, the EFSF and the ESM – the Commission lawyers had sought EU legal oversight of policy conditionality by drawing on Article 136(1) TFEU, thereby enabling the creation of a Council Decision (and later a Council Implementing Decision) whereby the contents of the MoU are essentially 'screened' in terms of EU law to ensure compliance (A4 interview – Commission lawyer). Crucially, however, no authorship is defined on the EU side; it is a 'screening mechanism' that interlocks the ESM Framework with the EU legal order by way of Regulation 472/13, where this process of ensuring EU law compatibility is presented. In this way, this screening mechanism is like an unmanned aerial vehicle, mindlessly screening the terrain of the MoU.

¹⁶² Ibid. para.45

¹⁶³ Ibid. para. 20

In the end, the General Court's main point is that it does not have jurisdiction to review any illegality of the MoU provisions in terms of compensation.¹⁶⁴ This relates to the notion, also seen in its case-law, that a claim for compensation is would only be admissible if the Commission and the ECB's conduct was illegal in the execution of their duties. In this case, these duties are legally constructed by the ESM Treaty and are thereby not adopted by the EU institutions. The General Court's boundary work is to simply make a boundary that differentiates jurisdiction, between the ESM framework from where the MoU arises, and the EU legal order: separate jurisdictions.

In terms of proving that the Commission failed in its duties to reject an MoU whose conformity with EU law it doubted, the General Court asserted that the MoU was only signed (26 April 2013) after the bank bail-in occurred by national decree (25 March 2013), and thus the Commission's inaction cannot be the cause of the losses of the applicants.¹⁶⁵ Of course the General Court does not go into whether the Commission knew about the bail-in and whether knowing what would happen has a legal foundation in this regard. In this case, a temporal boundary is simply made between the two events so that there is a break in the Commission's possible liability.

Finally, in terms of the action for annulment, the General Court simply asserts that it has no jurisdiction as it connects ownership of the MoU to the ESM and Cyprus, neither of which are bodies, agencies or institutions of the EU. The findings of the General Court were not surprising, especially with regard to the idea that in making boundaries between ECB and Commission action on the one hand, and the ESM action on the other, the General Court is **maintaining a boundary** between the EU legal order and the ESM framework, which is important in terms of protecting the EU legal order from being undermined by the actions of the ESM. But the effect is that it becomes difficult not to **blur the boundaries** as because of the opacity of the partitioning of roles and tasks to EU institutions within the ESM framework.

9.3.2 Appealing before the Court of Justice – Filling Gaps with Overlaps

Following the failure of the applicants to show a causal link between the EU institutions and their losses, they made an appeal where they maintained that the Commission and the ECB were the actual “authors of the bail-in implemented in Cyprus and that the General Court erred in law when examining their argument”.¹⁶⁶ In response, the Court of Justice doubled down on what the General Court had said:

¹⁶⁴ Case T-289/13 para. 47

¹⁶⁵ Ibid. para. 54

¹⁶⁶ Joined Cases C-8/15 P to C-10/15 P, para. 49.

“Participation of the Commission and the ECB, as envisaged by that provision, in the procedure resulting in the signature of the Memorandum of Understanding of 26 April 2013 does not enable the latter to be classified as an act that can be imputed to them. As the Court pointed out in paragraph 161 of the judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756), the duties conferred on the Commission and the ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own. Furthermore, the activities pursued by those two institutions within the ESM Treaty commit the ESM alone”.¹⁶⁷

It further added, following the opinion of the AG, that just because an EU institution had a role within the ESM framework did not mean that its role affected “the nature of the acts of the ESM, which fall outside the EU legal order”.¹⁶⁸ The Court is clearly **maintaining a boundary** between the ESM framework and the EU legal order. Critically, the Court then changed track and stated that while this boundary may prevent an action of annulment from being brought, the Court considered that unlawful conduct linked to the adoption of an MoU could be brought against the Commission and the ECB in terms of compensation for damages under non-contractual liability under Article 340 TFEU. In this regard, Article 268 explicitly gives the Court jurisdiction in such a dispute. With this, the Court found that the General Court had in fact erred in law because: “the Commission, as it itself acknowledged in reply to a question asked at the hearing, retains, within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from Article 17(1) TEU, so that it should refrain from signing a memorandum of understanding whose consistency with EU law it doubts”.¹⁶⁹ Here, the Court is **calibrating the boundary** of its jurisdiction to enable it to excavate and review any possible legal issues that it sees with the Commission’s conduct under the ESM framework.

The Court then set aside the judgement of the General Court and could thereby give the final judgement on the matter. The Court went on to explicitly outline that in all circumstances, as well as when acting under the ESM framework, the Commission is bound by EU law and the Charter of Fundamental rights, and must ensure an MoU’s consistency with these laws at all times.¹⁷⁰

This apparently was a bit of a shock to the EU lawyers. As one of my respondents, a lawyer for the Commission, noted: “the General Court first said the action is inadmissible because this has nothing to do with the Union, and then there was an appeal, and then it was Grand Chamber and you could see that the President Koen Lenaerts wanted to make a point clearly [...]: ‘well sorry you are the Commission, you have to respect the Charter no matter what, even if you negotiate an MoU as a member of the Troika etc., you’re bound by EU law’” (A1 interview – Commission lawyer). Notably, another Commission

¹⁶⁷ Ibid. para. 52-53.

¹⁶⁸ Ibid. para. 54.

¹⁶⁹ Joined Cases C-8/15 P to C-10/15 P, para. 59.

¹⁷⁰ Ibid. para. 67

lawyer stated the same thing: “there’s a constitutional reason [...] we are all sure that this was mainly Koen Lenearts, the President’s view, that the constitutional system of the Union would be incomplete if there was no possibility to seek damages against the Union itself for such action” (A5 interview). Moreover, an ECB lawyer pointed out that in some ways the Court was taking a constitutional step in terms of integration (F2 interview – ECB lawyer). The intimation is of course to the integration through law scholarship (Weiler, 1991; Stone Sweet, 2004) that has illustrated how the Court has in some instances adjudicated in a way that ‘constitutionalises’ parts of the Treaty and thereby pushes integration by expanding or consolidating the EU’s institutional structure. In this case, we have the Court enabling the boundary of EU legal jurisdiction to travel with the Commission outside of the Treaty framework and into another – the ESM framework – thereby **overlapping the boundaries**. In this way, the gap of leaving the Treaty framework to operate under the ESM framework is filled: the Court has “constitutionalised” overlapping boundaries between the EU legal order and the ESM framework, but which only envelop the Commission. But at this point the Eurogroup/ESM Board of Governors is still beyond the boundary of EU law.

In the *Ledra Advertising* case, it was shown how the applicants tried to make sense of the ESM in terms of their losses by attributing responsibility to the EU institutions: the Commission and the ECB. This resulted in the Court re-articulating the boundaries between the ESM and the EU: the Commission carries EU law with it wherever it goes. The result of this I argue is that the boundaries between the ESM and the EU legal order now **overlap** as the Commission functions in both, but is always and everywhere enveloped by the boundary of EU law.

9.4. *Mallis & Malli I & II*

9.4.1 *The Eurogroup Comes under the Spotlight*

At around the same time of the *Ledra Advertising* case, another case called *Mallis*,¹⁷¹ was being adjudicated and turned on similar questions, but with a slight yet critical difference: it looked at the Eurogroup statement and not the MoU in terms of the Cypriot bank bail-in. In other words, where the MoU was seen as having the disputed statement in *Ledra Advertising*, it was the Eurogroup statement that would be under scrutiny in *Mallis*. However, this statement was not being attributed to the Eurogroup: “The applicants have not brought their action against the Euro Group, but — and they insist on this point in

¹⁷¹ Case T-327/13, Konstantinos Mallis and Elli Konstantinou Malli v European Commission and European Central Bank (ECB), ECLI:EU:T:2014:909.

their observations on the objections of inadmissibility — against the Commission and the ECB”.¹⁷² In other words, the applicants were trying to impute the Eurogroup statement to the Commission and ECB.

In its examination, the General Court believed it necessary analyse “the Euro Group and its relationship to the Commission and the ECB with regard to the content of the contested statement”.¹⁷³ With the Lisbon Treaty in 2009, the Eurogroup had been recognised in primary law, and thus the General Court had recourse to the Treaties, where the Eurogroup is recognised in Article 137 and which refer to Protocol 14 of the Treaties where the practical elements of Eurogroup meetings are laid out, and specifically, their informality. Based on this, the General Court defines the Eurogroup as:

“a forum for discussion, at ministerial level, between representatives of the Member States whose currency is the euro, and not a decision-making body. That informal forum, the purpose of which is to facilitate the exchange of views on certain specific questions of common interest to the Member States which participate in it, has a certain institutional structure, inasmuch as it has a President who is elected for a fixed term. There is, however, no reason to regard that structure as being subsumed within the structure of the Commission or the ECB”.¹⁷⁴

The General Court further notes that even though the Commission assists in the preparation of Eurogroup meetings, it still emphasises that the Eurogroup is an “informal meeting of the ministers”. The General Court is making a textual reading of the Treaties, to which it adds that the rules applying to the Eurogroup do not indicate power being delegated to it by the Commission or the ECB, as well as no ‘power of review’ or the power to issue recommendations or give the Eurogroup binding instructions. The boundary work here is to **make a boundary** between the EU institutions and the national finance ministers in the Eurogroup forum so that no power is conferred and no tasks delegated between the former to the latter. In other words, nothing the ministers in the Eurogroup constellation do, such as issuing the disputed statement, can be traced back to the Commission or the ECB.

The General Court further defines the Eurogroup as not only having no decision-making capability, but also that it is not empowered to “adopt legally binding measures” and thus a Eurogroup statement cannot be intended to “produce legal effects with respect to third parties”.¹⁷⁵ To support this more explicitly, the General Court illustrates how the language of the statement cannot be seen as taking a definitive position: the Eurogroup statements uses word constructions that are “very general”, according to the Court, such as ‘welcomed several measures’, ‘took note of certain commitments’, and ‘requested the Cypriot authorities and the Commission to finalise the memorandum of understanding’. Indeed, these language

¹⁷² Ibid. para. 37

¹⁷³ Ibid. para. 38

¹⁷⁴ Ibid. para. 41

¹⁷⁵ Case T-327/13, para. 53.

constructions do not reflect hard binding law; rather they are like bureaucratic euphemisms concealing the intrusive character of the policy conditions of the MoU.

From here, an examination of how the ESM Treaty entrusts tasks to the EU institutions is undertaken with a view to re-confirm by way of the Court's case-law from *Pringle*, that "the duties conferred on the Commission and ECB within the ESM Treaty do not entail any power to make decisions of their own and, secondly, the activities pursued by those two institutions within the ESM Treaty solely commit the ESM".¹⁷⁶ And so even if the disputed statements could be attributed to the ESM, it would not mean that the Commission or the ECB enabled it. The General Court is comprehensively making boundaries between the entities to show how they cannot be seen to confer power on each other or commit each other to any conduct, besides the ESM being committed. In this case, the General Court then maintains a boundary between the Eurogroup and the ESM:

"far from claiming any authority to grant or refuse the assistance requested, the Euro Group considered that such a decision fell not within the sphere of its own powers but within the competence of the Board of Governors of the ESM. Indeed, first of all, the Euro Group abstained from any confirmation as to whether the FAF would be granted or not and merely stated that **it expected the ESM Board of Governors to be in position formally to approve the grant of assistance**. Secondly, the Euro Group indicated, in substance, that any such approval would be subject to ratification by the members of the ESM in accordance with national procedures".¹⁷⁷

Here the Eurogroup is seen to have no power, and it is, by way of its (disputed) statement, "expecting" the ESM Board of Governors (BoG) to make that decision. The members of the Eurogroup and the ESM BoG are the same persons, so they indeed must have a strong idea of what to expect. But the General Court maintains the boundary that is institutionally claimed to exist between the Eurogroup and the ESM BoG. And thus, anything the Eurogroup does can only be seen as being informative, even if the ESM BoG could be seen as having decision-making power that followed the same procedure as the disputed statement. Crucially, the ESM BoG has immunity from prosecution as per Article 35 ESM Treaty, so the Eurogroup is arguably able to hide behind this institutional veil that the General Court itself has said to exist between the Eurogroup and the ESM BoG. In this way, a boundary is made between the two, but to step over the threshold is at the Eurozone finance minister's discretion.

9.4.2 The Court's Jurisdiction over the Eurogroup

When the applicants of the first *Mallis* case appealed the judgement, they argued that the General Court made two errors in law: first, should have imputed the disputed statement to the Commission and the

¹⁷⁶ Ibid. para. 48.

¹⁷⁷ Case T-327/13, para. 59

ECB; and second, when the General Court classified the Eurogroup “as a mere ‘forum for discussion’”, it should have inferred that the Eurogroup actually “constitutes the channel by which the Commission and the ECB take decisions on specific questions linked to the ESM or to financial stability. The appellants contend that the ECB and the Commission are required to act in compliance with the legal framework defined by the Treaties and the protocols thereto and by secondary legislation. The exercise outside that framework of any competence or any power is similar to an abuse of powers”.¹⁷⁸

The Court examined each of these complaints regarding the General Court’s judgement, and found that the statement could not be imputed to the Commission or the ECB; the statement itself did not impose a legal obligation on the Cypriot government to implement the bank bail-in, and re-iterated the General Court’s finding that the statement was purely informative; and finally, the Court re-confirmed the informal status of the Eurogroup, and further drew on the AG’s Opinion in stating “the Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU”.¹⁷⁹ In this way, the Court is engaging in **boundary calibration** by reducing this provision’s scope so as to exclude the Eurogroup from the universe of entities (body, office or agency) construed by Article 263 TFEU. This means that the Court cannot review the legality of the Eurogroup’s conduct, and therefore does not have jurisdiction over the Eurogroup, to annul its acts within the meaning of Article 263 TFEU. In the next section, I look at the most recent and controversial case – *Chrysostomides*.¹⁸⁰

9.5 *Chrysostomides*

9.5.1 *Where Others Have Failed, we Shall Delineate a Continuum*

In the context of this case, one of my respondents noted that all cases regarding the Cyprus bank bail-in, i.e. *Ledra Advertising* and *Mallis*, had tried different strategies when attempting to theorize the legal links between responsibility for disputed action:

“in all these applications, you found different theories [...]: one appeal said it’s the MoU, the others said it was the implementation of the MoU, the third said it’s the set of acts leading to the MoU, the fourth said it’s a lack of preventing the MoU, that was *Ledra* in the end. [...] so in each of those case, there have been slightly different theories about what is the starting point of an alleged illegality of the ECB and the Commission’s actions. *Mallis*

¹⁷⁸ Joined Cases C-105/15 P to C-109/15 P, *Konstantinos Mallis and Others v European Commission and European Central Bank (ECB)*, ECLI:EU:C:2016:702 para. 41

¹⁷⁹ Joined Cases C-105/15 P to C-109/15 P para. 61.

¹⁸⁰ Case T-680/13, *Dr. K. Chrysostomides & Co. LLC and Others v Council of the European Union and Others*, ECLI:EU:T:2018:486.

& Malli, you remember, it was purely the MoU, they basically attacked the MoU for an action of annulment and the damage action” (F2 Interview – EBC lawyer).

Ledra Advertising was an action for damages under Article 268 TFEU and the second and third paragraphs of Article 340 TFEU, which sought compensation for acts by the Commission and the ECB, as well as the inaction of the Commission, all in terms of the MoU of 26 April 2013, while *Mallis* was an action for annulment, under Article 263 TFEU, of the Eurogroup statement of 25 March 2013.

In this way, the applicants in the *Chrysostomides* case were trying a different legal theory of attribution. Crucially, the applicants hired a lawyer – specifically a barrister under the British legal system – who is also a well-known and referenced EU legal scholar. In that way, this lawyer’s arguments were very comprehensive and detailed in navigating EU law. The type of procedure the lawyer is going for in this case is an action for compensation caused by an EU institution, or the ECB, under Article 268 and the second and third paragraphs of Article 340 TFEU regarding non-contractual liability of the Union. Given this overall objective, the legal strategy formulated is to create as many connections as possible to the EU legal order and thereby show that, given at least one of these connections, the alleged unlawful conduct has triggered the EU’s non-contractual liability. To that end, the list of defendants is long and of scale: the Council, the Commission, the ECB, the Eurogroup, and the European Union itself. Below, I have presented the arguments as accounted for in the judgment in order to show its ambitious and broad scope:

“First of all, the applicants claim that the adoption of the harmful measures is attributable to the defendants. The latter adopted certain acts (‘the contested acts’), by which they, firstly, obliged the Republic of Cyprus to adopt the harmful measures in order to receive assistance which was indispensable for it, secondly, approved the adoption of those measures and, thirdly, promoted or made permanent the implementation of those measures. At issue, more particularly, are the following acts:

- the Euro Group Statement of 25 March 2013;
- the ‘Euro Group Agreement of 25 March 2013’;
- the ‘decision of the Governing Council of the ECB of 21 March 2013 to demand payment of ELA on 26 March [2013] unless a rescue package is agreed’;
- the ‘ECB decisions to continue the granting of ELA’;
- the negotiation and conclusion, by the Commission, of the MoU of 26 April 2013;
- the other acts, by which the defendants endorsed and approved the harmful measures, namely the Euro Group statements of 12 April, 13 May and 13 September 2013, the ‘Commission’s findings that the measures adopted by the Cypriot authorities complied with conditionality’, Decision 2013/236 and the approval, by the Commission and the ECB, of the payment of various tranches of FAF to the Republic of Cyprus.

Next, the applicants claim that the contested acts were adopted without taking into account the interests of the closed group consisting of depositors or shareholders of the banks concerned, in flagrant and serious violation of

EU law. Finally, first, the applicants note that there is a direct link between the harmful measures and the losses they suffered. Secondly, they request to be compensated for those losses.”¹⁸¹

The strategy of the applicant’s lawyer is to elaborate a ‘continuum’ to link all the contested acts and insert all the EU institutions and the EU itself,¹⁸² so that responsibility for the act can be located at some point in the chain of links. The boundary work is about linking all the defendants into a larger boundary – a continuum – that connects them to the EU so that in the end, the EU’s non-contractual liability can be triggered. This strategy impressed some of the EU lawyers: “it was the best, I think that the theory was the strongest, the elaboration of the arguments were, you know, they came up with all possible arguments you could make, that you could make in such a case” (F2 interview – ECB lawyer).

9.5.2 Locating the Eurogroup in the EU Legal Order

In examining whether the Eurogroup could be considered an institution or body of the EU, the General Court has to specify that this question needs to be understood in terms of the meaning of Article 340 TFEU on the issue of non-contractual liability, and not just generally. As already noted, the Eurogroup is not recognised as a formal institution of the EU within the meaning of Article 13 TEU. More specifically, the Eurogroup is recognised as a meeting of ministers as per Article 137 TFEU and further under Protocol 14 as an informal forum. Thus, the General Court is making a very specific examination of the status of the Eurogroup within the EU governance system regarding the area of non-contractual liability. In establishing its jurisdiction to undertake such an endeavour, however, the General Court draws on its case-law, enabling it to broaden its scope when defining an ‘institution’ within the meaning of Article 340:

“According to the case-law, the term ‘institution’ used in the second paragraph of Article 340 TFEU must not be understood as referring only to the institutions of the Union listed in Article 13(1) TEU (see, to that effect, judgment of 2 December 1992, SGEEM and Etroy v EIB, C-370/89, EU:C:1992:482, paragraph 16). That term also covers, with regard to the system of non-contractual liability established by the TFEU, all other EU bodies established by the Treaty and intended to contribute to achieving the EU’s objectives. Consequently, measures taken by those bodies in the exercise of the powers assigned to them by EU law are attributable to the EU, according to the general principles common to the Member States referred to in the second paragraph of Article 340 TFEU (see, to that effect, judgment of 10 April 2002, Lamberts v European Ombudsman, T-209/00, EU:T:2002:94, paragraph 49)”.¹⁸³

In this way, by drawing on the case-law, the General Court engages in **boundary calibration** to broaden

¹⁸¹ Case T-680/13, paras. 77-79.

¹⁸² Ibid. para. 157.

¹⁸³ Case T-680/13, para. 82.

the scope of the definition of ‘institution’ to go beyond the definition of Union institutions as listed in Article 13(1) TEU and to include “all other EU bodies established by the Treaty and intended to contribute to achieving the EU’s objectives” with the effect that all “measures taken by those bodies in the exercise of the powers assigned to them by EU law are attributable to the EU”.¹⁸⁴

The Council lawyers, on the other hand, assert that the Eurogroup cannot be considered an institution, agency or body of the EU, and they refer to the *Mallis* case, where the Court of Justice stated that the “Eurogroup cannot be equated with a configuration of the Council or be classified as a body, office or agency of the European Union within the meaning of Article 263 TFEU” (M& para 61¹⁸⁵). However, as should be clear from this quotation from the judgement, the Court’s definition is with regard to the meaning of Article 263 TFEU, which refers to the obligations of the CJEU to make reviews of legality of Union acts and legislation. The General Court is thus enabling a legal differentiation between actions for annulment – Article 263 TFEU – and actions for damages in terms of Union liability – Article 340 TFEU. The General Court asserts that this differentiation means that disputes relating to non-contractual liability under Articles 268 and 340 were “established as an independent form of judicial remedy, having its own particular place in the system of means of redress and subject to conditions for its use formulated in the light of its specific purpose”.¹⁸⁶

As such, they can be differentiated from actions for annulment under Article 263 and thus the General Court calibrates the boundary of Article 340 to be much broader than Article 263: “in the light of the different and complementary purposes of those two types of action, it cannot be considered that the content of the concept of ‘institution’ for the purposes of the second paragraph of Article 340 TFEU is necessarily restricted to institutions, bodies, offices or agencies of the Union referred to in the first paragraph of Article 263 TFEU”.¹⁸⁷

Essentially, the General Court sees actions for annulment as only applicable to entities that can adopt acts that have intended legal effects vis-à-vis third parties, while actions for damages following Article 340 apply to the conduct of any entity of the EU in their pursuit of Union objectives. The General Court then goes on to define the Eurogroup as a body of the Union based on the fact that the Treaties make provision for the existence of the Eurogroup in Article 137 TFEU and Protocol No 14, where the

¹⁸⁴ Ibid.

¹⁸⁵ Joined Cases C-105/15 P to C-109/15 P, para 61.

¹⁸⁶ T-680/13, para. 109

¹⁸⁷ Ibid. para. 111

contents of its activities are outlined, as well as how these activities contribute to the objectives of the Union insofar as its activities contribute to an economic and monetary union as per Article 3 TEU. The General Court concludes: **“It follows that the Euro Group is a body of the Union formally established by the Treaties and intended to contribute to achieving the objectives of the Union.** The acts and conduct of the Euro Group in the exercise of its powers under EU law are therefore attributable to the European Union”¹⁸⁸.

The General Court then points out the constitutional issue that a contrary interpretation “would clash with the principle of the Union based on the rule of law, in so far as it would allow the establishment, within the legal system of the European Union itself, of entities whose acts and conduct could not result in the European Union incurring liability”¹⁸⁹. Here the General Court is making a boundary between a Union based on the rule of law and one that is not, in the sense that if the Eurogroup were seen as *not* being a body of the Union in that it would not incur liability of the Union, then the Union would *not* be based on the rule of law.

Having made this significant interpretation, the General Court then looks at whether the disputed Eurogroup statement required Cyprus to implement the harmful measures. Here the General Court sees the measures as, firstly, being agreed to at a “political level”,¹⁹⁰ in other words, not in a legal way, and further that the authority to grant assistance issues from the ESM Board of Governors, and so the Eurogroup statement must be seen as informative: “The Euro Group merely informed the public of the existence of certain policy agreements and expressed its opinion on the likelihood of the grant of FAF [Financial Assistance Facility] by the ESM”¹⁹¹.

Following this, the General Court then examines whether an agreement existed between the Eurogroup and Cypriot government, such that the latter would be required to implement the harmful measures on the basis of receiving financial assistance. The applicants argue that it can be considered as such because the German Minister of Economy referred to such an agreement between the Eurogroup and Cyprus in a letter sent to the German parliament. The General Court acknowledges that the German Minister of Economy considered this agreement to have been concluded between the Eurogroup and the Cypriot government on or around 25 March 2013, although the agreement is considered informal as it has no

¹⁸⁸ Ibid. para. 113, emphasis added.

¹⁸⁹ Ibid. para. 114.

¹⁹⁰ T-680/13, para. 115.

¹⁹¹ Ibid. para.117.

legal basis or procedure. The next issue that comes up is that the members of the Eurogroup are the same persons as the Board of Governors of the ESM. Here the General Court states:

“It follows that it is, in practice, impossible to determine a priori whether an ‘informal’ agreement, such as the agreement on conditionality, was concluded by those natural persons as representatives of the MSCE within the Euro Group or as members of the ESM Board of Governors”.¹⁹²

The General Court has now presented the critical question in differentiating the Eurogroup members from the ESM Board of Governors. And on this note, the General Court asserts that, because the financial assistance was granted under the ESM in line with a specific procedure laid out in the ESM Treaty,

“it must be considered that the agreement on conditionality was concluded by the finance ministers of the MSCE meeting on 25 March 2013 **as members** of the ESM Board of Governors, and not as members of the Euro Group. The mention of the Euro Group in the letter of the German Minister of Economy [...] can be explained by the fact that the representatives of the MSCE at the Euro Group who met on that date are, in principle, the same natural persons as the members of the ESM Board of Governors”.¹⁹³

In this way, the General Court makes a boundary between where there is a formal legal procedure – granting assistance as per the ESM Treaty – and an informal agreement concluded within the Eurogroup, as per the letter from the German Economy Minister. In other words, the General Court **makes a boundary** between a legal reality (i.e. ESM) and a political reality (i.e. Eurogroup).

Critically, this legal reality is construed by an international financial institution – the ESM – with a legal personality based on public international law; and thus exercising the power to grant financial assistance and agree on policy conditionality are “subject to the rules of public international law specific to an organisation for intergovernmental cooperation, EU law being applicable only in so far as the ESM Treaty specifically provides for that application”.¹⁹⁴ Therefore, the General Court can conclude that there are

“**no grounds** for granting the [Eurozone] finance ministers [...] meeting within the Euro Group as members of the latter the power to anticipate or to determine the decisions adopted by the ESM Board of Governors, since that power can be granted to them only as members of that board, even if the agreements relating to the conditions for granting FAF are decided in the context of a Euro Group meeting”.¹⁹⁵

And so the finance and economy ministers of the Eurozone Member States are seen to exist in multiplicity. The General Court is trying to make a boundary between the Eurogroup and the ESM Board

¹⁹² Ibid. para. 125.

¹⁹³ T-680/13, para. 127.

¹⁹⁴ Ibid. para. 128

¹⁹⁵ Ibid. para. 131, emphasis added.

of Governors based on which of these entities has been conferred power to grant assistance and presumably agree on policy conditionality. In making this boundary between the entities, which is based on the ESM Treaty conferring power on the ESM Board of Governors to decide on granting assistance, the General Court is giving the finance ministers a considerable level of discretion to *choose* which reality is preferable to their aims. In any case, the General Court concludes “that the agreement on conditionality was concluded by the representatives of the [Eurozone Member States] as members of the ESM Board of Governors. In the light of the above, it cannot be concluded that the Euro Group, by means of the agreement on conditionality, required the adoption of the harmful measures”.¹⁹⁶

Taking up the thread of how policy conditionality is being legally constructed from the first section of this chapter, it is notable that the Two-pack (Regulation 472/2013), which enables the creation of a Council Decision to mirror the MoU and thereby ensure its conformity with EU law, gives the General Court a platform to assert its jurisdiction and thereby examine the alleged harmful measures, as it was a Council Decision – Council Decision 2013/236 – which was made to mirror the Cypriot programme MoU of 23 April 2013. However, unfortunately for the applicants, this Decision does not include all the harmful measures that are in the MoU, as the General Court notes: “not all of the harmful measures are specifically mentioned therein”.¹⁹⁷ Because it is EU law, the General Court can use it to examine legality of the alleged measures which are said to have been imposed on the Cypriot government but *only* those that are specified in the Council Decision: “Consequently, the Court has jurisdiction to hear the present action in so far as it relates to that measure, as set out in Article 2(6)(b) of Decision 2013/236”.¹⁹⁸ And thus, the General Court dismisses that action.¹⁹⁹

9.6 Going to Court: What is the Eurogroup? Just a Meeting for Coffee?!

Once the *Chrysostomides* judgement of the General Court came out on 30 July 2018, the Council lawyers were “shocked” that the General Court had declared that the Eurogroup was subject to judicial control under Article 340 TFEU, i.e. non-contractual liability: “which is abhorrent for us, we are going to appeal that case, we are going to go to the Court of Justice” (E1 interview – Council lawyer). The Council lawyers do not believe that the Court has jurisdiction to review Eurogroup acts in terms of non-contractual

¹⁹⁶ Ibid. para. 132-133.

¹⁹⁷ T-680/13, para. 172.

¹⁹⁸ Ibid. para. 192.

¹⁹⁹ It should be noted that the *Chrysostomides* case is a very long judgement (70 pages) and thus, I have analysed the parts that relate to the policy conditionality in terms of the aims of this thesis. Thus, I have not analysed substantial parts of the case that relate to the infringement of the right to property, as well as the infringement of principle of protection of legitimate expectations, or the principle of equal treatment.

liability. Similarly, the applicants also appealed because they believed that the General Court had erred in law by not finding the defendants guilty via the legal continuum argument.

Fortunately, the public hearing for the appeal occurred on 25 February 2020, which gave me an opportunity to observe the practices of the lawyers when pleading before the Court of Justice. In the following, a reconstruction of the public hearing will be undertaken based on ethnographic notes in order to illustrate the lawyer's boundary work in action, for both the defendants and the applicants. On a methodological note, the following empirics come from notes taken by me during the public hearing on 25 February 2020. It should be noted that these are *not* transcripts and cannot be seen as 100 % faithful representations of the hearing. Because of this, I re-wrote the notes from the original rough notes and partly on memory in a way that is intelligible.

9.6.1 The Council Pleads: There is no Eurogroup as such...

The Council started its presentation by pleading on the issue of whether the Eurogroup is an entity established by the Treaty, specifically in reference to Article 340. As noted in the original case, the General Court had defined the Eurogroup as a body of the Union within the meaning of Article 340. The Council lawyer noted that this was indeed a question of *constitutional* significance, in that it entails recognising bodies of the Union. On this note, the Council lawyer asserts that the Eurogroup is an informal body and in terms of this status, it cannot fluctuate based on different provisions, i.e. between Article 263 and 340. This point is in regard to the *Mallis* judgement, which asserted that, in terms of the meaning of Article 263, the Eurogroup is not a body of the Union. To elucidate this position, she lays out three points for elaboration: 1) What is the Eurogroup? 2) What is it not? 3) The Principle of Conferral. On the first point, she makes an examination of the *letter* and the *spirit* of the Treaties. In terms of the letter of the law, she points out that, firstly, in the text of the Treaties, the meetings between the ministers of the Euro-area member states are considered informal; indeed, in the relevant provisions they are referred to as “ministers of those Member States whose currency is the euro”, (Article 137 TFEU) and not to the “Eurogroup” as a distinct entity. Secondly, there are no specific budgeting requirements for the Eurogroup (as opposed to the Euro Summit), and in sum, the Eurogroup is not formally established by the EU as an entity.

A more interesting examination is done in terms of the spirit of the Treaties. Firstly, she points out that Protocol 14 was inserted in the Lisbon Treaty to recognise the right of Eurozone ministers to meet and

discuss informally. Secondly, she says this was a deliberate choice to *not* recognise it formally in order to avoid division between the euro “ins” and “outs” of the Maastricht model. On this point, the General Court has disregarded the recognition of avoiding division and what she believes is the intention of the authors of the Maastricht Treaty: to have no formally recognised division in the ECOFIN Council.

Finally, on the recognition of an institution of the Union within the meaning of non-contractual liability, she mentions the relevant case-law: the *Krikorian* case,²⁰⁰ which asserts that before the Lisbon Treaty, it was confirmed by the Court that the European Council was not recognised as an institution of the Union (as per Article 7 EC/Article 17 TEU) within the meaning of non-contractual liability, and the General Court should have followed this case-law regarding the non-contractual liability of the Eurogroup. In sum, her boundary work here is about firmly showing that the Eurogroup is textually recognised as informal in order to ensure the spirit of *no division* in the ECOFIN Council stemming from the Maastricht Model of economic governance. In this way, the Council legal professional is engaging in **boundary maintaining**: the Eurogroup is informal and therefore not an institutional configuration, because that would create a boundary *within* the institutional configuration of the ECOFIN Council, which is not the legal reality construed by the Treaties.

In the next part of her pleadings, she takes this notion further by elaborating on the issue of the “natural persons” of the Eurogroup being the same as the ESM Board of Governors (BoG), and also when they meet up with the non-Eurozone ministers in the ECOFIN Council. On the point of the ESM, she points out that firstly, although it may be confusing to the general public, it is merely a ‘coincidence’ that these are the same people, and that this cannot be seen to mean that the ESM is part of the EU; the ESM BoG is distinct from the Eurogroup. Moreover, the ESM has its own budget, staff, working methods, and autonomy, and thereby ESM decisions cannot be imputable to the EU because of this autonomy. In terms of the ECOFIN Council, she refers to the *Mallis* case, which stated that the Eurogroup cannot be the same as the Council. Finally, the policy conditionality is negotiated between the ESM and the Member State in need of financial assistance, and then put into Council Decision. Bearing in mind that in *Pringle*, the Court said that policy conditionality is a Council decision and open to judicial control.

On the principle of conferral of power she notes several points. First, the narrative of the appellant party is that the Eurogroup exercises power and is very powerful, however, imputing power to an entity does not have anything to do with the degree of power it may actually have, because in any case the Treaty

²⁰⁰ Case C-18/04 P, *Krikorian and Others*, ECLI:EU:C:2004:691.

does not confer any power on the Eurogroup. In other words, it may be a political reality that it has power, but it is not a *legal reality*. Referring to academic sources,²⁰¹ she further notes that the Eurogroup cannot influence the EU, as the ministers' powers are constituted nationally and not from the EU. Given that the system of the EU is based on the principle of the conferral of power, and residual powers are left to the national scale, this means the Court of Justice does not have jurisdiction to hear the alleged harmful measures imposed by national ministers.

Finally, if it is the case that this system of conferral of powers between the national and EU levels according to the Treaties no longer fits the economic and political reality, then it is up to the Masters of the Treaties to change it, not the General Court. It is in this way that the Lisbon Treaty was made to recognise the European Council in line with the political reality that had developed into an institutional-legal reality, and as such, for the Eurogroup to be recognised formally, the Lisbon Treaty would need to be changed in that regard. In sum, the Council lawyer asserts that the General Court failed to draw the right conclusions stemming from this analogy. The Council thus wants those parts of the judgement recognising judicial control over the Eurogroup in terms of non-contractual liability to be disregarded.

Her boundary work is first about **making a boundary** between the political and the legal: it may be the case that the Eurogroup has political power, but it is not the case that this power is legally constituted. In other words, there is a clear boundary between the political reality and the legal reality, and based on this boundary, it must be recognised that the political reality and legal reality do not necessarily align. Although, they can, if the Masters of the Treaties will it, and hence the European Council was eventually recognised in the Lisbon Treaty even though it had existed *politically* long before that. This speaks to her point that the Eurogroup had also existed politically before the Lisbon Treaty, however, when it was recognised in the Treaty – that is to say legally – it was only recognised as an informal meeting forum, a point that further speaks to the political intention of the Maastricht model, which is to have no division of the ECOFIN Council. Thus, any legally constituted authority that the Eurogroup may have is only to the degree that its members are national ministers of the Eurozone member states and thereby are empowered from the national level, which means that the CJEU does not have the jurisdiction to hear any alleged unlawful behaviour, as it is attached to an entity that is *not* an EU body. The Council lawyer is legally attaching the Eurogroup to the national level through its constituent members by foregrounding their nationally constituted authority as ministers of Member States. Here she is **making a boundary** between the EU scale and the national scale, and attaching to the national jurisdiction the only substantial

²⁰¹ Unfortunately, I did not hear the names of the academics she mentioned.

elements that exist in her legal view – the ministers themselves. In some way, the effect is to dissolve any **boundary** that may have existed to differentiate the finance ministers of the Eurozone *as* a group: there is no Eurogroup as such; it is simply a meeting of ministers. It has no organizational autonomy, unlike for example the ESM and its Board of Governors. By dissolving this boundary, the members of the Eurogroup can be definitively attached to the national jurisdiction as ministers of their respective national governments, and thus she re-articulates the boundary between the EU and the national scales. In the next section, an analysis of the applicant’s lawyer’s response will be undertaken.

9.6.2 An Invitation to Erase the Eurogroup from the Treaties

The applicant’s lawyer notes that this is a complex case, which turns on constitutional points. The Cypriot bail-in is very unique in terms of the EZ crisis, notably in that it entailed the indiscriminate confiscation of deposits by EU action; he states firmly: “The EU cannot do this!” According to him, the Eurogroup is part of the EU and so can engage Article 340 TFEU. Moreover, the statement of 25 March 2013 was an unlawful act. These national measures were imposed on Cyprus by the defendants (the EU institutions). In his pleadings, he first elaborates on the point of the Eurogroup engaging non-contractual liability. The case-law indicates two steps to establish this: first, assessing whether it concerns an entity of the EU, and second, whether the entity is concerned in fulfilling the objectives of the EU.

In regard to the Eurogroup, it is defined by Protocol 14. First, it uses language that engages Union objectives, namely the language of obligation demonstrated by ‘shall’. Second, the Commission and the ECB participate, so the EU is involved. Third, just because it is comprised of national ministers does not disqualify it: the Eurogroup ministers represent national governments, but it is part of the EU. Thus, the Eurogroup owes its existence to EU law; it does not exist in a legal vacuum.

The case-law mentioned by the Council – i.e. the *Krikorian* case²⁰² – occurred before the language referring to the Eurogroup existed in the Lisbon Treaty (which was signed in 2007). In this way, the authors of the Treaty had a chance to *not* recognise the Eurogroup in the Treaty, but they did, and given that it is in primary law, i.e. Protocol 14 TFEU, it cannot be changed. In this way, from the perspective of the applicant’s lawyer, the Council is inviting the Court to erase Protocol 14. Furthermore, he says it is false to take the criteria from those cases, i.e. the meaning of an institution in terms of non-contractual liability from the *Krikorian* case, and by this, he asserts that the respondents are asking the Court to falsely narrow

²⁰² Case C-18/04 P, *Krikorian and Others*, ECLI:EU:C:2004:691.

the scope of Article 340 TFEU. His point here is that if the Member States wanted, they could have restricted the role of the Court, as they did in the area of freedom, security and justice, but they did not do this in terms of the Court's role regarding the Eurogroup.

The boundary work being done by the applicant's lawyer is about emphasising the recognition of the Eurogroup in primary law – i.e. the Treaties – and its contribution to the objectives of the Union. For him, the legal reality is that the Eurogroup exists as part of the EU and it is recognised as such in the Treaties. He is denying that there is a boundary between a political reality and a legal reality – there is only a legal reality. He further accuses the Council lawyer of a type of boundary calibration in that she is narrowing the boundary of Article 340 TFEU to apply only to institutions as defined by Article 13 TEU of the EU. In contrast, his **boundary calibration** entails broadening the scope of Article 340 TFEU to include any entity of the EU, and of course this hinges on his ability to show that the Eurogroup is indeed a body of the EU and not simply a meeting between national ministers. To show that it does contribute to the objectives of the Union, he points to the word 'shall' in Protocol 14.

9.6.3 The Commission Pleads: The Court does not have Jurisdiction!

After the applicant's lawyer, it is the Commission lawyer to next give his pleadings. The first point the Commission lawyer makes is to remind the Court that judges had asked the lawyers to focus on one point in their pleadings: the question of whether the Eurogroup is an EU body, which implies that the applicant's lawyer, who had gone through all his arguments during his pleadings was going against the Court's wishes. The Commission lawyer starts by introducing the question again, but he phrases it in terms of Article 340 TFEU: can the Eurogroup trigger an action for damages under this provision? He points out that there is a crucial constitutional element, which is that, depending on whether the Eurogroup is qualified as a meeting of ministers or as EU body, the competence of the Court to review the Eurogroup's acts will be affected. Essentially, his argument is that the Court does not have jurisdiction over the Eurogroup, and he draws on the case-law, notably *Mallis* to support his argument that the Eurogroup is not a body of the EU.

The Commission lawyer further points to the case *NF v European Council* of the General Court on the EU-Turkey statement,²⁰³ where he points out by analogy that the General Court found that a legal distinction could be made – or a boundary – between the Heads of State of the Member States meeting

²⁰³ Case T-192/16, *NF v European Council*, ECLI:EU:T:2017:128.

as the European Council (in this case, on 17 March 2016), and then on the day after (18 March 2016) engage in “a meeting between the Heads of State or Government of the Member States of the European Union and their Turkish counterpart, a meeting which, for reasons of costs, security and efficiency, had taken place in the same building as that used for the meetings of the European Council and those of the Council”.²⁰⁴ Based on this, the agreement produced by this meeting was defined as an ‘international agreement’ and not subject to EU law, the implication being that the General Court “does not have jurisdiction to rule on the lawfulness of an international agreement concluded by the Member States”.²⁰⁵ The Commission lawyer, by way of analogy, is arguing that the Court does not have jurisdiction over the Eurogroup, as they are meetings of the finance ministers of the Eurozone, in the same way that the General Court did not have jurisdiction over an international agreement made between “the Heads of State or Government of the Member States of the European Union and their Turkish counterpart”. Here, the boundary work is about illustrating that there is a legal boundary that encompasses the members of the Eurogroup under national legal jurisdiction on account of these members being national finance ministers, which in turn means that, in the case of the Eurogroup, there is no EU legal jurisdiction, with the consequence that the Court cannot reviews its acts.²⁰⁶

9.6.4 The Judges Push the Lawyers: Locate where the power comes from in the text.

After the lawyers had made their pleadings before the Court, the judges would now ask questions about the lawyers’ legal positions. In the following exchanges, I attempt to show how the interactions between the judges and the lawyers explores the boundaries of the legal and semantic questions being raised, which is whether the Eurogroup is a body of the EU, and can thus trigger the Union’s non-contractual liability.

For the most part, the judges concentrated their questions on the Council lawyer. One of the judges focuses his attention on how the Council lawyer’s argument sought to define the Eurogroup in terms of the Treaties; he says that the Council lawyer seems to deny any value to Protocol 14, to which Article 137 refers, but that this Protocol is annexed to the Treaties and constitutes the recognition of the Eurogroup in primary law. He then asserts that the Council lawyer had given value to other legal elements such as case-law and statutes, indicating that those have more value than provisions – i.e. Article 137 and Protocol 14 – that are part of the Treaties. To which the Council lawyer replies that the existence of Protocol 14

²⁰⁴ Ibid. para. 63.

²⁰⁵ Ibid. para. 73.

²⁰⁶ An ECB legal professional also pleaded but he essentially stated that the ECB cannot be held liable for any Eurogroup conduct for any scenario in which the Eurogroup is defined, and the case should be dismissed. Given its brevity, it has not been used in the analysis.

had a singular reasoning: to recognise the right of Eurozone ministers to meet informally and also to *not* meet formally. Discussions had taken place to formalize it but this was decided against in order to ensure the coherence of the EU system, so as not to entrench the distinction between Eurozone and non-Eurozone Member States. The judge seemed satisfied by this, but then moved onto another longer line of questioning:

Judge: Can you indicate your position regarding the arguments of the applicants, since the General Court cannot take the *Mallis* case-law regarding the different provision in terms of recognising the autonomous remedy of Art. 263.

Council lawyer: We refer to the Commission's didactic point about examining the steps for checking whether 1) it is a Union body; 2) look at its behaviour, the admissibility of which depends on the behaviour attributed to the body. Both steps apply to both Articles 263 and 340; both steps have to be followed in line with the *Mallis* judgement. In *Mallis*, the Court of Justice recognised that Eurogroup as not being an EU body.

Judge: But still on the issue of effective judicial protection, what happens in the absence of a responsibility to engage liability to ensure effective judicial protection?

Council: Effective judicial protection is guaranteed in alternative ways.

Judge: How do you respond to the point that the alternative remedies were checked by the appellants [applicants], does the Eurogroup benefit from immunity?

Council: That question was answered: the right to effective judicial protection cannot change attribution of power as laid down in Treaties. The Court has recognized this in the case law on article 47 of the Charter.

Judge: Based on what the Council said, an action for damages would follow if member state ministers found guilty.

Council: Any damage caused by national ministers in the Eurogroup derives from national law and so cannot engage the liability of the EU, so it is up to the national legal systems to decide if the Eurogroup ministers have standing before national courts. It is not up to the Council because it requires national interpretation, and is beyond the Court of Justice's jurisdiction.

Judge: the Eurogroup adopted declaration of 25 March 2013, if reasoned in categories of non-contractual liability, could the general categories as defined in Article 340 (para.2) apply to member states' political declaration, and as such, be a basis of actions that caused damages?

Council: in line with *Mallis* judgement, conditions must be laid down, 1) how to define an EU body, and 2) the type of behaviour. Conditions need to be fulfilled to establish a body as a body of the EU. The Eurogroup statement is a political declaration, so the decisive point of damages lies elsewhere.

The exchange sheds light on how the interaction through questioning unfolds the legal arguments further as the judge and the lawyer flesh out what is at stake and could be at stake, for example, the point about effective judicial protection perhaps not being sufficient at the national level; or how Article 340 could be applied to a simple political declaration.

In another exchange between a judge and the applicant's lawyer, the judge asks: Could you please tell us what your position on the *Mallis* judgement is, referring to the informal nature of the Eurogroup and the

Eurogroup not being formally part of Council formation? The applicant's lawyer replies that the General Court (in the initial case) did not depart from the *Mallis* ruling; the Court expressly described the Eurogroup as informal. But he says that *Mallis* is a case referring to acts of annulment, and not damages, and the distinction is crucial. He says that he does not get it: The Commission lawyers say that Protocol 14 gives "formal recognition" to the Eurogroup; and in recalling the Commission lawyer's argument, he points out that the Commission lawyer said that the wording of Protocol 14 is peremptory in a way that means the Eurogroup "must be informal". The applicant's lawyer says he is confused by this, because for him when something is recognized by the Treaty, its informality is denied. The applicant's lawyer then states: so if the purpose of Protocol 14 is to prohibit the Eurogroup from meeting "formally", does this mean that it prohibits the Eurogroup from using EU property or resources, or are they "only meeting for a coffee?"

Another judge says to the applicant's lawyer: you say that there is no doubt that the Eurogroup exercises immense power but then you say they engage in a discussion forum. Locate where the powers come from in the text; how is its power constituted? The applicant's lawyer replies by drawing on the recent biographic book written by Jeroen Dijsselbloem who was the President of the Eurogroup during the Cypriot banking crisis, and in which Mr Dijsselbloem has written that all these decisions about how to deal with the Eurozone crisis came from the Eurogroup. So for the applicant's lawyer, "there can be no doubt". He then says that acts of the Eurogroup are imputable to the EU. Then the question is whether the 25 March statement is harmful, bearing in mind that action for damages does not require binding decisions.

In another more tense exchange, a judge pushes the Council lawyer more on the comparisons made between the Eurogroup and to previous EU arrangements.

Judge: I'm struggling to see parallels in reference to the Schengen incorporation. Does it resemble the situation under Maastricht when Schengen was outside the EU; they met outside and separately from the Treaties? Is this a close analogy?

Council: asks to consult colleague.

Council: they are unprepared for this question. Council did not have this comparison in mind. Schengen was structured and progressively brought into Treaties. Eurogroup is not the same. We have what is written in the Treaties: an informal forum. There is no parallel to Schengen.

Judge: Who is providing secretarial support to the Eurogroup? How does it function in a practical sense?

Council: the Commission assists with preparation and secretarial elements. The Council also assists. She mentions the Euro Summit. The Euro Summit was set-up by non-EU intergovernmental agreement, yet it's being set-up is entrusted to the Eurogroup-

Judge interrupts: He makes an analogy to ministers meeting in terms of the Council Presidencies as meeting informally. They issue declarations, joint statements, if they do this and it causes damage, then what is the legal position?

Council: the informal ministerial meetings of the Presidencies are not considered Council meetings. They are not able to adopt acts or declarations, so are not imputable to Article 340. But it would be imputable to individual ministers.

Judge: you said your argument is supported by the occurrence of a number of declarations of the European Council (vis-à-vis Eurogroup) having to be confirmed by some national parliaments. But this was under previous pillars-- 2nd/3rd pillars of EU governance, after which constitutional clearance via national parliaments was lifted. So the Council's argument wasn't convincing.

Council: Who has power to grant financial assistance? It is the same ministers as the Eurogroup, but the power lies with the ESM, following a request from a Member State in financial need, so the ESM decides.

Judge: I didn't ask about that.

Council: It means that there is no automaticity. The Eurogroup declarations don't translate into ESM actions.

The above interaction reflects the difficulties of making analogies to previous EU arrangements, as the EU institutional structure has developed over time in complex and non-determined ways, hence the judge pushes the Council lawyer on some of the analogies made, for example, to the Schengen arrangement. In any case, the interaction above shows that legally rationalising the issue before the Court is not straightforward and complicated.

In sum, these interactions offer insight into how the judges seek to explore the boundaries by posing questions to the legal professionals. In a sense, it is boundary work through exploration by drawing on the collective legal arguments being made and then asking questions for clarification that can push the discussion further. At the time of writing, the judgement has not come out, but the above exchanges point to how seriously the judges take the issue. In that end, they question the Council lawyer extensively to further the understanding about the political power which the Eurogroup was seen, and acknowledged, to exercise, including by the President of the Court, and what this means for the legal reality of European economic governance. A lot of the argumentation centred on clarifying a boundary between a political reality where the Eurogroup is seen to exercise power, and a legal reality, construed by the Treaties, where the Eurogroup is not legally conferred any power, and as the Commission and Council lawyers assert, legally it must be informal according to the Treaties. Another point was therefore related to how to deal with a political entity – such as the Eurogroup – whose statements can cause damages, and what this means for the EU legal order's commitment to effective judicial protection. What should the Court of Justice do if national avenues for judicial protection are not effective? Especially when, as is the case here, the applicants had apparently tried other avenues to no avail. The point is that the forum of the Court

offers insight into how political entities could become legally constructed, as the re-accounting of events, such as those from the EZ crisis, shed light on whether there are significant gaps in a legal order – perhaps created by the crisis or perhaps existed before – and that the judges could decide to fill or not. Regardless of what is decided, it could have significant institutional implications, for example, the balance of decision-making authority within the ECOFIN Council, as well as the Court’s jurisdiction over the Eurogroup. As we now know from the literature on integration-through-law, the case-law of the Court of Justice can have un-foreseeable consequences that expand the EU’s institutional governance structure and provide new forms of agency to different societal actors (see for example Stone Sweet, 2004).

Summary of Findings

In this chapter, three court cases related to the Cypriot bank bail-in were analysed: *Ledra Advertising*, *Mallis*, and *Chrysostomides*. By analysing the legal argumentation in these cases the boundary work of the various legal professionals was presented, with specific focus on how the Court engages in boundary work as it sorts through the legal issues created by the solutions – such as the ESM and the modality of policy conditionality. Here we see how in *Ledra Advertising*, the General Court at first **makes a boundary** between the ESM on the one hand and the Commission and the ECB on the other, in terms of *who* is being committed to an action, and then it **maintains a boundary** between the jurisdictions of the EU and the ESM framework, to show that conduct regarding the MoU is outside EU jurisdiction. Moreover, a temporal boundary is made between the two events – when the Eurogroup statement and the event happens on the one hand, and the signing of the MoU by the Commission later on, on the other – so that there is a break in the Commission’s possible liability. Then on appeal, the Court of Justice drew on Article 340 in order to **calibrate the boundary** of its jurisdiction to enable it to excavate and review any possible legal issues that it sees with the Commission’s conduct *under* the ESM framework. In the appeal on *Ledra Advertising*, it was shown how the Court of Justice enabled **overlapping boundaries** between the EU legal order and the ESM framework by asserting that, in its role as guardian of the Treaties, the Commission is bound by EU law, regardless of whether it operates inside or outside the EU legal framework. In the *Mallis* case, it was shown that the General Court **made a boundary** between the ESM BoG and the Eurogroup, who are the same “natural persons”, thereby giving them some discretion as to which entity they choose to be in terms of their conduct. When the case went to appeal, we saw how the Court used **boundary calibration** of Article 263 TFEU to exclude the Eurogroup from the universe of entities (body, office or agency) construed by Article 263 TFEU. Finally, with the *Chrysostomides* case we gained insight into how the interactions between the judges and the lawyers explore the possible

boundaries around the legal issue in questions. One of the key findings here was the making of a boundary between the political reality of the Eurogroup, in that it is seen to exercise political power, but with no legal reality conferring it power. On this point, the applicant's lawyer asserted that there was only a legal reality, as set down in the Treaties recognising the Eurogroup, and the political power it exercises stems from there. The judgement has not been rendered yet, and thus it remains to be seen whether the Court of Justice will perhaps push the legal boundaries by calibrating the boundary of Article 340 to include the Eurogroup so that any unlawful conduct on its part could engage the liability of the Union and expand the Court's jurisdiction.

Chapter 10. European Legal Networks in Crisis

In this chapter, I will present the social network analysis and link it to the boundary work analysed in chapters 5 to 9, in order to show how, depending on the outcome enabled by boundary work, network expansion is observed in different ways. Related to this expansion is the process of consolidation of the solutions as they become legally validated and entrenched through contestation, i.e. the process of legal case-making. For mapping interaction, I employ a network methodology in two distinct ways. First, I employ a network method that can cater for change by measuring an agent's centrality over time: a temporal network. I use the measure of degree centrality to trace the level of an agents' involvement in the various crisis-solving processes and contestation processes, i.e. creating the various elements of the crisis management framework and defending these in court. In order for this measure of involvement to be conceptually meaningful, I then construct a different type of network: a referral network based on the answers of agents involved in the EZ crisis policy response. In this way, the degree centrality of the temporal network is compared to the degree centrality of the referral network, from which the measure can be used to infer an agent's symbolic capital: i.e. their involvement together with whether they are also seen to know well. From this, I infer a species of symbolic capital unique to being part of the EZ crisis policy response: euro- crisis juridical capital. Given that in the previous empirical chapters, it was shown that the practices of the legal and policy professionals have led to economic governance becoming legally constructed, we now need to see what this means for the *stakes* of European economic governance. In other words, the issue of what is now at stake if the stakes of economic governance have become rendered in legal form. This matters because if those stakes become symbolically legal – in terms of how economic governance becomes *defined* in legal terms – then those with more symbolic capital of the legal kind have more influence over the terms of these stakes.

In that way, it can be shown how using networks, namely, temporal networks for the historical trajectory of agents, and referral networks for the recognition of who knows well, one can illustrate the effects of practices on a disrupted field and thus we can be in a position to capture the emergence of a transnational field with specific stakes, in this case a species of juridical capital forged through practices and interactions during the EZ crisis.

10.1 Temporal Networks Unfolding in Crisis

Throughout the phases of the crisis, I have traced the network expansion of the agents from 2010 to 2019. In this way, the network simply traces which agents are part of which solutions and court cases, as well as the points at which more agents are brought into dealing with the EZ crisis, both internally, i.e. becoming part of EU structures, and externally, through contracting private firms and through the high level of litigation concerning EZ crisis legal issues.

In order to construct the temporal network, I drew on multiple data sources. The first key data source were the interviews themselves, whereby the respondents described which events they were a part of as well as the other agents they worked with. The interviewees repeated the same names thereby giving an acceptable degree of reliability. Other legal and policy professionals however were added based on other data sources, for example, I checked all the relevant court cases, where the names of the applicants, agents, and judges, as well as advocate generals are listed. Moreover, other biographical and historical accounts of the EZ crisis were checked, for example, a book on the ESM (2019) details how the it came to be and draws on interviews with the agents involved, and this confirmed the data gleaned from my interviews as well as providing new data on agent involvement. At the same time, a historical timeline of the crisis was created in Excel, pin pointing all the dates, which came again from multiple sources, namely, EU policy documents, for example, statements by Heads of State, as well as Bruegel's own timeline of the EZ crisis,²⁰⁷ as well as van Middelaar (2019), ESM (2019) and of course the interviews as well. Based on this, the temporal networks were put together.

10.1.1 A Historical Account of the Eurozone Crisis vis Temporal Networks

In the following, the unfolding of the EZ crisis, as well as the solutions and the court cases against those solutions, are re-presented in terms of the social networks attached to these events. In Chapters, 5, 6, 7, 8 and 9, an analysis was done of the practices of the agents at a subjective and interpretive level, i.e. a reconstruction of how the legal and policy professionals perceived the situation and how they enabled solutions and argued in court was presented. The point of the network analysis is to reconstruct the interactions and thereby infer a more objective social structure from these interactions between the legal and policy professionals over time in order to get an indication of their objective involvement in the EZ crisis policy response as a measure of their centrality in this process. To that end, I move through the EZ

²⁰⁷ See Eurozone Timeline at <https://www.bruegel.org/2015/09/euro-crisis/> (accessed 14 March 2018).

crisis chronologically and describe the changing network graphs from early 2010 until 2019, after which the degree centrality for the agents is presented, which for this thesis, is a measure of agent involvement.

For analytical reasons, the starting point of the network could be conceived of as a space where agents have not yet become connected, as the crisis has not engendered any issues that need to be solved. Empirically, perhaps these agents could be connected for other reasons, such as two of them working at the same institution, but given that I am looking at a specific social dynamic, which is the emergence of a type of capital through network interactions related to the EZ crisis, the starting point could be imagined as a social space that is not yet disrupted by crisis; not yet informed by the events of the crisis, and therefore no stakes related to the EZ crisis have emerged in terms of economic policy becoming legal constructed. From here, the starting point would then be around March 2010.

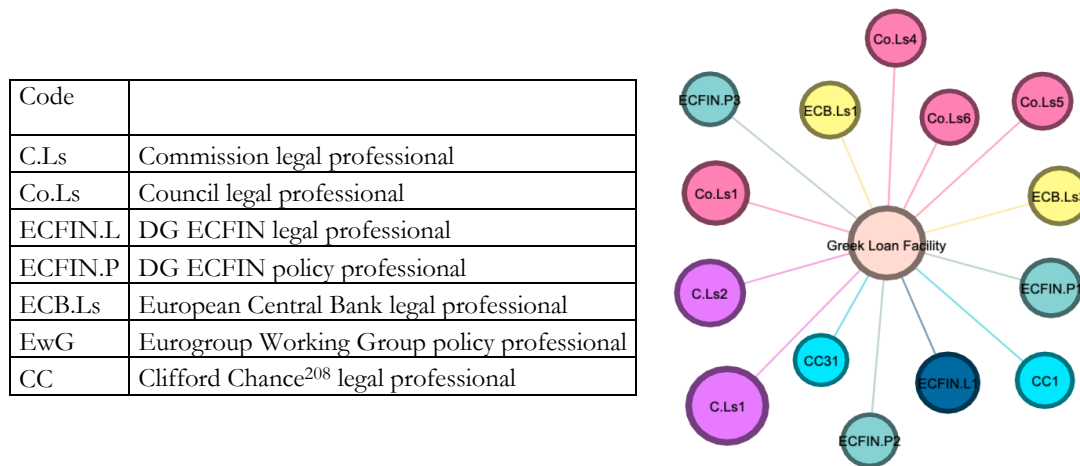


Figure 3: Network graph in March/April 2010.

In March 2010, legal and policy professionals from DG ECFIN, the Commission legal service, the Council legal service and national policy professionals started to work on a scheme of loans for Greece which would become known as the GLF, depicted in the above network graph, Figure 3. As explained in Chapter 4, the legal professionals of the Council and the Commission had very rarely done work on economic or finance issues related to EMU, so this was quite a novel interaction. In Chapter 5, I have argued that the GLF was put together through a process of bricolage, whereby the agents took different elements in order to set up the loan scheme. This process of bricolage required the expertise of legal professionals from Clifford Chance, but also drew on the expertise of the policy professionals. In the network graph below, the different types of agents are showed, as well as a code.

²⁰⁸ Clifford Chance is a major global law firm that originated in the City of London.

Once the GLF had finally neared completion, fears of contagion in financial markets spread rapidly and led to the very quick creation of the EFSM and the EFSF on the weekend of 7 May 2010. Given that the EFSM was pure EU law, the Commission and Council legal professionals worked on creating that regulation, while the EFSF was created to access bigger funds – not legally possible under the EU legal order – and, in Chapter 5 I again argued that this was done through a process of bricolage, whereby different elements are recombined to create a boundary object: the EFSF. This was based on a financial entity called an SPV, but with bonds governed by English law, and compatibility clauses connected to EU law (Merino, 2012). Again, lawyers from Clifford Chance were used to establish the EFSF as a Luxembourg corporate entity and drew up much of the agreement (C3 interview – ECFIN policy professional). See the network graph below, Figure 4.

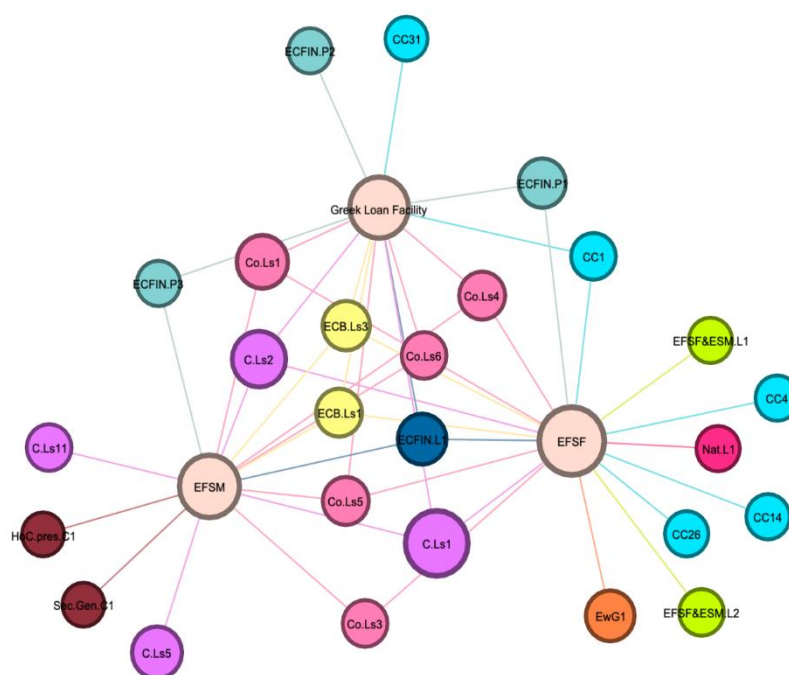


Figure 4: Network graph of legal & policy professionals in May 2010.

In the network graph above, it is shown that many of the same legal and policy professionals worked on all three instruments. The most central here being C.Ls1 and C.Ls2 from the Commission legal service, as well as ECFIN.L1, and ECB.Ls1 and ECB.Ls3 from the ECB. Following the decision to create the EFSF, the lawyer – formerly from the bank HSBC (EFSF&ESM.L1) – was hired as its first legal professional. In this way, the EFSF was becoming very much a financial institution, and yet it was still connected to EU law through compatibility clauses. As mentioned in Chapter 6, having such clauses was

Code	
C.Ls	Commission legal professional
Co.Ls	Council legal professional
ECFIN.L	DG ECFIN legal professional
ECFIN.P	DG ECFIN policy professional
ECB.Ls	European Central Bank legal professional
EwG	Eurogroup Working Group policy professional
EFSF&ESM.L	Legal professional hired by EFSF/ESM
Nat.L	National legal professional
CC	Clifford Chance ²⁰⁹ legal professional
HoC.pres.C	Head of Cabinet of the Commission President
Sec.Gen.C	Secretary General of the Commission

crucial from the perspective of the ECFIN legal professional in order to protect EU law under the EMU section of the Treaties (C1 interview). In terms of national legal professionals, there aren't any in these initial network interactions, which according to a Commission legal professional was because "MS representatives participating in these meetings usually come from Finance or

Economic ministries and rarely have a legal background. Their Ministers are more focused by the financial implications of the solutions. It is for that reason that it was mainly left to the EU institutions' lawyers to come up with the legal dressing" (A1 interview – Commission lawyer). This clarifies why there were so few national legal professionals involved in the construction of the mechanisms.

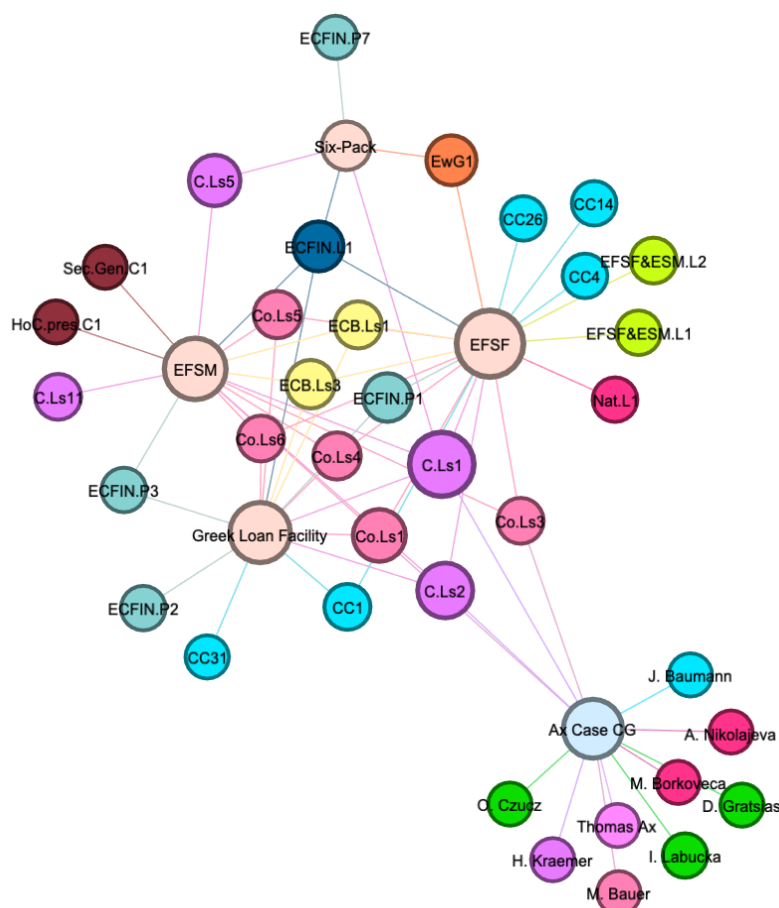


Figure 5: Network graph of legal & policy professionals in June 2010.

²⁰⁹ Clifford Chance is a major global law firm that originated in the City of London.

Following the announcement of the EFSM and its creation on 9 May 2010, an action for annulment was already filed on 8 June 2010 by a Mr. Ax from Germany,²¹⁰ but which was quickly dismissed. Nevertheless, it marks the point at which one of the first legal cases against a crisis solution appeared at the EU level. Because the EFSM is a Council Regulation, the Council lawyers were involved in defending the mechanism, but the Commission lawyers intervened in support of the Council. In the above network graph, Figure 5, we see that the lawyers who constructed the mechanism are the same ones that must defend it: C.Ls1, C.Ls2, Co.Ls1 and Co.Ls3.

At the same time, the President of the European Council, Van Rompuy, had put together a task force to look into improving economic governance in terms of debt and fiscal sustainability, which eventually led to the Six-Pack regulation. The Commission had already made a legislative proposal in September 2010 for the Six-Pack regulation, which was seen as an attempt by it to maintain its position as legislative agenda setter (Valle-Flor, 2018). Involved in this were key DG ECFIN and Commission legal professionals, as well as the Eurogroup working group President, EwG1. Concomitantly, once the EFSM and the EFSF had been created, it was decided that a permanent solution to financial assistance was needed; the EFSF was established as a temporary solution and would only be active for 3 years²¹¹ while the EFSM had very limited capacity (€60 billion). Already on 18 October 2010, Chancellor Merkel and President Sarkozy made a declaration to create a permanent mechanism, and from there work started on the ESM. A key part of this was the notion of Eurozone collective action clauses (CACs), discussed in Chapter 7, which was mandated in the ESM Treaty to enable private debt restructurings in the future. For drafting the CACs, lawyers from Cleary Gottlieb²¹² were used, which can be seen in the network graph below, to the very right. Also notable is ECFIN.Ls2 who came to work as a lawyer for DG ECFIN recruited from the IMF. DG ECFIN only had one legal professional before the EZ crisis, but as it unfolded, they started to hire their own lawyers²¹³ to work on legal issues of economic governance during the crisis.

²¹⁰ Case T-259/10, *Ax v Council*, ECLI:EU:T:2011:274

²¹¹ Extraordinary Council Meeting (Economic and Financial Affairs), 9-10 May 2010: Council document 9596/10.

²¹² Cleary Gottlieb is a global law firm, originally established in the US.

²¹³ The unit that ECFIN.Ls2 was hired by grew from 10 employee at the beginning of the crisis to 25 in two years (C1 interview – ECFIN legal professional) but these were a mix of lawyer and economists.

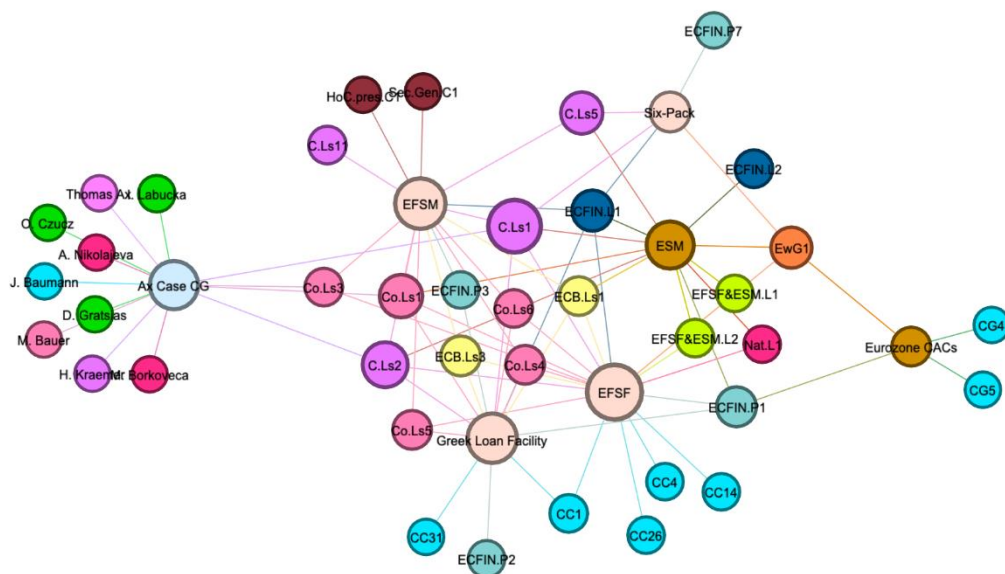


Figure 6: Network graph of legal & policy professionals from 2010 to 2011.

Code	
C.Ls	Commission legal professional
Co.Ls	Council legal professional
ECFIN.L	DG ECFIN legal professional
ECFIN.P	DG ECFIN policy professional
ECB.Ls	European Central Bank legal professional
EwG	Eurogroup Working Group policy professional
EFSF&ESM.L	Legal professional hired by EFSF/ESM
Nat.L	National legal professional
CC	Clifford Chance ²¹⁴ legal professional
HoC.pres.C	Head of Cabinet of the Commission President
Sec.Gen.C	Secretary General of the Commission

This inclusion of CACs indicated concern that a sovereign debt restructuring would occur. Over the course of 2011, doubts were raised as to the sustainability of Greek debt and the IMF called for its restructuring (Zettelmeyer, Trebesch, & Gulati, 2013a). On 26 October 2011, a Euro Summit statement invited “Greece, private investors and all parties concerned to develop a voluntary bond

exchange with a nominal discount of 50 percent on notional Greek debt held by private investors”.²¹⁵ This debt restructuring involved 4 prominent law firms: On the side of Greece, was again Cleary Gottlieb, while the creditors used Allen & Overy, Clifford Chance, and White & Case. A key feature of the deal was negotiated by Jean Lemierre of BNP Paribas bank on the side of the creditors and Michele Lamarche from Lazard on the side of Greece, namely a “co-financing” option which came via the EFSF. This was handled by lawyers from Clifford Chance, over and above their work on the GLF, establishing the EFSF and enabling the ESM’s first issuance of bonds. In this sense, the chaos ravaging the euro was a steady stream of business for them (C3 interview – ECFIN policy professional), which they called a ‘strategic

²¹⁴ Clifford Chance is a major global law firm that originated in the City of London.

²¹⁵ See Euro Summit Statement, 26 October 2011, available at https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/125644.pdf

role'.²¹⁶ During the same period, Germany and France made the first proposal of the Fiscal Compact (Besselink & Reestman, 2012). As already discussed, it essentially built on the EU law Six-pack, but added a Member State commitment to put a debt brake into national law at a constitutional level or equivalent (ibid.). In the network graph below, figure 7, one can see how the network expands greatly with all the private lawyers on the right, while on the Fiscal Compact, more centralisation occurs with the same Commission and Council legal professionals.

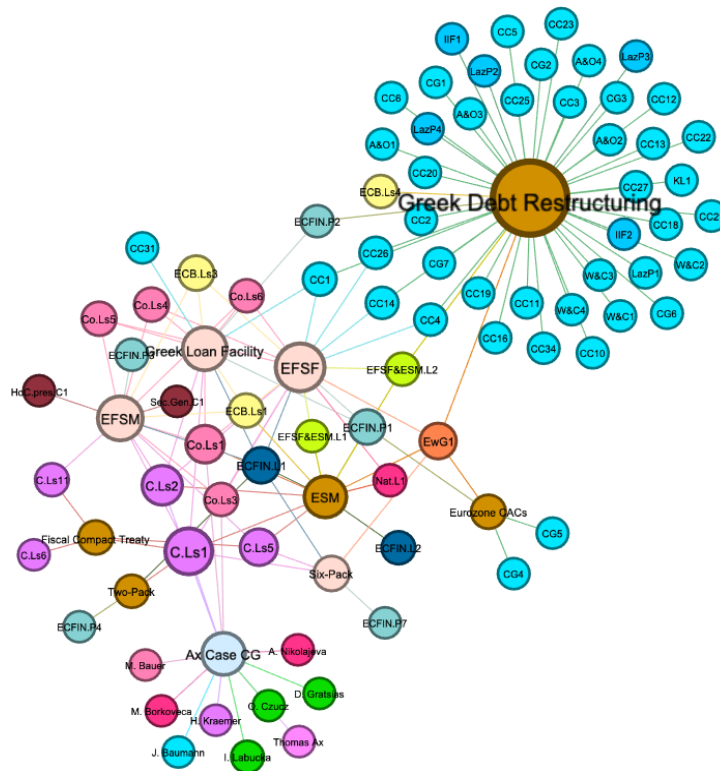


Figure 7: Network graph of legal & policy professionals from 2011 to 2012.

In 2012, the first high-profile case was adjudicated, which saw the Full Court composition of the Court of Justice, and an occurrence only seen for very critical cases. This was the *Pringle* case, which was contesting the ESM Treaty's compatibility with EU law. Again, we see the same EU legal professionals who have to defend what they have been part of negotiating and constructing. At the same time, we see a large number of national policy professionals involved in the case, all of whom generally agree that the ESM is compatible with EU law. As can be seen in the graph, the network is expanding, but most of the agents being connected are only involved in one or two situations. What is of interest is the core group in the middle where we have our most central agents: the Commission legal professionals (purple nodes),

²¹⁶ Clifford Chance, "Strategic role for Clifford Chance in Euro debt crisis resolution" 25 February 2013, see website https://www.cliffordchance.com/news/news/2013/02/strategic_role_forcliffordchanceineurodebtcrisisresolution.html

DG ECFIN legal professionals (dark blue nodes), the Council legal professionals (pink nodes), and ECB legal professionals (yellow nodes).

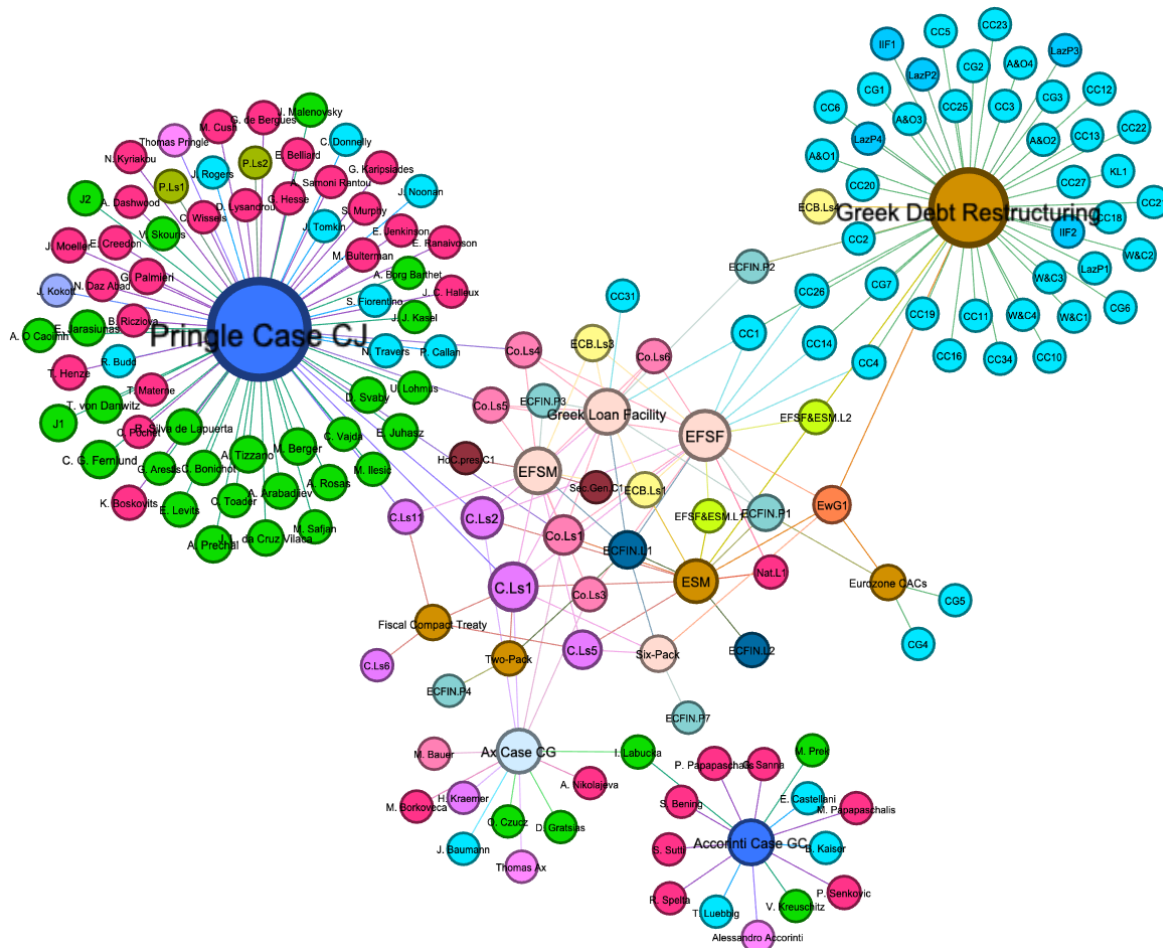


Figure 8: Network graph of legal & policy professionals from 2012 to 2013.

Code	
C.Ls	Commission legal professional
Co.Ls	Council legal professional
ECFIN.L	DG ECFIN legal professional
ECFIN.P	DG ECFIN policy professional
ECB.Ls	European Central Bank legal professional
EwG	Eurogroup Working Group policy professional
EFSF&ESM.L	Legal professional hired by EFSF/ESM
Nat.L	National legal professional
CC	Clifford Chance legal professional
HoC.pres.C	Head of Cabinet of the Commission President
Sec.Gen.C	Secretary General of the Commission
Green Node	Judges
Red Node	National lawyers

At the beginning of 2013, the first EU level case related to the Greek debt restructuring occurred, where the applicants sought to place non-contractual liability via the ECB's involvement in the restructuring, in order to recoup the loss of value of their investment in government bonds. In 2013, the Cypriot banking crisis occurred, a knock on effect of the Greek debt restructuring, and on 25 March 2013, the Eurogroup issues a statement indicating their support for a bank bail-in of uninsured depositors, which is executed in April. This highly

controversial action set of ‘waves’ of litigation against various EU institutions, which starts off with *Ledra Advertising* application in May 2013, followed by the *Chrysostomides* application in December 2013. In the network graph below, these two court cases are in the bottom-left corner.

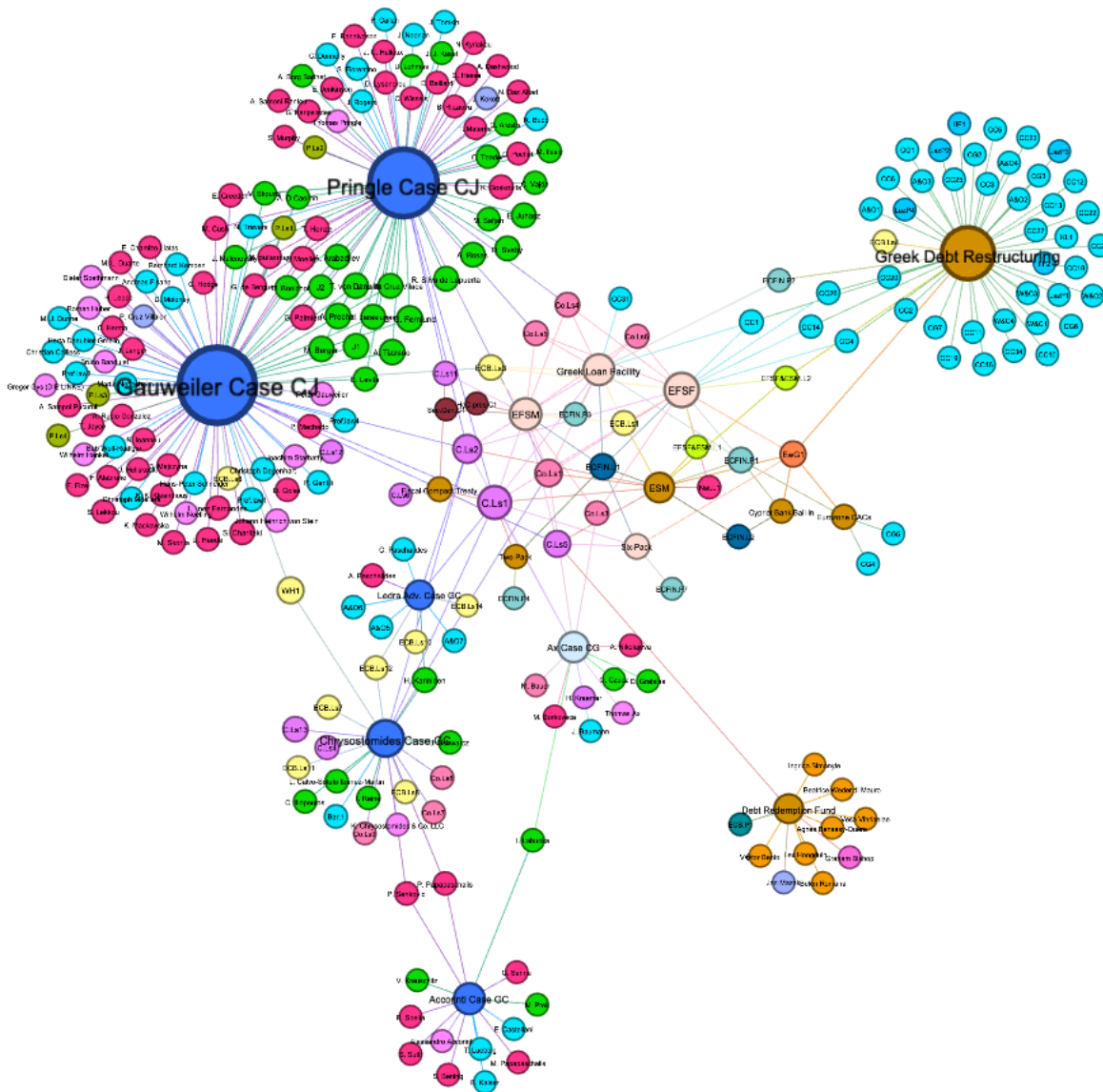


Figure 9: Network graph of legal & policy professionals from 2013 to 2014.

Still looking at the above network graph, in July 2013, another notable occurrence was the setting up by the Commission of an expert group on ‘Debt Redemption Fund and Eurobills’, which would look at “the possible merits, risks, requirements and obstacles of partial substitution of national issuance of debt through joint issuance in the form of a redemption fund and eurobills”.²¹⁷ This involved a Commission

²¹⁷ European Commission, “Expert Group publishes final report on debt redemption fund and eurobills”, 31 March 2014, at https://ec.europa.eu/commission/presscorner/detail/en/IP_14_342 (Accessed 5 October 2018).

lawyer as well as an Advocate General from the CJEU, and a select group of economists, for example, Graham Bishop and Beatrice Weder di Mauro, and it was chaired by a former ECB Executive Board member, Gertrude Tumpel-Gugerel. Their report did not lead to any redemption funds, and essentially found that the only way to debt mutualisation was Treaty change. The group is located in the far-bottom right side of the network graph below, with the main connection to the rest of the network being through the Commission lawyer C.Ls5, who worked on the Fiscal Compact, the ESM Treaty, and the Six-Pack.

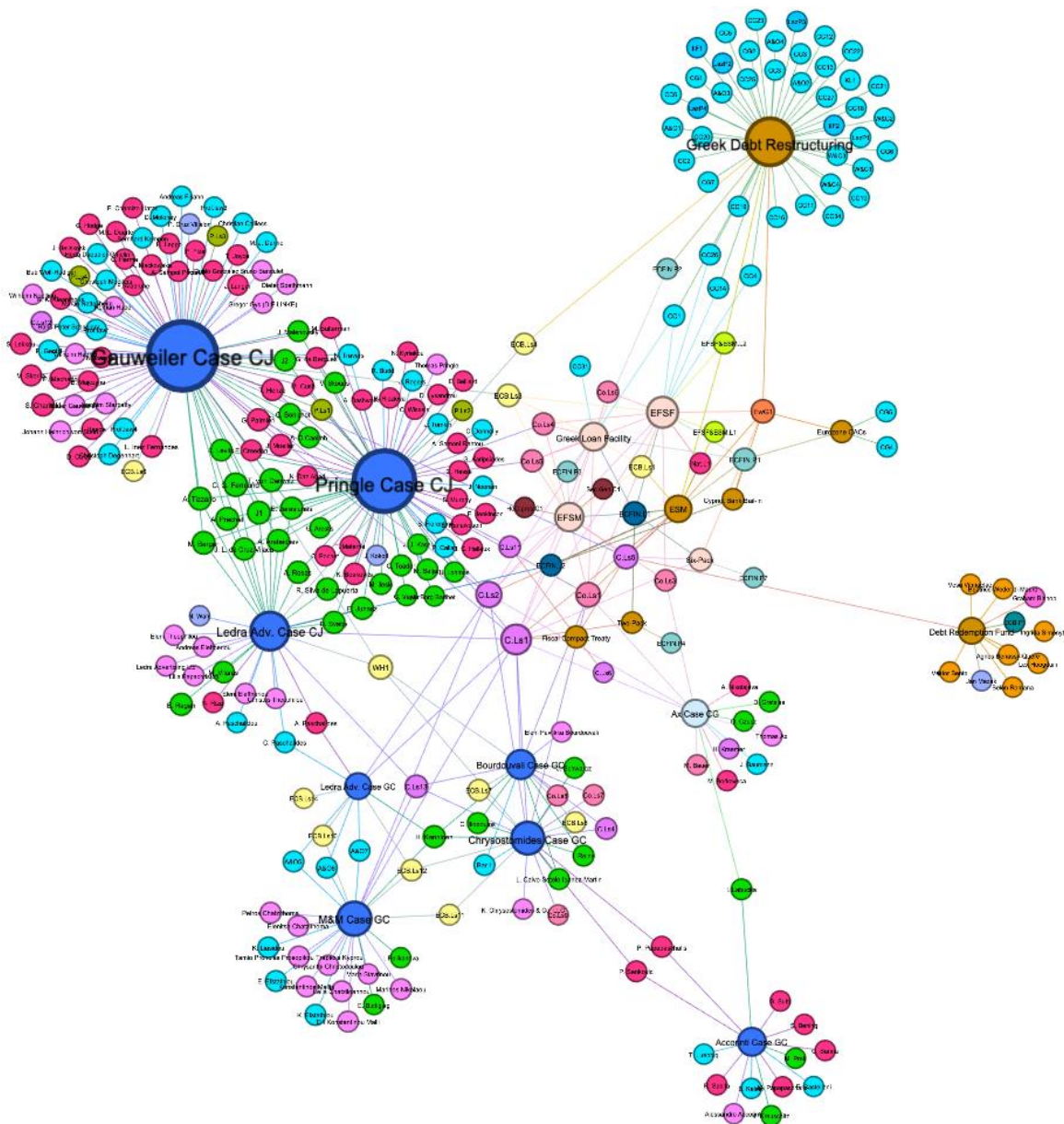


Figure 10: Network graph of legal & policy professionals from 2014 to 2015.

Code	
C.Ls	Commission legal professional
Co.Ls	Council legal professional
ECFIN.L	DG ECFIN legal professional
ECFIN.P	DG ECFIN policy professional
ECB.Ls	European Central Bank legal professional
EwG	Eurogroup Working Group policy professional
EFSF&ESM.L	Legal professional hired by EFSF/ESM
Nat.L	National legal professional
CC	Clifford Chance legal professional
HoC.pres.C	Head of Cabinet of the Commission President
Sec.Gen.C	Secretary General of the Commission
Green Node	Judges
Red Node	National lawyers

In 2014, the referral from the German Constitutional Court (FCC) went to the Court of Justice, culminating in the infamous *Gauweiler* case. This can be seen in the top far-left corner, next to the *Pringle* case. *Gauweiler* was also high-profile in that it assembled the Grand Chamber of judges, but not the Full Court like the *Pringle* case. Nevertheless, *Gauweiler* was significant and drew on the legal doctrine created by the judges in the *Pringle* case, as was detailed in Chapter 8.

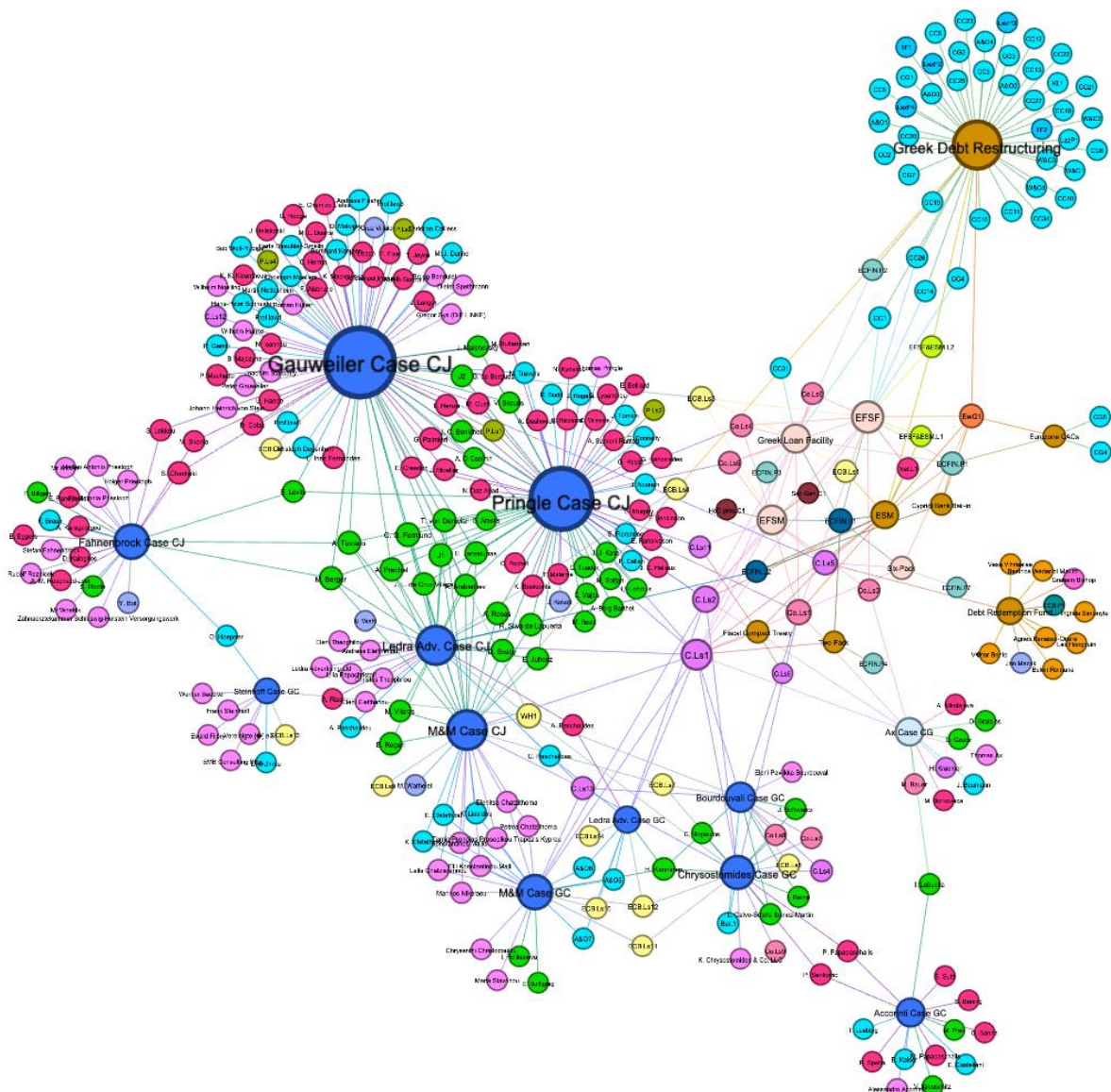


Figure 11: Network graph of legal & policy professionals from 2015 to 2017.

Following this, the next wave of case connected to the Cypriot bank bail-in arose, namely *Mallis* in October 2014, and then *Bourdouvali* in December 2014,²¹⁸ both of which are discussed in Chapter 9. See the cases in the bottom left-side of the network graph below. In 2015, the *Ledra Advertising* case had gone to appeal at the Court of Justice.

By 2015, the *Mallis* case had also gone to appeal, while two more cases were being adjudicated on the Greek Debt Restructuring. Then in 2016, the judgements for both *Ledra Advertising* and *Mallis* were given, both of which added to the growing legal doctrine related to the ESM framework and especially the Commission's role therein, as well as the nature of the Eurogroup, all of which is analysed in Chapter 9. The *Fabnenbrock*²¹⁹ case was a preliminary reference to the Court of Justice that turned on a bureaucratic definitional issue of whether, when filing claims for compensation against Greece for the disturbance of ownership (i.e. the Greek bonds), “those actions concern civil or commercial matters or actions or omissions in the exercise of State authority”.²²⁰ In 2017, the *Steinboff*²²¹ case was instigated and accused the ECB of non-contractual liability based on its inaction to stop Greece engaging in allegedly illegal action, i.e. restructuring its debt.

Finally, by 2018 another referral was made by the FCC to the Court of Justice, again concerning an ECB monetary policy programme, the PSPP. And again, it was adjudicated in the Grand Chamber, meaning it was considered relatively high-profile. Although not as controversial as the referral by the FCC on the ECB's OMT programme in *Gauweiler*, as discussed in Chapter 8, the *Weiss* case was still significant because it was many of the same German lawyers who had contested the OMT, as well as some of the same lawyers who had contested the ESM in Germany.

²¹⁸ Case T-786/14, *Eleni Pavlikka Bourdouvali and Others v Council of the European Union and Others*, ECLI:EU:T:2018:487

²¹⁹ Case C-226/13, *Stefan Fabnenbrock and Others v Hellenische Republik*, ECLI:EU:C:2015:383

²²⁰ Ibid. para. 15

²²¹ Case T-107/17, *Frank Steinboff and Others v European Central Bank*, ECLI:EU:T:2019:353

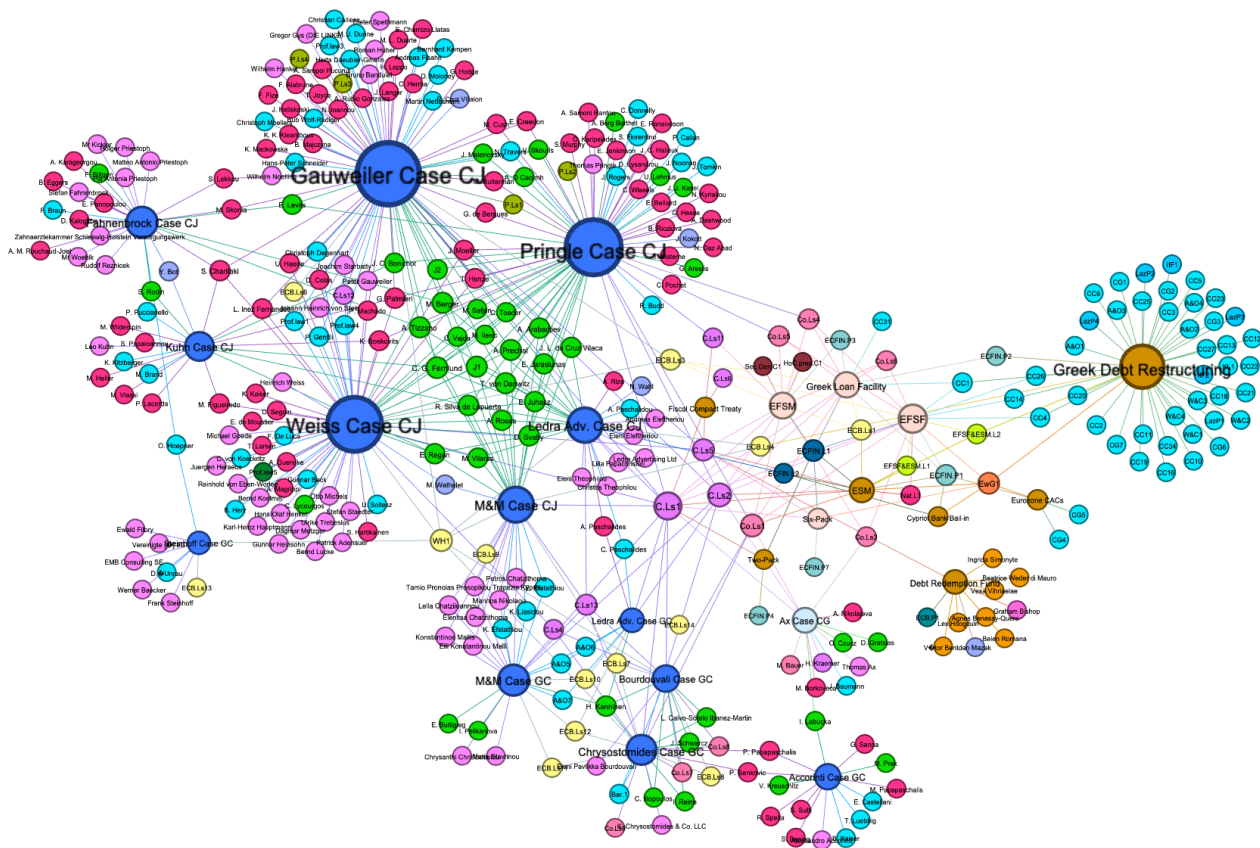


Figure 12: Network graph of legal & policy professionals from 2017 to 2019.

10.1.2 Degree Centrality of Temporal Network

This diachronic descriptive analysis of the EZ crisis illustrates the high level of legal activity engaged in by the legal and policy professionals in the area of economic policy. In terms of involvement, we can look at the degree centrality measures of the agents in order to get an indication of each agent's degree of involvement. This leads to the following table:

Code	Type of Agent	Degree Centrality
C.Ls1	Commission Legal Professional	17
C.Ls2	Commission Legal Professional	10
C.Ls5	Commission Legal Professional	7
C.Ls13	Commission Legal Professional	5
C.Ls11	Commission Legal Professional	3
C.Ls4	Commission Legal Professional	3
C.Ls12	Commission Legal Professional	2
Co.Ls1	Council Legal Professional	8

Co.Ls4	Council Legal Professional	4
Co.Ls5	Council Legal Professional	4
Co.Ls3	Council Legal Professional	3
Co.Ls6	Council Legal Professional	3
Co.Ls7	Council Legal Professional	2
Co.Ls8	Council Legal Professional	2
ECFIN.L1	DG ECFIN Legal Professional	6
ECFIN.L2	DG ECFIN Legal Professional	3
ECFIN.P1	DG ECFIN Policy Professional	5
ECFIN.P2	DG ECFIN Policy Professional	2
ECFIN.P3	DG ECFIN Policy Professional	2
WH1/ECB.Ls2	ECB Legal Professional	7
ECB.Ls3	ECB Legal Professional	5
ECB.Ls1	ECB Legal Professional	4
ECB.Ls12	ECB Legal Professional	3
ECB.Ls4	ECB Legal Professional	3
ECB.Ls7	ECB Legal Professional	3
ECB.Ls6	ECB Legal Professional	2
ECB.Ls10	ECB Legal Professional	2
ECB.Ls11	ECB Legal Professional	2
ECB.Ls8	ECB Legal Professional	2
EFSF&ESM.L2	EFSF/ESM Legal Professional	3
EFSF&ESM.L1	EFSF/ESM Legal Professional	2
P.Ls1	EP Legal Professional	2
P.Ls2	EP Legal Professional	1
P.Ls4	EP Legal Professional	1
P.Ls3	EP Legal Professional	1
EwG1	Eurogroup Policy Professional	6
CC1	Private Lawyer	3

Table 1: Degree centrality of legal & policy professionals involved in crisis solutions and crisis-related court cases.

As is clear, the Commission legal professionals – notably C.Ls1 as well as C.Ls2 and C.Ls5 – have very high degree centrality measures. This could be expected given the Commission’s central role in legislative procedures, however, the added element is how often C.Ls1 goes to court to defend what they have constructed. Other agents with high degree centrality are the Council legal professionals – notably Co.Ls1 – who was also very much a part of the construction of the various instruments, but did defend them as much as C.Ls1 did, in that other Council legal professionals were used as well in the court cases. In terms of DG ECFIN, their legal professional ECFIN.L1 has been involved in the construction of the

mechanisms and the legal instruments, such as Treaties and regulations, but does not go to court, as he is involved purely on the legal aspects of creation. Amongst the ECB legal professionals, ECB.Ls3 and ECB.Ls4 have high degree centrality, but where ECB.Ls3 has been involved in both construction of instruments and court cases, ECB.Ls4 has only been involved in court cases, indicating that he focuses on litigation. What is notable is the lack of involvement of the European Parliament legal professionals, and indeed, in the interviews these legal professionals were not seen to be much involved, much of which had to do with the fact that many of these elements were made in a rush and thus without the European Parliament being involved. When they did appear in the cases, notably *Pringle* and *Gauweiler*, it was because they requested to send observations, hence P.Ls1 has a degree centrality of 2.

In and of itself, these measures simply give an indication of involvement, but to really substantiate this measure I will construct a second type of network that develops the involvement measured above into a closer approximation of what this part of the study is interested in: the emergence of symbolic capital. By establishing this, I can illustrate how new stakes emerge at the intersection of two fields and how effective agents accumulate this symbolic capital, which goes to fulfilling the aim: to show how economic policy becomes legally constructed. But where the degree centrality indicated basic involvement, and which could be said to indicate social capital, as these agents are seen to interact through these legal activities, the next use of centrality measures draws on a process of referral, whereby 23 agents who were directly involved in the above activities were asked who they would refer me to in terms of those with deep knowledge of the EZ crisis, in other words, agents that are perceived as knowing well, which in Bourdieusian framework I argue is an indication of symbolic capital.

10.2 From Temporality to Referentiality

In the above temporal networks I sought to show how some agents became central from being involved in many crisis situations where they interacted with other agents and worked on solutions and the contestation of those solutions. This analysis was based on a variety of data sources, and the degree centrality measure showed us which agents were very central. However, for my purposes, this degree centrality will now be looked at in terms of how other agents directly involved have perceived involvement; i.e. which agents are seen as knowing well, as a result of their being involved in solution-making and case defending? In order to do this, I have constructed a network based on agent referrals.

10.2.1 Constructing a Referral Network

The construction of this network – showing the linkages between the actors in terms of who referred to who – is about elaborating how network ties contributed to a subsequent field structure, but only in terms of their effect. I say subsequent because, based on my theoretical assumptions, the crisis is assumed to have disrupted the relevant social fields when it started at the end of 2009, and thus locating actors requires an approach that can first trace the relevant agents as a population of agents involved. In other words, I could establish some sort of field boundary (albeit porous) by following the agents' ties to other agents and so on, until the data saturation was reached, as discussed in Chapter 3 on the methodology. In doing this – tracing an approximate field boundary – via constructing a network in terms of the referral method, I aim to foreground the field effect, i.e. the effect that the field produces on the agents, and thus enables their inclusion in the network. But these particular field effects – e.g. the mechanism of agents' inclusion in the network – are proposed to be generated by the agents' practices going back to the start of the crisis until 2019. In other words, practices in a disrupted context of crisis generate effects and over time structure the field; these effects are reflected in the accumulated symbolic capital which is connected to the similarly emerging stakes, and thereby a field effect is generated on the agents, enabling us to infer a field structure from its effects. See Figure 13 below – the referral network in 2020.

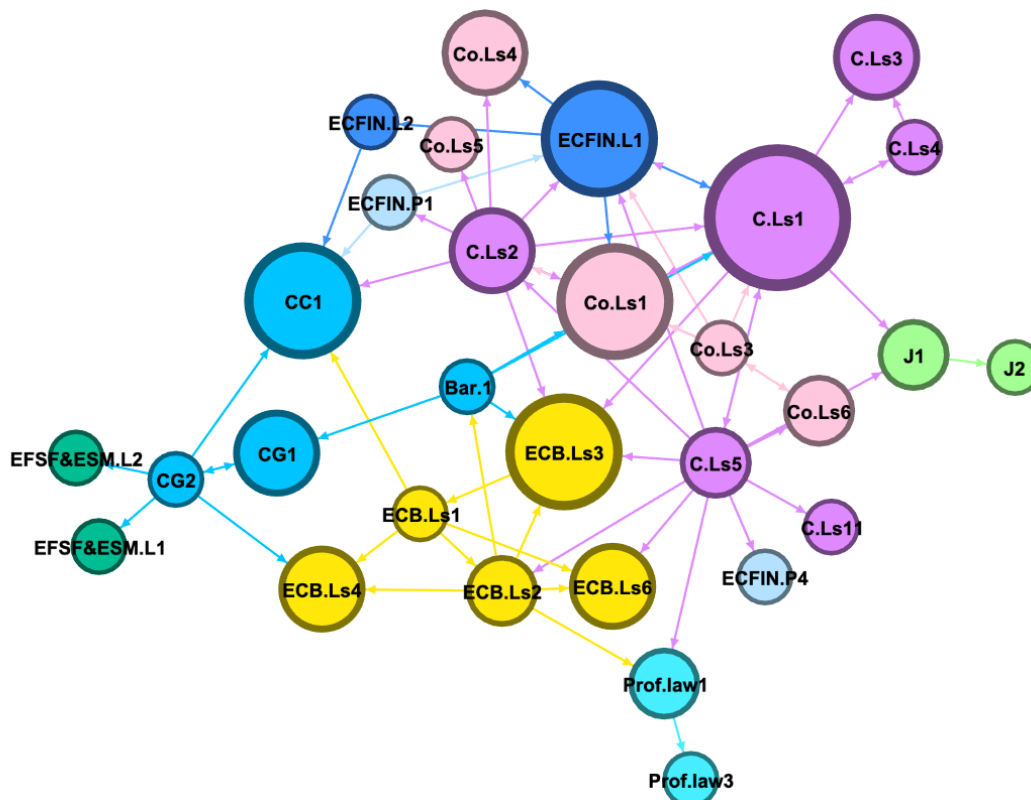


Figure 13: The referral network of legal & policy professionals in 2020.

In this way, the final network structure not only shows who is part of the field, but also how they are part of the field in terms of the effects of the field being translated into social capital in terms of who referred to who, but also symbolic capital in terms of who was thought of as an effective agent (Bourdieu, 2005), i.e. possessing (and accumulating) a species of capital seen to make that agent effective in terms of the stakes. In sum, the approach developed for this thesis, and to answer the research question, uses a network analytic approach in a historical sense to show how over time agents become part of dealing with the crisis through the concrete events and issues that need to be dealt with via their practices, which in turn generates field effects in terms of the emergence of types of capital attached to those practices, and through which the stakes of the field become crystallised and discernible. Below the network graph has been generated based on the referrals from the respondents (i.e. agents). In the next section, the basic degree centrality measures are presented and compared to the temporal network degree centrality measures of the agents, after which I discuss the notion of symbolic capital that could be inferred from these degree centrality measures.

10.2.2. General Observations of the Referral Network

In terms of the measures in the table below, a few points should be noted. First, the in-degree measure denotes the number of times that an agent was referred by another agent; the out-degree measure denotes the number of times an agent made a referral to another agent. Next to the total column, I have added the degree centrality measures for the legal and policy professionals from the temporal networks presented above.

Code	Agent	In-Degree (referred by agent)	Out- Degree (referred to agent)	Total	Degree from Temporal Networks
C.Ls1	Commission Legal Professional	6	7	13	17
ECFIN.L1	DG ECFIN Legal Professional	5	4	9	6
Co.Ls1	Council Legal Professional	5	2	7	8
ECB.Ls3	ECB Legal Professional	5	1	6	5
CC1	Private Lawyer	5	0	5	3
ECB.Ls4	ECB Legal Professional	3	0	3	3
ECB.Ls6	ECB Legal Professional	3	0	3	2
C.Ls2	Commission Legal Professional	2	8	10	10
C.Ls3	Commission Legal Professional	2	0	2	0
Co.Ls4	Council Legal Professional	2	0	2	4
Co.Ls6	Council Legal Professional	2	1	3	3
WH1/ECB.Ls2	Private Lawyer	2	5	7	7

CG1	Private Lawyer	2	1	3	1
Prof.law1	Legal Academic	2	1	3	1
J1	Judge	2	1	3	5
C.Ls5	Commission Legal Professional	1	11	12	7
ECFIN.L2	DG ECFIN Legal Professional	1	1	2	3
C.Ls4	Commission Legal Professional	1	2	3	3
ECFIN.P1	DG ECFIN Policy Professional	1	2	3	5
Co.Ls5	Council Legal Professional	1	0	1	4
ECB.Ls1	ECB Legal Professional	1	4	5	4
Co.Ls3	Council Legal Professional	1	5	6	3
Bar.1	Private Lawyer	1	4	5	1
ECFIN.P4	DG ECFIN Policy Professional	1	0	1	1
C.Ls11	Commission Legal Professional	1	0	1	3
EFSF&ESM.L2	EFSF/ESM Legal Professional	1	0	1	3
CG2	Private Lawyer	1	5	6	1
Prof.law3	Legal Academic	1	0	1	1
J2	Judge	1	0	1	3
EFSF&ESM.L1	EFSF/ESM Legal Professional	1	0	1	2

Table 2: Degree centrality measures for agents from the referral network, and from the temporal network.

In the above table the basic degree centrality measures of the agents in the referral network have been presented, together with, in the far right column, the degree centrality measure for each agent from the temporal network. In this way, we can see whether their involvement in solutions and court cases of crisis issues in the temporal network correlates with being seen to know well about these crisis issues by other agents who were involved. Firstly, there is a correlation between agents that have a high degree centrality from the temporal network and a high in-degree in the referral network. This means that some agents who were involved in many crisis-solving and solution-defending situations were also referred to as knowing well. Notably, there is C.Ls1, who was referred by 6 other agents, and who has a degree centrality from the temporal networks of 17, in that way this agent can be seen as highly central in not just being involved in constructing the various mechanisms, e.g. EFSM, the ESM, and the regulations, the Six-Pack, the Two-Pack, the Fiscal Compact, but also defending the constructions in court, namely, the ESM and the role of the EU institutions in the ESM framework in *Pringle*, *Ledra Adv.*, *Mallis*, *Chrysostomides*, and *Bourdouali*. More importantly, this Commission legal professional was referred to by six other agents as knowing well or being ‘key’.

Next is the legal professional ECFIN.L1 from DG ECFIN, who was referred to 5 times and was involved

in many of the constructions, including the mechanisms – the GLF, EFSM, EFSF, ESM – and the legislation of the Six-Pack and the Two-Pack. However, this person was not involved in court cases, as he is not a lawyer who represents institution, but rather works on the legal drafting side, hence his lower degree centrality from the temporal network is 6. The Council legal professional Co.Ls1 was similarly referred to 5 times and appeared 8 times in the temporal network. What is interesting is that he appeared in less court cases than his Commission counter-part C.Ls1, which could be attributed to the larger role that the Commission takes in court cases in that it often intervenes in preliminary reference procedures to give observations as ‘Guardian of the Treaties’.²²² During the EZ crisis, the Commission legal professionals gave observations in the *Gauweiler* case, and the *Weiss* case, whereas the Council did not appear in these cases. In this way, the Commission legal professionals engage a lot with various crisis issues, including those that do not directly concern them, but which they need to take a legal position on. In this way, C.Ls1 from the Commission appears in so many cases, having been part of writing their legal observations.

The ECB legal professional ECB.Ls3 was also referred to 5 times and has appeared in the temporal network 5 times. It should be noted that this thesis has not looked at all the legislation and activity regarding the creation of Banking Union as well as the Single Resolution Fund, etc. because it was seen to go beyond the scope of economic policy. Nevertheless the ECB legal professionals were still very prominent in economic policy in terms of carving out legally what the ECB’s role in conducting monetary policy was vis-à-vis economic policy, which came up in the *Pringle* and *Gauweiler* cases, as well as the issue of sovereign debt restructuring which came up in the *Accorinti* and *Steinboff* cases, and finally, its role under the ESM framework in *Ledra Advertising*, *Mallis* and *Chrysostomides*. In this way, the ECB legal professionals are also getting much experience from the various roles it has been given.

The next legal professional with five referrals is the lawyer from Clifford Chance. As mentioned in the temporal network, Clifford Chance ended up getting contracted to do a number of jobs: the GLF, the setting up of the EFSF, assisting in the issuance of EFSF and ESM bonds, as well as the bond exchange element of the Greek Debt Restructuring. In the referrals, it seemed that the key lawyer from Clifford Chance, CC1, was seen as capable.

Some interesting divergences are when an agent gets very few referrals but makes a lot of referrals. We see this in the case of C.Ls2 and C.Ls5. In the case of the former, this agent gives out 8 referrals and only

²²² See https://ec.europa.eu/dgs/legal_service/agent_en.htm (Accessed 15 April 2020).

gets 2, while the latter agent gives 11 referrals and only gets 1. Both were involved in a lot of crisis events, with C.Ls2 having a degree centrality of 10 and C.Ls5 having a degree centrality of 7. In that way, it could be that they are not seen as having a high level of competence, or in the network literature, this would be seen as low prestige, where an agent gives a lot of referrals but gets few (de Nooy, 2003). In the next section, this notion of prestige is going to be looked at in terms of the Bourdieusian concept of effective agents, which is the focus of this chapter.

10.2.3 Effective Agents and their Symbolic Capital

As argued, the crucial aspect of this network is that it illustrates which agents referred to whom in terms of experience and knowledge of the EZ crisis. In other words, it shows which agents are seen to know well (Lazega, 1992; Seabrooke, 2014a). In Bourdieusian, terms however, I argue that this can be seen as a type of symbolic capital that the most referred to agents have accumulated during the course of the EZ crisis, as they have been seen to act effectively (Bourdieu, 2005). Bourdieu used the notion of “effective agents” (2005, p.99) to denote those agents who had a species of capital that enabled them to act effectively in the field, in his case study of the French housing market. Similarly, I infer from this referral network that this group of agents are essentially seen as the effective agents, and the type of capital that enables them to be seen as effective is symbolic capital accumulated through their involvement and practices during the EZ crisis: given the legal nature of the practices, it can be concluded that this is juridical capital

To get to this inference, one must look at the chronology. The EZ crisis events that these agents were involved lasted from 2010 until today, i.e. some events, such as the *Chrysostomides* case is still ongoing. The referral network was constructed based on interviews from mid-2018 to end-2019. In this way, the referral network is synchronic and thus can be seen as the accumulation of practices, experience and conflicts from when the EZ crisis arose. Moreover, the accumulated experience is the sum of the various events in which the agents were involved, as shown in the temporal network, however, the key point of the referral network is that it shows the structure of who is seen to possess valuable experience and knowledge based on the views of a group of agents who we know were involved in all the key crisis events. In this way, the results of the referral network, indicated by the in-degree centrality measure, illustrates which agents possess symbolic capital accumulated through over time during the EZ crisis, and can be said to be an effective agent – i.e. possessing a species of capital that makes them effective. The next question is then in which context they can be said to be effective now. Here, a tentative suggestion

is that they are effective in a transnational field of economic governance. How is that *legal* professionals have become effective agents in *economic* governance? Throughout the crisis, European economic governance has become legally constructed through the enabling of solutions within the EU legal framework – the Six-pack, the Two-pack, the EFSM, the use of Article 136 for the macro-imbalances procedure – and the elaboration of legal interpretation of economic policy provisions in the Treaties via multiple court cases, thereby setting down doctrine on economic governance, as well as the construction of the ESM framework and the Fiscal Compact, which is still nevertheless connected to the EU legal framework. This is not to say that legal professionals are more in control of economic governance than finance ministers or heads of state, but rather to show how through processes of boundary work, legal professionals have become *more* influential in economic governance since before the EZ crisis, as was shown in Chapter 4 on the EMU. Recalling what the legal and policy professionals said, before the crisis, there was very little legal activity, and lawyers were not seen as being necessary to economic policy. With these two networks, it is shown how legal professionals have become centralised in constructing economic policy, albeit in specific legal forms.

This symbolic capital could be said to be juridical: Bourdieu has referred to ‘juridical capital’ vis-à-vis the state as “that particular form of cultural capital, predisposed to function as symbolic capital, that is juridical competence” (Bourdieu, 1994, p. 16), i.e. juridical capital has symbolic value in the field of state power because of the way that law rationalises and makes legitimate the coercive power of the state. In this way, “[s]ymbolic capital is a form of *power* that is not perceived as power but as legitimate demands for recognition, deference, obedience, or the services of others” (Swartz, 1997, p. 43, emphasis added). In other words, it is symbolic power (Bourdieu, 1986). This further implies that cultural capital will often be seen as symbolic capital because “its transmission and acquisition are more disguised than those of economic capital” (ibid., p.245), and by being disguised, its power to define or demand legitimation is similarly concealed, thereby its designation as symbolic. In the next chapter, more will be discussed on how the juridical capital outlined here functions to legitimate the power exercised during the EZ crisis.

Finally, if one looks at the background of the effective agents, we can specify even more why a particular type of juridical capital has made them very influential in the field of economic policy. For the sake of anonymity of the agents whom I interviewed, the background data collected is kept in general terms. The point here is to show that the accumulated cultural capital of the agents from before the EZ crisis could be inferred to have played a role in enabling their successful infiltration of the field of European economic policy. Firstly, many of them have legal backgrounds that confirm what the sociological

literature on the EU legal field has indicated: the legal professionals in the EU move between various legal positions. Notable here is that seven of the agents in the referral network were previously legal clerks at the CJEU, another three of them are connected to the College of Bruges, a notable EU-focused educational institution; and finally, many of the EU legal professionals have worked in more than one EU institution as a legal advisor, for example, C.Ls5 has worked at the Council and the Commission; Co.Ls1 has worked also at the Commission and the Council; ECB.Ls3 has worked at the Council and the ECB. Also, many of them have had national government positions before their EU legal positions; for example, C.Ls5 was at a national Ministry of Justice; C.Ls11 worked at a Ministry of Finance, and two of the Council lawyers came from the Conseil d'Etat. None of this is very surprising as it fits with the literature on the European legal field being weak and thus with porous external boundaries (Vauchez, 2008, 2011). For my purposes, the interesting element in the differentiation of the juridical capital observed in all these 'effective agents' of the referral network is that the agents with the most referrals have either a legal specialisation in banking and finance, or a dual background of both a legal degree and an economics degree. Thus, C.Ls1, ECFIN.L1, ECB.Ls3 and Co.Ls1 have both legal competences and finance/banking experience prior to the EZ crisis, which would have positioned them well before the crisis arose.

Summary of Findings

In this chapter, I presented the two-stage network approach to teasing out the process of how symbolic capital emerges – in this empirical case as juridical capital – in the interactions and practices of the legal and policy professionals during the EZ crisis. Specifically, it is related to the effects of their practices on the transnational context of the EZ crisis over time. Showing this is important to understand how network interactions can accumulate into an objective and structured dimension related to the context in which the legal and policy professionals have been embedded. Granted, this network approach only looks at one aspect of this objective structure in that it is focused on teasing out the process of the emergence of a novel species of capital, which concomitantly speaks to the emergence of new stakes in the area of economic policy, as, at a more macro-view, economic policy becomes legally constructed by the legal and policy professionals.

Specifically, a network methodology is used both diachronically and synchronically in order to reveal the effects of transnational fields in disruption. These effects are traced diachronically as, first, interactions and experiences gained from being involved in key solutions to the Eurozone crisis, which is then rendered synchronically as a referral network indicating an accumulated symbolic capital from being seen

to know well: juridical capital. At the intersection of the transnational fields of European economic governance, on the one hand, and European law on the other, economic policy has become legally constructed in a way that the stakes have become legal in nature, thereby giving agents with juridical capital high levels of influence in issues of European economic governance. In the next chapter, the findings of all the empirical chapters will be discussed in more depth vis-à-vis the theoretical framework and the literature that this thesis speaks to.

Chapter 11: Discussion & Conclusion

The Eurozone crisis has been studied from a variety of perspectives. Different scholars have sought to explain the origins of ideas related to the crisis (Blyth, 2013; Crespy & Vanheuverzwijn, 2019; Matthijs, 2016), the changing modes power afforded to Member States and EU institutions (Carstensen & Schmidt, 2018) the solutions adopted to put out the crisis flames (Coman, 2018) and their implications for politics and societies (Seabrooke & Tsingou, 2019) as well as European integration (de Witte, 2015; Hall, 2017; Ioannou et al., 2015), while others devoted attention to the politicisation and contestation of the solutions put in place to save the euro. While these contributions in EU studies and political economy have shed light on the politics of the crisis (Carstensen & Schmidt, 2018; Hall, 2017; Seabrooke & Tsingou, 2019), showing how political actors have sought to legitimize solutions whilst the crisis was fast/slow burning, little attention has been devoted to the uses of the law through professional practices to construct the crisis framework, both in the short and long term. This legitimization process has many layers and this thesis has sought to examine one of these layers by looking at the construction of legitimacy through law.

The developments of the EZ crisis have had significant implications for Member States and the notion of national sovereignty. Most notable is that, in this process of legally constructing economic governance at the supranational level – with the explosion in EU legislation – and at the transnational level – with the creation of the mechanisms like the EFSF and the ESM – the notion of sovereignty, which is said to be firmly connected to national statehood (e.g. Kaushal, 2015), we see a type of sovereign statehood appear in modified form at the EU level. Essentially, the two other non-national jurisdictions make forceful claims on national sovereign space by legally taking it out of parliamentary hands, most explicitly seen with policy conditionality imposed on the Member States that entered financial assistance programmes. And the issue with this shifting of sovereign democratic space to another scale, such as the EU scale, is that there is no parliamentary oversight from the European Parliament over policy conditionality (Ruffert, 2011). And therefore there is no democratic legitimization for this jurisdictional shift of scale. In effect, the national sovereignty related to economic governance such as fiscal policy is re-scaled, and the use of EU jurisdiction and transnational (EFSF) and international (ESM) jurisdiction has enabled this re-scaling (Valverde, 2009), through the process of legal construction that was deployed to deal with the EZ crisis.

11.1 Recapping the Puzzle, RQ and Propositions

The puzzle of this thesis is that if no institutional structure existed to deal with the Eurozone crisis, and the EMU structure denied such an occurrence ever arising, how was an intricate legal, institutional economic framework for managing crises constructed while the crisis itself unfolded? Moreover, which legal and policy professionals were in a position to construct such a complex framework and how did they do it under such urgent circumstances? As stated, the aim of the thesis is to show how legal and policy professionals enable and consolidate the legal construction of economic policy by answering the question: how do legal and policy professionals enable and consolidate solutions in an unfolding crisis? This question matters for understanding, firstly, how professional practices translate political tensions and enable legal frameworks that bind the political players, and secondly, the issues related to using the law to legitimate the intrusive exercise of power by unrecognised authorities, notably, the Eurogroup and its role in the ESM framework.

The thesis has sought to answer this question by analysing the practices of the legal and policy professionals, which is done by, first, re-constructing these practices and examining them through the lens of boundary work, and second, connecting these practices to their network positions in the field emerging from the crisis. In this way, the thesis is anchored in a sociological approach based on Bourdieu's field theory in transnational contexts (Adler & Pouliot, 2011; Dezalay & Garth, 2011; Kauppi & Madsen, 2014; Mudge & Vauchez, 2012; Vauchez, 2008) in order to show how this process unfolds empirically and the implications it has for the professionals as well as for political power. The aim of this chapter is to take the key empirical findings of the analysis and discuss them in terms of the theoretical assumptions and the propositions developed in Chapter 2. The propositions developed were:

- a) In a social context such as a transnational field, we can expect that the subjective (habitus) and objective (distribution of capital) structures will be disrupted by an unfolding crisis.
- b) If a transnational field is disrupted in a fashion asserted in proposition (a), then we can expect that the effects of practices to solve the crisis will produce reconfigured stakes that will shape the subjective and objective structures over time.
- c) If interactions between agents are part of practices, then tracing the effects of these interactions as network patterns over time can illustrate how the disrupted transnational field becomes stabilised with the emergence of reconfigured stakes.

In terms of proposition (a), and as Bourdieu & Wacquant (1992, p.131) noted, in times of crisis, "the routine adjustment of subjective and objective structures is brutally disrupted...". This condition was observed in terms of the subjective analysis where the legal and policy professionals described a situation

that was not only mired in urgency. In this way, thinking through how to deal with the crisis meant putting together agents who were not used to working together, physically or in the same epistemological domains. And as discussed in Chapter 4, this was also by design: the EMU governance structure in terms of economic policy was much more about politics in that it revolved coordination and convergence criteria, which in practice left discretion to the Member States, as seen in the failed application of the SGP and the court case that arose in regard to the discretion of the Council. In this way, the EZ crisis ushered in a disruption of the transnational fields of EU governance because it threw together groups of agents into a crisis situation that necessitated economic and political solutions but in legal forms, which for the respective agents from on the one side economics and finance, and on the other, EU law, indicated a disruption between their *habitus* and their positions prior to the EZ crisis.

More importantly, as was shown in Chapter 4, prior to the EZ crisis, there was very little *legal* activity going in the area of economic policy and indeed, it was understood that they did not need lawyers (C4 interview – DG ECFIN policy professional). Moreover, it was clear that there was very little interaction between legal professionals on the one hand, and representatives of finance ministries in the various Council arrangements, such as ECOFIN, as well as in the informal constellation of the Eurogroup (E3 interview – Council legal professional). With the crisis, suddenly legal professionals had to not only be consulted on everything, but had to create the ‘legal dressing’ (A1 interview – Commission lawyer). For example, the productive weekend in May 2010 from Chapter 5 when in reaction to fears of contagion, these agents created the initial mechanisms – but also very novel: they had to both make highly innovative interpretations, e.g. the reverse qualified majority voting for the Six-Pack regulation, as well as construct entirely new legal instruments, for example, the ESM. To more fully illustrate this disruption and what it meant for the practices of the legal and policy professionals, the concept of boundary work and bricolage were drawn on to analyse the practices to create solutions and defend those solutions.

In the next section, a recap of the types of boundary work practices observed in the analysis will be presented together with the key findings of these effects on, first, the *habitus* structures, i.e. what types of dispositional logics do we see coming out of the practices and how do they relate to the theoretical framework; and second, the effects of the practices on the issue of boundary specification regarding what agents became involved in solving the crisis or contesting the solutions, and how their positions changed through network transformation and expansion.

11.2 Boundary Calibration, Boundary Overlapping and Internal Expansion

This form of boundary work refers to the boundary calibration of legal scope to enable legal attachment through maximising scope, e.g. Art. 122.2; or to minimize scope to enable legal exclusion, e.g. Art. 125 (does not include loans); for the EU legal professionals, this practice is connected to their interest in keeping solutions inside the Union. In other words, this boundary work was observed in terms of enabling solutions to keep economic governance within the boundary of the EU legal order.

11.2.1 Findings of Its Effects on Subjective Structures: Two Legal Logics

The types of effects generated by the practice of boundary calibration were an ‘explosion’ in EU law on economic governance, i.e. in the area of EMU. Specifically, we saw the utilisation of Article 136: It has been used in the Excessive Deficit Procedure as part of the framework of Article 126; in the Macroeconomic Imbalances Procedure (MIP) as part of the framework of the ‘Six-Pack’; and the Medium-Term Budgetary Objective Procedure as part of the framework of Article 121 (Beukers, 2013, p.5). It has also been utilised as a basis for producing Council Decisions and Council Implementing Decisions that mirror the MoUs used in the imposition of policy conditionality on Member States entering financial assistance programmes, which as a practice is highly intrusive into national sovereign policy space, and was not considered possible before the EZ crisis, with some legal scholars seeing it as controversial and dubious (Ioannidis, 2016; Tuori & Tuori, 2014).

In terms of the habitus, based on the boundary calibration practices, and the background of the EU legal professionals, which are very much connected to legal backgrounds in terms of previous jobs and legal education, as outlined in the previous chapter, the dispositional logic coming through seems to be around jurisdiction; in other words a **jurisdictional logic**. This is inferred from the way that the EU legal professionals attempt to find ways to enable the EU legal order by seeing how its jurisdiction can be attached to the issue or object at hand. Again, in the case of calibrating the scope of Article 122(2) to attach to the EFSM funding instrument, we see the logic of jurisdiction; how can this provision be interpreted so that the instrument can be attached to the EU legal order?

The jurisdictional logic is also observed in the court cases, for example, in the first *Ledra Advertising* case, the General Court initially said it had no jurisdiction to look at conduct that was under the ESM Treaty and did not commit EU institutions to any illegal conduct. In the *Chrysostomides* case, we saw the Council and Commission legal professionals use jurisdictional logics in asserting that the Eurogroup was simply

a gathering of national finance ministers and thus their accountability fell under national jurisdictions and not the jurisdiction of the Court of Justice. What is further notable about the jurisdictional is that they seem to underpin the position-taking of the EU legal professionals, for example, the legal professional from DG ECFIN who stated that his concern from the beginning of the EZ crisis when the GLF was being set up, was protecting EU law, and hence his insistence that every MoU on policy conditionality should have a mirrored Council Decision so that it was clear that this was part of EU economic policy and was in line with EU law.

Moreover, another logic related to legal practices was observed in the court cases: a **constitutionalising logic**. First, this was clear in the appeal to the *Ledra Advertising* case, where the Court of Justice dismissed this, and said that no matter what framework the Commission operates under, it is bound by the EU legal order, especially the Charter (although the Court dismissed the claim that the Commission was liable). In this way, the Court had used **boundary overlapping** – enabling the overlapping of the EU legal order with the ESM framework via the Commission – to deploy this constitutionalising logic. And as mentioned, two Commission legal professionals (A1, A5 interviews) told me that they believed that President Lenaerts of the Court wanted to make a constitutional point: “the constitutional system of the Union would be incomplete if there was no possibility to seek damages against the Union itself for such action” (A5 interview – Commission lawyer). And we saw this again in the first *Chrysostomides* case when the General Court similarly made a judgement that the Eurogroup could in fact be considered an EU entity that can engage the non-contractual liability of the EU within the meaning of Article 340 TFEU. In other words, the Union would be an incomplete constitutional system if there was an entity such as the Eurogroup that could not engage the EU’s liability if was seen to act unlawfully. In the legal literature, this is said to be reminiscent of the famous *Les Verts* judgement which conceived the Treaty as a constitutional charter, and in *Ledra Advertising* the constitutionalising logic is seen as “filling the gaps in judicial protection” (Repasi, 2017, p.1125). This constitutionalising logic fits with the literature on integration-through-law in terms of how the Court is seen to constitutionalise the EU legal system (Weiler, 1991), i.e. the judges’ categories of perception see a constitutional system into the Treaties and whole corpus of secondary law and case-law.

What is interesting about these two logics observed in legal practice is how they relate to literature on jurisdiction and political communities, especially the notion of sovereignty, which is said to be firmly connected to national statehood, and yet we see a type of sovereign statehood appear in modified form at the EU level. As outlined in the theoretical framework, the use of boundary work concepts is connected to legal practices in terms of the empirical focus of this thesis, and therefore I discussed what this would

mean for perceptions of jurisdiction. In terms of the literature on jurisdiction in the sociology of law, we see how the jurisdictional logic mentioned above relates to what Kaushal (2015) has suggested about legal attachment, specifically, that the mechanism of jurisdiction works to sort out law's attachment at the boundaries. In terms of the findings here regarding a jurisdictional logic, I conceive of it as part of the habitus of the legal professionals, as opposed to the more vague notion that jurisdiction functions separately from human agents. Furthermore, in terms of Valverde's (2009) conception of how jurisdiction works through scale, we see this here as well, in terms of how the EU legal professionals deploy the jurisdictional logic to enable the EU scale when they sought to keep the financial mechanisms inside the EU legal order; but when the *Chrysostomides* case came up with the aim of defining the Eurogroup as an EU body, the EU legal professionals attempted to deny the legal reality of the Eurogroup at the EU scale, and rather said that it has no larger existence than simply being a gathering of national ministers of finance, and thus Eurogroup conduct remains accountable to national jurisdictions. Like Kaushal (2015), Valverde's (2009) reading sees jurisdiction and scale as relatively autonomous to human agents, whereas this thesis sees the functioning of jurisdiction more connected to the discretion of the legal professionals deployment of a specific jurisdictional logic.

In terms of the constitutionalising logic, it resonates with how Kaushal (2015) sees the mechanics of jurisdiction occurring in a way that confirms its attachment to a political community. But in the case of the EU, this logic is not just about reconfirming that there is a definitive EU political community undergirding the EU legal order, but that it seeks to fill gaps, such as in judicial protection (Repasi, 2017) in terms of the *Ledra Advertising* case, and how this constitutionalising logic came through in the first *Chrysostomides* case when the General Court judges asserted that the Eurogroup could engage the liability of the Union in terms of non-contractual liability. In this way, the constitutionalising logic (Tuori & Tuori, 2014) in this EU law context is a reflection, and an affirmation, of the integratory logic in the political context of the EU.

11.2.2 The Generation of Social Boundaries Via Internal Expansion

Where the EU legal professionals were successful in their boundary calibration, especially with the enablement of EU legal bases to produce legislation such as regulations and implementing decisions, it means that a knowledge mandate is cemented (Halliday, 1985) with the proliferation of legal instruments in the area of economic governance – EMU – necessitating more resources and lawyers to the Commission and the Council. Moreover, as was noted in the previous chapter on networks, the EU legal professionals who sustained a high level of involvement in dealing with crisis issues over time received

recognition in the form of referrals, which was illustrated by the referral network. The effects generated here are symbolic capital for these legal professionals – namely, juridical capital – as they are perceived to know well. In organisational terms and prestige, this capital has enabled the career advancement of many of those EU legal professionals involved, often from legal advisor in 2010, to being a director in 2019 of an area of law that has grown out of the EZ crisis. Notable here is C.Ls1 from the Commission, Co.Ls1 from the Council and ECFIN.L1 from DG ECFIN all becoming Directors in their respective institutional and organisational areas. Concomitantly, they have received resources in the form of new legal professionals to work in these areas that came out of the EZ crisis, for example, the Commission legal service now has a unit called *Eurozone & Economic Issues*, which was spun off from the Institutional Directorate (A4 interview). In this way, the effects generated by the practices during the EZ crisis have led to internal expansion and differentiation within the area of EMU law, and with the most experienced and knowledgeable as shown in the referral network, going up the hierarchy both organisationally, but also in terms of being perceived as knowledgeable and competent.

Another concrete effect has been the transformation of the notion of policy conditionality. During the crisis it was controversial and seen as being a coercive imposition on southern European Member States. Over the course of the crisis, however, the notion of political conditionality was turned into a new technical DG by the Commission: The Structural Reform Support Service. What is notable about this new DG is that it is run by one of the key policy professionals from the EZ crisis, namely ECFIN.P1, and a legal professional from the referral network – ECFIN.L2 – also works for it. This DG seeks to offer technical assistance to member states that come with their own proposal of reform. It has received incredible amounts of funding since the last budget. In this way, we see more expansion and direction of resources to agents who had played key roles in the crisis, and are now running institutionalised aspects that came out of the EZ crisis.

In Bourdieusian terms, this internal expansion which has seen some of the key ‘effective agents’ from the referral network not just go up the organisational hierarchy, but also receive resources in the form of funding and teams for their own units could be seen as the conversion of their specific juridical capital gained from their involvement in the EZ crisis into organisational capital, i.e. organisational resources to manage their own teams. This juridical capital could be used to convert to other capital, for example, economic if these EU legal professionals become corporate lawyers in finance and banking, which is seen in the literature on European transnational fields (Cohen, 2011).

11.3 Bricolage, Boundary Objects and External Expansion

11.3.1 The Recombinatory Logic of Bricolage

In Chapter 5 and 6, we saw the practices of bricolage that lead to the construction of boundary objects. Recalling that the successful boundary calibration of the Commission legal professionals meant that the EFSM was inside the EU legal order, but on the insistence of the Council lawyers state, it was capped at 60 billion because of the legal framework of the EU budget, and concerns that it would be illegal to adopt an instrument that went beyond the already agreed EU budget; so from here a solution outside EU jurisdiction was sought. It was at this point that the notion of an SPV was proposed, under Luxembourgish law, and with the designation EFSF. Here the boundary work is the boundary blending practice of bricolage as existing elements are pieced together to create a boundary object that can accommodate different preferences, e.g. some Member States preferred a guarantee structure over the bilateral loan structure of the GLF, as well as shut down political debate: English law will be used for the issuance of bonds, so as not to privilege any Eurozone jurisdiction; the Member State's ECB contribution key will be used, and so on. The drawbacks of the temporary EFSF become clear, and a permanent boundary object is desired, leading to the construction of the ESM. Again, bricolage leads to the construction of an international financial institution based on international law, with cross-boundary linkages to EU law. This construction includes the same persons as the Eurogroup – the constellation of Eurozone finance ministers who coordinate their economic policies – but arranged in the ESM as its Board of Governors. In this way, the type of practice logic seen here is a **recombinatory logic** deployed to recombine various elements into new organisational forms (Stark, 1996).

Firstly, the effects of this recombinatory logic are certainly not neutral. How legal and policy professionals enable and legitimize what political actors can do based on the constraints of EU law have implications on power relations and the EU's modes of governance, as seen with the issue of the ESM and EU citizens seeking remedies for damages they have suffered as a result of policy conditionality connected to financial assistance. Secondly, this recombinatory logic also denote a more recombinant conception of the conventional paradigms of intergovernmentalism and supranationalism. As mentioned in the literature review, the Eurozone crisis has seen depictions of the policy response in terms of 'deliberative intergovernmentalism' (Puetter, 2012) and 'executive supranationalism' (Trondal, 2010; Coman, 2014), and while these conceptions certainly add new understandings of governance arrangements, they still reproduce the governance paradigms. In this way, the notion of bricolage as a recombinant logic (Stark,

1996) adds an interesting dimension that sees the paradigms almost dissolved, as the boundaries between them are seen to dissolve. This is seen specifically in the legal linkages connect the two, but which has been referred to as creating legal uncertainty in this connection between the EU legal order and the ESM framework (Takis, 2019). Keppenne (2014) has called this “semi-intergovernmentalism”, but the bricolage conception see this process of the two paradigms becoming obsolete in that the solutions being used in the EZ crisis drew on all sorts of different types of governance elements and then recombined them into boundary objects, such as the ESM: being set up in an intergovernmental fashion, yet giving the Commission and the ECB central roles, having the Eurogroup as the ESM Board of Governors, yet ensuring that all legal documentation is compatible with EU law, and so on. Perhaps the bricolage conception, especially as Carstensen (2011) conceives of it is useful not just to understand the complex processes at play in the EZ crisis, but as a perspective that can be put in parallel to the governance paradigm view.

11.3.1 Boundary Object and External Expansion

The effects generated by this practice of constructing boundary objects lead to the effect of network expansion. Notably, when the Greek Loan Facility was constructed, lawyers from the private law firm Clifford Chance were brought in to advise on this bilateral loan scheme given they are specialists in legal finance. They were used again in the creation of the boundary object, the EFSF, as well as in the bond exchange deal during the Greek debt restructuring. In this way, these lawyers already had a knowledge mandate in this area of legal finance. However, this network expansion is not permanent as the work is contractual and temporary. Nevertheless, one of the Clifford Chance lawyers was seen to know well (Seabrooke, 2014) in the referral network. Moreover, their involvement in the EZ crisis has garnered them multiple awards, elevating them in their field of finance.

The construction of permanent boundary object in the form of the ESM however, led to the new legal professionals being hired permanently to work for this new international financial institution, that is nevertheless still connected to EU law. In this way, the effects of boundary object creation has been external network expansion, which has now taken on a permanent form with the ESM, which is still connected to the EU economic governance structure.

11.4 Boundary Blurring

In a number of different contexts, we saw boundary blurring, which generally refers to the creating of

purposeful opacity between boundaries (Block-Lieb & Halliday, 2017; Liu, 2015). Boundary blurring often came up in dealing with novel legal questions that had not been thought about prior to the EZ crisis, which goes back to the theme from Chapter 4 on how the EMU was politically constructed in that Germany sought a stability community – a notion connected to its difficult monetary history (Beyer et al., 2009) – which denied the possibility that sovereign debt crises would ever occur as long as there was budgetary discipline and strict price stability. For example, in the case of the ECB.

As analysed in Chapter 7, in the Greek debt restructuring, the ECB asserted that it could not accept a haircut on its holdings of government bonds, as the ECB legal professionals said it would be a violation of Article 123 TFEU (see Vicuña, 2013) and so it got preferred creditor status for the Greek debt restructuring. But when the OMT was later announced, the ECB clarified that it *would* respect the *pari passu* clause and *not* have preferred creditor status in the case of a debt restructuring in order to increase the effectiveness of the programme, which means that, if that programme were activated, it would not be able to protect its bond holdings from a possible debt restructuring if a majority of bondholders voted in favour (Martinelli, 2016). It follows that this would be a violation of Article 123 TFEU. In the *Gaunweiler* case, this issue was raised by the FCC, to which the ECB stated it would vote against a debt restructuring and then it would not be in violation of EU law. This would however could mean the failure of a debt restructuring, which the IMF could require as part of its participation in a financial assistance programme.

In order to ensure that the ECB and ESCB would not be an obstacle in such a situation, it came up with bond-buying thresholds for its subsequent programme, the PSPP. The OMT was never activated so the reality of buying bonds under that programme could be put aside. However, the PSPP was activated and thus the ECB having a blocking position could become a distinct reality. In accordance with the Euro CAC voting mechanism, the ECB first set a threshold of 25 % on its holdings of any given debt security in order to avoid it having a blocking minority in the event of an agreed debt restructuring. However, in order to properly “promote the full and smooth implementation of the PSPP”, it increased the issue share limit to 33 %, “subject to verification on a case-by-case basis that a holding of 33 % per ISIN would not lead the Eurosystem central banks to reach blocking minority holdings in orderly debt restructurings”.²²³ This complicated sequence is a reflection of the ECB legal professionals blurring the boundaries between legal issue and technical issues, as the issue becomes more and more convoluted. Moreover, when I asked a lawyer for the ECB about this issue, he stated that they simply try to avoid going in either direction if asked about it in court (F2 interview – ECB lawyer). In this way, it is boundary

²²³ Decision (EU) 2015/2101 of the European Central Bank of 5 November 2015 amending Decision (EU) 2015/774 on a secondary markets public sector asset purchase programme (ECB/2015/33)

blurring purposefully. In terms of a practical logic, practices of boundary blurring seem to be about refraction – for example, the ECB refracts the legal issue with a technical medium, much like light is refracted when it hits a prism. In this way, the legal boundary is blurred because it is refracted with technical measures. In this way, I posit that the practical logic here is a **logic of refraction**.

11.4.1 Cross-boundary Linking

Cross-boundary linking is a practice that emerged during the EZ crisis as a way for the EU legal professionals to ensure the boundary objects being constructed, namely, the GLF, the EFSF, and the ESM, were linked to the EU legal order in a way that ensured these objects' compatibility with EU law, but also protected the EU legal order.

Using **cross-boundary linking** consolidates a boundary object's connections across jurisdictions. The boundary object has to bridge two different systems of governance, so it refers to EU legal provisions, while also being connected to other legal jurisdictions that are normatively perceived by investors. Given that boundary blurring refers to *purposefully* making something opaque, it raises the question of why I argue that cross-boundary linking is a form of boundary blurring. The reason is because the intention was to make, *inter alia*, the MoUs compatible with EU law, but knowing full well that there would be two interlocked systems both producing a version of policy conditionality. In the ESM Framework, it would be the MoU, which was negotiated and signed by the Commission on behalf of the ESM Board of Governors, but only committed the ESM, in terms of agreeing to a financial assistance facility in return for the implementation of the MoU. In the EU legal framework, the MoU's contents were essentially copied and put into a Council Decision or a Council Implementing Decision, but the Council was not seen to be the authority imposing policy conditionality on any Member States. Within EU law, Regulation 472/2013 is made that concretises the links between the ESM framework and EU legal order, specifically Article 7(2), which enables the coupling mechanism between the two legal frameworks.

This practice generated the effect of enabling the Court of Justice to assert its jurisdiction because it could use the compatibility clauses, or the tasks conferred on the Commission by these linkages, as grounds to enable judicial review. Other times, these cross-boundary linkages have, although clarifying the supremacy of EU law vis-à-vis the boundary object such as the ESM, led to the Court to engage in boundary blurring. Notably, in *Pringle*, because the ESM framework and the EU legal order is tightly coupled by Regulation 472/13, the modality of imposing policy conditionality is caught between the two legal orders, but is not substantively constituted in either. Kilpatrick (2017) has referred to this a liminal

state, i.e. a transitional state that is in the threshold between non-EU law and EU law.

Below is a summary and overview of the practices of boundary work presented above and the practice logics emerging from these, as well as their empirical observation.

Table 3: Overview of Notable Instances of Practices with Practical Logics and Empirical Examples

Practice	Logics Deployed	Empirical Example	As seen in Chapter
Boundary Calibration	Jurisdictional Logic – used by Commission legal professionals	Calibration of Art. 122(2) to enable EFSM; Calibration of Art. 136(1) to enable Council Decisions to screen MoU's	Chapter 5 & 6
Boundary Overlapping	Constitutionalising Logic – used by judges at CJEU.	CJEU enabled overlapping boundaries in Ledia Adv. case so Commission always bound by EU law when operating outside it.	Chapter 9
Boundary Object via Bricolage	Recombinatory Logic – used by ECFIN legal and policy professionals.	Used in creating boundary objects in terms of funding mechanism (e.g. EFSF and ESM) that bridge the EU legal order and international law frameworks, and are constituted by heterogeneous organisational elements.	Chapter 5 & 6
Boundary Blurring	Logic of refraction – used by ECB lawyers.	Used by especially the ECB lawyers to blur the legal boundary of Art. 123 with technical measure to avoid violating Art. 123. In this way the legal boundary is refracted with technical measures.	Chapter 7.

11.5 Stabilising a Field via Networks and the Continuation of EMU Struggles

11.5.1 Boundary-specification and Stabilisation

Recalling the referral network, it was created using a snowball sampling technique (Saunders et al., 2012), which led to a point of data saturation. Specifically, each interviewee was asked to whom they would refer me on the institutional and legal aspects of the EZ crisis, and their answers were consolidated and turned into a referral network. The point of data saturation was when referred persons failed to respond to multiple emails; as well as when interviews repeated the same names. This is a significant point, especially in regard to the temporal networks. Firstly, the temporal networks do not have a well-defined boundary specification, and there is certainly data missing, because accounting for every person that was involved in these various crisis issues is logistically very difficult. And in that way, the temporal networks are also used more as an indication of involvement of key agents. With the referral network, the boundary specification is more certain because of the snowball sampling technique, whereby 20 positive responses

out of a total of 35 agents were received. In this case, 20 positive responses means either that a person responded in the affirmative to an interview request and during the interview, they referred me to other persons, or they responded in the negative to an interview, but then referred me to other persons by email.

In this way, it is a high response rate out of the known population of 35 effective agents. Of course, this does not mean it is an absolutely true picture of reality, there is still missing data because of the specific difficulties of boundary-specification in network analysis generally speaking: Knowledge on whether some actors are connected are based on a specific actor, whose concealment could make it difficult to draw inferences from the data, and that is why we seek as much coverage and triangulation (Laumann, Marsden, & Prensky, 1983)¹. Nevertheless, in terms of the Bourdieusian framework, there is an argument to be made that this point of data saturation on which the network is based specifies a boundary from where we can infer field effects. In this way, my analysis is not concerned with Conceptually, field effects is how Bourdieu has conceived of possible boundaries of a field: “[t]he limits of the field are situated at the point where the effects of the field cease” (Bourdieu & Wacquant 1992, p.100).

By constructing the referral network, I sought to capture the emergence over time of a type of juridical capital accumulated by the ‘effective agents’ of the overall transitional field context of the EZ crisis, and accrued by them in their practices of solving crisis issues and defending those solutions in legal terms. With the process of creating the referral network following a snowball sampling technique to reach data saturation, the emergence of this juridical capital for the agents could be said to create a field effect that specifies a boundary within which the agents are affected, as firstly, a hierarchy in terms of who has a lot of this juridical capital and who has less is apparent in the referral rate for each agent, and secondly, at stake in this field is juridical capital in that by having more of it in terms of an agent being part of a field related to economic governance – i.e. juridical capital in an economic policy field – means that it becomes an effective property to the degree that the economic policy field has become juridified, i.e. legally constructed.

The analysis undertaken did not seek to capture the complete set of species and distribution of capital of all the agents involved in the EZ crisis, as the assumption was that the transnational fields of the EU were disrupted during this crisis and so the point was to capture how the practices of the agents to solve the crisis would reconfigure the field. In this way, the analytical approach focused on capturing change in the field, as opposed to capturing a static overview of the field, which could tell us about other properties of capital that could also have significance on the field. This type of analysis would be more

suited to a field that is more settled than one going through crisis.

Nevertheless, the point of saturation is in many ways the point where the field could be said to become more stabilised, in contrast to its disrupted beginnings during the crisis, as the method of tracing the referrals between the agents has reflected the historical process of how the agents become connected to each other through crisis events and struggles, such as constructing financial mechanisms and litigating court cases, and where the objective (positions) and subjective (dispositions) structures become increasingly settled around the stakes of juridical capital in an economic policy field. However, in line with Vauchez (2011), this emergence of juridical capital becoming significant in EU economic policy speaks to the strengths of the weak field of European law. Because law, and specifically EU law, has become definitional in co-constructing the EU governance structure (Mudge & Vauchez, 2012), it is ubiquitous in its functioning in many policy domains.

Going back to the puzzle of this thesis, and the discussion of EMU's history, the domain of economic policy was made in a mostly non-legal way, and moreover, denied the existence of the sovereign debt crises in a single currency zone ever occurring. Hence, the question to the puzzle of how did a comprehensive legal institutional structure get made to tackle the EZ crisis if the instruments did not exist. In the analysis, it was shown that the practices produced effects over time that saw the economic policy domain become 'juridified' (Amentbrink, 2014) in different ways; most of it occurred within the EU legal order in terms of substantive economic policy; but the financial assistance element occurred outside with the mechanisms like the ESM, with the final result being an uneasy interlocking of the two systems. The point is that the EU legal professionals were to a large degree successful in enabling the juridical visions and divisions of EU law to infiltrate the economic policy domain, but in terms of the rationalising forces of legal forms.

Going back to the boundary work practices, this type of rationalising legal logic was seen in boundary calibration where the EU legal professionals were successful in getting the first mechanism constructed in EU law – the EFSM – and crucially, the policy conditionality under Article 136(1). The point is that in many ways they have the knowledge mandate (Halliday, 1985) of the EU's basic operating code, and they know how to re-code when needed. More importantly, with the legal construction of economic policy, the juridical capital that the EU legal professionals have acquired makes them influential in the domain of economic policy vis-à-vis economic professionals, in that they can state the conditions of possibility, which recalling Chapter 4 on the EMU, came up when, as a Council legal professional stated: they weren't used to being in a situation where lawyers were saying that, 'no, the Treaty doesn't allow you to do that,

the [ECOFIN] Council doesn't have that power', and so on [...]" (E3 interview).

11.5.2 Juridical Capital and Struggles

This juridical capital enables the legal and policy professionals to engage in struggles that are not so explicit; these are more epistemological contests about who is better equipped to represent a solution in a way suitable to the extant institutional context. This is where the holders of juridical capital have been so effective, especially those that are competent with both law and finance: they can take the economic solutions or ideas and mould them into legal constructions in expert ways without losing financial or economic fidelity, as was shown with the boundary calibration of the various provisions of EU law. This process of legal construction is also about legitimating the economic and political solutions, and speaks to the socio-historical role of the law in state-building and its proximity to the field of power (Bourdieu, 1994). In this case, the juridical capital is influential because the EU governance structure is co-constructed by law (Vauchez, 2011). In this way, the position-takings of the effective agents are about why and how EU law is the more legitimate way of doing things (C.Ls1); or that EU law must be protected from intergovernmental frameworks that do not have the same legitimacy as EU law, such as international law (Co.Ls1 and ECFIN.L1).

11.6. Conclusion: The Definitional Power of Law and Legitimation²²⁴

11.6.1 Answering the Research Question

In this thesis, I have presented an analytical and methodological framework that sought to show how the practices of legal and policy professionals enable and consolidate solutions in a crisis, by tracing the effects of these practices – seen as boundary work, bricolage and network interactions – on the process of how economic governance becomes legally constructed. To that end, I will explain my answer to the research question: how do the practices of legal and policy professionals enable and consolidate solutions in an unfolding economic crisis?

Legal and policy professionals enabled solutions by strategically interpreting legal rules to accommodate financial and political preferences (boundary calibration). In some instances these interpretations were

²²⁴ Parts of this section come from a policy brief written as part of this PhD's fulfilment in the GEM-STONES programme. See "Legally Recognising the Authority of the Eurogroup" Nicholas Haagensen March 2020 Agora Forum.

seemingly in violation of EU jurisdiction and competence, so they had to move into another jurisdiction to construct a solution (boundary object construction) thereby giving it a different legal form based on that jurisdiction, namely, public international law. Moving between jurisdictions raised issues of legitimacy and accountability for the EU legal professionals, so they consolidated these solutions by explicitly referring to EU jurisdiction and competence in provisions inserted into the non-EU legal instruments (cross-boundary linking), thereby entangling the jurisdictions with each other. This links the jurisdictions to create compatibility and consistency between two legal structures, the EU legal order and the ESM legal order, but also blurs the boundaries between the jurisdictions; and thus the legally constituted authority of each contaminates the other, making it ambiguous as to the accountability of EU entities operating in the ESM legal order. Hence, the many court cases that sought to clarify this accountability. Notably, the *Ledra Advertising* judgement asserted that the Commission and the ECB are accountable under EU law when it operates under the ESM legal framework (boundary overlapping).

11.6.2 Critical Reflections

In terms of taking a broader perspective on the process analysed in this thesis, in looking at how economic governance has become legally constructed, it could be said that we have seen how the definitional power of law has been brought to bear on economic governance in the European field of power. It should be noted that the agents that were identified in the referral network as having a type of judicial capital that made them effective in the area of economic governance during the EZ crisis cannot be seen as being the most *powerful* agents in terms of the crisis. Rather the point is that these agents having juridical capital became influential because of how – through their practices – they could deploy the definitional power of law onto the economic and political preferences of the heads of state, and as the crisis unfolded, this influence grew – more juridical capital was accrued – as they constructed and expanded the legal scaffolding that now shapes European economic governance.

The EZ crisis and the construction of the referral network further speaks to the process of how legal representations of social and economic issues become naturalised into institutional structures. In other words, the proliferation of all these instruments and legislation means that legal representations were successful in defining how the crisis issues should be dealt with. The reason this is important to reflect over is because, in following a Bourdieusian approach, one cannot help but reflect over the “neutralizing and naturalizing discourses” (Dezalay & Madsen, 2012, p. 447) being used to not only represent the governance of an economic crisis in legal terms, but also how legal representations legitimate the exercise of power by political elites. In this way, this case study of the Eurozone crisis, by looking at “the

fabrication of new legal expertise” (ibid.) arose in line with the management of the EZ crisis, we can also get insight into the process of legitimation. In other words, by seeing how the practices of the legal and policy professionals leads to new legal expertise – exemplified in the importance of the juridical capital emerging in the area of European economic governance – it becomes clear how important the legal legitimation of the EZ policy response is for the political elites.

The point is the practices which sought to legitimate the EZ policy response illustrate the highly complex nature of the policy response, while also reflecting its dubious justifications. The overall objective of all these mechanisms – primarily ESM – was purportedly to safeguard ‘financial stability of the Euro area as a whole’ (see, ESM Treaty), and in order to legally validate the ESM, strict conditionality was stated as the way to achieve financial stability. Indeed, this is how the CJEU interpreted the ESM Treaty to be compatible with EU law, and particularly Article 125 TFEU. In other words, a legal reality was construed whereby financial assistance from the ESM to a Euro-area member state was compatible with EU law on the condition that strict conditionality would be imposed on said member state. But in empirical reality, financial stability was engendered by ECB President, Mario Draghi’s statement, followed shortly thereafter by the announcement of OMT, a sentiment shared by the respondents in my research. This matters because in the end, it is not clear how imposing harsh policy conditionality on financially weak member states safeguards ‘financial stability of the Euro area as a whole’, when the definition of financial stability is ambiguous, as Yves Mersch, Member of the Executive Board of the ECB has noted, it remains a “protean concept, with various manifestations and different understandings of its basic aspects”. This means that its legal definition is not clear, and it is difficult to see how it can then be part of legally legitimating strict policy conditionality. By examining the legitimation of EZ policy response, it is arguable that this policy response has been more about fulfilling the political preferences of more powerful states and EU institutions, as well as reproducing their powerful position, as opposed to ensuring financial stability of the Euro area. Hence, the long and convoluted legal path taken to achieving financial stability, which in the end primarily revolved around the actions of the ECB.

The high degree of intrusive and coercive power involved in the imposition of conditionality on the weaker countries has proven difficult to legitimate – it has pushed the rational-legal capacity of EU law passed the limit of its jurisdiction, i.e. EU law cannot legitimate it, leaving international law to legitimate this coercive power, with linkages between this international law structure and the EU legal order. This blurring of jurisdictions – or jurisdictional entanglement – although an expedient solution to ensure compatibility with EU law in policy conditionality, is still highly problematic, as it creates legal

uncertainty (Takis, 2019), troubling rule of law concerns (Kilpatrick, 2015), because there is still no EU legal source conferring authority on any institution to exercise such power, which means there is no possibility of legal accountability for imposing conditionality (Craig, 2017), hence the *Chrysostomides* case, discussed in Chapter 9, that is seeking to finally hold the Eurogroup liable on behalf of the Union, as the Eurogroup was seen to be the centre of political-economic decision-making during the EZ crisis.

11.6.3 Limitations of this Study

This thesis has endeavoured to show how economic governance becomes legally constructed by analysing the practices of the legal and policy professionals involved in the EZ crisis. In terms of doing a case-study of the Eurozone crisis, it is a complex undertaken and defining the boundaries of the case is difficult. This study focused specifically on the agents by mapping their trajectories and interactions and practices. The limitations of such a study are that a lot of the content and choices become informed by the agents being looked at, which could distort the overall view of the EZ crisis. For example, this study has not looked at Banking Union which is also a key topic in the reform of the EMU following the EZ crisis. More importantly, a difficulty for this study is looking at such a legally complex topic through a sociological lens. Firstly, I do not have any formal legal training, and therefore leaning about the intricacies of EU law, let alone EU law deployed in the EZ crisis required very close reading. Nevertheless, the boundary work concepts were utilised to keep the sociological processes in focus. However, it is still a highly complex area and in that way the difficulties of rendering it need to be noted.

Alternative approaches to this sociological perspective could have been with a linked ecologies approach (Abbott, 2005) to policy professionals (Farrell & Quiggin, 2017) which could have made more use of the specific linkages between professionals and the different policy contexts they traverse, as well as the alliances that enable professionals to gain dominance over tasks and problems which also garner rewards for politicians, for example, this could have enabled more focus on the role of private legal professionals and how their contributions during the EZ crisis has afforded the opportunities in their own professionals fields. Moreover, another limitation could be the heavier focus of this study on the legal professionals as opposed to the policy professionals, especially the economists. However, this means that another avenue for research could specifically be a more systemic comparison of professional practices between economists and legal professionals.

11.6.4 Central Contributions

The central contributions of this thesis are fourfold.

First, the thesis contributes in a methodological and conceptual way by showing how social network analysis can be utilised to study change the effects of practices of agents on field structures. SNA was used to this in two key ways: These effects are traced diachronically as, first, interactions and experiences gained from being involved in key solutions to the Eurozone crisis, which is then rendered synchronically as a referral network indicating an accumulated symbolic capital from being seen to know well: juridical capital. In this way, a contribution is made to scholarship that argues for the utility of using SNA in terms of Bourdieusian fields (Bottero & Crossley, 2011; de Nooy, 2003; Lunding et al., n.d.; Singh, 2016).

Second, following from the methodological contribution noted above, a conceptual contribution is made to sociological studies of fields by elaborating a conceptual approach to trace field-level change by rendering the process of symbolic capital creation through practices as a property that is also seen to engender novel stakes at the intersection of the transnational fields of European economic governance, on the one hand, and European law on the other. In this case, European economic governance was seen to become legally constructed enabling the emergence of legal stakes, thereby giving agents with juridical capital high levels of influence on issues of European economic governance. Crucially, the conceptualisation utilised here is based on assumptions of field disruption through an exogenous crisis, which leads to a reconfiguration of the field through the accumulated effects of practices of the agents, with the emergence of a core group of effective agents (Bourdieu, 2005; Lunding et al., forthcoming).

Third, an empirical contribution of this study is an approach to the Eurozone crisis that focuses on the trajectories of the agents involved and uses their experiences as well as their interactions and practices as the point of departure to understand how the Eurozone crisis has changed European economic governance by legitimizing political solutions through legal means. In this way, the empirical chapters have contributed with a nuanced and subjective view of how the crisis unfolded and its impact on those involved in the policy response.

A third contribution is to EU studies literature on integration-through-law, where it is shown that the use of law in different ways, reflected specific practice logics, namely a jurisdictional logic and a constitutionalising logic, whereby the former is deployed in a highly instrumental fashion to legally enable the economic solutions within and across jurisdictions; and whereby the latter is deployed to legally

consolidate economic solutions. The relevant literature here has talked about the emergence of a large corpus of ‘euro-crisis law’ (Beukers et al., 2017) related to the Eurozone crisis policy response, the possible implications of the rule of law (Kilpatrick, 2015) and legal certainty (Tridimas, 2019), questions of constitutional mutation (Martinico, 2014) or simply institutional differentiation (de Witte, 2015) as well as changes in constitutional balance (Dawson & de Witte, 2013a). However, this scholarship, despite giving insights into the various ways law has been implicated in the EZ crisis, whether it be constitutionalising or differentiating, there is no scholarship on the professional practices that enable these legal processes. In that way, this thesis attends to this gap to show how through the practices of legal and policy professionals using jurisdictional and constitutionalising logics, deployed at different times during the crisis, enable process of legal integration and differentiation.

11.6.5 Future Research Perspectives

There are a number of possible avenues of research that come out of this study and which are related to different disciplines. In terms of sociological studies on professionals, future studies in this area could look at how private legal professionals who are litigating for applicants test different legal theories and the process of doing this. As noted, there have been several waves of court cases related to the Cypriot banking crisis, as well as many cases related to the Greek debt restructuring, and thus, it would be interesting to see how these legal professionals develop their theories and what is at stake for them in litigating these cases.

In terms of socio-legal studies, a second important avenue of research to explore would be to look at how the CJEU could be seen to have constructed its influence in the case-law on the crisis. Given that there was very little legal provisions to work with in the Treaties, it could be that the Court is relying more on its case-law than on the Treaties when it is adjudicating. This research could speak to other important work, especially being done in the area of network-citation analysis that looks at whether previous case-law constrains the Court (Šadl & Panagis, 2016) and how the Court preserves its authority vis-à-vis Member States in its use of EU legal principles (Šadl, 2015). Following this avenue of research could look at how the Eurozone crisis case-law could also be affecting other areas of law.

A third fruitful avenue of research should look at the international field of sovereign debt restructuring. Over the last couple of decades, there have been many sovereign debt restructurings, most notably the Latin American countries in the 1980s, and other emerging market economies in the Global South (Das, Papaioannou, & Trebesch 2012). Legally, sovereign debt restructuring has often been highly problematic

in terms of triggering drawn-out litigation which can have serious adverse effects on the economy of the sovereign (Das, Papaioannou, & Trebesch, 2012), let alone the citizens themselves. When it comes to resolving sovereign debt crises, there is no international legal mechanism or framework (Lastra, 2016), and in terms of litigation, it is for national courts to adjudicate in this area as all sovereign bonds indicate a jurisdiction that is based on a national court. As noted in Chapter 7, there are various policy actors, such as the Institute for International Finance (IIF), and the networks it coordinates, which play a large role in deciding how sovereign debt restructurings should be done. Legal professionals play a large role in this, as was seen with the Cleary Gottlieb lawyers that Greece hired. There is current struggle going between those who wish to see an international law mechanism that could make the process more smooth, and those who would simply leave it to market actors to decide. Tracing the various agents and struggles in this transnational field could shed light on what is at stake for legal and policy professional in the restructuring sovereign debt.

Appendix 1: List of Interview Partners

Date	Code	Professional from Institution	Place of Interview	Duration in hours & min.
25.05.2018	A1	Lawyer from European Commission Legal Service	Brussels, Belgium	01:04
15.06.2018	B1	Lawyer from European Parliament Legal Service	Brussels, Belgium	00:52
18.06.2018	C1	Legal professional from DG ECFIN , European Commission	Brussels, Belgium	00:58
20.06.2018	A2	Lawyer from European Commission Legal Service (former)	Brussels, Belgium	00:45
25.06.2018	A3	Lawyer from European Commission Legal Service	Brussels, Belgium	00:45
27.06.2018	C2	Legal professional from DG ECFIN , European Commission	Brussels, Belgium	01:52
12.07.2018	C3	Senior Policy professional from DG ECFIN , European Commission (former)	Brussels, Belgium	01:42
18.07.2018	C4	Senior Policy professional from DG ECFIN , European Commission	Brussels, Belgium	01:32
09.08.2018	A4	Lawyer from European Commission Legal Service	Brussels, Belgium	02:12
24.08.2018	D1	Senior policy professional from Eurogroup Working Group (former)	Brussels, Belgium	00:43
28.08.2018	A5	Lawyer from European Commission Legal Service	Brussels, Belgium	01:20
04.09.2018	E1	Lawyer from Legal Service of the Council of the European Union	Brussels, Belgium	01:04
09.11.2018	E2	Lawyer from Legal Service of the Council of the European Union	Brussels, Belgium	00:30
22.11.2018	E3	Lawyer from Legal Service of the Council of the European Union	Brussels, Belgium	01:36
13.02.2019	F1	Lawyer from the Legal Service of the European Central Bank	Skype	00:50
15.02.2019	A6	Lawyer from European Commission Legal Service (former)	Skype	01:00
10.07.2019	F2	Lawyer for the European Central Bank	Skype	01:30
18.09.2019	G1	Private Lawyer from Cleary Gottlieb	Skype	00:52
16.10.2019	G2	Private Lawyer	Skype	01:11
28.11.2019	G3	Private Lawyer	Skype	00:52
04.12.2019	G4	Private Lawyer from Cleary Gottlieb	Skype	01:00
09.12.2019	H1	Private (finance) from French Bank	Skype	00:50
17.12.2019	G5	Private Lawyer	Skype	00:30

Appendix 2: Example of Email sent to Possible Interviewees

Dear...

My name is Nicholas Haagensen and I'm a Marie Curie PhD Fellow in Political Science (<https://gem-stones.eu/people/nicholas-haagensen>). As part of the GEM-STONES Innovative Training Network (<https://gem-stones.eu/>), my research explores the institutional issues and court cases that arose during, and after, the Eurozone crisis through.

I chose to reach out to you as your name repeatedly came up in my background research; specifically, your participation in highly significant cases at the CJEU. As such, consulting you on questions related to both the *Pringle* and *Gauweiler* cases, as well as other institutional issues born from the Eurozone crisis, would prove to be an invaluable contribution to my research.

Bearing this in mind, might I request **the opportunity to interview** you with an eye on discussing some of the aforementioned issues. Expected to last approximately 30 minutes, the requested semi-structured interview could be scheduled at your convenience between [date 1 and date 2]. Equally, at your convenience, the interview could either be in person at your place of work or via phone. Please feel free to suggest the time and format most suited to your schedule.

Additionally, please know that as part of an EU-funded research effort all information collected will be stored and treated in line with the highest confidentiality standards. Accordingly, each confirmed interviewee will be provided with the opportunity to formally state the publicity level of the collected information along the continuum from quotable to privileged by way of non-attributable. Overall, the product of the interview will be used and stored in line with the project's ethics and data management guidelines.

Best Regards

Nicholas Haagensen

Appendix 3: Example of Semi-structured Interview Guide

- **Brief presentation of research**
 - Role of lawyers and judges in the Eurozone crisis and economic governance
- **Theme: Profession - Career & Career Trajectory**
 - How would you describe the role of lawyers in each institution?
 - Council?
 - Commission?
 - ECB?
 - National lawyers?
 - What are the main differences?
 - Where does law/lawyers have most influence in Eurozone crisis? And economic policy?
 - Relation between politics and law?
 - If they've worked in private practice:
 - How do private lawyers see law and the crisis?
 - Lawyers from Clifford Chance played a large role in the crisis, what are some implications for this?
- **Theme: EU Institutional Balance (IB) during and after crisis**
 - What has changed in the relation between the EU institutions?
 - Between the institutions and the member states?
 - How has IB transformed during the Eurozone crisis?
- **Theme: Crisis Mechanisms and Conditionality:**
 - How were the funding mechanisms created?
 - MoUs of ESM - Competence for Commission?
 - Different viewpoints of Council and Commission?
- **Theme: The judges and crisis cases**
 - What are the implications of the cases for your work as a lawyer?
 - **CJEU:**
 - *Pringle*
 - Are there any issues for EU legal order?
 - *Gauweiler*
 - How can judges differentiate of price stability (monetary policy) and stability of euro area as a whole (economic policy).
 - *Ledra* and *Chrysostomideis*
 - Are there any constitutional points here?
 - **National Courts:**
 - The role of national courts (constitutional or otherwise ruling on Union law?)
 - Portugal?
 - Which national cases do you think were significant for Euro area economic governance?
- **Theme: Jurisdictional issues**
 - German Courts: Jurisdictional battle?
 - Impact of Maastricht ruling
- **Economic and financial expertise v. law?**
 - ECJ's jurisdictional control over deficits and budgets

Appendix 4: Informed Consent Form

INFORMED CONSENT FORM FOR SOCIAL SCIENCE RESEARCH STUDIES

Title of Project: GEM-STONES – Globalization, Europe & Multilateralism: The Sophistication of the Transnational Order, Networks, and European Strategies

Principal Investigator(s): Prof. Anne Weyembergh
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Other Investigator(s): Nicholas Haagensen
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1. Purpose of the Study:

This is a European Joint Doctorat (EJD) gathering 15 partner organizations from 3 different continents. It includes 5 EU HEIs, 3 non-EU HEIs, 3 Think Tanks, 2 MNEs, 1 SME, & 1 NPO. Its shared research agenda on "Globalisation, Europe and Multilateralism" seeks to unpack the growing "Sophistication of the Transnational Order, Networks and European Strategies" in light of the EU's attempts at regime complex management. To this effect, the EU's response to international institutional proliferation is alternatively analyzed through the lens of its ability to provide purposeful complex regime management in light of its institutional capacities, network capacities, relative capacities and framing capacities. Collectively GEM-STONES will increase the breath of regime complex management theory as its postulates are confronted with the specific experience of the EU. The project will also expand the state-of-the art in EU studies, notably on the EU's external action.

The research will ultimately sketch a nuanced, innovative, and interdisciplinary answer to the question: how does the EU contribute towards the management of institutional proliferation? To meet this research objective, while also strengthening the EU's innovation capacities, GEM-STONES will select and train 15 highly competitive ESRs. Its chosen interdisciplinary research and training methods bridge a variety of SSH disciplines. Each ESR will accomplish a specific research project as part of the overall agenda. Ultimately, if successful, ESRs will be awarded a Double Degree from two of the project's HEIs. Training is to be an integrated curriculum designed to foster structured PhD training at the EU level, and allow for novel public-private collaborations. The 180 ECTS worth of training will be provided through research, education & practice and will incl. a significant internship.

2. Preferred level of Confidentiality *(please check preferred options)*

2.1. With Regards to Recordings

☐ Video/Audio Recording allowed

- ☐ Audio Recoding allowed
- ☐ Limited to researcher's personal notes and private transcripts

2.2. With Regards to Usage

- ☐ 'Named Citations' allowed – *i.e. attributable quotes can be included in the research*
- ☐ Only to 'Anonymized Citations' – *i.e. quotes in the research cannot be traced back to the source*
- ☐ No 'Direct Quotes' of any kind - *i.e. insights gathered through the interview can be anonymously referenced in the research but not quoted.*

3. Archiving

Regardless of the chosen recording and usage rules all information gathered during the interview will be archived in a secure fashion in conformity with the standards associated with the European Charter for Researchers. As such all notes/recordings when archived will be anonymized with the substantive content stored in one document and the list of interviewees that will allow one to attribute the various records stored on a separate document.

To guarantee all the collected data is kept in on a secure server, GEM-STONES offers its researchers a dedicated server in line with the highest security standards. Security of the data uploaded, stored and shared in the data set stems from different sources, namely: planning efforts deployed in the framework of the Data Management Plan; a system meeting the standards set by the European Commission; and ESR managing their personal data in a responsible way along the guidelines set out in the GEM-STONES research and training manual.

3.1. Security Standards of the GEM-STONES Data-Set

- Hosting server is located within the European Union;
- Data itself and the connection to the data set are both to be encrypted;
- User interface ensures that individuals have full control over the data they upload into the system

3.2. Data Set Security Specifications of the GEM-STONES Data-Set

- Server specifications: Digital Ocean virtual server (www.digitalocean.com). Data center located in Amsterdam (Netherlands). 2GB Memory – 2 CoreProcessor – 49GB SSD DISK – 3TB Transfer.
- Authentication specifications: User passwords encrypted by AES-256-CBC. Connection to the data-set encrypted and authenticated using the TLS 1.2 protocol, the ECDHE_RSA with P-256 key exchange, and the AES_128_GCM cipher. Web APP specifications: Framework LARAVEL 5 (PHP 7.0). MySQL 5.7. HTML5 ; CSS 3.

4. Procedures to be followed during the Interview:

You will be asked to answer a number of questions related to your professional activities which are deemed relevant to better understand the policies and governance aspects under scrutiny in the framework of GEM-STONES.

5. Discomforts and Risks

There are no risks in participating in this research.

6. Benefits

The benefits to you include the dissemination of a better understanding of your profession within the scholarly community and the public at large. The benefits to society include a better understanding of EU policies and policy recommendations which aim at improving the efficiency and legitimacy of policies and governance in the European Union.

7. Duration/Time:

GEM-STONES is funded by the EU programme MSCA-ITN (EJD) from 2016-2020.

8. Statement of Confidentiality:

Your participation in this research is confidential. In the event of any publication or presentation resulting from the research, no personally identifiable information will be shared. In need of using data involving individuals, code numbers/letters will be used.

9. Right to Ask Questions:

Please contact Ramona Coman at +32 26503480 or Ramona.Coman@ulb.ac.be with questions, complaints or concerns about this research.

10. Payment for participation:

There is no financial compensation provided to participants.

11. Voluntary Participation:

Your decision to be in this research is voluntary. You can stop at any time. You do not have to answer any questions you do not want to answer. Refusal to take part in or withdrawing from this study will involve no penalty or loss of benefits you would receive otherwise.

You must be 18 years of age or older to take part in this research study.

Participant Signature

Date

Investigator

Date

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