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## The ESM and the Principle of Transparency

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## Abstract

This note analyses a peculiar feature of the ESM, namely the lack of an acceptable set of standards for the fundamental democratic principle of transparency. Moving from the particular nature of this mechanism, we will highlight the most critical concerns connected to secrecy, confidentiality and inviolability of documents, looking not only at the ESM Treaty but also at relevant documents approved by its bodies (in particular the *Code of Conduct* and the *By-Laws*).

## Key-words

European Stability Mechanism, transparency, disclosure, democratic control



## 1. Introduction: the EU emphasis on transparency

Since the early 'Nineties, the European Union (EU) has introduced and implemented the principle of transparency into the activities of its institutions, prompted, in particular, by the European Parliament (EP) (Santini 2004: 6-7). The EP sought to fill this democratic gap, hoping at the very least to make European decision-making processes more accessible and open to public scrutiny (Santini 2004: 7), in order to shorten the distance between decision-makers and civil society. At the same time, national governments sought to introduce some counterbalances to the technocratic and almost impenetrable power of the European Commission (EC), with the intent of having a deeper knowledge of its activities and internal processes in order to make its members more accountable (Lodge 1994: 346).

After a lengthy process, the principle of open administration became explicitly expressed in the Treaty of Amsterdam (Craig 2012: 358), which enshrined access to documents as a right; the first important step in realizing transparency (von Bogdandy 2012: 330). Subsequently, Regulation n. 1049/2001, regulating access to documents, has been subject to a considerable number of judgments (Heliskoski and Leino 2006; Craig 2012: 361-365) that had the effect of restricting the expansion of this principle (Heliskoski and Leino 2006: 778). Indeed, the Court of First Instance (the CFI – now called the European General Court, or GC) and the European Court of Justice (ECJ) have applied the right to access and its numerous exceptions in many different ways, depending case-by-case on the other rights and interests involved, while still affirming the centrality of open institutions in the EU legal order (Craig 2012: 366).

The Lisbon Treaty, which provided for transparency and openness in several Articles of the TEU and the TFEU, was a step forward toward transparency. First of all, transparency became one of the EU's general purposes, pursuant to Article n. 1 of TEU, according to which “decisions are taken as openly as possible (...)”. Other important wording about this matter can be found, among other places, in: Article 10(3) TEU, which states that every European citizen has the right to participate in the democratic life of the Union; Article 11(2) TEU, which provides that “[t]he institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society”; and Article 15(1) TFEU, which prescribes that the Union's institutions, bodies, offices and



agencies shall work as openly as possible. As Mendes has pointed out, such provisions introduced a general principle of participation in decision-making processes that was explicitly raised as a pillar of EU democracy (Mendes 2011: 1875). Several concerns about the interpretation of these 'Treaties' rules remain, as some commentators have shown (Mendes 2011), but there is undoubtedly an increasing emphasis specifically on transparency in the EU legal order. This is confirmed by the provision of the right to access to documents in Article 42 of the Charter of Fundamental Rights of the European Union, according to which “[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to European Parliament, Council and Commission documents”.

The recent economic crisis, however, has put this important principle's fulfilment at stake within the Eurozone, as intergovernmental solutions to the crisis have been characterized by a “closed doors” approach (Hinarejos 2015: 26). The Euro-area Member States signed international treaties in order to strengthen the EU fiscal rules on public deficit and public debt (e.g. the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union – TSCG) and grant assistance to States in conditions of severe financial instability (by the “rescue funds”, namely the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM)<sup>1</sup>). The EU's emphasis on transparency, in particular, does not find an adequate equivalent within the construction of the ESM, the well-known permanent intergovernmental anti-crisis mechanism formally set outside EU law. Several legal scholars have cast some light on many critical features of this mechanism. First, although it is not part of EU law, it is surely part of the economic governance of the Eurozone, and it could threaten the constitutional balance within the Eurozone itself (Dawson and de Witte 2013). It could also jeopardize social and economic human rights within States that face severe economic conditions (Salomon 2015; Schwarz 2014) and undermine the principle of democratic rule (Schwarz 2014; Ruffert 2011: 1789). Another sign of the ESM's questionable construction, as we will argue, is how it harms the principle of transparency. This aspect seems alarming, as there is an intimate connection between transparency and the basic principle of democratic control of public expenditures and budget policy. The risk of opacity within the ESM could represent a step back from the increasing importance that EU law attaches to transparency.



After a brief description of the nature of the ESM, the paper will give an overview of the main problems the mechanism has with the fulfilment of the principle of transparency. Both the German Federal Constitutional Court and the Finnish Constitutional Law Committee have underlined the ESM's potential opacity, as we will describe in order to highlight the crucial role of transparency for parliamentary control. Subsequently, the ESM has imposed upon itself several disclosure rules, which still appear soft and barely effective in allowing the widespread transmission of ESM's activities to civil society. After analysing these rules, the paper will sketch possible solutions at the EU and national levels.

## 2. The nature of the ESM and its lack of transparency

The ESM, as defined by its establishing Treaty (hereinafter referred to as ESMT), is an “international financial institution”<sup>II</sup> created to “mobilise funding and provide stability support under strict conditionality (...) if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States”.<sup>III</sup> In a general sense, the ESM is an international organization (Ruffert 2011: 1783; Schwarz 2014: 400), established by an international treaty, with its own governance, whose decisions have to be respected by the ESM Member States, namely the Euro-area Member States. Although it has a close connection with the European Monetary Union (EMU), it is set outside EU law. Moreover, the ECJ in the famous *Pringle* judgment even affirmed the ESM's compatibility with several provisions of the EU Treaties.<sup>IV</sup>

The ESM does not formally have a fiscal redistribution function,<sup>V</sup> since it operates in the market through granting aid for the re-capitalization of financial institutions, loaning funds, purchasing bonds on the primary market and arranging for operations on the secondary market.<sup>VI</sup> Nonetheless, these mechanisms substantially affect domestic redistribution policies within States that have asked for financial assistance. Indeed, financial aid is granted on the basis of strict conditionality, included in Memoranda of Understanding (MoUs) which encapsulate the results of negotiations between applicant States and the EC, the European Central Bank (ECB) and, wherever possible, the International Monetary Fund (IMF).<sup>VII</sup> The MoUs contain conditionality measures, aimed at stabilising the financial condition of the State by imposing austerity policies on important welfare services, such as pensions, healthcare, education and employment protection.



As some legal scholars have noted, the ESM is not subject to the same transparency obligations as the EU institutions (Napolitano 2012a: 464; Maduro, de Witte and Kumm 2012: 10; Hinarejos 2015: 95-96; Tuori 2012: 47), notwithstanding the fact that almost all of its actors are EU actors as well (Euro-area Member States, EC, ECB).<sup>viii</sup> Moreover, although the EU legal order and the ESM system must be kept separate, the ESM pursues a goal, the stability of the Euro, which directly concerns the Union (or at least concerns the EMU, a relevant subset of the EU itself)<sup>ix</sup> and it is linked with the EU institutions.

The ESMT, quite apart from lacking any particular transparency obligations, also contains rules on confidential documents, immunity and inviolability. According to Article 34 ESMT, the main bodies, namely the Board of Governors (whose members are the financial ministers of the Euro-area States), the Board of Directors, the Managing Director, and any other person who works in connection with the ESM, “shall not disclose information that is subject to professional secret”. As highlighted by Tuori and Tuori (2014: 218), “what professional secrecy comprises is not defined” in the text of the Treaty. Subsequently, Article 35 states that, “in the interest of the ESM”, members of the Board of Governors, the Board of Directors, the Managing Director and other staff members “shall be immune from legal proceedings with respect to acts performed by them in their official capacity and shall enjoy inviolability in respect of their official papers and documents”. Finally, Article 32(5) establishes that “[t]he archives of the ESM and all documents belonging to the ESM or held by it, shall be inviolable”.

Such broad confidentiality, immunity and inviolability have exacerbated democratic control concerns in the Eurozone specifically within the intergovernmental solutions adopted to manage the crisis (Hinarejos 2015: 95). Moreover, it seems alarming that an institution like the ESM lacks transparency obligations, since this absence affects not only national parliamentary control, but also civil society’s control, and the ability of the media and academia to highlight critical issues because of the impossibility of officially accessing a large number of documents (Schwarz 2014: 402).

In addition, the ESM is substantively a public agency with an ambitious constitutional program and, specifically, with the reputation of being “a collective insurance device against future damages that could affect a country or a people” (Napolitano 2012b: 45).<sup>x</sup> It is true that the ESM acts within the financial market, so secrecy and confidentiality can be essential in certain circumstances, but public bodies that have this kind of impact on



welfare policy should adhere to minimum standards of political accountability and transparency.

These concerns about opacity stand in stark contrast with the aforementioned emphasis on transparency in the EU Treaties.

### 3. The ESM before the Finnish Constitutional Law Committee and the German Federal Constitutional Court: aspects related to parliamentary control

The ESM's opacity has not gone unnoticed by some national Constitutional Courts and Committees (specifically German and Finnish), which have underlined critical issues regarding its lack of transparency and highlighted the inevitable necessity of some forms of democratic control. The Finnish Constitutional Law Committee,<sup>xi</sup> as reported by Tuori and Tuori (2014: 219), "has emphasised that the provision on immunity does not affect the possibility of realising legal ministerial responsibility pursuant to the national constitution". This statement confirms that, indisputably, the financial ministers who sit on the ESM Board of Governors are responsible to their national parliaments. Such a responsibility, however, appears strong only in a few cases on which the Board must decide unanimously.<sup>xii</sup> In particular, the veto power of every single Minister is significant in the decisions to grant financial aid. For most of the deliberations, however, it is necessary to reach a qualified majority of 80% of the votes/shares,<sup>xiii</sup> which can be reached with the agreement of the top five contributors (Germany, France, Italy, Spain, and the Netherlands). In such decisions, only Germany and France have the power of veto, as their contributions exceed the 20% threshold of capital.<sup>xiv</sup>

The German Federal Constitutional Court (FCC), in turn, highlighted this lack of transparency in its famous judgement of 12 September 2012.<sup>xv</sup> According to the ruling of *Karlsruhe's* Court, certain interpretations of the provision concerning the inviolability of documents and the professional secrecy of the ESM's legal representatives "might violate the *Bundestag's* overall budgetary responsibility".<sup>xvi</sup> Therefore, such ESM provisions would be compatible with the German Basic Law only if the German parliament were to receive "comprehensive information"<sup>xvii</sup> (see: Majone 2014: 146; Rivosecchi 2014: 480; Schneider 2013: 54). Indeed, in a representative democracy, a parliament needs sufficient information



from the government in order to exercise its monitoring function for budget policy knowingly. Minimum standards of transparency are fundamental, first of and foremost, to enable effective control by the citizens' representatives. For these reasons, according to the FCC, ESMT provisions on secrecy, confidentiality and the inviolability of documents should not preclude the possibility (and the necessity) that the German parliament be given full knowledge of ESM activities; however, ESMT provisions do not foresee any exchange of information with parliaments, other than the annual report of the ESM Board of Auditors that the Board of Governors makes accessible to national parliaments.<sup>xviii</sup>

It is desirable that every ESM Member's parliament, following this principle, receive the same information about the ESM's activities. But the principle of giving comprehensive information to the parliament seems to require domestic constitutional decisions for its implementation.

The FCC judgment, however, takes into account only the transmission of information to the *Bundestag* and to the *Bundesrat* without considering the issue of transparency in a more direct way. Consequently, although German parliamentarians have the power to control several of the ESM's activities, citizens cannot have direct access to such information. From a constitutional point of view, this could represent an additional detriment to the democratic principle, since the ESM manages a significant amount of financial resources coming from European taxpayers and its actions have a relevant impact on redistributive policy in States where aid is provided to tackle financial crises.

#### **4. Soft rules of disclosure in the ESM *Code of Conduct* and in the *By-Laws***

During 2014, the ESM adopted two important documents: the Board of Directors approved the *Code of Conduct* (Code) for the Managing Director, members of the staff and, to the extent applicable, the Directors (12 March 2014);<sup>xix</sup> and the Board of Governors approved the *By-Laws* (8 December 2014), pursuant to Article 5(9) ESMT.<sup>xx</sup>

The Code, regulating among other things the duty of confidentiality, seemed to take into account the German FCC's statements, even using the same wording. Indeed, according to its Article 11(1), "[t]he duty of confidentiality does not prevent Directors and alternate Directors from providing *comprehensive information* to national parliaments, in case





this is foreseen at national level” (emphasis added). This provision simply takes note of the possibility for national parliaments to ask for and receive information on ESM activities, but it does not provide any particular duty to release information directly to citizens (for instance, in this Code there are no provisions about publication of relevant documents on the official website). Moreover, the other provisions of Article 11 of the Code confirm the duty of professional secrecy provided by Article 34 of the ESMT, but without specifying its concrete meaning, which is still undefined and seems dependent on the broad discretion of the three main bodies (the Board of Governors, Board of Directors and Managing Director).

These lacunae notwithstanding, this Code does take into account the will of parliaments to obtain as much information as possible, and providing comprehensive knowledge seems to prevail over confidentiality and secrecy duties. However, there are no specific procedures aimed at enforcing this power, which could render the Code ineffective; it is, above all, voluntarily adopted (the ESMT does not contain any indications about it) and can be reviewed by the Board of Directors (the executive body).

Article 11 of the Code must comply with Article 17 of the ESM *By-Laws*, which states specific rules for the disclosure of documents (Article 11(1) and (3), ESM *Code of Conduct*). Article 17 of the ESM *By-Laws*, in turn, contains numerous provisions on document disclosure, which actually seem very soft. There is no mention of the “comprehensive information” that the ESM must give to national parliaments; the only duties that the Board of Governors has imposed on itself are to refer requests for information or documents by national parliaments to the government of the relevant ESM Member<sup>XXI</sup> and to publish an annual report on the main activities of the ESM on its official website.<sup>XXII</sup> Instead, the most important documents of the ESM *may*, not *must*, be communicated to ESM Members, the EC, the ECB, and the IMF.<sup>XXIII</sup> These documents may also be disclosed to other parties, but only at the discretion of the Managing Director.<sup>XXIV</sup> In any case, the Board of Governors has the power to derogate from these rules “when necessary or appropriate for an overriding public interest or to effect the intent and purpose of the Treaty”.<sup>XXV</sup> Moreover, in several cases, the ESM *By-Laws* impose the duty *not* to communicate or disclose confidential information, in particular internal information. Minutes and summary records of the proceedings of the Board of Governors, for instance, are generally confidential.<sup>XXVI</sup> This is in addition to the duty, provided by the Treaty, to



keep inviolable all documents belonging to the ESM or held by it.<sup>xxvii</sup> Furthermore, the *By-Laws* have been adopted by a qualified majority of the Board of Governors (80% of the shares),<sup>xxviii</sup> and can be amended through the same process.<sup>xxix</sup> The implication is that such rules are fully in the hands of five or six of the Mechanism's main contributors.

Other secrecy and confidentiality rules are set out in several of the documents approved by the ESM's bodies, which for brevity I have added in a footnote.<sup>xxx</sup>

Finally, with the exception of the text of the Treaty, which is available in all of the official languages of ESM Members,<sup>xxxi</sup> documents published on the official website are only available in English. Supposedly, this is not a problem for parliaments, media and academia, but could hamper widespread access by the civil societies of all Member States.

## 5. Final remarks

After these brief notes, we can easily argue that, in the ESM governance, confidentiality and secrecy are the rule and transparency and disclosure the exception. This could be tolerable in a private company or even in international organizations in general, but it is problematic in international institutions that have an impact on welfare policy, and has prompted concerns regarding the protection of human rights (Salomon 2015; Schwarz 2014). The ESM's function means that it has to act in financial markets with a certain degree of discretion, but it should have higher standards of transparency because of its great influence on domestic economic and social policy.

One of the most critical points concerns the aforementioned safeguard clause regarding document disclosure, as stated by Article 17(13) of the ESM *By-Laws*, which gives the Board of Governors the significant power of derogating from the described soft rules, if necessary or appropriate for an overriding public interest. The meaning and the possible extension of "overriding public interest" are not defined, leaving to the discretion of the Board of Governors (voting by qualified majority – 80% of the votes/shares) the potential ability to go as far as to ignore the entire Article. However, a possible interpretation of the boundaries of this clause could be developed by the Court of Justice of the European Union. Indeed, according to Article 37 ESMT, any question of interpretation or application of the provisions of the Treaty and the ESM *By-Laws* should be decided by the ESM Board of Governors; subsequently, contested decisions can be submitted to the Court of Justice,



in accordance with Article 273 TFEU.<sup>xxxii</sup> Therefore, an ESM Member State could bring a case to the Court, with the purpose of defining the content of Article 17(13) ESM *By-Laws* in greater detail.

In any case, this theoretical possibility does not, as such, solve the problems of the disclosure's soft and barely effective rules. In this realm, a potential solution would seem to be feasible at the national level rather than at the EU level, given the intergovernmental nature of the mechanism. The Constitutional or Supreme Courts of the Euro-area Member States could implement information duties for the ESM – duties that the German FCC has rightly affirmed with regard to its parliament – perhaps extending such duties to civil society and promoting a general open government policy. In this way, the impact of additional cracks in the democratic principles in the European regional system (and in particular in the Eurozone) could be mitigated.

Finally, of course, transparency must not be considered a magic bullet and, in certain circumstances, disclosure of sensitive documents could produce more negative than positive effects (Grimmelikhuisen 2012). For example, parts of documents containing personal data concerning individuals are generally (and properly) excluded from disclosure rules.<sup>xxxiii</sup> However, as a matter of fact, the ESM system represents a countertrend compared to European Law, with regard to the fulfilment of the principle of transparency. As Norberto Bobbio wrote, a democracy should be, at least in a perfect world, a government of public power in public (Bobbio 1980: 182). This final statement should prompt reflection on the current developments in the Eurozone integration process, with particular regard to the instruments that its actors have created to face the economic and financial crisis.

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<sup>i</sup> The very first “rescue fund”, the European Financial Stabilization Mechanism (EFSM), was created by a EU Regulation (N. 407/2010), with a quite narrow financial capacity. See Ruffert (2011: 1779-1780).

<sup>ii</sup> Article 1, ESM Treaty, (T/ESM 2012-LT). The text of the Treaty is available at <http://www.esm.europa.eu/about/legal-documents/index.htm> (last visited 15 Dec. 2015).

<sup>iii</sup> Article 3, ESMT.

<sup>iv</sup> ECJ, Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland and the Attorney General*, 2012, nyr in ECR. See, among others, de Witte and Beukers (2013); Van Malleghem (2013); De Lhoneux and Vassilopoulos (2014). On the nature of the ESM see also von Bogdandy and Ioannidis (2014: 94).

<sup>v</sup> According to ECB, the ESM does not act as a fiscal transfer “but only as a liquidity bridge that allows euro area countries in distress to ‘buy time’ to take the necessary measures to restore fiscal sustainability and competitiveness in the medium term” (ECB, Monthly Bulletin, “The European Stability Mechanism”, June 2011).



<sup>VI</sup> Articles 15-18, ESMT.

<sup>VII</sup> Article 13(3), ESMT.

<sup>VIII</sup> The only non-EU actor is the International Monetary Fund, which is actually a consulting actor, brought on under appropriate circumstances at the discretion of the ESM (see points 8, 12 and 13 of the “Whereas”; Article 5(5), Article 13, Article 38 ESMT).

<sup>IX</sup> As Tomkin (2013: 188-189) pointed out: “[t]he establishment of a body that is fundamentally and intrinsically concerned with the Union’s single currency outside the Union Treaties is not easily reconcilable with the central place of economic and monetary union within the Union legal order”.

<sup>X</sup> On the constitutional features of the ESM see also: Maduro, de Witte and Kumm (2012: 10); Chiti and Teixeira (2013: 697); Dawson and de Witte (2013: 826); Scicluna (2014: 546).

<sup>XI</sup> PeVL 13/2012.

<sup>XII</sup> Article 5(6), ESMT.

<sup>XIII</sup> Article 5(7), ESMT.

<sup>XIV</sup> Germany 26,9%, France 20,2% (Annex 1, ESMT).

<sup>XV</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], 2 BvR 1390/12, Sept. 12, 2012 (hereinafter *ESM* case). Citations refer to the paragraphs of the English translation, available at [http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912\\_2bvr139012en.html](http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2012/09/rs20120912_2bvr139012en.html) (last visited 15 Dec. 2015).

<sup>XVI</sup> *ESM* case, para 240.

<sup>XVII</sup> *ESM* case, para 256 and 259.

<sup>XVIII</sup> Article 30(5), ESMT.

<sup>XIX</sup> Available at <http://www.esm.europa.eu/about/governance/code-of-conduct/index.htm> (last visited 15 Dec. 2015).

<sup>XX</sup> Available at <http://www.esm.europa.eu/about/legal-documents/index.htm> (last visited 15 Dec. 2015).

<sup>XXI</sup> Article 17(11), *ESM By-Laws*.

<sup>XXII</sup> Article 23(3), *ESM By-Laws*. Moreover, according to Article 17(12), *ESM By-Laws*, “[t]he Board of Directors, acting by qualified majority, shall adopt detailed guidelines reflecting the ESM’s policy regarding the matters referred to in this Article 17 [disclosure of documents]”. To date (15 Dec. 2015), such guidelines are not yet available on the ESM official website.

<sup>XXIII</sup> Article 17, *ESM By-Laws*.

<sup>XXIV</sup> Article 17(5) b, *ESM By-Laws*.

<sup>XXV</sup> Article 17(13), *ESM By-Laws*.

<sup>XXVI</sup> Article 17(6), ESMT.

<sup>XXVII</sup> Article 32(5), ESMT.

<sup>XXVIII</sup> Article 5(7) c, ESMT.

<sup>XXIX</sup> Article 28, *ESM By-Laws*.

<sup>XXX</sup> For example, in: *Terms and condition of capital calls for ESM* (9 October 2012), point 3; *European Stability Mechanism High Level Principles for Risk Management* (20 May 2015), point 5.2; *European Stability Mechanism Guideline on the Secondary Market Support Facility*, art. 5(1); *European Stability Mechanism Guideline on Precautionary Financial Assistance*, art. 5(2) b; *Guideline on Financial Assistance for the Direct Recapitalisation of Institutions* (8 December 2014), art. 12(1). All documents are available at <http://www.esm.europa.eu/about/legal-documents/index.htm> (last visited 15 Dec. 2015).

<sup>XXXI</sup> See the final provision of the Treaty, according to which the texts in the correspondent languages of the ESM Members are equally authentic.

<sup>XXXII</sup> Point 16, ESMT Whereas.

<sup>XXXIII</sup> Article 17(8), *ESM By-Laws*.

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