

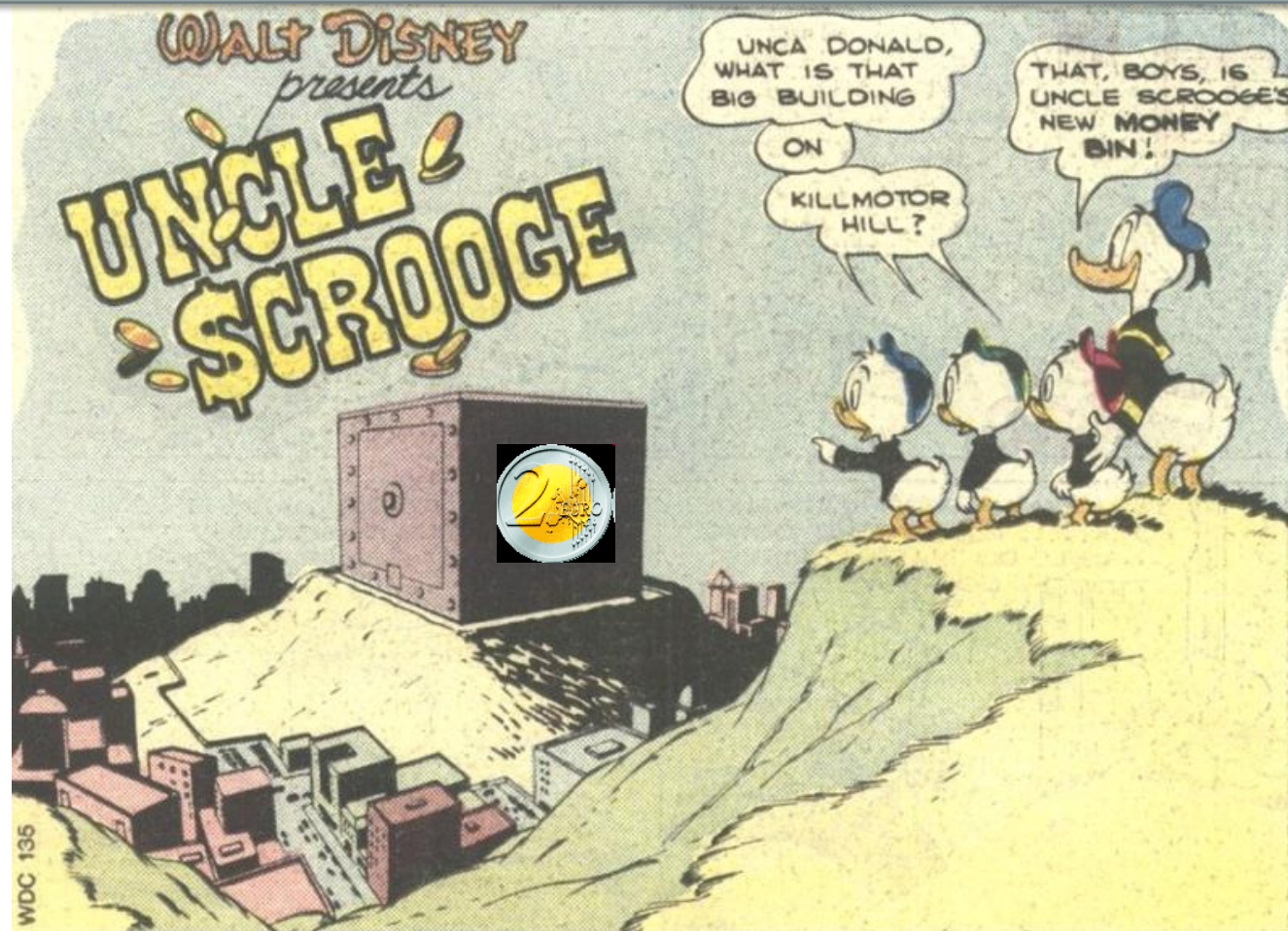
# The EEMU (and beyond) Background, Structure, Evolution

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2023

# Chapter 1

## Free Movement of Capital, Freedom of Payment - and Why There Is an EEMU



## THE EU-27

- Customs Union (more than free trade area)
- Internal Market – Art. 26 TFEU
- Monetary Union
- Political union *in statu nascendi*

## FREE MOVEMENT OF CAPITAL *WITHIN THE INTERNAL MARKET*

- Definition of the internal market – Art. 26 TFEU
- Freedoms = individual rights (of natural and legal persons)
- Direct effect in national orders
- Duties incumbent on EU and its MS
- Prohibition of discriminations and non-discriminatory restrictions

**FREE MOVEMENT OF CAPITAL**  
*WITHIN THE INTERNAL MARKET*

Free movement of goods and services

Free movement of persons

Free movement of goods

**Freedom to provide services**



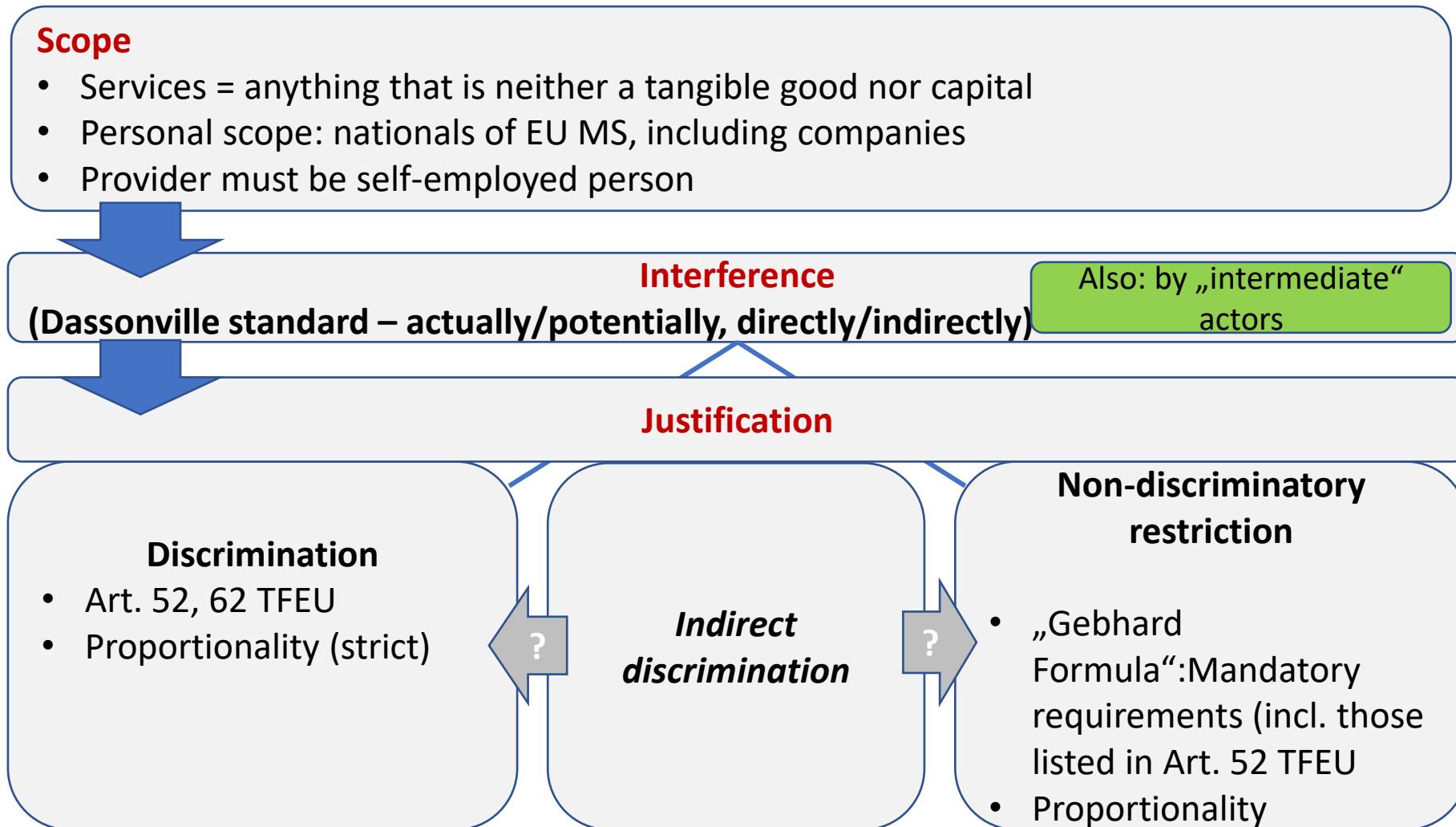
Workers

**Free movement of capital**  
(also for 3rd States)

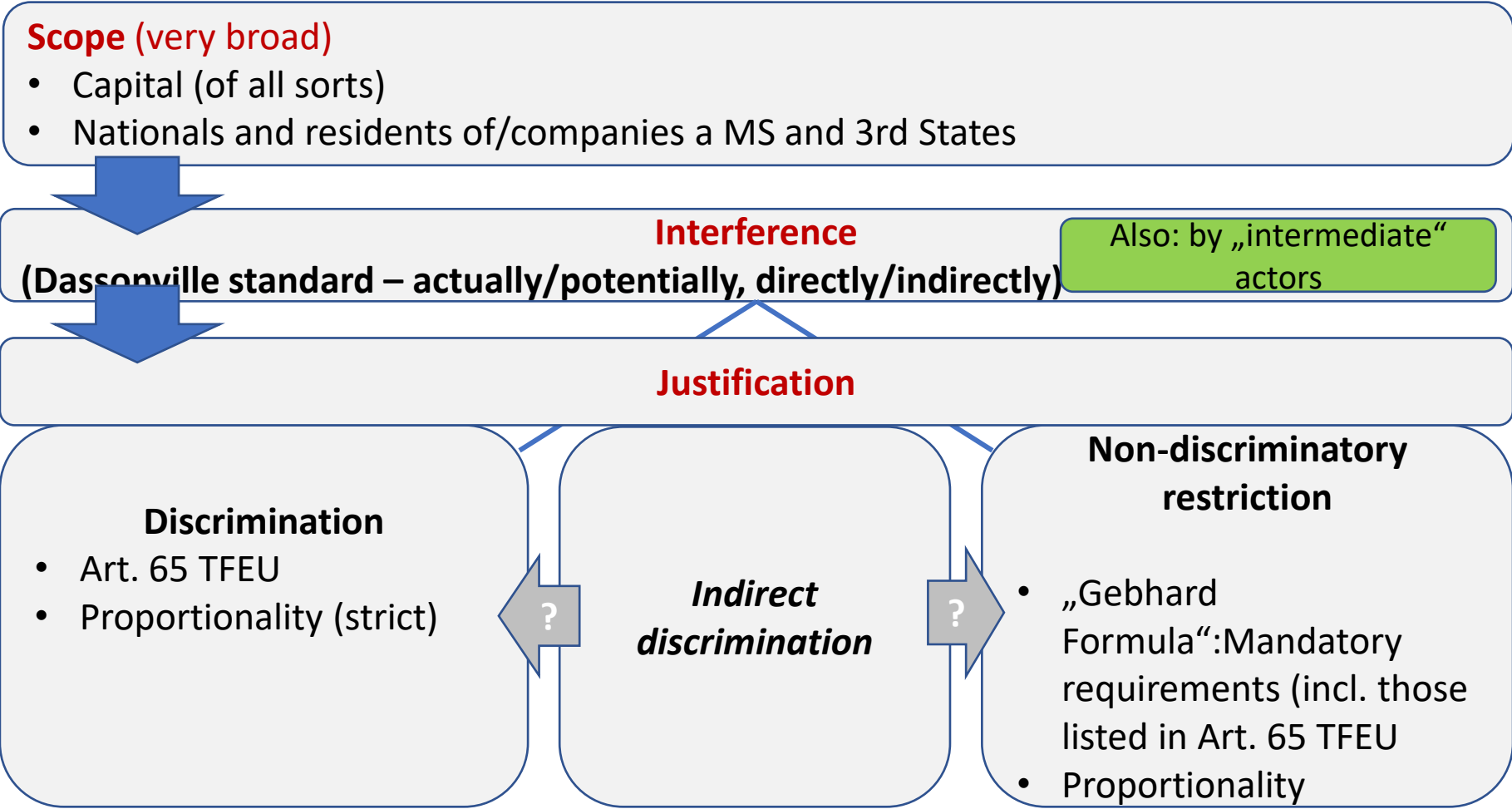


Self-employed (establishment)

## Checklist: Free Movement of Services



# Checklist: Free Movement of Capital



## FREE MOVEMENT OF CAPITAL *WITHIN THE INTERNAL MARKET*

### **Typical forms of interference**

- Golden shares
- Privileges of the State
- Prohibition of transactions
- Discriminatory taxation
- Non-binding measures (advertisement, deterrence)



## FREE MOVEMENT OF CAPITAL *WITHIN THE INTERNAL MARKET*

### **Justification of restrictions/interference**

- Taxation
- Supervision
- Administrative/statistical information
- Public policy and public security
- Other imperative/mandatory requirements (at least for non-discriminatory measures)

Beware: Proportionality is always required!

## FREEDOM OF PAYMENTS BETWEEN MS

### *WITHIN THE INTERNAL MARKET*

- „Dependent“ freedom (associated with transaction falling within a different freedom)
- All means of payment
- 2009/2015 Payment Services Directive
- SEPA (Single Euro Payments Area)

## THE EURO *AND THE INTERNAL MARKET*

### Benefits of a single currency

- No barrier to freedom of payment
  - Mitigation of exchange-rate risk
  - Reduction of transaction costs
- Homogeneous interest rates
- Flourishing capital markets
- Advantages of a global currency

## *Chapter 2*

# *The Treaty of Maastricht and the Genesis of the EEMU*



# *I. Background: The Breakdown of „Bretton Woods“*



## THE HISTORICAL BACKGROUND

### *„BRETTON WOODS“ UNTIL ITS BREAKDOWN*

#### The „Bretton Woods“ System of the IMF (1944-1973)

- Free convertibility of currencies (as a prerequisite of free international trade)
- Competent International Organisation: International Monetary Fund (IMF)
- „Gold standard“: USD pegged to gold (1 oz. Au = 35 USD), other currencies pegged to USD („par value“)
- Fixed but adjustable exchange rates (pegs)

## THE HISTORICAL BACKGROUND

### *„BRETTON WOODS“ UNTIL ITS BREAKDOWN*

#### The Breakdown of „Bretton Woods“

- Late 1960s: System did not adequately reflect economic strength of countries and supply and demand
- USA: increasing inflation because of enhanced volume of money (financing of Vietnam war)
- Abandonment of fixed pags for floating exchange rates as of 1973
- Consequence: serious economic and fiscal disturbances, loss in predictability of cost of international transactions

## THE GLOBAL MONETARY SYSTEM AFTER 1970

- Convertibility of currencies (as before)
- Flexible („floating“) exchange rates
- Emerging capital markets („Petro dollar“)
- Sovereign debt crises, enhance risk of sovereign default, especially with developing countries and emerging economies



## THE IMF TODAY

- 189 Member States
- Functions (Art. I Statute) include watching upon convertibility of currency, since 1970 accent on financial assistance (fund!)
  - Various facilities (concessional)
  - LIC: various non-concessional facilities
- Weighted voting according to quotas („one State, one vote“ does not apply)
- Special Drawing Rights (replacing USD as reference)
- Main function: financial support to States in fiscal distress (balance of payment); aid to development → *Chapter 6*

## *II. The Genesis and Features of the EEMU*



nypswitzerland

## THE EURO

### *A CURRENCY IS BORN*

#### Timetable

- Werner Plan 1970 (established against backdrop of impending breakdown of „Bretton Woods system“)
- European Monetary System 1979 (with ERM I and ECU)
- Delors Report on Economic and Monetary Union 1989
- Treaty of Maastricht 1992
- ECB/ECSB start operating (as well as ERM II), Euro as book currency 1999
- Euro notes and coins 2002

# THE EEMU

## EMU

### Monetary Policy

For Euro Area  
MS: exclusive  
EU  
competence  
(ECB)

Otherwise:  
MS keep  
their  
competence

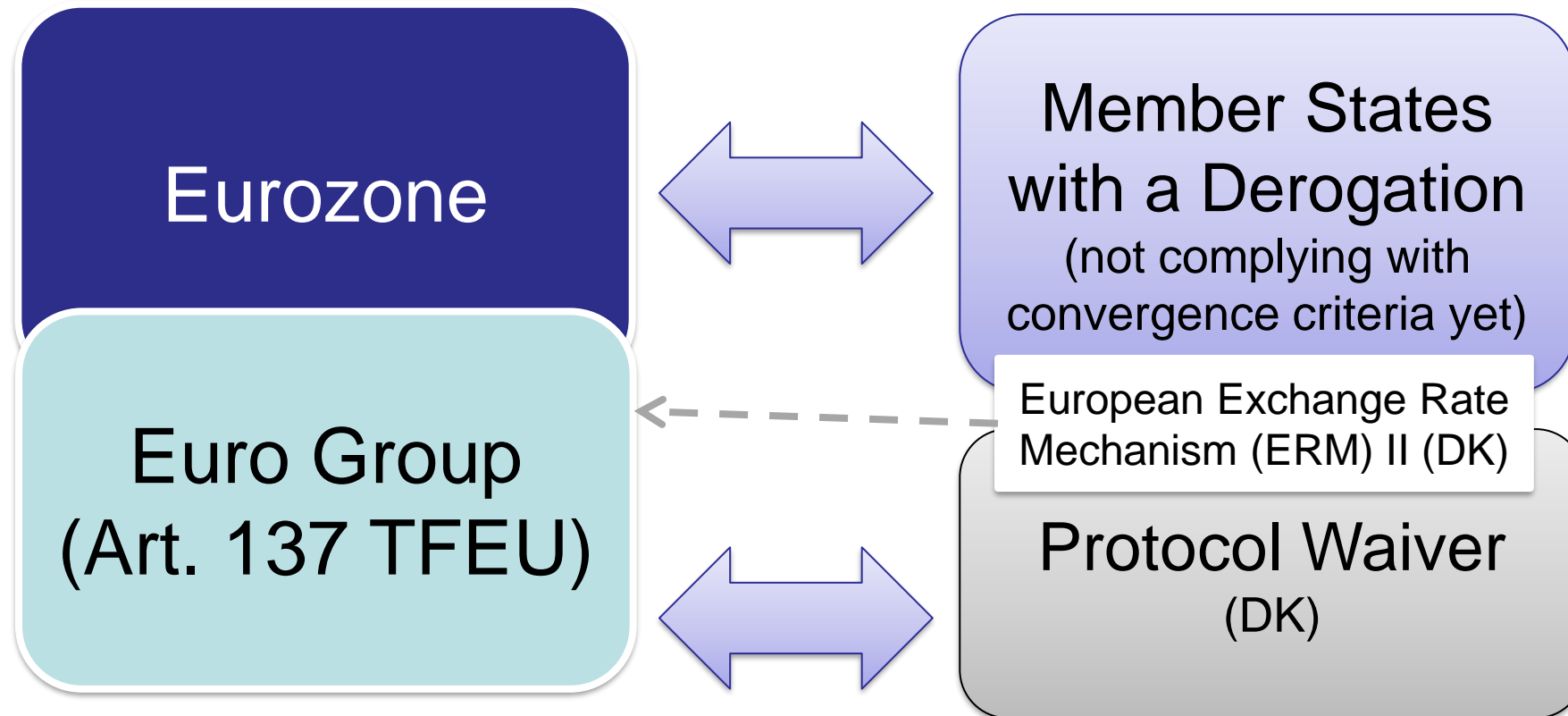
### Economic Policy

EU: close  
coordination  
of MS policy

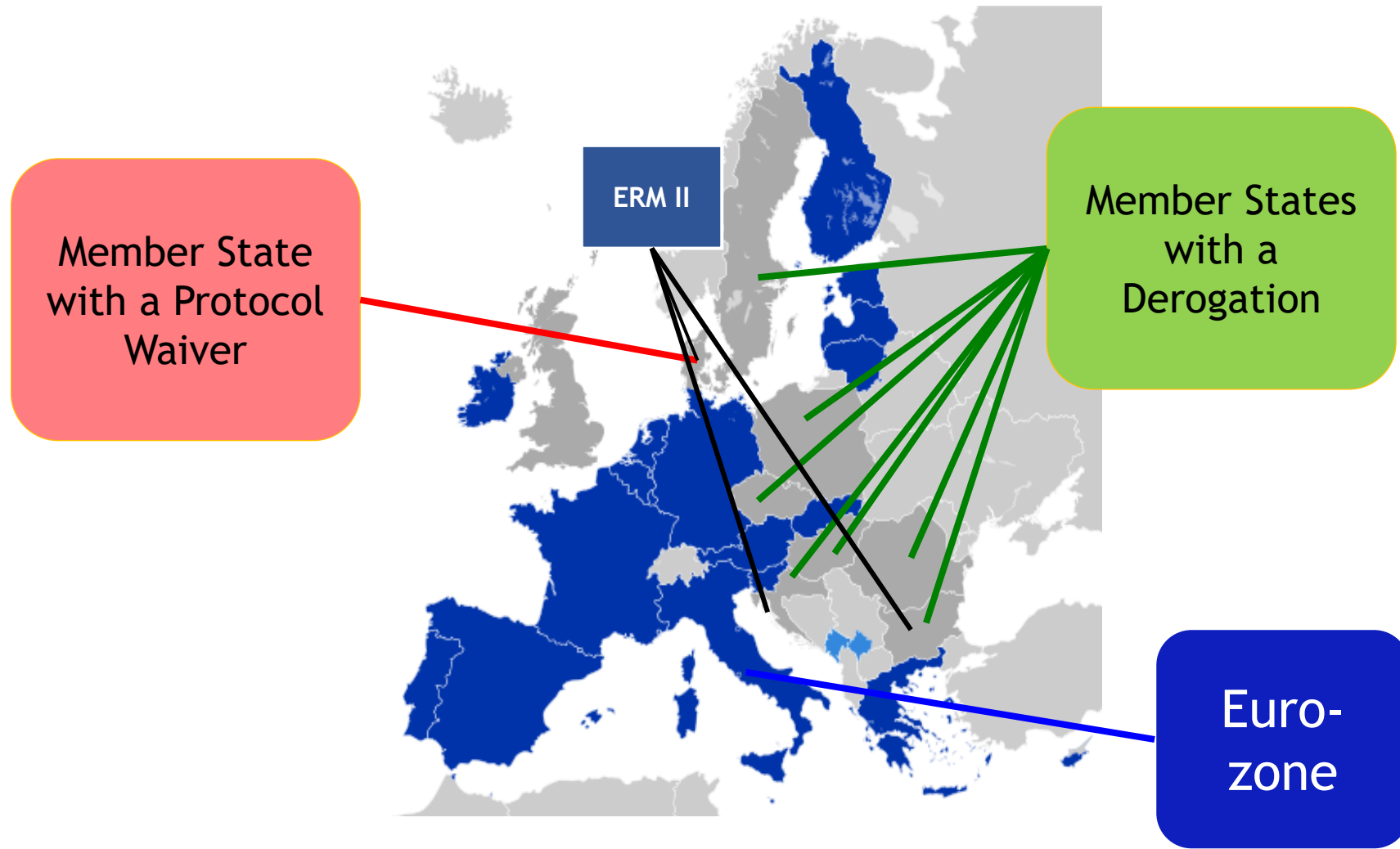
Duties for MS:  
no monetary  
financing, no  
excessive  
deficit

## EEMU AND „EURZONE“

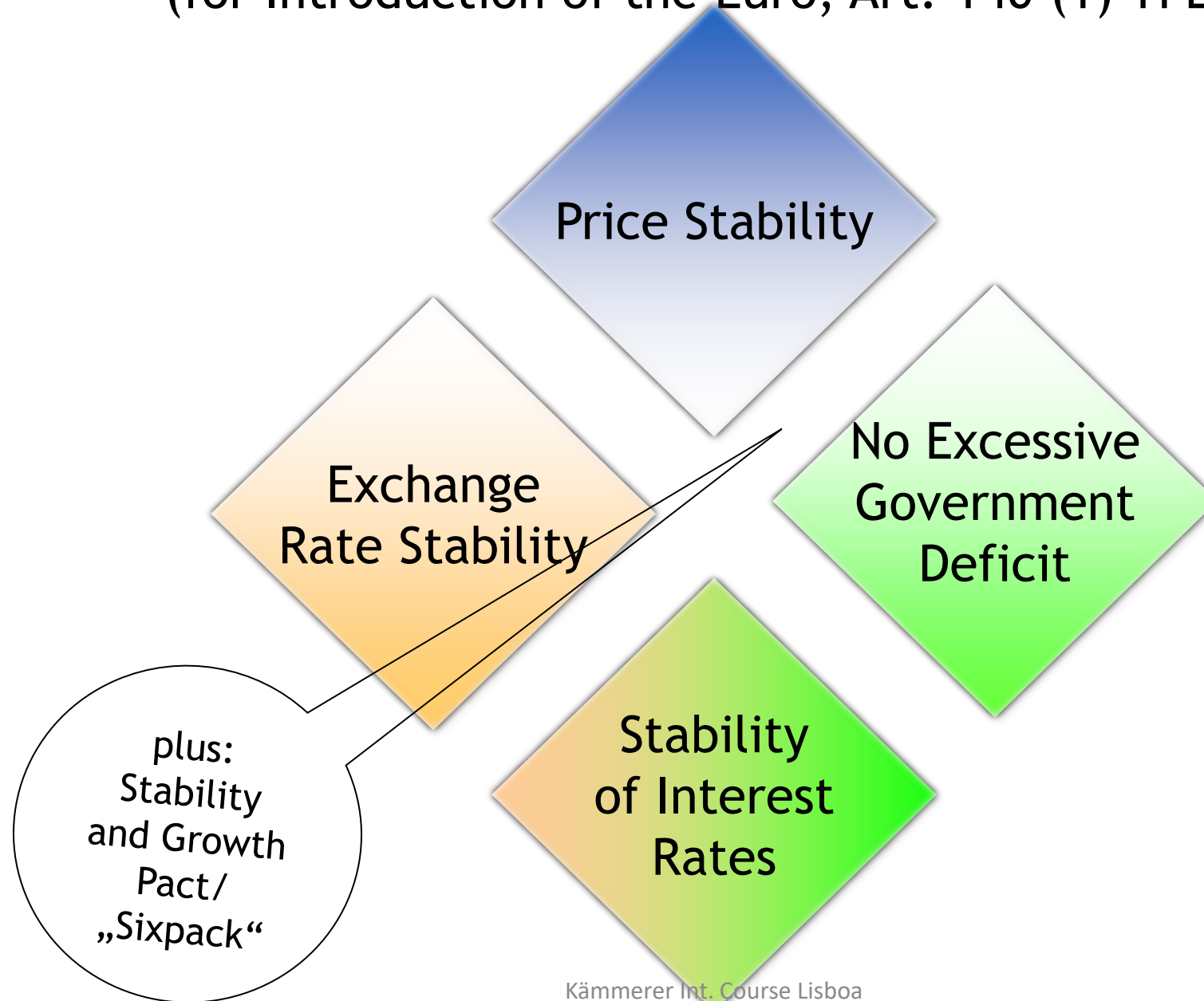
There is no such thing as a „Euro membership“!



# Eurozone and Eurogroup



# Convergence Criteria (for Introduction of the Euro, Art. 140 (1) TFEU)



# Convergence Criteria

(for Introduction of the Euro, Art. 140 TFEU)



achieving a high degree of price stability = a rate of inflation which is close (at most 1.5 % above) to that of the three best performing Member States in terms of price stability




# Convergence Criteria

(for Introduction of the Euro, Art. 140 TFEU)

Sustainability of the government financial position (Council decides whether excessive deficit exists).

Reference values according to TFEU Protocol No. 12 are:

- Government deficit of at most 3% of gross domestic product
- Government debt of at most 60% of gross domestic product

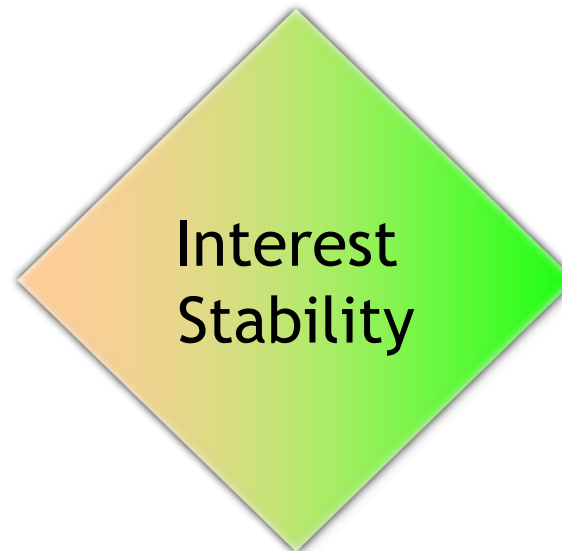


No excessive  
Government  
Deficit

# Convergence Criteria

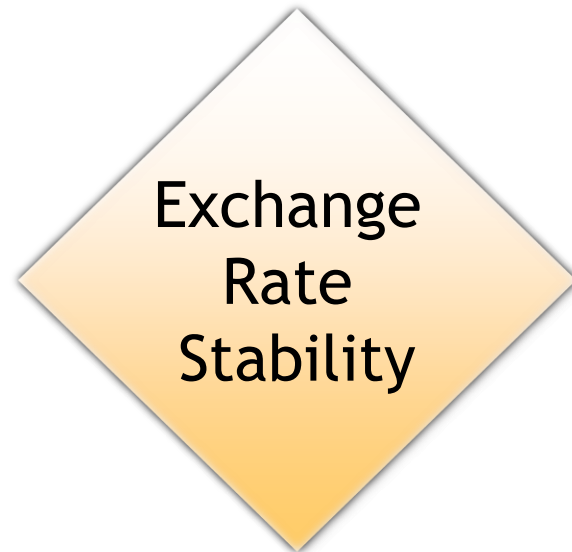
(for Introduction of the Euro, Art. 140 TFEU)

Convergence of long-term interest rates (at most 2 % above those of the three best performing Member States)



# Convergence Criteria

(for Introduction of the Euro, Art. 140 TFEU)



Maintaining exchange rate fluctuations according to ERM II for two years without devaluing against the Euro

## *Chapter 3*

# *The Monetary „Wing“ of the EEMU: ECB and ESCB and Their Commitment to Price Stability*

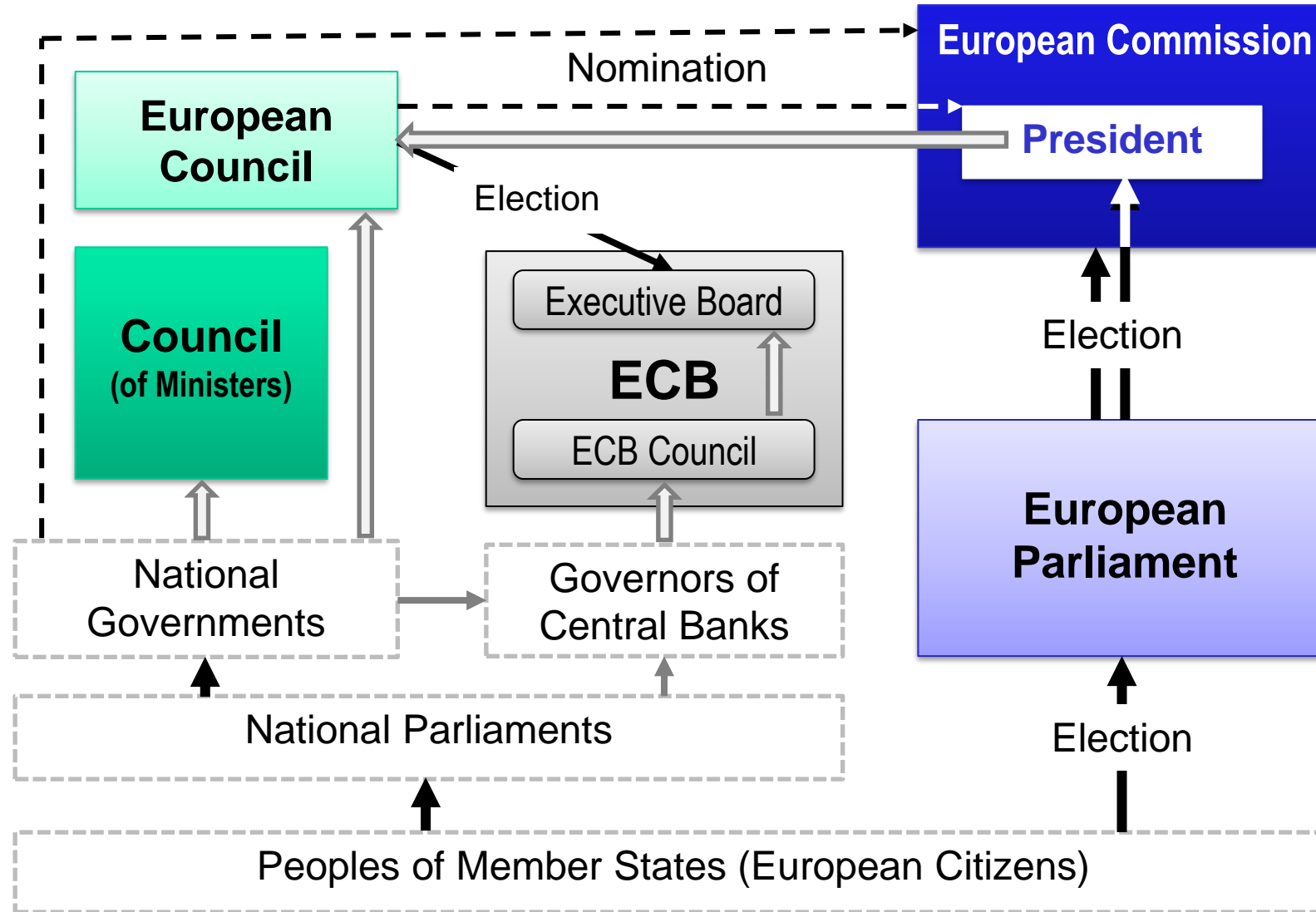


## NOTIONS

*Not to be mixed up:*

- *„Eurozone“/“Euro Area“ („Euro-19“)  
= countries for which the euro is the currency (exclusive monetary powers of the EU=*
- *European System of Central Banks (ESCB), Art. 282 (1) 1 TFEU  
= ECB + all 27 CB*
- *Eurosystem, Art. 282 (1) 2 TFEU  
= ECB + all 19 Eurozone CB, conducting the monetary policy for the Eurozone*
- *Euro Group (Art. 137 TFEU)*

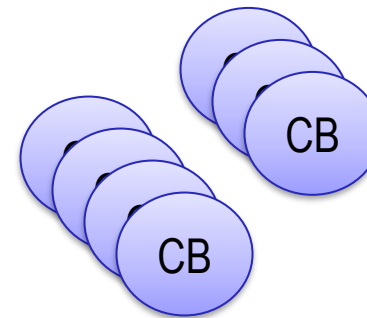
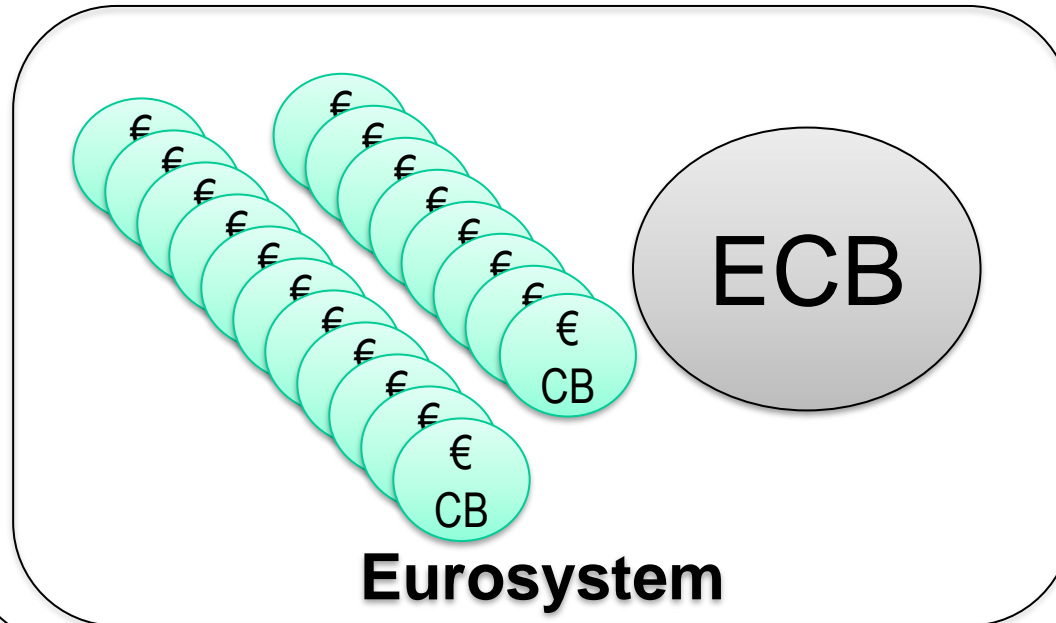
# Major EU Institutions (excluding judicial bodies)



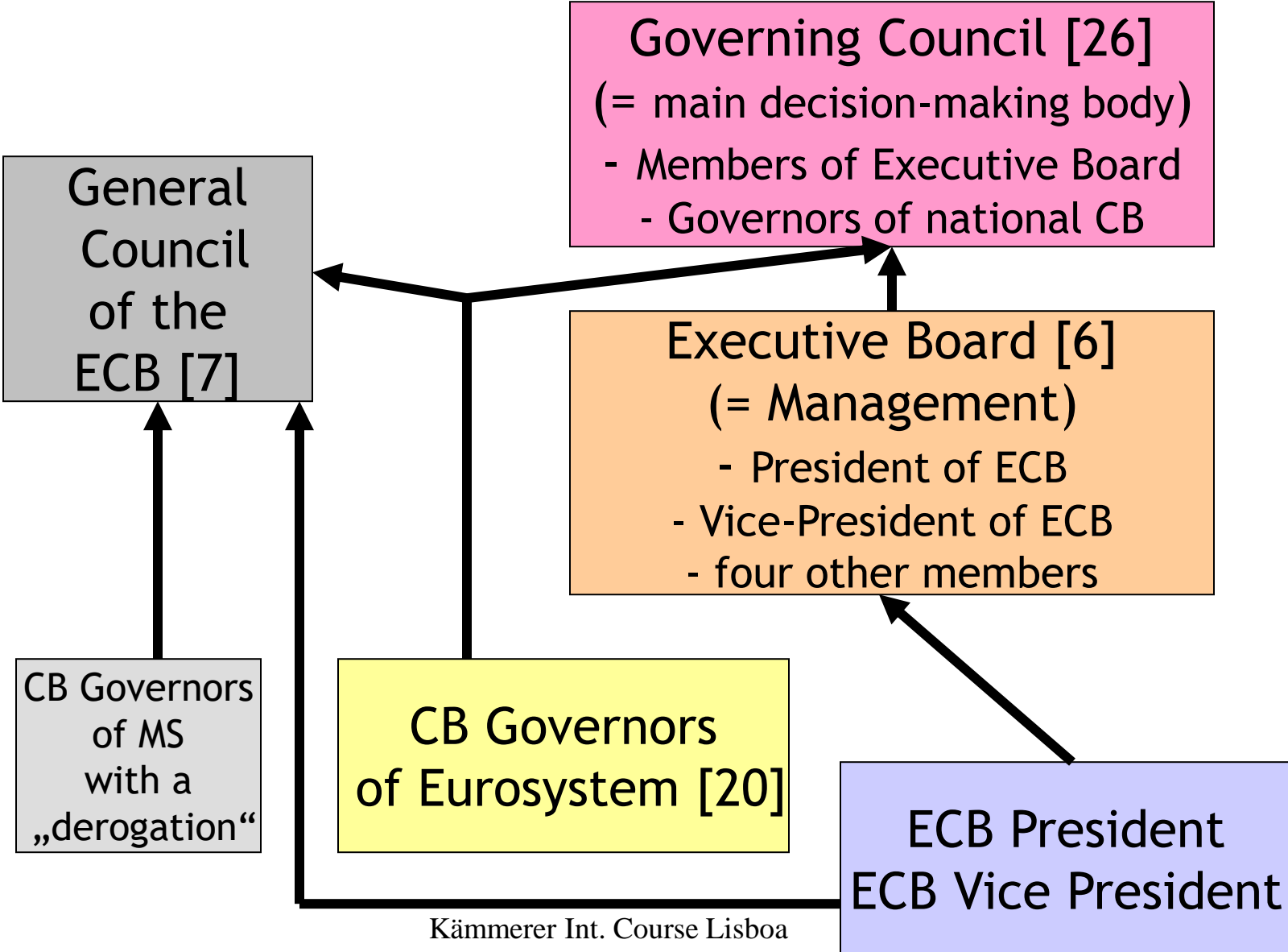
# ECB AND ESCB COMPOSITION

## ESCB

(European System of Central Banks)



# ECB BODIES (ORGANS)





## ECB FUNCTIONS

- **Monetary policy for the Union**
- Foreign exchange transactions
- Foreign reserves of the member states
- Ensuring the functioning of payment systems
- Banknotes and coins (Art. 128 TFEU)
- *Supervision of credit institutions if competency is delegated (to the ECB, Art. 127 (6) TFEU)*
- Contribute to general economic policies and the Union's competencies according to Art. 3 TFEU (secondary objective, Art. 127 (1) 2 AEUV)

## ECB

### FUNCTIONS: MONETARY POLICY (1 OF 3)

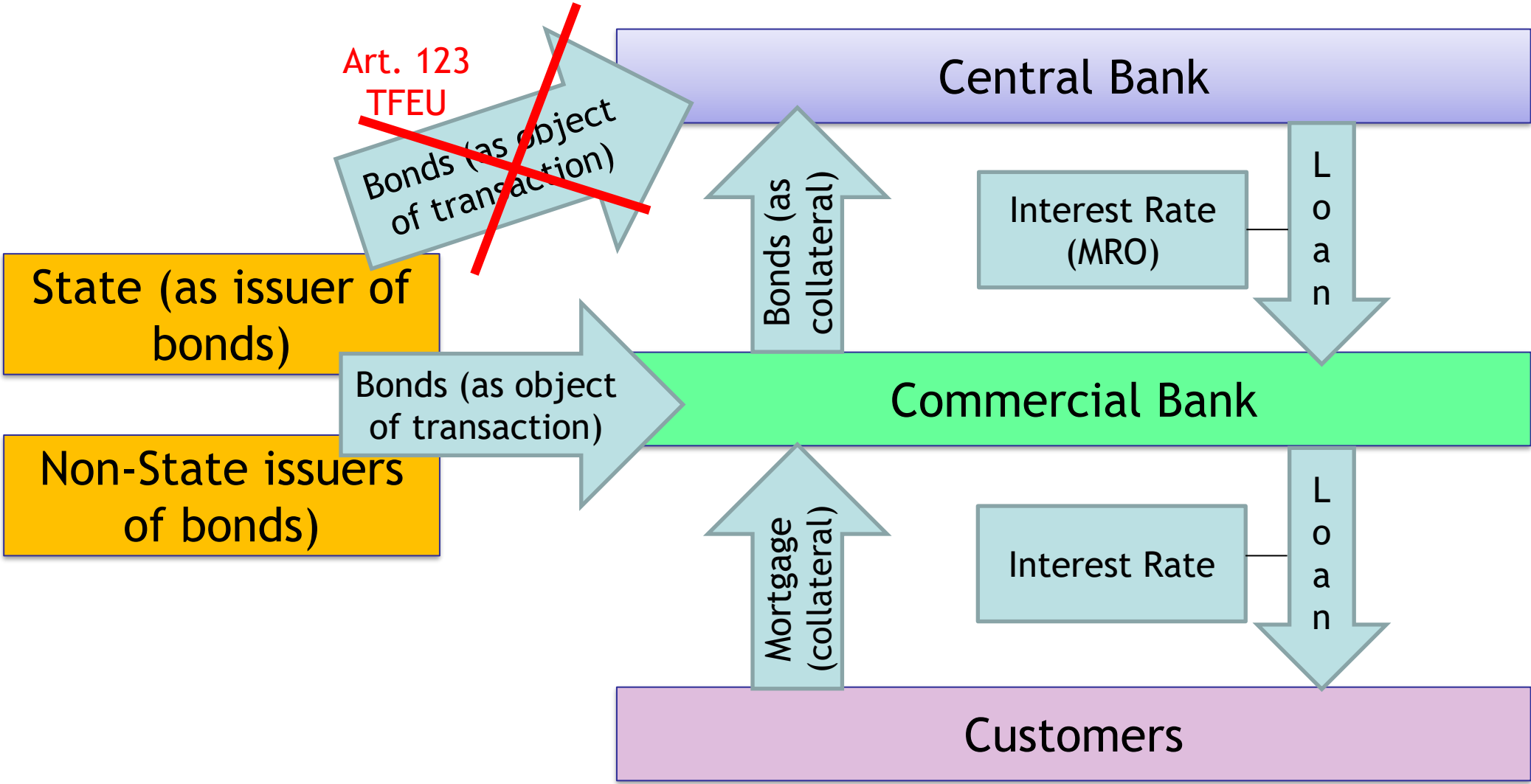
- Open Market Policy/Operations
  - All sorts of transactions with commercial banks
  - Sale and purchase of bonds, gold, securities etc.
  - Collateral for loans granted to commercial banks
  - Limits:
    - Prohibition of direct direct purchase from sovereign issuers (Art. 123 TFEU)
    - No circumvention of that prohibition (**disputed: selective measures like OMT - German Const. Court vs. ECJ; Emergency Liquidity Assistance (ELA) for Greek banks**)

## ECB

### FUNCTIONS: MONETARY POLICY (2 OF 3)

- Minimum Reserve Policy
- Lending / Interest Rate Policy
  - Main Refinancing Operation (MRO)
  - Marginal Lending Facility
  - Deposit Facility
- Other (unnamed) instruments of monetary policy (pursuant to ESCB/ECB Statute)
  - Large-scale purchase programmes since 2008 (OMT, QE, PSPP, CSPP, PEPP etc.): unconventional monetary measures to unclog monetary transaction mechanism or economic policy (prohibited to ECB)?

**ECB**  
**FUNCTIONS: MONETARY POLICY (3 OF 3)**



## ECB

### OBJECTIVES: PRIMACY OF PRICE STABILITY

- Basis: Art. 127 (1) TFEU, Art. 282 as well
- Accompanying provisions: Art. 123 to 126 TFEU
- Definition
  - Annual increase in the Harmonized Index of Consumer Prices (HICP) for the euro area of 2% (ECB)
  - No price stability in a deflation
- Problem: diverging evolution of consumer prices between MS

# ECB INDEPENDENCE

- Legal basis
  - Art. 119 (2), 130 and 282 (3) TFEU
  - Art. 88 sent. 2 German Basic Law as constitutional requirement (no similar provisions in other constitutions)
- Main purpose: Price stability
- Aspects of independence:
  - Operational and institutional
  - financial
  - personal

## Chapter 4

# The Economic „Wing“ of the EEMU: Fiscal Guidelines for Member States



## ECONOMIC POLICY FEATURES

- Avoidance of excessive government deficits (Art. 126 TFEU) [+ „Fiscal Compact“]
- Prohibition of facilities in favour of governments with central banks / direct sovereign lending (Art. 123 TFEU)
- Prohibition of privileged access of governments to financial institutions (Art. 124 TFEU)
- No bailout (Art. 125 TFEU), but
  - De-facto exceptions in Art. 122, 143 TFEU
  - Financial assistance pursuant to ESM Treaty in connection with new Article 136 (3) TFEU



## ECONOMIC POLICY

### FISCAL DISCIPLINE (ART. 126 TFEU)

- Prohibition of excessive government deficits (Art. 126 (1), (2) TFEU); for reference values see Protocol no. 12
  - Annual growth of government deficit not exceeding 3% of GDP
  - Aggregate government deficit not exceeding 60% of GDP
- Secondary law: Stability and Growth Pact
- Procedure in case of excessive deficit (Art. 126 (4)-(12) TFEU):
  - Opinion of Economic and Financial Committee
  - Council decision on existence of deficit, makes recommendations
  - Eurozone: Gives notice, requests reports
  - Eurozone may impose/invite measures: publication of information, EIB lending policy, non-interest-bearing deposit with Union, fines

## ECONOMIC POLICY

### PROHIBITION OF FACILITIES WITH CENTRAL BANKS (ART. 123 TFEU)

*Provision binds both MS/EU and central banks → relevant to economic and monetary policy*

- Prohibition of credit facilities, Art. 123 (1) TFEU
- Overdraft facilities (providing means to public sector which may result in a negative balance)
- Other credit facilities
- Prohibition on central banks purchasing debt instruments from public authorities (Art. 123 (1) TFEU)
- Exceptions (see Reg. (EC) No. 3603/93)

**ECONOMIC POLICY**  
**NO PRIVILEGED BANK ACCESS FOR THE STATE (ART. 124 TFEU)**

It is prohibited (according to Reg. (EC) No. 3604/93)

- To oblige financial institutions to acquire public sector liabilities
- To prohibit the sale of such liabilities
- To offer any incentives which result in an undue advantage of the public sector accessing the financial markets:
  - Tax advantages solely for financial institutions
  - financial advantages which do not comply with the principles of a market economy (regarding the acquisition of public sector debt)

## ECONOMIC POLICY

### „NO BAILOUT“ (ART. 125 TFEU)

- Relates to
  - Liabilities of the „central government“ of a Member State
  - Liabilities of the regional or local authorities
  - MS: Liabilities of other public authorities or undertakings
- Exception: Financial guarantees for the joint execution of a mutual project
- Scope highly disputed (but clarification through ECJ, case Pringle → *next slide*)
- Special provisions (see next slides):
  - Art. 122 TFEU (→ 2/3 slides ahead and also Chapter 6; encompasses aid to Greece, EFSF aid, Corona aid without involvement of EFSF/ESM = SURE, NGEU)
  - Art. 143 TFEU (for non-Euro MS only)

## ECONOMIC POLICY „NO BAILOUT“ (ART. 125 TFEU)

ECJ, Case C-370/12 Pringle/Govt. of Ireland et al.  
Bailout is associated with **moral hazard**

Permitted (according to ECJ)	Prohibited (according to ECJ)
Mutual assistance between MS if strictly conditional (as in ESM)	Unconditional assistance Unconditional debt remission or any sort of „haircut“ Anything else generating moral hazard



The Treaty prohibits assistance of any kind by means of which

- (1) The probability of other Member States **standing surety** for a sovereign debtor is enhanced; and
- (2) Where the transfer (even interest advance) may result in a **less stability-inclined policy** of the benefitting Member State

**ECONOMIC POLICY**  
**„NO BAILOUT“ (ART. 125 TFEU) – ART. 122 ETC.**

<b>Art. 122</b>	all Member States	Severe difficulties caused by “exceptional occurrences beyond its control”	Union assistance ( <i>acc. to CJEU, Pringle-Case, no decision on admissibility of assistance from Member States</i> )	Financial assistance „under certain conditions“; discretion regarding if and how
<b>Art. 143 f.</b>	Member States with derogation	Difficulties regarding balance of payments	Union assistance	Council grants mutual assistance; discretion regarding condition and details (examples in Art. 143 (2) TFEU)
<b>Art. 136 (3) &amp; ESM-Treaty (→ ch. 6)</b>				

**ECONOMIC POLICY**  
**„NO BAILOUT“ (ART. 125 TFEU) – ART. 122 ETC.**

**Details of Art. 122 (2) TFEU**

- Matters of fact
- Exceptional occurrences (natural, social or economic catastrophes), beyond the control of a member State
- „Difficulties“ caused by them (including budgetary)

*Unclear: How should contributory negligence consisting of a lack of budgetary discipline be taken into account?*

- Legal consequences
  - Financial assistance by EU (*provision is silent on assistance by MS!*)
  - Discretionary decision
  - Conditionality („under certain conditions“)

**ECONOMIC POLICY**  
**„NO BAILOUT“ (ART. 125 TFEU)**  
**THE „EUROBOND“ QUESTION (NEXT 7 SLIDES)**

*Topical question: May the EU or may the Member States jointly issue so-called Eurobonds, e.g. intended to mitigate of the economic effects of the Corona crisis?*



# Phenomenology of Eurobonds

## Type 1 Eurobonds (= in a narrow sense)

Bonds issued by the European Union  
(e.g. within SURE or NGEU  
(„Corona bonds“))

## Type 2 Eurobonds (= in a broader sense)

Bonds issued by the  
ESM

*Conditionality required  
for subsequent lending  
by ESM*

Bonds issued (jointly) by  
the Euro MS themselves

(3 variants → next slide)

### Legal problems:

- Conferral (permitted by Treaty, especially Art. 311 TFEU)?
- Compliance with Art. 122 (2) TFEU?
- No circumvention of Art. 125 (1) TFEU where MS give (pro rata) guarantees for debt taken on by EU (as in NGEU = Next Generation EU – volume € 0.72 trillion)?

Legal Obstacles?

## Type 2 Eurobonds

Bonds issued conjunctly by the MS pertaining to the „Eurozone“

Eurobonds with joint and several guarantees/liability  
(*dívidas/obligações solidárias*)

Eurobonds with pro rata guarantees/liability  
(*dívidas/obligações proporcionais*)  
Example: Germany + Länder

Sovereign bonds with individual liability  
(*dívidas/obligações individuais*)

Possible combinations (as senior/junior)

## Type 2 Eurobonds with joint and several liability

1

Complete or partial mutualisation with seniority of (mid-term or long-term) Eurobonds

2

Mutualisation with juniority of (mid-term or long-term) Eurobonds

### (1) Probability of other MS standing surety

- Joint liability implies that *any* MS may be (formally) hold liable for total debt (principal + interest)
- Low (but extant) risk of irrecoverability where mutualisation does not exceed 60% (of BIP), higher risk where Eurobonds are junior
- Possible „cross-contagion“ between default on bond categories possible

### (2) Focus on stability

- Debtor MS can rely on others „paying the bill“
- No conditionality
- No rigid control mechanisms (such as in ESM) and sanctions for fiscal indiscipline

→ **Inconsistent** with Article 125 TFEU

## Type 2 Eurobonds with joint and several liability

3

Complete or partial mutualisation with short-term Eurobonds (Eurobills)

- (1) Probability of other MS standing surety
  - Any MS may be (formally) held liable for total debt
  - But very low risk of irrecoverability
  - No time for possible „cross-contagion“
- (2) Focus on stability
  - Debtor MS can rely on others „paying the bill“
  - Short maturity permits for de-facto exclusion from next instalment, efficiency akin to ESM (Troika) supervision

→ Potentially consistent with Article 125 TFEU

4

Any complete or partial mutualisation involving ESM-assisted MS

ESM as „stability enhancer“?

- Agreed conditionality and supervision (MoU) would have to encompass issuance of bonds (undesired)
- After issuance low chances of imposing effective sanctions against co-issuers of Eurobonds for fiscal indiscipline within bond context
- Unrealistic options, since issuance would require participation of ESM-assisted MS

## Type 2 Eurobonds with pro rata liability

1

### Pro rata bonds with common interest rates (Type 1)

- (1) Probability of other MS standing surety
    - No liability for principal
    - But transfer of „interest advance“ (rating!)
  - (2) Focus on stability
    - Debtor MS likely enjoys interest benefit even when conducting a sloppy fiscal policy
    - Danger of retorsion and fiscal „race to the bottom“ with resulting general instability
- Generally **inconsistent** with Article 125 TFEU

2

### Pro rata bonds with averaged interest rates (Type 2)

- Interest rate at issuance = weighted average of packaged bonds
- (1) Probability of other MS standing surety
    - No liability for principal
    - No transfer of „interest advance“
  - (2) Focus on stability
    - No interest benefit, just pooling advantage = lower transaction cost (reduced liquidity premium)
- Generally **consistent** with Article 125 TFEU

Type 2 Eurobonds with ...	Generally illicit	Exceptionally permitted	Generally permitted
<b>Joint and Several Liability</b>	<ul style="list-style-type: none"> <li>- Comprehensive mutualisation of all sovereign debt</li> <li>- Senior Eurobonds and junior national bonds</li> <li>- Senior national bonds and junior Eurobonds</li> </ul>	„Eurobills“ with very short maturity and very effective control of conditionality	-----
<b>Pro Rata Liability</b>	Most forms of pro rata bonds with <i>common</i> (pooled) interest rates	When issued conjunctly by States touching ESM support plus one other State, provided that ESM conditionality extends to issuance of bonds	Pro rata bonds with <i>averaged</i> interest rates and joint administration

## Can the Legal Barriers be Overcome?

### Formal requirements

- Bond issuance by interpositioned EU agency (EDA model)
  - Art. 114 TFEU questionable basis, as fiscal policy does not pertain to internal market
  - Art. 352 TFEU (but requires unanimous decision of all MS)
  - Intergovernmental Agreement cannot bring about an EU agency
- Joint bond issuance by MS:
  - EU Law is rather indifferent as to the legal basis (Treaty?) and form
  - Treaty as such does not suffice as a means for circumventing Art. 125 TFEU (Art. 136 (3) TFEU does not waive it and applies to ESM only)

### Material requirements

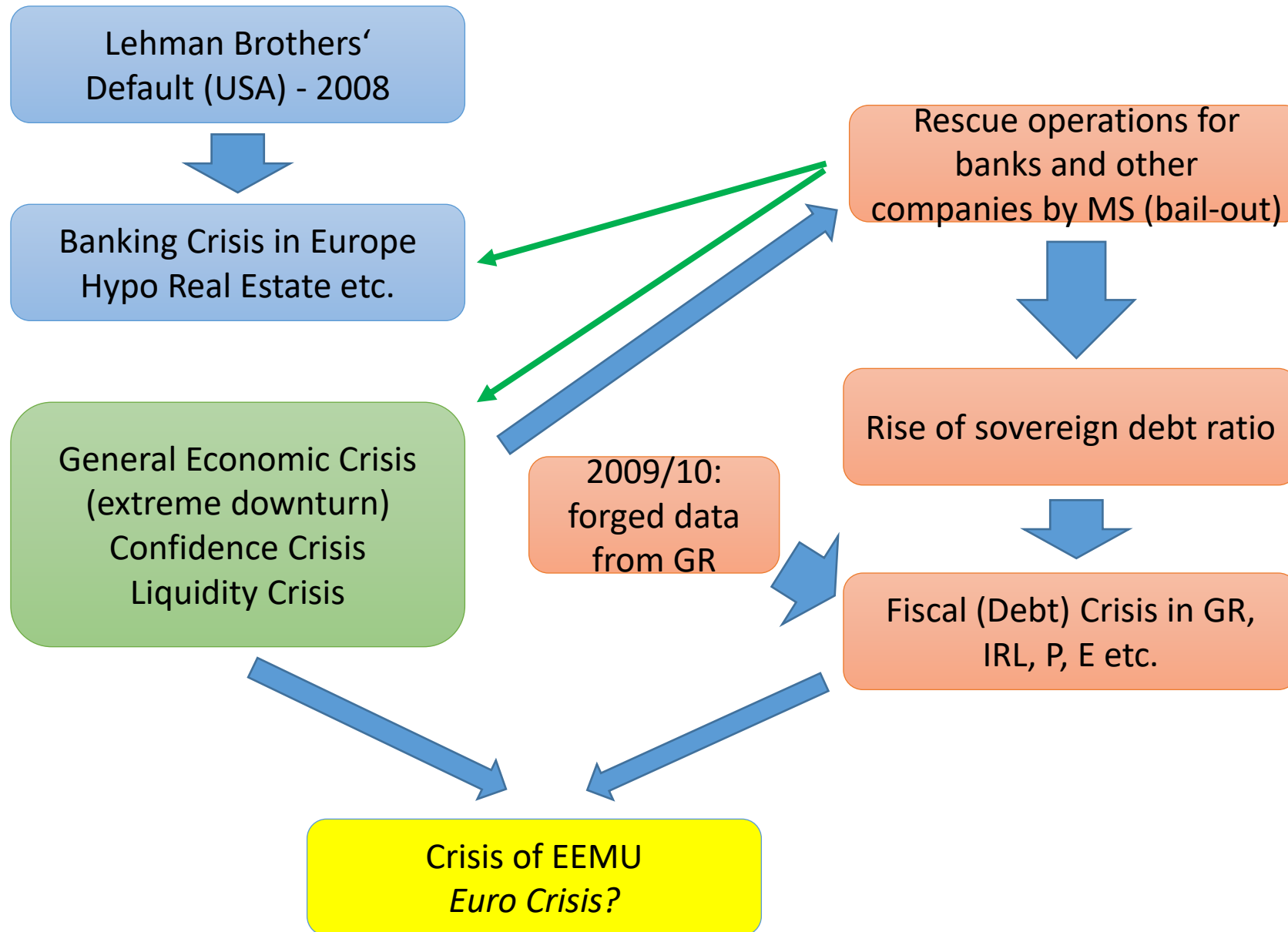
#### Joint bond issuance by MS

- Art. 352 TFEU (-): object and purpose is not to empower Union but to lift a ban affecting MS
- Treaty amendment waiving Art. 125 TFEU („Art. 136 (4)“ TFEU): possible, but
  - requires ratification by all MS
  - Would belie the stability orientation of Art. 123 et seq.

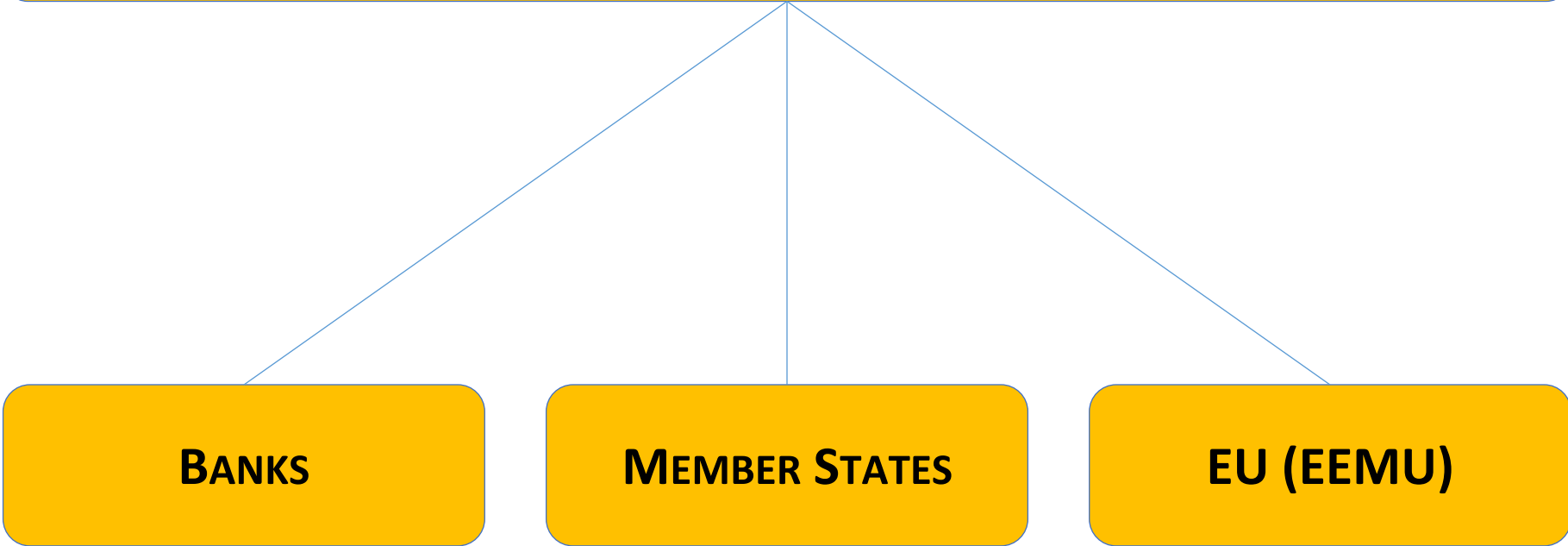
***Chapter 5***  
***The Crisis of 2008***  
***and Shortcomings***  
***of the EEMU***







**SHORTCOMINGS AND LESSONS  
REGARDING**



## SHORTCOMINGS AND LESSONS BANKS

- Subprime („toxic“) securities, often re-securitised
- High degree of international interconnectedness (underestimated by politics)
- Interbank lending (and lending to other sectors by banks) stalled by crisis
- Evidence of banks being „systemically relevant“ and „too big to fail“
- Bailout of banks (and moral hazard) ensuing

## SHORTCOMINGS AND LESSONS MEMBER STATES

- Deficient supervision (supervisory forbearance, arbitrage, capture etc.) → need for a meta-supervision of supervisors by new EU bodies
- Increase of sovereign debt due to need to rescue (or wind up) banks → markup of interest rates in some but not all MS →
- Disruptive effects enhancing hazard of sovereign default (State bankruptcy), but absence of both effective preventive instruments and insolvency mechanisms

## SHORTCOMINGS AND LESSONS EU/EEMU






- Lack of effective *post*-euro convergence requirements
- Legal impossibility of „withdrawing from the euro“ without exiting the EU (→ Art. 50 TEU)
- Uncertainty about application of Art. 122 and 125 (indispensability of EU and mutual financial assistance vs. strict interpretation of „no bailout“)
- Functions of ECB must go beyond those of an ordinary central bank

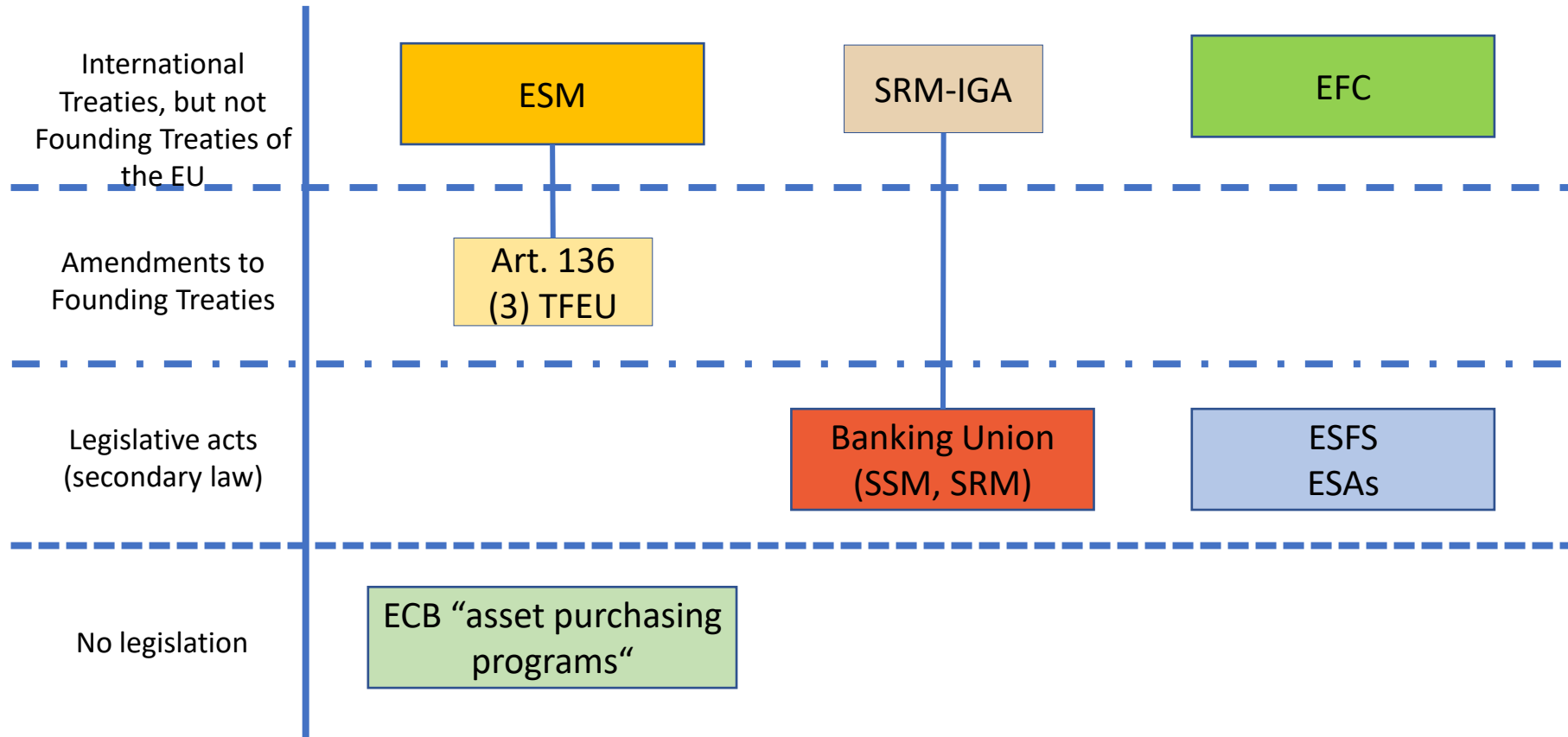
## *Chapter 6*

### *Fundamental Reforms - and Their Ambiguities*



## REFORMS OVERVIEW

- Prevention of sovereign default (and its acceptance as possible scenario): Conditional financial assistance, Stability Funds (EFSF, EFSM, ESM) 
- Sovereign debt: Fiscal Compact 
- Financial system: Extension of ECB toolkit, asset purchase programmes 
- Improved regulation of banks and prevention of moral hazard: Banking Union 
- Improved supervision of financial institutions: European Supervisory Authorities and „Capital Markets Union“ 



International  
Treaties, but not  
Founding Treaties of  
the EU

ESM

SRM-IGA

EFC

Amendments to  
Founding Treaties

Art. 136  
(3) TFEU

Legislative acts  
(secondary law)

Banking Union  
(SSM, SRM)

ESFS  
ESAs

No legislation

ECB "asset purchasing  
programs"



# *I. Stabilisation Mechanisms (Prevention of Sovereign Default)*

Sven Klippel

# *The Traditional Approach (Public International Law)*

## STATE BANKRUPTCY (SOVEREIGN DEFAULT) *IN PUBLIC INTERNATIONAL LAW*

- No generally agreed terminology
  - „State bankruptcy“
  - „State insolvency“
  - „Sovereign default“
- Lack of binding rules in Treaty and customary law
  - Threshold disputed
  - But: Cross-Default Clauses (CDC)
- Frequent phenomenon (ca. 100 cases in 200 years)

## STATE BANKRUPTCY

### *PROCEDURAL ASPECTS – „INSOLVENCY PROCEEDINGS“?*

- State of Necessity (Art. 25 ASR)
  - Temporary suspension only
  - Strict prerequisites
  - Not applicable to private creditors
- Debt Restructuring in Clubs of London and Paris
  - Insolvency proceedings *in nuce*
  - Non applicable to multiple creditors (individual bondholders)
- IMF-Assisted Debt Restructuring
  - Insolvency proceedings *in nuce*
  - Non applicable to multiple creditors (individual bondholders)

**STATE BANKRUPTCY**  
***PROCEDURAL ASPECTS – „INSOLVENCY PROCEEDINGS“?***

- Sovereign Debt Restructuring Mechanism (SDRM) Proposal
  - Features of insolvency proceedings
  - Binding elements, stay of payments
  - Involvement of individual bondholders unclear
  - Rejected by USA
- Collective Action Clauses (CAC)
  - Substitute for insolvency proceedings
  - Efficient against holdout creditors
  - Art. 12 (3) ESM Treaty and Greek debt restructuring

*The New European Approach: Stability Funds (+ IMF)  
New forms of financial assistance to MS*



## OVERVIEW

### FINANCIAL ASSISTANCE PROVISIONS PRIOR TO AND AFTER 2008

Art. 122	all Member States	Severe difficulties caused by “exceptional occurrences beyond its control”	Union assistance ( <i>acc. to CJEU, Pringle-Case, no decision on admissibility of assistance from Member States</i> )	Financial assistance „under certain <b>conditions</b> “; discretion regarding if and how
Art. 143 f.	Member States with derogation	Difficulties regarding balance of payments	Union assistance	Council grants mutual assistance; discretion regarding <b>condition</b> and details (examples in Art. 143 (2) TFEU)
Art. 136 (3) & ESM-Treaty	Eurozone Member States	Serious financial problems of a Member State, financial stability of the entire Eurozone is endangered	ESM assistance	ESM Board of Governors has discretion; <b>strict conditionality</b> of assistance (= no actual deviation from Art. 125 TFEU)

## FINANCIAL ASSISTANCE

### FIRST STEPS: *AD HOC* AID (GREECE)

#### Details of Art. 122 (2) TFEU

- Matters of fact
- Exceptional occurrences (natural, social or economic catastrophes), beyond the control of a member State
- Causally determined „difficulties“ (including budgetary)

*Unclear: How should contributory negligence consisting of a lack of budgetary discipline be taken into account?*

- Legal consequences
  - Financial assistance
  - Discretionary decision
  - „under certain conditions“



## THE STABILITY FUNDS – FIRST GENERATION (EFSF AND EFSM)

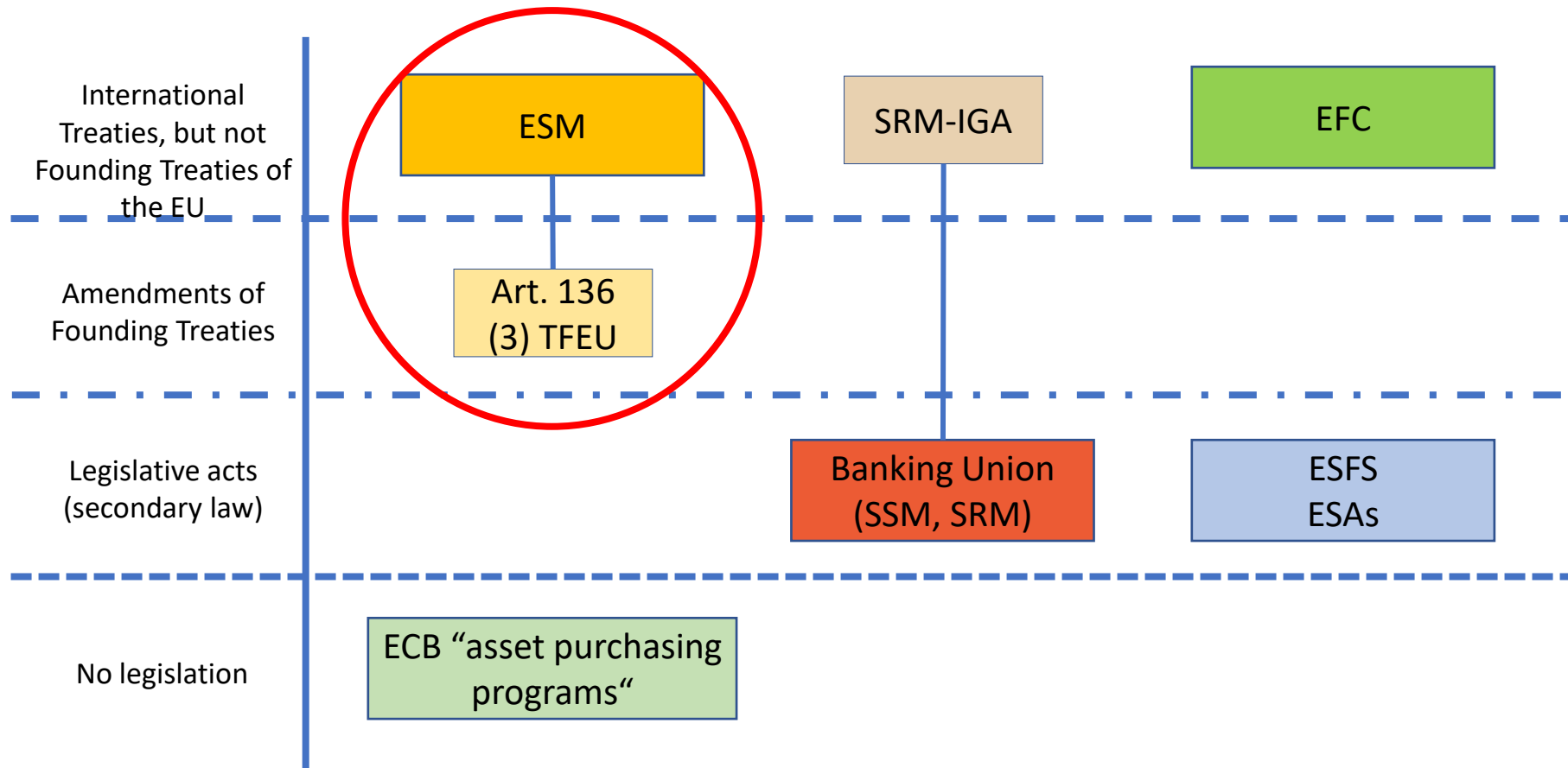
European Financial Stabilisation Mechanism (EFSM) [= EU Aid] (6/2010)

European Financial Stability Facility (EFSF) [= Aid provided by MS] (6/2010)

*European Stability Mechanism (ESM) (since 10/2012)*

- Temporary Fund
- Common institution of MS, society under law of Luxembourg
- Capital (originally) € 440 bn (Germany: € 127 bn)
- Additional loans by IMF
- *Basis EFSF Framework Treaty; individual Council decisions pursuant to Art. 136 (1) TFEU or MoU*
- *Beneficiaries: GR (until 2015, now ESM), formerly: IRL, P, E, CY*

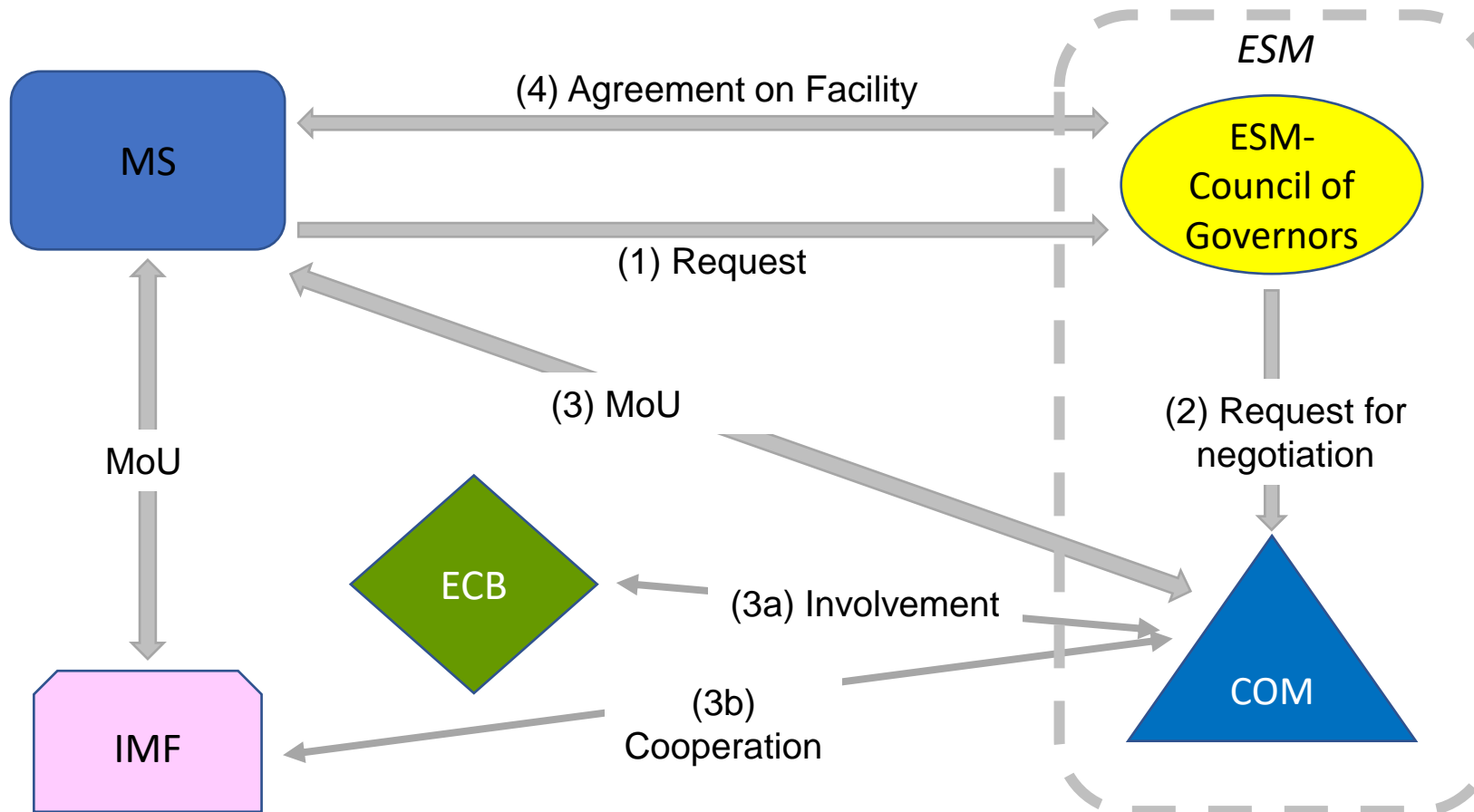
# THE STABILITY FUNDS – SECOND GENERATION (ESM)



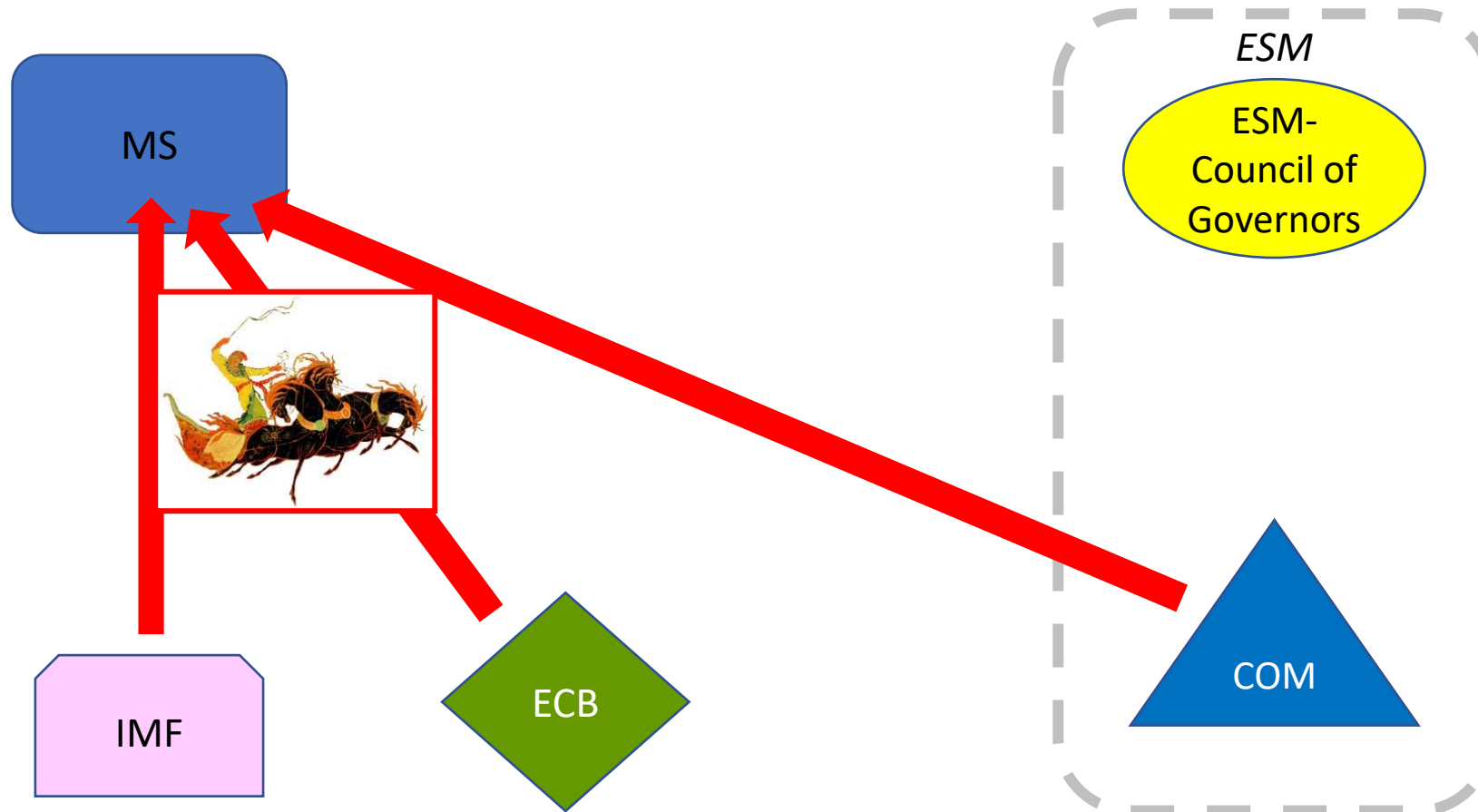
## THE STABILITY FUNDS – SECOND GENERATION (ESM)

- Legal Basis: ESM Treaty + new Art. 136 (3) TFEU, in force since 2013
- Permanent Fund
- International Financial Organization of Euro MS, seat: Luxemburg
- Capital € 700 billion (500 billion available, 80 billion to be paid in) (share of D: € 190 billion = 27%)
- Lending policy: Various facilities and operations
  - Precautionary financial assistance (precautionary credit line)
  - Fin. assistance for re-capitalization of financial institutions of an ESM Member
  - Loans to ESM Member
  - Primary market support facility (= purchase of ESM Member's bonds)
  - Secondary market support facility
- **Strict conditionality** according to MoU pursuant to the chosen instrument
- Revised and increased capital calls possible
- Right to take up loans on financial markets

# THE STABILITY FUNDS – SECOND GENERATION (ESM) NEGOTIATION OF ASSISTANCE

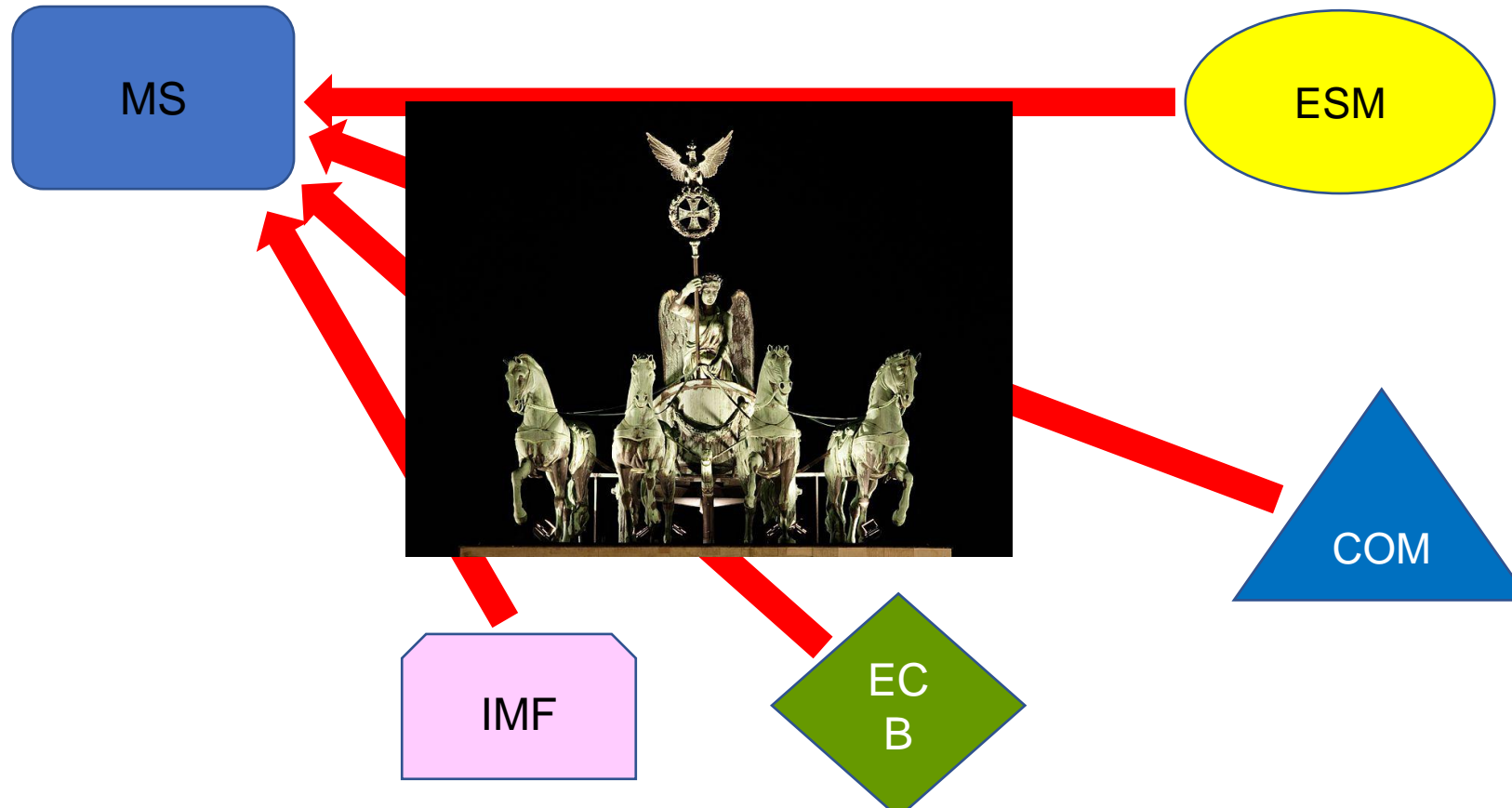


# THE STABILITY FUNDS – SECOND GENERATION (ESM) CONTROL OF COMPLIANCE – „TROIKA“



# THE STABILITY FUNDS – SECOND GENERATION (ESM) CONTROL OF COMPLIANCE – „QUADRIGA“

Photo: Aleph



## *II. The Fiscal Compact - Control of Expenditure*

Sven Kitzler

## TSCG AND FISCAL COMPACT (2012)

- Treaty, mainly for Eurozone MS
- Structural deficit decisive
- Low thresholds
- Sanctions imposed by ECJ
- „Automatic“ reduction of debt
- Reversal of qualified majority



### *III. ECB Asset Purchase Programmes*

Sven Krippel

## ECB ASSET PURCHASE PROGRAMMES

“Within our mandate, the ECB is ready to do whatever it takes to preserve the euro. And believe me, it will be enough.”

Are purchase programmes within the ECB’s mandate?

Problematic features:

- Selectivity → do they still qualify as till monetary policy? (ECJ: goal is to combat disturbance of monetary transaction mechanism)
- Circumvention of direct purchase of bonds from States, prohibited by Art. 123 TFEU?

## Initial Asset Purchase Programmes

Name	Description	Dates	Financial Scope	Rationale
Covered Bond Purchase Programme 1 (CPBB1)	Eurosysteem purchases covered bonds up to target of 60 billion Euros	July 2009 – June 2010	Holdings of 60 billion Euros at termination, current holdings of approx. 4.2 billion Euros	Ease funding conditions for credit institutions thereby encouraging lending
Securities Market Programme	Eurosysteem purchases public and private sector bonds on secondary markets, liquidity partially re-absorbed	May 2010 to September 2012, terminated with the announcement of the OMT Programme	Current holdings of approx. 62.7 billion Euros	Address the malfunctioning of securities markets and restore the monetary policy transmission mechanism
Covered Bond Purchase Programme 2 (CPBB2)	Eurosysteem to purchase covered bonds up to target of 60 billion Euros	November 2011 – October 2012	Purchases of only 16.4 billion Euros, current holdings of approx. 3.9 billion Euros	Ease funding conditions for credit institutions thereby encouraging lending

## Expanded Asset Purchase Programmes

<b>Name</b>	<b>Description</b>	<b>Dates</b>	<b>Financial Scope</b>	<b>Rationale</b>
Covered Bond Purchase Programme 3 (CPBB3)	Eurosystem purchases covered bonds	Net purchases October 2014 - December 2018, currently reinvesting maturing securities	Current holdings of 262.1 billion Euros	Ease funding conditions for credit institutions thereby encouraging lending
Public Sector Purchase Programme (PSPP)	Eurosystem purchases central, regional and local government bonds on secondary markets	Net purchases March 2015 - December 2018, currently reinvesting maturing bonds	Current holdings of approx. 2.1 trillion Euros	Transmission of monetary policy, facilitate credit provision and contribute towards higher inflation levels
Corporate Sector Purchase Programme (CSPP)	Eurosystem purchases securities issued by non-bank corporations in primary and secondary markets	Net purchases June 2016 - December 2018, currently reinvesting maturing securities	Current holdings of approx. 178 billion Euros	Ease financing conditions for the real economy as a precondition for inflation to return to its 2 % target

## ECB ASSET PURCHASE PROGRAMMES

### Pandemic Emergency Purchase Programme (2020)

- Temporary, aimed at countering the risks posed by Covid-19 to the monetary transmission mechanism
- All asset categories under the existing asset purchase programmes (private and public sector securities) are eligible
- Total of 1.85 trillion euro
- Terminates with end of pandemic

## ECB ASSET PURCHASE PROGRAMMES

### LEGAL CONTROVERSIES

- Concerns about excess of powers (no more monetary but economic policy) because of
  - Selectivity of some programmes (OMT)
  - Insufficient assessment of proportionality (PSPP, according to Federal Const. Court – constitutional complaint founded)
  - Assistance to banks and issuing bodies (ECB: required to unblock transaction mechanisms)
- Concerns about violation (by circumvention) of Art. 123 TFEU  
ECJ and Federal Constitutional Court agreeing on necessity of a cooling-down period between purchase by commercial bank and purchase by central bank

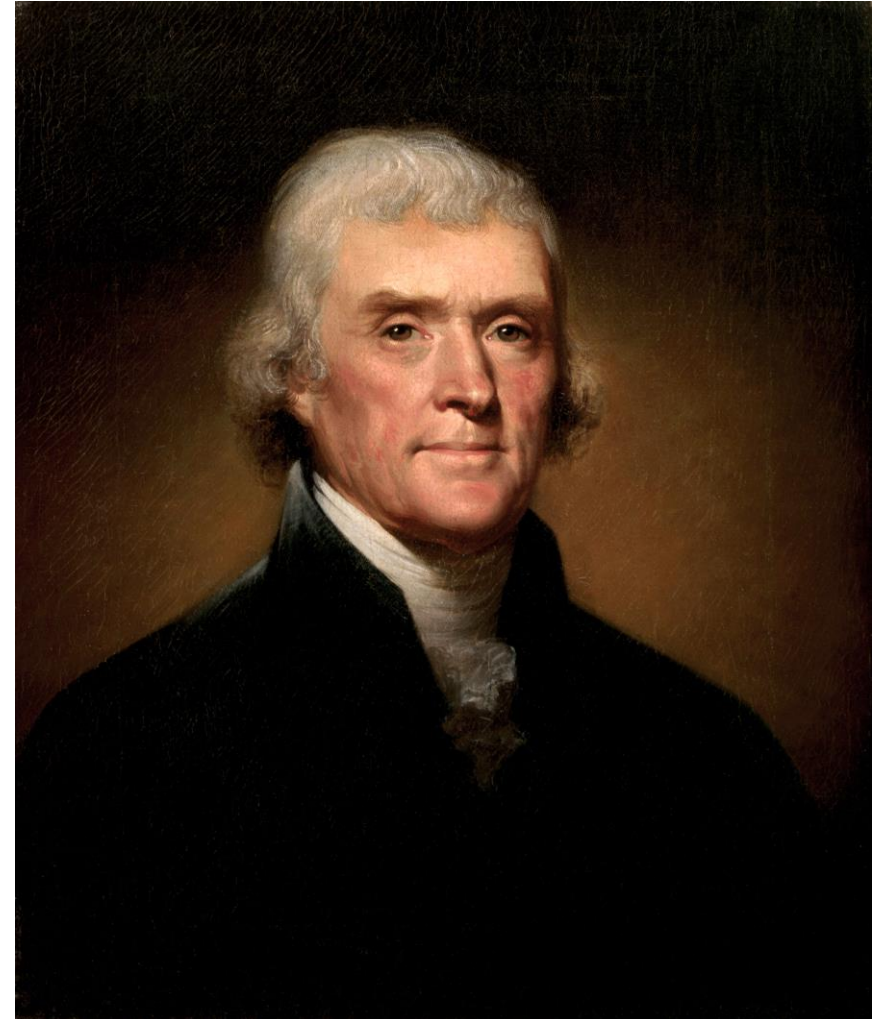
OMT was never implemented – government bond spreads fell significantly after announcement

## *IV. Measures Relating to Financial Market Actors*

*Supervision and Resolution of Credit Institutions:  
Common Rules and Common Authorities - The Banking  
Union*

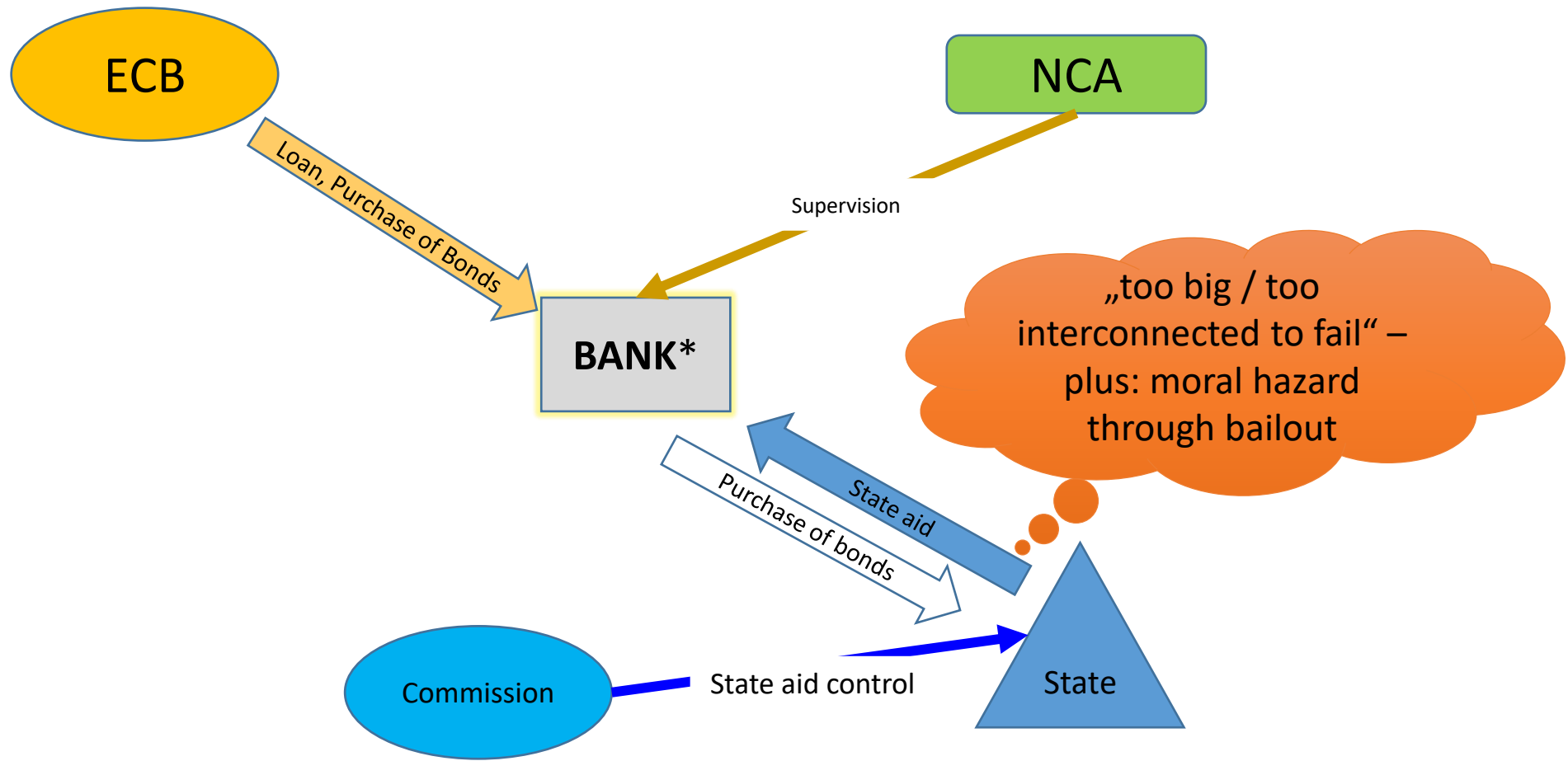


„I believe that banking institutions are more dangerous to our liberties than standing armies.“

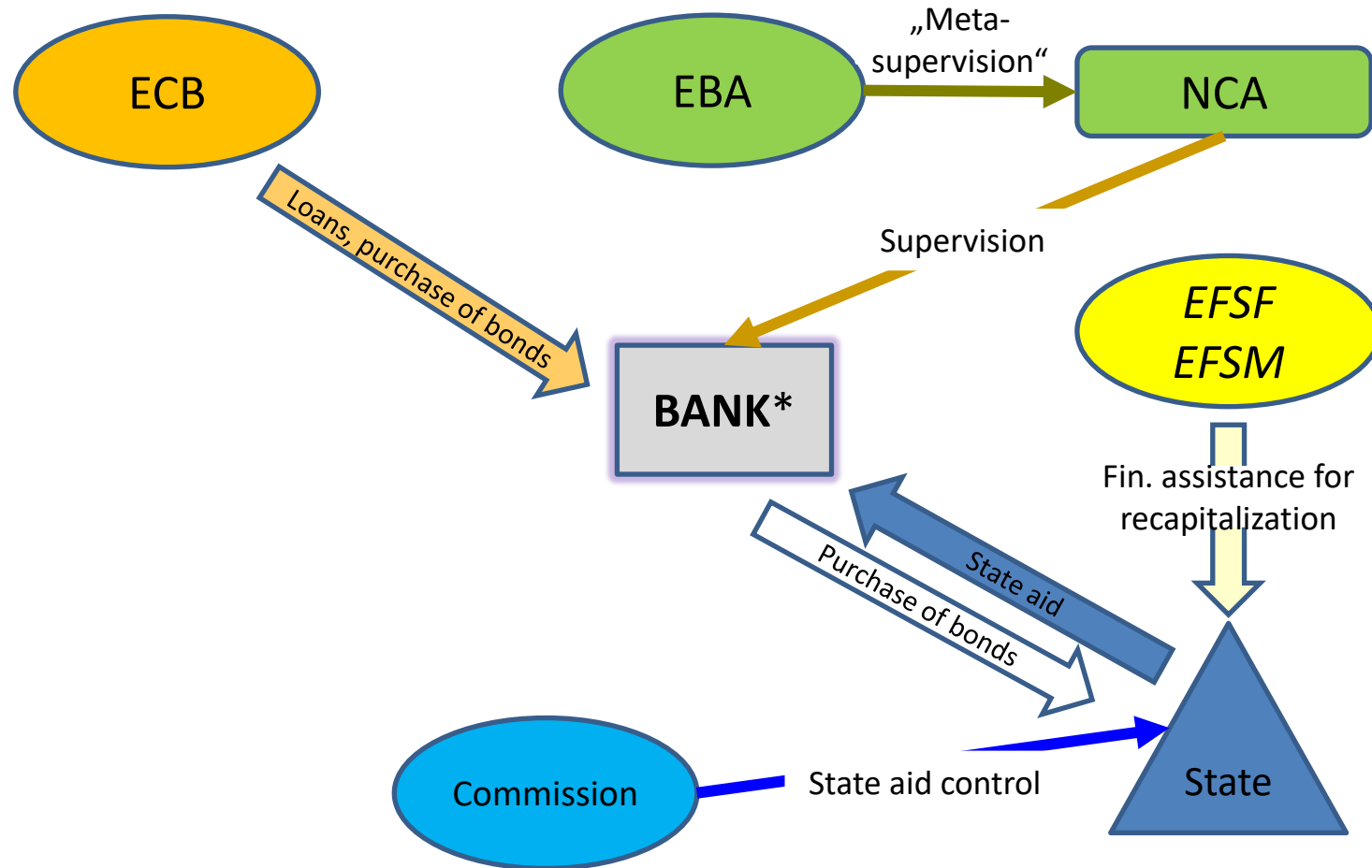


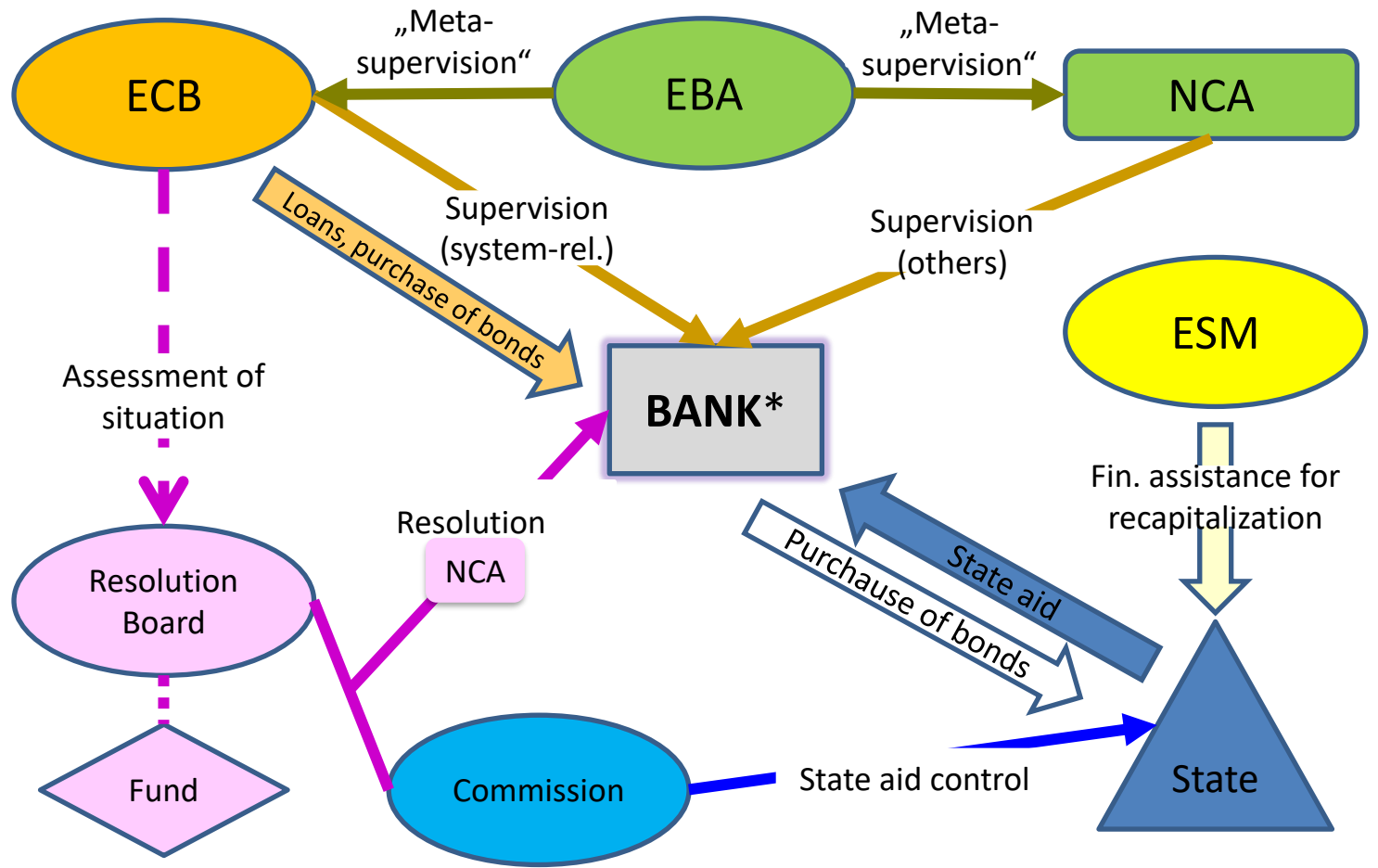
# REFORMS

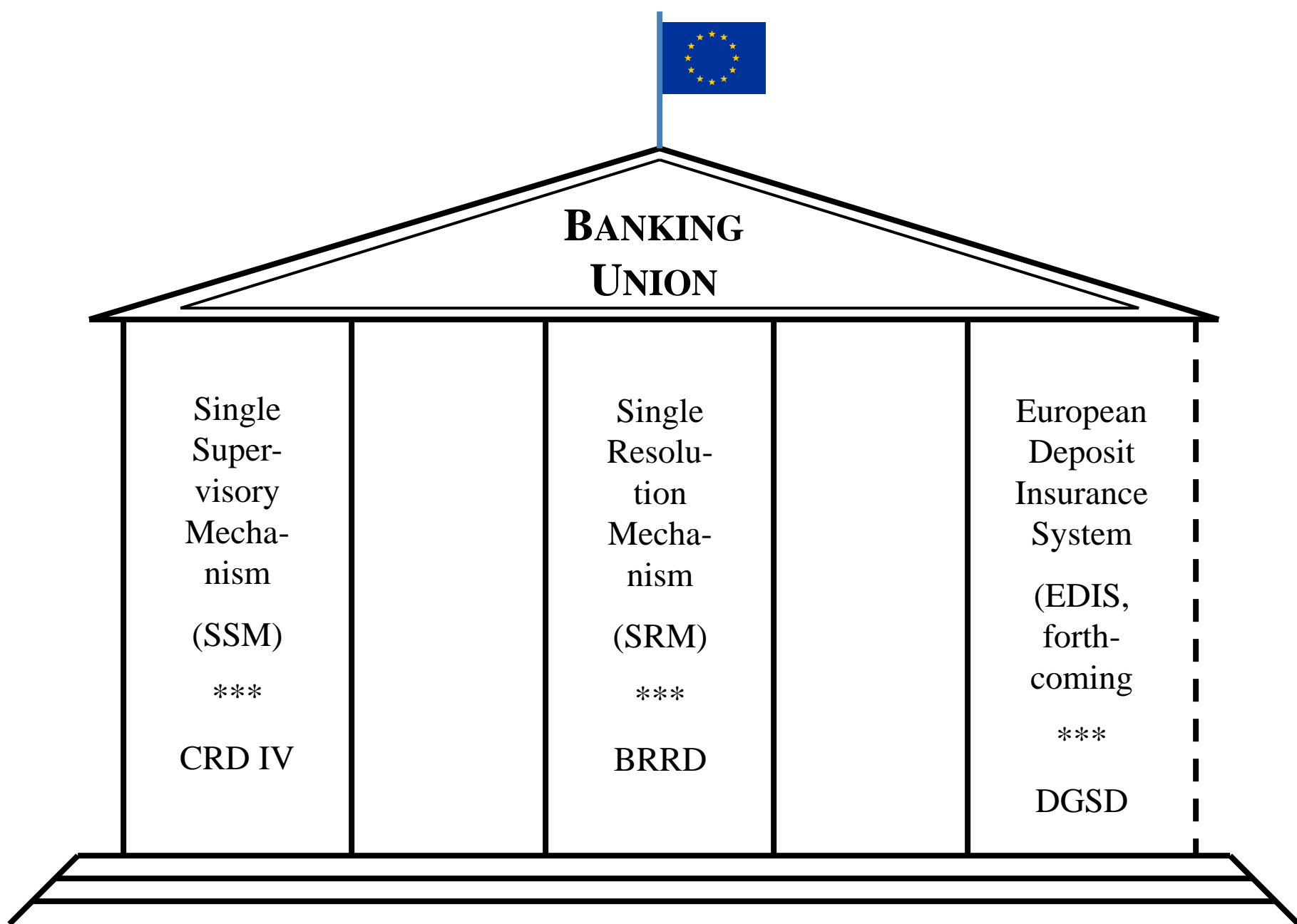
## TOWARDS THE BANKING UNION: SITUATION IN THE CRISIS



# TOWARDS THE BANKING UNION: SITUATION AFTER THE CRISIS







Eurozone only



# BANKING UNION

Single  
Super-  
visory  
Mech-  
anism  
(SSM)

Single  
Resolu-  
tion  
Mech-  
anism  
(SRM)

European  
Deposit  
Insurance  
Scheme  
(EDIS,  
forth-  
coming)

**THE SINGLE SUPERVISORY MECHANISM (SSM)  
CENTRALISED SUPERVISION OF CREDIT INSTITUTIONS**

## BANKING UNION

### THE SINGLE SUPERVISORY MECHANISM (SSM)

Art. 127 (6) TFEU: “The Council [...] may unanimously [...] confer *specific tasks* upon the European Central Bank *concerning* policies *relating* to the prudential supervision of credit institutions [...].”



# THE BANKING UNION

## SSM – DISTRIBUTION OF POWERS

Supervision by ECB  
(according to SSM Regulation, 2013)

Supervision by  
National Authorities

- „Significant credit institutions“ in Euro Area, i.e.
  - value of assets exceeds € 30 bn. OR
  - the 3 leading banks of a MS OR
  - Assets exceed 20% of the MS's GDP OR
  - banks touches ESM support (OR)
- Other credit institutions: upon *Selbsteintritt*

- Euro Area: Other credit institutions (unless ECB decides to assume supervision)
- Outside Euro Area: all institutions

# THE BANKING UNION

## SSM – DISTRIBUTION OF POWERS

ECB

Guidelines, instructions

NCA

### „Exclusive“ Powers

- All CI (Art. 4 ] lit. a, c, Art. 6 [4]):
  - Authorization of C.I. (but not rejection of respective applications – Art. 14 [2])
  - Withdrawal of authorizations
  - Assessment of notifications regarding qualified holdings
  - Penalties (mostly)
- Important C.I.:
  - Reviews, compliance
  - Supervisory powers

... unless ECB decides to exercise powers (Art. 6 [5] lit. b)

### Powers

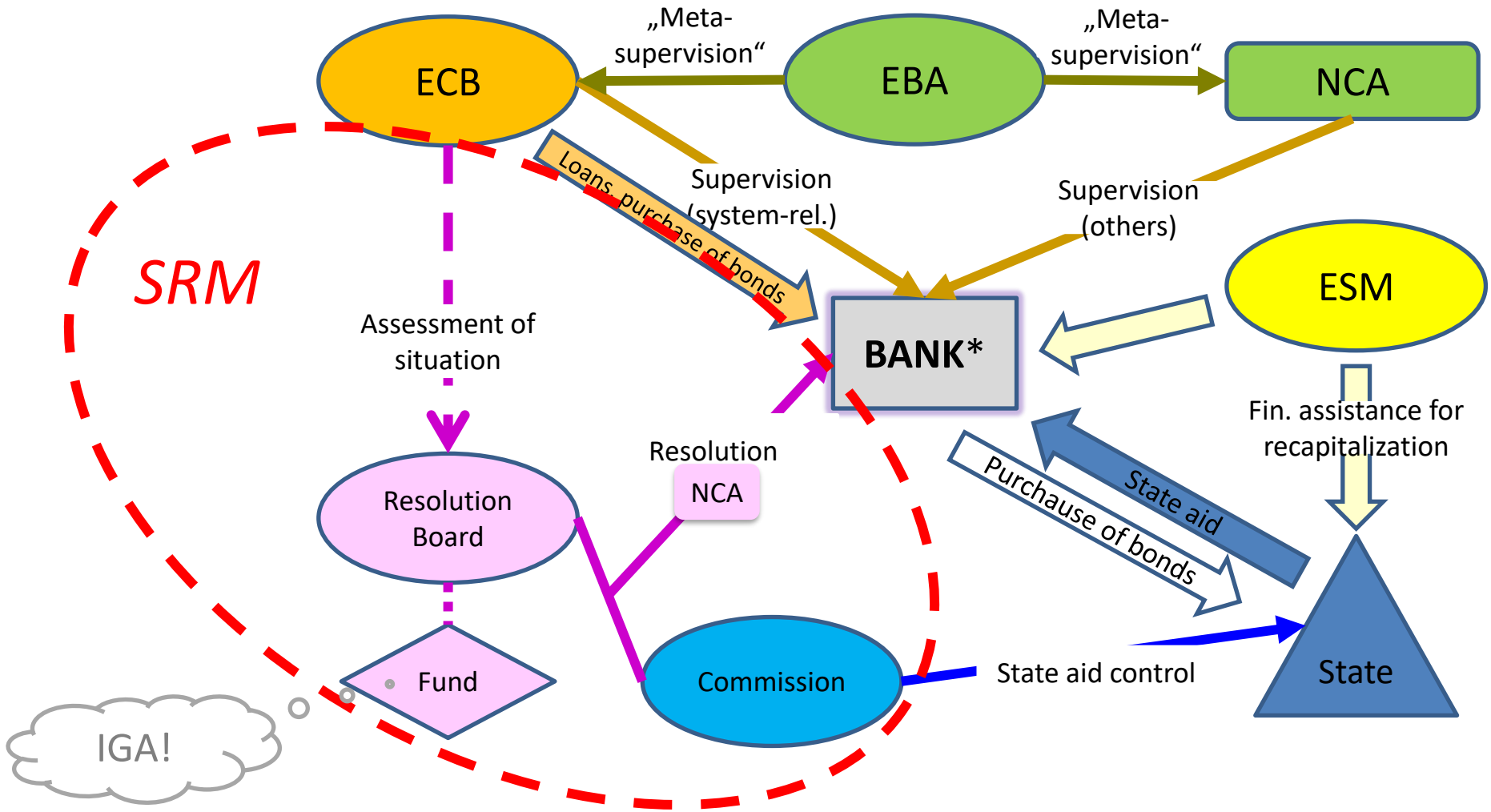
*Original? (arg. e Art. 127 [6] TFEU)*  
*Delegated? (arg. e Art. 4, 6 SSM Reg.)*

- All CI:
  - Rejection of applications for authorization
  - Macroprudential tasks according to Art. 5 (1)
- Less significant C.I.:
  - Reviews, compliance
  - Supervisory powers

**THE SINGLE RESOLUTION MECHANISM (SRM):  
DOING AWAY WITH „TOO BIG TO FAIL“ AND BAILOUT**

# BANKING UNION

## THE SINGLE RESOLUTION MECHANISM (SRM)



## BANKING UNION

### THE SINGLE RESOLUTION MECHANISM (SRM)

- Banks shall be no longer „too big to fail“ → prevention of moral hazard
- Resolution as a special insolvency mechanism for moribund banks
- No conferment of task on ECB, because
  - Resolution is not supervision in terms of Art. 127 (6) TFEU and
  - Dual function as lender and supervisor may impair independence when bank is not healthy
- Creation of Single Resolution Board (SRB)
- Establishment of a Single Resolution Fund (SRF), administered by SRB
- Bail-in as one of four resolution tools → Liability cascade

# BANKING UNION SRM - TOOLS

Resolution Plan



Resolution Scheme



Resolution Tool

Sale of  
Busi-  
ness

Bridge  
Insti-  
tution

Asset  
Separa-  
tion

Bail-in

Otherwise – or as  
supplement –: national  
insolvency proceedings  
(liquidation)

Analogous application  
of Art. 107 f. TFEU  
where appropriate

# BANKING UNION

## SRM – BAIL-IN TOOL – LIABILITY CASCADE

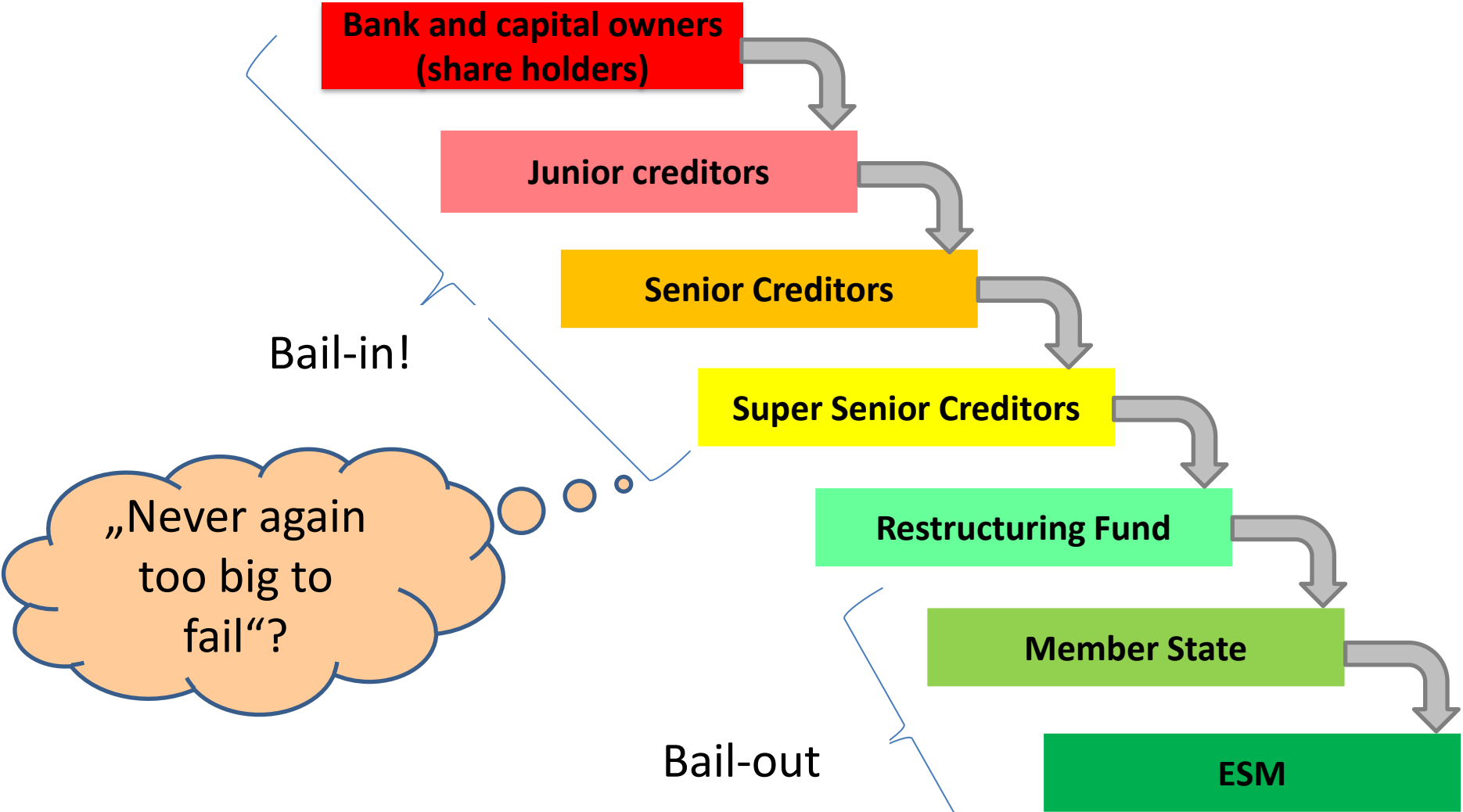


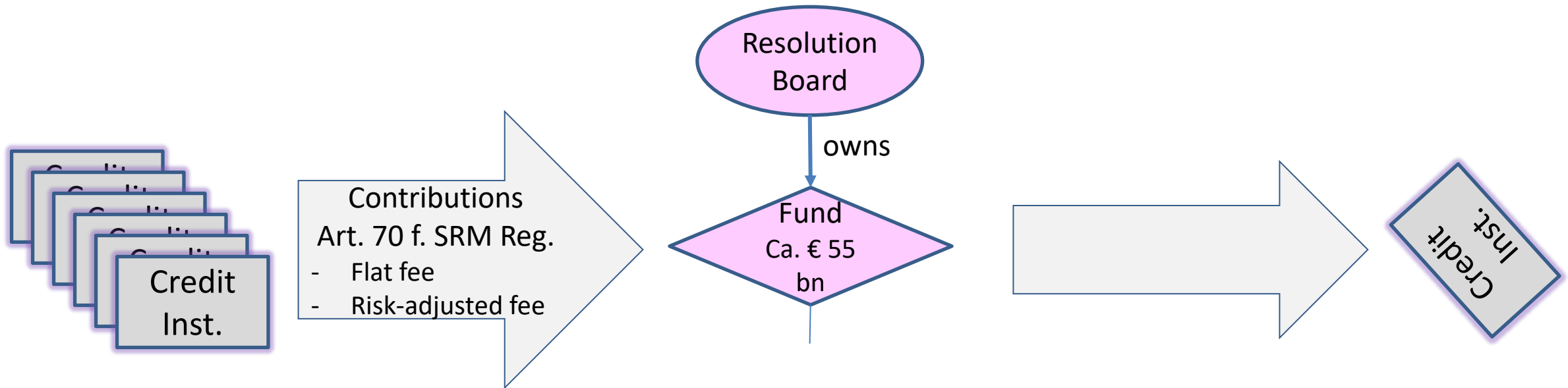


Photo: El País



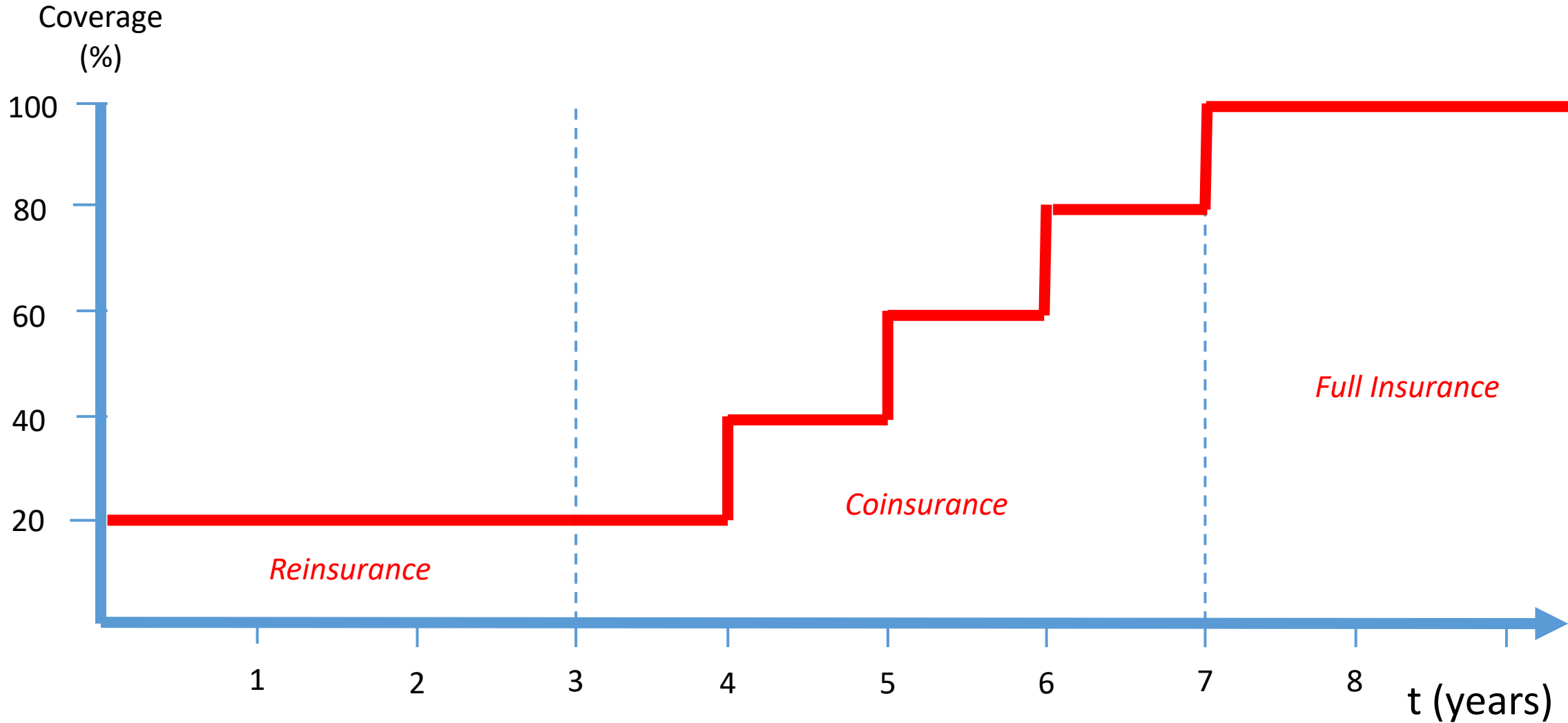
# BANKING UNION

## SRM – THE SINGLE RESOLUTION FUND (SRF)



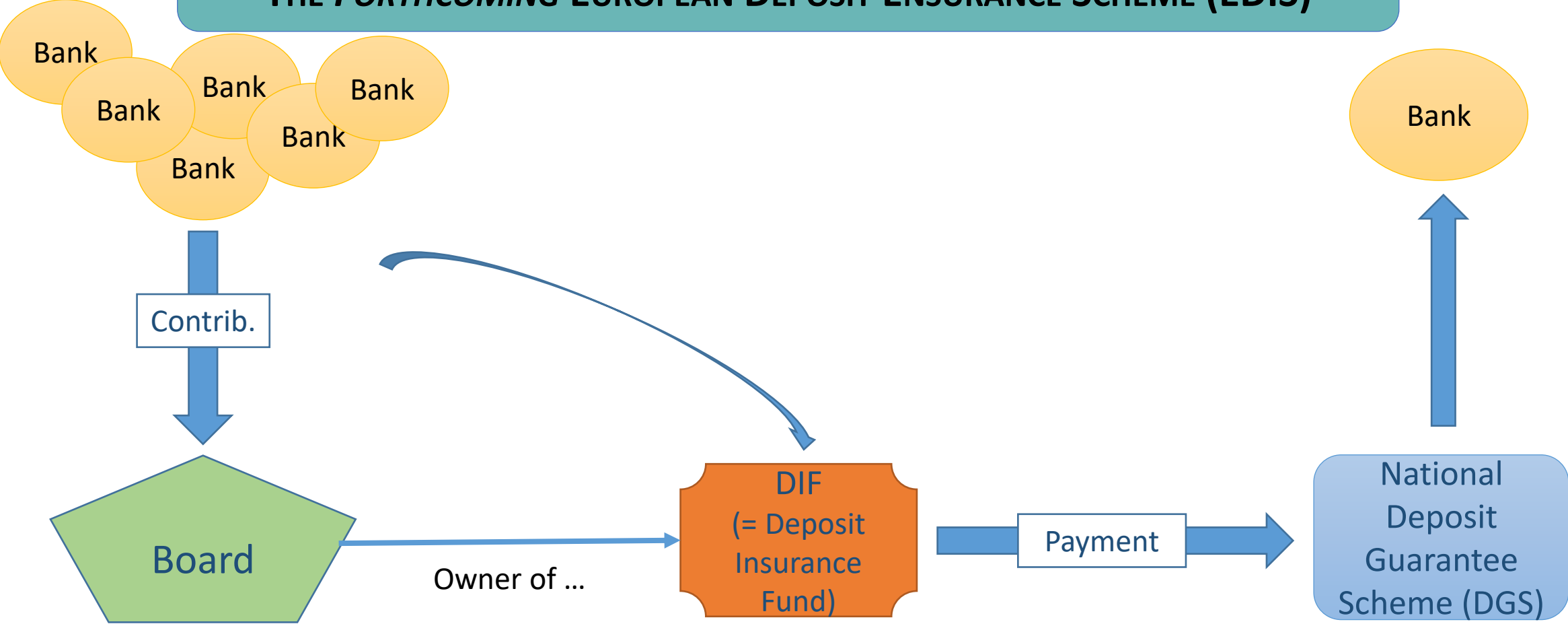
# BANKING UNION

## THE *FORTHCOMING* EUROPEAN DEPOSIT ENSURANCE SCHEME (EDIS)



# BANKING UNION

## THE *FORTHCOMING* EUROPEAN DEPOSIT ENSURANCE SCHEME (EDIS)



*Better Supervision of Other Financial Markets:  
The European Supervisory Authorities (ESAs)*

# IMPROVING SUPERVISION: THE NEW EUROPEAN SUPERVISORY AUTHORITIES

European Systemic Risk Board (ESRB)

European Banking  
Authority (EBA)

European Securities  
and Markets  
Authority (ESMA)

European Insurance and  
Occupational Pensions  
Authority (EIOPA)

Coordination, information  
Guidelines, Recommendations  
Exceptionally: orders  
Very exceptionally: *Selbsteintritt*

National competent authorities  
(e.g. BaFin, Autorité des Marchés Financiers, Instituto de Seguros de Portugal)

Financial Institutions (Banks, Intermediaries, Insurances etc.)

*A Stocktaking of the Reforms:  
A Mixed Picture*



- Integration marching at increasingly different speeds („intégration à plusieurs vitesses“)
- Incremental fragmentation of primary law (with intergovernmental „satellites“ such as ESM waiting to be reinserted in the TEU/TFEU)
- Questionable practice of adopting regulations (secondary law) instead of Treaty amendments
- Insufficient democratic control of an increasingly self-confident ECB



- Breakdown of the EU has been averted and the EEMU appears to be more resilient
- Eurozone has remained intact, no MS has dropped out of the euro (but the UK withdrew from the EU)
- More sophisticated regulation and supervision of banks and financial markets
- Sovereign debt: no new crisis (but moderate containment and further increase due to Covid and Ukraine crises)

# Chapter 7

## *The Broader Picture: Regulation of Finance in, and with, the EEA, Switzerland, the UK, and Others*



Source: The Sun



*I. Regulation of Financial Services: Third-State Régime  
and Standard of Equivalence*

# FREEDOMS

Free movement of goods and services

Free movement of persons

Free movement of goods

**Freedom to provide services**



Workers

**Free movement of capital**  
(also for 3rd States)



*Incl. Financial market services:  
**no**  
„passporting“ for 3rd States!*

Self-employed (establishment)

## The Third-State Regime

- Free movement of capital
  - applies both within the EU and to transfers between the EU and third States (Art. 63 (1) TFEU)
  - Background: IMF – free convertibility; freedom of investment
- Freedom to provide services
  - Applies within internal market only unless otherwise agreed by a Treaty
  - Financial services:
    - EU-based actors require only one license which allows them to provide services in all 27 MS (“passporting”)
    - No passporting for financial service providers from third States, which are admitted if the regulatory standards in their country of origin are equivalent to that of the EU (“standard of equivalence” – “Third-State Régime”)
    - UK aspired to maximum freedom to provide financial services (with passporting) but no freedom for other categories of services (“Polish plumber”) → Cherry picking?
    - If UK limbos standards to attract financial businesses, it risks losing any EU market access and the risk of a new global financial crisis may be enhanced

*II. Brexit and Available Models for the Structuring of  
Legal and Economic Relations with the EU*

# The Economist



Barack Obama on the American economy  
BY INVITATION

OCTOBER 8TH-14TH 2016

# The road to Brexit



41

Albania 111,000 Croatia 11,000 France 11,000 Ireland 11,000 Latvia 11,000 Netherlands 11,000 Romania 11,000 Spain 11,000  
Austria 11,000 Cyprus 11,000 Germany 11,000 Greece 11,000 Hungary 11,000 Italy 11,000 Poland 11,000 Slovenia 11,000  
Bahrain 11,000 Denmark 11,000 Czech Rep 11,000 Gibraltar 11,000 Estonia 11,000 Lithuania 11,000 Malta 11,000 Portugal 11,000 Slovakia 11,000  
Belgium 11,000 Estonia 11,000 France 11,000 Greece 11,000 Hungary 11,000 Ireland 11,000 Latvia 11,000 Lithuania 11,000 Malta 11,000  
Bulgaria 11,000 Cyprus 11,000 Denmark 11,000 Czech Rep 11,000 Gibraltar 11,000 Estonia 11,000 Hungary 11,000 Italy 11,000  
Croatia 11,000 France 11,000 Germany 11,000 Greece 11,000 Ireland 11,000 Latvia 11,000 Netherlands 11,000 Poland 11,000  
Czech Rep 11,000 Denmark 11,000 Estonia 11,000 Finland 11,000 France 11,000 Germany 11,000 Greece 11,000 Hungary 11,000  
Cyprus 11,000 Denmark 11,000 Estonia 11,000 Finland 11,000 France 11,000 Germany 11,000 Greece 11,000 Hungary 11,000  
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## The UK and the EEMU before Brexit: Increasing Estrangement

- Reluctance of the to follow path of „ever closer Union“, EU membership considered by many as a matter of profitability
- Maastricht Treaty: Protocol Waiver from Art. 140 TFEU for the UK
  - No membership in ERM II
  - Introduction of euro never considered
- London developing to global hub for financial services, thanks to liberal and sophisticated regulation (but also freedom to provide services)
- UK influential in development of of new EU rules on financial regulation (but also objecting to many of them – sometimes without success due to qualified majority in Council)

# BREXIT: ART. 50 EUV EU LEVEL

Referendum: 51.2% in favour of leaving EU  
23 June 2016

Notification of decision to withdraw from EU  
29 March 2017 (Art. 50 (2))

Negotiation of exit agreement UK/EU  
(Art. 50 (2))

- Qual. Majority (Council)
- Approval by EP and **2 years**
- brit. Parliament (UK Withdrawal Agreement Bill)

In absence of an agreement

All prerequisites met

Not all prerequisites met

Extension of time limit  
Eur. Council  
(unanimous) Art. 50  
(3)

No extension

„Orderly exit“

„Automatic exit at deadline“

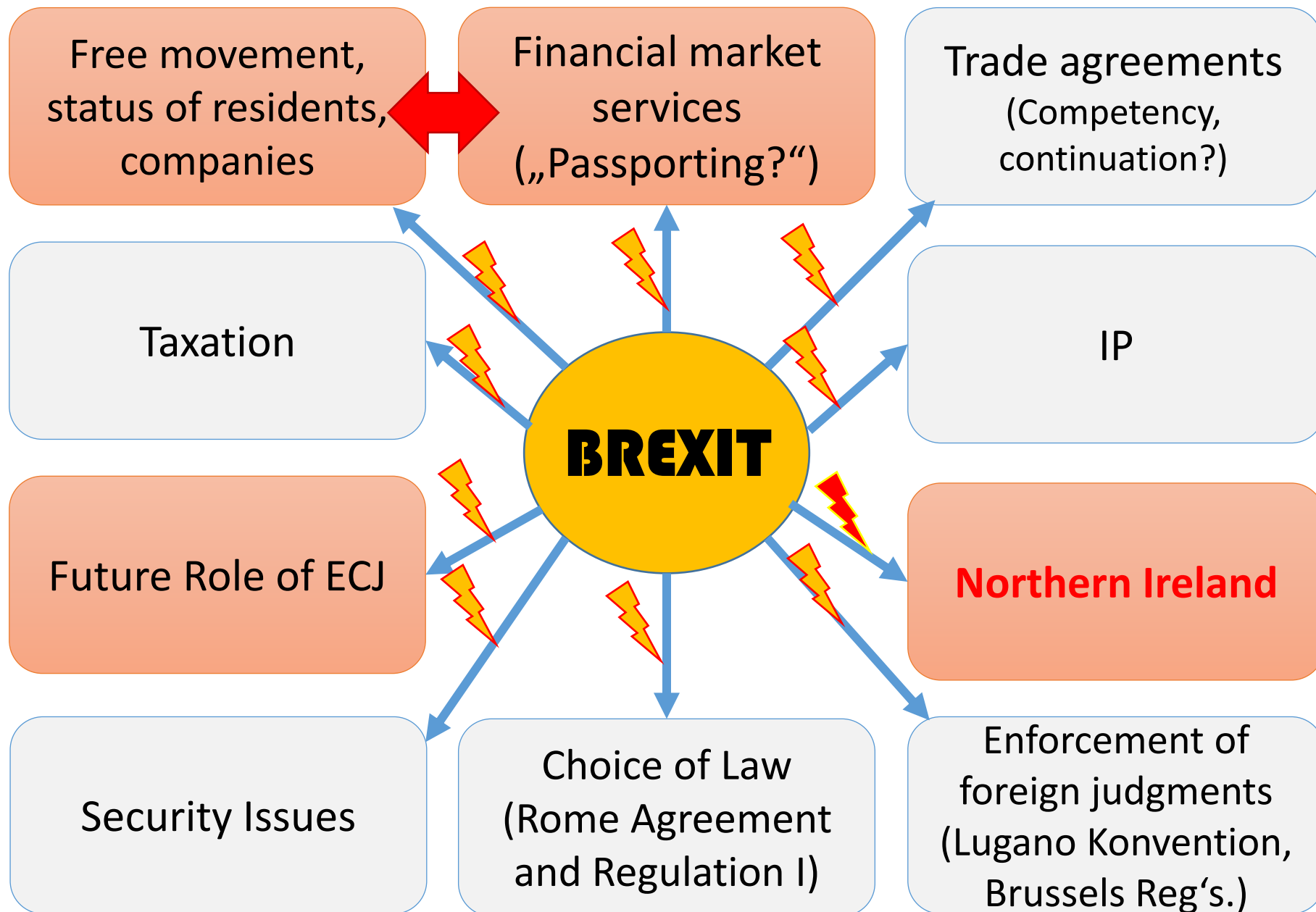
UK exiting EU on 31 January 2020

## Exit Agreement (November 2019)

- UK exits from EU on 31 January 2020
- Transition Period until 31 December 2020, with UK *de facto* remaining in Internal Market
- Protocol on Ireland/Northern Ireland approaching the latter to the internal market for at least four years after end of transition period

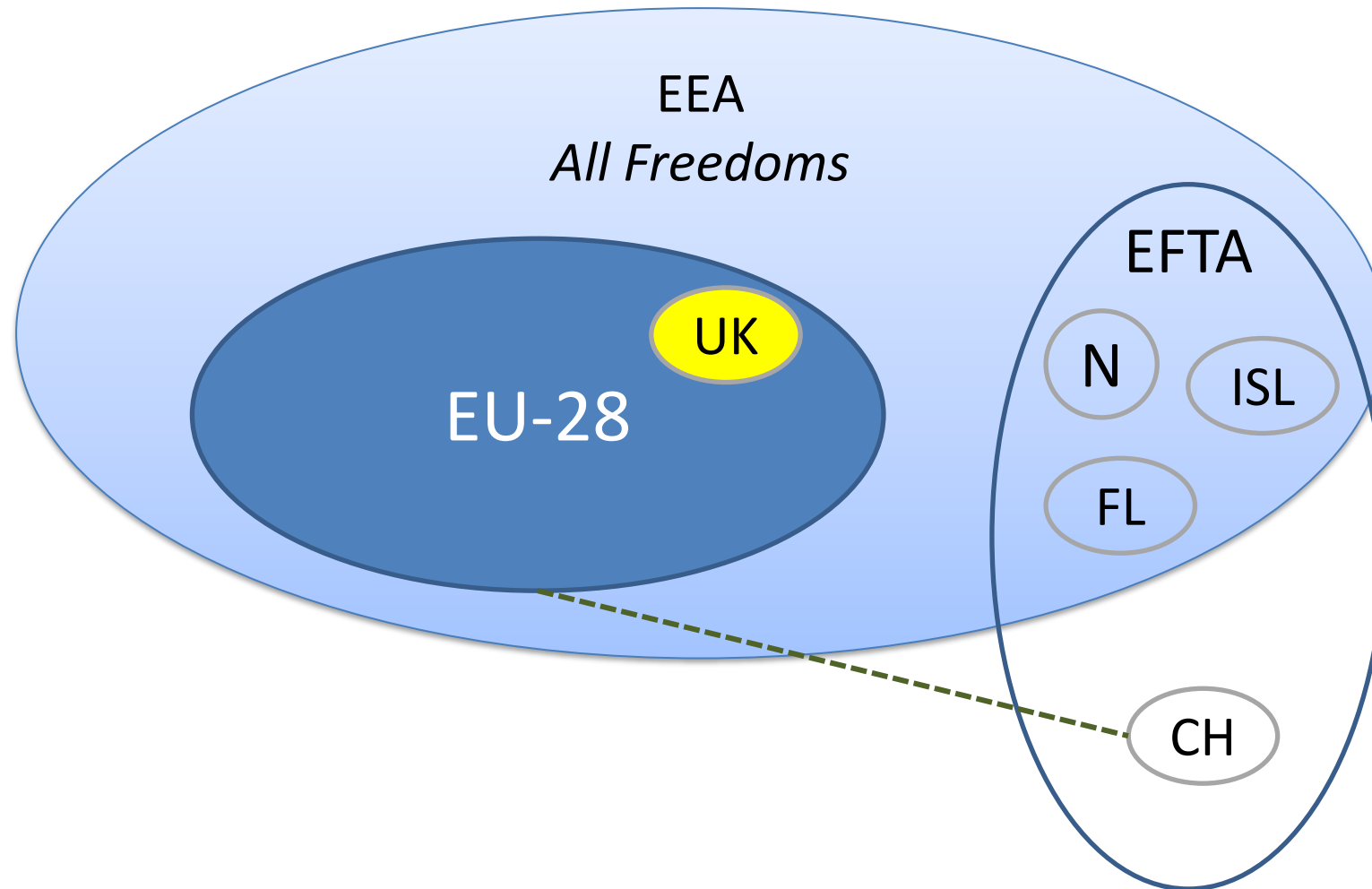
= withdrawal agreement in terms of Art. 50 (2) 2 TEU, not a treaty on the future relations („Post-Brexit Agreement“)





**BREXIT VARIANTS (IN RETROSPECT)  
FROM “SOFT” TO “WILD”**

## OPTION 1: BREXIT IS CALLED OFF (STATUS QUO)



## OPTION 1: BREXIT IS CALLED OFF (STATUS QUO)

Prerequisites:

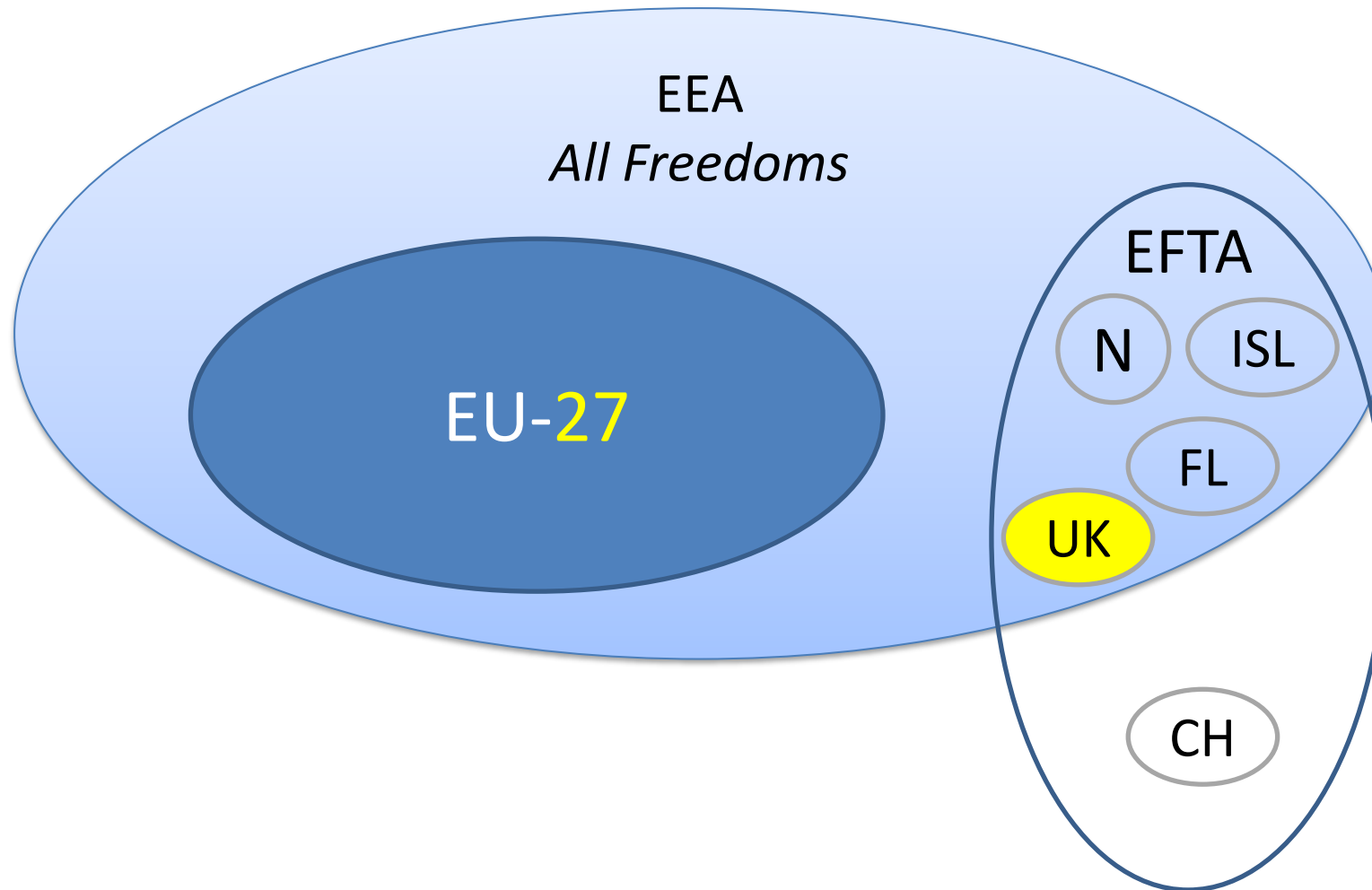
- Agreement on exit modalities fails (in British Parliament)
- New Referendum with Pro-EU Majority
- Reversal of British exit legislation

Problem: Admissibility of a revocation of the notification? (→ *Question by Inner House of Court of Session, Edinburgh, of 21 Sept. 2018 for preliminary ruling by ECJ, Case Wightman et al.*)

Consequence: UK remains in EU and internal market

*Probability: always very low*

## OPTION 2: „SOFT EEA BREXIT“



## OPTION 2: „SOFT EEA BREXIT“

### EEA [EWR] Terms:

- Emulation of constitutive elements of internal market (freedoms and competition law)
- Interpretation of EEA rules in conformity with EU law
- Implementation of secondary EU law through approval by the EEA Joint Committee [composed of representatives of ISL, N and FL and the EU] and transformation by the respective EFTA Member States
- Judicial protection by EFTA Court in Luxembourg (which must observe the jurisprudence of the ECJ)
- All EEA bodies must take into account the interpretation of EU law by the ECJ

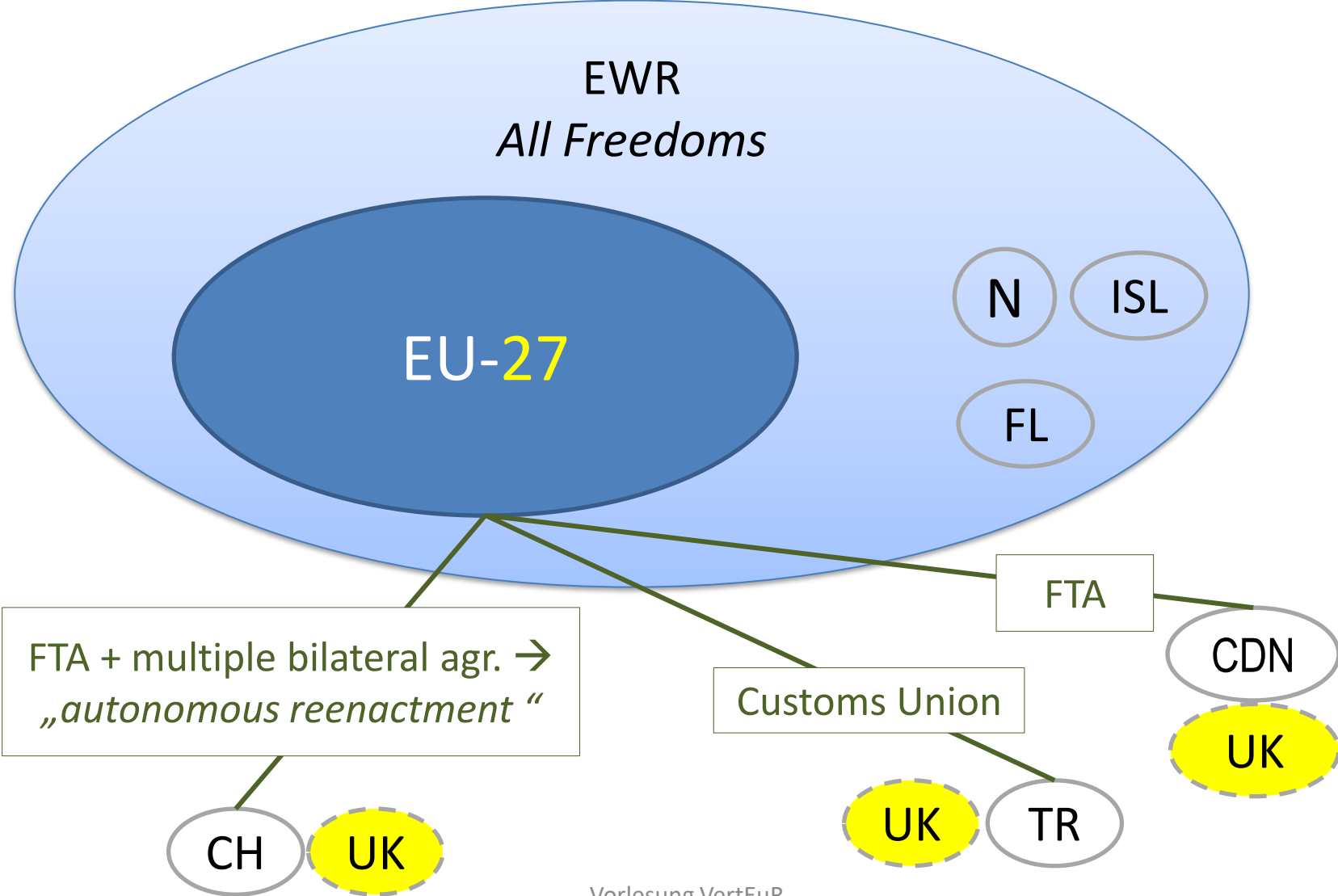
## OPTION 2: „SOFT EEA BREXIT“

Prerogatives unclear:

- Termination of UK's EEA membership alongside with withdrawal from EU?
- If so, accession to EEA (und EFTA) required

Consequence: UK remains *de facto* in internal market, only limited trade-related room for maneuver

**OPTIONS 3-5**  
**„CANADIAN MODEL“ („CETA +/++/+++“)**  
**„SWISS MODEL“ / „TURKISH MODEL“**





## OPTION 3: THE SWISS MODEL

### Terms:

- Autonomous Reenactment → CH decides in full sovereignty whether and when it emulates EU law (but so on theory only)
- Numerous agreements concluded between EU and CH
- „Guillotine clause“ → Failure to observe one of the agreements triggers termination of all other agreements
- EU is desirous to substitute numerous agreements with few, but comprehensive, new treaties

## OPTION 4: THE TURKISH MODEL

### Terms:

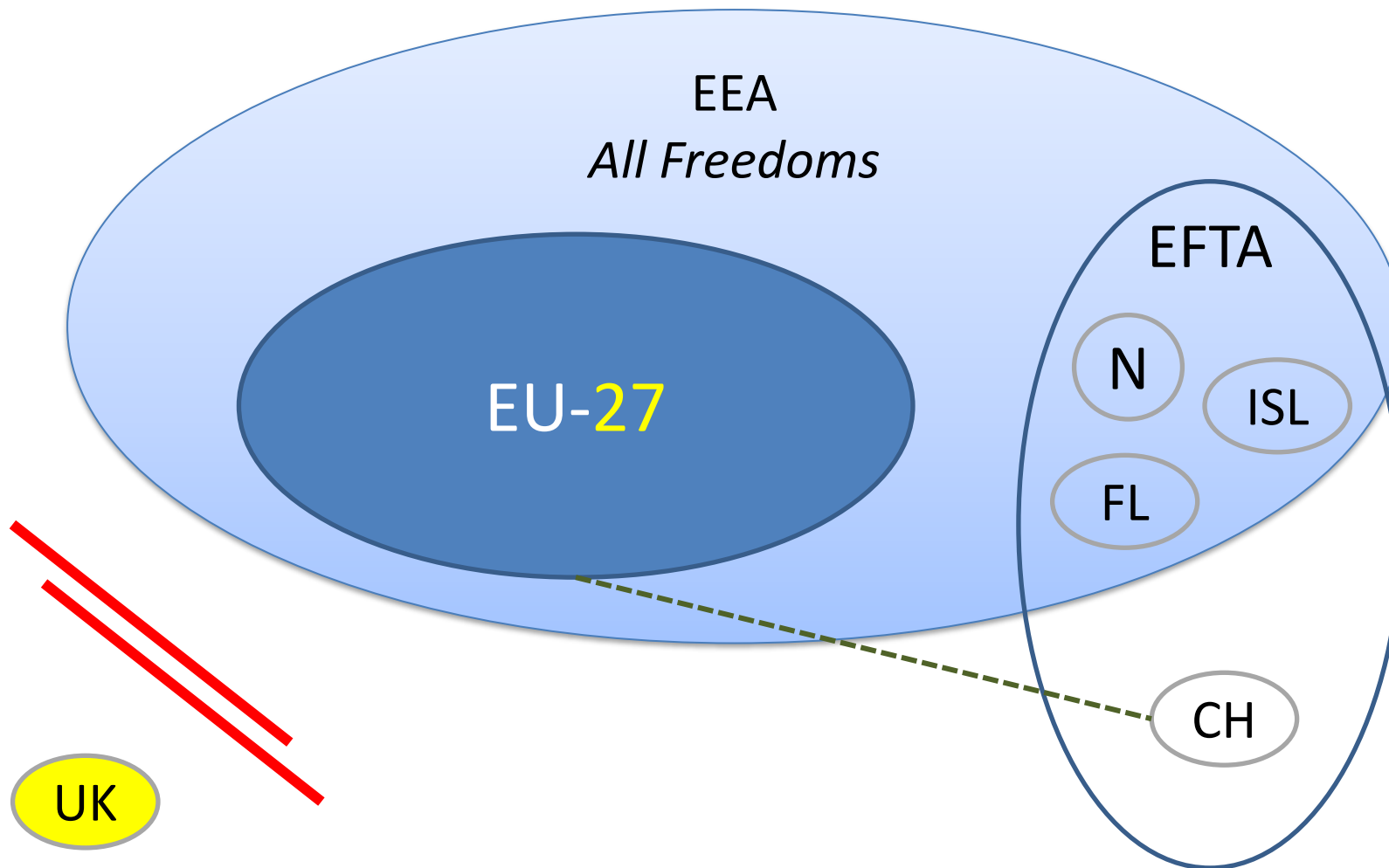
- Association Treaty of 1963, leading to the eventual establishment of a Customs Union in 1995
- Freedoms do not apply, but facilitation in some areas of trans-border trade/movement
- ECJ: Standstill duty = no introduction of new barriers to performance of services or establishment after 1973

## **OPTION 5: THE CANADIAN MODEL (CETA +/CETA ++/CETA +++ ...)**

### Terms:

- Free-trade agreement confined to agreed areas of trade in goods or services
- No customs union
- Canada as blueprint (CETA = „Comprehensive Economic and Trade Agreement“ between EU and CDN), 2016)
- No automatic continuation of treaties concluded by EU with third States in their relations with UK, negotiations of new treaties can take many years
- Virtually no chance of „passporting“; partner to agreement remains third State

## OPTION 6: „HARD (WILD, NO-DEAL) BREXIT“



## OPTION 6: „HARD BREXIT“



EU-UK legal relations are determined by public international law and unilateral rules only

Applicable to UK (*inter alia*)

Not applicable to UK (*inter alia*)

WTO Law

- Full Treaty-making power of UK
- Problem: Most-favoured nation clause

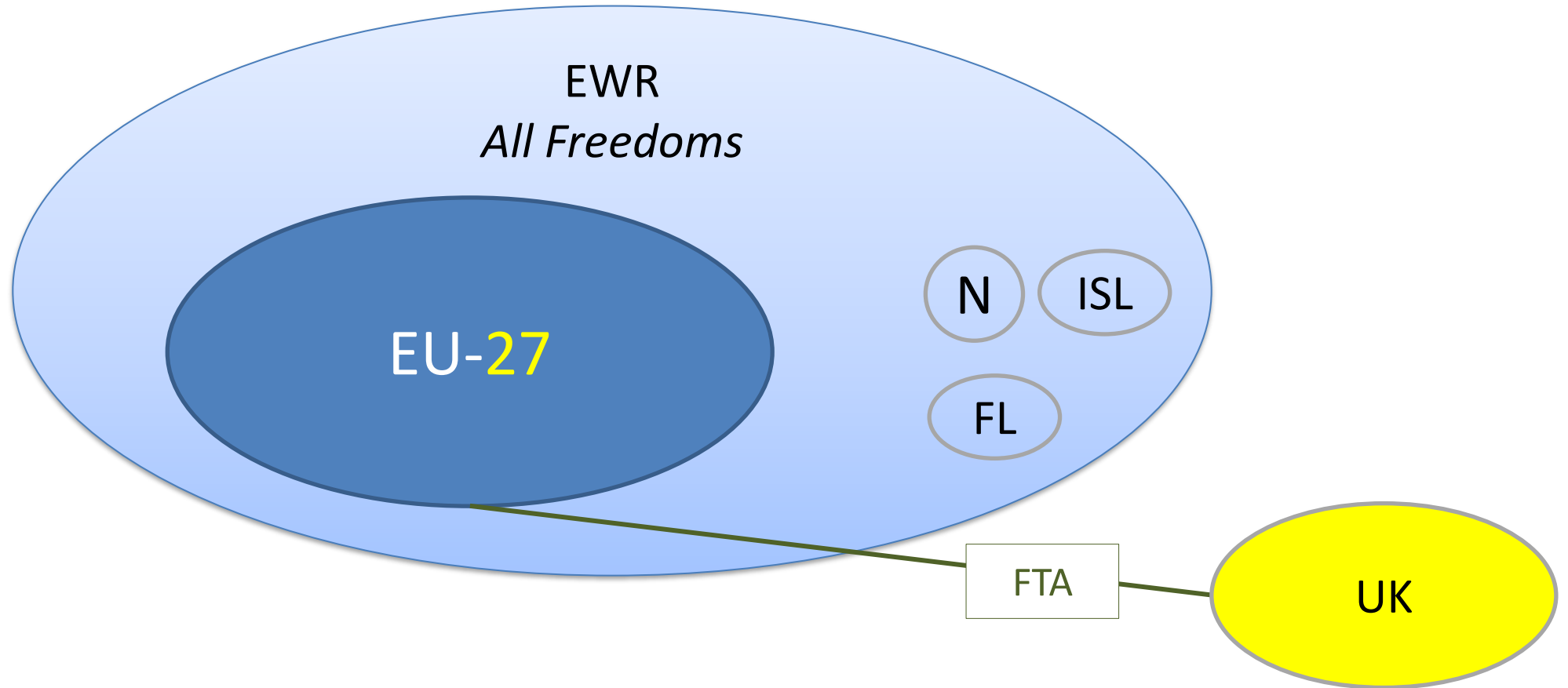
Other trade agreements

- Problem 1: Negotiation is time-consuming
- Problem 2: No automatic continuation of EU trade agreements involving UK

Art. 63 TFEU

- Free movement of goods
- Free movement of persons
- Freedom to provide services
- EU fundamental rights

# THE TRADE AND COOPERATION AGREEMENT (29 DEC 2020)


























## EU-UK Trade and Cooperation Agreement

= ordinary trade agreement pursuant to Art. 207 TFEU; „Post-Brexit Agreement“

- No customs duties on mutual trade (but no customs union)
- Very limited agreement on services (most importantly: no agreement on financial services → UK is third State)
- Dispute settlement incumbent on arbitral courts, not ECJ
- Provisions on IP, subsidies, transport, judicial cooperation, fisheries etc.

→ a rather hard but at least not a „no-deal Brexit“

	EEA Model	CH Model	TR Model	Hard Brexit
<b>Free movement of capital</b>	Yes (maximum) 	Yes 	Yes 	Yes 
<b>Free movement of goods</b>	Yes (but no formal CU) 	Limited (only for EEA goods) 	For goods from EU and TR 	Customs and non-tariff barriers 
<b>Free movement of persons</b>	Yes 	Mostly yes 	Limited 	No 
<b>Freedom of financial services</b>	Yes, some restrictions 	No (3rd State régime) 	No (3rd State régime) 	No (3rd State régime) 
<b>Influence on EU lawmaking</b>	Indirectly (no right of vote, but participation) 	Barely 	Barely 	No 
<b>Financial contributions</b>	Yes 	Yes 	No 	No 