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A New Proposal for a Crisis Management Procedure for the ECB to Ensure Price Stability among the Eurozone

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Synopsis

This article proposes a new procedure for the Eurosystem as crisis law to achieve the price stability target in a better and safer way. To this end, the procedure is initiated in the event of high inflation rates. As a last resort, it envisages the Bank for International Settlements (BIS) as the ECB's administrator in order to avert the danger of hyperinflation. This proposal suggests that a structured solution during times of higher inflation may be inspired by insolvency and restructuring laws that are not directly applicable to central banks. Therefore, the proposal at hand aims to integrate elements of these laws into the ECB's framework to ensure price stability in the Eurozone. The proceedings are to be judicially supervised by a new chamber at the International Court of Justice (ICJ).

The procedural proposal consists of several phases:

- Phase 0 (normality): creating preventive plans and early warning systems;
- Phase 1 (opening): triggering the procedure upon exceeding certain inflation rates;
- Phase 2a (implementation): a new BIS committee overseeing the implementation of (monetary policy) measures to reduce inflation;
- Phase 2b (control): the new BIS committee taking over the ECB's monetary policy if inflation persists; and
- Phase 3 (return to normality): the ECB regains its independence once inflation is stabilized.

I. Introduction

A. The proposal in a nutshell

This article proposes a new procedure for the Eurosystem as crisis law to achieve the price stability target better and safer. To this end, the procedure is initiated in the event of high inflation rates. As a last resort, it envisages the Bank for International Settlements (BIS) as administrator of the ECB to avert the danger of hyperinflation.

B. History and hypothesis

The starting point of the considerations[1] that led to the procedural proposal is the danger posed by hyperinflation. These currency collapses of the last 2000 years were mostly based on considerable expansions of the money supply by central banks. They are accompanied by severe economic crises, causing mass unemployment and posing a threat to political stability. As early as 1943, Stefan Zweig remarked that 'nothing ever embittered the German people so much (...), nothing made them so furious and so ripe for Hitler as the inflation'.[2] The question of central bank insolvency was usually not pursued with reference to their inability to become (formally) insolvent under current law and to their power to create money. There seems to exist a dogma of the formal and material insolvency impossibility of central banks.

This led to the hypothesis that it might be possible to make insolvency and restructuring law fruitful for central banks (here limited to the ECB and NCBs[3]), i.e., to transfer it (de lege lata) with the goal to prevent and/or combat (hyper) inflation. The gigantic balance sheet totals of today's central banks alone trigger the question as to whether the market adjustment function of insolvency law should be allowed to help here. Additionally, it is worth noting that insolvency is a debt-/liquidity-induced crisis situation, while inflation mainly results from an excessive use of the money printing press.

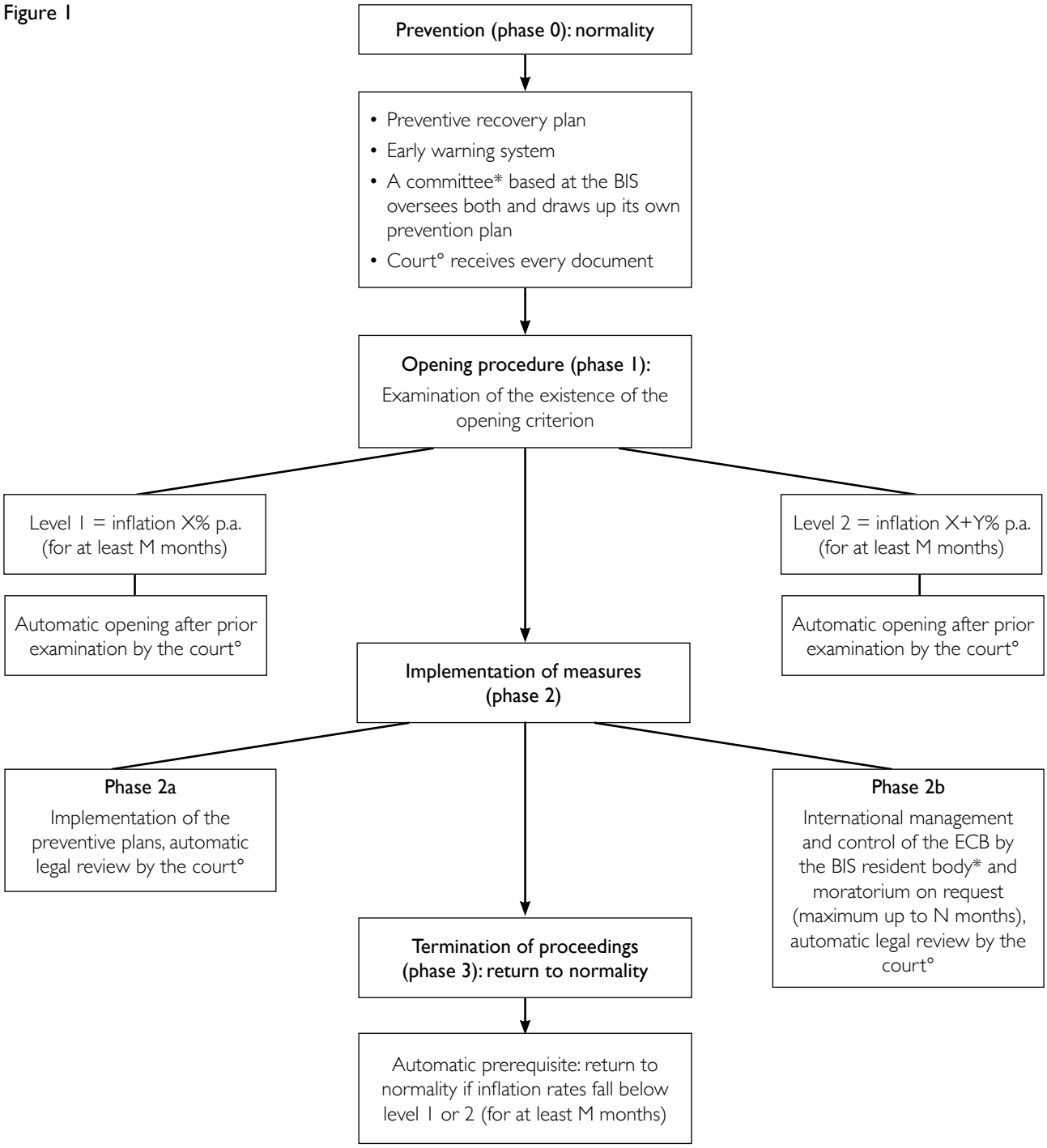
Notes

1 Fischer, Valentin L., Insolvenz- und Restrukturierungsrecht für EZB und Bundesbank? Ein neues Krisenbewältigungsverfahren zur Sicherung der Preisstabilität [English translation: Insolvency and Restructuring Law for ECB and Bundesbank? A New Crisis Management Procedure to Ensure Price Stability], Doctoral Dissertation Humboldt-University of Berlin, Schriften zur Restrukturierung 27, Baden-Baden 2024, pp. 17–234. This article reflects the personal opinion of the author only.

2 Zweig, Stefan, The World of Yesterday. An Autobiography, New York 1943, p. 219.

3 NCBs = national central banks whose currency is the euro.

Figure 1



° Court = new chamber at ICJ.

- Automatically monitors the procedure and actions of the BIS-based committee
- UN Secretary General names half of a pool
- ICJ judges select other half of this pool
- From the pool, half of the judges are chosen by the judges in the pool, the other half are drawn from the remaining pool
- Judges of the chamber only with citizenship of euro member states

*** BIS-based committee as administrator**

- Associated with a new department at the BIS 'international central bank control and administration'
- Independent of instructions
- BIS fills a pool
- Members of the committee are drawn from this pool
- Members of the committee only with citizenship of euro member states

C. Legal status quo and economic fact

The legal status quo is quickly answered: the ECB and NCBs are not subject to any existing insolvency and restructuring laws because the interpretation and the wording of the law deny any applicability of such laws to the ECB and NCBs.[4] More generally speaking, no modern central bank was or is subject to such laws. Nor is there any known case of such proceedings being conducted over the assets of a modern central bank.[5] When attempting to transfer insolvency and restructuring law to the ECB and NCBs (by way of regulatory amendments), it is helpful to bear in mind the following economic fact: central bank money creation is *de facto* limited by the public's willingness to accept it as a medium of exchange. This is that the public will no longer demand its currency if it has lost its confidence in it because the central bank has created too much of it, with the result that the prices of goods have risen too quickly and too sharply. This observation raises the question of whether an insolvency scenario can occur at all for the ECB:[6]

Based on the common pool approach, an insolvency scenario occurs if the debtor's liability fund is not sufficient to fully satisfy all creditor claims.

If this approach is applied to the ECB, after adjusting the balance sheet (among other things, the missing maturity of the negative Target balance on the liabilities side must be taken into account), the ECB has a liability fund that exceeds its liabilities by around € 285 billion. This means that the liability fund appears to be sufficient to satisfy the liabilities for the time being. Nevertheless, the liability fund could be used up in two scenarios.

Firstly, over-indebtedness could occur as a result of the ECB no longer being able to service its liabilities in euros. The massive collapse in the market prices of government bonds represents the first variant of this scenario. In this case, the market value of the ECB's portfolio of government bonds would fall to such a critical level that the assets would no longer be sufficient to service the liabilities. Due to the loss-sharing limit, the NCBs would not be able to fully relieve the ECB of its liabilities (see Articles 32.5[7] and 33.2[8] ECB Statute). This would constitute an insolvency scenario.

Over-indebtedness in euros could also occur if, for example, Target claims have to be written off as a result of a euro or EU member state leaving the euro, causing the public to lose confidence in the currency. The current negative Target balance would be increased, which would not reduce the creditors' liability fund due to the lack of Target claims' maturity. However, the declining confidence in currency stability could lead to a sell-off of euro-denominated government bonds, which would result in market price decreases. This could cause the market value of the ECB's portfolio of government bonds to fall into a critical range, meaning that variant one of the first insolvency scenario would occur indirectly. Compensating for the negative equity by creating money and subsequently purchasing bonds ('seigniorage') could lead to a (further) loss of public confidence in the currency and hyperinflation, depending on the seigniorage volume. This countermeasure is, therefore, not suitable for averting an insolvency scenario.

The second possible insolvency scenario is that the ECB is no longer able to service its foreign currency liabilities. This would occur if all currency reserves were exhausted and it was no longer possible to exchange euros for foreign currency due to the low external value of the ECB's own currency. Seigniorage would not help here if the euro is no longer convertible into foreign currency. Likewise, a transfer of currency reserves by the NCBs to the ECB cannot be counted on with certainty. This would mean that the volume of foreign currency liabilities would exceed the value of the assets that can be converted into foreign currency.

Therefore, the question of whether an insolvency scenario can occur with central banks must be affirmed.

D. Failed hypothesis: no transfer of insolvency and restructuring laws to the ECB and NCBs

The aim of the transfer can only be a restructuring, because the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), as well as member state constitutional law (in this case relating to Germany), already require the two institutions to be retained. The benefit of transferring the regulatory systems of insolvency and restructuring law to the ECB and the NCBs is that this area of law provides proven solutions for the insolvency scenario. There is therefore a chance that the conditions for opening insolvency or restructuring proceedings can be prevented, and that the financial stability and functionality of both institutions can be restored. The transfer can also be expected to have a disciplining and

Notes

4 Fischer, *supra* n. 1, pp. 78–88 with further references.

5 *Ibid.*, pp. 65–77.

6 *Ibid.*, pp. 109–179 provides the legal proof that the insolvency scenario is applicable to ECB and NCBs.

7 'The sum of the national central banks' monetary income shall be allocated to the national central banks in proportion to their paid up shares in the capital of the ECB, subject to any decision taken by the Governing Council pursuant to Article 33.2.'

8 'In the event of a loss incurred by the ECB, the shortfall may be offset against the general reserve fund of the ECB and, if necessary, following a decision by the Governing Council, against the monetary income of the relevant financial year in proportion and up to the amounts allocated to the national central banks in accordance with Article 32.5.'

risk-minimising effect on those responsible. The specific transfer of the regulatory systems to the ECB and NCBs is based on the method of free analogy. The question is: would it make sense to extend the personal scope of application of these regulatory concepts to the ECB and NCBs? This depends on whether the involved interests of the ECB and the NCBs are comparable to those entities that are currently subject to the regulatory systems under insolvency and restructuring law. The focus should be on the transfer according to the telos.

However, the specific transfer of the regulatory systems to the two institutions fails because there is already no practicable and unambiguous substantive opening criterion.[9] Liquidity measures (such as inability to pay back debt) fundamentally fail as opening criteria due to the authority of the ECB to create money in one's own currency. Balance sheet-induced measures (such as over-indebtedness) fail due to the empirical fact that central banks can sometimes operate for decades with negative equity and still fulfil their tasks. Nevertheless, researchers agree that negative equity can lead to a loss of confidence in the stability of the currency. However, it is not possible to quantify these risks (e.g., 10 % or 30 % inflation per year) and cast them into clearly subsumable legal criteria for the opening of a proceeding.

E. Retrieval of a suitable non-insolvency criterion to commence a proceeding

The only suitable criterion could be the decrease in purchasing power of the currency.[10] This is also referred to as policy insolvency, meaning the failure of an institution to fulfil its tasks. The criterion of (impending) hyperinflation is clear-cut, unambiguous, and practicable if it is linked to the exceedance of a certain inflation rate per year. Economists have to determine which level of inflation over which period of time suits this criterion. It addresses the specific threat and problem of high inflation rates by focusing precisely on this criterion. However, this criterion has no relation to excessive debt or illiquidity and is therefore not of an insolvency law nature.

F. Utilisation of this criterion as a starting point for a procedural proposal to ensure stable prices

However, if insolvency law is viewed as part of crisis law,[11] which broadens the view of insolvency law to include crisis situations that are not necessarily debt-induced, there is, in any case, a dogmatic relationship with insolvency law. Behind this broader view is the realisation that insolvency law has not been able to solve the crises of the last 30 years (from flood disasters and bank as well as sovereign insolvencies to a global pandemic), or has only been able to do so selectively. This approach does not threaten to soften the dogma of insolvency law because the hyperinflation-related collapse described here is not classified as an insolvency situation, but as a crisis situation. A crisis is systemic if insolvency law as a whole is likely to be overwhelmed because, in the event of the collapse of, e.g., entire markets, the relationship between creditors and debtors would have to be regulated in a way other than under insolvency law. In this terminology, a hyperinflation would be a systemic crisis, with the consequence that insolvency law could only make a limited contribution to resolving it. Therefore, a broader approach is necessary.

II. Methodology and approach

The proposed crisis management procedure below (the term may still be varied) is based precisely on the criterion of rising inflation rates. It may be categorised as crisis law that is related to insolvency law, as already shown in the introduction. The examination of the potential introduction of such a procedure is divided between the ECB and NCBs, see under III. and IV. It is necessary to look at both institutions because they are closely intertwined in terms of credit. After highlighting the specific benefits of the introduction of this procedure (see under III. A.) the possibility and implementation of legal feasibility must be addressed (see under III. B.). It should be emphasised here that such a procedure does not yet exist and must be devised from scratch. Such a proposal can therefore only indicate key points and must not be seen as a complete and finished solution that takes every eventuality into account. After a brief reference to the provisions to be amended (see III. B. 1.), the essential cornerstones of the potential regulations of a crisis management procedure are to be outlined in a first attempt, see III. B. 2. This is done based on selected focal points. While thinking up this possible new procedure, selected provisions of insolvency and restructuring law (the German Insolvency Ordinance 'InsO',[12] the Bank Recovery and

Notes

9 *Ibid.*, pp. 179–234.
10 *Ibid.*, pp. 207–214.
11 Paulus, Christoph G., Kann das Insolvenzrecht mit Krisen umgehen?, ZRI (Zeitschrift für Restrukturierung und Insolvenz) 2023, pp. 741–749, pp. 741ff.
12 Insolvenzordnung (InsO) as of October 5, 1994 (BGBl. I p. 2866), which was last amended by Article 6 of the act of July 15, 2024 (BGBl. 2024 I No. 236).

Resolution Directive[13] and the directive on restructuring and insolvency[14]) will be used as inspiration for this procedure to be discussed here. Further inspiration can be expected from statutory proposals for dealing with sovereign debt crises, because principles of insolvency and restructuring law were used here to propose a (new, because non-existent) procedure. Should it be possible to outline a coherent procedure that is expedient in terms of the problem situation, it will be necessary to go into the central bank's enforcement immunity and the fact that, despite the procedure, it must be ensured that other tasks of the ECB and NCBs continue to be fulfilled, see under III. B. 3. and 4. The examination of the possibility and implementation of the legal feasibility of such a procedure depends on a summing-up consideration and weighting of the arguments at hand, see under III. B. 5. The discussion of the introduction of such a procedure for the ECB is followed by a discussion of the introduction on the part of the NCBs (IV.) and followed by a summary of the article (V.).

III. ECB

A. Benefits of introducing a crisis management procedure compared to the status quo in view of maintaining the ECB as an institution: pros and cons

The main central advantage of a crisis management procedure, understood in the sense described here, is that it would address the observed threat situation of hyperinflation precisely by referring to the inflation rate and attempting to reduce it to a reasonable level as the aim of the procedure. The advantages of a low inflation rate for an economy as such, but also for the individual stakeholders (ECB, its creditors and debtors as well as capital owners, etc.) are almost undisputed and can be illustrated well in a counterfactual manner by the opposite: a high inflation rate distorts any economic calculation based on relatively stable prices and also makes the saving or hoarding of money required for the investment process unattractive.[15] Consequently, a high inflation rate leads to the collective impoverishment of an economy. The only disadvantage for debtors would be that their speculation on a secret and creeping devaluation of their debt would not work out. However, trust in this is not worthy of protection, as it is aimed at an unjustifiable transfer of wealth from creditors to debtors. Secondly, it could increase public confidence if a procedure were in place in the event that the central bank fails to meet its price stability target. Whether the central bank employees caused this personally through bad decisions or whether external causes were responsible can only be clarified in the course of the proceedings. However, the central bank and its employees are responsible for meeting this target, even if they are not personally to blame in the event of failure. For the creditors, the pursued preservation of the purchasing power of their claims represents a significant benefit. If inflation is low, a possible profit distribution also has a higher purchasing power from the capital owners' perspective than if inflation is high. It therefore makes sense from an ex-ante perspective to consider the introduction of such a procedure. In the best or most optimistic case, the proposal could result in a model law,[16] e.g., at the level of the United Nations[17] (UN).

B. Possibility and implementation of legal feasibility

1. Necessary constitutional and legislative amendments

From a technical point of view, it is also necessary to notice that the introduction of such a procedure would require a variety of changes to existing regulations. The most feasible option would be to amend the TFEU and the ECB Statute as its annex.[18] In terms of legislative implementation, the main focus would be on balancing the independence of the ECB on the one hand and the powers of a neutral body as administrator and a court supervising it on the other hand, which will be discussed below III. B. 2. e. It will also be necessary to amend Article 88 sentence 2 of the German Constitution ('*Grundgesetz*') by temporarily transferring the ECB's powers to a neutral body, which goes beyond the wording of the article. There may also be a need for change at the level of the legal structure of the administrative institution, see below III. B. 2. e. ii. (c).

Notes

13 BRRD = Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council (Official Journal of the European Union, L 173/190).

14 Directive 2019/1023/EU of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Official Journal of the European Union 2019, L 172/18).

15 Mises, Ludwig von, Human Action. A Treatise on Economics, New York 1949, pp. 547ff.

16 Paulus, Christoph G., A Resolvency Proceeding for Defaulting Sovereigns, in: Klaus-Albert Bauer, Andreas Cahn, Patrick S. Kenadjian (Ed.), Collective Action Clauses and The Restructuring of Sovereign Debt, Institute for Law and Finance series vol. 12, Berlin 2013, pp. 181–205, p. 192f.

17 Paulus, Christoph G., A Statutory Procedure for Restructuring Debts of Sovereign States, RIW (Recht der Internationalen Wirtschaft) 2003, pp. 401–406, p. 403.

18 Fischer, *supra* n. 1, pp. 197f.

2. Outline of regulations for the proposed procedure in detail based on selected focal points

a. Brief summary of the procedural proposal

For a better understanding of the procedural proposal to be explained below, please refer to the graphic diagram showing the main phases and parties involved in the procedure (Figure I). The following explanations represent only selected focal points of this proposal, see below b. to g., consisting first of the objectives and principles of the procedure, followed by central problems. These begin with the search for a practicable, clear substantive criterion for the opening of proceedings, followed by the right to file an application, the rules on the competent court together with legal protection options and the administrator, the claims covered and the effects of the opening of proceedings as well as the course of the proceedings themselves (based on four phases).

b. Objectives and principles of the procedure

At the beginning of the reflection on the objectives and principles of such a procedure, *fundamental considerations* come to light that may seem banal, but are or can be of central importance: firstly, the procedure must not be symbolic legislation[19] with the consequence that the rules must also be implemented, complied with and this process monitored. In view of the growing symbolic legislation in other areas, this needs to be mentioned separately. Paradoxically, the procedure is most effective if and when it never has to be applied.[20] This is because it means that the Governing Council of the ECB makes its monetary policy decisions in such a prudent and price-stable manner that there is no need to initiate the procedure (the so-called disciplining effect[21]). Thirdly, it is now an important strategic decision how to name a procedural proposal (including the parties involved in the procedure) so that it is likely to have the best possible chance of being realised in the political process.[22] Furthermore, the procedure must be based on constitutional requirements, be transparent, and be able to withstand questions of democratic legitimacy.[23] Special mention must also be made of the time factor.[24] In critical phases, central banks must be able to act very quickly in order to restore confidence and reassure the markets. In this area, as the financial crisis of 2008 et seq. has shown, it can sometimes take just a few hours. The final general principle is that of equal treatment of creditors, which in turn is intended to ensure fairness in the proceedings.[25]

The *main aim* of the procedure must be to avert the threat situation described in the introduction. This represents high inflation rates, which are based on high annual money supply growth rates and/or (among other things) the loss of public confidence in the ECB's ability to maintain a low target inflation rate.

A *secondary procedural objective* could be that of (traditional insolvency or restructuring law-inspired) *debt settlement,* as reflected, for example, in the plan procedure (German '*Insolvenzplanverfahren*') of the German Insolvency Ordinance ('InsO'), in the stabilisation and restructuring framework under the directive on restructuring and insolvency and in the bail-in instrument of the BRRD. Whether this would make sense requires argumentation. One argument against this is that there is no clear connection between the threat situation (of high inflation rates) and high indebtedness or even negative equity on the part of a central bank.[26] The official balance sheet of the German Reichsbank was, in fact, healthy on paper at the time of hyperinflation.[27] This first empirical argument leads to the conclusion that it is not possible to find a practical substantive opening criterion that addresses this specific threat situation. Secondly, from a bird's eye view, it is a questionable circumstance that an institution that can create its own money can find itself in a situation (usually through 'monetary policy' speculation with government bonds) in which its equity is depleted. To then reward them for their misconduct with a debt regulation mechanism seems cynical since all other economic entities (apart from commercial banks) cannot print their own money and thus could lead to increased moral hazard on the part of the actors acting on behalf of the ECB. Because the ECB must continue to exist under the current TEU and TFEU, no liquidation would be possible, but only the restructuring of the legal entity itself. An ECB debt restructuring would therefore only be possible by means of a plan. As the main creditors are public budgets as well as NCBs with a positive Target balance,[28] these institutions, which are closely intertwined with the ECB, would essentially have to conclude a contract (as

Notes

19 Paulus, Christoph G., A Resolvency Proceeding for Defaulting Sovereigns, IILR (International Insolvency Law Review) 2012, pp. 1–20, p. 8.
20 *Ibid.*, p. 1, p. 9.
21 Paulus, Christoph G., Ein Regelungssystem zur Schaffung eines internationalen Insolvenzrechts für Staaten, ZG (Zeitschrift für Gesetzgebung) 2010, pp. 313–330, p. 319.
22 Paulus, *supra* n. 19, p. 5.
23 Paulus, *supra* n. 21, p. 315.
24 *Ibid.*, p. 327.
25 Paulus, Christoph G., Taugt das Insolvenzrecht als Vorlage für ein Staaten-Resolvenzrecht?, IWRZ (Zeitschrift für Internationales Wirtschaftsrecht) 2017, pp. 99–106, p. 100.
26 Fischer, *supra* n. 1, pp. 202–207.
27 Dierschke, K./Müller, F., Die Notenbanken der Welt, Berlin 1926, pp. 82f.
28 Fischer, *supra* n. 1, pp. 129–132.

a plan). This does not appear to be practicable: on the one hand, there is little incentive on the political side to write off the central bank's debts, as this would be immediately reflected in the EU member states' budgets (in the form of lower central bank profit distributions), and on the other hand, the NCBs would also have to bear the resulting loss, at least up to a certain amount.[29] Fourthly, it is not even certain that a reduction in debt would help to overcome the threat of high or rapidly rising inflation rates; nevertheless, a better ratio of debt to equity would certainly also improve the ECB's monetary policy flexibility.[30] However, the past has shown that central banks (and above all their currencies) can also function in a stable fashion over long periods with no equity left. Regarding indebtedness, a preventive approach is recommended: if limits were set for the ECB and the NCBs on their maximum indebtedness (public law approach), the likelihood of them depleting their own capital because of speculative errors or bad monetary policy decisions would be reduced. For these reasons, it is advisable not to include an insolvency law component in the form of a debt reduction mechanism in the crisis management procedural proposal, with the result that questions regarding the rules on the verification of claims, the plan vote and the formation of groups and quorums for the vote[31] do not arise. Despite this, the German InsO, the BRRD, and the directive on restructuring and insolvency may contain other provisions that may be of value for the following procedural proposal.

c. Practical, clear material opening criterion

For the derivation and justification of the practical suitability of the substantive opening criterion, reference is made to the introduction. It is therefore advisable to define the opening criterion as exceeding certain consumer price inflation rates. Accordingly, a lower inflation rate (level 1) should be set for the inaction of measures subject to phase 1 of the procedure and a higher one for the ultima ratio activation of international control over the ECB (level 2). How high these respective inflation rates should be must be left to economists. The fact that these cannot be fully justified scientifically and will therefore have an arbitrary component must be accepted from a legal perspective, as this problem is a constant in the legal field, which manifests itself in questions such as whether the maximum sentence for this offense should be five or six years or what default interest rate should be set by law, i.a.

However, it must be prevented that the ECB possibly manipulates in this context (certainly then with the pretended official justification of changed consumer purchasing habits). One possible remedy could be to anchor the opening rate not to inflation on the markets, but to the annual increase in the money supply M0, M1, M2 and/or M3. From an empirical point of view, however, there is a significant disadvantage in that a close correlation (including an anticipatory one) between growth rates of the conventional monetary aggregates and annual inflation in the Eurozone has not been established for some time.[32] In practice, this could lead to a situation where the opening criterion is triggered, but there is no threat from the inflation rate, with the result that the money supply growth alone is not a useful criterion in practice. Due to the time lag between the expansion of the money supply and inflation, a combination of both metrics is also not suitable as a substantive opening criterion. The practical consequence of these considerations is that the calculation of the basket of goods must be placed in the hands of a neutral authority. This could, for example, be the court, the administrator, or a combination of both parties. Alternatively, a neutral commission of experts could be considered, but this would also raise the question of the selection and composition of the experts, which would reveal the problem of the interlocking of powers (German '*Gewaltenverschränkung*').

From a technical point of view, it would make sense to add a time dimension to the criterion of the opening of proceedings so that coincidences cannot unintentionally open the proceedings: for example, this addition to the regulation could require the inflation rate to exceed the respective annual percentage rate over a period of M months.

d. Authority to apply

The question of choosing a practical criterion for the opening of proceedings is followed by the question of the authority to file an application. This could lie with the debtor, the European Commission, creditors, and/or third parties. The right of the ECB's creditors (including commercial banks) to file an application is ruled out from the outset due to the obvious risk of abuse (constant filing of applications), which may be accompanied by an unintended loss of public confidence in the ECB's ability to maintain a low target inflation rate.[33] The main advantage of the clear opening criterion is that there is basically no need for any authorisation to file an application. The proceedings could be opened automatically if the substantive and temporal criteria were both met. In order to avoid false alarms, the court could be required to check whether there is such

Notes

29 *Ibid.*, pp. 47f.
30 *Ibid.*, pp. 202–207.
31 Paulus, *supra* n. 17, p. 405.
32 Diermeier, Matthias/Goecke, Henry, Geldmenge und Inflation in Europa: Ist der Zusammenhang verloren?, IW policy paper 2016, p. 17f.
33 Paulus, *supra* n. 17, p. 401.

a coincidence that, exceptionally, no proceedings need to be opened. The main advantage of this automatic mechanism, supplemented by the seriousness check, would be a very high level of legal certainty for all stakeholders involved. A right to apply to the EU commission would once again turn the initiation of proceedings into a political issue, which is precisely what the introduction of the procedure aims to prevent: taking the reins out of the hands of failed (monetary) policy and placing them in the hands of an orderly procedure and its stakeholders. To give the debtor (i.e. the ECB) a right of application does not make sense due to inherent disincentives: mainly, the psychological aspect speaks against it in that, as expected, no ECB Executive Board or Governing Council member would want to make themselves unpopular by suggesting that their colleagues submit this request, not to mention the expected reputational damage for the high-ranking ECB employees who would dare to 'go to Canossa' at a press conference. Human hubris, in this case, the hope that the situation can still be brought under control, would suggest that the debtor's application, if it came, would be submitted too late.

e. Competent court, competences, administrator, and legal protection

Which court or which institution could supervise the administrator and conduct the proceedings is central because this competent panel, in the form of the judges belonging to it, would give the proceedings a face. The judges would personify the proceedings (alongside the administrator) through their personalities (and the public perception of them).

i. Court

In principle, a state court, an arbitration court, or a court of an international organisation is conceivable. Arbitration courts must be ruled out due to questionable democratic legitimacy and the public's mistrust of such courts, precisely in order to avoid provoking accusations of shadow and secret justice. Maintaining trust through or despite the introduction of such a procedure is crucial. Courts of the member states are ruled out because an agreement on one of them in the political process seems unrealistic, and even in the event of an agreement, the public would suspect a bias. For example, public perception would tend to interpret the choice of a German court as anti-inflationary and the choice of an Italian court as pro-inflationary as well as favouring a broad interpretation in favour of the ECB. The courts of the European Union do not recommend themselves either: this follows from the interlocking of powers (German '*Gewaltenverschränkung*'), which manifests itself in the appointment of their judges, which the governments of the member states have in their hands, see Article 253 et seq. TFEU. If, for the purposes of this procedural proposal, a court was chosen whose judges are appointed by a key stakeholder (the entirety of the member states or, in this case, at least those whose currency is the euro), this would mean a serious loss of credibility for the procedure.

What remains are (i) international organisations that are courts or (ii) adjudicative bodies of international organisations. At this point, it is worth looking at the discussion about a debt settlement tribunal for sovereign debt, because this proposal (although in a different context) also requires an institution to conduct the proceedings, which in turn should be neutral. In this field, the establishment of an independent court for state insolvencies was already considered over 100 years ago.[34] For the purposes pursued here, the choice of the International Court of Justice appears to make sense.[35] Its long existence (based on the predecessor organisation of the Permanent Court of International Justice) ensures a high level of trust, and its seat in Europe promises better public acceptance than a non-European seat.

Technically, the election of this court would mean that a new chamber would have to be set up there, which, for legitimacy reasons, may only consist of judges who are nationals of a euro member state. Diversity in terms of nationality, regionality, and profession[36] would have to prevail to offer the public few opportunities to challenge the decisions of this chamber. At this point, it is worth remembering the 'Troika' from the Greek sovereign debt crisis in 2010 et seq., which created the feeling in Greece that Germany was dictating to Greece what it should and should not do. In answering the question of how the judges should be elected, the first step is to recognise that every democratic act must come to a legitimising end: in a democratic state, it is the people themselves who are allowed to vote as sovereigns. All democratic legitimacy must come from them. The population, on the other hand, does not elect anyone, it is set as the sovereign. A democratic election of judges in the euro member states is impractical. In the context of the proposal for a statutory procedure for sovereign debt restructuring, *Paulus* suggests that the UN Secretary-General should appoint 30 judges, who in turn would elect the few judges of the chamber, and they in turn would elect the chairman from

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34 Manes, Alfred, Staatsbankrotte, Wirtschaftliche und rechtliche Betrachtungen, 3rd Edition., Berlin 1922, pp. 207ff.
35 Paulus, *supra* n. 17, p. 403.
36 Paulus, *supra* n. 21, p. 323.

among them.[37] A complementary possibility would be for the ICJ judges to elect further judges to the pool, from which the ancient Greek-inspired lot would decide which judges would be used in the proceedings.

A practical problem would be the technical implementation of installing such a new chamber at the ICJ since it would necessitate an amendment of its Statutes according to Article 69[38] of the Statute of the ICJ. Accordingly, in accordance with Article 108 of the UN Charter,[39] a majority of two-thirds of the members of the General Assembly plus ratifications by two-thirds of the members of the UN, including all the permanent members of the Security Council, are required.

At a technical level, there is the practical need for an agreement concerning the scope of legal force (extension of legal force).[40] In any case, this would have to include all euro member states, the ECB, and the administrator. Given the high time pressure in such crisis situations, the problem of time-consuming enforcement could be overcome by granting the court's decisions (possibly after the expiry of a short period for lodging an appeal) the most direct possible formative effects, so that enforcement would be largely obsolete.

The court's powers would consist of moderating the proceedings (based on the respective phase, working towards accelerating the proceedings by setting deadlines), monitoring the administrator, and, in the event of a dispute, deciding very quickly (e.g., within 24 hours) to establish legal certainty. To enable better and quicker judicial control, the court should be present at all relevant meetings and negotiations so that it can best observe the administrator.[41] The court must have a comprehensive right to inspect files relating to the ECB and the administrator to perform its duties. It must be clear that the court only has a participation and file inspection right, but is not at all involved in influencing the ECB's and/or administrator's decisions.

ii. Administrator

In turn, private, state, and international organisations or natural persons can act as administrators. Since the proposed procedure addresses nothing less than the stability of the currency, private individuals and organisations are not suitable; they could create too much of an impression of cronyism or pursue interests that are too singular according to psychological dynamics. A state administration is out of the question due to the interlocking of powers (German '*Gewaltenverschränkung*'): their payment by the state alone can lead to subconscious manipulation of behaviour. In public opinion, they would likely be seen as too close to the (equally state-owned) central bank. The characteristic of neutrality is the most important criterion for the administrator.[42] Neither the International Monetary Fund (IMF) nor the World Bank is suitable: they are perceived too much as creditor institutions to be considered neutral in this respect. The Bank for International Settlements, which was founded in 1930 and whose functions, organisational structure, legal basis, and historical development have been compiled by Hasse,[43] to which reference is made below, comes into play on the one hand due to its concentrated specialist expertise and on the other due to its largely unknown nature (and therefore neither particularly positive nor negative connotation). For this purpose, it is necessary to determine whether it is justifiable to propose the BIS (as an organisation outside the European institutional structure) to be allowed to assume temporary control over the ECB and its monetary policy. Historically, this is reminiscent of the Dawes Plan[44] of 1924, on the basis of which the Reichsbank was partially placed under international control, see Paragraphs 14 and 27 of the Reichsbank Act[45] of 1924, which provided for the formation of a General Council with equal numbers of Germans and foreigners and placed the supervision of the currency's gold coverage in the hands of a foreign commissioner responsible for this. At this point, it should be noted that it is not the purpose of this article to present a legal or statutory/contractual plan of action for the potential introduction.

(a) Overview of the BIS

Hasse summarises the BIS as an international organisation in that it plays a central role in the global

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37 Paulus, Christoph G., A Standing Arbitral Tribunal as a Procedural Solution for Sovereign Debt Restructurings, in: Carlos Alberto Primo Braga, Gallina Andronova Vincelette (Ed.), Sovereign Debt and The Financial Crisis, Will this time be different?, Washington, DC 2010, pp. 317–329, p. 321.

38 'Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations.'

39 'Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.'

40 Paulus, *supra* n. 37, *p.* 323.

41 Paulus, *supra* n. 19, p. 12.

42 Paulus, *supra* n. 17, p. 403.

43 Hasse, Die Standardsetzung des Basler Ausschusses für Bankenaufsicht bei der Bank für Internationalen Zahlungsausgleich, pp. 5ff.

44 See only the Legislative Act on the London Conference of August 30, 1924 (RGBl. II, p. 289) with the Final Protocol as an annex, there Annex I (Agreement between the German Government and the Reparations Commission, sub. I. a).

45 German Banking Act of August 30, 1924 (RGBl. II, p. 235).

governance of the financial markets (as a supporting organisation of many regulatory networks, above all the Basel Committee and the Financial Stability Board[46]), also conducts important monetary and economic research and acts as a financial services provider for central banks, i.e., it is the 'bank of central banks'.[47] The legal bases[48] of the BIS are its Statutes,[49] the BIS Constituent Charter[50] and an agreement with the Swiss Confederation (convention respecting the BIS).[51] According to Article 3 of the BIS Statutes,[52] its mandate consists in particular of promoting cooperation between central banks and creating new opportunities for international financial transactions. While the BIS is an international organisation, its legal form is that of a joint-stock company under Swiss law. According to Article 55 No. 1 of the BIS Statutes,[53] it is in principle exempt from any jurisdiction; however, contracting parties may sue it in civil and commercial matters relating to banking and financial transactions in accordance with Article 55 No. 1 lit. a) of the BIS Statutes.[54] In disputes concerning the interpretation of the Statutes between the BIS and member central banks, the arbitration tribunal provided for in the 1930 Hague Convention has exclusive jurisdiction pursuant to Article 54 No. 1 of the BIS Statutes.[55] The BIS Constituent Charter gives the BIS legal capacity and the Statutes legal force, see Nos. 1[56] and 2[57] of this Charter. No. 4 of the BIS Constituent Charter stipulates majority requirements for an amendment to the BIS Statutes.[58] Further provisions of the BIS Constituent Charter (Nos. 6–9) provide for tax exemption for the BIS.

In terms of organisational law,[59] the BIS consists of a Board of Directors, which determines the direction and strategy of the Bank (Article 26 BIS Statutes[60]) and consists of 18 members, of which the central bank governors of the USA, Germany, the UK, France, Belgium and Italy are always members (a further nine governors of other central banks can be elected to the Board of Directors for three years, Article 27 BIS Statutes). Only central banks may be members or shareholders of the BIS, see Articles 14 et seq. BIS Statutes. The General Meeting of 63 central banks has subordinate powers (Articles 15,[61] 44 to 47 BIS Statutes). The third body is the General Manager, who is appointed by the Board of Directors for a maximum of five years and who must implement the strategy of the Board of Directors into practice (Article 39 BIS Statutes[62]). The General Manager has the right to nominate the heads of department, who are appointed by the Board of Directors based on his proposal (Article 40 No. 2 BIS Statutes[63]).

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46 Hasse, *supra* n. 43, p. 32.
47 *Ibid.*, p. 6.
48 *Ibid.*, pp. 38ff.
49 Statutes of the Bank for International Settlements of January 20, 1930, as amended on November 7, 2016 (translation into German), https://www.bis.org/about/statutes-d.pdf.
50 Constituent Charter of the Bank for International Settlements of January 20, 1930, https://www.bis.org/about/charter-d.pdf.
51 Agreement on the Bank for International Settlements of 20 January 1930 between the duly authorised representatives of the Governments of Germany, Belgium, France, the United Kingdom of Great Britain and Northern Ireland, Italy, and Japan, of the one part, and the duly authorised representatives of the Government of the Swiss Confederation, of the other part (translation into German), https://www.bis.org/about/convention-d.pdf.
52 'The objects of the Bank are: to promote the co-operation of central banks and to provide additional facilities for international financial operations; and to act as trustee or agent in regard to international financial settlements entrusted to it under agreements with the parties concerned.'
53 'The Bank shall enjoy immunity from jurisdiction […].'
54 '[The Bank shall enjoy immunity from jurisdiction, save:] to the extent that such immunity is formally waived in individual cases by the Chairman of the Board, the General Manager, the Deputy General Manager, or their duly authorised representatives […].'
55 'If any dispute shall arise between the Bank, on the one side, and any central bank, financial institution, or other bank referred to in the present Statutes, on the other side, or between the Bank and its shareholders, with regard to the interpretation or application of the Statutes of the Bank, the same shall be referred for final decision to the Tribunal provided for by the Hague Agreement of January, 1930.'
56 'The Bank for International Settlements (hereinafter called the Bank) is hereby incorporated.'
57 'Its constitution, operations and activities are defined and governed by the annexed Statutes which are hereby sanctioned.'
58 'Articles 2, 3, 8, 14, 19, 24, 27, 44, 51, 54, 57 and 58 of the said Statutes shall not be amended except subject to the following conditions: the amendment must be adopted by a two-thirds majority of the Board, approved by a majority of the General Meeting and sanctioned by a law supplementing the present Charter.'
59 Hasse, *supra* n. 43, pp. 33ff.
60 'The Board shall determine the strategic and policy direction of the Bank, supervise the management, and fulfil the specific tasks given to it by these Statutes, and shall take the decisions necessary to carry out these responsibilities.'
61 'Shares may be subscribed or acquired only by central banks, or by financial institutions appointed by the Board in accordance with the terms and conditions laid down in Article 14.'
62 '(1) A General Manager and a Deputy General Manager shall be appointed by the Board on the proposal of the Chairman of the Board. Each appointment shall be made for a maximum of five years and may be renewed. (2) The General Manager (chief executive officer) will carry out the policy determined by the Board and will be responsible to the Board for the management of the Bank. […] (4) Neither the General Manager nor the Deputy General Manager shall hold any other office which, in the judgement of the Board, might interfere with his duties to the Bank. […].'
63 'The Heads of Departments and any other officers of similar rank shall be appointed by the Board on the proposal of the General Manager.'

(b) EU and euro member states' legal requirements for implementing the proposal

Is the structure of the BIS sufficiently suitable from a legal perspective to temporarily transfer decisions on the ECB's monetary policy to it? Aspects relating to the rule of law and democratic legitimacy appear problematic because the introduction of this procedural proposal is expected to lead to legal proceedings before the European Court of Justice (ECJ) and constitutional courts of euro member states. What remains to be solved is that not all NCBs are shareholders of the BIS. This, therefore, loosens the democratic legitimacy of the BIS. Hence, the remaining central banks (i.a., the central banks of Cyprus and Malta) should become shareholders of the BIS.

At the European level, the introduction of the procedure would require an amendment to the European primary law. Whether the BIS has sufficient legitimacy as a temporary administrator would become apparent in the political process of amending the treaties. Restrictions on the requirements of the administrator regarding its need for democratic legitimacy and its anchoring in the rule of law are due to the fact that the administrator itself should be independent, i.e., the possibility of influence by stakeholders should be low. The following points are problematic, albeit solvable: on the one hand, the members of the BIS consist only of central banks and, on the other hand, also of those that are not part of the Eurosystem. The fact that the members are only central banks themselves can be justified by their expertise in choosing a monetary policy that complies with the respective mandate or objective. However, concerns remain that central banks outside the Eurosystem are also entitled to influence the procedure. These concerns can be mitigated by the suggestion that, for the purposes of the procedure, the 'International Central Bank Control and Management' department (to be newly formed) will consist solely of nationals of euro member states and will not be subject to instructions from the General Manager, the General Meeting, or the Board of Directors. The members of the organisational unit below this new department could be drawn from a pool selected by a BIS body (to be determined) to avoid prior influence. In terms of organisational law, the means of residency at the BIS could be used (by way of association through a special agreement), as it is already the case with the Financial Stability Board, which is organised as a Swiss association.[64] Accordingly, the BIS itself would not be the administrator, but a body to be set up at the BIS, affiliated to it but independent of it financially, in terms of personnel and instructions. Within the committee, decisions would be made by majority vote, rules of procedure would be drawn up, and a member would be elected as chairman. In addition, the committee would need a comprehensive right to inspect files relating to the ECB to provide the best possible support during the prevention phase (and to question the ECB's assumptions) as well as to shape the necessary measures during the implementation phase in the best possible way.

(c) Need for change at the level of BIS regulations

At the legal level of the BIS, change would be needed to fulfil the new task of international supervision of central banks in the event of a crisis. This includes an amendment to the mandate in Article 3 of the BIS Statutes. In addition, the Board of Directors would have to ensure that it complies with the court's decisions described above.

The lack of transparency, for which the BIS is accused, is essentially due to the strict confidentiality required for an open exchange of information between senior central bank employees.[65] For the possible administrative task of a (new) BIS department, it would be necessary that, on the one hand, sufficient transparency is ensured so that legal protection can be guaranteed (e.g., in the form of participation and file inspection rights of the court) and, on the other hand, that further stakeholders of the proposed procedure (NCBs, euro member states, the public, commercial banks, etc.) are sufficiently informed in order to maintain or improve their confidence in the proceedings.

iii. Legal protection mechanism

The question of the existence or design of legal protection options begins with the reminder that some of the decisions to be made by the administrator must be made very quickly and may be difficult to review (in a short time) due to the high financial volumes involved. Legal protection can therefore only avoid jeopardising the procedural objective if appeals are decided quickly. An on-call service in the ICJ chamber mentioned above would therefore be necessary. Article 85 (3) BRRD[66] provides inspiration here; legal actions largely have no suspensive effect (Article 85 (4) a) BRRD[67]). The removal of the consequences of enforcement cannot be demanded in principle (Article 85 (4) b) sentence 2

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64 Hasse, *supra* n. 43, p. 37.

65 Hasse, *supra* n. 43, p. 25.

66 'Member States shall ensure that all persons affected by a decision to take a crisis management measure, have the right to appeal against that decision. Member States shall ensure that the review is expeditious and that national courts use the complex economic assessments of the facts carried out by the resolution authority as a basis for their own assessment.'

67 'the lodging of an appeal shall not entail any automatic suspension of the effects of the challenged decision[.]'

BRRD[68]), but there is still a right to compensation for disadvantages (Article 85 (4) b) sentence 3 BRRD[69]). In this context, it would make the most sense not to leave the lodging of an appeal to an institution or a body of such an institution, but to instruct the court to review all (essential) procedural acts *itself*. This would ensure complete legal protection in the interests of the stakeholders. To ensure a competent and time-efficient legal review by the court, it is necessary that the court is already involved in phase 0 in such a way that it automatically receives the prevention plans from the ECB and the BIS resident body (administrator) as well as the correspondence conducted in order to be able to form a picture of the situation at an early stage. It is impossible for the judges to become fully acquainted with the subject matter in a short period of time in the subsequent phases. It is clear that the court does not influence any decisions by the ECB and/or the administrator.

f. Claims covered and effects of the opening of proceedings

The question of the claims covered by the proposed procedure is not as obvious as for proceedings aimed at debt settlement. Nevertheless, it arises incidentally in the context of the moratorium advocated here, which depends on the individual case, as a result of the opening of proceedings. One way of differentiating between covered and non-covered claims is the dividing line between contractual and statutory claims, as proposed by the IMF in its proposal for a statutory restructuring mechanism for sovereign debt.[70] Here it is argued that all claims should be covered by a moratorium with the exception of claims for damages under Article 340 TFEU[71] (in order to emphasise the incentive for compliant behaviour, especially during a crisis) and with the exception of all foreign claims (in order not to endanger international confidence) and (up to a certain amount) also claims of commercial banks (deposits) and public budgets against the ECB (in order not to unintentionally create or fuel payment difficulties for commercial banks and sovereigns as a domino effect).

The primary effects of the opening of proceedings (at inflation rate level 2) are the takeover of control of the administrator body affiliated with the BIS over the ECB's monetary policy, the associated activation of the court for judicial supervision of that administrator organisation, and a moratorium to be defined in more detail. The moratorium here refers to a temporary suspension of contractual obligations (e.g., similar to Article 69 (1) BRRD[72] or Article 6 (1) sentence 1 of the directive on restructuring and insolvency[73]) as well as the prohibition of enforcement, insofar as this is permissible, see sub 3. below. Three main types of a moratorium are conceivable, whereby the specific effects of the moratorium must be balanced with the substantive criterion for the opening of proceedings:[74] firstly, a moratorium that occurs automatically upon the opening of proceedings. The second, less severe form is an automatic moratorium that expires after a certain period of time (e.g., 6–12 months) or can only be maintained by the court for a certain period upon application. The third variant is a moratorium that may only come into force both based on a (debtor's) application and a court decision. As it is from an ex-ante perspective not entirely clear in the context of a central bank whether the inflation problem will also be accompanied by an over-indebtedness problem, it is recommended that the application for a temporary moratorium, which can only be extended by a court decision, be made at the request of the administrator. This gives the administrator leeway to initiate a restructuring of the balance sheet, for example. The administrator will only apply for the moratorium in an extreme emergency so as not to further jeopardise the remaining public confidence in the euro (and the associated reliability of the ECB regarding its obligations).

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68 'Where it is necessary to protect the interests of third parties acting in good faith who have acquired shares, other instruments of ownership, assets, rights or liabilities of an institution under resolution by virtue of the use of resolution tools or exercise of resolution powers by a resolution authority, the annulment of a decision of a resolution authority shall not affect any subsequent administrative acts or transactions concluded by the resolution authority concerned which were based on the annulled decision.'

69 'In that case, remedies for a wrongful decision or action by the resolution authorities shall be limited to compensation for the loss suffered by the applicant as a result of the decision or act.'

70 Paulus, *supra* n. 17, p. 404.

71 'The contractual liability of the Union shall be governed by the law applicable to the contract in question. In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties. Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties. The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.'

72 'Member States shall ensure that resolution authorities have the power to suspend any payment or delivery obligations pursuant to any contract to which an institution under resolution is a party from the publication of a notice of the suspension in accordance with Article 83(4) until midnight in the Member State of the resolution authority of the institution under resolution at the end of the business day following that publication.'

73 'Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework.'

74 Paulus, *supra* n. 17, p. 401.

g. Course of the procedure

The procedural proposal can be divided chronologically into four phases (phases 0 to 3).

i. Prevention (Phase 0): Normality

The normal situation is inspired by the BRRD: the ECB must draw up a *preventive recovery plan* influenced by Article 5 et seq. BRRD that is updated on an ongoing basis and submit it to the BIS committee. The background to this preventive measure is that the ECB is forced to constantly deal with its own risks, particularly those to monetary stability. The intention is also to prevent people in a hierarchical system, most of whom have the same educational background (economics), from staying in a self-referential bubble and, from experience, only confirming their own positions rather than really thinking 'out of the box'. In a hierarchical structure, the desire for promotion can lead to the concealment of problems if the problem in question is a taboo subject in the current environment. This is remedied by the committee based at the BIS, which acts as the addressee of the plan and is allowed to ask critical questions. At best, this preventive instrument alone will lead to better reflection on the part of the ECB and thus to a more balanced risk appetite and a more sustainable risk culture.

In order to avoid possible framing by the ECB, it would be necessary for the BIS-based committee itself to draw up a preventive plan for how the committee would hypothetically act in the ECB's place in phase 2a. This would allow it to make more qualified queries to the ECB about its own plan once it has gone through the same planning process. Ideally, the administrating committee and the ECB should draw up their plan simultaneously and independently of each other so as not to influence each other. In addition, the committee should already have a plan in place for what actions it would take under what conditions in phase 2b in order to be better prepared if an eventuality occurs.

Based on this preventive restructuring plan, it is recommended that an *early warning system* inspired by Article 3 of the directive on restructuring and insolvency is also implemented during normal operations to be able to immediately contain emerging risks. The early warning system for the financial markets operated by the Financial Stability Board at the BIS in cooperation with the IMF also provides inspiration for such an early warning system.[75] The objection that the proposed procedure assumes that the ECB does not engage in any risk management and prevention is misguided in that this is the case, but there is no body that critically scrutinises these plans. The ECB's independence means that it is only subject to a - virtually ineffective[76] - control by the ECJ but is otherwise its own master.

It is crucial to *involve the court early on* in this phase. The court should already receive all prevention plans, including correspondence, in this phase 0 so that it can familiarise itself with them at an early stage, which has the advantage of being able to make faster and better decisions in potentially later phases. It must be clear that the court is not at all involved in influencing the ECB's and/or administrator's decisions.

ii. Opening proceedings (phase 1): Examination of the triggered opening criterion

Exceeding certain inflation rates serves as a substantive opening criterion for the procedural proposal. As already mentioned, there should be two independent criteria that differ only in the level of the inflation rate. The distinction between the two intervention thresholds (inflation rate *levels 1 and 2*), which are associated with different levels of powers (of the administrating body), serves to preserve the ECB's independence as far as possible.

Because the opening criterion is clearly defined, the court only needs to examine the situation to determine whether any exceptional circumstances have coincidentally triggered it. However, since the criterion for initiating proceedings covers a certain period of time, this should rarely be the case.

iii. Implementation of measures (phase 2a = level 1): Implementation of the preventive plans

Article 27 (1) BRRD should be used as a guideline for achieving the lower annual inflation rate: on the one hand, the BIS committee should be able to demand the updating of preventive plans, but also the implementation of options for action therein. Restructuring in this context does not primarily mean debt settlement, but rather crisis management in the broader sense: what measures can be taken if which (in particular inflation) risk materialises or threatens to materialise? These include, for example, raising key interest rates, tightening minimum reserve requirements, reducing or ending purchase programs and changing communication with the public.

The removal of managing directors in accordance with Article 28 BRRD and an order for provisional administration in accordance with Article 29 BRRD would be too far-reaching for this first level: on the one hand, this would mean the loss of the ECB's independence even at this stage. Secondly, to maintain public confidence, it would make sense to clearly communicate to the public through the design of the regulations that the change of control over the ECB's monetary policy and corresponding measures will only occur when the situation is on the verge of getting out of control, i.e.,

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75 Hasse, *supra* n. 43, p. 17.
76 Fischer, *supra* n. 1, pp. 49–51.

inflation is rising too soon and too fast. This is precisely when it would be in the interests of the money users to temporarily replace the management staff with the expertise of the body based at the BIS until the situation has normalised.

iv. Implementation of measures (phase 2b = level 2): International takeover of the management and control of the ECB

If the inflation rate exceeds the higher threshold (level 2), the court activates the international control or administration of the BIS body over the ECB in the opening order. From a technical point of view, Article 35 BRRD (special administration) can be used as a guide. The change of control from the Governing Council of the ECB to the body based at the BIS requires detailed justification, as this represents a serious encroachment on the independence of the ECB, even temporarily suspending it (for the duration of this phase) in such a way that the ECB is subject to external control. The first reason why this far-reaching step is being advocated here is a psychological or reputational one: the public associates the high inflation rates with the faces of the current ECB Governing Council and Executive Board, above all the President, regardless of whether they are actually causally responsible for the situation or not. Replacing these people in the way currently prescribed by the ECB's regulations (Articles 10.1,[77] 11.2,[78] 11.4[79] ECB Statute) would sometimes take years. By having the BIS-based body take over operations, the necessary staffing discontinuity can be quickly ensured to increase public and stakeholder confidence (which is hanging by a thread) in the ECB's ability (now under international control) to achieve its price stability objective as quickly as possible. The second reason for 'taking the reins out of the hands' of the ECB's managers lies within them: anyone in a position of responsibility at the time of a crisis is under great pressure to defuse the situation. This pressure can be so great that the necessary sobriety in assessing the situation and the options for action can dwindle. In such crises, the career prospects of the people associated with the crisis are at stake. When new people enter the playing field who have just (and only) stepped up to get the situation back under control, they can act with a different mental approach: on the one hand, they are not 'burned' by the occurrence of the crisis, and on the other hand, they have the chance to make a positive contribution without carrying negative personal baggage from the crisis. The socio-psychological aspect of the so-called 'escalation of commitment' also works to the disadvantage of the ECB actors responsible when the crisis occurred. According to Cialdini, this means that once a person has committed to a position, they automatically want to and usually do act in accordance with this commitment without much thought (due to a natural tendency).[80] In the present context, this means that if central bank employees have taken a certain position in internal meetings and external press conferences, for example, they may maintain it even though it has proven to be wrong, so as not to run the risk of being perceived as inconsistent with their previous actions and statements. Thirdly and finally, international control gives ECB managers an even greater incentive to avoid the opening of proceedings at first hand, i.e. a high rate of inflation, if possible, to avoid damaging their own reputations. On the assets side, this means that the ECB would, ceteris paribus, refrain from major monetary policy operations involving the purchase of government or corporate bonds; on the liabilities side, this would mean that the ECB would maintain a more conservative capital buffer. The decision in favour of BIS-affiliated control would thus have a disciplining effect with regard to the crisis resilience of the ECB's monetary policy. For these three reasons, the procedural proposal contains the temporary change of control over the ECB by a body based at the BIS, subject to the condition of inflation level 2.

The range of powers that this body at the BIS should now have in its temporary administrative role should be based on the powers of the ECB Governing Council and Executive Board. In order to bring the inflation rate back down to a level compatible with the TFEU price stability target, the administration needs to be given the full range of monetary policy instruments. A 'soft' option for lowering inflation will be the communication strategy of the BIS-based board as administrator: expectations about the future development of the inflation rate influence the public's actions today. In specific terms, this means that if it expects inflation rates to fall (here, for example, due to the change of control to the BIS-based body), the public will slow down its exodus from the euro (by exchanging it into foreign currencies or by acquiring tangible assets not denominated in

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77 'In accordance with Article 283 (1) of the Treaty on the Functioning of the European Union, the Governing Council shall comprise the members of the Executive Board of the ECB and the governors of the national central banks of the Member States whose currency is the euro.'

78 'In accordance with the second subparagraph of Article 283 (2) of the Treaty on the Functioning of the European Union, the President, the Vice-President and the other members of the Executive Board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council after it has consulted the European Parliament and the Governing Council. Their term of office shall be eight years and shall not be renewable. Only nationals of Member States may be members of the Executive Board.'

79 'If a member of the Executive Board no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may, on application by the Governing Council or the Executive Board, compulsorily retire him.'

80 Cialdini, Robert B., Influence: The Psychology of Persuasion, New York 1993, pp. 43ff.

euros). These expectations are largely driven by the extent to which the central bank announces its next steps and whether it sticks to these announcements.

There should be no authorisation for a bail-in. This follows from the fact that the crisis management procedure should not constitute a debt settlement procedure, see above III. B. 2. b. Nevertheless, the BIS-based body should be allowed to conduct negotiations with relevant stakeholders, depending on the situation or constraints, e.g., on recapitalisation by the capital owners, and or on the granting of a restructuring loan[81] (e.g., to signal that the BIS-based body will under no circumstances choose the means of inflation or seigniorage to combat (symptoms of) the crisis).

v. Termination of proceedings (phase 3): Return to normality

In the best-case scenario, the BIS-based committee succeeds in pushing the inflation rate below the respective levels 1 and 2. When asked about the conditions for terminating the procedure,[82] the opening conditions could be used (as a mirror image) as an equally clear and transparent criterion. With the abolition of the opening conditions, a new Governing Council and a new Executive Board should determine the fate of the monetary policy of the ECB. In terms of personnel, care should be taken to ensure that there is discontinuity between those Council members who had a seat on the Council when the procedure was opened and the new Council members, so that those responsible do not make the same mistakes again and the public also has the impression that new decision-makers are now steering the destiny more responsibly.

If even the BIS-based body is no longer able to stop hyperinflation, the difficulty in drafting rules in advance is that the right measures depend on the degree of confidence still held by the public and all stakeholders. In the most serious case, there is no alternative but to declare a foreign currency as legal tender. If confidence is still at a higher level, it may be possible to wind up the ECB (Articles 10 et seq. BRRD) and simultaneously establish a new central bank, or even just order the transfer of certain non-performing assets (Articles 38 et seq. BRRD). However, experience has shown that in the event of hyperinflation, the balance sheet solidity of a central bank does not play a major role in the public's decision as to whether it still has confidence in this currency. This can be explained by the fact that most members of the public do not have the time or expertise to read or interpret the respective balance sheet. In some cases of hyperinflation, the balance sheet would even have deceived the public, as the official balance sheet of the German Reichsbank, for example, was solid during the hyperinflation of 1923.[83]

vi. Further regulatory points

Further points to be regulated are listed below - in the knowledge that it is not possible to be exhaustive here: on the one hand, even though the proposed procedure does not provide for traditional debt settlement, it could make sense to provide for the formation of a creditors' committee.[84] This has the advantage for the committee based at the BIS that it can inform itself about the interests of the creditors via a short official channel and can thus coordinate its actions with them at an early stage, precisely in order to avoid misunderstandings.

The costs of the proceedings would also have to be clarified; it must be borne in mind that remuneration by a party to the proceedings may entail the risk of (subconscious) manipulation.[85] In monetary terms, an additional chamber at the ICJ and the expenses of the BIS-based body in supporting the preparation of the preventive plans and as administrator represent a negligible side item. One proposal would be that a provision (in the order of a mid-eight-figure amount) be formed for this at the ECB level, which would be paid by the NCBs in accordance with the ECB capital key or deducted pro rata from a distribution of the annual profit.

h. Interim result

The above considerations have shown that an ECB crisis management procedure is conceivable to combat the threat of high inflation, which insolvency and restructuring law cannot address. The ideas are to be understood as a starting point for a discussion, not as final answers.

3. Enforcement immunity

Since, in the context of the present procedural proposal, under certain conditions (see above III. B. 2. f.) a moratorium is proposed, the issue of the immunity of central bank assets from enforcement needs to be mentioned separately. From this perspective, the moratorium is further justified because the immunity provisions[86] of the EU treaties have no effect vis-à-vis third

Notes

81 Paulus, *supra* n. 17, p. 403.
82 Paulus, *supra*, n. 37, pp. 322f.
83 Dierschke/Müller, *supra* n. 27, pp. 82f.
84 Paulus, *supra* n. 17, p. 405.
85 *Ibid.*, p. 405.
86 Bsaisou, Marcus, Vollstreckungsimmunität von Zentralbanken, Doctoral Dissertation Humboldt University of Berlin, Veröffentlichungen zum Verfahrensrecht 167, Tübingen 2019, pp. 369ff.

countries in relation to the ECB.[87] There is therefore a risk[88] that central bank assets which, despite a moratorium under European law, are stored, for example, at another central bank (in the USA, the focus lies on whether the amounts are 'property of the central bank held for its own account under 28 USC § 1611 (b) (1)')[89] or at the BIS[90] (here, however, No. 10 of the BIS Constituent Charter[91] applies), can be seized for enforcement purposes. If the aim is to obtain worldwide recognition for the proposed moratorium, appropriate international treaties are required. These should also cover the risk that payments of amounts are demanded from the ECB by way of legal action on the grounds that it is the 'alter ego' of the EU.[92]

With regard to the moratorium, the possibility of enforcement against ECB assets would also have to be temporarily suspended upon authorisation from the ECJ.[93]

4. Ensuring the fulfilment of other tasks of the ECB despite the introduction of a crisis management procedure

At a technical level, despite the international supervision of the ECB by the body based at the BIS, it would still have to be ensured that the other tasks incumbent on the ECB that are not of a monetary policy nature continue to be fulfilled. These tasks mainly include banking supervision. The ECB also acts as the EU's 'house bank', collects data, and conducts research.

The ECB's supervision of the NCBs pursuant to Article 14.3[94] of the ECB Statute[95] is closely interwoven with the implementation of monetary policy, so it would make sense to temporarily assign this task to the BIS-based body. This would also avoid conflicts of competence between the body as administrator and the ECB, which would retain the powers for other tasks.

5. Weighing up and summing up consideration

When weighing up whether the procedure is possible and feasible, the criteria of whether there are unsolvable problems and whether the procedure, as it can be implemented, addresses the real threat situation are particularly decisive. Whether there will be political will for such a procedure is not the issue here. The argumentation has shown that all the design problems of the procedure can be addressed and solved, even if this is only possible by amending existing provisions of EU primary law, constitutional law of the euro member states and BIS law, and furthermore (depending on the territorial scope of a moratorium) international treaties would have to be concluded with regard to central bank enforcement immunity.

C. Relationship to and implications for NCBs

A crisis management procedure in accordance with the key points proposed above would mean that the NCBs would have to continue to implement monetary policy decisions and measures for the duration of the international supervision of the ECB by a body based at the BIS. In addition, the NCBs statutes would have to be amended on the basis of Article 131 TFEU[96] (coherence between ECB and NCBs statutes) so that they would explicitly ensure compliance with ECB decisions and instructions in the event of a crisis management procedure. Under the existing rules on profit and loss distribution, the NCBs would be obliged to take responsibility for the successes and failures of the BIS resident body as administrator within the legally permissible limits.

Should the BIS conclude in its crisis analysis that it would make sense to provide one or more NCBs with capital (and no owner state is able or willing to do so), a transfer of the Articles 19 to 26 BRRD (intra-group financial support) would be appropriate.

Notes

87 *Ibid.*, pp. 380ff.
88 Olivares-Caminal, Rodrigo, Legal aspects of sovereign debt restructuring, London 2010, pp. 46ff.
89 Baxter, Thomas C./Gross, David, Central Bank Immunity, in: Rosa M. Lastra, Lee C. Buchheit (Ed.), Sovereign Debt Management, Oxford 2014, pp. 117–125, p. 125.
90 Devos, Diego, Special Immunities - Bank for International Settlements, in: Rosa M. Lastra, Lee C. Buchheit (Ed.), Sovereign Debt Management, Oxford 2014, pp. 127–137, p. 137.
91 'The Bank, its property and assets and all deposits and other funds entrusted to it shall be immune in time of peace and in time of war from any measure such as expropriation, requisition, seizure, confiscation, prohibition or restriction of gold or currency export or import, and any other similar measures.'
92 Fischer, *supra* n. 1, pp. 76f.
93 Bsaisou, *supra* n. 86, pp. 371f.
94 'The national central banks are an integral part of the ESCB and shall act in accordance with the guidelines and instructions of the ECB. The Governing Council shall take the necessary steps to ensure compliance with the guidelines and instructions of the ECB and shall require that any necessary information be given to it.'
95 Dittrich, Lars, Die Bedeutung des Rechts für die Stabilität des Geldes, Doctoral Dissertation Heidelberg University, Studien zum europäischen und deutschen öffentlichen Recht 13, Tübingen 2014, pp. 222ff.
96 'Each Member State shall ensure that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESCB and of the ECB.'

The proposal to transfer the powers of the ECB Governing Council and Executive Board to an administrating body based at the BIS for the duration of the second level phase means that the NCB's ability to influence the Governing Council via their Presidents is temporarily suspended (depending on the voting rotation system). This circumstance alone could make amendments to euro member state's constitutions necessary (e.g. Article 88 sentence 2 of the German constitution). The latter German provision would have to be extended to the effect that the ECB is temporarily placed under the control of a body based at the BIS, whose measures are subject to the judicial supervision of a (new) chamber of the ICJ. As it is to be expected that the administrative measures relating to the ECB's monetary policy will be clearly formulated measures, insofar as the NCB's involvement is required, there is no need to replace the respective NCB's governors, as they have no leeway in this respect. In the event of their opposition, the Governing Council has the option of dismissing them in accordance with Article 14.2[97] of the ECB Statute. Sentence 2 of this provision, however, opens up legal protection before the ECJ, which would further delay the process.

IV. National central banks whose currency is the euro (NCBs)

With regard to the NCBs, it would not make sense to transfer the crisis management procedure for reducing inflation to them in its entirety. This is because, according to Article 127 (2) indent No. 1[98] in conjunction with Article 129 (1)[99] TFEU, the Governing Council of the ECB is responsible for setting monetary policy. The NCBs only have executive powers, with the result that it is not possible to influence the inflation rate to a sufficient extent with the powers remaining with them. Regarding the proposal for international control and management, this means that the NCB's management bodies do not have sufficient powers to be able to promote the achievement of the procedural objective (reduction of inflation). The introduction of the procedural proposal with regard to the diversion of phase 2b is therefore out of the question for the NCBs.

This leaves the bifurcation between phase 2a and the prevention phase 0, which consists of drawing up a preventive recovery plan and introducing an early warning system. Both processes would be overseen by the BIS-based committee. Critical questions from the committee would lead to better reflection on the part of the NCBs preparing the plan. In this context, it is questionable what measures the NCBs could devise in this preventive recovery plan in the event of entering into phase 2a and whether these would be suitable for achieving the procedural objective. Since monetary policy is determined by the Governing Council of the ECB and since monetary policy can essentially influence inflation rates, this question must be answered in such a way that the NCBs no longer have any powers to take the relevant measures after the transfer of powers to the ECB. Accordingly, preventive recovery planning on the part of the NCBs is not expedient. Preventive planning on the part of the BIS-based body with regard to the ECB already includes consideration of the situations at the NCBs, as the NCBs largely have pure implementation powers with regard to monetary policy, which would be under the control of the BIS-based body during phase 2b.

What remains is the early warning system. Things are different here: on the one hand, it would be helpful for the ECB if the NCBs were to notify the ECB that there is a risk of level 1 or 2 inflation rates being exceeded or rising in their respective countries. On the other hand, an early warning system at the NCB level could lead to their respective presidents, as members of the ECB Governing Council, being better prepared internally to contribute to a wiser monetary policy decision in this body. In addition, the early warning system can ensure greater awareness on the part of the NCBs of the dangers of inflation, with the result that monetary policy decisions would be more sustainable and better made in the interests of price stability. For these reasons, it makes sense to encourage the establishment of an early warning system at the NCBs.

V. Conclusion

If insolvency law is understood as part of a more comprehensive crisis law, it is permissible to consider a procedure that uses high inflation rates as a material opening criterion for a crisis management procedure for the present Eurosystem. The article has shown that the introduction of a crisis management procedure can help to address the threat of high inflation rates. This is

Notes

97 'The statutes of the national central banks shall, in particular, provide that the term of office of a Governor of a national central bank shall be no less than five years. A Governor may be relieved from office only if he no longer fulfils the conditions required for the performance of his duties or if he has been guilty of serious misconduct. A decision to this effect may be referred to the Court of Justice by the Governor concerned or the Governing Council on grounds of infringement of these Treaties or of any rule of law relating to their application. Such proceedings shall be instituted within two months of the publication of the decision or of its notification to the plaintiff or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.'

98 'The basic tasks to be carried out through the ESCB shall be: to define and implement the monetary policy of the Union[.]'

99 'The ESCB shall be governed by the decision-making bodies of the European Central Bank which shall be the Governing Council and the Executive Board.'

characterised by a preventive approach (the preventive phase includes the preparation of preventive recovery plans and the introduction of an early warning system), but also - should this approach fail - provides finally (after a mild implementation phase during which measures elaborated in the plans have to be adopted) for the ECB's monetary policy decisions to be taken over by an independent body based at the BIS (strong implementation phase). The actions of the BIS-based committee would be subject to judicial supervision by an ICJ chamber. Due to the NCB's powers to implement monetary policy, the only option for the NCBs would be to introduce (a part of) the suggested prevention phase. The procedure is tailored to the special features of the Eurosystem. However, the introduction of this procedural proposal is also particularly suitable for the inflation-plagued countries of Argentina, Turkey, and Zimbabwe. Around the globe, the right legal rules are central to solving the (hyper-)inflation problem, since the law is the 'anchor of confidence in central banks and the stable value of money'.[100]

Notes

100 *Dittrich, supra* n. 95, p. 253 (translation by the author of this article).

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