

## The Legal Nature and Character of Memoranda of Understanding as Instruments used by the European Central Bank.

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### Introduction

The article will provide the first comprehensive mapping-out exercise of the legal nature and character of Memoranda of Understanding (MoUs) as bilateral instruments utilised by the ECB to establish frameworks for exchange of information, policy dialogue and cooperation, or financial assistance. We will provide, in particular, a critical analysis of the nature, inherent characteristics, and legal effects of MoUs signed between the ECB and third parties, including EU Member States' and third countries' authorities. Given the steady reliance of the ECB since its inception, on such instruments, this article aims to inform current literature on the practices of the ECB in this area and especially in the field of banking supervision. The paper also aims to feed more broadly into current discourses on the impact of 'soft law' – encompassing non-binding rules that enjoy special legal relevance. Inter alia, it will inform current scholarship on the democratic oversight of EU soft law as well as its impact upon Member States' practices, inclusive of adjudicatory avenues available in case of dispute.

In the last few years, EU institutions and bodies are increasingly using instruments that do not conform to our traditional understanding of 'typical EU acts', namely those acts found in Article 288 TFEU.<sup>2</sup> These instruments can broadly be characterised as 'atypical acts' of EU institutions and bodies and include Commission Communications, information notes, Council Conclusions, Resolutions, Declarations and, notably for our purposes, Memoranda of Understanding (MoUs).<sup>3</sup> Legal scholarship has been using the term 'soft law' to refer to such instruments, alluring to their alleged lack of binding force.<sup>4</sup> Inevitably, the increased use of these 'atypical' instruments has created questions about their legal effects. As regards MoUs, pertinent questions concern: i) the credibility of *inter partes* dispute resolution under an MoU vis-a-vis the enforcement of obligations under the respective Memorandum; and ii) the susceptibility of an MoU to external review by the CJEU. The latter is also important in

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<sup>2</sup> To use the categorisation of Advocate General (AG) Bobek, 'typical acts' are those included in Article 288 TFEU: regulations, directives, decisions, recommendations and opinions. AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959

<sup>3</sup> AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959, R. Wessel, 'Soft' International Agreements in EU External Relations: Pragmatism over Principles? ECPR SGEU Conference, Panel *Hard and Soft Law in the European Union*, Paris 13-15 June 2018.

<sup>4</sup> R. Wessel, 'Soft' International Agreements in EU External Relations: Pragmatism over Principles? ECPR SGEU Conference, Panel *Hard and Soft Law in the European Union*, Paris 13-15 June 2018, P.L. Lancos 'A Hard Core Under the Soft Shell: How Binding Is Union Soft Law for Member States?' 2018(4) EPL 755.

relation to demarcating/establishing the competence of the CJEU to hear individual complaints of alleged rights violations taking place under an MoU. As we will discuss, cases before the CJEU include questions on whether decisions authorising the signing of non-binding agreements can be challenged under Article 263 TFEU on grounds of institutional competence. This line of case law is particularly relevant from an access to justice point of view - especially the participation of the citizen in potential judicial review proceedings against EU Institutions such as the ECB.<sup>5</sup>

The ultimate aim of the article is to fill existing silences in the literature on MoUs with regard to the signing, mutual obligations and liability that MoUs create.<sup>6</sup> Although resort to these instruments has so far attracted the attention of scholars in fields such as EU competition law,<sup>7</sup> and external relations,<sup>8</sup> it has been less explored in the area of the European Monetary Union (EMU) and even less so with regard to the ECB.<sup>9</sup> Within the field of EMU, legal scholars have primarily focused on examining MoUs in the context of financial assistance given to Eurozone Member States vis-a-vis the Euro area sovereign debt crisis.<sup>10</sup> Although financial assistance forms an essential component of any study on MoUs, this article distinguishes itself from previous work in the field by looking beyond the use of MoUs during the EU financial crisis. We focus on the use of MoUs more broadly as instruments used by the ECB from its establishment in 1997, until the present day, and with reference to monetary policy and banking supervision.

The article will commence in Part I by deciphering the definition and application of MoUs as atypical acts while also challenging the assumption that they should be conveniently defined as instruments of ‘soft law’. In this respect we explore the legal status of MoUs under EU and international law, and more broadly the legally binding nature and judicial control over non-legal positions and commitments, often described as EU soft law. We do so while also pointing to definitional grey areas with regard to the obligations that MoUs impose to the signatory parties, and the possibility of challenging or modifying their content.

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<sup>5</sup> See T. Konstadinides, *The Rule of Law: The Internal Dimension* (Hart Publishing, 2017), Chapters 1, 2.

<sup>6</sup> The lack of scholarly attention to so-called ‘soft-law’ instruments has been noted in the literature. Senden also notes a lack of scholarly attention on what she names ‘soft postlegislative rulemaking’, i.e. the use of soft law instruments (e.g. communications, notices, codes) by the Commission when it comes to further implementing EU law. L. Senden ‘Soft Post-Legislative Rulemaking: A Time for More Stringent Control’ (2013) 19(1) ELJ 57.

<sup>7</sup> O. Stefan, ‘European Union Soft Law: New Developments Concerning the Divide between Legally Binding Force and Legal Effects’ (2012) 75 *Modern Law Review* 879-893.

<sup>8</sup> R. Wessel, ‘Soft’ International Agreements in EU External Relations: Pragmatism over Principles? ECPR SGEU Conference, Panel *Hard and Soft Law in the European Union*, Paris 13-15 June 2018.

<sup>9</sup> Academic discussions have taken place more broadly with regard to the non-binding powers and tasks of the bodies involved in the European System of Financial Supervision (ESFS), namely the European Supervisory Authorities (ESAs) and the European Systemic Risk Board (ESRB). For some examples see M. Busuioc, ‘Rule-Making by the European Financial Supervisory Authorities: Walking a Tight Rope’ (2013) 19(1) ELJ 111; E. Ferran, K. Alexander, ‘Can soft law bodies be effective? The special case of the European Systemic Risk Board’ (2010) 35(6) *ELRev* 751.

<sup>10</sup> See C. Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge, Cambridge University Press, 2014); J. Hinarejos, *The Euro Area Crisis in Constitutional Perspective* (Oxford, Oxford University Press, 2015); E. Nanopoulos & F. Vergis, *The Euro-Crisis as a Multi-Dimensional Systemic Crisis of the EU* (2018, Cambridge, Cambridge University Press).

We contend that MoUs are incapable of being conclusively defined. This is because the several terms of an overarching definition (e.g. soft law) may lack certain MoU attributes inherent in another definition (e.g. atypical acts; legal acts) which can be complementary to our assessment of their legal character and nature. What is more, there is no universal definition of the concept of soft law. The best, and as we contend, the only way of making them understood is to examine their mandatory or permissive wording/drafting; taxonomise them according to the legal obligations (if any) that flow from them and draw some empirical insights of their use in practice. When it comes to the MoUs signed by the ECB in particular, we also need to take into account the confidential nature of some of them: with some MoUs not being made public, any attempt to produce an all-encompassing definition is bound to be weak. Following a critical review of the current literature and the case law of the CJEU as to the legal status of MoUs we undertake in Part II an empirical analysis of publicly available MoUs signed by the ECB from the early stages of the EMU up until the latest relevant developments on the Banking Union.<sup>11</sup> This Part depicts, for instance, the evolution of the use of MoUs and common characteristics between them.<sup>12</sup>

Based on the above considerations, Part III of the article will attempt to establish a legal framework that can assist our understanding of the nature, operation, and legal consequences of MoUs signed by the ECB. For this purpose we will examine whether the various MoUs discussed in Part II should be given a homogeneous interpretation, or whether the exercise of discerning their legal character should rely on a test based on their aims and/or the parties involved. We finally draw some lessons about the drafting of MoUs signed by the ECB, as well as the potential for litigation that may arise from their use in the event of disagreement between the signatory parties or in cases where one party does not honour the terms of an MoU.

Overall, the paper offers a novel understanding of the nature and role of MoUs involving the ECB by critically evaluating relevant legal doctrine, the case law of EU Courts, and the ECB's institutional practice. The analysis comes at a pertinent time. Although the ECB has been involved in the negotiation and conclusion of MoUs since the early years of its establishment, the use of these instruments has increased with the establishment of the Single Supervisory Mechanism (SSM). The transfer of new supervisory tasks to the ECB, as well as its central role within the SSM which requires a high level of cooperation between the ECB and national supervisory authorities, has increased the use of MoUs as 'cooperation tools'.<sup>13</sup> As evidenced by the latest (2017) ECB Annual Report on Supervisory Activities, this trend will continue. According to the Report, the ECB has joined some of the existing MoUs that were agreed between euro area National Competent Authorities (NCAs) and third

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<sup>11</sup> Annex I of this paper provides a database of the publicly available MoUs involving the ECB - in full text or only in Press Release form. The Annex provides online links where the reader is directed for further details and information about each MoU.

<sup>12</sup> Please note that some of these MoUs are confidential and thus the only available data about them are the ECB Press Releases announcing their signature. Others are only mentioned in the ECB Annual Supervisory Reports, without any other information publicly available as to their content. See Section II for more details on this point.

<sup>13</sup> See the 2017 ECB Annual Supervisory Report.

country supervisory authorities before the establishment of the SSM. The plan is that over time the ECB will conclude its own MoUs with third country supervisory authorities so that it does not have to rely on existing MoUs. Moreover, EU legislation on banking supervision requires the ECB to enter into MoUs with NCAs of Member States and of non-euro area Member States, especially those of countries that are home to at least one global systemically important institution.<sup>14</sup> The ECB also continues using MoUs in areas beyond banking supervision: the past three years have seen new MoUs in the field of statistics, exchange of information, and relations with third countries.<sup>15</sup>

It, therefore, transpires that the use of MoUs will not only continue in the years to come but it may also increase in the area of financial supervision. Against this background, this contribution seeks to offer a framework for addressing the broad range of opportunities associated with MoUs in general and the legal challenges that lie ahead with regard to their definition and resort by the ECB. It is our intention that some of our conclusions will be able to guide others and used in future discussions on resort to EU atypical acts by other EU Institutions.

## **I. Are MoUs instruments of soft law?**

As explained, this article has been written in the context of the increased presence of EU Institutions, and the ECB in particular, in signing atypical acts with third parties. Although MoUs are often perceived as such, their scope and extent (in determining for example whether parties are obliged to carry out the provisions of an MoU or break off negotiations at any time) is rather uncertain. For example, the often non-mandatory style of their wording, their habitual conclusion between EU Institutions such as the ECB and non-Member State authorities as well as the usual absence of registration with the EU give a strong presumption of something less than primary or secondary legislative. Defining the legal character of MoUs has indeed produced challenges for the EU Institutions concerned as well as opportunities for clarification of the breadth of the scope of EU law in this quasi-legal context. The limited case law of the CJEU in this particular context (i.e. the use of MoUs by EU institutions) does not offer a comprehensive definition or categorisation of these instruments and their corresponding effects for the involved parties.

As we will see below, disputes pertaining to MoUs that have so far found their way before the CJEU frequently explore questions that have been asked in the context of other cases appearing before the same Court concerning non-legally binding instruments.<sup>16</sup> Judicial

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<sup>14</sup> Article 3 and Article 8 of the SSM Regulation; 2014 ECB Annual Supervisory Report page 26.

<sup>15</sup> MoU between the ECB and Banco Central do Brasil (April 2016), MoU between Eurostat and the ECB on the quality assurance of statistics underlying the Macroeconomic Imbalances Procedure (November 2016), MoU between the ECB and the US Office for Financial Research (May 2017), and MoU between the ECB and the South African Reserve Bank (March 2018).

<sup>16</sup> Joined Cases C-105/15 P to C-109/15 P *Mallis v Commission and ECB* [2016] ECLI:EU:C:2016:702; Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising v Commission and ECB* [2016] ECLI:EU:C:2016:701; Case C-258/14, *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448; Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas* [2017] ECLI:EU:C:2017:395. See for an analysis of these

responses to such questions have surpassed the permissible limits prescribed by the EU Treaties, inter alia, on grounds of institutional competence. This is an important development given that the recent use of MoUs in financial assistance programmes has brought to the surface pertinent questions regarding the MoUs' legal status, justiciability and liability which relates to the degree of the involvement of EU Institutions in the negotiation and signing of these MoUs.

The purpose of this section is to contextualise MoUs and provide some preliminary findings about their character and nature, as well as identify impending issues and concerns pertaining to their use. In particular, this section asks whether it is accurate to characterise MoUs as 'soft law' instruments and whether this characterisation can be applied generically to all MoUs signed by the ECB. To answer these questions, the section begins by (A) considering what is deemed to be 'soft law' in international law and, more specifically, in the EU legal system ('EU soft law'). Space precludes a detailed discussion of 'soft law' in these contexts, so the aim is to provide an overview rather than an exhaustive account. In turn, (B) we explore CJEU case law to identify how the practice of the ECB fits into current definitions of EU soft law, and point out a feature of the MoUs involving the ECB which differentiate them from some of the other EU soft law instruments. This feature is the element of mutuality (i.e. the reciprocal understanding or agreement between the two parties to be bound by the terms of the MoU) that goes into the end text of the Memorandum. Our analysis of legal doctrine leads us to conclude that simply categorising MoUs as instruments of 'soft law' is inadequate to provide a comprehensive understanding of their character and nature as well as their consequences. Instead, we submit that the legal doctrinal exploration of MoUs should be complemented by an empirical insight of the use of these instruments in practice. As such, the following section paves the way for the mapping out exercise that follows in Part II of this paper.

*A. MoUs in EU law as legal acts and as instruments of 'soft law'*

A starting point in our discussion about the character and nature of MoUs in the context of EU law, and in particular with reference to those MoUs signed by the ECB pertains to their textual absence from the EU Treaties. While, therefore, EU Institutions and bodies have been signing MoUs with third parties for some time (e.g. MoUs have been common practice for the ECB), the EU Treaties provide no information about them. A glance at Article 288 TFEU, which conveniently defines regulations, directives, opinions and recommendations is revealing of the EU Treaties' silence in relation to MoUs. This omission is almost symbolic of the fact that MoUs have not historically had a place in the EU legal toolbox. At the same time, the omission from Article 288 TFEU is not categorical as to whether MoUs are to be considered EU legal acts or not, or legally binding or not, for several reasons. Firstly, it is widely accepted in EU legal scholarship that the categorisation of legal acts in Articles 288 – 291 TFEU is incomplete and fails to recognise other instruments developed through EU

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cases C Kilpatrick, 'The EU and its sovereign debt programmes: The challenges of liminal legality', EUI Working Papers 2017/14.

institutional practice over time.<sup>17</sup> Secondly, to the extent that an MoU includes an element of mutuality between two or more actors, it might be said to resemble international agreements (Article 218 TFEU) or interinstitutional agreements (Article 295 TFEU). These two types of agreements are also not mentioned in Article 288 TFEU but it can hardly be argued that they are not part of the EU legal toolbox. Thirdly, in light of the Treaty's incomplete categorisation, it becomes challenging to identify whether a legal instrument used by the EU institutions is legally binding or has legal effects. Indeed, the Treaty provides that recommendations and opinions shall have no binding force. However, since it makes no reference to the array of other instruments utilised by EU bodies, it is naturally silent as to the precise legal consequences of these instruments.

CJEU jurisprudence partially answers the question of whether MoUs can be considered EU acts. It held in *Florescu* that:

As an act whose legal basis lies in the provisions of EU law [...] and concluded, in particular, by the European Union, represented by the Commission, the Memorandum of Understanding constitutes an act of an EU institution within the meaning of Article 267(b) TFEU.<sup>18</sup>

The *Florescu* case concerned an MoU concluded between the EU (represented by the Commission) and a Member State (Romania) for the provision of financial assistance by the EU to Romania under Article 143 TFEU. The Romanian national court had asked for a ruling on the interpretation of the MoU which required from the CJEU a determination of whether the case was admissible for a preliminary reference under Article 267 TFEU. In declaring the admissibility of the reference request, the CJEU noted (as quoted above) that the MoU constituted an act of an EU institution within the meaning of Article 267(b) TFEU. This is because, in the case at hand, the consideration of an MoU as an EU act seems to derive from its roots into typical EU acts: an EU Regulation and a Council Decision which required the adoption of the MoU<sup>19</sup> It is, therefore, clear from this judgment that MoUs *can* be considered acts of EU institutions. Whether for this to happen the MoU in question must always be underlined by a typical EU act, such as a Regulation or a Decision, has not been clarified by the Court. We return to this point in Part III of this paper

The CJEU's interpretation of MoUs as legal acts can be juxtaposed against the literature on the role of non-binding norms in the international legal system signed by international organisations in order to formalise and enhance cooperation with third parties.<sup>20</sup> In this context, MoUs are often treated as atypical treaties or international agreements in the sense that they constitute an expression of political will which sets out bilateral operational

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<sup>17</sup> P Craig and G De Burca *EU Law* (OUP 2015) p. 120-121; L Senden 'Soft Post-Legislative Rulemaking: A Time for More Stringent Control' (2013) 19(1) ELJ 57.

<sup>18</sup> Case C-258/14 *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448 para 35.

<sup>19</sup> Case C-258/14 *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448 paras 29 – 35.

<sup>20</sup> See D Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford, Oxford University Press, 2003).

arrangements under a framework international agreement or regulating technical matters.<sup>21</sup> The term ‘soft law’ appears attractive as a means of categorising MoUs *de jure* and distinguishing them from treaties proper. Indeed, in the absence of an overarching definition, MoUs have conveniently been categorised by legal scholars as bilateral instruments of soft law adopted by two parties with a view to clarifying issues of common political interest or setting out a general agreement on cooperation.<sup>22</sup> Aust remarks that ‘many soft law instruments can be regarded as MoUs in the sense that there is no intention that they should be legally binding’.<sup>23</sup> This of course begs the question of what is ‘soft law’ and whether describing MoUs as soft law instruments enhances our understanding of their character and nature.

What makes soft law attractive as a concept makes it also limited as an overarching term to describe MoUs in general. We identify two limitations. The first is that soft law is a concept for which there is no universal definition and MoUs are in themselves amorphous instruments to be examined under soft law lenses. The second limitation is that the mainstream interpretation of soft law suggests a lukewarm situation where the instrument in question is neither strictly binding nor lacking completely legal significance. Against these limitations, and at the expense of legal certainty, the soft law terminology will be employed here to generally gauge the duality of the character of MoUs as i) binding instruments / mandatory acts which generate certain obligations that must be complied with; ii) non-legal norms in the form of mere guidance proposing a course of conduct, recommendations, policies etc.<sup>24</sup> It is important to note that regardless of their effect as ‘legal’ or ‘non-legal’ (or policy instruments), what is common to all soft law instruments (and applies to MoUs) is that they are negotiated outside the legal contours and the ordinary law-making process used in a particular legal system for the adoption of regular acts. Additionally, soft law norms are not generally considered to be binding in the traditional legal sense. This is a feature which has generated heated discussions especially in terms of whether or not failure to abide with soft law constitutes a violation of a legal obligation.<sup>25</sup>

Soft law scholarship identifies and examines the tension between the ‘legal’ and ‘non-legal’ nature of soft law. Aust submits that the term soft law is generally used to describe international instruments that their makers recognise are not treaties even if they employ mandatory language such as “shall”, but have as their purpose the promulgation of principles or rules (albeit not legally binding) that the authors of the text hope will become of general

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<sup>21</sup> See M Fitzmaurice & E Olufemi, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, 2005), p.30

<sup>22</sup> Senden for instance places memoranda next to notices, communications, guidelines, codes of conduct describing them all as soft law instruments. L Senden, *The Concept of Soft Law in EC Law* (Oxford, Hart Publishing, 2004) p.115. Repasi also submits that ‘The choice of an MoU, being an instrument that traditionally does not produce legal effects, in order to lay down the conditions for financial assistance instead of an international legal agreement is a deliberate one made by the parties.’ R Repasi ‘Judicial protection against austerity measures in the euro area: Ledra and Mallis’ (2017) 54(4) 1123.

<sup>23</sup> A Aust, *Handbook of International Law* (Cambridge University Press 2010), p.11.

<sup>24</sup> See AG Bobek Opinion in Case C-16/16 para 82, where he states that instruments: “soft law does not easily fit within the binary, black and white distinction between binding and non-binding legal effects”.

<sup>25</sup> See below for differences in the academic debate with regard to the financial assistance MoUs, fn. ...

universal application.<sup>26</sup> Having said that, the impact of soft law instruments is far from trivial. Some scholars, use the term ‘soft law’ to describe legal commitments that have a ‘soft’ or informal dimension - including in some cases a mixture between legally binding and non-legally binding norms.<sup>27</sup> Senden, for instance, provides that soft law encompasses rules of conduct which do not enjoy legally binding force per se but may nonetheless produce such an effect indirectly.<sup>28</sup>

Initially, therefore, it appears that it is ‘bindingness’ that distinguishes soft law from hard law - the latter referring to formal legal instruments that unequivocally produce binding rights and responsibilities. Taking, for example, MoUs entered into between the United Nations (UN) and third parties (such as international bodies or Member States) pursuant to the Charter of the UN, the term ‘Memorandum’ can be used to denote a less formal or binding international instrument. As remarked, however, we shall also be mindful of the relevant ‘effect’ that such an international instrument is capable of generating. Wessel, for instance, argues against ‘bindingness’ being the sole determining characteristic that distinguishes between soft and hard law. Accordingly he comments that it is ‘confusing and does not seem to do justice to the fact that these norms (as *law*) form part of the legal order and that they commit the actors involved.’<sup>29</sup> It therefore seems that soft law is capable of carrying legal and justiciable commitments. As Stefan further argues - although generally non-binding - soft law instruments can produce a large array of legal effects such as, inter alia, to create legitimate expectations for the individuals, to clarify the content of certain hard law provisions, and to structure the discretion of certain institution.<sup>30</sup> Such legal effects could be produced by MoUs, depending on a number of variables such as the identity of the respective parties negotiating the respective MoU, the subject matter, content and wording of the MoU, as well as the intention of the signatories. These are factors that determine the intensity of the obligations to achieve a particular result and accordingly their respective legal effects and gravity of any potential breach that may occur after signature.<sup>31</sup>

Looking more specifically now at MoUs as soft law instruments, we shall add that with regard to their enforceability and general legal consequences, international practice that applies to MoUs which produce legal effects resembles that applying to other binding

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<sup>26</sup> A Aust, *Modern Treaty Law and Practice* (Cambridge University Press 2018), p.49. See also F Terpan, ‘Soft Law in the European Union—The Changing Nature of EU Law’ (2015) 21(1) *European Journal of International Law* 68.

<sup>27</sup> See F Terpan ‘Soft Law in the European Union—The Changing Nature of EU Law’

<sup>28</sup> See for detail L Senden, *Soft Law in European Community Law* (Hart Publishing, 2004)

<sup>29</sup> RA Wessel, ‘Soft’ International Agreements in EU External Relations: Pragmatism over Principles?, Draft paper, presented at the ECPR SGEU Conference, Panel *Hard and Soft Law in the European Union*, Paris 13-15 June 2018, p.3

<sup>30</sup> O Stefan, ‘European Competition Soft Law in European Courts: A Matter of Hard Principles?’ (2008) 14(6) *European Law Journal* 753.

<sup>31</sup> Compare for example the MoU signed between the UN and the Institut de Management et de Communication Interculturels on Cooperation in Training of Candidates for Language Competitive Examinations, March 2010. <http://www.un.org/Depts/DGACM/Uploaded%20docs/ISIT.pdf> with the MoU signed between the UN and the International Criminal Court on building the Capacity of States to Enforce in accordance with International Standards on the Treatment of Prisoners, Sentences of Imprisonment pronounced by the Court, September 2014. <https://www.legal-tools.org/doc/66a7b1/pdf/>



agreements. More specifically, it transpires that the legal effect of an agreement (binding or non-binding) seems to depend on the parties' intention to be bound by it as a matter of international law. The intention of the signatories to be bound is established by looking at the terms of the agreement and the circumstances in which it was drawn up. Applying this test, Fitzmaurice and Olufemi conclude that 'there is no reason to distinguish memoranda of understanding from any other form of agreement in this respect.'<sup>32</sup> It follows that the name and form of the agreement are not decisive for establishing whether an international agreement is binding or not. Any form of dispute resolution mechanism (such as arbitration) mandated by the MoU itself or intervention by an international court such as the CJEU can provide a careful consideration of any 'legal effects' that may spring out of the MoU in question. A genuine attempt to resolve disputes arising *inter partes* or challenges by other natural or legal persons in this context should be without prejudice to the standard view that MoUs are devoid of any legal consequences. The above leads us to conclude that we shall be open-minded about MoUs creating grounds for legal obligations without being treaties themselves. By the same token, the nature and sub-components of MoUs, such as addendums which reflect the concurrence of wills as a result of negotiations between two parties to undertake a positive obligation, may also produce legal effects or consequences.<sup>33</sup>

Does the above conclusion imply that 'soft' law instruments can become 'hard by implication'?<sup>34</sup> Scholarship remains inconclusive about the extent to which soft law instruments have legitimately replaced hard law in certain cases - for instance resorting to MoUs instead of binding bilateral agreements.<sup>35</sup> Klabbers has been most critical about the drawbacks of soft law and rejects the function of soft law instruments, arguing that these instruments often operate as treaties in disguise.<sup>36</sup> Looking more specifically at the EU legal order, Wessel appears cautious about the extent to which resort to soft law in the context of EU law forms a secret passage to 'stepping outside' the EU established legal framework (e.g. Article 218 TFEU) and, therefore, disregarding the EU *acquis* of EU external relations.<sup>37</sup> Likewise, we believe that recasting a soft law instrument into more familiar hard sources bears risks as it undermines the EU democratic process and distorts the demarcating line that separates an instrument that may produce legal effects from one that has both *de facto* and *de jure* legally binding force.<sup>38</sup> Having said that, the CJEU has held that the duty of sincere cooperation (enshrined in Article 4 (3) TEU) is applicable to provisions of soft law acts and need to be taken into account by national authorities. As such, the obligations flowing from

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<sup>32</sup> M Fitzmaurice & E Olufemi, *Contemporary Issues in the Law of Treaties* (Eleven International Publishing, 2005), p.30

<sup>33</sup> See AG Sharpston in Case C-660/13 *Council of the EU v Commission* [2015] ECLI:EU:C:2015:787.

<sup>34</sup> See J Klabbers, 'The Undesirability of Soft Law' (1998) 67(4) *Nordic Journal of International Law* 381.

<sup>35</sup> See A. Ott, 'Soft Law in EU External Relations: Evading International Treaty Law and Undermining EU Constitutional Principles?', *Yearbook of European Law*

<sup>36</sup> J Klabbers, 'The undesirability of soft law' (1998) *Nordic Journal of International Law* 381; J Klabbbers, 'The redundancy of soft law' (1996) *Nordic Journal of International Law* 167.

<sup>37</sup> RA Wessel, 'Soft' International Agreements in EU External Relations: Pragmatism over Principles?, Draft paper, presented at the ECPR SGEU Conference, Panel *Hard and Soft Law in the European Union*, Paris 13-15 June 2018, p.4

<sup>38</sup> O Stefan, 'European Competition Soft Law in European Courts: A Matter of Hard Principles?' (2008) 14(6) *European Law Journal* 753.

soft law provisions shall be relied upon as a standard for reviewing the legality of EU secondary legislation such as Commission Decisions (hard law) but not vice versa. In both cases, however, the duty of sincere cooperation shall not be understood as making the provisions of acts of soft law binding ('hard'). As Advocate General Wahl explained this is 'on pain of eluding the legislative procedure set out in the Treaty'.<sup>39</sup>

*B. Are MoUs involving the ECB instruments of soft law?*

As discussed, when attempting to define MoUs under the prism of soft law, the main question to answer is whether MoUs are binding and/or create legal obligations. If we focus specifically on MoUs signed by the ECB, the ESCB Statute does not provide us with insight about bindingness or legal effects. The Statute is as silent on the legal character of the MoUs as are the EU Treaties. Instead we learn from Article 34 ESCB Statute of the type of legal acts that the ECB can adopt. Accordingly, the ECB can adopt regulations to implement its tasks in the areas of monetary policy, payment systems, prudential supervision, and in cases defined by the acts of the Council<sup>40</sup>; 'take decisions necessary for carrying out the tasks entrusted to the ESCB under the Treaties and the Statute'; and make recommendations and deliver opinions. Formally speaking, MoUs are not in the list of legal acts that the ECB can adopt, even though the list includes recommendations and opinions which are not legally binding, similarly to what MoUs allegedly are.<sup>41</sup> The same goes for the ECB Rules of Procedure, which stipulate the legal acts that can be adopted by the ECB without mentioning Memoranda anywhere.<sup>42</sup> Yet, as we mentioned previously in relation to Article 288 TFEU, the EU codified sources of law are not necessarily conclusive as to the format of an act that can be adopted by an EU institution or as to its binding or non-binding nature. In this sense, it might be useful to turn to the jurisprudence of the CJEU for further guidance on the nature of these MoUs.

Despite the lack of presence and recognition of MoUs in the text of EU primary law as soft law instruments or otherwise, MoUs do not immediately appear to be immune from review by the Luxembourg Courts. Under Article 263 TFEU, the CJEU can review the legality of acts of the ECB other than recommendations and opinions, provided that these acts are intended to produce legal effects vis-à-vis third parties. Hence, two elements need to be established in order to confirm the justiciability of MoUs signed by the ECB: i) that the Memoranda are acts of the ECB; and ii) that they produce legal effects vis-à-vis third parties. We already mentioned above that the CJEU has ruled in at least one occasion that MoUs constitute EU acts.<sup>43</sup> The crucial element, therefore, for an MoU to be subjected to review by the CJEU, seems to be whether it produces legal effects against third parties. As we will see

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<sup>39</sup> See Opinion of AG Wahl in Case C-526/14 *Kotnik and Others* [2016] ECLI:EU:C:2016:76.

<sup>40</sup> Article 41 ESCB Statute.

<sup>41</sup> Protocol (No 4) on the Statute of the European System of Central Banks and of the ECB (2016) OJ C 202/230 (hereafter 'ESCB Statute') Article 34.

<sup>42</sup> Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the ECB (ECB/2004/2), (2004) OJ L 80 as amended.

<sup>43</sup> See above the discussion about the *Florescu* case.

below, however, the legal effects of an act do not necessarily imply that the act is also binding.

Although the CJEU has not explicitly placed MoUs outside the spectrum of Article 263 TFEU (provided that they produce legal effects) there is hardly any judicial guidance with regard to the ‘soft’ character and nature of MoUs, and in particular with regard to MoUs signed by the ECB. The most extensive line of relevant case law primarily concerns MoUs related to the grant of financial assistance to Eurozone Member States. These MoUs are not signed by the ECB as such, even though they involve the ECB.<sup>44</sup> MoUs on financial assistance have led to some of the few cases where the fundamental question of the MoUs’ nature has been examined by the CJEU, giving us a glimpse into the Luxembourg judges’ position on the MoUs ontology. Admittedly the well-known *Mallis* and *Ledra* cases gave us little clarification: the CJEU found that the Article 263 TFEU challenges to the content of the contested MoU were inadmissible due to the fact that an MoU signed by a Member State and the ESM falls outside the EU legal order and thus is not a reviewable act.<sup>45</sup> In *Ledra*, however, the CJEU found that the fact that the ESM is outside the EU legal order should not prevent the admissibility of a claim for damages under Article 340 TFEU (non-contractual liability of the EU) in the event the claimant can successfully demonstrate that there was unlawful conduct by the Commission and the ECB during the adoption of an MoU.

The above case law has left unanswered the question of what would happen in case an MoU signed *within the EU legal order* was challenged before the CJEU under either Article 263 TFEU or 340 TFEU. On first look, and by way of analogy with the case of *Ledra*, one might say that this route to challenging an MoU is in principle open to signatories or third parties whose rights might be affected. To put it differently, if this particular MoU between the ESM and a Member State - which merely *involved* the ECB - is able to be contested under Article 340 TFEU, there is no reason why the same would not be possible for MoUs signed by the ECB that fall within the scope of EU law *stricto sensu*. As the academic debate on the legal nature of the financial assistance MoUs proliferates, scholars remain in stark disagreement on whether such MoUs resemble legally binding contracts or are to be categorised as soft law instruments.<sup>46</sup>

More recent jurisprudence of the CJEU on ‘soft’ (non-legally binding) instruments (including bail-out MoUs) establishes a general pattern which can be useful vis-a-vis the legal effects and reviewability of Memoranda in general, and those signed by the ECB in particular.<sup>47</sup> The

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<sup>44</sup> Article 13 ESM Treaty, Available at: <https://www.esm.europa.eu/legal-documents/esm-treaty>; See also Case T-680/13 *Chrysostomides* [2018] ECLI:EU:T:2018:486 paras 201 - 204.

<sup>45</sup> Joined Cases C-105/15 P to C-109/15 P *Mallis & Others v European Commission and ECB* [2016] ECLI:EU:C:2016:702; Joined Cases C-8/15 P to C-10/15 P *Ledra Advertising Ltd and Others v European Commission and ECB* [2016] ECLI:EU:C:2016:70.

<sup>46</sup> For two contradicting views see A. Poulou ‘Financial Assistance Conditionality and Human Rights Protection: What is the Role of the EU Charter of Fundamental Rights?’ (2017) 54(4) *CMLRev* 991 (and references therein) and R Repasi ‘Judicial protection against austerity measures in the euro area: Ledra and Mallis’ (2017) 54(4) *CMLRev* 1123.

<sup>47</sup> Case C-526/14 *Kotnik and Others* [2016] ECLI:EU:C:2016:767; *Kotnik* concerned the compatibility of bail-in provisions included in the 2013 Banking Communication with the general principle of proportionality. Case C-

CJEU's jurisprudence on non-legally binding instruments adds something distinctive and persuasive to our present discussion about the legal effects of MoUs, the admissibility of claims before the CJEU in this respect, as well as the relevant legal remedies available in case of dispute. In *Kotnik*, for instance, the CJEU considered the legal effects of a 2013 Banking Communication issued by the Commission as a 'soft' bail-in tool for restructuring banks in difficulty by restricting state aid in the banking sector to the minimum necessary.<sup>48</sup> The Communication offered national authorities general guidance on the criteria for the compatibility of state aid with EU internal market rules. It also introduced specifically a so-called 'burden-sharing requirement' to Member States which was designed to shift losses / restructure costs onto creditors and shareholders to reduce costs to taxpayers. Compliance with this requirement for public support to the banking sector was made subject to the principle of proportionality. Subsequently the constitutionality of the implementing provisions of Slovenian banking law was challenged by private individuals and the Slovenian National Council and Ombudsman. Following a preliminary reference by the Slovenian Constitutional Court, the CJEU confirmed the Commission's wide discretion under Article 107(3) TFEU when exercising its exclusive competence to approve state aid, including the adoption of guidelines such as the one at issue.<sup>49</sup>

Despite the CJEU's confirmation of the somewhat 'soft' obligations set by the Commission in the Communication, the judgment in *Kotnik* carries both a competence enhancement and competence restriction element for the Commission. With regard to competence enhancement, although the CJEU held that the Banking Communication must be interpreted as meaning that it is not binding on the Member States, it nonetheless affirmed the Commission's strong hand in the management of Member States instituting bail-in measures via using soft law and more generally the competence of the EU with regard to the financial crisis. With reference to competence restriction, the CJEU held that although the Communication does no more than establish 'soft' guidelines, its effects limit the Commission in the exercise of its discretion under Article 107(3)(b) TFEU to declare compatible state aid that remedies a serious disturbance in the economy of a Member State. As such, the CJEU imposed a limit on the Commission's discretion to approve state aid, because departure from the Communication's guidelines (and arguably soft law instruments in general) could potentially be in breach of general principles of law, namely legitimate expectations, and give rise to institutional liability.

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258/14 *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448. *Florescu* concerned the compatibility of austerity measures adopted by Romania (implementing the conditions that the EU had attached to the grant of financial assistance) with the right to property. The CJEU held that the need to rationalise public spending in an exceptional context of global financial crisis constitutes a legitimate limitation on the exercise of that fundamental right.

<sup>48</sup> Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (2013) OJ 216/1).

<sup>49</sup> See for a case analysis V Babis, 'State Helps Those Who Help Themselves: State Aid and Burden-Sharing' University of Cambridge Legal Studies Research Paper 62/2016. Available from <http://www.law.cam.ac.uk/ssrn/>

On the other hand, *Florescu* (discussed perviously) concerns the flipside of MoUs. The CJEU provided guidance in the event an MoU has been adopted through national measures (as it has been the case in the context of those MoUs setting bailout conditions). Deciphering the extent to which these measures fall within the scope of EU law is important to a claimant (a privileged, natural or legal person) who can enjoy the full protection guaranteed by the EU Charter of Fundamental Rights in order to challenge a broader set of domestic measures.<sup>50</sup> Contrary to the MoU in the Cyprus bail-in cases, the MoU of balance-of-payments assistance under challenge in *Florescu* was an act of an EU Institution: it was concluded by the Commission on behalf of the European Union.<sup>51</sup> Again contrary to the Cyprus cases, *Florescu* was not an Article 263 TFEU case but one brought before the Court via the preliminary reference procedure (Article 267 TFEU). As such, for admissibility purposes, and given that the national court had asked for a ruling on the interpretation rather than the validity of the MoU, it sufficed that the MoU was an EU act regardless of whether it was binding or whether it produced legal effects. In his Opinion, Advocate General (AG) Bot expressed the view that an MoU does not produce binding legal effects. Conversely, academic commentators argued that the CJEU's judgment implied that the MoU in question had binding legal force.<sup>52</sup> Despite these conflicting views, the CJEU left this question unanswered.

The latest case on financial assistance MoUs, where the CJEU rejected the claims for compensation brought by individuals and companies in relation to the restructuring of the Cypriot banking sector,<sup>53</sup> does not advance the jurisprudence on the status of the MoUs as soft law instruments or otherwise but offers a view on how an act of an EU institution (in this case a Decision of the Council) may be found to be 'mandatory' for the recipient.<sup>54</sup> According to the General Court, the wording, substance, and context of the act, as well as the intention of its author, need to be considered to decide on the mandatory nature of the act. In the case at hand, the Decision was worded in mandatory terms, using the word 'shall' when referring to the Republic of Cyprus. The Council's written submissions to the Court showed that the Council intended the Decision to produce legally binding effects, while the context of the case indicated that it was common practice to issue such decisions attached to financial assistance to Member States. As a result of these factors taken together, the Decision was

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<sup>50</sup> In *Florescu* the CJEU held that EU Charter of Fundamental Rights applies to national measures adopted to meet the conditions attached to the financial assistance granted by the EU to a Member State. Case C-258/14 *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448. More recently, Case T-147/17 *Anastassopoulos and others v Council and Commission* (26 September 2018 - in progress) demonstrates that individual claimants also rely on the EU Charter of Fundamental Rights in direct actions against the EU Institutions for damages which relate to financial losses which they allege to have incurred as a result of government bonds which were subject to Greek Law 4050/12 (Private Sector Investment). The claimants argue that they received the same treatment as legal persons (e.g. banks and funds) which resulted to discrimination and a breach of Article 21 of the EU Charter (non-discrimination).

<sup>51</sup> See discussion above, under sub-section I.A.

<sup>52</sup> M Markakis and P Dermine, 'Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu' (2018) 55 (2) *Common Market Law Review* 643.

<sup>53</sup> Cases T 680/13 *Chrysostomides & Co. and Others v Council and Others* and T 786/14 *Bourdouvali and Others v Council and Others* [2018] ECLI:EU:T:2018:486.

<sup>54</sup> Council Decision of 25 April 2013 addressed to Cyprus on specific measures to restore financial stability and sustainable growth (2013) OJ L 141/32 ; *Chrysostomides* paras 183 - 193.

found to be ‘mandatory’ for the Member State. Although it would be a mistake to equate a Decision with an MoU, not least because the former is defined in the TFEU, we can employ the ruling of the General Court as a draft guide for considering whether an act is ‘mandatory’ (a binding instrument that must be complied with) rather than mere guidance proposing a course of conduct.<sup>55</sup>

### *C. Interim Conclusion*

For the two reasons considered above including, for instance, the absence of MoUs from the Treaty’s legal geography and the lack of insight into the CJEU’s approach when it considers a challenge against an MoU signed between the ECB and a third party, any study about the character and nature of MoUs signed between the ECB and a third party as soft or otherwise is bound to draw from the general CJEU jurisprudence in relation to ‘soft’ non-legally binding instruments as well as varying approaches taken by legal scholars writing in the field as these are sketched in the preceding sections.

We shall reiterate that while soft law may be appealing as a concept in our discussion we shall be cautious about using it as an overarching term to describe MoUs signed by the ECB. As mentioned, soft law is a concept for which there is no universal definition and MoUs signed by the ECB vary in character to be constrained under a particular definition of soft law. A terminology that embraces an aggregate of the majority of approaches taken in relation to soft law has therefore been employed here to generally gauge the duality of the character of MoUs signed by the ECB. Such MoUs may manifest themselves differently: at times they can consist of binding instruments / mandatory acts which generate certain obligations that must be complied with by the signatories. In other instances they may constitute non-legal norms in the form of mere guidance proposing a course of conduct, recommendations, policies etc.

Accordingly, we need to be cautious about labelling MoU obligations as ‘soft’ using a blanket description that has been customarily employed to describe heterogeneous non-treaty instruments such as codes of practice, declarations, guidelines or recommendations. In particular, our position is that ‘non-legal’ soft law is not a term that paints the full picture when it comes to MoUs signed by the ECB. Although it may be an exaggeration to call some MoUs signed by the ECB disguised legal agreements or disguised contracts, we may run the risk of simplification by taxonomizing them as mere instruments that streamline policy programmes. Such simplification could affect the legal clarity of the commitments undertaken by the relevant parties as well as difficulties regarding the enforcement of individual rights. For instance, although soft law provisions appear to bind the EU Institutions, the Commission retains certain discretion and flexibility in most of the areas where it has issued guidelines or notices, and can depart from soft law if it justifies its action in a satisfactory way. It is not clear whether this is an option for the ECB, for instance, vis-à-vis certain MoUs that will be discussed later in this contribution and which go beyond having

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<sup>55</sup> After all, Decisions are legally binding by virtue of Article 288 TFEU.

merely legal relevance. These concern, for instance, MoUs signed after the establishment of the Banking Union where there is a visible link between the MoU in question and an EU legal act such as a Regulation. A violation of the terms of the MoU in this respect may raise questions about breaching the respective obligations under the Regulation.

There are also institutional challenges produced by using ‘non-legal’ soft law terminology to describe MoUs signed by the ECB, namely that soft law does not offer solutions to the problem of distribution of powers among the EU Institutions who choose to sign MoUs that may inhibit the unity of EU law. For instance soft law guidelines can hardly help us ascertain whether it is the ECB that represents the EU as a whole or merely itself - acting in an independent capacity - when it chooses to negotiate and adopt an MoU with a third party. Moreover, there is a certain lack of clarity as to the depth of obligations produced by soft law, which is reflected also in our understanding of Memoranda. As Terpan puts it, ‘when rules are enshrined in a source other than a formal treaty or a binding unilateral act, or when they have not been legalised by a jurisdiction, there is a presumption that these rules do not create clear legal obligations.’<sup>56</sup> Yet at the same time, rules found in such sources are often stronger than a ‘best effort obligation.’<sup>57</sup> Seen along these lines, MoUs are somewhere in the middle between formal acts, and mere agreements between two parties that stipulate a best efforts obligation towards achieving a common objective.

Last, the ‘soft law’ terminology does not help meet challenges of procedural nature which the ECB may have overlooked at the time of signing an MoU in the context of the EMU, such as the potential justiciability of MoUs or, more generally speaking, the role of the EU courts in adjudicating issues pertaining to MoUs. For instance, the CJEU’s recent jurisprudence discussed here about the reviewability of non-legally binding MoUs<sup>58</sup> puts into sharp relief the orthodox approach that (soft law) acts which are not legally binding do not produce legal effects and fall outside the jurisdiction of the Luxembourg Court under Article 263 TFEU *stricto sensu*. This does not necessarily indicate a radical change to the way the CJEU has been setting its admissibility criteria. It might simply be the result of the fact that cases involving MoUs have only recently appeared before the CJEU. Hence, the CJEU only recently had the opportunity to consider the reviewability of these instruments and provide us with hints about their nature, which were not available to the ECB and the other signatories so far. With the establishment of the Banking Union it is almost inevitable that further cases will arise in the future with regard to the ECB’s competences and decision-making powers, and possibly also with regard to MoUs. Yet, for the time being, taking the above into consideration it emerges that labelling the MoUs signed by the ECB as ‘soft law’ species does not demystify or denounce the fundamental challenges discussed above.

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<sup>56</sup> F Terpan, ‘Soft Law in the European Union—The Changing Nature of EU Law’ (2015) 21(1) *European Journal of International Law* 68 p.73.

<sup>57</sup> F Terpan, ‘Soft Law in the European Union—The Changing Nature of EU Law’ (2015) 21(1) *European Journal of International Law* 68 p.73.

<sup>58</sup> C-660/13 *Council of the EU v Commission* [2015] ECLI:EU:C:2015:787.

## **II. Mapping out the MOUs signed by the ECB**

The discussion so far has provided some tentative conclusions and illustrated some remaining gaps as to what is the legal status of MoUs used in areas of EU law or signed by the ECB. Given the lack of answers to some basic questions underlying the legal status of MoUs, the purpose of the remaining analysis is to create an analytical framework that can help us in practice to understand the nature, operation, and legal consequences of MoUs signed by the ECB. To do so, we first need to map the publicly available MoUs signed by the ECB to this day, which has not been done anywhere in the literature so far. This exercise will serve a twofold aim: firstly, it will provide the right context for this article to draw conclusions on the legal consequences flowing from MoUs. Secondly, it will allow us to identify and critique the main themes that arise from the use of MoUs, which will be used later to structure a legal framework for the use of these instruments by the ECB.

A general description of MoUs involving the ECB is an inevitable part of this discussion. Broadly speaking, MoUs involving the ECB fall into two categories. The first category includes MoUs that aim to facilitate exchange of information, policy dialogue, and cooperation, between the ECB and EU bodies; Member State authorities; and non-EU actors and bodies such as third country central banks. Examples of MoUs falling under this category include the 2013 ‘MoU on the cooperation between the members of the European Statistical System and the Members of the ESCB’, and the 2009 ‘MoU between the Eurosystem and 27 central securities depositories on T2S’. As will be subsequently seen, further distinctions can be made in this category depending on the policy areas affected by different MoUs (e.g. pre- and post-Banking Union MoUs).

The second category of MoUs relates to granting financial assistance to Eurozone Member States. We shall clarify that these MoUs are not signed by the ECB as such but - as mentioned previously - involve the ECB in other ways. Acknowledging the exceptional nature of these MoUs, which were signed in times of steep financial problems facing the Eurozone, we consider them as part of the broader discussion rather than the main guiding model in our subsequent analysis. In other words, given that the ECB is not a signatory of those MoUs per se, we are more interested in the general principles that emanate from the case-law surrounding these Memoranda, as previously discussed, rather than their drafting or their content as such.

Before we continue our analysis, we should reiterate a point made previously. For this contribution, we compiled and analysed a dataset of MoUs that are available for the public and can be accessed online. We collected and analysed those MoUs whose full text is available. Where the full text was not available online, we used the official ECB Press Releases announcing the conclusion of an MoU between the ECB and another actor, which inevitably gave us more limited information than the fully available MoUs. When delving into the ECB Annual Supervisory Reports, it became apparent that the ECB is involved in



banking supervision MoUs which are neither available online, nor announced to the public via a Press Release. For example, the 2017 ECB Annual Report on Supervisory Activities states that in 2017 the ECB was part of 30 MoU negotiations from which it concluded 15 MoUs.<sup>59</sup> It also states that since the establishment of the SSM, the ECB has concluded MoUs with 25 supervisory authorities and joined existing MoUs that were previously signed between (i) euro area's National Competent Authorities (NCAs) and 9 supervisory authorities of the non-euro area EU Member States, and (ii) euro area's NCAs and 49 third country authorities. Annex I to this paper sets out the MoUs that constitute our dataset. As is apparent, our dataset is more limited than the information provided in the 2017 ECB Annual Report. What follows is a discussion of our main observations with regard to the MoUs that are stipulated in the dataset of Annex I to this paper.

#### *A. Diverse policy areas, signatories, and objectives*

One of the first things that one notices when looking at the list of the MoUs involving the ECB is the diversity of the policy areas and subject matters of the various Memoranda.<sup>60</sup> As we mentioned above, the MoUs under study concern various subjects. A dominant subject area is that of statistical information. An MoU signed in 2003 delineates the areas of responsibility in economic and financial statistics between the ECB DG Statistics and Eurostat, a 2013 MoU provides for the cooperation between the members of the European Statistical System and the members of the ESCB for the exchange of statistical information, and a 2016 MoU sets out practical working arrangements for the cooperation between Eurostat and ECB DG Statistics on the quality of statistics underlying the Macroeconomic Imbalances Process. In all three MoUs, the signatories are internal, EU, actors and their national counterparts: either the ECB and Eurostat or the European Statistical System - which includes national statistical institutes - and the ESCB - which includes national central banks.

Another set of MoUs concerns operations for the Eurosystem. An MoU dating back in 2001, replaces a previous arrangement that was in force since 1994 and deals with the effects of the EMU on the interplay between function of payment systems oversight and that of prudential supervision. It attempts to address, by way of co-operation and information sharing in Stage Three of the EMU, the gap between the EU-level oversight of payment systems, and the nationally-controlled function of prudential supervision with regard to large value payment systems. The parties to the MoU were the overseers of the payment systems (i.e. the National Central Banks of all the Member States) and the banking supervisors of all the Member States.

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<sup>59</sup> 2017 ECB Annual Report on Supervisory Activity, p.63, available at: <<https://www.bankingsupervision.europa.eu/press/publications/annual-report/html/index.en.html>>

<sup>60</sup> It should be noted that our findings are based on the dataset of MoUs included in Annex I to this article. While some of these Memoranda were fully available online to the public, others were not and therefore with regard to those MoUs we had to confine our research to the relevant Press Releases. This includes mainly MoUs signed between the ECB and third-country banks such as the Central Bank of Russia. Annex I stipulates which Memoranda were not publicly available. Annex II sets out the publicly available MoUs that contain confidentiality clauses, for the purposed of the analysis further on.

Interestingly, the ECB is not a signatory to all the MoUs concerning the Eurosystem. For instance, the 2010 MoU regarding exchange of information among national central credit registers is published by the ECB but does not mention the ECB as a party to the Memorandum. The text of the Memorandum defines the parties as the national central banks of Austria, Belgium, Czech Republic, France, Germany, Italy, Portugal, Romania and Spain.<sup>61</sup> By way of contrast, a 2015 MoU on adapting banknote equipment to the then new €20 banknote identifies the ECB, the National Central Banks (NCBs) of the Eurosystem, and industry partners (e.g. European industry associations, banknote equipment manufacturers and other partners) as the parties that undertake to work towards a common goal under the Memorandum. The ECB is a signatory of two additional MoUs that could also fall in this (sub-)category and that are connected with Securities operations: a 2009 MoU between the Eurosystem and central securities depositories (i.e. Eurozone NCBs) on the Target2 Securities project, and a more recent (2016) MoU between ESMA, National Securities Regulators and ECB for the exchange of information.

From 2012 afterwards, we see public announcements of MoUs on technical and policy cooperation between the ECB and third-country central banks or other third-country bodies. The only recorded MoU with a third country central bank prior to 2012 is an MoU between the ECB and the People's Bank of China, which was signed in 2002 and renewed in 2008.<sup>62</sup> One of the notable characteristics of these Memoranda is that they are not publicly available; there is only a Press Release announcing each of the post-2012 ones, and information about the ECB-People's Bank of China can only be found in the ECB Annual Reports. This makes it uncertain whether this type of MoUs were not signed by the ECB before 2012 or whether there is simply no public information about them. Two such MoUs were signed in 2012, one with the Central Bank of Turkey and one with the Bank of Russia. In addition, the ECB signed an MoU with the Reserve Bank of India in 2015, one on cooperation with Banco Central do Brasil in 2016, and one with the South African Reserve Bank in 2018. The Press Releases for the three latter Memoranda are identical.<sup>63</sup> In 2017, the ECB signed an MoU with the US Office of Financial Research.

The final policy area that we see MoUs being signed by the ECB is that of banking supervision. This is one of the most interesting set of MoUs given that banking supervision is one of the areas that has changed the most in recent years and especially after 2013 when the Single Supervisory Mechanism (SSM) Regulation was adopted. These changes lead to a number of questions regarding the MoUs in this policy field, including whether some of the

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<sup>61</sup> Page 3 of the MoU.

<sup>62</sup> There is no Press Release for this MoU but it is mentioned in the 2002 and 2008 ECB Annual Reports.

<sup>63</sup> Further information about these MoUs is given in the 2012 ECB Annual Report (p.144-145), according to which the ECB-Bank of Turkey MoU focuses on technical and policy cooperation in the areas of 'financial stability, research and monetary policy, communication and international relations, markets and statistics'. The ECB-Bank of Russia MoU lays the groundwork for continued cooperation between the two banks 'at the technical and policy levels, an information exchange on economic and financial developments, and a joint programme of cooperation activities. The parties agreed to focus on monetary policy, financial stability and banking supervision in the initial cooperation phase. The ECB will implement the programme of cooperation activities together with euro area NCBs.' Finally, the 2015 ECB Annual Report states that the 2015 MoU with the Reserve Bank of India was signed in the context of the cooperation between the ECB and central banks of G20 emerging market economies 'with a view to sharing technical expertise and best practices.

older Memoranda have become redundant by virtue of new secondary legislation such as the SSM Regulation<sup>64</sup>, and whether the new secondary legislation itself makes obligatory the signature of relevant MoUs. These substantive questions are discussed later on. For now, suffice it to outline the MoUs that fall within this category, noting the instances where previous Memoranda have been replaced with more recent ones.

The ECB is also signatory to a 2003 MoU, together with national banking supervision authorities and EU national central banks (then 14 countries), which sets out ‘high-level principles of co-operation’ between these parties in crisis management situations. Since this Memorandum was signed at a time of an upcoming expansion for the EU with the future accession of ten new Member States to the Union, the text of the MoU provided that ‘the banking supervisory authorities and central banks of acceding countries will be invited to become parties to the MoU once these countries have joined the EU’. As such, a complementary MoU was signed in 2005, this time including as signatories the newly-acceded EU Member States, and the EU Finance Ministries, which were not included in the 2003 MoU.<sup>65</sup> Neither the 2003 nor the 2005 MoUs are publicly available. However, a publicly available MoU signed in 2008 extends, updates, and replaces the 2005 MoU. It also seems to shift the attention from crisis management situations to ‘Cross-Border Financial Stability’, while its signatories are Financial Supervisory Authorities, Finance Ministries and other Ministries according to national competencies, Central Banks in Member States, and the ECB.

Post-2013, the attention shifts to MoUs relating to the new EU supervisory structure. Two types of MoUs can be identified here. The first is Memoranda signed between the ECB and EU institutions or bodies. This includes an MoU signed by the ECB and the Council of the European Union in 2013, which provides for the cooperation on procedures related to the SSM, and an MoU between the ECB and the Single Resolution Board (SRB) which covers cooperation and information exchange and was signed in 2015 and revised in 2018. The second type of MoUs includes Memoranda signed between the ECB and national authorities / bodies of EU Member States. In this category we can include two MoUs signed in December 2016. The first MoU is signed between the ECB and the financial supervisory authorities of the four Member States and deals with prudential supervision of significant branches in Sweden, Norway, Denmark, and Finland.<sup>66</sup> In 2017, Estonia, Iceland, Latvia, and Lithuania, acceded to this MoU. The second is an MoU between the Finnish, Norwegian and Swedish Ministries of Finance and the Danish Ministry of Business on cooperation regarding

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<sup>64</sup> Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (2013) OJ L 287/63 (Hereafter ‘SSM Regulation’).

<sup>65</sup> MoU on co-operation between the Banking Supervisors, Central Banks and Finance Ministries of the European Union in Financial Crisis situations, 2005. A 2007 MoU provides for the adherence of the central banks of the new Member States, Bulgaria and Romania, both to the 2003 MoU on high-level principles of co-operation in crisis management situations, and the 2001 MoU on cooperation between payment systems overseers and banking supervisors.

<sup>66</sup> MoU Between Finansinspektionen (Sweden), Finanstilsynet (Norway), Finanstilsynet (Denmark), Finanssivalvonta (Finland) and the European Central Bank on prudential supervision of significant branches in Sweden, Norway, Denmark and Finland, 2016.

significant branches of cross-border banking groups. Although the ECB is not a signatory of this MoU, it is affected by the provisions of the MoU, which refers to the ECB as one of the competent authorities of host Member States (under the SSM Regulation) and recognises the need for close and timely information sharing between competent and resolution authorities of home and host Member States.<sup>67</sup>

Beyond the differences in their subject matters, the above-mentioned MoUs also have a number of diverse goals, although two predominant objectives characterise the majority of the MoUs: i) cooperation and ii) exchange of information between the signatories. Other objectives include the amendment of an internal ECB document (e.g. the ECB Governing Body's Code of Conduct), the expression of a mutual commitment of the signatories to work towards a certain project (e.g. Target2 Securities, and the introduction of the new 20 Euro banknote), and the distinction of areas of responsibilities between bodies with overlapping tasks (e.g. the 2003 MoU between the ECB and Eurostat). One MoU concerns internal ECB affairs, setting out a Code of Conduct (i.e. ethical conventions, standards and benchmarks) for the members of the ECB Governing Council and their alternatives.<sup>68</sup> A later amendment to this Code via a new MoU introduces more detailed provisions on the independence of the Governing Council.

The two objectives of cooperation and exchange of information are often presented together in MoUs. The only MoU that refers to exchange of information as a sole objective is the 2010 Memorandum on the exchange of information among national central credit registers, which establishes a framework for the regular and ad hoc exchange of information among central credit registers and commits the parties to exchange information in accordance with this framework.<sup>69</sup> Cooperation here is mentioned only as something that needs to take place between of the authorities in case of difficulties with the received data.

In other instances, exchange of information can be seen as one of the means of cooperation between the parties. An indicative example is the 2003 'MoU on high-level principles of cooperation between banking supervisors and central banks in crisis management situations' which 'consists of a set of principles and procedures for cross border cooperation between banking supervisors and central banks in crisis situations.' The flow of information between involved authorities is only one of the issues dealt with in the MoU, others being the identification of the relevant authorities, and the creation of a logistical infrastructure to support the enhanced cooperation between authorities. The fact that cooperation takes a broader format than exchange of information is also evidenced by the statement that 'cooperation will take the form required by the specific features of the crisis and with regard to all the relevant supervisory and central banking tasks and functions.'<sup>70</sup> The same can be

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<sup>67</sup> See 2016 MoU paras 9-10, 16-17, and 27.

<sup>68</sup> The MoU was signed in 2002 by the members of the Governing Council and amended in 2006.

<sup>69</sup> It should be noted that this MoU was discontinued in September 2018, after the mutual agreement of the participants that its objectives are now achieved through harmonisation <<https://www.ecb.europa.eu/press/govcdec/otherdec/2018/html/ecb.gc180928.en.html>>

<sup>70</sup> From the relevant Press Release.

said about the 2015 MoU between the ECB and the SRB, whereby the exchange of information is considered to be one of the ways for cooperation between the two signatories, with other examples being the alignment of the annual work cycle of the ECB and the SRB on recovery and resolution planning, and on-site inspections.<sup>71</sup>

One of the MoUs whose objectives stands out is the 2013 MoU between the Council and the ECB on the cooperation on procedures related to the SSM. Although the title of the Memorandum refers to ‘cooperation’, the actual text focuses on the accountability and reporting obligations of the ECB, as a banking supervisor, to the Council and the Eurogroup. Unlike other MoUs, this Memorandum between the ECB and the Council appears more as a document setting out the accountability-related obligations of the ECB and less as our traditional understanding of a Memorandum as a document which underpins the intention of the signatories to work towards a common objective. The two main sections of the Memorandum are entitled “Accountability” and “Selection and Appointment Procedures”. Hence, neither refer to exchange of information or cooperation in the same way as other MoUs focus on these two objectives. Although the final provisions of the 2013 MoU mention the confidentiality requirements that must be applied to the ‘information exchanged’ under the Memoranda, the text itself only refers to information that must be sent by the ECB to the Council and the Eurogroup in the form of Annual Reports. It also mentions the exchange of *views* that takes place during the bi-annual exchange of views between the Chair of Supervisory Board and the Eurogroup. In other words, it seems as if the ECB has the predominant role of sender of information, while the Council and Eurogroup are presented as the recipient of it.

The different nature of this MoU probably results from underlying secondary legislation which dictates the relationship between, on the one hand, the ECB and, on the other hand, the Council and Eurogroup. Article 20 SSM Regulation sets out the accountability and reporting obligations of the former to the latter institutions, which are mirrored in the text of the 2013 MoU. It appears that the purpose of the MoU is to put flesh on the bones of SSM Regulation by specifying *inter alia* the procedure in which the ECB should fulfil its legal obligations to disclose information to the Council and the Eurogroup.<sup>72</sup> It can therefore be said that the origins of this MoU in secondary law explain why there is no reciprocity in disclosing information, in contrast to other MoUs with cooperation objectives. Moreover, this MoU can be conceptualised as a joint attempt by two institutions to improve accountability in the area of the SSM along the lines of EU secondary legislation.

### ***B. Common drafting features and characteristics***

There are four notable common features in the drafting of the MoUs signed by the ECB. These features have to do with the way the Memoranda: i) attempt to stipulate and limit their

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<sup>71</sup> Paragraph 1 of the MoU. See also the 2008 MoU on Crisis Management, which states that cooperation will involve the exchange of information but also, *inter alia*, the creation of a framework for cooperation on preparing common solutions and actions to manage a potential crisis.

<sup>72</sup> The opening text of the 2013 MoU explicitly refers to Articles 20(1) to (4) and (6) of the SSM Regulation.

legal nature; ii) describe how they fit within the general, applicable, (EU) legal framework; iii) determine how the parties should resolve potential disagreements; and iv) set out confidentiality and professional secrecy obligations for the parties. What follows is a description of each of these features based on a survey of all the publicly available relevant MoUs, coupled by a reflection of issues that may arise in regard of each. Our purpose is not to find specific differences between each Memorandums through a comparison of the clauses in the MoUs. We acknowledge that MoUs are negotiated between two or more parties and that these negotiations entail compromises between the parties. Hence, we also take into consideration in our analysis that deviations to the clauses of the MoUs may simply be due to the fact that not all parties agreed on the insertion of a particular clause in the final text of a memorandum.

Taking into consideration the space for compromises among parties during the negotiation process of MoUs, the following analysis does not intent to consider the four features identified above as free-standing elements of the memorandums. Instead, it is argued that for the main purpose of this article, which is to decipher the legal nature of the MoUs, the four features are not mutually exclusive, but they are complementary to each other. To use an example, we can only appreciate the full extent of an MoU clause which provides that disputes should only be resolved internally (relevant to feature iii) if we go back and assess the parties' intentions objectively. In this hypothetical scenario it may be the case that the parties did not intend the MoU to have a legally binding nature in the first place (relevant to feature i). The parties' intention to create legal relations will more often than not be manifested textually in the MoU. In turn, the wording of an MoU vis-a-vis its legal nature can affect the role of the CJEU in potential litigation and dispute resolution. In the event the wording of the relevant MoU excludes the CJEU's adjudicatory role, we need to have a separate discussion about whether another dispute mechanism is required (back to feature iii). Along the same lines, one can find it hard to understand how a confidentiality clause is to be enforceable or even workable (feature iv) if the MoU prompts us to make the assumption that the parties involved did not recognise the MoU's legal nature and binding obligations that may flow from it (feature i). Before we engage with these issues, let us go back in our assessment of the four features identified above which are common in the drafting of the MoUs signed by the ECB.

#### **i. Dealing with the MoU's legal nature: Disclaimer clauses**

The first notable, common textual feature of almost all the publicly available MoUs is the way in which they deal with their own legal nature, which most of the times is connected to how they describe the intentions of the parties signing / involved in the Memorandum. In the majority of instances where these 'disclaimer clauses' appear, it is to signal the 'non-legally binding nature' of the document, or the intention of the parties not to create any legally

enforceable rights by signing the MoU. Such provisions sometimes appear even in the Press Releases announcing the conclusion of MoUs whose full text is not publicly available.<sup>73</sup>

Most of the MoUs make a clear effort to explain the parties' position on the issue by using phrases such as: 'the provisions of this MoU are not legally binding on the parties and therefore no legal claim by any party or third party may arise in the course of its practical implementation.'<sup>74</sup> One of the clearest statements is included in the 2015 MoU between the SRB and the ECB, which devotes an entire paragraph on the legal nature of the MoU. Paragraph 4 of the Memorandum states that 'this MoU is a statement of intent and does not create any directly or indirectly enforceable rights. The Participants shall fulfil their responsibilities under this MoU on a best-effort basis.'<sup>75</sup> A similarly elaborate clause is included in the 2017 MoU between the Office of Financial Research and the ECB, which states: 'This MoU does not create any legally binding obligations, confer any rights, or supersede any US or EU laws or regulatory requirements in force on the parties' respective jurisdictions. Accordingly, the MoU also does not confer upon any person the right or ability to directly or indirectly obtain, suppress, or exclude any information or to challenge the execution of a request for assistance under this MoU' (paragraph 2.6).

In other Memoranda, disclaimer clauses are more brief and take it as a given that the MoU in question is not legally binding, by stating: '*[a]s the provisions of this Memorandum are not legally binding on the Participants, they may not give rise to any legal claim on behalf of any Participant or third parties in the course of their practical implementation.*'<sup>76</sup> Only few MoUs are silent on their legal nature<sup>77</sup>, which gives rise to the question of whether they should be perceived differently than the rest: does their silence amount to an intention to create (or maintain) some sort of legally binding effects or to impose stronger obligations on the signatory parties to follow the line of the Memorandum? Or is it the case that the parties assume that an MoU is by default non-binding and therefore see no need to specify this in the text of the Memorandum? A final question which is particularly important for the purpose of our analysis concerns the extent to which Memoranda which lack disclaimer clauses are generally capable of protecting their signatories from liability.

## **ii. Fitting the MoU in the general legal framework: Context clauses**

The second common feature in various MoUs is that they include paragraphs / clauses contextualising the Memoranda vis-a-vis the general EU - and, often, national - legal

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<sup>73</sup> Press Release for the 2005 MoU on cooperation between the banking supervisors, central banks, and finance ministries of the European Union in Financial Crisis situation which defines the MoU as a 'non-legally binding instrument for setting forth practical arrangements'.

<sup>74</sup> 2010 MoU on the exchange of information among national central credit registers for the purpose of passing it on to reporting institutions.

<sup>75</sup> The phrase 'statement of intent' also appears in the 2017 MoU between the Office of Financial Research and the ECB (Paragraph 2).

<sup>76</sup> 2008 MoU on cross-border financial stability; 2016 MoUs (2 MoUs) between Sweden, Norway, Denmark, Finland, and the ECB.

<sup>77</sup> 2003 MoU on economic and financial statistics between DG Statistics and Eurostat; 2013 MoU between the Council and the ECB on the SSM; 2016 MoU between Eurostat and the ECB on the quality assurance of statistics underlying the Macroeconomic Imbalances Procedure.

framework. Similarly to the ‘disclaimer clauses’, the ‘context clauses’ exist to limit the effects of the MoU vis-a-vis the existing legal framework: their main objective is to prevent the respective MoUs from being interpreted as affecting the competence delimitation between the signatories, or as binding the current and future applicable legal framework. For instance, the 2003 MoU between the ECB and Eurostat states that it has been signed ‘without prejudice to the EU competences of the Commission and the ESCB and ECB’ and thus does not prevent the further development of the relevant legal framework on the collection of statistical information.<sup>78</sup>

Other context clauses state the relation between the MoU and national legislation. For instance, the 2010 MoU on the exchange of information among national central credit registers declares that it does not commit parties to the exchange of information where this is not allowed by national legislation.<sup>79</sup> A more recent MoU, namely the 2015 SRB-ECB MoU, states that it does not modify or supersede any EU or national laws or any other provisions under other agreements applicable to the parties (paragraph 4.2).<sup>80</sup> Reading paragraph 4.2 of the same Memorandum as a whole, we can even observe a reference to the status of this MoU in a kind of ‘hierarchy’ of instruments: The MoU is below EU law, national laws, and other provisions that apply to the ECB and the SRB under multilateral or bilateral agreements.

In other instances, a context clause defines the link between two Memoranda which concern the same issue but were signed at different times. Such clauses may state that the Memorandum extends, updates, or complements a previous MoU, or declare the renewed commitment of the Parties to the Memorandum.<sup>81</sup> Others define which Memorandum shall prevail in case of a conflict between an older and a more recent MoU.<sup>82</sup>

Finally, context clauses are sometimes used to link a Memorandum with specific secondary legislation or other EU acts. These clauses resemble provisions found in the Preambles of EU acts, which set out the legal basis for the said act. In particular, some MoUs are very closely linked with secondary EU legislation or are signed because secondary EU legislation necessitates or allows for their conclusion. MoUs signed after the establishment of the Banking Union are prime examples of a close link between an MoU and an EU legal act. Specifically, the 2015 MoU between the SRB and the ECB was concluded on the basis of Articles 30(7), and 34(5) of the SRM Regulation.<sup>83</sup> The former requires the signature of an

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<sup>78</sup> The 2008 ‘MoU on cooperation between the financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability’ states that ‘cooperation between the parties will take place on the basis of the existing institutional and legal framework for financial stability in Member States as well as the applicable Community legislation, *fully respecting the roles and division of responsibilities among the Parties.*’

<sup>79</sup> See also the 2016 MoU between Eurostat and ECB, clause H, which states that the MoU ‘is without prejudice to reporting and quality assessment obligations following from Union legislation.’

<sup>80</sup> See also the 2016 MoU between Sweden, Norway, Denmark, Finland, and the ECB on prudential supervision, para. 14, and the MoU between the ECB and the Office of Financial Research para 2.7.

<sup>81</sup> See, e.g. 2008 MoU on cooperation between the financial supervisory authorities, central banks and finance ministries of the European Union on cross-border financial stability.

<sup>82</sup> 2016 MoU between Eurostat and ECB, clause H.

<sup>83</sup> Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the



MoU regarding cooperation, and the latter of an MoU regarding exchange of information. The resulting Memorandum covers both. This is the only example from our dataset whereby secondary legislation specifically refers to the conclusion of an MoU to achieve a specific purpose.

By way of comparison, legislation referenced in other Memoranda merely requires close cooperation<sup>84</sup> or another connection between the parties. In these instances, the Memoranda seem to be an instrument of choice rather than one stipulated in secondary EU law. Take here as an example the 2013 Council - ECB MoU on the SSM, which refers to the EU legislation (i.e. the SSM Regulation) that mandates the accountability and reporting obligations of the ECB, which are covered in the Memorandum itself. Differently from the background to the 2015 MoU, the SSM Regulation does not mention either a *need* or *possibility* for the conclusion of an MoU between the Council and the ECB. It merely states that the ECB has legal obligations to the Council and the Eurogroup, which are further detailed in the MoU.<sup>85</sup> As a matter of fact, arrangements made between the European Parliament and the ECB for the accountability and reporting of the latter institution (i.e. the same subject-matter as the 2015 MoU) were made through an Interinstitutional Agreement between the Parliament and the ECB.<sup>86</sup> It seems, therefore, that the conclusion of an MoU between the Council and the ECB was a choice by the parties among other alternatives.

### **iii. Settling potential disagreements: Settlement clauses**

Linked with the two issues above (i.e. the legal nature of the MoUs and their position in the general legal framework) is the third common feature of some Memoranda, namely the inclusion of a few sentences or paragraphs stipulating what will happen in case of disagreement concerning the MoU - i.e. who is the responsible person or body to resolve the disagreement, and through which process. For the purpose of this article, we can name these ‘settlement clauses’. One can assume here that these types of clauses are necessary given that the parties perceive the MoUs as non-legally binding. To put it simply, if the assumption is that the EU courts cannot review or intervene in a non-legally binding act / document, there needs to be some other way to resolve disagreements which may arise in the course of these acts, such as differences in the interpretation of the MoU.

This alternative way of settling disagreements is usually internal and rather informal, and takes place first at a working level. Only if no solution is found, the disagreement is taken to the signatories. The 2016 Eurostat-ECB MoU, for instance, specifies that disagreements between the parties to the MoU should be resolved ‘at a working level with a view to

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framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010 (2014) OJ L 141/1 (hereafter ‘SRM Regulation’).

<sup>84</sup> 2016 MoU between the Eurostat and the ECB on the quality assurance of statistics underlying the Macroeconomic Imbalances Procedure.

<sup>85</sup> See discussion above, S.2A, page ...

<sup>86</sup> Interinstitutional Agreement between the European Parliament and the European Central Bank on the practical modalities of the exercise of democratic accountability and oversight over the exercise of the tasks conferred on the ECB within the framework of the Single Supervisory Mechanism (2013/694/eu) (2013) OJ L 320/1.

reaching an amicable solution.<sup>87</sup> If the matter is not resolved within two months, it should be referred to the signatories. The 2015 SRB-ECB MoU contains a similar clause<sup>88</sup> - only, this time, stipulating the confidential nature of the procedure. According to the clause, the first port of call is direct negotiations between relevant units and representatives appointed by the SRB and the ECB. Only if this negotiation stage is not effective the dispute will proceed to the senior management or the permanent Board Members of the SRB and members of the Executive Board of the ECB who can provide for a final resolution to the issue.

Admittedly, only the minority of the MoUs contain such settlement clauses. Yet, the existence of these clauses is, in itself, of interest to our research. If not anything else, these clauses raise the question of the connection between an MoU and traditional litigation via the European Courts. Moreover, we can ask what difference these clauses make: what is the authority that will resolve a dispute arising under the MoUs which do not contain a settlement clause? In this sense, it is also relevant to note the one MoU that stands out with regard to its settlement / remedies provisions. The 2009 Target2-Securities MoU includes a clause (paragraph 5.5) that limits the available remedies for a party to the rights to withdraw and be excluded from the Memorandum. By virtue of this clause, parties do not have access to any other remedy, including those for breach of contract. This clause covers the entire MoU except the part on confidential information for which parties are entitled to ‘any additional rights or remedies’ that they may have under ‘the applicable statutory law’, which is the law applicable at the seat of the ECB (paragraph 7.4). It is also the only MoU which states that disagreements between the parties can be submitted to settlement under the Rules of Arbitration of the International Chamber of Commerce (paragraph 7.6).

#### **iv. Requesting confidentiality: Confidentiality and professional secrecy clauses**

Finally, the last common feature among the MoUs is the attention they place on confidentiality. A number of Memoranda are not even publicly available.<sup>89</sup> Moreover, all but one of the publicly available MoUs signed by, or involving, the ECB include ‘confidentiality clauses’, which impose requirements of confidentiality and professional secrecy on their signatories.<sup>90</sup> These clauses are phrased in a similar, but not identical, manner, and they typically take the format of one or two clauses in the text (e.g. paragraphs, or references in the Preamble to the MoU). Only some MoUs define in detail what information is considered to be confidential and what not.<sup>91</sup> Overall, there is no consistency in these confidentiality clauses and the law they refer to. Memoranda can be found which refer to ‘Community and national legislation’; ‘the applicable Community and national confidentiality and professional secrecy regulations’; ‘applicable confidentiality rules’; and ‘relevant Union law’.

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<sup>87</sup> 2016 MoU between Eurostat and ECB, para.I. For a similarly worded clause see the 2003 MoU between the ECB and the Eurostat, para.23.

<sup>88</sup> Paragraph 15 of the MoU.

<sup>89</sup> See Annex I.

<sup>90</sup> The only MoU that does not include a confidentiality clause is the 2006 MoU amending the ECB Governing Council Code of Conduct.

<sup>91</sup> See the 2009 Target2 MoU, and - albeit in a different format - see the Annex to the 2017 MoU between the Office of Financial Research and the ECB.

Despite the difference in the wording of these provisions, one key observation can be made: the confidentiality and professional secrecy obligations have their origin in other sources, which are not the Memorandum as such. In fact, layers of obligations appear to be applicable to the MoUs. These layers consist of obligations deriving from EU law and national law and more than one layers may apply to a Memorandum at the same time, with the application of each layer to a Memorandum being largely dependent on the identity of its signatories, and its subject matter. Let us outline this argument here before we subsequently explain it in depth. An analysis of the confidentiality clauses in the Memoranda shows that the first layer of obligations consists of primary EU law, including the Protocol n.4 on the Statute of the ESCB and of the ECB (hereafter ‘ESCB Statute’). Arguably, these obligations bind the ESCB always when the ECB or the NCBs sign a Memorandum that falls within their competences. The second layer of obligations derives from secondary EU legislation, such as Directives and Regulations when these apply to the MoU, or - more correctly phrased - when these are somehow linked with the MoU.<sup>92</sup> The third layer of obligations is national legislation applicable to the MoU in question. This might be national legislation of the Member State where both parties are located / have their seat<sup>93</sup>, where one party is located<sup>94</sup>, or even of a third country, such as the US in the case of the MoU between the Office of Financial Research and the ECB.

To explain our argument, we can consider each layer of obligations separately, coupled with relevant examples from MoUs. Looking at each level of obligations together but also one-by-one helps us map out the legal regime applicable to the parties signing the MoU specifically with regard to confidentiality and professional secrecy, and takes us one step closer to understanding the legal nature of these instruments. In turn, this mapping out exercise will help us identify any issues, problematic aspects or tensions, similarly to what we have done previously in this section for the other three types of common clauses found in the Memoranda (i.e. disclaimer, context, and settlement clauses).

As we said above, the first layer includes primary EU law, in line with our traditional thinking about sources in EU law. ‘Confidentiality’ does not appear as such in the TEU, while the TFEU only mentions it in Part Seven (General and Final Provisions), Article 338 TFEU, in regard to the production of Union statistics which must conform to statistical confidentiality. Thus, the reference to confidentiality in the TFEU relates specifically to statistics rather than to a generic duty or obligation to maintain confidentiality. In EU legal scholarship, confidentiality is often discussed as the opposite practice of openness or transparency of EU institutions, which is codified in Article 15 TFEU.<sup>95</sup> Without getting into the particulars of what is currently becoming in the literature a growing debate on the

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<sup>92</sup> See our discussion above under ‘context clauses’ on the link between some MoUs and secondary legislation.

<sup>93</sup> 2016 MoU between Finnish, Norwegian, Swedish Ministries of Finance and Danish Ministry of Business on cooperation regarding significant branches of cross-border banking groups.

<sup>94</sup> The 2009 MoU on Target2 specifies that the law applicable to the MoU is that of the seat of the ECB.

<sup>95</sup> A. Alemanno, ‘Unpacking the principle of openness in EU law: transparency, participation and democracy’ (2014) 39(1) ELRev 72.

transparency of the ECB<sup>96</sup>, suffice it to say that the ECB has its own confidentiality regime by virtue of the ESCB Statute and secondary legislation, which is discussed below. With regard to professional secrecy, Article 339 TFEU requires the members of the institutions of the Union, and other officials and servants of the EU ‘not to disclose information of the kind covered by the obligation of professional secrecy.’

Despite the separate references of the Treaty to the terms ‘confidentiality’ and ‘professional secrecy’, the two have been used interchangeably by the CJEU in the field of financial supervision. In the case of *Altmann*, which dealt with the disclosure of information about investment firms by a supervisory authority, the obligation to maintain professional secrecy was said to cover confidential information.<sup>97</sup> In a more recent case, AG Bot opined that there is an overlap between confidentiality and professional secrecy and that ‘the use of those two terms must be regarded as redundant, in as much as they in reality denote a single purpose and the same idea.’<sup>98</sup>

The Statute of the ESCB provides some additional information on confidentiality and professional secrecy obligations in Articles 37 and 5. The former provides that members of the governing bodies and the staff of the ECB shall not disclose information of the kind covered by the obligation of professional secrecy. This prohibition extends to members of the governing bodies and the staff of the NCBs. Article 5 concerns the collection of statistical information and provides that, for this purpose, the ECB must cooperate with several actors. Article 5(4) mandates the Council to define the applicable confidentiality regime and the appropriate provisions for enforcement. Given the position of Article 5(4) in the text of the Statute, we can assume that the ‘confidentiality regime’ refers here specifically to statistical information rather than information handled by the ECB more generally speaking.

All these primary law provisions clearly apply to the ECB as an EU institution, persons working for the ECB, and - when it comes to the ESCB Statute - the 28 national central banks which are part of the ESCB.<sup>99</sup> When the MoUs refer to confidentiality and professional secrecy requirements, however, they do not necessarily distinguish between obligations that apply to the EU and those that apply to signatories coming from Member States, such as national authorities other than NCBs. For example, the 2008 MoU on cross-border financial stability concluded between the Financial Supervisory Authorities, Finance Ministries and other authorities, NCBs, and the ECB states that ‘*the Parties shall ensure* that all persons dealing with, or having access to, such [confidential] information are bound by the obligation

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<sup>96</sup> For recent literature see D. Curtin, ‘Accountable Independence’ of the European Central Bank: Seeing the Logics of Transparency’ (2017) 23(1) *European Law Journal* 28; F. Coman-Kund, A. Karatzia, and F. Amtenbrink, ‘The transparency of the European Central Bank in the Single Supervisory Mechanism (2018) 51(1) *Kredit und Kapital* 55.

<sup>97</sup> Case C-140/13 *Altmann v Bundesanstalt für Finanzdienstleistungsaufsicht* paras 28-35; Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* [2014] ECLI:EU:C:2014:2362 paras 22, 46, 48.

<sup>98</sup> Opinion of AG Bot in Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* [2018] ECLI:EU:C:2018:464 para 55.

<sup>99</sup> Article 131 TFEU; Article 14 of the ESCB Statute.

of professional secrecy’ (clause 8.3).<sup>100</sup> Where does this obligation originate from with regard to the parties to the Memorandum that are not the ECB or EU bodies? Is it possible for an MoU on its own to create confidentiality obligations for Member States exchanging information, which do not exist in EU law or their national laws at the time of the signature of the MoU? Even with regard to the EU actors in an MoU, what obligations exactly does professional secrecy impose on them?

These questions can be potentially tackled by looking into the other two layers of obligations. The second layer of obligations derives from secondary EU law apposite to the MoUs. We can see that secondary legislation often operates as a ‘gap-filler’, furnishing the details as to the confidentiality and professional secrecy obligations of the signatories. One legal act applies as an umbrella to all the MoUs signed by the ECB: the ECB Decision 2004/2 on the ECB Rules of Procedure<sup>101</sup>, which inter alia sets out the confidentiality regime of the ECB. Article 23 and 23a of the Decision map the confidentiality requirements that apply to the ECB in the fulfillment of its tasks, including those of financial supervision. There is no apparent reason why this confidentiality regime would not apply to the ECB when signing an MoU or acting under an MoU.

Other secondary legislation connected to MoUs is not the same throughout the dataset of Memoranda. As we have previously discussed, a number of MoUs are connected to Regulations or Directives, depending on their subject matter. Interestingly, with regard to the publicly available MoUs that contain confidentiality clauses, only the five MoUs that were signed after 2012 are directly linked with EU secondary legislation.<sup>102</sup> Each of the secondary legislation instruments linked with each of these five MoUs provides rules on confidentiality and/or professional secrecy. Where this secondary legislation is mentioned in the MoU, it sets out requirements not only for the ECB, but also for the other signatory/-ies of the Memorandum.

For example, the 2013 MoU between the Council and the ECB on the SSM is clearly rooted in the SSM Regulation which specifies that the reporting obligations of the ECB towards the Council and the Euro Group should be subject to the professional secrecy requirements set out in the ESCB statute and EU law.<sup>103</sup> The 2015 MoU between the SRB and the ECB and its revised 2018 version refer to ‘relevant Union law’ and make reference in its Preamble to the SSM Regulation and the SRM Regulation.<sup>104</sup> We outlined previously the obligations deriving from the SSM Regulation.<sup>105</sup> The SRM Regulation also contains specific confidentiality and

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<sup>100</sup> See also the 2016 MoU with Nordic countries on the prudential supervision of significant branches, clause 48, which states that “The Participants will ensure that all persons dealing with, or having access to, such confidential information, are bound by the obligations of professional secrecy in accordance with the applicable Union law.

<sup>101</sup> Decision of the ECB of 19 February 2004 adopting the Rules of Procedure of the ECB (ECB/2004/2), (2004) OJ L 80 as amended.

<sup>102</sup> See in Annex II the five MoUs signed after 2013. We can exclude from our discussion the 2016 MoU on cross-border supervision which does not include the ECB as a signatory.

<sup>103</sup> Recitals 55 and 74, and Article 27(1) of the Regulation.

<sup>104</sup> 2018 MoU para. 13

<sup>105</sup> Need to cross-reference

professional secrecy requirements.<sup>106</sup> By referring to both of these Regulations, the MoU ensures that both parties are covered in terms of confidentiality obligations. The SSM Regulation is also mentioned in the 2016 MoU between the ECB and authorities of Nordic countries on prudential supervision of significant branches. Other relevant EU law which establishes confidentiality requirements in the context of the 2015 MoU (as revised in 2018)<sup>107</sup> includes the Capital Requirements Directive<sup>108</sup> and the Banking Recovery and Resolution Directive.<sup>109</sup> Each of these Directives covers confidentiality obligations which apply both to the ECB (in the context of banking supervision)<sup>110</sup> and to national authorities, bodies, and individuals, acting under the Directives and thus, arguably, also when acting under the MoU.<sup>111</sup> Lastly, the two remaining public MoUs containing confidentiality clauses<sup>112</sup> are concerned with the exchange of statistics and hence refer to the relevant, detailed, confidentiality regime set out in Council Regulation 2533/98.<sup>113</sup>

Moving on, the third layer of obligations that may be imposed on the parties upon the signature of an MoU consists of national legislation. The 2008 MoU on cross-border financial stability, for instance, states that ‘any information exchanged and received by virtue of the application of the provisions of this [MoU] is subject to conditions of confidentiality and professional secrecy as provided in Community *and national legislation*.’ A similar clause is included in the 2016 MoU on the supervision of significant branches.<sup>114</sup> Although subjecting the application of the MoU provisions to both EU and national rules creates a double layer of protection, what remains unclear is which rules of confidentiality shall prevail in case of inter partes dispute. In spite of the fact that one may rush to conclude that EU rules on confidentiality would preempt national ones, the degree to which confidentiality is respected as a general principle of EU law and specifically in the context of enforcement proceedings is unclear. There are no CJEU guidelines, for instance, as to whether in case of dispute a national court shall refrain from disapplying an inconsistent national confidentiality provision with EU law. The CJEU’s case law is in short supply in this regard and does not provide any

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<sup>106</sup> Recitals 116, 117, Article 88.

<sup>107</sup> Paragraph 48 of the MoU.

<sup>108</sup> Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC (2013) OJ L 176/338 (Hereafter ‘CRD IV’).

<sup>109</sup> 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 (2014) OJ L 173/190 (hereafter ‘BRRD’).

<sup>110</sup> Articles 9 and 27 SSM Regulation.

<sup>111</sup> From the CRD: Recital 29 and Section II (Articles 53 - 62). From the BRRD: Recitals 36, 86, Article 84, esp. Article 98 on exchange of confidential information. The link between the MoU and these two Directives is apparent from paragraph 8 of the MoU, which states that ‘for the purposes of this [MoU] the terms and expressions have the same meaning as in Directives 2013/36/EU and 2014/59/EU, unless stated otherwise’.

<sup>112</sup> The 2013 MoU between the ECB and the European Statistical System, and the 2017 MoU between the ECB and the US Office of Financial Research.

<sup>113</sup> Council Regulation (EC) No 2533/98 of 23 November 1998 concerning the collection of statistical information by the European Central Bank (1998) OJ L 318/8, as amended, Article 8.

<sup>114</sup> The MoU states ‘Any confidential information will be exchanged in accordance with relevant national and Union law.’

answers as to the extent to which national judges shall proceed with an interpretation that is in par with a general principle of EU law emanating from the protection of rights under EU law which arise from breaches of contractual duties of confidentiality.

By contrast, the wording of the respective MoUs suggests that Member States are allowed to lay down their own confidentiality and professional secrecy rules. Their competence to do so, however, shall be exercised in a way which is commensurate with their membership obligations in light of their duty of sincere cooperation under Article 4(3) TEU. The CJEU has traditionally emphasised the Member States' duty of loyal cooperation - i.e. if the situation is covered by the material scope of EU law, Member States ought to exercise their competences in accordance with EU law.<sup>115</sup> This means in effect that the rules on confidentiality and professional secrecy as provided by EU law may supersede national legislation on the same issue in the Member States if the effectiveness of EU law is at stake. The case will of course be different where reference to national legislation on confidentiality concerns the law of a third country (see for e.g. the MoU between the ECB and the US Office for Financial Information). In any case, professional secrecy in banking supervision at the national level is largely harmonised through the Credit Requirements Directive (CRD IV) and the BRRD, as explained above. Moreover, in this field the ECB also has to apply relevant national law according to Art 4 (3)(3) of the SSM Regulation. Thus, national confidentiality provisions transposing the CRD and the BRRD into national law may be conceived also as provisions to be applied by the ECB.

The discussion so far is telling in that, in certain instances, there is a whole scope of legal acts behind a Memorandum, which give teeth to the MoU's confidentiality and professional secrecy clauses. The analysis also leads to a question which looms over the discussion regarding confidentiality clauses in MoUs: what happens with the MoUs that are not supported by a secondary act? Is it necessary to have a scaffolding of secondary law behind the MoU for a confidentiality clause to 'bite'? Or are the provisions of the MoU on their own sufficient to create a regime that protects the confidentiality of the information exchanged between the signatories? These considerations are pertinent to understanding the legal nature of the MoUs but also for the purposes of legal clarity and legal certainty. Lack of precision as to the obligations of the parties and the scope of these obligations might lead to uncertainty among the parties, especially about the consequences that may follow a breach of these obligations.

Against the above background, the coexistence of confidentiality clauses and 'disclaimer clauses' is particularly noteworthy and, we might even say, slightly puzzling. If a document contains a confidentiality clause, like the ones mentioned above, but it simultaneously contains a 'disclaimer clause' refuting the legally binding nature of the document, what guarantees to each signatory that confidentiality will be maintained by the other party?

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<sup>115</sup> See for instance: C-369/90 *Micheletti* [1992] ECR I-4239; Opinion of A.G. Maduro in C-135/08 *Rottmann* [2010] ECR I-1449; C-446/03 *Marks & Spencer Plc* [2005] ECR I-10837; C-148/02 *Garcia Avello* [2003] ECR I-11613; C-192/05 *Tas Hagen* [2006] ECR I-10451. See also on the duty of sincere cooperation: G. De Baere and T. Roes, 'EU loyalty as good faith' (2015) 64 (4) *International & Comparative Law Quarterly* 829.

Ultimately, what obliges the signatories to comply with their confidentiality or professional secrecy obligations under the Memorandum if there is no enforcement mechanism in place? What happens in case a party breaches its obligations in this respect?

These reflections take us to a broader question which can be asked about the MoUs which include any of the above types of disclaimer, context, settlement, and confidentiality clauses: to what extent are these clauses capable of achieving their objectives? As seen above, the phrasing used in the Memoranda with regard to their legal nature often conflates ‘intention’ with ‘effects’, by implying that: because the parties do not intend to create any legally enforceable rights by signing the MoU, the document is not legally binding. Yet, it is worth asking whether the one (intention) necessarily determines the other (effects) and whether a clause is sufficient to dispose of any legally binding effect of a document - in our case of a Memorandum. These reflections take us to another query, i.e. whether the nature of the Memoranda may inhibit the achievement of their objectives as a whole, regardless of whether we are talking about the exchange of statistics or the cooperation on banking supervision between the ECB and third actors.

### **III. An Analytical Framework for the use of MoUs by the ECB**

Our discussion so far has, perhaps, raised more questions on the subject of the use of MoUs by the ECB than expected by the reader. Bringing together the above theoretical discussion and empirical exploration, this section will attempt to create a typology of issues that arise in the existing MoUs and that may arise in the future practice of the ECB - and, potentially, of other institutions - with these instruments.

To begin with, we can summarise the four areas discussed in Section II where issues arise and are likely to arise in the future with the use of MoUs by the ECB. The first is the MoUs’ attempt to stipulate their legal nature, which leads to a consideration of whether the signatories can effectively repudiate any legal effects that may result from signing a Memorandum. The second matter deals with the position of the MoUs in the existing legal framework and provokes questions as to the differences between Memoranda that are rooted in secondary legislation and those that are not. The third concerns the way in which the parties solve any disagreements that may arise under the Memorandum. Finally, the fourth area of concern is the use of confidentiality and professional secrecy clauses in almost all the publicly available MoUs, which brings into question the effectiveness of these clauses given the uncertain enforceability of the MoUs.

These four areas are the pillars of our proposed analytical framework; any attempt to sketch the framework needs to tackle the most pertinent questions that arise from these areas. The lack of case law and the scarce literature on the status of MoUs in EU law - discussed in Part I - do not assist our task as they deprive us from any solid lessons that could have been drawn from these sources. Two recent AG Opinions, however, are of particular interest. The first is, AG Sharpston’s Opinion in Case C-660/13 and the second is AG Bobek’s Opinion in Case C-



16/16.<sup>116</sup> One might argue that we should be wary of relying too heavily on these two Opinions, which were not strictly speaking referring to MoUs signed by the ECB and were not followed per se by the ECJ in its respective rulings. Nevertheless, we find that the reasonings behind the Opinions go to the heart of one of the central concerns of our paper, namely whether an act perceived as non-binding by its parties can still have (binding) legal effects.

Given the lack of any concrete rulings by the CJEU on the subject of the binding nature of MoUs, and since the ECJ in the two cases above (C-660/13 and C-16/16) did not expressly or entirely dismiss the opinions of the Advocate Generals on the particular topics, we can utilise these reasonings as focal points in setting our analytical framework. What makes the Opinions particularly compelling in the context of the current paper is that each Advocate General deals with two separate types of acts / instruments, both of which are relevant to MoUs signed by the ECB. AG Bobek discusses the so-called ‘atypical acts of EU institutions’ while AG Sharpston focuses on MoUs signed by the Commission with a third country. As we will see below, both these types of instruments bear resemblance and are relevant to the MoUs signed by the ECB. This observation illustrates once again the fluid nature of these Memoranda.

Sharpston’s Opinion is targeted at the admissibility of MoUs in a challenge under Article 263 TFEU. The Advocate General engages with the question of whether an MoU between the Commission and Switzerland, and its subsequent addenda, might have legal effects or consequences despite both parties having expressed their intention not to be bound by them as a matter of international law. She considers this question as something that must be clarified in order to decide on the admissibility of the case before the CJEU under Article 263 TFEU, given that Article 263 TFEU provides for the Court to review the legality of acts of the Commission (other than recommendations and opinions) intended to produce legal effects vis-à-vis third parties.

As she explains, what matters in proving the binding effect of an agreement ‘depends on the parties’ intention to be bound by it as a matter of international law’. To establish that intention, one has to look into *the actual terms of the agreement* and *the circumstances* in which it was drawn up. The name and form of the agreement are not decisive in establishing whether an international agreement is non-binding. In deciding whether parties intended to be bound by their signatures, consideration must be given to the terminology of the agreement: were the terms used expressing intent (e.g. using verbs such as ‘intent to’, ‘accept to’) or obligation (‘shall’, ‘must’, ‘undertake’)? Did the MoU contain clauses that brought them closer to binding than non-binding agreements, such as clauses regarding their entry into force, ratification, registration or deposition elsewhere, or the settlement of disputes? In the case at hand, even though the MoU in question contained a disclaimer that the parties did not intend to create any binding or legal obligations on either side under domestic and

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<sup>116</sup> AG Sharpston Opinion in Case C-660/13 *Council of the EU v Commission* [2015] ECLI:EU:C:2015:787; AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959.

international law, Sharpston still opined that the agreement in question produced legal effects and could be reviewed under Article 263 TFEU.

One must be careful when drawing parallelisms between case law concerning similar matters but different institutions. One of the tenets of Sharpston's argument was that the Commission had signed the addendum to the MoU in question *on behalf of* the European Union. The ECB does not hold the same role of the 'guardian of the Treaties' or that of 'the face of the EU in external relations' as the Commission does. Specifically, Article 17(1) TEU provides that 'with the exception of the common foreign and security policy, and other cases provided for in the Treaties, it [the Commission] shall ensure the Union's external representation.' Conversely, it is difficult to argue that, when signing an MoU, the ECB is representing the Union as a whole and not itself as an institution. It is also relevant here that, at least in the field of financial supervision, secondary legislation stipulates that the ECB may 'develop contacts and enter into administrative arrangements with supervisory authorities, international organisations and the administrations of third countries' and that 'those arrangements shall not create legal obligations in respect of the Union and its Member States'.<sup>117</sup>

Even so, the AG's guidance, set out above, on the factors that are taken into consideration by the CJEU when looking into the legal effects of an allegedly non-binding instrument should also inform the practice of the ECB when drafting Memoranda. The same can be said about lessons drawn from case law regarding the test to determine legal effects for acts that are not MoUs. In this respect, we can highlight the CJEU's 'legal effects' test, according to which a measure adopted by an EU institution is reviewable by the CJEU under Article 263 TFEU when it is intended to have binding legal effects capable of affecting the interests of the applicants by bringing about a distinct change in the applicant's legal position.<sup>118</sup> In order to determine whether a measure produces such legal effects, the CJEU will look into its subject matter, content, and substance, as well as its factual and legal context.<sup>119</sup>

It is therefore apparent that the test to determine legal effect consists of a combination of factors. The intention of the parties is one of these factors but it does not necessarily seem to be the determining one. What is more, a word of warning must be given here about the emphasis that should be placed on the intentions of the drafters of an act, either that act is an MoU or any type of 'atypical act' that is not defined in the Treaties.<sup>120</sup> A loophole might be created if the legal nature of an act is judged predominantly on the basis of the drafters' intentions at the time when the act was adopted. Let us assume that the ECB had no intention of drafting a binding measure (e.g. a Regulation on banking supervision) to achieve a specific purpose. For this reason, it selected to draft an MoU instead. Because the ECB selected an MoU, its intent was for that instrument not to be binding. Because of this intent, which was validated by the choice of the instrument, the said instrument (in our case an MoU) can never be binding, irrespective of its content and wording, because the ECB did not intend to adopt

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<sup>117</sup> SSM Regulation Article 8.

<sup>118</sup> Case 60/81 *IBM v Commission* EU:C:1981:264 para 9.

<sup>119</sup> Case T-573/10, *Octapharma Pharmazeutika v EMA*, not published.

<sup>120</sup> *Commission v Council* (22/70 EU:C:1971:32 (hereafter 'ERTA judgment')).

any binding measures when it was adopting it.<sup>121</sup> In this way, the drafters risk pre-determining the context and purpose of an MoU as a result of choosing to act via an MoU in the first place. Placing an excessive attention on ‘intention’ as opposed also to ‘content’ and ‘wording’ might run the risk of creating this loophole.

There also seems to be a general confusion arising out of the CJEU’s jurisprudence as to whether an act which has ‘legal effects’ is also ‘binding’ or whether the two are separate characteristics of an act that need to be shown for an action challenging that act to be admissible under Article 263 TFEU. AG Bobek’s Opinion aptly illustrates this obscurity and offers some constructive thoughts on the distinction between ‘bindingness’ and ‘legal effects’. The Advocate General explains that the test to determine the admissibility of a claim challenging an ‘atypical act’ under Article 263 TFEU has been modified by the CJEU throughout the years. What started in *ERTA* as a requirement to show that the act was intended to have ‘legal effects’ has turned into a requirement to show that the act has ‘binding legal effects’, which is a more narrow test than the original criterion and implies a more narrow category of acts than those which have legal effect. Binding force implies that the act in question is coupled with enforcement and sanction mechanisms. By way of contrast, ‘legal effects’ connote acts that impact on the legal situation of their addressees or on their rights and obligations.<sup>122</sup> As a result of the confusing approach of the CJEU in its relevant case law,<sup>123</sup> one might be tempted to think that ‘binding’, ‘mandatory’, or ‘having legal effects’ are synonymous or identical characteristics of an EU act and by extension of MoUs signed by EU institutions or bodies. Yet, in reality, an act may be carrying legal effects without being binding on its parties.<sup>124</sup>

Based on the above considerations, on the one hand it is not implausible that a measure which was not intended to be binding by the EU institution that adopted it is found by the CJEU to have legal effects.<sup>125</sup> On the other hand, we do not expect a flood of litigation to arise under Article 263 TFEU vis-a-vis the MoUs signed by the ECB, mainly because of one big difference between these MoUs and measures that were adopted by an EU institution whose legal effects have been doubted in the past. Contrary to the latter, which are addressed by the institution to the respective addressee(s) (e.g. a Commission Recommendation), the former are primarily bilateral and express a common position of the parties to follow a stipulated course of action.

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<sup>121</sup> This argument is taken from AG Bobek’s Opinion in Case C-16/16, where he discussed the same loophole with regard to a Commission Recommendation in paras 78-79. AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959.

<sup>122</sup> AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959 paras 73,74,87, 109.

<sup>123</sup> AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959 paras 59-66.

<sup>124</sup> AG Bobek Opinion in Case C-16/16 *Belgium v Commission* [2017] ECLI:EU:C:2017:959 para 113.

<sup>125</sup> See recent decision in Case T-561/14 *One of Us v Commission* [2018] ECLI:EU:T:2018:210 where the Court found that a Commission’s Communication had legal effects. The Commission had argued that the Communication, due to its form and nature, was not intended to produce binding legal effects and that it was an act of the Commission which reflects the latter’s intention of following a particular line of conduct, such acts not having to be regarded as being intended to produce legal effects.

Nonetheless, whether it is realistic or not to expect litigation under Article 263 TFEU should not necessarily be the first consideration in the minds of the drafters of MoUs when they put together MoUs. In a Union based on the rule of law, EU institutions should comply with their legal obligations and should respect the confines of their powers irrespective of how little chance there might be for litigation. Moreover, in case of disagreements between the signatories, it is more likely that informal dispute settlement mechanisms will be preferred, even for those MoUs that do not stipulate this in their text. We accept, for instance, that if one party does not oblige to its obligations under the MoU (e.g. with confidentiality requirements) there might be policy / reputational considerations, or peer pressure by the other party which itself might even stop cooperating in response. Indeed, it is likely that disputes under MoUs have been resolved in this way so far. If worse comes to worse and there is no way to settle the differences between the signatories, the MoU will likely get renegotiated or abandoned.

However, the fact that there has not been litigation so far on our subject of analysis should not be seen as the norm for the future. We have observed earlier that MoUs are being signed for the first time by the ECB in the context of the Banking Union, and that MoUs have recently (i.e. after 2012 for the publicly available Memoranda) started being directly linked with secondary legislation. Both of these developments are relevant in considering the future of MoUs. The expansion of MoUs into the area of Banking Union will likely highlight even more the need for confidentiality on behalf of the ECB and the respective signatories in each MoU. Information is to be exchanged between the ECB and national or EU actors in the field of banking supervision, including that on the performance of large branches of credit institutions, supervisors' liquidity reports and recovery plans,<sup>126</sup> (group) resolution plans, as well as information collected on an institution subject to a “failing or likely to fail” assessment.<sup>127</sup> Those credit institutions may seek to challenge the basis on which such information is exchanged.<sup>128</sup> As we argued in the first section of this article, regardless of the legal effects of an MoU, signatories or third parties should not have problems with admissibility if they wish to seek damages under Article 340 TFEU.

Moreover, cases might arise under Article 267 TFEU, similarly to how an ECB Press Release<sup>129</sup> and an MoU on balance-of-payments assistance<sup>130</sup> found their way before the CJEU in the past. In a recent case, the investors of a company that was dissolved sought access to information about the company, which was confidential under the 2004 Markets in Financial Instruments Directive.<sup>131</sup> The national supervisory authorities refused access to that information.<sup>132</sup> Along similar lines as this case and in light of the increased need for

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<sup>126</sup> 2016 MoU between Sweden, Norway, Denmark, Finland, and the ECB on prudential supervision.

<sup>127</sup> 2015 SRB - ECB MoU as revised in 2018.

<sup>128</sup> For a recent case on confidentiality requirements under Article 53(1) of the CRV IV see Case C-594/16 *Buccioni* [2018] ECLI:EU:C:2018:717.

<sup>129</sup> Case C-62/14 *Gauweiler v Deutscher Bundestag* [2015] ECLI:EU:C:2015:400.

<sup>130</sup> Case C-258/14 *Florescu v Casa Județeană de Pensii Sibiu*, [2017] ECLI:EU:C:2017:448

<sup>131</sup> Case C-15/16 *Bundesanstalt für Finanzdienstleistungsaufsicht v Ewald Baumeister* [2018] ECLI:EU:C:2018:464.

<sup>132</sup> Directive 2004/39/EC on markets in financial instruments (2004) OJ L 145/1.

confidentiality sketched above, we can think of the situation where a significant financial institution based in a Eurozone Member State (ie member of the Banking Union) is resolved and investors of that institution are seeking access to information exchanged between the ECB (as the supervisor of the institution) and the SRB under the SRM Regulation read together with the 2018 MoU on cooperation and information exchange between the two institutions. It is not improbable that this scenario could lead to a preliminary reference request from a national court.

Considerations over confidentiality obligations also extend beyond the potential for litigation against the ECB. If we flip our point of view, the ECB itself may have reasons to be concerned about the situation where the other party/ies to a Memorandum do not follow the confidentiality requirements that are applicable to them. Situations whereby confidentiality requirements are not complied with may jeopardise not only the data exchanged between the signatories, but also the effectiveness of the Memorandum in achieving its objectives and potentially the objectives of any underlying EU legislation. In this respect, it might be useful to refer to the discussion in Section II on how different parties to a Memorandum are bound by confidentiality obligations.

The potential for non-compliance with the confidentiality regime applying to MoUs is also connected with the second development identified above, namely the link between an MoU and secondary legislation. We can argue that an MoU which is directly linked to a Regulation or a Directive, especially one that mandates the conclusion of the Memorandum, should be interpreted differently from other MoUs that were adopted on the initiative of the signatories. This distinction is based on the fact that the former type of MoUs can be considered as an extension of the secondary legislation. These MoUs are bound to increase in number due to newly adopted Banking Union legislation that either expressly requires the conclusion of MoUs with competent authorities of Member States<sup>133</sup> or requires close cooperation between the ECB and relevant financial supervision actors.<sup>134</sup>

The interpretative differences among different Memoranda may lead to a different application of the ‘legal effects’ test on MoUs insofar as secondary legislation constitutes part of some Memorandum’s legal background and creates obligations for the ECB to adopt them.<sup>135</sup> We saw previously that the CJEU recently characterised an MoU as an EU act where that MoU was directly connected to secondary EU legislation i.e. an EU Regulation and a Council Decision which *required* the adoption of the said MoU.<sup>136</sup> We raised then the question of whether an MoU would have been heard by the CJEU under Article 267 TFEU if it were not connected to these ‘typical acts’. Along similar lines, we can also question whether an MoU not directly connected to secondary EU law would have the same treatment by the CJEU as an MoU that was signed upon the initiative of the parties.

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<sup>133</sup> SSM Regulation Article 3(1), Article 3(6).

<sup>134</sup> SSM Regulation Article 3, SRM Regulation Article 32(2).

<sup>135</sup> On how this obligation could affect the legal effects test, see Case T-561/14 *One of Us v Commission* [2018] ECLI:EU:T:2018:210 paras 66-101.

<sup>136</sup> See discussion in Part I on the CJEU’s treatment of an MoU in the *Florescu* case.

A recent – although unrelated to EMU – case illustrates this consideration with regard to the connection between a Commission Communication and Treaty-embedded rights. In the *One of Us* case, a group of individuals challenged a Commission Communication under Article 263 TFEU. The Communication stated that the Commission would not act upon the individuals' European Citizens' Initiative (ECI). According to the Commission, the Communication, due to its form and nature, was not intended to produce *binding legal effects* and that it merely reflected the Commission's intention of following a particular line of conduct. According to the General Court, however, the Communication expressed the refusal of the Commission, which affected the citizens' (substantive) right derived from the Treaty (Article 11(4) TEU) and the corresponding procedural guarantees afforded to the organisers through the ECI Regulation<sup>137</sup>. Not submitting the Communication to judicial review would compromise the realisation of the Treaty objectives (set out in Article 11(4) TEU). Moreover, the procedural guarantees for the organisers expressed in the secondary law instrument (ie the ECI Regulation) implied that the communication produced binding legal effects with regard to its addressees.

Along these lines, we can argue that it does matter for the purposes of the CJEU's approach whether an MoU is rooted in EU secondary law, and all the more so when this link is traced back to rights embedded in the Treaty. In the context of the current paper, these connections between Treaty-secondary law-MoUs are relevant insofar as some of the MoUs examined in Part II are directly linked to EU Regulations or EU Directives. Beyond the bounds of the judicial realm these connections are also relevant when considering the practical obligations of the parties to enter into MoUs. Assume here, for a minute, that the ECB concludes an MoU with a non-participating Member State under Article 3(6) of the SSM Regulation. This Article requires the ECB to do so, rather than merely giving it the option to conclude an MoU. Assume now that a disagreement arises under the said MoU because the non-participating Member State has breached one of the promises they made in the text of the MoU. Without a legal enforcement mechanism to solve this disagreement, the parties are likely to resort to informal mechanisms, such as peer pressure, as we pointed out earlier in the paper. Worst come to worst, we said, the parties will dissolve the MoU. But, in this scenario, the MoU is mandated by EU secondary legislation. It is therefore questionable whether the ECB would be able to get out of the text of the MoU without being in breach of its obligations under the SSM Regulation.

## Conclusion

Part III of this paper emphasised that, beyond the legalistic considerations over potential litigation, there is a bigger, overarching issue to be highlighted regarding the MoUs. As seen overall in this paper, the uncertain legal character of the MoUs, which evade blanket categorisations, leads to questions of enforcement or, in other words, of how to ensure the achievement of an MoU's goals. We have attempted to shed light on certain areas of concern

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<sup>137</sup> Regulation 211/2011 of 16 February 2011 on the citizens' initiative (2011) OJ L 65/1.

pertaining to the use of MoUs by the ECB and to map a potential analytical framework for conceptualising MoUs. Given these concerns, perhaps the ECB, as well as any EU institution, should consider on a case-by-case basis whether an MoU is the appropriate instrument to achieve the desirable objectives.

## ANNEX I

### List of MoUs signed by, or involving the ECB<sup>138</sup>

Name of MoU	Date of Signature / Entry into effect	Full text publicly available?	Source of where available
MoU on cooperation between payment systems overseers and banking supervisors in stage three of economic and monetary union	2 April 2001 (Entered into force retroactively on 1 January 2001)	No	<www.ecb402.en.htm>
MoU on a Code of Conduct for the members of the Governing Council <sup>139</sup>	May 2002	Yes	<www.ecb/en0006000>
MoU between ECB and the People’s Bank of China <sup>140</sup>	September 2002	No	Source of information <https://www.ecb.europa.eu/press/pr/date/2002/html/pr020923.en.pdf?00>
MoU on Economic and Financial Statistics between the ECB (DG Statistics) and the European Commission (Eurostat)	10 March 2003	Yes	<https://www.ecb.europa.eu/press/pr/date/2003/html/pr030310.en.htm?with_euros>
MoU on high-level principles of cooperation between the banking supervisors and central banks of the European Union in crisis management situations <sup>141</sup>	Entry into effect on 1 March 2003	No	<www.ecb310_3.en.htm>
MoU on the exchange of information among credit registers for the benefit of reporting institutions	10 March 2003 (publication of Press Release)	Yes	<www.ecb310_2.en.htm> Full text N
MoU on co-operation between the Banking Supervisors, Central Banks and Finance Ministries of the European Union in Financial crisis situations	18 May 2005 (entered into effect on 1 July 2005)	No	<www.ecb518_1.en.htm>
MoU on cooperation between the financial supervisory authorities, central banks, and finance ministries of the European Union on cross-border financial stability	1 June 2008	Yes	<www.ecb/financialstability>
MoU on Target2-Securities	16 July 2009	Yes	<www.ecb/d21826f32>

<sup>138</sup> Please note that this is not an exhaustive list of MoUs concluded by the ECB, but only reflects publicly available information on concluded MoUs. Press Releases on the majority of these MoUs, including links to the full texts of Memoranda (where these are available) are accessible at: <www.ecb.europa.eu/press/pr/date/2018/html/index.en.html>

<sup>139</sup> See the amendments by the 2006 ‘Memorandum of Understanding on the Memorandum of Understanding on a Code of Conduct for the members of the Governing Council’, published in the Official Journal (2002) OJ C 123/9.

<sup>140</sup> According to the 2008 ECB Annual Report this MoU was renewed in 2008.

<sup>141</sup> See also the Press Release on the adherence of the central banks of the new Member States, Bulgaria and Romania to this MoU on 1 August 2007.



MoU on the Exchange of Information among National Central Credit Registers for the purpose of passing it on to reporting institutions <sup>142</sup>	April 2010	Yes	<www.ecbregisters2018/Discontinuation/Discontinuation.html>
MoU between the ECB and the Central Bank of the Republic of Turkey	4 July 2012	No	<www.ecb.int/press/pr/2012/704.en.htm>
MoU between the ECB and the Bank of Russia	30 October 2012	No	<www.ecb.int/press/pr/2012/030_2.en.htm>
MoU between the Council of the European Union and the ECB on the cooperation on procedures related to the Single Supervisory Mechanism (SSM)	December 2013	Yes	<www.ecb.int/press/pr/2013/ucouncil_en.htm>
MoU on the cooperation between the Members of the European Statistical System and the Members of the European System of Central Banks	24 April 2013	Yes	<www.ecb.int/press/pr/2013/he_ess_and_esms.htm>
MoU between the ECB and the Reserve Bank of India	12 January 2015	No	<www.ecb.int/press/pr/2015/112.en.htm>
MoU on adapting banknote equipment to the new 20 EUR banknote	23 July 2015	No	<www.ecb.int/press/pr/2015/723.en.htm>
MoU between the Single Resolution Board and the ECB in respect of cooperation and information exchange <sup>143</sup>	22 December 2015	Yes	<https://srb.europa.eu/media/10000/attachment_data/data/20151222/20151222_srb_cooperation_and_information_exchange.pdf> (20151222)
MoU between the European Securities and Markets Authority (ESMA) and the ECB	8 February 2016	No	<www.esma.europa.eu/news/esma-ecb-exchange-information>
MoU between the ECB and Banco Central do Brasil	15 April 2016	No	<www.ecb.int/press/pr/2016/416.en.htm>
MoU between Eurostat and the ECB/ DG Statistics on the quality assurance of statistics underlying the Macroeconomic Imbalances Procedure	7 November 2016	Yes	<https://ec.europa.eu/eurostat/infopublication/2016/12/22897/Financing%20of%20the%20Macroeconomic%20Imbalances%20Procedure%20-%20MoU%20between%20Eurostat%20and%20the%20ECB%20-%20DG%20Statistics%20on%20the%20quality%20assurance%20of%20statistics%20underlying%20the%20Macroeconomic%20Imbalances%20Procedure%20-%2020161107.pdf>
MoU between Finansinspektionen (Sweden), Finanstilsynet (Norway), Finanstilsynet (Denmark), Finanssivalvonta (Finland) and the ECB on prudential supervision	2 December 2016	Yes	<www.fktl.fi/media/10000/attachment_data/data/20161202/20161202_mou_between_ecb_and_finanstilsynet_finanstilsynet_finanssivalvonta_fktl.pdf>

<sup>142</sup> This MoU was discontinued in September 2018 upon the mutual understanding of all parties in light of the imminent establishment of AnaCredit, a dataset that will provide the information in a harmonised manner across all Member States. <https://www.ecb.europa.eu/press/govcdec/otherdec/2018/html/ecb.gc180928.en.html>

<sup>143</sup> This MoU was revised on 30 May 2018.

supervision of significant branches in Sweden, Norway, Denmark and Finland <sup>144</sup>			ial%20sup es%20in%
MoU between the Finnish, Norwegian and Swedish Ministries of Finance and the Danish Ministry of Business on cooperation regarding significant branches of cross-border banking groups	9 December 2016	Yes	<www.reg 4d78a87ba
MoU concerning consultation, cooperation and the Exchange of Information between the Office of Financial Research and the ECB	30 May 2017	Yes	< www.ecf OFR_conc change_of_ 70e76d671
MoU between the ECB and the South African Reserve Bank	19 March 2018	No	<www.ecb r180319.er

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<sup>144</sup> See also Accession to the MoU of the competent authorities of Estonia, Iceland, Latvia, and Lithuania in April 2017.

## ANNEX II

<b>Publicly available MoUs containing confidentiality clauses<sup>145</sup></b>							
<b>Signatories of the MoUs containing confidentiality clauses</b>							
	<b>MoU</b>	<b>ECB</b>	<b>NCBs</b>	<b>National Authorities</b>	<b>EU body</b>	<b>Third-country body</b>	<b>Clause ‘comm legisla</b>
1	<b>2008 on cross-border financial stability</b>	X	X	X (Financial Supervisory Authorities, Finance Ministries, other ministries)			Yes ‘Comm legisla
2	<b>2009 Target2</b>	X	X (of the eurosystem)	X			No, re: applica ECB’
3	<b>2010 on the exchange of info among national central credit registers for the purpose of passing it on to reporting institutions</b>	<i>Not a party but will store the MoU, the Implementation Guide, and may be consulted in case of doubts or uncertainties with the MoU</i>	X (of Austria, Belgium, Czech Republic, France, Germany, Italy, Portugal, Romania, and Spain)				‘Confid profes provisi superv Party’ such u
4	<b>2013 with the Council on the SSM</b>	X			X (Council of the European Union)		
5	<b>2013 with the European Statistical System</b>	X (MoU refers to the ESCB)	X (MoU refers to the ESCB)	X (National statistical institutes (NSIs) and other national	X (Commission – Eurostat. MoU refers to the	X (European Statistical System includes EEA	Confid out in Regula sets ou confid

<sup>145</sup> The list reflects information only about n those MoUs whose full text is publicly available online.

				authorities. MoU refers to the Members of the European Statistical System)	Members of the European Statistical System)	and EFTA countries: Iceland, Norway, Switzerland, Liechtenstein)	
6	<b>2015 with the SRB (revised in 2018)</b>	X			X (Single Resolution Board, which is an EU agency)		
7	<b>2016 between the Finnish, Norwegian and Swedish Ministries of Finance and the Danish Ministry of Business</b>	<i>Not a signatory, but affected by this MoU due to its supervisory tasks.</i>		X (Denmark, Finland, Sweden)		X (Norway: Seen in the MoU together with the other three countries as ‘the Nordic countries’)	
8	<b>2016 with Finnish, Norwegian, Swedish, and Danish authorities on prudential supervision of significant branches</b>	X		X (Denmark, Finland, Sweden)		X (Norway)	Yes, Any co inform exchar with re Union The pa that all with, c confid are bo obligat secre; the app -Mayb
9	<b>2017 With the Office of Financial Research</b>	X				X US Office of Financial Research	

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