

### **EUI Working Papers**

LAW 2012/09 **DEPARTMENT OF LAW** 

ANOTHER LEGAL MONSTER?
AN EUI DEBATE ON THE FISCAL COMPACT TREATY

Loïc Azoulai, Miguel Poiares Maduro, Bruno De Witte, Marise Cremona, Anna Hyvärinen, Anna Kocharov, Anwar Abdallat

Edited by Anna Kocharov

## EUROPEAN UNIVERSITY INSTITUTE, FLORENCE DEPARTMENT OF LAW

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ISSN 1725-6739

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Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

#### **Abstract**

On 1 February 2012, member states of the European Union minus the United Kingdom and the Czech Republic agreed on the text of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the Fiscal Compact Treaty or FCT), subsequently signed on 2 March 2012. The new international treaty poses a number of questions on compatibility with EU law, implications for the Union legal system, institutional balance, national sovereignty and democratic accountability. The EUI debate on the FCT addressed some of these issues.

#### **Keywords**

Fiscal Compact Treaty – Economic Governance – EU Legal Order

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#### TABLE OF CONTENTS

FOREWORD	
Anna Kocharov	1
THE DEBATE: OPENING STATEMENTS	3
Loïc Azoulai	3
Miguel Maduro	3
Bruno De Witte	6
Anna Hyvärinen	8
Marise Cremona	9
DISCUSSION	11
POSTSCRIPT: A MATTER OF TRUST	
Anna Kocharov	
ANNEX: CONCISE BACKGROUND OF THE FISCAL COMPACT	
Anwar Abdallat	20
Comparison Table of Key Provisions of the Fiscal Compact Treaty	24

### ANOTHER LEGAL MONSTER? AN EUI DEBATE ON THE FISCAL COMPACT TREATY

#### **FOREWORD**

This publication is based on the debate, which took place at the Law Department of the European University Institute on 16 February 2012. Not very much was available on that date on the then brand new Fiscal Compact Treaty (FCT)<sup>1</sup>, making the debate especially topical. The background reading distributed to the participants included a report of the UK House of Lords "The Euro Area Crisis" supplemented with oral and written evidence by Giuliano Amato (former Prime Minister of Italy), Edward Carr (The Economist), Professor Paul Craig, Charles Grant (Centre for European Reform), The Rt Hon David Lidington MP (Minister for Europe), Professor Steve Peers, and Olli Rehn (Vice-President of the European Commission). Many places in the discussion refer specifically to this report.

The main themes can be summarized as follows. First, there are legal consequences following from the international law nature of this treaty: adoption of the FCT does not need to follow the procedure for amending the Union Treaties, not all Member States of the EU must take part, while the resulting treaty can enter into force upon the ratification, in this case, by only twelve Member States; it does not enjoy primacy of EU law and does not have direct effect in the national legal orders, making the rules contained in this treaty less enforceable than Union law; the validity of its provisions is subject to compliance with EU law, including the duty of cooperation, and this is a mobile clause, meaning that also any future modifications of EU law will prevail over the FCT; finally, in this international law setting where not all Member States are onboard, questions may arise regarding the use of Union institutions and attribution to them of extra tasks. Second, there appears to be a consensus that in substance the FCT does not add very much to the governance of the Euro zone: it is primarily a political document that restates much of what had already been in place under the "Six-Pack" rules in Union law. The principle novelty breaking with EU law and, indeed, with one of the main principles of international law, could be the possible departure from the principle of equality of Member States. The German Constitutional Court in its Greek bailout judgment<sup>4</sup> stated that under the German Constitution, "the decision on revenue and expenditure of the public sector [must] remain in the hand of the German Bundestag as a fundamental part of the ability of a constitutional state to democratically shape itself. As elected representatives of the people, the Members of Parliament must remain in control of fundamental budget policy decisions in a system of intergovernmental governance as well." It would therefore appear impossible for Germany to ratify a treaty that imposes on its people budgetary rules other than those decided by the German people itself. Yet, this is exactly what the signatory states undertake to do under the FCT: to accept budgetary rules that do not result from the national democratic deliberation. This creates inconsistency between the position of Germany, where such rules exist as the emanation of the German people, and where the logic of the Bundesverfassungsgericht seems to preclude ratification of treaties imposing budgetary rules, and the other signatory states, who are expected to accept such rules (as a precondition for financial aid) not as a result of their democratic process but pursuant to an international agreement. Third, the practicality

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<sup>&</sup>lt;sup>1</sup> Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, http://european-council.europa.eu/media/639235/st00tscg26\_en12.pdf (03.03.2012).

<sup>&</sup>lt;sup>2</sup> House of Lords, European Union Committee, 25th Report of Session 2010–2012, *The Euro Area Crisis*, www.publications.parliament.uk/pa/ld201012/ldselect/ldeucom/260/260.pdf and www.parliament.uk/documents/lords-committees/eu-select/euroareacrisis/Evidencevolume.pdf (29.02.2012).

<sup>&</sup>lt;sup>3</sup> See http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/898 (29.02.2012).

<sup>&</sup>lt;sup>4</sup> Judgment of the Second Senate of 7 September 2011, 2 BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, press release in English; www.bundesverfassungsgericht.de/pressemitteilungen/bvg11-055en.html (29.02.2012).

of fixing budgetary rules, e.g. in the national constitutions and in the Union Treaties, may be questioned for the excessive rigidity of this approach. Moreover, undertaking international obligations to set budgetary rules in national law, especially in national constitutions, could render future Union action in this area more difficult, thus breaching the duty of sincere cooperation in EU law. Fourth, the FCT is illustrative of the progressive and increasingly prevalent shift away from the Community method and alternative instruments in EU law towards a blend of inter-governmental agreements with the use of Union institutions and with the subsequent incorporation of the substance of these agreements in Union law. The early examples of this approach are the Social Agreement annexed to the Social Protocol of the Maastricht Treaty and the Schengen Agreement, which gave birth to the common immigration policy. The FCT therefore is not a new tool of European integration but yet another instance of Member States opting out of Union law for a more flexible and expedient solution but with practical use of Union institutions.

The discussion is followed by concluding remarks on the broader constitutional questions highlighted and unresolved by this treaty. A brief outline of the main developments leading to the FCT is found in the *Annex*.

Anna Kocharov

#### THE DEBATE: OPENING STATEMENTS

#### Loïc Azoulai:

I will make a statement to start the debate say why I think that the Fiscal Compact Treaty is a monster. There are many reasons why we can label this text a legal monster: it is poorly drafted; it does not fit with the body of EU law or at least there is some inconsistency there, which is an important question; and it risks to undermine the idea of the European Union. There are different legal issues to be discussed: the relationship with EU law; the relationship with national law and in particular constitutional law; constitutional integrity of the member states; the question of enforcement of the treaty and in particular the role of the Court of Justice; the role of the European Commission; the question of the jurisdiction of the Court of Justice; and the question of flexibility and differentiation which result from this text. Another thing that would be worth discussing is the picture of the European Union that emerges from this text: what picture of the European Union is reflected by this kind of agreement?

#### Miguel Maduro:

I do not have such a critical view of the treaty and its drafting. I think the drafters managed to do something that is not too bad in light of the very strong political constraints under which they were working. It must have been a difficult task for the poor lawyers who drafted this, and we have to take this into account. That said, let me now proceed to criticize the treaty...

The curious thing is that the strongest criticisms that we can make of this treaty are also what makes these criticisms less relevant. Several of the criticisms that are made of this treaty regard both its content but also the flexibility that it leaves, the weak enforcement mechanisms, and that it adds almost anything new. All true, But if so, why should we care about what is in the treaty?

The treaty has a political function – hopefully it will have a political function – and this is the value I assign to this treaty. It allows Mrs Merkel to sell in Germany certain things that she knows need to be done but that she is not able to sell to her own political public opinion otherwise. This, for me, is the goal of this treaty. It is not because European political leaders genuinely believe that this is what the markets want to end the crisis – they know that it is not the case – but they believe that this may have a political legitimating function with respect to the national public opinions. It is hoped that the political legitimating function of this agreement will then enable the politicians to take the measures that almost all economists long claim to be necessary. At least I hope that this is the understanding underlying this agreement.

But let us talk about the legal monstrosity that gives the title to this roundtable.

This agreement could have been adopted by enhanced cooperation and if it were adopted by enhanced cooperation it would have been much better because of several reasons:

- 1. it would allow a proper and more efficient use of EU institutions;
- 2. it would be the benefit from EU procedures and mechanisms of enforcement;
- 3. it would have allowed for a possible real enhancement of economic and political coordination, one of the purported ambitions to which, in the end, this treaty adds almost nothing.

Amendment of EU Treaties would have been even more preferable, though it was simply not possible because one of the Member States vetoed it. I think it was right of the other Member States not to accept the position of the United Kingdom, if I understand correctly what the position of the UK was. Although in the report form the House of Lords, the minister of European affairs of the UK refused to

articulate clearly what the conditions of the UK were, the indications given by the minister and what has been said is that the UK wanted a reintroduction in certain fields of competences of a veto right for the United Kingdom. I think this is unacceptable: one can only imagine the consequences if such precedent was open.

Since a treaty amendment was impossible, it was decided not to proceed through enhanced cooperation. The explanation for the latter seems to be that some member states, in particular Germany, thought that a treaty would be symbolically more powerful. This is ironic: symbolically more powerful but legally less so. May be it was thought that it might be more legitimate but I am not so sure whether it actually is. In any event, this is what was decided and this choice limited the ambition of this treaty.

On the one hand, this treaty is a restatement of the six-pack reform, of the legislation that was adopted already and of the appeals for further coordination on economic level at least among the states of the Euro area. All things already done. Even the Euro Summit has been taking place albeit in a less structured form. No hard core governance mechanisms have been introduced by this agreement. This agreement changes nothing in terms of reinforcing such mechanisms. There was even a talk about European economic government at some point. We remain very far from that.

On the other hand, this prevented what some had feared might be a negative consequence of the introduction of mechanisms of hard governance into the treaties: further inter-governamentalization of decision-making and of political and economic leadership in Europe. This might have been the case. Had they opted for a reform of the Treaties, one of the risks would have been stronger intergovernmentalization. In the end, things stay as they were except that the Commission is somehow actually reinforced by this agreement. In the end, when discipline is necessary, states go back to the "good old" community method...

The new role of the Commission could give rise to a possible legal challenge, as is evidenced in the report of the House of Lords, where it is questioned whether it is lawful to attribute new tasks to EU institutions. In reality, the agreement is carefully drafted not to seem that they give EU institutions new competences; it allows the institutions to do some things if they want to do them. The agreement is drafted in such a way that we can say that they are not expanding the existing competences of EU institutions: they say that the Commission might do, it can be asked to do, and if the Commission then decides to act, for instance to prepare a report, it will be within the discretion of the Commission and binding only politically. However, there are other aspects that in my view could be in tension with EU law despite the obligation of consistency, coherence and compatibility with EU law that one finds in the agreement.

The first aspect is nothing new introduced by this agreement but the reinforcement of an already existing practice under EU law, a practice that has never been discussed. I am talking about the fact that groups of Member States coordinate their actions and the positions that they are going to take in a particular area of EU competence and in a particular procedure of decision-making, organizing between themselves a kind of voting syndicate. This agreement reinforces the possibility of emergence of a voting syndicate and, in fact, makes it legally binding between those states: the Euro-plus states agree between themselves that they will deliberate and the object of this deliberation will determine a common position in some aspects of the Euro, such as sanctions. Is this compatible with EU law? Does it not affect the rights of other Member States? I have serious doubts. It is not a new practice but it now becomes legally binding for those states and I think it needs to be discussed.

Now, regarding the so-called "golden rule". There are many arguments in favour and against constitutionalizing budget discipline, and both can take a democratic form. The arguments in favour could be:

- 1. budget deficits for one state create externalities for the other states of the Euro area, and this justifies imposition of the budget rule in order to avoid these democratic externalities on the other states;
- 2. budgetary discipline also serves to prevent inter-generational democratic problems within a state because the current participants in the national democratic deliberation who decide on the deficit now are not the same ones who will pay for this deficit in the future. Budgetary decisions are always problematic from the democratic point of view. It does not mean that they are not good or are not good for future generations, they might be, but from the democratic point of view they are complicated because it is one group of people deciding on something that is, to a great extent, about another group of people.

The arguments opposing constitutionalizing budgetary discipline can be presented in democratic terms as follows:

- 1. constitutionalizing budgetary discipline restricts the scope of political action and political choices, and entrenches a particular conception of economic and fiscal policy;
- 2. this already problematic limitation at national level of future political deliberation, constitutionalizing budgetary discipline becomes even more problematic on the Union level because, for some people at least, it lies at the core of self-government and is necessary for the preservation of national democracy.

Here comes one of the most ironic aspects. The other day I was in Dublin and I was asked for advice on how to push for a referendum on the new treaty in Ireland, one of the prerequisites for a referendum being that the treaty affects the national constitution and the sovereignty of the Irish people. I replied that the strongest arguments would be the decisions of the German Constitutional Court. The Lisbon judgment, and even more so the Greek bailout judgment clearly say that budgetary policy is one of the core areas of the concept of self-government that is necessary to preserve national democracy and state sovereignty. So Germany insisted on a Treaty that can be constructed, in light of its own Constitutional Court, as violating the conditions for national democracy present in the constitution. It is true that Germany itself has such a limit in its own Constitution but this is because the Germans themselves decided to have it. What the German Constitutional Court says is that this kind of issues have to be nationally decided; if they are not nationally decided, then national democracy is no longer preserved. I do not agree to this view but I can't avoid the irony and wonder what will the German Constitutional Court say if called in to assess the compatibility of the agreement with the German Constitution. Finally, about drafting, which causes some perplexities as mentioned before. As I also said before, taking into account the constraints under which the agreement was drafted, a reasonable job was done. But there are some things that are rather bizarre for me, such as the concept of a "permanent rule": I do not know what it is. They say that the "golden rule" needs to be a "permanent rule" preferably of a constitutional nature. I have never seen a permanent rule. If anyone can give an example of a permanent rule, please let me know, I would be very interested. The closest thing to a permanent rule I know are the eternity clauses in some constitutions, such as the German constitution. Paradoxically, under the Fiscal Compact Treaty, this "permanent rule" does not need to be in a constitution, so it is a rule that is more permanent than the rules that are found at the core of a constitution even if it does not need to be in the constitution... I think the "translation" is: "we want something that is important, or at least we want people to believe that these rules would be important". However, if you look at the exceptions, a lot of flexibility has, in fact, been introduced. The "golden rule" may not even be silver.

The last ironic aspect is that from the point of view of enforceability this international treaty is weaker than EU legislation, than the six-pack legislation for example. Even if the Court of Justice is given jurisdiction to decide on the national implementation of the "golden rule", this international agreement is an international agreement. As such, one may claim that it does not benefit from supremacy or even direct effect.

#### Bruno De Witte:

As I agree with most of the things said by Miguel, I will try to make some additional, specifically legal, comments.

The nature of this document is that of an international treaty between less than all the member states of the European Union. The organizers of this event wonder whether this is a "legal monster", but in fact it is less unique than one would think. Perhaps it can be called a monster if you look at its content and disapprove of it, but the instrument itself, namely an agreement between some of the members of the EU, is something we have seen throughout the history of European integration though rarely between so many member states. I can think of one other example of an agreement concluded between almost all member states, namely the Agreement on Social Policy annexed to the Treaty of Maastricht. In Maastricht, 11 of the then 12 member states (the United Kingdom being the missing one) agreed to sign this Agreement, and a separate Protocol on Social Policy, concluded between all member states as part and parcel of the Maastricht Treaty, allowed the 11 to "use" the EU institutions.

Apart from this example, there are many other cases of what one could call partial agreements, that is: agreements between some but not all the member states. At the time the European Communities was created, one such agreement entered into force almost simultaneously, namely the Treaty establishing the Benelux Economic Union, and the EEC Treaty contained an express reference to it which basically authorized this partial agreement, whose content overlapped considerably with the EEC Treaty, as long as it went further than EEC law and none of its legal rules conflicted with EEC law. This explicit authorization is still in the Treaties today, namely in Article 350 TFEU. Later on, there were other examples, of which the most well-known were the Schengen Agreement and Schengen Convention that were initially concluded between a limited number of member states but whose membership later expanded without ever including all the EU countries.

If one looks more closely at those various partial agreements, two categories can be distinguished:

- 1. special interest agreements, when some member states have a special interest in something which the others do not share; take for example the protection of the environment of the Alps: only the member states whose territory is part of the Alps have an interest in concluding such an agreement, but the others not;
- 2. the "move forward" agreements that try to push forward the agenda of European integration in a situation where not all member states are ready to do so; this was the case with the Agreement on Social Policy and with Schengen, and this is the case now again with the Fiscal Compact Treaty: not all countries are prepared to take this (alleged) step forward in integration, and the conclusion of a separate international agreement allows them to do so..

The advantages of these instruments are readily apparent. They are based on the fact that EU member states are still sovereign states with the capacity to conclude international treaties. By concluding a separate agreement, its signatories can bypass veto positions for single countries that may exist under EU law. Another advantage is in relation to the entry into force: if you draw up a separate international agreement, you can also adopt specific rules for its entry into force, and in fact this Fiscal Compact Treaty allows for its entry into force if only 12 of its 25 future signatories will ratify it. This is not an unimportant detail of course because we can expect major difficulties at the ratification stage, for example in Ireland where a referendum will be held.

There are certain legal conditions for the conclusion of such separate agreements. First, they have to respect the primacy of EU law. The Fiscal Compact Treaty does so, as is made clear in the well-drafted Article 2(2): "The provisions of this Treaty shall apply insofar as they are compatible with the Treaties on which the Union is founded and with European Union law." This is a mobile conflict rule: it recognizes not only the primacy of EU law as it stands today but also as it might become in the future: if, for example, new provisions of secondary EU law will be enacted that conflict with the Fiscal Compact Treaty, they will prevail. A second condition is respect for the duty of sincere

cooperation: states cannot sabotage or undermine the functioning of the EU by concluding separate international agreements, and in that context the point raised by Miguel about the 'voting syndicate' could be controversial. The fact that the parties to the Fiscal Compact Treaty agree to vote in a certain way within the EU Council will indeed affect the operation of that EU institution, although one could add here that the same thing happens already now between the Euro area countries: the 'Ecofin' Council meetings are usually preceded by meetings of the ministers of finance of the Eurozone countries at which they agree on certain positions, and afterwards they vote together in the Council along those lines. So, there is in effect a voting syndicate of the Euro area countries. In my view, this facilitates decision-making in the Council and should not be considered a breach of the duty of cooperation; one could take the same view for the voting syndicate contemplated by the Fiscal Compact Treaty.

I now move on to the famous question of the 'borrowing' of the EU institutions. There is a major difference to be made, in this respect, between the Court of Justice and the other institutions. As we can read in the report of the House of Lords that was circulated before this meeting (The Euro Area Crisis, 25th report of session 2010-2012), Article 273 TFEU has been in the Treaty from the very beginning and it allows the member states to submit to the Court of Justice, "under a special agreement between the parties", "any dispute between Member States which relates to the subject matter of the Treaties". The subject matter of the FCT is indeed closely connected to the TEU and TFEU, and Article 8(3) of the FCT is expressly declared to be a 'special agreement' in the sense of Article 273 TFEU. This possibility of giving extra competences to the Court of Justice has been repeatedly used in the past, most famously perhaps in the Brussels Convention on jurisdiction and recognition of judgments (now replaced by the so-called Brussels-I Regulation), which was a separate convention concluded between the member states of the EC in which they created a preliminary reference procedure involving the Court of Justice, similar to but not identical with the general preliminary reference procedure provided by the EC Treaty..

But what about the other institutions? According to Article 13(2) TEU, the EU institutions shall act within the limits of the powers given to them under "the Treaties" (meaning: the TEU and the TFEU, and no other treaties). This would be a strong textual argument for the view that it is not possible to give any new competences to the Commission, the Parliament and the Council under separate international agreements such as this one. Although the powers or the tasks given by the FCT to the EU institutions are rather modest, some powers or tasks are indeed given to the Commission, to the Council and even to the European Parliament. One way to make sense of this is to distinguish between 'competences' and 'tasks'. What Article 13 TEU seeks to convey is that the competences of the institutions are fixed by the treaties; it does not exclude that extra tasks may be given to the institutions as long as those tasks fit within their competences. To explain this difference, a parallel can be made with secondary EU legislation, by which new tasks are often given to the Commission and the Council, e.g. to further implement a piece of legislation. Those tasks fit within the general constitutional mandate of those institutions but they are extra tasks, in the sense that they are not specified with so many words in the Treaties but are being gradually defined as EU law develops. In the present case of the FCT, this does not happen through secondary legislation but through a separate international agreement, the main difference being that, as Miguel already said, the Commission and the Council are under no obligation to perform those tasks but are free to accept them or not (although they will of course accept them...). Now, do those extra tasks defined by the FCT fit within their constitutional competences, as defined by the TEU and TFEU? Without having studied the FCT in great detail yet, my impression is that this is indeed the case: within the context of their competences in the field of Economic Union, as recently fleshed out by the 'six-pack' legislation, the institutions will also perform the tasks which are attributed to them under the FCT.

So, to conclude, whereas I agree that there was no legal or political need for this international treaty, I would also say that it does not raise major problems from an EU law perspective.

#### Anna Hyvärinen:

I will try to shed light on the history of this agreement. Last year, Germany was pushing very hard for a treaty amendment, and behind this there was a call for more discipline of the Euro-zone countries. Especially Finland and the Netherlands supported these calls, whereas most other member states thought that, instead, more solidarity is needed. Three main alternatives for treaty amendment were discussed:

- to amend Article 126 TFEU (the excessive deficit procedure);
- to amend Article 136 TFEU which is only applicable to the Euro-zone countries;
- to amend Protocol 12 on the excessive deficit procedure.

The December 2011 European Council was a turning point for these discussions. Before and even during these Council meetings, there were serious discussions and a push to amend the treaties. However, when the UK did not get all the safeguards it wanted and refused to sign, the other member states opted for having an international treaty instead. The speed of the negotiations on the new agreement was quite unusual, which may show in the end result, as was already mentioned. The first meeting took place just before Christmas. In the negotiations, there were three persons from each member state, three representatives of the EP, and – obviously – the Commission and Council legal service were also present. During the holidays, member states had a chance to deliver written comments on the first draft. The negotiations continued after the holidays and they only lasted two to three weeks, which is quite exceptional: the process was very fast. The agreement was finalized at the summit of the Heads of states in the end of January 2012. So you can imagine that the civil servants of both the member states and of the institutions were under an immense pressure when drafting this treaty.

Taking up the case of Finland, the good thing about our constitution is that it requires that the government inform the parliament on EU matters without delay. So there is a lot of public documentation, and it is even available on the internet. In this matter, only a few days after the first draft was issued, a detailed legal analysis was sent from the Prime Minister's Office to the Parliament; the latter actively discussed the issue and requested information on the negotiations, which is very good for democratic accountability.

In March 2012, the treaty will be signed and it will be time for ratifications. The treaty will enter into force quite soon. What is required is either the ratification of 12 Euro-zone member states or, failing that and past 1 January 2013, the ratification of any 12 member states. What is even more pressing is the clear link in the recitals of this treaty with the European Security Mechanism. In the future, a Euro-zone member state wishing to receive help from the ESM is invited to ratify this treaty and to transpose the balanced budget rule into its legislation. This is probably the most important point in the recitals of the new agreement.

What will become of this agreement? Some of its rules will be incorporated into the EU legislation, for example Article 6 FCT on debt issuance plans and Article 11 FCT on major economic policy reforms. In other words, some powers given to the Commission in the agreement will also become part of the secondary legislation very soon. This may facilitate the dilemma on the use of EU institutions in an international treaty such as the present treaty. In addition, Article 16 FCT contains the goal of incorporating these provisions into the EU legal framework; in practice, this means the EU Treaties. Further, the recitals provide that these rules will be incorporated in the EU Treaties as soon as possible. Within the first five years there will be an assessment of implementation. Then it will be discussed whether to make the new agreement a part of the founding treaties.

In my personal opinion, despite the good intentions, this may turn out to be somewhat counterproductive. Already Article 126 TFEU on the excessive deficit procedure is very detailed As demonstrated in the six-pack negotiations last year, member states wanted quicker and more efficient procedures, but there are limits on what can be done because of Article 126 TFEU. The situation

might become even more challenging if the new agreement with its many detailed rules is incorporated as such into the EU Treaties. It would set in stone certain things, which might be better placed in secondary legislation.

To conclude, I would like to point out the main features of this agreement:

- the debt ratio or the "golden rule";
- the automatic correction mechanism, which must be transposed into the national legislation;
- closer economic policy coordination between the Euro-zone countries here lies a potential controversy because economic policy is a matter of all 27 member states;
- governance arrangements. These do not go as far as particularly France would have wanted. However, I find it positive that now the arrangements are codified. Hopefully this will lead to preparing EU summits properly in the Euro-group. In the past, hasty preparations have been a problem.

Although the new agreement is a legal document in the form of an international treaty, personally I that it has the nature of a political document. There are certain articles, which are written as legal provisions but in many instances the language of the agreement resembles European Council Conclusions. To give some examples: the recitals; the phrasing "inviting" the Commission to act in different issues; Article 7 including a gentlemen's agreement on reversed qualified-majority voting (this is not really a legal rule but a specific voting commitment between the Euro-zone states); and the articles on competitiveness and growth, which merely set the goals and do not put into place new obligations.

This treaty is a mix of many things, legally and politically.

#### Marise Cremona:

I will say something about fragmentation / differentiation, the use of the Court, and some of the drafting issues.

First, as regards the issue of fragmentation / differentiation / enhanced cooperation, Bruno has put it extremely well: this is a technique, which has been used before. The real question is that it seems to be becoming more common, it is more and more the escape route and it poses questions as to the way in which the European Union can actually go on working as it is at the moment. Particularly, it shows that Treaty amendment procedures do not work, and it is very difficult to get change; it shows that enhanced cooperation is not the solution of choice of the member states. There would have been some difficulties with enhanced cooperation as Bruno said but I think it could have been managed, perhaps using Euro-zone enhanced cooperation under Article 136 TFEU, together with enhanced cooperation under Article 20 TEU. It could have been done that way if they had wanted to do so, but the choice was not to do that. It is quite interesting that member states in the end, when they are in a crisis and do not know what to do, fall back on what they know and what they know is the traditional kind of international agreement: they feel more comfortable with international agreements, they know how to do those things and, as Anna said, they did it remarkably quickly.

So the draft Treaty is a form of differentiation, as an alternative to enhanced cooperation, but in Article 10 it also envisages action under Article 136 TFEU and enhanced cooperation as possible future developments. Enhanced cooperation has two distinct rationales which are sometimes in tension with each other: the first is to see it as an avant guard, the participants moving forward on a project in the hope and expectation that others will later join; the second is to see it as a way of unblocking a decision-making impasse, of finding a way for some Member States effectively to opt out of a decision. The draft FCT shows aspects of both characteristics: in terms of its genesis it is primarily about getting a decision in face of the UK 'veto', and in its recognition in Article 10 that 'active use' will in future need to be made of enhanced cooperation it assumes that the differentiation will need to

continue in the EU Treaty framework. But by referring to the objective of eventually incorporating the FCT into the 'legal framework of the EU' (Article 16) and by allowing for the participation of all Member States (Article 15) it presents itself as a transitional stage of integration.

I take Miguel's point about the dangers of limiting future action, but in a way this has also been done before. One of the reasons why we are where we are today is because of the constraints that were put in place at the setting up of the European Central Bank and EMU, the Treaty-based enshrinement (in Article 4 EC) of the maintenance of price stability as the primary objective of economic and monetary policy. So we might now be compounding the error, since this is something that has been tried and that caused problems before.

Second, as regards the use of the Court and the other institutions, it is clear that as far as the Court goes we are within the scope of Article 273 TFEU (Article 8(3) of the FCT). This is one issue where it is quite instructive to look at the earlier versions of this treaty because it has changed, particularly if one looks at the role of the Commission. At one stage it was proposed that the Commission would be able to bring an action before the Court to enforce Article 3(2) and that has disappeared. It has disappeared for a very good reason, namely that Article 273 TFEU refers to disputes between member states. Obviously one can argue that there are other reasons for giving the Commission a lower profile but legally speaking this is one of them. There has been some questioning whether this treaty falls within the 'subject matter of the treaties' as required by Article 273 TFEU, but I think Steve Peers makes a very good point on this in his evidence to the House of Lords Select Committee when he says that Article 344 TFEU already gives exclusive jurisdiction to the Court as far as the EU Treaties are concerned, so if Article 273 TFEU is to mean anything at all, then it should refer to something that goes beyond the actual content of the EU Treaties but at the same time relates to the subject matter of the Treaties, which is something different. The question that arises here, and it arises also in relation to the other institutions, is whether it is possible to grant the Court these powers by majority rather than by unanimity, and the fact that this is an international agreement of some not all the member states. As far as the first is concerned, I would point out that this is an agreement within Article 273 TFEU, not an exercise of competence under Article 273: Article 273 does not confer a power on the Union while establishing decision-making procedures for its exercise; it rather allows a Union institution to accept jurisdiction if it is decided to refer a case to it. There is nothing in the text that requires unanimity, only that there is a 'special agreement between the parties', i.e. the parties to the dispute. As regards the second issue, there are precedents for granting the Court jurisdiction in cases where not all Member States participate in the agreement. In the case of the 1980 Rome Convention, the jurisdiction of the Court was dealt with in two Protocols and the member states who adopted those two Protocols issued a Declaration expressing the view that 'any State which becomes a member of the European Communities should accede to this Protocol'.. In my view then, neither unanimity nor participation of all Member States is required by Article 273.

In terms of the drafting, I would like people's view on one point: as Bruno said, Article 2 is drafted well, but I have a question on the second paragraph: why does it say that "The provisions of this Treaty [...] shall not encroach upon the competences of the Union to act in the area of the economic union": why this qualification which appears as a limitation? Why not just "upon the competences of the Union"? Why should not the FCT protect Union competence in the area of the internal market for example, which is of course what the UK was concerned about – and still is concerned about?

#### **DISCUSSION**

#### Federico Fabbrini: "A double "golden rule" for Europe?"

My question concerns the "golden rule" required by the Fiscal Compact Treaty and the implications of the existence of this rule both at the national level and the EU level in Europe. From a comparative constitutional perspective, it may be noticed that also other fiscal unions are characterized by the existence of analogous rules at the state level. In the United States, for instance, 35 states out of 50 have a balanced budget requirement in the state constitution. However, in the US, there is no equivalent rule at the federal level. On the contrary, in the EU, we also have a golden rule at the supranational level since Article 310(1)(3) TFEU institutes a balanced budget requirement for the Union. If we have the same constitutional requirement at both national and EU levels, what are the implications in terms of the policies that may be adopted to tackle the economic crisis? Does this compel the abandonment of any Keynesian strategy to stimulate the economy and are there any other options available?

#### Boris Rigod:

I have a comment on generational justice mentioned by Miguel: the biggest promise is not the next generation justice but the present generation justice. If you look at Greece, I do not know whether the next generation will suffer but this generation suffers from budget deficits already.

#### Miguel Maduro:

They are suffering from the deficits created by the previous generations

#### Boris Rigod:

Concerning the Lisbon judgment, what the German Constitutional Court said is not that you cannot coordinate your budgetary policies but that you cannot transfer the competence over national budget, for instance to the Commission. Certainly, member states may agree to maintain certain levels of deficits. So I doubt whether the limitation there is so strict.

About using the Commission under the FCT: the major issue is about having the other member states pay for it. Why should the British taxpayers fund the Commission when the Commission does something for the Euro-states?

#### Miguel Maduro:

There is a difference with what is happening already under the EU Treaties because the UK agreed to that asymmetric use with respect to what is in the EU Treaties, it is part of the agreement on the optout that they agree on the use of the institutions by the other Member states on the issues they have opted-out. In this new agreement, of course the Commission can start something under different rules but is not legally obliged; this is why the wording used in the FCT is "invited to". This is why the Commission is not given the power to start the infringement procedure but is instead invited, if it so decides, to study and therefore make a proposal that then the member states are obliged to comply with. From the point of view of the Commission, it means that they are using their resources for something that they are not obliged to do and in that respect it is not much different from what we already know takes place.

#### Loïc Azoulai:

It is an invitation which does not specify who is inviting the Commission: it can be an invitation by the European Council to make a report under the rules of the EU treaties and then the contracting party will be obliged to bring the infringement proceedings to the Court of Justice. So it is a power to dictate the introduction of the "golden rule", possibly through a constitutional amendment and then, if the parties do not comply, to bring an enforcement procedure similar to that under Article 260 TFEU, meaning that there might be financial sanction should a member state not comply with the judgment of the Court of Justice. I do not see there the idea of an agreement of the contracting party to submit the dispute to the Court of Justice. I see a renewed jurisdiction conferred on the Court of Justice to impose a procedural obligation, to impose the introduction of a rule, it is even worse than the eternity clause because you dispossess the people of their sovereignty, you impose a constitutional amendment...

#### Marise Cremona:

But they signed the treaty, nobody forces the states to sign treaties.

#### Miguel Maduro:

It is not that the Court will be imposing, it is the member states that have entered into an obligation by signing a treaty. The question is the compatibility of this obligation with the constitutions of some member states, and the example I would give is Germany or the German Constitutional Court judgments: according to these judgments, by imposing that obligation this treaty is transferring something that, according to the German constitutional court, cannot be transferred to the European Union. There is such a requirement (a budgetary limit) in the Constitution of Germany but it is because the German people decided so, and according to the judgments of the German Constitutional Court, that decision cannot be transferred to the Union level, yet this is what this agreement is all about. One must remember that what is done in here is different from the stability pact criteria that wasn't really legally enforceable. Now, at least political leaders say this will be.

#### Loïc Azoulai:

By doing that, the agreement amends the *pouvoir constituant* of the member states.

#### Bruno De Witte:

But it is still an international agreement, so it will not prevail over the national constitutions of the member states.

#### Miguel Maduro:

This is another irony: the way to ensure that this agreement does not encroach on the national sovereignty is by making it in international law so that it is not enforceable with respect to the national constitutions.

#### Francois-Xavier Millet:

It is very interesting that Anna mentioned that this agreement is very much like a decision of the European Council meeting, and indeed it is very much soft law, so I would not see the language "preferably constitutional" as legally enforceable. It is more recommendation style, not a strong wording. As Bruno mentioned, this was already done before, not a new form of amending the treaty. In the past, it has been done in the form of decisions of the representatives of governments within the

European Council meetings: it happened in 1992 for Denmark in the framework of the Maastricht treaty and for Ireland in 1999. The problem here was that there were some member states who would not agree, so they took another form. Still, I think a better comparison would be the decisions of the representatives of the governments in the European Council meetings that set recommendations rather than binding norms.

#### Hans-Wolfgang Micklitz:

I see from this conversation that there is a consensus that what is new in this treaty is very limited: in terms of content it seems to be very much in line with what we have already. So then there are a number of questions:

The legitimacy aspect, the point between input and output legitimacy: all this exercise is serving just to please the German public opinion with the irony that Miguel mentioned. I think this has an impact on the whole architecture of the EU.

The point by Marise that it is ever more confusing, that there is no clear structure anymore: the ideas of the hierarchy and supremacy do not exist and we have all sorts of intermediary forms: what does it mean for the constitution of the EU?

For an economic lawyer, the crucial document is the Lisbon declaration in 2000, this was for the making of EU law in the field that concerns trade, money, finances, is much more important than later Treaty amendments. This efficiency-driven document changed the whole impact and the way of thinking. Today, there is no clear distinction anymore, for example financial services: if we take the so-called MiFID directive plus the regulations, there are 250 pages of law, yet it is not law but "we do out best, we are cooperating, we invite". So there is a change that is observed not only on the level of the EU Treaties or an international treaty but it is at all levels of the law.

#### Loïc Azoulai:

Notice how all the new measures go into the same direction, which is to impose sanctions on the member states. To exaggerate a bit, one could say that we are turning EU law into a structure of punishment of the member states; member states are constantly supposed to fail in economic performance, they are constantly under the pressure of reporting, monitoring, surveillance, sanctions. With this treaty, this is a new league of nations under control.

#### Miguel Maduro:

They need it!..

#### Hans-Wolfgang Micklitz:

The idea to use the ECJ to punish and sanction will undermine the law because it will not work. It is very easy to predict.

#### Loïc Azoulai:

What we have is an accumulation of rules on reporting, monitoring, surveillance, it is amazing. Two days ago there was again a report on the economic imbalances of the member states. And with this new procedure derived from the "six-pack", again, there is a possibility of sanctions of the member states.

#### Anna Hyvärinen:

I just want to point out that this agreement is not only problematic legally but also politically, more particularly in terms of governance. In the future, there will be three kinds of meetings: the European Council meetings, the Euro Summit meetings that started last year, and then meetings of the signatory states of the fiscal compact. So there will be three different kinds of meetings between the heads of states. In addition, of course, there will be regular Council meetings, Euro-group meetings and so on.

Another point I want to make is that under the FCT, the president of the Euro Summit will be elected at the same time as the European Council president. I think that in practice this means that this will be the same person.

#### Miguel Maduro:

Unless there will be two important politicians unemployed at the same time...

#### Anna Hyvärinen:

Sure. But I still think that you are most likely to elect one person to preside both at the European Council and at the Euro-zone Summits. Does this also mean that in the future, it is always a person from a Euro-area country? Most likely so.

#### Anwar Abdallat:

There is another puzzling article in the FCT, Article 13, which is about parliamentary scrutiny and the whole idea of instituting democratic accountability. It is an international treaty, so, on the one hand, why the European Parliament? If is OK to borrow the institutions, on the other hand, the idea seems similar to the assembly of the Western European Union, which has been dissolved, and then the European Parliament along with national parliaments has taken over its scrutiny tasks regarding the powers of the EU. What kind of a relationship will be this: only the parliaments of the signatory parties or all national parliaments of the EU? Moreover, if the European Parliament is taken to the margins of the project as it currently is, will it force it way with the other institutions trying to step in?

#### Anna Hyvärinen:

As far as I know this issue has not been discussed in Finland. From the background material for this session it appears that there can be some problems in making reference to Protocol No 1 because all the parliaments are there, including the UK and the Czech parliaments, which have not signed the FCT. It remains to be seen what this will mean in practice. Another question is whether national parliaments will want to discuss their national budgets with the EP? The EP may want to do this but do the national parliaments also want to do it? The new agreement concerns mainly national budgets, which is a very sensitive issue.

#### Loïc Azoulai:

There is a reference in Article 3(2) last sentence that the mechanisms which will be put in place fully respect the prerogatives of national parliaments. Yet, it is also said before that there is an obligation to set up the mechanism which has been elaborated by the European Commission, so it is doubtful.

#### Bruno De Witte:

I should like to add something about this Treaty's institutional machinery, or rather the absence of it. The only new institution created by it is the Meeting of the Heads of State or Government of the Contracting Parties that will presumably be convened in the margin of a European Council meeting, but there are no lower-level institutions with specific decision-making powers. This is why I would predict that not many legal activities will develop from the FCT. Any action taken under this agreement will either be unilateral, by the contracting parties themselves (for example: changing their constitution), or by the EU institutions acting upon the tasks given to them by the FCT. So, basically, all measures of Economic Union governance will continue to be adopted by the EU institutions, subject to EU law procedures and constraints.

#### Anna Tsiftsoglou:

I find the legitimacy issue central in this debate: if in these fiscal issues Germany imposes rules which it itself under its own constitution would not follow – and according to the BVerfG's recent interpretations this is the way things are – I am sceptical how the policy would work.

#### Miguel Maduro:

This crisis and this treaty connect to a much deeper crisis in European integration. It is what we hear all the time now, that at the core of the economic and fiscal crisis there is a political crisis. If you read newspaper articles, every day there is an economist or a policy-maker, someone, who tells us what the European Union should do but no one tells how to get the European Union to do that. This is the really difficult question. The overwhelming majority of economists, with few exceptions, have by now agreed on a model, with certain variations, of what ought to be the answer to the crisis: a mixture of austerity and economic growth policies, a mixture of sanctions and conditionality with elements of solidarity and mutualisation of debt. We all know that this needs to be done but no one knows how to get the European Union to do it. From my point of view, we cannot do anything about it in the short term. This is why I can only say what the Union can do if it gets out of this crisis, if it survives this crisis. There is nothing within the mechanisms internal of the Union to solve the crisis, for it depends on national political dynamics. Yet, this tells us what we can do in the future:

- 1. ensure that this kind of issues do not depend purely on national dynamics; that is, ensure that European policies and European problems depend on European politics;
- 2. make those national political dynamics more Europe-sensitive.

I do not think that this crisis is the responsibility of Germany, I do not think that Germany is the country to be most blamed, but on the other hand it is true that some of the aspects that could somehow solve the crisis are now being blocked by Germany. So why is Germany doing it? Because Mrs. Merkel is being democratically accountable: she is doing what the majority of the German public wants her to do. The question we need to answer is why doesn't she get the right political incentives? It has to do with the perception about the European issues on the national level in member states. It happens to be in Germany but it could be in other member states on other issues. We have not been able to internalize in our national politics the interdependence that we have in the European Union. Because we have not internalized this interdependence, national politics operates in a way that provides wrong incentives for national action at European level. We have not been able to replace national politics in areas where we should by European politics. This is what we could do in terms of changing the structure of decision-making, though this cannot be done in the short term. As a lawyer who thinks about EU constitutional law, I think of what this crisis teaches me so I can try to have an impact on the future.

#### Boris Rigod:

You talk about political incentives, and this is what is done in this treaty: it gives incentives not to pose externalities in inter-dependent European Union. What happened is that one member state by its fiscal and budgetary policy imposed externalities on the whole Euro area, not the other way around. To say now that Germany has wrong political incentives is not the whole story.

#### Miguel Maduro:

You are right, and it is the fiscal policy not of only one member state. Some member states were more serious than the others, some took irresponsible decisions, others were cheating, but it is the responsibility for fiscal policy of different member states, including my own. Different member states that provoke externalities each other. Some economists have argued that these irresponsible policies were fed by banks from other central and northern countries that had excessive liquidity and wanted to provide credit and make bigger profits. This also tells us something about the nature of European politics. In the US, when people talk about the responsibility for the financial crisis, they do not say that it is the responsibility of the people who have taken credit when they could not afford it; they talk about the responsibility of the banks that have provided the money when they should not have. While in Europe the dominant narrative is the other way around: it is those who borrowed money that are to blame. It is interesting how narratives are framed; they are framed also thanks to the nature of the political space in Europe. The narrative and the explanations differ between the European countries, so it is also difficult to generalize: for some it is the public debt, for others like Ireland it is the banking crisis. It is dangerous to create black-and-white narratives. That's why it is also dangerous to say now that it is the responsibility of Germany if Europe does not get out of the crisis: it is another black-andwhite narrative.

#### Ernst-Ulrich Petersmann:

I think the German perspective of the legitimacy question is very different from the Greek perspective. The German perspective emphasizes very much that the legitimacy of the Eurozone rules is gone: all the Euro-zone member states have persistently violated the budget discipline, the debt discipline, so without the rule of law there is no legitimacy.

#### Loïc Azoulai:

Including Germany.

#### Ernst-Ulrich Petersmann:

Yes, of course. But the Lisbon Treaty does not provide for a bailout: there is a prohibition, and it approaches the problem in terms of preventing the violation of rules but if the rules are consistently violated, there is no bailout clause. So from the German perspective, the problem is how to justify the legitimacy of what we are doing with the European Stability Mechanism – of course we have to do it – how can we promote growth – it is a stability and growth pact. Here, I think that the German conception of legitimacy is what is emphasized in all the six-pack regulations, the quotations in the preambles of all the six-pack regulations and the directives. It is stronger national ownership of the agreed rules and disciplines, said in one phrase, the rule of law. Without the rule of law, from the German perspective, there cannot be any legitimacy. Having said this, austerity is not enough, everybody knows it. It has always been a growth and stability pact. The problem is how to create growth.

#### Federico Fabbrini: "The rule of law: intergovernmentalism vs. supranationalism"

I have some perplexity as to what extent does this treaty add to the rule of law and I am quite sceptical about its effectiveness. Budgetary rules constraining the member states already existed in the Stability and Growth Pact but the SGP was not respected because it was subject to mere intergovernmental enforcement. If European history has taught us anything, it is that intergovernmentalism has not increased the rule of law. It is only through the Community method and by empowering supranational institutions that we can ensure that the states comply with the Treaties. Since the Fiscal Compact Treaty is inspired by an intergovernmental logic, however, it is difficult to see how this pact will be able to increase the rule of law in the field of economic policy in the European Union.

#### Antoine Duval:

Coming back to Miguel's point, this treaty can also be seen as creating a narrative which is black-and-white. We discussed already how legally it would be complicated to implement it. Hence, this treaty, and I agree with Anna Hyvärinen, is very much a political thing, a political narrative that states that the crisis is mainly due to the failure of the growth and stability pact. In reality, this treaty is hiding the fact that there were very big economic imbalances that the Euro enhanced and that were not managed by the European institutions. This is the core of the economic weakness of the Euro-zone, which this treaty does not solve. It might hide this fact a little longer but we will be faced with these problems again and we will have to decide whether, and how, to go on with the euro and the European Union.

#### Miguel Maduro:

No bailout was the greatest potential guarantee for the fiscal discipline of the states. It was not so much the stability pact but the idea that a state could fail and there would be no bail out that was expected to lead markets to impose discipline on states. The expectation was that the markets would differentiate, but the markets did not differentiate. This also to do with the responsibility of the banks of the wealthier countries: they were the first ones who did not differentiate in granting the debt and the credit because they were making money on it. As in the US, banks were making money by granting credit to easily. The system did not work because there was no differentiation between the different public debt of the member states of the Euro. Now, the system is differentiating, and it is differentiating also where it should not differentiate. In fact, if we want to have the possibility for some states to recover or if we want to have a really non-distorted competition in the internal market it makes no sense for companies in the internal market not to have equal access to credit. I know companies in Portugal now that are perfectly solid and which mostly depend on foreign markets but don't have access to credit or when they do it is at much higher interest rates than their competitors in the internal market. Banks in other members states are using the so called country risk criteria in a rather blind and absolute manner denying credit to companies that may even be in a better financial and economic position than those in other states. The internal market for financial services is not working in that respect. This is the irony: we did not have differentiation where we ought to have it, that is between states, and we are having differentiation now where we ought not to have it. One of the most important things that could be done to help countries in difficulty to get out of the crisis is to give to companies from these states access to credit at interest rates that allow them to compete in the internal market. If these companies are forced to move, as it is already happening, the vicious circle just spirals down.

#### POSTSCRIPT: A MATTER OF TRUST

A recurring issue of European integration that underlies the FCT is the problem of trust between the peoples of Europe. At the dawn of the European Communities, it was a matter of trust between the states in each other's intentions to preserve peace; this trust was promoted through the creation of economic interdependence between member states in the internal market. Deepening economic integration and the creation of the Euro increased not only interdependence but also the likelihood that national economic governance create externalities on other member states.

The Euro crisis undermined trust between member states in each other's economic governance, and the solution for fostering trust offered by the FCT risks to compromise legitimacy of the Union in both "doubting" and "doubted" peoples. On the one hand, for member states such as Germany, the FCT does not offer a mechanism that would ensure prevention of crises in the future in as much as it is less enforceable than Union law and in substance adds little to the pre-existing EU arrangements. On the other hand, for member states such as Greece, the treaty imposes rules that lie at the heart of national sovereignty and self-determination of peoples, as perceived not only by the German Constitutional Court in its Greek bailout judgment but also by member states of the Union generally, which did not insert binding rules on national budgets into the Union Treaties.<sup>5</sup> The fact that the signatory states of the FCT provided for its entry into force upon only 12 ratifications, evidences that they anticipated reluctance of their peoples to accept budgetary rules not deliberated in the national democracy.<sup>6</sup> For this reason, the new treaty may prove damaging for the trust of citizens in both the Union and individual member states.

The problem of legitimacy is not new for the European Union; it is connected to the fact that the Union, and the European Communities from which it evolved, were not designed to withstand such a strong degree of interdependence. It is a Union of independent states, <sup>7</sup> in which democratic (process) legitimacy is firmly grounded in the national level: the Treaties (and amendments thereof) are ratified unanimously by all the peoples of Europe; members of the European Parliament are elected on national (and not European) level; national governments represent their peoples in the Council. In this construction, interference with the national democratic system undermines the legitimacy of the Union itself. Yet, the decisions taken by national governments produce externalities on the peoples of other member states, the latter not being represented in the national democratic process of other states and thus being unable to influence the decisions that affect them. To balance this situation, the European system of economic governance, while operating through "soft law", provides for a rigid system of sanctions on states with excessive public deficit. This constitutes an inbuilt incoherence within the Union structure: member states are sovereign and budgetary decisions are an integral part of selfdetermination of peoples, yet interference into this right of self-determination takes place whenever the exercise of this right creates externalities on other member states. European integration, therefore, creates a misbalance, which needs to be adjusted in a manner coherent with the Union's constitutional structure.

<sup>&</sup>lt;sup>5</sup> Giuliano Amato, oral evidence before the House of Lords, European Union Committee 25th Report of Session 2010–2012 Report: The euro area crisis, Annex p. 3.

<sup>&</sup>lt;sup>6</sup> Already in 2006, the Eurobarometer survey of European public opinion signalled concerns in smaler member states over "the supremacy, and even imperialism, of the "strong" countries - i.e., France, Germany, the United Kingdom", European Commission, DG Communication, The European Citizens and the Future of Europe (2006).

<sup>&</sup>lt;sup>7</sup> For the most recent analysis, see Bruno De Witte, *The European Union as an International Legal Experiment*, in JHH Weiler and G. De Burca, The Worlds of European Constitutionalism (2012) Cambridge.

<sup>&</sup>lt;sup>8</sup> Roland Bieber, Observer - Policeman - Pilot: On lacunae of legitimacy and the contradictions of financial crisis management in the European Union, EUI LAW 2011/16, p. 11.

Previously, in EC law, the European Court of Justice developed principles that protect individuals in cases where they are not represented in the national political process yet are affected by it. This was done through affirmation of directly effective rights of the individual against the state in situations that have a "Community dimension", thereby placing a check on state action when this action creates externalities beyond its own political system<sup>9</sup> and adding to the output legitimacy of the Union through enforcing policies more effectively than sanctions. The Euro crisis illustrates that the "Community dimension" of national governance has grown far beyond cases of people, goods and services (hypothetically) crossing the internal borders. It is now the state debt that "crosses the internal borders".

Paradoxically, despite the obvious cross-border effects of poor national governance in ever more integrated Europe, the right of Union citizens to good governance is only applicable vis-à-vis the Union but not vis-à-vis member states. This right is contained, for example, in Articles 41 and Article 42 of the EU Charter of Fundamental Rights, Articles 15 and 228 TFEU, as well as secondary EU law adopted under these competences. In other instances, principles such as legal certainty, coherence, access to review, obligation to state reasons or proportionality apply to action by member states only when Union law or freedoms are involved. This piecemeal approach leaves out situations where the competence to act remains with the member states, yet national action produces effects in other states of the Union as a result of the expanding and deepening nature of European integration. Uniting the various rights under a single EU fundamental right to "good governance" that would be applicable to all national acts (similar to e.g. non-discrimination on the grounds of sex or nationality) would contribute to greater convergence of national systems and cultures of governance. In essence, the FCT makes a first step in this direction by applying to member states one of good governance rules contained in the Union Treaties, the balanced-budget rule of Article 310 TFEU until now applicable to Union but not national budgets. Extending this approach to other Treaty provisions would not only raise the trust of European peoples in each other's governments but also answer their hopes for Europe as promoter and guarantor of better governance at all levels.

> Anna Kocharov Florence. 5 March 2012

<sup>&</sup>lt;sup>9</sup> For more on this see Miguel Poiares Maduro, We the Court (1998) Hart Publishing.

#### ANNEX: CONCISE BACKGROUND OF THE FISCAL COMPACT

#### Anwar Abdallat

The evolution of the sovereign debt crisis foreclosed access of the Member States with high levels of budget deficit and public debt to sustainable financing on the financial markets. This prompted the Union and its member states to adopt a number of instruments of various legal nature and duration: measures under EU law, measures in national law, amendment of Union Treaties, private-law and international-law instruments. What follows is a summary reconstruction of the main legal and political instruments leading to the FCT, starting with the entry into force of the Treaty of Lisbon, 1 December 2010 and limited to the sovereign debt crisis. A table in the end of this section reconstructs how some of these provisions have subsequently "travelled" into the fiscal compact.

#### 1. Instruments of Crisis Management

Actions by the European Central Bank (ECB)

Article 127(2) TFEU lists the tasks of the ECB, which include the promotion of "smooth operation of payment systems". The Euro crisis undermined smooth operation of payment systems, which led to the ECB purchasing bonds of distressed Euro area countries on the secondary market and creating loan facilities, which enjoy leverage thanks to the access to ECB lending. Arguably, this undermines the general prohibition on overdraft facilities and intra-EU bailouts in Articles 123 and 125 TFEU. In its Decision 8 December 2011, the ECB granted an unprecedentedly large loan at low interest rates for three years to private banks of Euro member states; to implement this loan, the ECB changed its rules 10 on "adequate collaterals" required by the TFEU.

#### The European Financial Stabilisation Mechanism (EFSM)

In May 2010, the Council established a rescue mechanism, the EFSM, which allowed emergency lending to Greece with the money raised by the Commission on the financial markets. <sup>12</sup> The legal basis used for the EFSM was Article 122(2) TFEU, which provides for powers of the Council, on the proposal from the Commission, to grant financial assistance in cases of "exceptional occurrences" beyond the requesting state's control. The appropriateness of this legal basis in cases where the government of the requesting state "had contributed to create the sovereign debt crises which they were facing" is questionable. <sup>13</sup>

<sup>10</sup> Decision of the European Central Bank of 14 December 2011 on additional temporary measures relating to Eurosystem

refinancing operations and eligibility of collateral (ECB/2011/25) (2011/870/EU) OJ L341/65.

Article 18(1)b Protocol 4 TFEU.

<sup>12</sup> Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism, OJ L

De Witte, Bruno, The European Treaty Amendment for the Creation of a Financial Stability Mechanism, Working Paper Europapolitisk Analys/European Policy Analysis, 2011, 6, 1-8, Swedish Institute for European Policy Studies (SIEPS) 2011/06.

#### The European Financial Stability Facility (EFSF)

The EFSF is an intergovernmental lending facility created by a combination of an instrument of international law concluded between the Euro area member states<sup>14</sup> with an instrument of private law of one Member State.<sup>15</sup> The Facility issues its own debt under a guarantee undersigned by the Euro area member states plus Sweden and Poland. The EFSF allowed larger lending amounts for future lending and no longer used the legal basis in Article 122(2) TFEU.

#### Amendment of the TFEU and the European Stability Mechanism (ESM)

Right from their conception, the short-term emergency solutions offered by the EFSM and EFSF were to be replaced by the long-term stability mechanism, the ESM. In order to provide a legal basis for ESM, for the first time EU member states used the simplified Treaty amendment procedure introduced by the Lisbon Treaty. <sup>17</sup> The resulting amendment added one paragraph to Article 136 TFEU:

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

Pursuant to this new legal basis, on 11 July 2011, finance ministers of the Euro area countries signed the Treaty establishing the European Stability Mechanism. 18 Following the difficult ratification process in Slovakia, the ESM was renegotiated to begin already in July 2012.<sup>19</sup>

#### 2. Instruments of Economic Governance

#### The ECB beyond Monetary Policy

On 5 August 2011, the then-President of the ECB Jean-Claude Trichet and his designated successor Mario Draghi addressed to the constitutional organs of Italy a letter<sup>20</sup>, proposing to this country a list of 'crucial' economic and social policy measures, the most suited legal instruments for their implementation, and a timeline for Parliamentary ratification, including a suggestion of a "constitutional reform tightening fiscal rules". This letter, although not binding, exceeds the

<sup>&</sup>lt;sup>14</sup> EFSF Framework Agreement between Kingdom of Beligium, Federal Republic of Germany, Republic of Estonia, Ireland, Hellenic Republic, Kingdom of Spain, French Republic, Italian Republic, Republic of Cyprus, Grean Dutchy of Luxemboug, Republic of Malta, Kingdom of the Netherlands, Republic of Austria, Portuguese Republic, Republic of Republic, Republic of Finland and the European Financial Stability Facility, www.efsf.europa.eu/attachments/20111019\_efsf\_framework\_agreement\_en.pdf (03.03.2012).

<sup>&</sup>lt;sup>15</sup> European Financial Stability Facility, a *société anonyme* incorporated in Luxembourg, Council Regulation No 407/2010,

<sup>&</sup>lt;sup>16</sup> European Council 28-29 October 2010 Conclusions EUCO 25/1/10 REV 1 CO EUR 18 CONCL 4, available at: http://www.consilium.europa.eu/uedocs/cms\_data/docs/pressdata/en/ec/117496.pdf, p.2.

<sup>&</sup>lt;sup>17</sup> Article 48(6) TEU.

<sup>&</sup>lt;sup>18</sup> Treaty Establishing the European Stability Mechanism, available at: www.european-council.europa.eu/media/582311/05tesm2.en12.pdf (03.03.2012).

<sup>&</sup>lt;sup>19</sup> European Council, Statement by the Euro Area Heads of State and Government Brussels, 9 December 2011, p.5 available at: http://consilium.europa.eu/uedocs/cms\_data/docs/pressdata/en/ec/126658.pdf.

<sup>&</sup>lt;sup>20</sup> The full text of the Letter in English is available at: www.corriere.it/economia/11\_settembre\_29/trichet\_draghi\_inglese\_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?fr=correlati (29.02.2012).

competences of the ECB under the Union Treaties<sup>21</sup> creating a "precedent for economic governance", which until then fell "within the prerogative powers of the Member States".<sup>22</sup>

#### The European Semester

In 2010, the Council approved a procedure for closer coordination of national budgets and economic policies.<sup>23</sup> This procedure, called the European Semester, divides the year into two semesters. In the first semester, member states present their draft budgets, stability and convergence programs to the Commission and member states for a review of their conformity with the rules of the Stability and Growth Pact and the targets set in the Europe 2020 strategy.<sup>24</sup> Based on this review, the European Council and the Commission issue policy advice to member states, following which the latter finalize their national budgets in the second semester.

#### The 'Six-Pack'

In September 2010, the Commission delivered a package of six legislative proposals (the so-called 'Six-Pack'), which were adopted in November 2011 and entered into force on 13 December 2011. It is composed of the following measures:

- 1. Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area, which foresees imposition of gradual financial sanctions for breach of fiscal policy targets unless a 'reverse qualified majority' in the Council is reached against the Commission's proposal to impose sanctions.
- 2. Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area, which provides that a repeated failure to act on Council recommendations will expose euro area member states to sanctions, unless these are voted down by a reverse qualified majority of euro area member states.
- 3. Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies, which reinforces and amends the Stability and Growth Pact, empowering the Commission to issue a warning in case of significant deviations from fiscal policy goals.
- 4. Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances, empowering the Council to adopt recommendations and open an excessive imbalance procedure for Member States with imbalances that put at risk the functioning of the EMU.
- 5. Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure, which enhanced the corrective role of the Stability and Growth Pact by setting out rules on the reduction of the debt-to-GDP ratio where it exceeds 60% (reduction rate of 1/20th per year); an excessive deficit procedure is launched in the case of deviations.

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Article 282 TFEU.

<sup>&</sup>lt;sup>22</sup> Roland Bieber, Observer - Policeman - Pilot: On lacunae of legitimacy and the contradictions of financial crisis management in the European Union, EUI LAW 2011/16, p.4.

European Council Conclusions, Brussels 17 June 2010 EUCO 13/10 CO EUR 9 CONCL 2 http://www.consilium.europa.eu/uedocs/cms\_data/docs/pressdata/en/ec/115346.pdf#page=6 (23.03.2012).

General Report on the Activities of the European Union (2010) European Commission, p. 14, http://europa.eu/generalreport/pdf/rg2010\_en.pdf (03.03.2012).

6. Directive 2011/85/EU of 8 November 2011on requirements for budgetary frameworks of the Member States, establishing common rules on accounting systems, statistics, forecasting practices, fiscal rules, budgetary procedures and fiscal relations with local and regional authorities.

In November 2011, the Commission proposed two additional regulations building on the European Semester.<sup>25</sup> The first proposed regulation would give the Commission the power to assess draft budgets of the Euro area countries and, if necessary, request that these drafts be revised; the draft also proposes closer monitoring and reporting requirements for euro area countries in excessive deficit procedure, and requires euro area Member States to establish independent fiscal councils for budget forecasts. The second proposed regulation would empower the Commission to subject member states to enhanced surveillance, while the Council would issue recommendations for corrective action.

#### The Euro-Plus Pact

The Euro-Plus Pact<sup>26</sup> is a political commitment of the Euro area states and open to non-Euro member states and aimed at closer coordination of economic policies. The pact contains a list of commitments linked to the Europe 2020 strategy, with the participating states signing up to the commitments of their choice. The commitments target competitiveness, employment, sustainability of public finances, and financial stability. Compliance with these commitments is being monitored but there is no mechanism for enforceability.

The following is a comparison table, which traces key provisions of the Fiscal Compact Treaty to the preceding legal and political arrangements; the left column contains the terms of the FCT, while the right column gives the corresponding provisions of the preceding instruments. Highlights added by the author.

Proposal for a Regulation of the European Parliament and of the Council on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area COM(2011) 821 final and Proposal for a Regulation of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area COM(2011) 819 final.

European Council Conclusions 24/25 March 2011 EUCO 10/1/11 REV 1 18 ANNEX I EN, www.consilium.europa.eu/uedocs/cms\_data/docs/pressdata/en/ec/120296.pdf (03.03.2012).

### COMPARISON TABLE OF KEY PROVISIONS OF THE FISCAL COMPACT TREATY

#### FISCAL COMPACT TREATY

#### PREVIOUS CORRESPONDING PROVISIONS

#### **Rules of the Fiscal Compact**

#### Article 3(1)a

the budgetary position of the general government of a Contracting Party shall be *balanced or in surplus*;

**Article 109(3) Basic Law of the Federal Republic of Germany**, the Federal Law Gazette Part III, No 100-1, as amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944)

The budgets of the Federation and the Länder shall in principle be *balanced* without revenue from credits.
[...]

#### Article 3(1)b

the rule under point (a) shall be deemed to be respected if the annual structural balance of the general government is at its country-specific mediumterm objective, as defined in the revised Stability and Growth Pact, with a lower limit of a structural deficit of 0,5 % of the gross domestic product at market prices. The Contracting Parties shall ensure rapid convergence towards their respective medium-term objective. The time-frame for such convergence will be proposed by the European Commission taking into consideration country-specific sustainability risks. Progress towards, and respect of, the medium-term objective shall be evaluated on the basis of an overall assessment with the structural balance as a reference, including an analysis of expenditure net of discretionary revenue measures, in line with the revised Stability and Growth Pact;

**Article 115(2) Basic Law of the Federal Republic of Germany**, the Federal Law Gazette Part III, No 100-1, as amended by the Act of 21 July 2010 (Federal Law Gazette I p. 944)

Revenues and expenditures shall in principle be balanced without revenue from credits. This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed *0.35 percent* in relation to the nominal gross domestic product.

In addition, when economic developments deviate from normal conditions, effects on the budget in periods of upswing and downswing must be taken into account symmetrically. Deviations of actual borrowing from the credit limits specified under the first to third sentences are to be recorded on a control account; debits exceeding the threshold of 1.5 percent in relation to the nominal gross domestic product are to be reduced in accordance with the economic cycle.

### Article 1(3)b Regulation 1467/97 as amended by Regulation 1177/2011

The report [of the Commission under Article 126(3) TFEU] shall reflect, as appropriate: [...] the developments in the *medium-term* budgetary positions, including, in particular, the record of adjustment towards the medium-term budgetary objective, the level of the primary balance and developments in primary expenditure, both current and capital, the implementation of policies in the context of prevention and correction of excessive macroeconomic imbalances, the implementation of policies in the context of the common growth strategy of the Union, and the overall quality of public finances, in particular the effectiveness of national budgetary frameworks;

#### Article 3(1)c

the Contracting Parties may temporarily deviate from their respective medium-term objective or the adjustment path towards it only in exceptional circumstances, as defined in point (b) of paragraph 3;

### Article 3(1)d

where the ratio of the general government debt to gross domestic product at market prices is significantly below 60 % and where risks in terms of long-term sustainability of public finances are low, the lower limit of the medium-term objective specified under point (b) can reach a structural deficit of at most 1,0 % of the gross domestic product at market prices;

#### Article 3(1)e

in the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically. The mechanism shall include the obligation of the Contracting Party concerned to implement measures to correct the deviations over a defined period of time.

#### Article 3(2)

The rules set out in paragraph 1 shall take effect in the national law of the Contracting Parties at the latest one year after the entry into force of this Treaty through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to throughout the national budgetary processes. The Contracting Parties shall put in place at national level the correction mechanism referred to in paragraph 1(e) on the basis of common principles to be proposed by the European Commission, concerning in particular the nature, size and time-frame of the corrective action to be undertaken, also in the case of exceptional circumstances, and the role and independence of the institutions responsible at national level for monitoring

#### Article 109 (3) Basic Law of the Federal Republic of Germany, the Federal Law Gazette Part III, No 100-1, as amended by the Act of 21 July 2010 (Federal Law

Gazette I p. 944)

[...] The Federation and Länder may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity. For such exceptional regimes, a corresponding amortisation plan must be adopted. [...]

#### Article 1 Protocol (No 12) on the Excessive Deficit **Procedure (TFEU)**

The reference values referred to in Article 126(2) of the Treaty on the Functioning of the European Union

- 3 % for the ratio of the planned or actual government deficit to gross domestic product at market prices;
- 60 % for the ratio of government debt to gross domestic product at market prices.

#### Article 3(4) Regulation 1467/97 as amended by **Regulation 1177/2011**

The Council recommendation made in accordance with Article 126(7) TFEU shall establish a maximum deadline of six months for effective action to be taken by the Member State concerned. When warranted by the seriousness of the situation, the deadline for effective action may be three months. The Council recommendation shall also establish a deadline for the correction of the excessive deficit, which shall be completed in the year following its identification unless there are special circumstances. [...]

Article 4(1) Proposal for a Regulation of the European Parliament and of the Council of 23 November 2011 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area COM(2011) 821 final

Member States shall have in place numerical fiscal rules on the budget balance that implement in the national budgetary processes their medium-term budgetary objective as defined in Article 2a of Regulation (EC) No 1466/97. Such rules shall cover the general government as a whole and be of *binding*, preferably constitutional, nature.

compliance with the rules set out in paragraph 1. Such correction mechanism shall fully respect the prerogatives of national Parliaments.

#### **Article 4**

When the ratio of a Contracting Party's general government debt to gross domestic product exceeds the 60 % reference value referred to in Article 1 of the Protocol (No 12) on the excessive deficit procedure, annexed to the European Union Treaties, that Contracting Party shall reduce it at an average rate of one twentieth per year as a benchmark, as provided for in Article 2 of Council Regulation (EC) No 1467/97 of 7 July 1997 on speeding up and clarifying the implementation of the excessive deficit procedure, as amended by Council Regulation (EU) No 1177/2011 of 8 November 2011. The existence of an excessive deficit due to the breach of the debt criterion will be decided in accordance with the procedure set out in Article 126 of the Treaty on the Functioning of the European Union.

#### Article 5

- 1. A Contracting Party that is subject to an excessive deficit procedure under the Treaties on which the European Union is founded shall put in place a budgetary and economic partnership programme including a detailed description of the structural reforms which must be put in place and implemented to ensure an effective and durable correction of its excessive deficit. The content and format of such programmes shall be defined in European Union law. Their submission to the Council of the European Union and to the European Commission for endorsement and their monitoring will take place within the context of the existing surveillance procedures under the Stability and Growth Pact.
- 2. The implementation of the budgetary and economic partnership programme, and the yearly budgetary plans consistent with it, will be monitored by the Council of the European Union and by the European Commission.

### Article 2(1)a Regulation 1467/97 as amended by Regulation 1177/2011

When it exceeds the reference value, the ratio of the government debt to gross domestic product (GDP) shall be considered sufficiently diminishing and approaching the reference value at a satisfactory pace in accordance with point (b) of Article 126(2) TFEU if the differential with respect to the reference value has decreased over the previous three years at *an average rate of one twentieth per year* as a benchmark, based on changes over the last three years for which the data is available.

### Point 11, European Council Conclusions, 17 June 2010 EUCO 13/10 CO EUR 9 CONCL 2

The present *rules on budgetary discipline* must be fully implemented. As regards their strengthening, the European Council agrees on the following orientations: [...]

- b) Giving, in budgetary surveillance, a much more prominent role to levels and evolutions of debt and overall sustainability, as originally foreseen in the Stability and Growth Pact;
- c) from 2011 onwards, in the context of a "European semester", presenting to the Commission in the spring *Stability and Convergence Programmes* for the upcoming years, taking account of national budgetary procedures;
- d) ensuring that all Member States have national budgetary rules and medium term budgetary frameworks *in line with the Stability and Growth Pact*; their effects should be assessed by the Commission and the Council;

**The Euro Plus Pact**, European Council Conclusions 24/25 March 2011 EUCO 10/1/11 REV 1 14

p. 14: This *Pact* has been agreed [...] to strengthen the *economic pillar* of the monetary union, [...]

**Article 1 Proposal for a Regulation** of the European Parliament and of the Council **on the strengthening of economic and budgetary surveillance of Member** 

# States experiencing or threatened with serious difficulties with respect to their financial stability in the euro area COM(2011) 819 final 2011/385 (COD)

1. This Regulation sets out provisions for strengthening the *economic and budgetary surveillance* of Member States experiencing or threatened with serious difficulties with respect to their financial stability and/or that receive or may receive financial assistance [...]

#### Article 6

With a view to better coordinating the planning of their national debt issuance, the Contracting Parties shall report *ex-ante* on their public *debt issuance plans* to the Council of the European Union and to the European Commission

### Point 11, European Council Conclusions, 17 June 2010 EUCO 13/10 CO EUR 9 CONCL 2

The present *rules on budgetary discipline* must be fully implemented. As regards their strengthening, the European Council agrees on the following orientations: [...]

- b) Giving, in budgetary surveillance, a much more prominent role to levels and *evolutions* of debt and overall sustainability, as originally foreseen in the Stability and Growth Pact;
- c) from 2011 onwards, in the context of a "European semester", presenting to the Commission in the spring Stability and Convergence Programmes **for the** *upcoming* **years**, taking account of national budgetary procedures;

#### Article 7

While fully respecting the procedural requirements of the Treaties on which the European Union is founded, the Contracting Parties whose currency is the euro commit to supporting the proposals recommendations submitted by the European Commission where it considers that a Member State of the European Union whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. This obligation shall not apply where it is established among the Contracting Parties whose currency is the euro that a qualified majority of them, calculated by analogy with the relevant provisions of the Treaties on which the European Union is founded, without taking into account the position of the Contracting Party concerned, is opposed to the decision proposed or recommended.

#### Regulation 1173/2011/EU

#### Article 4(2)

The decision requiring a lodgement shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.

#### Article 5(2)

The decision requiring a lodgement shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.

#### Article 6(2)

The decision imposing a fine shall be deemed to be adopted by the Council unless it decides by a qualified majority to reject the Commission's recommendation within 10 days of the Commission's adoption thereof.

#### **Article 8**

1. The European Commission is invited to present in due time to the Contracting Parties a report on the provisions adopted by each of them in compliance with Article 3(2). If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes in its

#### **Article 258 TFEU**

If the *Commission* considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a *reasoned opinion* on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the

report that such Contracting Party has failed to comply with Article 3(2), the matter *will be brought to the Court of Justice of the European Union* by one or more Contracting Parties.

Where a Contracting Party considers, independently of the Commission's report, that another Contracting Party has failed to comply with Article 3(2), it *may* also *bring the matter to the Court of Justice*.

In both cases, the judgment of the Court of Justice shall be binding on the parties to the proceedings, which shall take the necessary measures to comply with the judgment within a period to be decided by the Court of Justice.

- 2. Where, on the basis of its own assessment or that of the European Commission, a Contracting Party considers that another Contracting Party has not taken the necessary measures to comply with the judgment of the Court of Justice referred to in paragraph 1, it may bring the case before the Court of Justice and request the imposition of financial sanctions following criteria established by the European Commission in the framework of Article 260 of the Treaty on the Functioning of the European Union. If the Court of Justice finds that the Contracting Party concerned has not complied with its judgment, it may impose on it a lump sum or a penalty payment appropriate in the circumstances and that shall not exceed 0,1 % of its gross domestic product. The amounts imposed on a Contracting Party whose currency is the euro shall be payable to the European Stability Mechanism. In other cases, payments shall be made to the general budget of the European Union.
- 3. This Article constitutes a special agreement between the Contracting Parties within the meaning of Article 273 of the Treaty on the Functioning of the European Union. Article 8 provides that the EU Court of Justice may rule on whether parties have complied with the requirements of Article 3(2); and that the Court may levy *a fine of up to 0.1 per cent of GDP* if its ruling is not complied with.

**Commission**, the latter may **bring the matter before the Court of Justice** of the European Union.

#### **Article 259 TFEU**

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

#### **Article 260 TFEU**

- 1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.
- 2. If the *Commission* considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It *shall specify the amount of the lump sum or penalty payment to be paid by the Member State* concerned which it considers appropriate in the circumstances.

If the *Court* finds that the Member State concerned has not complied with its judgment it may impose a *lump sum or penalty payment* on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers *appropriate in the circumstances*.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned *not exceeding the amount specified by the Commission*. The payment obligation shall take effect on the date set by the Court in its judgment.

Communication from the Commission of 1 September 2011, SEC(2011) 1024 final

Updating of data used to calculate lump sum and

penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings

#### **Economic Policy Coordination**

#### Article 9

Building upon *economic policy coordination*, as defined in the Treaty on the Functioning of the European Union, the Contracting Parties undertake to work jointly towards an *economic policy that fosters the proper functioning of the economic and monetary union and economic growth through enhanced convergence and competitiveness.* To that end, the Contracting Parties shall take the necessary actions and measures in all the areas which are essential to the proper functioning of the euro area in pursuit of the objectives of fostering competitiveness, promoting employment, contributing further to the sustainability of public finances and reinforcing financial stability.

#### Article 10

In accordance with the requirements of the Treaties on which the European Union is founded, the Contracting Parties stand ready to make active use, whenever appropriate and necessary, of *measures specific to those Member States whose currency is the euro*, as provided for in Article 136 of the Treaty on the Functioning of the European Union, and of *enhanced cooperation*, as provided for in Article 20 of the Treaty on European Union and in Articles 326 to 334 of the Treaty on the Functioning of the European Union on *matters* that are *essential for the proper functioning of the euro area, without undermining the internal market*.

**The Euro Plus Pact**, European Council Conclusions 24/25 March 2011 EUCO 10/1/11 REV 1 14

- p. 14: This Pact has been agreed [...] to strengthen the *economic pillar of the monetary union*, achieve a new quality of economic policy coordination, improve competitiveness, thereby leading to a higher degree of convergence. This Pact focuses primarily on areas that fall under national competence and are key for increasing competitiveness and avoiding harmful imbalances. Competitiveness is essential to help the EU grow faster and more sustainably in the medium and long term, to produce higher levels of income for citizens, and to preserve our social models. [...]
- p. 16: The choice of the *specific policy actions necessary* to achieve the common objectives remains the responsibility of *each country* [...]

#### **Article 136 TFEU**

- 1. [...] the Council shall, in accordance with the relevant procedure from among those referred to in Articles 121 and 126, with the exception of the procedure set out in Article 126(14), adopt measures specific to those Member States whose currency is the euro:
- (a) to strengthen the coordination and surveillance of their *budgetary discipline*;
- (b) to set out *economic policy guidelines* for them, while ensuring that they are compatible with those adopted for the whole of the Union and are kept under surveillance.
- 2. For those measures set out in paragraph 1, only members of the Council representing Member States whose currency is the euro shall take part in the vote. [...]

#### **Article 20 TEU**

1. Member States which wish to establish *enhanced cooperation* between themselves within the framework of the Union's non-exclusive competences may make use of its institutions and exercise those competences by applying the relevant provisions of the Treaties, subject to the limits and in accordance with the detailed arrangements laid down in this Article and in Articles 326 to 334 of the Treaty on the Functioning of the European Union.

Enhanced cooperation shall aim to further the objectives of the Union, protect its interests and reinforce its integration process. Such cooperation shall be open at any time to all Member States, in accordance with Article 328 of the Treaty on the Functioning of the European Union.

2. The decision authorising enhanced cooperation shall be adopted by the Council as a last resort, when it has

established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole, and provided that at least nine Member States participate in it. The Council shall act in accordance with the procedure laid down in Article 329 of the Treaty on the Functioning of the European Union.

- 3. All members of the Council may participate in its deliberations, but only members of the Council representing the Member States participating in enhanced cooperation shall take part in the vote. The voting rules are set out in Article 330 of the Treaty on the Functioning of the European Union.
- 4. Acts adopted in the framework of enhanced cooperation shall bind only participating Member States. They shall not be regarded as part of the acquis which has to be accepted by candidate States for accession to the Union.

#### **Article 326 TFEU**

Any enhanced cooperation [...] shall not undermine the internal market or economic, social and territorial cohesion. It shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.

#### Article 11

With a view to **benchmarking** best practices and working towards a more closely coordinated economic policy, the Contracting Parties ensure that all major economic policy reforms that they plan to undertake will be discussed **ex-ante** and, where appropriate, coordinated among themselves. Such coordination **shall involve the institutions of the European Union as required by European Union law**.

**The Euro Plus Pact**, European Council Conclusions 24/25 March 2011 EUCO 10/1/11 REV 1 14

- p.15: Each year, concrete national commitments will be undertaken by each Head of State or Government. In doing so, Member States will take into account best practices and *benchmark* against the best performers, within Europe and vis-à-vis other strategic partners. The implementation of commitments and progress towards the common policy objectives will be monitored politically by the Heads of State or Government of the euro area and participating countries on a yearly basis, on the basis of a report by the Commission.
- [...] It will be in line with and strengthen the existing economic governance in the EU, while providing added value. It will be consistent with and build on existing instruments (Europe 2020, European Semester, Integrated Guidelines, Stability and Growth Pact and new macroeconomic surveillance framework) [...] and accompanied with a timetable for implementation. These new commitments will thereafter be included in the National Reform and Stability Programmes and be subject to the regular surveillance framework, with a strong central role for the Commission in the monitoring of the implementation of the commitments, and the involvement of all the relevant formations of the Council and the Eurogroup. The European Parliament will play its full role in line with its competences. Social partners will be fully involved at the EU level through the Tripartite Social Summit.

[...]

#### Governance

#### Article 12

1. The Heads of State or Government of the Contracting Parties whose currency is the euro shall meet informally in *Euro Summit meetings*, together with the President of the European Commission. The President of the European Central Bank shall be invited to take part in such meetings.

The President of the Euro Summit shall be appointed by the Heads of State or Government of the Contracting Parties whose currency is the euro by simple majority at the same time as the European Council elects its President and for the same term of office.

2. Euro Summit meetings shall take place when necessary, and at least twice a year, to discuss questions relating to the specific responsibilities which the Contracting Parties whose currency is the euro share with regard to the single currency, other issues concerning the governance of the euro area and the rules that apply to it, and strategic orientations for the conduct of economic policies to increase convergence in the euro area.

**Euro Summit Statement, Brussels, 26 October 2011**, Annex 1: Ten measures to improve the governance of the euro area

p. 11: There will be *regular Euro Summit meetings* bringing together the Heads of State or government (HoSG) of the euro area and the President of the Commission. These meetings will take place *at least twice a year*, at key moments of the annual economic governance circle; they will if possible take place after European Council meetings.

