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MWP 2013/36
Max Weber Programme

The Eurozone Crisis and the Legitimacy of
Differentiated Integration

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EUI Working Paper **MWP** 2013/36

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ISSN 1830-7728

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

Abstract

This paper examines and critically discusses several new forms of differentiated integration developed in reaction to the Eurozone crisis, including the so-called Two-Pack of economic governance, the ESM Treaty and the Fiscal Compact. A number of elements from these instruments will be discussed that best illustrate the challenges of the most recent forms of further integration in the light of legitimacy. A theoretical framework for the concept of legitimacy is used that builds on the assumptions that legitimacy is provided through legality and that parliaments contribute to the legitimacy of political projects as an important element of so-called 'input legitimacy'.

The paper illustrates some of the opportunities, challenges and risks of the recent forms of differentiated integration. It is argued that in the absence of an increased legitimacy of democratic politics at the level of the European Union, the most important legitimacy source remains at the level of national democracy and parliaments. Therefore, the importance of national legitimacy moments should not be underestimated. Moreover, they should not be avoided.

Keywords

Eurozone crisis, legitimacy, differentiated integration, legality, national parliaments, Six Pack, ESM Treaty, Fiscal Compact

Max Weber Fellow in LAW, European University Institute. I am grateful to the Dutch Niels Stensen Foundation ('Niels Stensen Stichting') for providing financial support to conduct post-doctoral research at the EUI. I would also like to thank Marise Cremona and Jan Herman Reestman for their valuable comments.

An earlier version of this paper was presented at the EUDO Dissemination Conference on 'The Euro Crisis and the State of European Democracy' held in November 2012.

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Max Weber Fellow, 2012-2013, 2013-2014

1. Introduction

The Eurozone crisis has led to important new forms of differentiated integration, both within the EU Treaties and outside. Existing and new instruments for differentiated integration have been used for the deepening of economic governance, for rules on increasing budgetary discipline and for the creation of emergency funds. These innovations apply to the member states of the Eurozone, but sometimes also include others. Thus, the so-called ‘Six-Pack’ of EU legislation, which entered into force in December 2011, intends to strengthen economic governance and partly applies to all member states and partly only to the Eurozone. The Fiscal Compact (FC) was concluded in March 2012 by 25 member states, mainly in order to strengthen budgetary discipline.¹ In September 2012, the European Stability Mechanism (ESM Treaty) establishing a permanent rescue fund entered into force for the member states of the Eurozone, succeeding the earlier EFSF, which originated in May 2010. These new forms of differentiated integration raise important questions of legitimacy.

This paper will examine and critically discuss the new forms of differentiated integration using a theoretical framework for the concept of legitimacy that builds on two commonly made assumptions. Firstly, that legitimacy is provided through legality. Secondly, it builds on the assumption that parliaments contribute to the legitimacy of political projects, as an important element of so-called ‘input legitimacy’.

The various legal instruments that are central to the political response to the Eurozone crisis (the ‘Six-Pack’, ESM Treaty and Fiscal Compact) will not be discussed exhaustively here. Instead, a number of elements from these instruments that best illustrate the challenges of the most recent forms of further integration in the light of legitimacy will be discussed. The paper will illustrate some of the opportunities, challenges and risks of the recent forms of differentiated integration.

These opportunities, challenges and risks should be seen in the broader legitimacy context of European integration and of the Eurozone crisis, not only as a financial and political crisis, but also a social one. There has been a shift from permissive consensus on the European project to social unrest with mass protests and general strikes in member states, such as Greece, Spain, Portugal and Italy.²

2. The paths to strengthened cooperation or further integration

The Eurozone crisis confronts the Union with an interesting legal and political puzzle: that of how to operate when new powers are necessary for some – in this case for the Eurozone – but when not all member states – notably some outside the Eurozone – are willing to make this possible?

2.1 The obvious and less obvious paths (from a legal perspective) not chosen

The Treaties offer obvious paths for the creation of new powers for the European Union or the Eurozone. The first is Treaty amendment through article 48 EU. The ordinary amendment procedure is cumbersome, however, and involves several risks, most recently illustrated by the fate of the Constitutional Treaty, rejected by France and the Netherlands in 2005.³ Negotiations are complicated and time consuming, they risk opening a Pandora’s box and ratification by all member states is by no means guaranteed.

A second, less cumbersome, procedure available for the creation of new powers for the Union is the flexibility clause of article 352 TFEU. This article allows for the creation of new powers necessary for the attainment of the objectives of the European Union. Unanimity between the member states is still required (as with Treaty amendment) as well as the consent of the European Parliament,

¹ Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

² Compare Giandomenico Majone, ‘Rethinking European Integration after the Debt Crisis’, *UCL Working Paper*, June 2012, p. 1-32 at p. 6-7 where he explains the replacement of the permissive consensus of the past by public debate and hostile reactions through “the fact that monetary union has put an end to the primacy of process as the criterion of policy evaluation on the EU.”

³ Note that the simplified amendment procedure of article 48(6) EU does not allow for the creation of new competences for the Union.

but no European Convention is convened or national ratification required. In the case of Germany, we know that use of this flexibility clause requires ratification by the *Bundestag* and the *Bundesrat*, but the basis for this is to be found in German constitutional law.⁴

It can be argued that several other and less obvious paths are also available for creating new powers. A first one, proposed by Herman Van Rompuy on the eve of the December 2011 European Council, is what I call the ‘protocol trick’ of article 126(14) TFEU. It comes down to an amendment of the ‘Protocol on the excessive deficit procedure’. This article represents an interesting abnormality in EU law, as it allows for Treaty change (protocols have the same status as the EU Treaties), but without requiring the Treaty amendment procedures of article 48 EU. Instead, provisions can be adopted to replace this protocol through a much simpler procedure, namely through unanimity in the Council and consultation with the European Parliament and the European Central Bank. Some argue that much of what has been agreed in the Fiscal Compact – to be discussed below – could also have been done this way.⁵ However, it was considered unattractive by some member states, including France and Germany, exactly – though not only – because it does not require the active involvement of national parliaments.

A second less obvious path is a combination of the flexibility clause in article 352 TFEU and the procedure for enhanced cooperation in article 20 EU. In this way, new competences could be created to then only be applied by, for example, the member states of the Eurozone.

An advantage of these paths is that non-Eurozone member states can also participate in the exercise of the newly created power intended to solve the current problems of the Eurozone. In other words, they have an inclusive character.

None of the above procedures for creating new powers or competences for the Union has been used,⁶ for different reasons. These include procedural/legal reasons (the unanimity required for Treaty change and use of the flexibility clause) and purely political reasons (France has arguably been keen to go outside the EU Treaties and create a new nucleus of the Eurozone member states). Instead, the policy responses have taken a different form, which will now be discussed.

2.2 The policy responses and the paths chosen

In the first place, a number of member states – notably but not only the Eurozone member states – have gone outside the EU Treaties and concluded new intergovernmental treaties, namely the EFSF and ESM emergency fund Treaties and the Fiscal Compact. In addition, there has been extensive use of the procedure of article 136 TFEU, which allows for a strengthening of Eurozone coordination and surveillance with regard to budgetary discipline and for the setting out of economic policy guidelines. Both paths will be discussed below.⁷

3. Assessing the paths chosen: legality

The first perspective from which the new instruments will be discussed is that of the principle of legality. In the European Union legal order this principle has found a specific expression in the principle of conferral or attributed powers. Thus, the Union shall act within the limits of the powers conferred by the member states (article 5(2) EU). Moreover, the institutions of the Union shall act

⁴ *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08, *Lisbon judgment*, 30 June 2009, para. 328.

⁵ Jacques Ziller, ‘The Reform of the Political and Economic Architecture of the Eurozone’s Governance. A Legal Perspective’, in: Allen, Carletti & Simonelli (eds.), *Governance for the Eurozone. Integration or Disintegration* (FIC Press, 2012) p. 115-138 at p. 130; Bruno De Witte, ‘Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy’, in: Allen, Carletti & Simonelli (eds.), *Governance for the Eurozone. Integration or Disintegration* (FIC Press, 2012) p. 139-160 at p. 152.

⁶ A Treaty amendment has been initiated using the simplified amendment procedure in article 48(6) TFEU – namely the addition of a new article 136(3) TFEU – but this new article does not create a new competence for the Union; see also European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, para. 73.

⁷ The unconventional measures taken by the European Central Bank in the form of new legal practices, such as buying government bonds on the secondary market, although a very important element of the European response to the Eurozone crisis, are outside the scope of this paper. The focus here is on the policy responses by political actors.

within the limits of the powers conferred on them by the Treaties (article 13(2) EU). This principle puts limits to what the member states and the Union institutions can do both within and outside the EU Treaties.

Moreover, it is useful to note at the outset that EU law has a combination of characteristics that is unique for an international organization. Based on the case law of the European Court of Justice (notably *Van Gend & Loos* and *Costa/ENEL*) EU law has primacy over and direct effect in national law. Not only do the new intergovernmental Treaties lack these characteristics of EU law, but the same characteristics also limit what member states can do through these new Treaties.⁸

3.1 Strengthened Eurozone cooperation within the EU Treaties (art. 136 TFEU); or, how far can you go within the Treaties?

One of the instruments that have been used extensively in the political response to the Eurozone crisis is the strengthened cooperation of article 136 TFEU. This article allows for members of the Eurozone to both adopt measures to “strengthen the coordination and surveillance of their budgetary discipline” and to “set out economic policy guidelines for them”, “in order to ensure the proper functioning of economic and monetary union” (article 136(1) TFEU). How should this procedure be understood? What are the limits to the action it allows for? And how has this article been applied in the Eurozone crisis?

Article 136 TFEU was introduced by the Lisbon Treaty of 2009 and was also included in the failed Constitutional Treaty. At the time, Amtenbrink and De Haan were critical of its inclusion as “this new form of closer cooperation within the already existing closer cooperation created by the provisions on EMU could open a gap between Member States with a derogation and the eurogroup.”⁹

How can this procedure be understood? Clearly, it is not intended as a *flexibility clause* in the sense of article 352 TFEU. No new powers can be created for the Union (Eurozone) in order to attain its objectives.¹⁰ Even though the procedure is sometimes referred to as *enhanced cooperation*,¹¹ this may not be the best term for it (and it is not the one used by the Treaty itself). The enhanced cooperation procedure under EU law (article 20 EU) is designed for the use of existing legal bases, but without the participation of all member states. Article 136, instead, includes all Eurozone member states (or none) and does not allow for enhanced cooperation of only nine of them. In fact, calling it enhanced cooperation seems to imply that it is possible for member states to join or not, and that a minimum number of member states of the Eurozone is required to participate, but not all.¹² Instead, article 136 TFEU itself does not allow for a minimum of, e.g., nine Eurozone member states to adopt measures, nor does it allow for non-Eurozone member states to join.

Article 136 TFEU can probably best be understood as a Eurozone-specific *enabling clause*.¹³ In fact, it is similar to the enabling clause of article 121(6) TFEU, which allows for the adoption of detailed rules for the multilateral surveillance procedure by the Union. It can also be compared to the broad legal basis of article 114 TFEU (which allows for the adoption of measures which have as their objective the establishment and functioning of the internal market) or one of the many specific legal bases included in the EU Treaties. It could be argued, however, that it has to a certain extent been

⁸ Similarly, Vestert Borger & Armin Cuyvers, ‘Het Verdrag inzake Stabiliteit, Coördinatie en Bestuur in the Economische en Monetaire Unie: de juridische en constitutionale implicaties van de eurocrisis’, *SEW Tijdschrift voor Sociaal Economische Wetgeving* (2012) p. 370-390 at p. 389, who also add the EU principle of loyal cooperation.

⁹ Fabian Amtenbrink and Jakob De Haan, “Economic governance in the European Union: Fiscal policy discipline versus flexibility”, 46 *CML Rev.* (2003), p. 1075-1106 at p. 1101-1102.

¹⁰ The unanimity safeguard for member states – present in article 352 TFEU – is also lacking in this procedure of article 136 TFEU, as it prescribes a qualified majority among the member states of the Eurozone.

¹¹ M. Ruffert, ‘The European debt crisis and European Union law’, *Common Market Law Review* (2011), p. 1777-1805 at p. 1801.

¹² Amtenbrink and De Haan in fact use the better term *closer cooperation*. See Fabian Amtenbrink and Jakob De Haan, *supra* n. 10, p. 1101-1102.

¹³ An interesting question is whether the combination of article 136 TFEU and article 20 EU would be possible.

applied as a sort of ‘Eurozone-flexibility clause’, creating new powers for the Eurozone. This relates particularly to the recent use of article 136 TFEU by the member states of the Eurozone to fundamentally redesign the multilateral surveillance system of article 121 TFEU, on which more below.

As there is no case law yet on the scope of article 136 TFEU, it is useful to discuss the recent application of this article together with the question of what the limits to action under this procedure are. In general terms, Ruffert rightly argues that it does not cover deviance from Treaty rules.¹⁴ But how should this be interpreted? Piris argues that this article does not allow for the creation of a true economic union, but also that the scope of application of Article 136 is *extremely* wide (...).¹⁵ Smits seems to be more generous.¹⁶

The recent use of article 136 TFEU contains three interesting elements.¹⁷ A first element is the use of the article for several specific steps in the final stages of the Excessive Deficit Procedure “with a view to reinforcing and deepening the fiscal surveillance” with regard to Greece since May 2010. A second element is the introduction of reversed qualified majority voting in several steps of the Macro-Economic Imbalances Procedure, the Medium-Term Budgetary Objective Procedure (in the framework of article 121 TFEU) and the Excessive Deficit Procedure (in the framework of article 126 TFEU). A third element is the introduction of new sanctions, most notably in the newly-created Macro-Economic Imbalances Procedure (as part of the “Six-Pack”).

A first most interesting element in the application of article 136 TFEU are the very detailed Commission recommendations and Council decisions under article 126(9) TFEU to give notice and to reinforce and deepen fiscal surveillance with regard to Greece. This decision was adopted for the first time in May 2010 and has been renewed many times since.¹⁸

On a procedural note, the combined use of articles 126 and 136 TFEU provides an answer to the question of what is meant in article 136 TFEU by the “relevant procedure” of article 126 TFEU, as it excludes and therefore cannot relate to the procedures of article 126(14) TFEU. Instead, it relates to the procedure of adoption for the different steps in the Excessive Deficit Procedure, in this case to the procedure for the adoption of a Council decision under article 126(9) jo. (13) TFEU. This means that the European Parliament is not involved (which is different from the use of article 136 TFEU in combination with article 121(6), which prescribes the ordinary legislative procedure – for more see below).

¹⁴ “In the light of this clear wording, Article 136 TFEU does nothing but provide a means for enhanced cooperation of the Eurogroup, giving procedural indications about voting in its paragraph (2). Deviance from Treaty rules is not covered, even if this leads to strengthened budgetary control which is desirable.”, Ruffert, *supra* n. 12, p. 1801.

¹⁵ See respectively Jean-Claude Piris, ‘Which institutional solutions for managing the multi-tier governance can be found in the framework of the current EU treaties?’, *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 19; and Jean-Claude Piris, *The Future of Europe. Towards a Two-Speed EU?* (Cambridge University Press 2012) p. 107.

¹⁶ “The author’s [Ruffert, TWB] questioning of the legality of the changes brought about in economic governance raises valid points, but his conclusions seem to go too far. If Article 136 TFEU would not allow the Council and Parliament to strengthen budgetary discipline and economic policy coordination, the provision would be rather futile. It is, after all, the absence of strong enforcement powers for the EU executive that led to the 2003 debacle with the Stability and Growth Pact. Only by strengthening the Commission, through the introduction of reversed QMV, could this fault be remedied meaningfully.”, René Smits, ‘Correspondence’, *Common Market Law Review* (2012) p. 827-831 at p. 829.

¹⁷ Further interesting elements contained in the “Two-Pack”, which entered into force on 30 May 2013, are not taken into account in this paper. Moreover, the European Commission in its ‘Blueprint for a deep and economic and monetary union’ has proposed the idea of a future fourth element, namely the Convergence and Competitiveness Instrument (CCI), to be based on article 136 TFEU: “The instrument would be established by secondary legislation. It could be construed as part and parcel of the MIP reinforced by the contractual arrangements and financial support as outlined above and thus be based on Article 136 TFEU.”; Communication from the Commission. A blueprint for a deep and genuine economic and monetary union, Brussels, 30.11.2012, COM(2012) 777 final/2, p. 22.

¹⁸ 4 and 10 May 2010, 19 August and 7 September 2010, 9 and 20 December 2010, 24 February and 7 March 2011, 5 and 12 July 2011, 26 October and 8 November 2011, 9 and 13 March 2012.

The combined use of articles 126 and 136 TFEU leads to very far-reaching decisions, including very detailed instructions to Greece. The detail is illustrated by the following examples of instructions included in the Council decisions on Greece: “a reduction of the Easter, summer and Christmas bonuses and allowances paid to civil servants with the aim of saving EUR 1500 million for a full year”, “a reduction of the highest pensions with the aim of saving EUR 500 million for a full year” and “an increase in excises for fuel, tobacco and alcohol, with a yield of at least EUR 1050 million for a full year”.¹⁹

These decisions are unprecedented and change the nature of the application of the Excessive Deficit Procedure. They can, however, arguably be reconciled with the scope of article 136 TFEU to the extent that they strengthen the coordination and surveillance of the budgetary discipline of the member states.

A second element is the introduction – through the “Six-Pack” measures adopted on the basis of articles 136 and 121(6) TFEU – of the reversed qualified majority voting modality for a number of steps/decisions in the Macro-Economic Imbalances Procedure (MEIP), the Medium-Term Budgetary Objective Procedure (MTO) and the Excessive Deficit Procedure (EDP).²⁰ How should we assess this in the light of the scope of article 136 TFEU? According to the Council Legal Service, the list of sanctions under article 126(11) TFEU may be enlarged for Eurozone member states to the extent that this aims to strengthen the coordination and surveillance of their budgetary discipline. The possibility is limited, however, in the sense that these measures must respect the essential institutional equilibrium and architecture established by the Treaties. What does this mean? It means that the introduction of reversed qualified majority voting is allowed.²¹ Suspension of voting rights on this legal basis, for example, would not be possible.

Two elements seem to make reversed qualified majority voting in the “Six-Pack” possible. First, the new voting modality only applies to newly-created steps. This means that there is no interference with the existing voting modalities in the Treaties. This essential element, that it does not simply apply to all the steps of, for example, the Excessive Deficit Procedure, is often overseen. Second, the new voting modality applies to so-called implementing acts and not to so-called legislative acts. The attribution of an implementing power to the Council exercised through a procedure of reversed qualified majority voting is, according to the Council Legal Service, not problematic.

The changing nature of the multilateral surveillance system (art. 121 TFEU)

Ruffert raises an interesting point with regard to a third element in the use of article 136 TFEU, one that has not received much attention so far:

Some of the measures to achieve convergence and budgetary control are highly doubted in EU legal terms, though in a less spectacular way than those to react to financial emergency. *Few scholars would argue that Article 121(4) TFEU covers the sanctions – fines or deposits – contained in parts of*

¹⁹ See article 2 of Council Decision of 12 July 2012 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit.

²⁰ Articles 4(2) and 5(2) of 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; article 3(3) of Regulation (EU) No 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct macroeconomic imbalances in the euro area; articles 6(2) and 10(2) of Council Regulation 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies as amended by Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011; and article 10(4) of 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.

²¹ Smits comes to a similar conclusion: “If Article 136 TFEU would not allow the Council and Parliament to strengthen budgetary discipline and economic policy coordination, the provision would be rather futile. It is, after all, the absence of strong enforcement powers for the EU executive that led to the 2003 debacle with the Stability and Growth Pact. Only by strengthening the Commission, through the introduction of reversed QMV, could this fault be remedied meaningfully.”, Smits, *supra* n. 17, p. 829.

the reform package, in particular, if the provision is compared with the elaborate mechanism of sanctions in Article 126 TFEU.²²

The author refers to the introduction of sanctions in the Macro-Economic Imbalances Procedure (MEIP) and the Medium-Term Budgetary Objective Procedure (MTO) – respectively introduced and strengthened by the “Six-Pack” – in the framework of article 121 TFEU on the multilateral surveillance of economic policy.

The objective here is not to discuss the political desirability or the economic soundness of the redesigned multilateral surveillance system of article 121 TFEU as a response to the crisis. Suffice it so say that the Macro-Economic Imbalances Procedure is a reaction to imbalances in the national economies that have been argued to contribute to the deepening of the crisis, such as the housing bubbles in Spain and Ireland.

The objective here is to illustrate how the introduction of sanctions has fundamentally changed the character of the multilateral surveillance system of article 121 TFEU and to relate this to the notion of legality. For this, it is important to know that the multilateral surveillance system of article 121 TFEU is based on recommendations. These are obviously not legally binding under EU law (article 288 TFEU). In both the Macro-Economic Imbalances Procedure (MEIP) and the Medium-Term Budgetary Objective Procedure (MTO), the adoption of recommendations and not following up on them can now lead to sanctions.²³ This, it is argued, fundamentally changes the nature of the multilateral surveillance system of article 121 TFEU. Does this application stay within the scope of article 136 TFEU? According to the Council Legal Service, the establishment of new sanctions, also in this preventive arm, is allowed in so far as it has the objective of strengthening the coordination and surveillance of the budgetary discipline of member states or of contributing to setting out economic policy guidelines for member states. It can easily be argued that the sanctions concerned have this aim. It can also be argued, however, that they go beyond mere coordination and surveillance as intended in the framework of article 121 TFEU.

In fact, a very broad reading of the scope of article 136 TFEU has to be adopted to justify the introduction of sanctions-based procedures in the framework of article 121 TFEU. If a more restrictive reading is adopted, a tension arises with the principle of attributed powers. The question seems to be: what action can be situated in between the provision becoming futile at one extreme (the fear of Smits)²⁴ and it being abused to create a true economic union with converged budgetary and economic politics at the other extreme (clearly not allowed, according to Piris)?²⁵

3.2 Strengthened Eurozone cooperation outside the EU Treaties (ESM, Fiscal Compact); or, how far can you go outside the Treaties?

In response to the Eurozone crisis, member states of the EU have concluded a number of new treaties, next to the existing EU Treaties: the EFSF, establishing a temporary emergency fund, decided on in May 2010; the Fiscal Compact, mainly increasing budgetary discipline, agreed in March 2012; and the ESM Treaty, establishing a permanent emergency fund, which entered into force in September 2012. These new Treaties raise interesting questions. How should going outside the Treaties be considered in general? Why was the treaty instrument chosen in these specific cases?²⁶ And what is the relationship of these treaties – both substantively and institutionally – to EU law?

²² Ruffert, *supra* n. 12, p. 1800, italics added TWB.

²³ See for more detail: article 3 of 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; article 4 of 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.

²⁴ Compare Smits, *supra* n. 17, p. 829.

²⁵ Compare Piris, *supra* n. 16, p. 19.

²⁶ This question is extensively discussed by De Witte, *supra* n. 6, and will not be discussed here. De Witte discusses the relevant instruments in an article on Treaty games (and takes them together with the amendment procedure of article 136(3) TFEU), concluding that law functions as an instrument as well as a constraint in the Euro crisis policy.

How should going outside the Treaties in terms of the power of member states to do so and in terms of principle be considered? With regard to the competence of member states to conclude so-called ‘inter se treaties’,²⁷ it is relevant to note that monetary policy is an exclusive policy so some member states concluding new intergovernmental treaties on this matter outside the EU Treaty framework is not allowed. Economic policy, however, is a coordinating power of the EU, so it has been argued that member states are still allowed to conclude separate Treaties in this area, as long as they comply with EU law, which takes primacy.²⁸ From that perspective, neither the ESM Treaty nor the Fiscal Compact raises a problem, as has recently been confirmed with regard to the ESM Treaty by the European Court of Justice in the *Pringle* case.²⁹

Craig, in his discussion of the Fiscal Compact, interestingly separates the power to conclude these Treaties from a possible principle justifying it. Is there such a principle justifying that “if the Member States fail to attain unanimity for amendment, and do not seek or fail to attain their ends through enhanced co-operation, does it mean that 12, 15, 21, etc. Member States can make a treaty to achieve the desired ends and the EU institutions can play a role therein, where the 27 Member States have not agreed to make use of the EU institutions, and where the treaty thus made deals with subject-matter covered directly by the existing Lisbon Treaty?”³⁰

Craig argues that if the reasoning of the European Court of Justice’s case law (on which more below) can be extended, then such a principle can be accepted.³¹ It would, however, have implications for “the way in which the European Union broadly conceived develops”.³² Two comments are appropriate here. Firstly, I believe that Craig, as do others, expects too much from the possibility of enhanced co-operation as an alternative to Treaty amendment.³³ Enhanced co-operation does not allow for changing the rules, only for applying them without the participation of all the member states. The flexibility clause (possibly combined with enhanced co-operation) can function as a genuine alternative.

Secondly, it can be argued that in the present case the United Kingdom is not just ‘a certain’ member state not agreeing to Treaty amendment, but is a special case. Clearly the United Kingdom had a different interest in the proposed Treaty amendment from all the other member states, an interest

²⁷ For this term, see De Witte, *supra* n. 6.

²⁸ Compare Bruno De Witte, ‘European Stability Mechanism and Treaty on stability, coordination and governance: role of the EU institutions and consistency with EU legal order’, *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 15 who calls economic policy a shared power: “Inter se agreements are not allowed in matters falling within the EU’s exclusive competence. Monetary policy is, in relation to euro area countries, an exclusive competence of the EU (Art 3.1 TFEU); it has been argued, also in the *Pringle* case, that the ESM Treaty deals with monetary policy and is therefore illegal under EU law. However, in the system of the TFEU, the question of financial assistance to member states is clearly located in the Economic Policy chapter (Articles 120 to 126) rather than in the Monetary Policy chapter (Articles 127 to 133), and economic policy is a *shared* competence, in which the Member State have preserved the right to develop their own policies, alone or together with others.” [Italics in original.] See also Piris, *supra* n. 16, p. 19.

²⁹ European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, paras. 60, 68-69. For comments, see Bruno De Witte and Thomas Beukers, ‘The Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*’, 50 *CML Rev* (2013) p. 805-848.

³⁰ Paul Craig, ‘The Stability, Coordination and Governance Treaty: principle, politics and pragmatism’, *ELR* (2012) p. 231-248 at p. 239. He distinguishes another principle, which would justify it “only where the issue is so important that the very survival of the European Union, or an important element thereof such as the euro, is at stake.” (p. 240).

³¹ Note also that the authors of the ‘Tommaso Padoa-Schioppa group’ actually suggest moving forward, not on the basis of the current EU Treaties, but through a new intergovernmental Treaty as the best way forward. See Jean-Victor Louis, ‘Institutional dilemmas of the Economic and Monetary Union’, *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 6.

³² Craig, *supra* n. 31, p. 240.

³³ Craig, *supra* n. 31, p. 238: “The Lisbon treaty therefore embodies requirements before change can take place, namely the ordinary and the simplified revision procedure. These provisions enshrine the proposition that the rules of the game should not be altered unless all agree. They also contain criteria as to what should happen when all do not agree, by offering the possibility for enhanced co-operation.”

that was different even from that of the so-called ‘pre-ins’ (the member states with a derogation and therefore an obligation to join the Euro in the future). Firstly, it does not take part in the monetary union and will not, based on its opt-out negotiated at Maastricht. Secondly, the rules of the economic union only apply to it partly.³⁴ Thus, article 7 of the Fiscal Compact (which intends to make reversed qualified majority voting the practice under the Excessive Deficit Procedure for the Eurozone member states), even if it were not to apply to the Eurozone member states only, would have little impact on the United Kingdom, to which the obligation of article 126(1) TFEU to avoid excessive government deficits does not strictly apply.³⁵ Similarly, the German wish to increase the powers of the European Court of Justice under the Excessive Deficit Procedure would not impact the United Kingdom (this was not eventually achieved through the Fiscal Compact). Even the obligation to include the balanced budget rule in national law, preferably constitutional, was arguably not intended for the United Kingdom.³⁶

It can be asked whether this has any meaning at all for the principle discussed. Clearly, there is a difference between going outside when dealing with a matter that relates to something that the ‘out’ who is blocking change is not directly affected by and when not. It would have arguably been different if the Treaty amendment dealt with banking union, as the United Kingdom does share the internal market rules on financial services, so there is a much clearer interest there.

Compatibility of the new Treaties with EU law

At least three interesting legal questions are raised with regard to the compatibility with EU law of the Emergency funds and the Fiscal Compact. Two relate to the substantive conformity of the Treaties with EU law. Firstly, what is the relationship between going outside the Treaties creating a permanent ESM emergency fund and article 125 TFEU, often referred to as the ‘no-bailout’ clause?³⁷ Borger argues that the prohibition in article 125 TFEU can be interpreted both narrowly and broadly.³⁸ Smits is optimistic about the possibilities of creating an emergency fund.³⁹ De Gregorio Merino, a member of the Council Legal Service writing in a personal capacity (and acting as an agent for the European Council in the *Pringle* case), argues the following: article 125 TFEU prohibits member states from guaranteeing the debt of any member state and providing loans that defeat the purpose of this article (that is, not accompanied by conditionality), but it does not prohibit loans and credits that are conditional and where the beneficiary is held to pay the loan back.⁴⁰ De Witte does see a potential conflict, but as long as the ESM is not applied in the sense that no financial support is actually given within its framework before January 1 2013 – when the ratification of article 136(3) TFEU should

³⁴ See Protocol 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

³⁵ It shall only endeavour to avoid it. See article 5 of Protocol 15 on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland.

³⁶ See also article 4 of the Commission proposal of 23 November 2011, which was only intended to apply to the Eurozone.

³⁷ Ruffert is extremely critical about the earlier temporary EFSF fund, which I do not discuss here, *supra* n. 12, p. 1785: “To begin with, Article 125(1) TFEU is rather explicit (...) In the present legal situation, a bailout by the Union (first sentence) or by one or more Member States (second sentence) is forbidden. As a result, the decision of the Eurogroup of 2 May 2010 concerning Greece, the establishment of the EFSF, the extension of both in 2011 and the Eurogroup’s support for Ireland and Portugal are in breach of European Union law.” Smits is much less so, *supra* n. 17, p. 827: “I beg to differ from the legal analysis that leads Ruffert to the conclusion that the establishment of the EFSF and of the European Financial Stabilization Mechanism (EFSM), the granting of credit to Greece, Ireland and Portugal, and the ECB’s Securities Market Program are in breach of Union law.”

³⁸ Vestert Borger, ‘De eurocrisis als katalysator voor het Europese noodfonds en het toekomstig permanent stabilisatiemechanisme’, [The Euro crisis as catalyst for the European emergency fund and the future permanent stabilisation mechanism] *SEW Tijdschrift voor Sociaal Economische Wetgeving* (2011) p. 207-216 at p. 212.

³⁹ See Smits, *supra* n. 17, p. 828: “The evolved interpretation of the no-bailout clause, which bars other Member States from assuming the debt of a fellow State but does not bar them from assisting the latter in repaying its own debts, is appropriate.”

⁴⁰ Alberto de Gregorio Merino, ‘Legal developments in the economic and monetary union during the debt crisis: the mechanisms of financial assistance’, *Common Market Law Review* (2012) p. 1616-1646 at p. 1627.

have been completed in all member states of the EU (not only of the Eurozone!) – an actual conflict can be avoided.⁴¹ The envisaged article 136(3) TFEU allows the Eurozone member states to establish a “stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole”.

The question of whether the ESM Treaty is in violation of article 125 TFEU has not been answered by the *Bundesverfassungsgericht* in its judgment of September 2012. It was, however, recently answered in the negative by the European Court of Justice in the *Pringle* case,⁴² a case in which the Irish Supreme Court asked for a preliminary ruling on the compatibility of the ESM Treaty with EU law and on the validity of the European Council decision of March 2011 amending article 136 TFEU (intended to introduce the above-mentioned article 136(3) TFEU). The Court followed the reasoning of De Gregorio Merino, stating that “Article 125 TFEU does not prohibit the granting of financial assistance by one or more Member States to a Member State which remains responsible for its commitments to its creditors provided that the conditions attached to such assistance are such as to prompt that Member State to implement a sound budgetary polity.”⁴³

Secondly, what is the relationship between going outside the EU Treaties through the Fiscal Compact by prescribing a balanced budget rule and the differently defined one incorporated in secondary EU law, namely the Medium-Term Budgetary Objective (MTO) of the ‘Six-Pack’. Observers see no legal problems here, even though they sometimes fail to make the most precise comparison (comparing the Fiscal Compact with the 3% deficit norm instead of with the MTO). De Witte convincingly argues: “However, it is clear that, whereas these figures are *different*, they are not *incompatible*. Just as the TFEU leaves the member states free to set a ‘golden rule’ which is stricter under their own constitutional law (as Germany and Spain have done, for example), it also allows the member states to do so *collectively*, by means of an inter se agreement.”⁴⁴

A third question, which is raised by both Treaties, is of an institutional nature, namely about the legality of the use of Union institutions outside the EU Treaty framework. The Fiscal Compact borrows the European Commission, the Council and the European Court of Justice. The ESM Treaty borrows the European Commission and the European Central Bank. This raises a question of principle about the use of EU institutions outside the Union Treaties.

The – little – earlier case law of the European Court of Justice on this matter should be put in perspective in two ways. Firstly, it relates to relatively innocent use of the institutions, if we compare it with the recent Eurozone crisis-related Treaties (in the *Aid for Bangladesh* case, for example, the Commission coordinated the aid given by member states outside the framework of the EU Treaties).⁴⁵ Secondly, the case law leaves a number of important questions open,⁴⁶ such as: do all member states need to consent to the use of the institutions? And what kind of tasks can actually be carried out outside the framework of the European Union?

The recent *Pringle* case of the European Court of Justice about the ESM Treaty has left the answer to the first question open.⁴⁷ This was possible, since, unlike the case of the Fiscal Compact, the

⁴¹ De Witte, *supra* n. 29, p. 15. Note in this regard that “The Spanish bank bailout is being transferred from the temporary eurozone fund (EFSF) to the permanent fund (ESM), with the first tranche expected in December, ESM chief Klaus Regling said in a press conference.”, *EuObserver.com*, 13 November 2012.

⁴² European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012. See De Witte and Beukers, *supra* n. 30.

⁴³ European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012, para. 137.

⁴⁴ De Witte, *supra* n. 29, p. 16; Craig does not see problems of compatibility and argues that the “TSCG does not advance matters very much from the obligations contained in the EU Treaty and accompanying legislation”, Craig, *supra* n. 31, p. 235; Borger & Cuyvers also see no problems: “De gouden regel levert op zich geen conflicten met Europees recht op.”, Borger & Cuyvers, *supra* n. 9, p. 379.

⁴⁵ European Court of Justice, C-181/91 and C-248/91, *Aid for Bangladesh*, Jur.1993, I-3685.

⁴⁶ See Borger & Cuyvers, *supra* n. 9, p. 382; ‘Editorial Comments. Some thoughts concerning the Draft Treaty on a Reinforced Economic Union’, *Common Market Law Review* (2012) p.1-14 at p. 9.

⁴⁷ European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, para. 158. The Court did, however, speak of *the* Member States as opposed to Member States being entitled to entrust tasks to the institutions outside the framework of the Union.

use of institutions was not contested among the member states here. In fact, on 20 June 2011 all 27 EU member states authorized the seventeen member states of the Eurozone to request the European Commission and the European Central Bank to perform the tasks provided for in the ESM Treaty. A similar thing has not happened, however, with regard to the Fiscal Compact, and the United Kingdom has on several occasions expressed its reservations over the use of the European institutions in this Treaty.

With regard to the second question, it follows from the *Pringle* case that the use of institutions as envisaged by the ESM Treaty is compatible with EU law.⁴⁸ Moreover, with exceptions,⁴⁹ most observers have not been very critical about the Fiscal Compact's use of the EU institutions outside the Union Treaties.⁵⁰ I believe this is rightly so. Here I will discuss one element of the use of the European Court of Justice which has not to my knowledge received attention so far, but which could prove to be more problematic, namely the power to impose sanctions under the Fiscal Compact.

ECJ power to impose sanctions under the Fiscal Compact

Most observers see no problem with the European Court of Justice's role under the Fiscal Compact.⁵¹ It can in fact be argued that this is not a case of borrowing the European Court of Justice, but of applying a power of the European Court of Justice directly conferred on it by the Treaties, namely by article 273 TFEU. The very interesting case of the power given to the European Court of Justice by the Fiscal Compact to impose sanctions on member states (article 8(2) FC), however, remains undiscussed.

This is an interesting element, since it cannot be explicitly found in article 273 TFEU. A power to impose sanctions for the European Court of Justice exists under EU law in relation to the infringement procedure (article 258-259 TFEU), and an action for this can be started by the European Commission under article 260 TFEU. The power to impose sanctions under the Fiscal Compact should in fact be understood in analogy with article 260(2) TFEU. Article 260 TFEU confers a power on the European Court of Justice to impose a lump sum or penalty payment in case a member state does not comply with a judgment by the Court. Importantly, it deals with infringements by member states of "an obligation under the Treaties". However, not only are we dealing with an action started by member states (article 273 TFEU) rather than by the Commission (under article 260 TFEU), but also an infringement of the Fiscal Compact as referred to in article 8 Fiscal Compact (failure to comply with article 3(2) FC) does not qualify as an obligation under the EU Treaties.

Therefore the Fiscal Compact creates a new power for the European Court of Justice, as it is not simply exercising Treaty powers here. This is remarkable from the perspective of the attribution of powers principle. The argument that a power to impose sanctions is simply implied in article 273 TFEU is not very convincing.⁵² It would be interesting to see if the European Court of Justice, if asked about the compatibility of article 8(2) Fiscal Compact with EU law, would be self-restraining on this point, in the sense of rejecting a power given by Member States to make attainment of the objectives of the economic and monetary union more effective. Peers argues that "the Court could hardly be accused of judicial activism if it simply carries out the task which member states have expressly given it here."⁵³ He offers an easy solution, arguing that the "Court's dispute settlement jurisdiction can

⁴⁸ European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, paras. 155-177.

⁴⁹ Notably Craig, *supra* n. 31, p. 238-247.

⁵⁰ Borger & Cuyvers, *supra* n. 9, p. 384; De Witte, *supra* n. 6, p. 155-156; 'Editorial Comments. Some thoughts concerning the Draft Treaty on a Reinforced Economic Union', *Common Market Law Review* (2012) p.1-14 at p. 6.

⁵¹ Craig, *supra* n. 31, p. 245; Borger & Cuyvers, *supra* n. 9, p. 385; De Witte, *supra* n. 6, p. 155: "the 'use' of the Court of Justice to enforce the international law obligations contained in the Fiscal Compact is justified." It can be expected therefore they also see no problem with the role of the European Court of Justice under the ESM Treaty (article 37 ESM Treaty).

⁵² Even though the Court in the *Pringle* case has shown its willingness to adopt a broad reading of article 273 TFEU to also include disputes between a member state and an international organisation of which the only parties are EU member states; see European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, para. 175.

⁵³ Steve Peers, 'The Stability Treaty. Permanent Austerity or Gesture Politics', *EuConst* (2012) p. 404-441 at p. 420.

logically extend to encompass a procedure to enforce its own judgments.”⁵⁴ An alternative way to solve the matter is by considering the imposition of sanctions as a mere ‘task’, as opposed to a new power, which does not alter the essential character of the Court’s powers conferred by the EU Treaties.⁵⁵ But are we really merely dealing with a task, which in the Court’s test as applied to political institutions seems to entail that it does not “entail any power to make decisions of their own”?⁵⁶ Another way for the Court to close the gap would be to go beyond the textual ‘notion’ of institutional balance of article 13 EU Treaty, and use the ‘principle’ of institutional balance as the source of a specific legal norm which could not be found in the text of the Treaty,⁵⁷ as it did in the *Chernobyl* case to overcome a procedural gap.⁵⁸

How should we consider this use? Overall, it can be argued that a very responsible use of the Treaty instruments seems to have been made. This can be illustrated by what has not been included in the Fiscal Compact, for example giving the Commission the power to act directly on behalf of the member states (under article 8 FC) – desired by some, but equally denounced by others as going against the institution’s Treaty-based independence. In fact, the Fiscal Compact is to be seen as a compromise between those forces that would have liked to go further, and those which were more conservative. The choice of instrument itself, once it was made, put serious constraints on what could actually be regulated.

Some of the comments made on the Fiscal Compact, even though defensible from a strictly legal point of view, seem to fail to take into account these political dynamics. De Witte argues that “There was, arguably, no strict need to adopt a new treaty to implement what is contained in the text of the Fiscal Compact. Most of what it contains in terms of economic governance at the European level could have been adopted through enhanced cooperation within the EU or by means of a modification of Protocol No. 12 on the excessive deficit procedure.”⁵⁹ Nevertheless, it will be argued below that the intergovernmental Treaty contains important advantages over secondary EU law when it comes to imposing the obligation on member states to incorporate a balanced budget rule, preferably in the formal national constitution or otherwise materially in national constitutional law.

3.3 The way forward: Treaty change?

So far, European politicians have been able to avoid using Treaty amendment for further integration (apart from the creation of article 136(3) TFEU, which, however, does not create new powers). Recent Commission proposals on a banking union as well as the report “Towards a Genuine Economic and Monetary Union” presented on 5 December 2012 by the President of the European Council – and prepared in close collaboration with the Presidents of the Commission, the Eurogroup and the European Central Bank – again raise the question of the extent to which a fiscal union or political union can be brought about without Treaty change.

With regard to the banking union, three elements should be distinguished: the supervision of banks (Single Supervisory Mechanism), resolution powers (Single Resolution Mechanism) and a deposit guarantee fund. With regard to supervision, several actors had argued that a Treaty change was

⁵⁴ Steve Peers, ‘Towards a New Form of EU Law? The Use of EU Institutions outside the EU Legal Framework’ *EuConst* (2013) p. 37-72 at p. 64.

⁵⁵ Compare the Court’s approach to the ‘tasks’ given by the ESM Treaty to the Commission and the European Central Bank; European Court of Justice, Case C-370/12, *Pringle*, 27 November 2012, paras. 158-165.

⁵⁶ European Court of Justice, Case C-370-12, *Pringle*, 27 November 2012, para. 161.

⁵⁷ Compare Bruno de Witte, ‘The Role of Institutional Principles in the Judicial Development of the European Union Legal Order’, in: Francis Snyder (ed.), *The Europeanisation of Law. The Legal Effects of European Integration* (Oxford, Hart Publishing 2000) p. 83-100 at p. 92.

⁵⁸ European Court of Justice, Case 70/88 *European Parliament v Council (Chernobyl)*, 22 May 1990. In this case, not only did the Court increase the powers of *locus standi* of the European Parliament, but it thereby also increased its own powers.

⁵⁹ De Witte, *supra* n. 6, p. 152. Similar comments were made by Commissioner Olli Rehn on 12 December 2011 in relation to the substantive agreement reached during the December European Council.

required and that article 127(6) TFEU was not sufficient.⁶⁰ Sweden, for example, has argued that only through a Treaty amendment can the non-Eurozone member states be involved (as article 127(6) TFEU only covers the European Central Bank, which is not an institution with powers in relation to the non-Eurozone member states, and nor do the latter have voting rights in this institution). The German *Bundesbank* has argued that a Treaty amendment is needed to make a dual role of the European Central Bank possible: giving this institution both a supervisory role over national banks as well as a monetary role would otherwise endanger its independence as well as its price stability mandate. Similarly, according to the Council Legal Service a Treaty amendment would be necessary to give a separate bank supervision board within the ECB any formal decision-making powers.⁶¹ With regard to the Single Resolution Mechanism, Germany has questioned article 114 TFEU as the correct legal basis, advocating the use of the flexibility clause of Article 352 TFEU instead. In other words, this mechanism too raises the question of the extent to which the current treaty powers suffice.

On the one hand, a successful Treaty change that takes away any doubt about the legality of a Single Supervisory Mechanism, and also about the other elements of a banking union, provides increased legitimacy. On the other hand, a procedure that takes years can arguably not be part of crisis resolution. Moreover, Treaty change has the disadvantage that you have to get it right first time or you risk starting another long process of fixing earlier faults. This means a Treaty change would have to lead to the introduction of broad legal bases or enabling clauses, leaving the details to be worked out under secondary law. It also means a political assessment has to be made (and agreed on!) of what is needed in the long term to solve the Eurozone crisis as well as to prevent future ones. For now, especially since the December 2012 European Council, the prospect of a big Treaty change is receding.⁶²

4. Assessing the paths chosen: democratic legitimacy

In the following, some democratic challenges of the different types of differentiated integration discussed above will be illustrated. As said, there will be a focus on input democracy, related to rules of change (the different procedural requirements for the creation of rules) and related to the new instruments set up, in particular the role of (representative) institutions under them. I will also discuss the particular impact of the balanced budget rule of the Fiscal Compact on the powers of national parliaments. Finally, I will touch upon the current debate over the level that provides or should provide the most important legitimating role for EU policy responses to the crisis: the level of national parliaments and democracy or the level of the European Parliament and democracy.

4.1 Input legitimacy and new Treaties versus extensive use of secondary legislation

From the discussion above, it is clear that the policy responses to the Eurozone crisis have led to important innovations both within and outside the framework of the EU Treaties.⁶³ Outside the framework of the EU Treaties, an emergency fund has been created and an obligation to adopt at national level, preferably constitutional, a balanced budget rule. Within the framework of the EU Treaties, a Macro-Economic Imbalances Procedure has been created with the possibility of imposing sanctions.

In terms of input legitimacy, there is an interesting difference between the two paths chosen for these policy outcomes. The ‘outside’ route of an intergovernmental Treaty leans on the legitimacy of national parliaments, as the ESM Treaty and Fiscal Compact require ratification at the national level. The ‘within’ route of article 136 TFEU instead leans to a great extent on legitimacy provided at

⁶⁰ Article 127(6) TFEU: “The Council, acting by means of regulations in accordance with a special legislative procedure, may unanimously, and after consulting the European Parliament and the European Central Bank, confer specific tasks upon the European Central Bank concerning policies relating to the prudential supervision of credit institutions and other financial institutions with the exception of insurance undertakings.”

⁶¹ *Financial Times*, ‘ECB supervisory proposal illegal, says adviser’, 18 October 2012.

⁶² See also ‘Charlemagne’, *The Economist*, 22 December 2012.

⁶³ Again, I leave aside here the unconventional measures of the ECB.

the European level, as the “Six-Pack” measures adopted on the basis of article 136 and 121(6) TFEU jointly are adopted through the ordinary legislative procedure. This means qualified majority voting in the Council and co-decision for the European Parliament.

How should the ‘outside’ route be evaluated from an input legitimacy perspective? The conclusion of new intergovernmental Treaties has been criticized for its lack of transparency and democracy.⁶⁴ While in terms of transparency the recent conclusion of the Fiscal Compact can surely be criticized, in terms of the involvement of parliaments one must not forget that these Treaties require ratification, meaning approval by national parliaments and sometimes even a referendum (notably on the Fiscal Compact in Ireland). Whatever the level of popular support among those represented nationally for the specific measures adopted, national Parliaments arguably still provide greater legitimacy than the European Parliament. And whatever the role played in the Irish referendum by the link between the ratification of the Fiscal Compact and the possibility of receiving ESM funding, such a referendum nonetheless still provides greater legitimacy in Ireland than the conclusion of an EU regulation would have.

How then can the ‘within’ route of article 136 TFEU be viewed? An extensive use of article 136 TFEU is possibly problematic considering the fact that this procedure prescribes qualified majority voting in the Council, and member state representatives can thus be outvoted. In practice, this does not seem to have been formally the case with regard to the relevant ‘Six-Pack’ or ‘Two-Pack’ measures, but it is still clear that some member states have had to accept things they strongly opposed during negotiations. The best example is the introduction of *semi-automatic* sanctioning (a decision is deemed to be adopted unless rejected), which France opposed. France initially seemed to be able to avoid the introduction of this type of sanction through the October 2010 Deauville deal with Germany, but finally had to accept it in a showdown between the Council and the European Parliament.

This illustrates another relevant element of article 136 TFEU, namely the involvement of the European Parliament. From a democratic perspective, involvement of the European Parliament is generally seen to compensate the possibility of member states being outvoted by providing legitimacy at the European level. To what extent is this true also for an (over-) extensive use of article 136 TFEU? Obviously, the European Parliament cannot legitimate measures that overstep the boundaries of article 136 TFEU. In that case an opposing or outvoted member state can have recourse to the European Court of Justice through an action for annulment (article 263 TFEU). To my knowledge, there is no sign yet of a member state being outvoted under article 136 TFEU or contemplating recourse to the European Court of Justice.

It can be said that the European Parliament has been successful, both in its linking of the six measures of the “Six-Pack” – note that the ordinary legislative procedure was not prescribed for all these measures⁶⁵ – and in its impact on the final outcome (especially the above-mentioned *semi-automatic* sanctioning).

Interestingly, also members of the European Parliament *not* from Eurozone countries voted on the measures that only apply to the Eurozone. Is this institutionally problematic? Ideally, the European Parliament should not be seen to represent nationals of member states as such, but to represent the

⁶⁴ De Witte, *supra* n. 6, p. 154: “The main disadvantage of the non-EU treaty route is, of course, that the special qualities of EU law are lost, namely the relatively democratic and transparent mode of decision-making (at least if compared to purely intergovernmental decision-making), and the capacity to make the rules ‘stick’ by means of a relatively efficient judicial enforcement system.”; Ruffert, *supra* n. 12, p. 1789: “Nonetheless, the erection of a new international institution enhances the complexity of the design of European integration, and it also sidesteps some crucial features of the EU’s institutional concept, which should strive for more transparency and not for a complex plurality. The reflection behind this critical remark leads to one of the core challenges of the new ESM for EU law. Indeed, its construction is questionable in the light of the principle of democratic rule. The “democratic deficit” has always threatened progress in the course of European integration.”

⁶⁵ Notably, Directive 2011/85/EU on requirements for budgetary frameworks of the Member States and Regulation No 1177/2011 on speeding up and clarifying the implementation of the excessive deficit procedure (amending Regulation No 1467/97) only required consultation of the European Parliament, as they were adopted on the basis of article 126(14) TFEU.

Union's citizens (article 14 EU). There is, however, obviously a tension here, as Piris rightly notes.⁶⁶ Interestingly, the European Parliament itself is not in favour of creating a (separate) Eurozone assembly.⁶⁷

4.2 The (absent) role of supranational institutions under the new intergovernmental Treaties

The new intergovernmental Treaties have been criticized for their absence of accountability mechanisms involving the European Parliament.⁶⁸ In fact, in our discussion of the legality of borrowing the EU institutions outside the EU Treaties, no mention was made of the European Parliament. The European Parliament has no role in decision-making on providing financial assistance to member states under the ESM Treaty. The President of the European Parliament is not welcome at Euro Summits, even though he may be invited to be heard.⁶⁹ Moreover, no new accountability mechanisms are created for the Commission, considering its strengthened role under the Fiscal Compact and the ESM Treaty. Arguably, however, the European Parliament can use existing accountability mechanisms to scrutinize the actions of the European Commission 'under' these Treaties. The same holds for the European Central Bank's actions under the ESM Treaty. Moreover, several commitments made in the Fiscal Compact, for example on the budgetary and economic partnership programme (article 5 FC), will be implemented through secondary EU law, involving the European Parliament on the basis of its EU Treaty powers.

Some of the criticism is less related specifically to the intergovernmental Treaties, but goes to the heart of the institutional set-up of the Excessive Deficit Procedure of article 126 TFEU. Thus, Hix argues with regard to the budgetary role of oversight of the Commission that "(...) the Commission does not have a sufficiently democratic mandate to pass judgement on national budgetary discipline."⁷⁰ With regard to key economic governance decisions of the Ecofin Council, he argues that "(...) while each minister might be accountable to his or her own member state this does not make him or her either individually or collectively legitimate for the EU as a whole. Put another way, why would the public or a parliament in a Eurozone state accept a majority decision against them by the Eurozone Finance Ministers (such as the imposition of a fine for breaching the 3% budget deficit rule)?"⁷¹ Hix is particularly concerned with democratic legitimacy since major redistributive consequences are now involved, both between Member States as a result of the funds, and within Member States as a result of austerity measures.

With regard to redistributive consequences within states, the case of Greece is pressing in its relation to the use of article 136 TFEU (see paragraph 3.1 above). It should be noted that the decisions that would arguably have the greatest redistributive consequences between Member States in the short term are taken unanimously (namely those under the EFSF and ESM Treaty). One exception is the so-

⁶⁶ Piris, *supra* n. 16, p. 10: "Par ailleurs, les Etats participants pourraient avoir des difficultés politiques à accepter que les décisions les concernant exclusivement soient proposées et décidées par une Commission et un Parlement dans leur composition reflétant la totalité des Etats membres de l'Union européenne."

⁶⁷ See Benjamin Fox, 'No eurozone-only assembly, say MEPs', *EuObserver*, 6 October 2012.

⁶⁸ Written evidence submitted by Simon Hix to the European Scrutiny Committee of the House of Commons, 4 January 2012: "However, the European Parliament is currently absent in the proposed intergovernmental structures for a fiscal compact for the Eurozone. If the European Parliament was given an oversight role of the Commission and the Eurozone Finance Ministers, this would at least add one democratic check in the proposed structure."; Janis Emmanouilidis, 'Which lessons to draw from past and current use of differentiated integration', *Challenges of Multi-tier Governance in the EU*, European Parliament AFCO Workshop, October 2012, p. 11-12: "the European Parliament runs the risk of being sidelined in some of the processes aiming to lead to a "Genuine Economic and Monetary Union"."; Ruffert, *supra* n. 12, p. 1790: "As may be shown, parliamentary control and political accountability towards the European Parliament is non-existent in the ESM, and it is substantially diminished with respect to national parliaments as in all similar institutional structures at the international level."

⁶⁹ Article 12(5) FC.

⁷⁰ Hix, *supra* n. 69.

⁷¹ Hix, *supra* n. 69.

called super-qualified majority under the ESM Treaty. Where the Commission and the European Central Bank both conclude that a failure to urgently adopt a decision to grant or implement financial assistance would threaten the Eurozone's economic and financial sustainability, a majority of representatives of member states representing 85% of the capital contribution – key to the ESM Fund – is sufficient (article 4(4) ESM Treaty). While all member states but Germany, France and Italy can be outvoted in this procedure, to compensate for this an emergency reserve fund is then automatically created to cover possible risks. A transfer from this emergency reserve fund back to the regular reserve fund can only be decided unanimously.

Interestingly, article 4(4) ESM has been the subject of a Judgment of the Estonian Supreme Court. The Court concluded that this provision interferes with the financial competence of the *Riigikogu* (Estonian Parliament) and the financial sovereignty of the State of Estonia, but that this interference is justified by substantial constitutional values. Article 4(4) ESM Treaty provides an appropriate, necessary and reasonable measure for the achievement of the objective of eliminating a threat to the economic and financial sustainability of the euro area.⁷²

While under the intergovernmental Treaties each representative of a member state has a veto, the exact role of national parliaments is left to national constitutional law (be this by previous consent, accountability ex post, etc.).⁷³ Hix is again critical: “The current plans do not specify in any detail how national approval would work. (...) Without an agreement on at least a set of minimum procedures, there is a danger that some national governments will try to side-step national parliamentary approval of their contributions to the EFSF and ESM.” Even though Hix's fears may be justified, it may be asked whether the solution should instead be found at the level of the intergovernmental treaties. This route would easily lead to accusations of an attempt to interfere with the national constitutional identity of member states.⁷⁴

4.3 The Fiscal Compact and the powers of national Parliaments

The Fiscal Compact intends to further increase the budgetary discipline of member states and impacts on the powers of national Parliaments. To understand how, one should first look at the definition of the Balanced Budget Rule in the Fiscal Compact and its relation to existing EU law. Secondly, and more importantly, one should look at the character of this rule and the intention of the Fiscal Compact to have it enshrined in the national law of the contracting parties, preferably at a constitutional level.

Even though the definition of the Balanced Budget Rule is not identical under the “Six-Pack” and the Fiscal Compact, the differences are not great.⁷⁵ In general terms, the Fiscal Compact Balanced Budget Rule is similar to existing EU law in the sense that, as do the Treaty-based 3% deficit rule and the “Six-Pack” Medium-Term Budgetary Objective rule (MTO), it provides a maximum for member state deficits, but without deciding what policy measure are to be taken to stay within these limits.⁷⁶

⁷² Estonian Supreme Court *en banc*, Constitutional Judgment 3-4-1-6-12, 12 July 2012, points 204-210. For comments, see Carri Ginter, ‘Constitutionality of the European Stability Mechanism in Estonia: Applying Proportionality to Sovereignty’, 9 *EuConst* (2013) p. 335-354.

⁷³ The German *Bundesverfassungsgericht* has recently decided that the *Bundestag* must consent to every individual disposal and that there must be sufficient parliamentary influence on the way the funds are handled by the receiving states. BverfG, 2 BvR 1390/12, 12 September 2012.

⁷⁴ For the Treaty obligation of the *European Union* to respect the national constitutional identity of the member states, see article 4(2) EU.

⁷⁵ Moreover, the application of the rule is country specific. The Fiscal Compact starts from a more strict 0.5% limit of the structural deficit, but gives more leeway (1%) to member states with a relatively low general government debt (significantly below 60% of GDP). The “Six-Pack” starts from a less strict 1%, but can be more strict in its actual application to a specific country.

⁷⁶ Compare also Brigid Laffan, ‘Testing Times: Responsibility to the fore in the Euro Crisis’, Paper prepared for the conference in honour of Peter Mair: Responsive or Responsible, EUI, 26-28 November 2012, p. 1-17 at p. 12: “If national governments are increasingly drawn into budgetary and fiscal cycles within the EU and Euro area, how can national parliaments continue to exercise their traditional prerogatives in domestic public finances.” But also on same page: “Budgetary and economic policy falls within the political space of constrained choice, but choice nonetheless. (...)”

The recent combined application of articles 126(9) and 136 TFEU in the case of Greece (discussed above) goes much further in this respect!

Arguably more important is the different character of the new Balanced Budget Rule. The Fiscal Compact creates the following obligation with regard to its Balanced Budget Rule:

The rules (...) 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 process.⁷⁷

What does ‘permanent’ mean? And ‘or otherwise guaranteed to be fully respected’? This, unfortunately, is not very clear.⁷⁸ According to the *Conseil Constitutionnel*, in France the introduction of binding and permanent provisions would require changes of several provisions of the Constitution. Alternatively, ‘otherwise guaranteed to be fully respected’ could be satisfied in France through the adoption of an organic law, which is of a permanent nature and would bind the entire public administration.⁷⁹

Moreover, it is questionable in some member states, including the Netherlands, whether parliament can bind itself.⁸⁰ That the obligation further constrains national parliaments, however, seems to be undisputed.⁸¹ Member states must also create an automatic correction mechanism, which is triggered in the event of significant observed deviations.⁸² Nonetheless, it can again be argued that member states are still free to decide what policy choices to make in the design of their automatic correction mechanism.

Hix critically argues that “As the agreement is currently designed, neither the new constraints on national budgets (...) nor the rules governing the transfer of resources between member states would be accepted as legitimate by citizens and national parliaments in the member states involved.”⁸³ Should the balanced budget rule then have been better included in secondary EU law? This has been argued implicitly.⁸⁴ In contrast, it is here argued that the path of a Treaty, preferably in the form of an amendment of the EU Treaties, but in the absence of that in the form of a new intergovernmental Treaty, is to be welcomed. Does secondary EU law, which can be adopted by a qualified majority

(Contd.) _____

There are choices about the balance between spending cuts and tax increases and within both categories about where to cut and where to raise taxes.”

⁷⁷ Article 3(2) Fiscal Compact.

⁷⁸ Borger & Cuyvers, *supra* n. 9, p. 380; Compare also J.H. Reestman, ‘Europe’s Not Always Able to Speak German: On the Dutch Implementing Act and the Hazardous Interpretation of the Implementation Duty in Article 3(2) Fiscal Compact’, 9 *EuConst* (2013) p. 480-500 at p. 491.

⁷⁹ Conseil Constitutionnel, Décision no. 2012-653 DC of 9 August 2012, points 20-24.

⁸⁰ ‘Editorial. The Fiscal Compact and the European Constitutions: ‘Europe Speaking German?’, *EuConst* (2012) p. 1-7 at p. 3: “The United Kingdom and the Netherlands are among the countries in which the rule applies that a parliament cannot bind itself. A parliament deciding on the budget cannot be bound by a ‘balanced budget rule’ enacted by act of parliament, if parliament does not want to be bound by it or ignores it when deciding on the budget. Nevertheless the Dutch government has announced that it intends to implement the balanced budget rule by an act of parliament.”

⁸¹ Borger & Cuyvers, *supra* n. 9, p. 381; ‘Editorial. The Fiscal Compact and the European Constitutions: ‘Europe Speaking German?’, *EuConst* (2012) p. 1-7 at p. 5-6: “The Fiscal Compact, however, strikes at the heart of the institutions of parliamentary democracy by dislocating as a matter of constitutional principle the budgetary autonomy of the member states. It affects the power of the purse of national parliaments (and also for the European Parliament!), historically the primary spring of development of their powers.”

⁸² See also the Commission communication of 20 June 2012 on Common principles on national fiscal correction mechanisms.

⁸³ Hix, *supra* n. 69.

⁸⁴ De Witte, *supra* n. 6, p. 152: “The core of the new treaty and its real novelty, also in terms of democratic practice, lies elsewhere, namely in the introduction of the ‘golden rule’: the obligation to introduce into national law (preferably constitutional) the new budgetary limits defined in Article 3, para. 1, in particular a ‘structural’ deficit not exceeding 0.5% of the GDP. Again, this could have been achieved legally speaking by means of EU legislation, if necessary adopted by means of the ‘enhanced cooperation’ mode of decision-making.”

vote,⁸⁵ really have sufficient status and legitimacy to mandate a change of formal national constitutions or otherwise of material constitutional rules, in the sense that it requires guarantees implying similar status? I would argue that it does not and that ratification of such an obligation by member states, leading to an active involvement of national parliaments, is desirable.

4.4 The way forward: European or national democratic legitimacy?

Undoubtedly, the most prominent source of legitimacy for European integration lies at the level of national parliaments and democracy. Is this sustainable in the long term, also in light of the current Eurozone crisis responses? Two opposing positions are found in the academic literature.

Some argue that the national level will have to lend its legitimacy to a solution to the crisis.⁸⁶ Weiler argues that “at what will be a decisive moment in the evolution of the European construct, the importance, even primacy of the national communities as the deepest source of legitimacy of the integration project will be affirmed yet again.”⁸⁷ Scicluna contends that “democracy is still best preserved by sovereign states within a more limited EU. The Eurozone crisis illustrates the dangers that ‘more Europe’ poses to European democracy much more rapidly than it points to Europeanisation as the solution.”⁸⁸

Others argue that legitimacy must eventually be found at the European level. According to Laffan, the increased collective responsibility among executives in the Eurozone leads to a legitimacy gap. The “limits of responsiveness at national level must be compensated for by greater responsiveness at the EU level.”⁸⁹ Maduro takes a more extreme position, arguing that “a model that would make EU democracy wholly or fundamentally dependent on national democracies is destined to fail”⁹⁰ and proposes several reforms – not requiring Treaty amendment – for the creation of a European political space, including a reform of the EU budget and true electoral competition on the Presidency of the European Commission. Fabbrini takes a similar position on the appropriate level of legitimacy: “as shown by the protests in the streets of many European capitals, the legitimacy of decisions taken on behalf of the EU cannot be a derivative of the legitimacy enjoyed by the governments of its member states”.⁹¹

5. Conclusions

In the absence of an increased legitimacy of democratic politics at the level of the European Union, the most important legitimacy source remains at the level of national democracy and parliaments. This predominant national legitimacy source functions through various different steps, be it a *Bundesverfassungsgericht*, Estonian Supreme Court or *Conseil Constitutionnel* judgment, national parliamentary ratification of a new Treaty, a popular referendum in Ireland, a decision on European matters by a national Finance Minister, etc. When the permissive consensus on the European project

⁸⁵ Note that the so-called “Two-Pack” in which a similar rule was originally included by the Commission has been proposed on the basis of articles 121(6) and 136 TFEU. See article 4 of 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, 23 November 2011.

⁸⁶ J.H.H. Weiler, ‘In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration’, *European Integration* (2012) p. 825-841.

⁸⁷ *Ibid.*, p. 837.

⁸⁸ Nicole Scicluna, ‘EU Constitutionalism in Flux: Is the Eurozone Crisis Precipitating Centralisation or Diffusion?’, *European Law Journal* (2012) p. 489-503 at p. 501.

⁸⁹ Laffan, *supra* n. 77, p. 13.

⁹⁰ Miguel Pórigues Maduro, *A New Governance for the European Union and the Euro: Democracy and Justice* (Directorate-General for Internal Policies of the European Parliament, September 2012) p. 1-31 at p. 14.

⁹¹ Sergio Fabbrini, ‘The Democratic Governance of the Euro’ in: Maduro, De Witte, Kumm (eds.), *The Democratic Governance of the Euro*, RSCAS Policy Papers 2012/08, p. 27-31 at p. 29: “Decisions made at the EU level require a legitimizing mechanism at that level, not at the level of its member states. Without proper involvement of the EP in those decisions, the latter will lack the justification sufficient to be accepted by the European citizens affected by those decisions.”

has given way to social unrest in several member states, the importance of these legitimacy moments should not be underestimated. Moreover, they should not be avoided.

This leads to a number of conclusions. Firstly, the much criticized Fiscal Compact is to be preferred over secondary EU law as an instrument creating the obligation to introduce a Balanced Budget Rule and an automatic correction mechanism at the level of national, preferably constitutional, law, or at least with what can be called materially constitutional guarantees. Secondly, Treaty change, or otherwise use of the flexibility clause in combination with enhanced co-operation, is to be preferred over an over-extensive use of article 136 TFEU (as a sort of ‘Euro-flexibility’-clause). Thirdly, ESM Treaty amendment is to be preferred (even though that would mean early amendment of an agreement that has already been renegotiated in the past) over an over-extensive interpretation of article 19 ESM Treaty (reviewing the list of financial assistance instruments) to make direct recapitalization of banks through the ESM possible in the future. And finally, from this perspective, the failure to have a Greek referendum on the outcome of the October 2011 Euro Summit, an idea proposed by then Greek Prime Minister Papandreou, but cancelled under Franco-German pressure, is to be seen as a missed opportunity.

