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Flexibilisation of the Euro Area: Challenges and  
Opportunities

Thomas Beukers



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## **Abstract**

This working paper explores the challenges and opportunities of a possible euro area flexibility clause. Such a clause, if introduced through a limited revision of the current EU Treaties, could be used to partially respond to one of the institutional challenges exposed by the Eurozone crisis, namely that member states (permanently) outside the euro area can block change desired by the member states within the euro area. It would provide an alternative to a comprehensive treaty revision and to going outside the treaties by concluding additional intergovernmental treaties.

## **Keywords**

Eurocrisis; Treaty Amendment; Flexibility; Euro Area Flexibility Clause; Democratic Legitimacy; Institutional Unity; Membership; ESM Treaty; Fiscal Capacity; Stability Bonds; Banking Union.

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## 1. Introduction

### *The Eurozone crisis and the challenges for the Union*

The Eurozone crisis exposes a great number of challenges for the European Union and for the euro area in particular. One of these challenges is the development of the economic pillar of the economic and monetary union to a degree that makes the monetary union sustainable. A second challenge for the Union is to design a proper allocation of responsibilities for maintaining and restoring financial stability. A specific institutional challenge is posed by the difficulty in agreeing on change in a Union in which the rules of changes are very rigid, especially with regard to policy areas where a number of member states have integrated further than others, as is the case for the euro area.

This institutional challenge relating to the EU's rules of change constitutes the subject of this paper. It has a dual aspect, which is clearly illustrated by the events of the crisis. A strongly perceived necessity<sup>1</sup> of new powers for the euro area is combined with the possibility of blocking their creation (also) for member states both temporarily and permanently outside the euro area. In other words, those member states which have chosen to integrate further in the euro area, and which face a need to adapt the basic rules, are limited by the – sometimes related and sometimes unrelated – wishes of those outside the euro area. The most telling example is the United Kingdom veto of a change in the basic legal framework at the December 2011 European Council, which finally led to an agreement outside the framework of the EU Treaties, the so-called Fiscal Compact.<sup>2</sup>

Several ways exist to respond to this institutional challenge. One way is to adopt a comprehensive revision of the treaties (or many limited revisions) in a process that not only adapts the euro area to changing circumstances, prepares it for the future, and makes the single currency sustainable, but that also takes on board unrelated wishes of those outside the euro area. A second response is that of going outside the EU treaties, which avoids the necessity of agreement by those outside the euro area, as was done in the case of the Fiscal Compact. A further response would be to make change in the EU more flexible, for example through the creation of a euro area flexibility clause by way of a limited treaty amendment. The objective of this paper is to explore the challenges and opportunities of such a euro area flexibility clause, and thereby contribute to the broader debate about (treaty) change in the Union. Before doing that, I will briefly introduce this possible revision of the EU's rules of change, and contrast it with the other potential responses identified.

### *Flexibilisation of the euro area*

One can think of several revisions of the current rules of change in the EU Treaties that would render change more flexible. One way would be to create a new flexible treaty amendment rule prescribing only a qualified majority for amending the treaties as opposed to the unanimity prescribed by Article 48(4) EU. Another way would be to make the simplified revision procedure of Article 48(6) EU also available for an increase of competences of the Union or to also make it applicable outside the limited scope of Part Three of the TFEU. A further proposal for a more flexible amendment rule is advocated by the Spinelli Group.<sup>3</sup> Politically, however, the time may not be ripe for more flexible treaty amendment, even if limited only to the euro area.

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<sup>1</sup> The concept of necessity is used in a subjective sense here, including both political and legal necessity, and it is acknowledged that there may be different views on the extent of this necessity.

<sup>2</sup> The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union was signed on 2 March 2012 by 25 member states of the Union.

<sup>3</sup> The Spinelli Group, *A Fundamental Law of the European Union* (Verlag Bertelsmann Stiftung, 2013) p. 20: “But we modify the procedure for the Intergovernmental Conference to allow amendments to be agreed by three quarters of the states. The European Parliament gains the right of assent to treaty changes. Any future new treaty will enter into force either once ratified by four fifths of the states representing a majority of the EU population or, if carried in a pan-EU referendum, by a simple majority. This less rigid approach to constitutional amendment will bring the EU into line with all other international organisations and federal states, and help to avoid situations in which one recalcitrant state can take

Yet another institutional innovation, one that will be explored in more detail below, would be to create a new, possibly rigid, flexibility clause only for the euro area member states. This would create an opportunity to adopt measures for the euro area, where powers are currently lacking in the Treaties, but are nonetheless considered necessary to attain the objectives of the Union, or better the objectives of the economic and monetary union, without having to revise the Treaties<sup>4</sup> or having to go outside them. In other words, it would at least partially remedy the problems identified above, namely that the crisis illustrates the necessity of new powers for the euro area, the creation of which can be blocked by those temporarily and permanently outside the euro area, combined with the existing lack of support for change by non-euro area member states.

Let me put such a euro area flexibility clause in the context of existing procedures. A euro area flexibility clause would obviously exist next to the current flexibility clause of Article 352 TFEU, which allows the Council to adopt measures if the Treaties have not provided the necessary powers, but action is nonetheless necessary to attain one of the objectives set out in the Treaties. Unlike this general flexibility clause however, under a euro area flexibility clause no unanimous Council decision would be required with a right to vote for all member states. Instead, only the representatives of the euro area member states would decide on its use. Unlike a (so far only theoretical) combined use of the flexibility clause of Article 352 TFEU with enhanced cooperation under Article 20 EU,<sup>5</sup> no further authorisation would be required by the Council, this time acting with a qualified majority, in each individual case for only a number of member states to make use of the newly created powers under Article 352 TFEU. Again unlike a combined use of flexibility and enhanced cooperation, there would be no requirement to establish that the objectives cannot be attained within a reasonable period by the Union as a whole, as is the case under Article 20(2) EU.

In fact, a treaty change creating a euro area flexibility clause can be understood as a permanent authorisation to the euro area member states to combine flexibility with stable strengthened cooperation. In that sense it would be similar to Article 136(1) TFEU,<sup>6</sup> but with a much broader substantive scope (see below). Such a ‘352 for the euro area only’ would be a specific flexibility clause similar to the limited versions existing under Articles 21(2) and 77(3) TFEU for the attainment of the objective of a right to move and reside freely in the Union for all EU citizens.<sup>7</sup>

### ***Comprehensive treaty reform***

A euro area flexibility clause is different from a *comprehensive treaty reform*, as it does not have ambitions that go beyond one of the institutional lessons learned from the current Eurozone crisis. Thus, it is different from the Fundamental Law proposed by the Spinelli Group,<sup>8</sup> which proposes a comprehensive revision of the Treaty of Lisbon and a major step towards a federal union.<sup>9</sup> A euro area flexibility clause consists of only a procedural institutional amendment which creates increased but still limited flexibility for the euro area, without proposing an overhaul of the current institutional balance and with no changes to substantive policy areas. It does not anticipate substantive decisions

(Contd.) \_\_\_\_\_  
the rest hostage.”

<sup>4</sup> Konstadinides argues that “until recently, the density of EU legislation emanating from former Article 308 EC demonstrates that resort to this ‘catch-all’ clause bypassed the need to amend the Treaty.”, see Konstadinides, ‘Drawing the line between Circumvention and Gap-Filling: An Exploration of the Conceptual Limits of the Treaty’s Flexibility Clause’, *Yearbook of European Law* (2012) p. 1-36 at 3.

<sup>5</sup> A euro area flexibility clause is different from the enhanced or strengthened cooperation clauses of Article 20 EU and Article 136(1) TFEU in the sense that these latter clauses (alone) do not allow for the creation of new powers.

<sup>6</sup> Article 136(1) TFEU allows for the adoption of measures for the euro area to strengthen coordination and surveillance of budgetary discipline and to set out economic policy guidelines.

<sup>7</sup> See Article 21(2) TFEU, which provides a specific flexibility clause for attaining the “objective” of every citizen of the Union having the right to move and reside freely within the territory of the member states as mentioned in Article 21(1) TFEU; the wording of the specific flexibility clause of Article 77(3) TFEU is slightly different: it can be used to facilitate the ‘rights’ (as opposed to objective) to move and reside freely.

<sup>8</sup> Spinelli Group, *supra* note 3.

<sup>9</sup> *Ibid.*, p. 5.

taken for the euro area.<sup>10</sup> Moreover, it does not anticipate member states leaving the Union and committing to associate membership.<sup>11</sup>

A major substantive Treaty revision, however, at the moment does not seem to be politically feasible.<sup>12</sup> What about a sequence of smaller substantive revisions? That may be an alternative. But even if all member states were always willing to cooperate to change the treaty framework to respond to the challenges of the euro area, the rigid time-consuming and cumbersome amendment procedure is still not ideal to ‘appropriately’ respond to changing needs and circumstances through a treaty amendment each individual time.

### ***Going outside the treaties***

A euro area flexibility clause is also different from a new *additional (euro) treaty*, as its ambition is limited to changes within the current treaty framework. Creating additional treaties has actually been an important part of the response of member states of the euro area to the crisis, through the Fiscal Compact and the ESM Treaty. Together with a search for the limits of powers within the Treaties, notably an extensive use of Article 136(1) TFEU (e.g. the so-called ‘Six Pack’ and ‘Two Pack’ of economic governance legislation),<sup>13</sup> this has been the approach of the euro area member states: to move forward avoiding the use of the existing amendment procedure of Article 48 EU, and without the consent and/or participation of all member states.<sup>14</sup>

This response to the current crisis has been advocated by Piris in a proposal that entails legally building a two-speed Europe through closer cooperation among states in an additional treaty.<sup>15</sup> Similarly, the Glienicker Group proposes a two-speed Europe<sup>16</sup> through a new contractual basis for the euro area. This group’s proposed new Euro-Treaty would replace “previous piecemeal reforms” and create an economic government for the euro area with “graduated rights of intervention in national budgetary autonomy” and a budget. Instead, a euro area flexibility clause would eventually lead to further differentiation between the euro area and the (permanent) ‘outs’ within the framework of the treaties, as opposed to outside it.

Going outside the treaties is an attractive solution for the euro area member states if consent to change within the treaty framework by the ‘outs’ is the problem. Importantly, there are limits to what can be done in relation to economic and monetary union outside the treaties. Some of the limits are similar to the limits that a euro area flexibility clause will also be confronted with (on which, more below in sections 2 and 3). Nonetheless, there are a number of advantages to staying within the framework of the (revised) EU treaties. One of these is that it fosters the overall coherence of the legal system (compare for example the different substantive budgetary requirements under EU law and under the Fiscal Compact). Another one is the availability of the EU institutional framework with its typical procedural and judicial safeguards.

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<sup>10</sup> Contrast the Spinelli Group, *ibid.*, p. 12: “A new treaty is needed to mark the important fresh stage in European integration in which the eurozone is transformed into a fiscal union run by a federal economic government.”

<sup>11</sup> *Ibid.*, p. 20: “The Fundamental Law creates a new category of associate membership for any member state which chooses not to join the more federal union. Each associate state would negotiate its own arrangement with the core states.”

<sup>12</sup> In this sense Piris, *The Future of Europe. Towards a Two-Speed EU?* (Cambridge University Press 2012) p. 59: “Thus, at least at the time of writing, a substantive revision of the EU treaties looks politically implausible.”

<sup>13</sup> *Ibid.*, p. 107: “In other words, the scope of application of Article 136 is *extremely* wide (...)”.

<sup>14</sup> One could also include the simplified revision procedure as a way of moving forward, even though it is not available for increasing powers and in the case of ESM Treaty is to be seen only as a confirmation of what could already be done. One mode that has not been used is a combination of Articles 20 EU and 352 TFEU, enhanced cooperation and the flexibility clause.

<sup>15</sup> Piris, *supra* note 12. More precisely, this is his fourth proposal in the book.

<sup>16</sup> Glienicker Group, ‘Towards a Euro Union’, 18 October 2013: <<http://www.bruegel.org/nc/blog/detail/article/1173-towards-a-euro-union/>> (last visited 24 October 2013)

## 2. Creating a euro area flexibility clause: opportunities and challenges

The success of a euro area flexibility clause is not guaranteed. The extent to which such a clause can operate as a successful response to the institutional challenge identified depends on a number of conditions. Firstly, it depends on its design. The creation and specific design of a euro area flexibility clause raises a number of political and legal challenges, which will be discussed in this section. Secondly and closely related, the potential success of a euro area flexibility clause depends in practice on the extent to which it can actually be used to respond to the current and future needs of the euro area. Some initial thoughts about this are given in section 3 below, where current developments and proposals relating to the Eurozone crisis are briefly discussed.

### *A (euro area) flexibility clause: EU powers beyond conferral*

To understand some of the institutional and substantive challenges raised by a euro area flexibility clause, it is useful to look at the current general flexibility clause of Article 352 TFEU. The flexibility clause can be understood as a codified form of implied powers, explicitly recognising that not all needs for future action can be foreseen, the underlying idea being that if only it had been realised that the power would be necessary, it would have been created. The challenge raised by the existence of implied powers lies in finding a balance between effectiveness and flexibility on the one hand, and sovereignty, the limits to conferred powers and democratic legitimacy on the other hand.

The current general flexibility clause of Article 352 TFEU has in fact been criticised by Von Bogdandy and Bast for representing “the weakest point in the limiting function of the current division of powers.”<sup>17</sup> Lebeck argues that “implied powers are problematic since they weaken the constraining effects of conferred powers, and possibly the constraining effects of subsidiarity.”<sup>18</sup>

At the same time, the inclusion of the flexibility clause in the past and current treaties is to be seen as a (continued) recognition by the treaty drafters of its need and benefits.<sup>19</sup> Moreover, Dashwood argues that the tension between the principle of conferral and the codified implied power of the flexibility clause “which is real in theory, has been successfully resolved in practice.”<sup>20</sup>

Finally, it has been argued that the role of Article 352 TFEU in its new post-Lisbon version is very limited, so much so that it has even been called a ‘faded constitutional memory’.<sup>21</sup> If this is true, a new euro area flexibility clause would mean a revival of flexibility in the Union.

### *Overcoming the hurdle of Article 48 EU*

For the introduction of a euro area flexibility clause, the ordinary amendment procedure of Article 48 EU will have to be used. Using the simplified revision procedure of Article 48(6) TFEU is not an option (as it was in the case of Article 136(3) TFEU), as the competences of the Union are clearly increased. Finding unanimous agreement among the representatives of the member states in the ordinary amendment procedure (Article 48(4) EU) might prove to be a first, insurmountable, hurdle

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<sup>17</sup> Von Bogdandy and Bast, ‘The Vertical Order of Competences’, in: Von Bogdandy and Bast (eds.), *Principles of European Constitutional Law* (Hart Publishing, 2005) p. 362.

<sup>18</sup> Lebeck, ‘Implied Powers Beyond Functional Integration? The Flexibility Clause in the Revised EU Treaties’, *Journal of Transnational Law and Policy* (2008) 303-358 at 306.

<sup>19</sup> Konstadinides, *supra* note 4, p. 2: “The flexibility clause has always expressed the view of the Treaty drafters, that the powers specifically allocated to the EU may not prove to be adequate for the purpose of attaining the objectives expressly set by the Treaties.”

<sup>20</sup> Dashwood, ‘Article 308 EC as the Outer Limit of Expressly Conferred Community Competence’, in: Barnard and Odudu (eds.), *The Outer Limits of European Union Law* (Hart Publishing 2009) p. 44.

<sup>21</sup> Konstadinides, *supra* note 4, p. 35: “The constraints to the use of Article 352 TFEU (plethora of new legal bases, unanimity, monitoring by the European and national parliaments, express exclusion from CFSP, new national constitutional safeguards) are vigorous enough to curb further the use of the once mighty flexibility clause and confine its loose practice to a faded constitutional memory.” Also, p. 31: “The Treaty of Lisbon grants Member States a number of additional safeguards in attaining the objectives set out in the EU Treaties through Article 352 TFEU. These safeguards have rendered it almost obsolete.” And p. 33: “The minimal number of proposals under Article 352 TFEU since the coming into force of the Treaty of Lisbon demonstrates that the flexibility clause has grown inflexible.”

(see, e.g., the experience with the UK and the Fiscal Compact); ratification may prove to be a second, difficult, one (see, e.g., the historical experience with referenda in Ireland, Denmark, France and the Netherlands and, although not an EU treaty amendment, the recent Czech ratification of the Fiscal Compact).

A referendum in the United Kingdom does not seem to be required for the introduction of only a euro area flexibility clause.<sup>22</sup> Nevertheless, convincing this ‘out’ (and Denmark) to allow its introduction may be the main political challenge of such a clause, confirming the dual aspect of the EU’s institutional challenge analysed above. What will be required to convince the United Kingdom (which agreed to the amendment of Article 136 TFEU, but blocked further treaty amendment in December 2011) is essentially a political question (possibly including a repatriation of powers), and would have to be balanced with the idea of a limited treaty amendment.

Member states may have little enthusiasm for starting this ordinary amendment procedure. On the other hand, a non-comprehensive treaty reform could be feasible if certain political and legal concerns are addressed. Should this prove impossible, a separate Euro-Treaty (see the Piris/Glienicker proposals above) might be the way forward. Another possible way forward within the Treaty framework could be through a *political* agreement (at European Council level) stating that non-euro area member states will in principle authorise the adoption of measures proposed by the Commission through a combined use of the flexibility clause of Article 352 TFEU and the enhanced cooperation of Article 20 EU.<sup>23</sup> In any case, it is useful to consider the further challenges of a euro area flexibility clause.

Would a convention be required under the ordinary revision procedure for the introduction of a euro area flexibility clause? This is not necessarily the case: a simple majority of the European Council and the European Parliament can agree that convening a convention is not justified by the extent of the proposed amendments (Article 48(3) EU). It can be argued that the proposed limited amendment does not justify convening a convention. In any event, it would probably be difficult to have a convention on this proposal without turning it into proposals for comprehensive treaty revision, which could make it a very lengthy process.

In fact, it is useful to bear in mind that even without a convention a limited treaty revision can easily take up to 2 years to enter into force. The recent amendment to Article 136 TFEU – through the simplified revision procedure – still took more than 2 years to enter into force: the political decision was taken by the European Council in December 2010, the legal decision in March 2011, and entry into force occurred in May 2013. The introduction of a euro area flexibility clause is therefore arguably of limited help in addressing current issues such as the establishment of a banking union (see more on this below). One could partly remedy this by already making political agreements about the measures to be adopted under a future euro area flexibility clause, to speed up the process of adoption once the treaty amendment has entered into force. Yet, this would arguably be a complex political process, and one that raises new issues of democratic legitimacy.

The limited treaty revision proposed here could still be of value for possible future initiatives like a euro area fiscal capacity or stability bonds (again, see more on this below). In addition, it can be of general value in creating an open (but not unlimited) power to respond to future, currently unforeseen, circumstances in the euro area in a more flexible way than is now the case.

### ***The democratic legitimacy of transfer of powers***

It could be argued that an extensive use of a (euro area) flexibility clause is in tension with democratic legitimacy, as it can lead to a significant increase in powers of the euro area/Union without national ratification. However, it will be recalled that extensive use was made of the general flexibility clause

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<sup>22</sup> See section 4(4) UK European Union Act 2011, which states that the referendum requirement does not apply in the case of “the making of any provision that applies only to Member States other than the United Kingdom.”

<sup>23</sup> Exploring the challenges raised by this way forward does not fall within the scope of this paper.

in the seventies and eighties in the areas of, for example, regional and environmental policy,<sup>24</sup> at that time not competences of the Communities.

Under the current general flexibility clause, these concerns are partly addressed by prescribing approval by the European Parliament, but it may well be argued that this form of input legitimacy at EU level is not sufficient,<sup>25</sup> especially if an extensive use of a new euro area flexibility clause is intended. One could add to this that the involvement of parliaments under the current clause, through the procedure for monitoring the subsidiarity principle, is not sufficiently strong.<sup>26</sup> One could therefore further address these concerns of democratic legitimacy by requiring approval of any decision to use a future euro area flexibility clause by the euro area member states in accordance with their respective constitutional requirements. Such a requirement would lead to a more rigid euro area flexibility clause compared to the current general clause. It would also be in stark contrast with the Spinelli Group proposal to make the current general flexibility clause more flexible.<sup>27</sup>

Introducing such a requirement for the euro area flexibility clause would also bring it closer in line with the spirit of the constitutional practice of some member states relating to the current general clause. In this context, the requirement introduced by the German Constitutional Court in its Lisbon Judgment of prior authorisation by the German Parliament for a German vote under Article 352 TFEU on a specific measure should be noted.<sup>28</sup> Note also that the UK European Union Act 2011 states that a UK Minister may in principle not agree to a decision under the Treaty's flexibility clause unless an Act of Parliament has approved the draft decision.<sup>29</sup> Konstadinides in this context speaks of "powerful warnings issued by the German and Danish constitutional courts against an unprecedented use of EU residual competence".<sup>30</sup>

The possible requirement to address concerns about democratic legitimacy could be drafted as follows:

These measures shall not enter into force until they are approved by the Member States whose currency is the euro in accordance with their respective constitutional requirements.<sup>31</sup>

Adding this requirement would not make a euro area flexibility clause more effective. It would, however, make extensive use of the clause more legitimate. A compromise between legitimacy and effectiveness could be found in a requirement to authorise the adoption of measures in unanimity and through approval in accordance with national constitutional requirements. After this authorisation, the

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<sup>24</sup> Konstadinides, *supra* note 4, p. 2: "The use of the flexibility clause reached its heyday in the 1970s and the 1980s. (...) Today, Article 352 TFEU has grown weak and weary. Recourse to it by the Council is now rare."

<sup>25</sup> See in general on the continuing importance of legitimacy through the member states, as opposed to the EP, 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 at 837: "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."

<sup>26</sup> See Lebeck, *supra* note 18, p. 356: "The increased role for national parliaments, regarding subsidiarity, seems only to change the role of national parliaments from non-existent to very weak."

<sup>27</sup> Spinelli Group, *supra* note 3, p. 17-18: "The Fundamental Law greatly extends QMV in the Council at the expense of unanimous decision making. Notably, this change affects the important 'flexibility clause' which allows action to be taken by the Union in certain circumstances when such action has not been expressly foreseen by the treaties."

<sup>28</sup> *Bundesverfassungsgericht*, BVerfG, 2 BvE 2/08, *Lisbon judgment*, 30 June 2009, para. 328. It can be expected that the German Constitutional Court would interpret similarly a euro area flexibility clause that is procedurally similar to the current flexibility clause.

<sup>29</sup> See Section 8. For exceptions and alternative agreements, see <<http://www.legislation.gov.uk/ukpga/2011/12?view=plain>> (last visited 30 October 2013).

<sup>30</sup> Konstadinides, *supra* note 4, p. 3.

<sup>31</sup> See also Annex 1: draft proposal euro area flexibility clause.

actual measures could be adopted, and importantly also amended, by unanimity only, or even with a qualified majority, as long as the (amended) measures stay within the scope of the authorisation.<sup>32</sup>

### ***The appropriate institutional structure***

Creating a new euro area flexibility clause means making a choice about the unity of the institutions involved. The issues of principle behind such a choice are whether EU institutions can be used for the benefit of only a limited number of member states and whether nationals of member states that are not going to be bound by the rules adopted should have a vote within the institutions.

Using EU institutions for the benefit of a limited number of member states raises several issues. Can the EU institutions in total independence appreciate the relationship and possible tensions between measures adopted under the euro area flexibility clause and the part of the *acquis* that is binding on all member states? And who should bear the administrative costs in these cases?<sup>33</sup> Importantly, under EU law such use of institutions for a number of member states is currently accepted, both in cases of use within the EU treaty framework (e.g. for enhanced cooperation and for EMU) and outside (e.g. EFSF and ESM Treaty).<sup>34</sup> Within the framework of the EU treaties this does not seem to be a contentious issue; the situation is different when it comes to the use of institutions outside the treaties, as illustrated by the Fiscal Compact, where there is no agreement by all member states on the use of institutions under this intergovernmental treaty. Craig argues that “[t]he default assumption must (...) surely be that where the contracting states have not used enhanced cooperation this should incline the EU institutions against participation in such an inter-state agreement.”<sup>35</sup>

A possible euro area flexibility clause also raises the question of how to solve an old institutional dilemma for this new provision. Should British MEPs have a right to vote when it comes to giving consent to the use of a euro area flexibility clause? And should a Danish Commissioner have a right to vote on the proposal? In general, should nationals within an institution have a right to decide on matters that do not bind ‘their’ member states?

Again, under EU law participation by voting of nationals of member states that will not be bound by the adopted rules is currently accepted for both the European Parliament and the Commission. The situation is different for the Council, where members are sometimes excluded from voting – e.g. member states that have not adopted the euro<sup>36</sup> – and specific rules exist to define majorities in such instances.<sup>37</sup> Thus, the Commission and European Parliament are considered an institutional unity under enhanced cooperation,<sup>38</sup> economic and monetary union,<sup>39</sup> and where member states have negotiated a specific opt-out/opt-in arrangement (e.g. the United Kingdom, Denmark and

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<sup>32</sup> I thank Pieter van Nuffel for bringing this idea to my attention.

<sup>33</sup> On the practical issue of costs in the case of enhanced cooperation, see Article 332 TFEU: “Expenditure resulting from implementation of enhanced cooperation, other than administrative costs entailed for the institutions, shall be borne by the participating Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise.”

<sup>34</sup> In both cases, use of the EU institutions happens with the explicit agreement of non-participating EU member states. With regard to the ESM Treaty this has also been accepted by the ECJ in the *Pringle* case; Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012. See De Witte and 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 at 843-847.

<sup>35</sup> Craig, ‘*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance’, 9 *EuConst* (2013) p. 263-284 at 274.

<sup>36</sup> See e.g. Article 136(2) TFEU and Article 139(4) TFEU.

<sup>37</sup> See e.g. Article 238(3) TFEU.

<sup>38</sup> With regard to enhanced cooperation, a practical consideration is probably also in place, considering the unlimited possible combinations of member states participating under different enhanced cooperation initiatives, which would lead to just as many compositions of the EP/Commission if the principle of institutional unity were abandoned.

<sup>39</sup> Sometimes with maybe surprising results, such as the current *British* chair of the EP’s Economic and Monetary Affairs Committee Sharon Bowls.

Ireland).<sup>40</sup> Note also in this context that it is formally possible for MEPs to have a different nationality to that of the member state in which they are elected,<sup>41</sup> even though this is in practice an exception.

In discussing the arguments for and against having nationals within institutions decide on issues that do not bind ‘their’ member states, it is useful to look at the arguments raised in the academic literature on enhanced cooperation. Fabbrini believes that the operation of Parliament and the Commission in their standard composition “should be positively appreciated, bearing in mind that the members of these last two bodies do not represent their states of origin, but rather the EU citizens, and can therefore defend the interests of the EU as a whole.”<sup>42</sup> With regard to the Commission, Piris argues instead that “there are convincing arguments in favour of changing the rules on this point, in order to allow only those Commissioners having the same nationality as the participating Member States to participate in votes when the aim is to develop a given case of enhanced cooperation involving those Member States only.”<sup>43</sup> This cannot but be related to his appreciation of the independence of Commissioners: “Commissioners are supposed to be independent of their state of origin. Of course, this is theoretical. Everybody knows that the political reality is different.”<sup>44</sup> With regard to the European Parliament, Dougan convincingly argues that it depends on “whether in the current state of European supranational democracy, MEPs may legitimately claim to represent the collective European interest, or only the parochial interests of their own constituency or Member State.”<sup>45</sup> He rightfully concludes that “This fundamental question about the proper democratic mandate of an MEP is an essentially political one.”<sup>46</sup>

Applying these arguments analogously to a euro area flexibility clause leads to the following conclusion. The desirability of a right to vote for a Danish Commissioner on a proposal to be put forward under the clause depends on how you see the independent character of this institution. The desirability of a right to vote for a British MEP depends on how you see the representative claim of MEPs.

If the use of institutions for the benefit of only a limited number of member states is currently accepted under EU law, and also the power of nationals within the European Parliament and Commission to vote on rules that do not bind ‘their’ member states, is then – considering the above arguments – the creation of a euro area flexibility clause *the* moment to decide on a new sub-institution? Should a euro area flexibility clause complement the institutional structure of the euro area, which includes a European Central Bank, Eurogroup and Eurosummits, with a Europarliament and a Eurocommission too? And should the Eurogroup be given the power to take legally binding decisions under the euro area flexibility clause?

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<sup>40</sup> See e.g. Protocols 19 and 21 to the Lisbon Treaty.

<sup>41</sup> See Article 20(2) TFEU on the right to vote and to stand as candidate in elections to the European Parliament in the member state of residence.

<sup>42</sup> Fabbrini, ‘The Enhanced Cooperation Procedure: A Study in Multispeed Integration’, *Centro Studi Sul Federalismo Research Paper*, October 2012, p. 7.

<sup>43</sup> Piris, *supra* note 12, p. 118.

<sup>44</sup> *Ibid.*, p. 117.

<sup>45</sup> Dougan, ‘The Unfinished Business of Enhanced Cooperation: Some Institutional Questions and Their Constitutional Implications’, in: Ott and Vos (eds.), *Fifty Years of European Integration: Foundations and Perspectives* (TMC Asser Press, 2009) p. 178. Also, p. 170: “The risk is that the MEPs in question might share the same political or cultural views as their national governments, and thus display the same antagonism towards the purpose and substantive content of the proposed enhanced cooperation measure.” But also on p. 172: “(...) in the scenario where enhanced cooperation eventually proves to be a dynamic and integrative mechanism, the exclusion of voting rights for MEPs from non-participating Member States could pose a serious challenge to the institutional role and legislative prerogatives of the European Parliament.”

<sup>46</sup> *Ibid.*, p. 174.

The idea of a limited treaty revision would militate against changing the current system based on the principle of institutional unity of the European Parliament and the Commission.<sup>47</sup> It may also be taken into account that the European Parliament itself does not seem to favour the creation of a separate Euro Assembly.<sup>48</sup> The same idea of a limited treaty revision would also lead to the conclusion that with regard to the Eurogroup it may not be necessary to give this body formal decision-making powers, as the current practice of using the formal Council setting can be continued, as can suspending the voting rights of member states with a derogation.

### ***Substantive limits to the use of the flexibility clause***

The current substantive limits to the use of the general flexibility clause of Article 352 TFEU illustrate that creating a euro area flexibility clause would not only lead to a procedural novelty (in the sense that the clause can be used by euro area member states collectively), but would also lead to a substantive change, as the economic and monetary union does not seem to be intended (anymore)<sup>49</sup> under the objectives referred to in current Article 352(1) TFEU.

This is at least the conclusion that would seem to follow from Declaration 41 of the Lisbon Treaty on the current general flexibility clause of Article 352 TFEU, which declares that the objectives referred to in Article 352(1) TFEU are those set out in Article 3(2) and (3) EU and Article 3(5) EU.<sup>50</sup> This is intended (politically) to exclude the objective of Article 3(4) TFEU (“The Union shall establish an economic and monetary union whose currency is the euro”) as one on the basis of which action under Article 352 TFEU can be taken.<sup>51</sup> It is not necessary to enter into a discussion about the legal significance of this declaration<sup>52</sup> to understand that a euro area flexibility clause designed to attain the objectives of the economic and monetary union would represent a change in approach to flexibility with regard to this policy area.

One of the current limits to the use of Article 352 TFEU that would certainly also exist in the case of a euro area flexibility clause is that expressed in Declaration 42 of the Lisbon Treaty. According to this declaration, use of Article 352 TFEU, in line with the existing case law of the European Court of Justice, cannot lead to the ‘adoption of provisions whose effect would, in substance, be to amend the Treaties’. The flexibility clause allows for filling gaps, not for circumvention. This limit requires an individual assessment of measures to understand when exactly circumvention of treaty amendment is the case. What exactly would, in substance, an amendment to the treaties be? A change in the institutional balance? The creation of new policies? I will return to this issue in section 3 below.

Another limitation to the current flexibility clause, namely that it cannot be used to attain the objectives of the Common Foreign and Security Policy (Article 352(4) TFEU), does not seem to be affected by a possible euro area flexibility clause. More relevant seems to be the limit to the current flexibility clause that it cannot entail harmonisation of laws in cases where the treaties exclude this (Article 352(3) TFEU). Considering this limit, an explicit choice by the drafters of a euro area

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<sup>47</sup> Compare Piris, *supra* note 12, p. 126 on creating new institutions in an additional euro treaty: “It would obviously be politically and legally better and more simple to avoid establishing new institutions or organs, as this might entail political tensions and legal difficulties.”

<sup>48</sup> At least, this was reflected in an unofficial reflection paper prepared by three influential MEPs (Brok, Verhofstadt, Gualtieri) in the Autumn of 2012 during negotiations with Herman Van Rompuy; see Fox, ‘No eurozone-only assembly, say MEPS’, *EuObserver*, 6 October 2012, <<http://euobserver.com/news/117773>> (last visited 25 October 2013).

<sup>49</sup> i.e. since the Treaty of Lisbon. See Declaration 41 discussed below. In the past, measures relating to EMU have been adopted through the flexibility clause. See, e.g., Regulation 1103/97 on Certain Provisions Relating to the Introduction of the Euro [1997] OJ L162/1; Regulation 2595/2000 amending Regulation (EC) No 1103/97 on certain provisions relating to the introduction of the euro [2000] OJ L 300/1.

<sup>50</sup> Action pursuing only the objectives set out in Article 3(1) TFEU is excluded.

<sup>51</sup> Lebeck, *supra* note 18, p. 351: “it seeks to exclude, albeit through soft law, policies of the EMU from the scope of Article 352 TFEU”.

<sup>52</sup> *Ibid.*, p. 353: “The constraints on the exercise of implied powers through the annexed declarations are, from a legal perspective, very weak.”

flexibility clause as to whether and to what extent harmonisation under this clause is allowed would seem desirable. Making it possible in areas in which harmonisation is currently excluded would require not only a euro area flexibility clause, but also a change to the relevant treaty provisions. The extent to which to allow for harmonisation under a new euro area flexibility clause is essentially a political decision.

Harmonisation of economic policy does not currently seem to be excluded under the Treaties, as strictly speaking it is not an area where the *Union* has powers to coordinate the actions of the member states, but one where *member states* coordinate their economic policies within arrangements as determined by the Treaties (Article 2(3) TFEU, although this provision arguably does not fully reflect the Union powers in this area).<sup>53</sup> Allowing for harmonisation in the area of economic policy would nonetheless be a radical break with the past, not only in the light of the current limits to Article 352 TFEU, but also in the light of the current division of competences between the Union and the member states in this policy area (where no provisions expressly allowing for harmonisation exist).<sup>54</sup>

To the extent that harmonisation is currently expressly prohibited in, for example, the area of employment policy,<sup>55</sup> the insertion of a euro area flexibility clause would not be sufficient to allow for such harmonisation – even if this were considered necessary to attain the objectives of the economic and monetary union – but an amendment of the respective treaty provisions prohibiting harmonisation would also be necessary.

Interpretation of the objectives of the economic and monetary union, and identification of the action necessary to attain them, will eventually determine the scope of a euro area flexibility clause. Both issues will arguably also be central to judicial review by the European Court of justice. In this context, it may be relevant that, as Lebeck argues, the interpretation by the Court of the objectives under the existing clause has been broad, considering the treaty objectives as a whole.<sup>56</sup> Konstadinides argues that “Past jurisprudence suggests that common sense and the demands of the real world seem to have won against the formalistic, but ambiguous, constraints stemming from the wording of the Treaty’s flexibility clause.”<sup>57</sup>

### ***The institutional and substantive relationship with the ‘outs’***

The euro area – the member states to which the euro area flexibility clause would be available – and the economic and monetary union – the objective for which the clause would be designed – do not completely overlap. This may raise both institutional and substantive challenges between the euro area and the ‘outs’.

Creating a euro area flexibility clause in fact also means altering the relationship with the member states outside the euro area, both those with a temporary derogation (the so-called ‘pre-ins’) and those with a permanent opt-out. A central institutional preoccupation in many cases of differentiated integration within and outside the treaty framework of the EU is that all the ‘outs’ should always be able to join. Thus, enhanced cooperation “shall be open at any time to all Member

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<sup>53</sup> See also Article 2(5) TFEU and note that in the areas where the *Union* (as opposed to member states) has the competence to coordinate the actions of the member states, harmonisation is not allowed.

<sup>54</sup> See Articles 120 TFEU and following.

<sup>55</sup> See Articles 2(5), 5(2) and 149 TFEU.

<sup>56</sup> Lebeck, *supra* note 18, p. 316. Moreover, the substantive limit that the clause had to relate to action ‘in the course of the operation of the common market’ (abolished by the Lisbon Treaty) has been interpreted broadly by the ECJ. See Dashwood, *supra* note 20, p. 43: “the European Courts have recognised that Article 308 is available to supplement the powers specifically conferred on the institutions of the Community across the whole range of its activities, not merely those connected with the establishment and functioning of the common market (‘the whole Treaty thesis’).” Similarly, Konstadinides, *supra* note 4, p. 17: “The current reference of Article 352 TFEU to the attainment of ‘the objectives set out in the Treaties’ is an example of legal drafting which reflects current practice.”

<sup>57</sup> Konstadinides, *supra* note 4, p. 11.

States”,<sup>58</sup> and the Fiscal Compact “shall be open to accession by Member States of the European Union other than the Contracting Parties.”<sup>59</sup>

Should a similar approach be taken towards a euro area flexibility clause? Should the clause be designed in such a way as to make *ad hoc* involvement of the member states with a derogation or even an opt-out possible?<sup>60</sup> The Fiscal Compact and the Euro Plus Pact illustrate the fact that there can be cases where legal or political measures relating to the economic and monetary union are considered desirable by a great number of member states, not only euro area member states but also member states with a derogation and even an opt-out. It could be argued that a right to participate (or, put differently, an obligation to be bound) once the derogation is abrogated sufficiently addresses this issue. We can compare this to the current situation of strengthened cooperation in the euro area under Article 136(1) TFEU.

On the other hand, it can be considered desirable to involve future ‘ins’ in some way in decision-making under a euro area flexibility clause (e.g. a right to participate in deliberations on its use, which could otherwise be expected to shift to the Eurogroup setting). A step further would be to consider member states with a derogation not to be automatically bound by measures adopted under the euro area flexibility clause when they adopt the single currency, but to allow them to opt-in at that moment (in a way comparable to enhanced cooperation and candidate states for EU accession, Article 20(4) EU). This would arguably make a new euro area flexibility clause more acceptable to current ‘pre-ins’. It could be drafted as follows, expressing that they are not automatically bound, but do commit to adopt the measures concerned in accordance with their respective constitutional requirements:

Measures adopted on the basis of this Article shall bind only Member States whose currency is the euro. They shall not be regarded as part of the *acquis* which has to be accepted by Member States with a derogation for adoption of the euro as a currency. If it is decided, in accordance with Article 140(2) TFEU, to abrogate a derogation, the Member State concerned shall adopt these measures in accordance with its respective constitutional requirements.<sup>61</sup>

While this solution might make a euro area flexibility clause more acceptable to the current ‘pre-ins’, it would not be ideal in the light of the uniform application of EU (euro area) law. There is no guarantee that new euro area member states will actually adopt the measures. Considering that negotiations about the introduction of a euro area flexibility clause through the amendment procedure of Article 48 EU would be politically complex, it is, however, a theoretical possibility that would be worth keeping in mind.

What about the substantive tensions between measures adopted under a euro area flexibility clause and the parts of the *acquis* that bind all member states, such as the rules on the internal market? Obviously, measures adopted on the basis of a euro area flexibility clause should comply with the Treaties.<sup>62</sup> It could be politically wise to include an indent in the euro area flexibility clause that states the obvious:

Any measure adopted under this Article shall comply with the Treaties and Union law. The measure shall not undermine the internal market or economic, social and territorial cohesion. It

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<sup>58</sup> Article 20(1) EU.

<sup>59</sup> Article 15 Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

<sup>60</sup> The alternative creation of a flexibility clause that can be used by any combination of member states is arguably not desirable.

<sup>61</sup> See also Annex 1: draft proposal euro area flexibility clause.

<sup>62</sup> Piris is aware of the same limits to his proposal for an additional treaty. Piris, *supra* note 12, p. 122: “as long as the proper functioning of the internal market and the *acquis communautaire*, as well as all the other rules of the treaties, would be respected.” Also *ibid.*, p. 139: “Therefore, it follows from this examination that there would be no legal obstacle to the conclusion of an additional treaty organizing closer cooperation between some of the EU Member States on matters to be determined by them, as long as they continue to be bound by all their obligations under the EU treaties.”

shall not constitute a barrier to or discrimination in trade between Member States, nor shall it distort competition between them.<sup>63</sup>

Moreover, the substantive rights of non-euro area member states would be institutionally guaranteed through the enforcement actions available under the treaties to the Commission and through the related jurisdiction of the European Court of Justice (possibly even made explicit in the clause).<sup>64</sup>

### 3. A euro area flexibility clause in practice

Determining the *exact* limits to what can be achieved under a euro area flexibility clause is not within the scope of this paper. Moreover, it would be a very difficult exercise, considering the discretion such a clause would arguably give.<sup>65</sup> Nonetheless, it is useful to describe some relevant discussions regarding crisis-related proposals and crisis-related ideas that would involve the use of the existing flexibility clause of Article 352 TFEU (possibly combined with enhanced cooperation under Article 20 EU), as this points to the possible limits of a euro area flexibility clause given by current treaty provisions. It also raises the question of how current proposals and ideas to use Article 352 TFEU relate to the political intention expressed in Declaration 41 of the Lisbon Treaty to exclude the objective of economic and monetary union.

#### *European Stability Mechanism*

There is at the moment no express intention to incorporate the ESM Treaty into the EU legal framework. The European Commission does not exclude that this can be done on the basis of Article 352 TFEU.<sup>66</sup> There might be a tension, however, between the objectives for the attainment of which this provision can be used (and from which Declaration 41 intends to politically exclude the economic and monetary union) and the objective of the ESM, which is to safeguard the stability of the euro area. This could indicate a changed approach to Declaration 41 (at least from the side of the Commission). In any event, Declaration 41 does not *legally* seem to preclude the adoption of measures on the basis of Article 352 TFEU for the attainment of the objective of economic and monetary union.

It can very well be argued that incorporation would serve to attain the objective of economic and monetary union, and that the ESM in this sense would fall within the scope of a euro area flexibility clause. On the other hand, to the extent that incorporation would require an amendment to the EU's Decision on Own Resources,<sup>67</sup> it should be noted that the latter is procedurally more difficult than the current flexibility clause of Article 352 TFEU.<sup>68</sup>

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<sup>63</sup> See also Annex 1: draft proposal euro area flexibility clause.

<sup>64</sup> As would again be the case for an additional treaty as proposed by Piris, *supra* note 12, p. 141: "The Commission or any EU Member State should be able to seize the Court of Justice of the EU of any infringement of the EU treaties and EU law by one participating state or by all of them collectively".

<sup>65</sup> Compare about the discretionary power provided by Article 352 TFEU, Lebeck, *supra* note 18, p. 326: "This means that implied powers provide an excessive degree of legislative discretion to the Council, making constitutional constraints relatively ineffective and democratic accountability very difficult."

<sup>66</sup> *Communication from the Commission. A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Brussels, 28.11.2012, COM(2012) 777 final, p. 34: "While it would not be excluded to integrate the ESM into the EU framework under the current Treaties, via a decision pursuant to Article 352 TFEU and an amendment to the EU's own resources decision, it appears that, given the political and financial importance of such a step and the legal adaptations required, that avenue would not necessarily be less cumbersome than operating an integration of the ESM through a change to the EU Treaties. The latter would also allow the establishment of tailor-made decision-making procedures." One can infer a similar conclusion from para. 67 of the ECJ's Pringle case, where the Court states that there is no obligation to act on the basis of Article 352 TFEU to adopt a stability mechanism. Case C-370/12, *Thomas Pringle v. Government of Ireland, Ireland, The Attorney General*, Judgment of the Court of Justice (Full Court) of 27 November 2012.

<sup>67</sup> *Ibid.*

<sup>68</sup> The adoption of a Decision on Own Resources requires unanimity in the Council and approval by the member states in accordance with their respective constitutional requirements; see Article 311 TFEU.

### ***Stability bonds and European Debt Agency***

Whether stability bonds can be adopted on the basis of Article 352 TFEU seems to depend on the specific form they would take, and in particular if they can be designed in conformity with the so-called no bailout clause of Article 125 TFEU. Stability Bonds under several but not joint guarantees have been argued to comply with the latter provision.<sup>69</sup> The rationale for Stability Bonds as argued by the Commission in its Green Paper on the issue is clearly related to the euro area and economic and monetary union, including financial stability in the euro area, the transmission of monetary policy, and the improvement of efficiency in the euro area sovereign bond market.<sup>70</sup> In other words, in terms of objectives this could again be argued to fall within the scope of a euro area flexibility clause.

Similarly, it has been argued that the current flexibility clause could be used for the establishment of a European Debt Agency. Artus *et al* argue that this could be a way to “restore a capacity for fiscal stabilisation against fluctuations in activity” in the euro area, and that it could be implemented under Article 352 TFEU, possibly in combination with enhanced cooperation.<sup>71</sup>

### ***Fiscal capacity, possibly with a stabilisation function***

The idea of the establishment of a fiscal capacity for the euro area, intended to “improve the resilience of the euro area as a whole”,<sup>72</sup> on the basis of Article 352 TFEU is also subject to discussion.<sup>73</sup> The central questions here seem to concern the extent to which changing the Decision on Own Resources would be sufficient (although as mentioned above this is not less cumbersome than the procedure of Article 352 TFEU), and that to which the principle of the unity of the EU budget (Article 310 TFEU) would preclude such a fiscal capacity without amendment of the treaties. Or could a fiscal capacity be managed outside the Union budget on the basis of Article 352 TFEU?

And what about using a fiscal capacity for macroeconomic stabilisation? According to the Commission, using Article 352 TFEU for this purpose would amount to a circumvention of the Treaty amendment procedure and would thus not be allowed.<sup>74</sup> Similarly, Repasi argues that the microeconomic approach proposed by Van Rompuy, according to which “the fiscal capacity would work as a complement or partial substitute to national unemployment insurance systems”,<sup>75</sup> “cannot be

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<sup>69</sup> European Commission Green Paper on the feasibility of introducing Stability Bonds, Brussels, 23.11.2011, COM(2011) 818 final, p. 11.

<sup>70</sup> *Ibid.*, p. 4-5.

<sup>71</sup> Artus, Bénassy-Quéré, Boone, Cailloux and Wolff, ‘A three-stage plan to reunify the Euro area’, *Conseil d’Analyse Économique Working Document* (March 2013) p 20.

<sup>72</sup> Herman Van Rompuy, *Towards a Genuine Economic and Monetary Union*, 5 December 2012, p. 5.

<sup>73</sup> Compare Repasi, ‘Legal option for an additional EMU fiscal capacity’, Report for the European Parliament’s Committee on Constitutional Affairs (2013) p. 12: “A legal basis for the establishment of a fund outside of the EU budget and of an agency which implements it, can be found in Article 352 TFEU. The functions of the fund as proposed by the President of the European Council serve to attain a “sustainable development of Europe based on balanced economic growth” and to safeguard the “economic and monetary union whose currency is the Euro”; objectives mentioned by Article 3 TEU.”

<sup>74</sup> *Communication from the Commission to the European Parliament and the Council Strengthening the Social Dimension of the Economic and Monetary Union*, Brussels, 2.10.2013, COM(2013) 690 final, p. 11-12: “A common instrument for macroeconomic stabilisation could provide an insurance system to pool the risks of economic shocks across Member States, thereby reducing the fluctuations in national incomes. (...) The EU’s current competences are limited, as regards employment, to incentive measures designed to encourage cooperation between Member States and to support their action, excluding any harmonisation (see Article 149 TFEU). As regards social security and social protection, its competence is limited to adopting directives setting minimum requirements for Member States’ systems whose fundamental principles and financial equilibrium are set by Member States (see Article 153 TFEU). Given the current framework of competences and the system of own resources of the Treaties, the flexibility clause of Article 352 cannot be used either, as the establishment of macroeconomic stabilisation systems would exceed the general framework of the current Treaties and thus amount to amending the Treaties without following the requisite procedures.”

<sup>75</sup> Herman Van Rompuy, *Towards a Genuine Economic and Monetary Union*, 5 December 2012, p. 11.

implemented on the basis of Article 352 TFEU.”<sup>76</sup> Finally, Repasi comes to a similar conclusion with regard to the idea of raising EU taxes to fund the fiscal capacity.<sup>77</sup>

### ***Contractual arrangements and a convergence and competitiveness instrument***

A further recently proposed idea, the conclusion of contractual arrangements with member states combined with a convergence and competitiveness instrument, has also been related to Article 352 TFEU. According to the Commission, the instrument could be established on the basis of Article 136, or alternatively “one could envisage having recourse on Article 352 TFEU, if necessary by enhanced cooperation.”<sup>78</sup> Hohmann and Kullas see no role for Article 136 TFEU, but agree on the possible use of Article 352 TFEU to this end *for the objective of economic monetary union* (apparently ignoring the existence of Declaration 41 of the Lisbon Treaty).<sup>79</sup>

### ***Banking union***

Finally, the possible use of Article 352 TFEU has also played a role in both academic and political debate with regard to the developing banking union. In this context, recent discussion on the use of either Article 114 TFEU or Article 352 TFEU for a Single Resolution Mechanism should be mentioned.<sup>80</sup> Without going into detail, it can be argued that the more effective and centralised the intended banking union is to be, the more pressing the need for the use of either Article 352 TFEU (and possibly a euro area flexibility clause) or the treaty amendment procedure. Adopting measures on the basis of Article 114 TFEU will arguably be more effective, as it prescribes a qualified majority. However, the possibilities of Article 114 TFEU are not unlimited,<sup>81</sup> and Article 352 TFEU can provide an alternative. Article 352 TFEU is an alternative that can only be used in unanimity, however, and here a euro area flexibility clause could provide a useful combination of both legitimacy and effectiveness.

## **4. Conclusion**

The following premises and arguments motivate the limited treaty amendment explored in this paper (see the Annex for the text of a possible draft proposal):

- 1) The Eurozone crisis illustrates the dual nature of one of the EU’s current pressing institutional problems: a clear necessity for new powers for the euro area, the creation of which can, however, be blocked by those – both temporarily and permanently – outside the euro area.
- 2) A comprehensive substantive Treaty reform – although possibly desirable – is currently not politically feasible; a treaty amendment creating a flexible treaty amendment procedure (doing away with unanimity) is similarly not feasible. A limited treaty amendment creating a Eurozone flexibility clause will equally have to pass the test of political feasibility, but it might be politically more feasible.
- 3) A euro area flexibility clause would provide, within the EU treaty framework, the possibility of responding to unforeseen future needs of the euro area, without having to resort

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<sup>76</sup> Repasi, *supra* note 73, p. 26.

<sup>77</sup> *Ibid.*, p. 25: “This means, conversely, that the Treaties do not provide for any legal basis for an own EU tax which cannot be circumvented by relying on Article 352 TFEU (Mayer and Heidfeld 2011: 375).”

<sup>78</sup> *Communication from the Commission. A blueprint for a deep and genuine economic and monetary union. Launching a European Debate*, Brussels, 28.11.2012, COM(2012) 777 final, p. 22.

<sup>79</sup> Hohmann and Kullas, ‘Roadmap for “Genuine” Economic and Monetary Union’, *Centrum für Europäische Politik Policy Brief*, No. 2013-16 of 22 April 2013, p. 14.

<sup>80</sup> Barker, ‘Germany wins allies over banking union concerns’, *The Financial Times*, 13 September 2013; see also *Eurointelligence*, 23 October 2013.

<sup>81</sup> See in this sense also the recent Opinion by Advocate General Jääskinen about the adoption of the Short Selling Regulation on the basis of Article 114 TFEU in case C-270/12, *UK vs. Council and Parliament* (12 September 2013), para. 46.

to an amendment of the EU Treaties, or concluding *ad hoc* international agreements.

4) The possibilities offered by a euro area flexibility clause are not unlimited. Relevant limits will be found in current treaty provisions, which cannot be amended through a euro area flexibility clause.

5) The institutional unity of the European Parliament and Commission in cases of differentiated integration is accepted under current EU law. The idea of a limited treaty revision would militate against changing the institutional unity of these institutions under a new euro area flexibility clause.

6) A euro area flexibility clause would probably be more acceptable to the so-called 'pre-ins' if the measures adopted did not automatically bind them once their derogation is abrogated, but if they would at that point have to adopt these measures in accordance with their respective constitutional requirements. This solution would not be ideal in the light of the uniform application of Union law, as there are no guarantees that this will actually take place.

7) Extensive use of a euro area flexibility clause would be more legitimate if combined with a requirement that measures need to be approved by member states of the euro area in accordance with their respective constitutional requirements. This would, however, not make it more effective. One could also differentiate between a rigid procedure for an authorisation to use the clause, followed by a less rigid procedure for the adoption (and future amendment) of the actual measures.

## **Annex I: draft proposal euro area flexibility clause**

The following draft provision could take the form of a new Treaty article (e.g. Article 352 bis TFEU), or a new Protocol. The choice for or against the drafted indents depends on political choices, for example between effectiveness and legitimacy.

The language chosen in the following draft provision reflects as much as possible the language of existing treaty provisions.

*1) If action by the Member States whose currency is the euro should prove necessary, within the framework of the policies defined in the Treaties, to attain the objectives as set out in Article 3(4) of the Treaty on European Union, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*

*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.*

*3) The measures set out in paragraph 1 shall not enter into force until they are approved by the Member States whose currency is the euro in accordance with their respective constitutional requirements.*

*4) Any measure adopted under paragraph 1 shall comply with the Treaties and Union law. The measure 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.*

*5) Measures based on paragraph 1 shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.*

*6) Measures adopted on the basis of paragraph 1 shall bind only Member States whose currency is the euro. They shall not be regarded as part of the acquis which has to be accepted by Member States with a derogation for adoption of the euro as a currency. If it is decided, in accordance with Article 140(2) of the Treaty on the Functioning of the European Union, to abrogate a derogation, the Member State concerned shall adopt these measures in accordance with its respective constitutional requirements.*

