



# EMU *Inter-se* Agreements: A Laboratory for Thinking about Associative Institutionalism

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Thesis submitted for assessment with a view to obtaining the degree of  
Master in Comparative, European and International Laws (LL.M.)  
of the European University Institute

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European University Institute  
**Department of Law**

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## Summary

Member States *inter se* agreements are a complex legal phenomenon epitomizing the tension between intergovernmental channels of cooperation and supranational structures of integration characterizing the evolution of EU law. EMU *inter se* agreements, in particular, constitute a unique laboratory to investigate this tension and they help to better understand the legal nature of Member States' international agreements which display substantive, institutional and teleological proximity to EU law.

EU law imposes some restraints on Member States for the conclusion of *inter se* treaties. This work critically scrutinises both competence-based and procedural-based restraints which are aimed at safeguarding the specific characteristics of EU law and the peculiarities of EU institutionalism. More specifically, the evaluation of *inter se* treaty-making restraints moves from the consideration that the use of EU Institutions outside of the Treaties' framework is liable to undermine the very nature of EU institutionalism. The use of institutions outside the EU framework, as devised by the EMU *inter se* treaties, induces to a reinforcement of contractual visions of Europe premised on the conception of EU institutions as common organs in the hands of Member States.

The EU external relations law practice provides interesting solutions to the risk of departure from Institutionalism entailed in the contractual conception of Europe. In particular, the Court's understanding of mixed agreements suggests an 'associative institutionalist' vision of Europe which is less concerned on the precise apportioning of competences between the EU and its Member States and is more attentive to the procedural framework in which the intergovernmental and the supranational components of the EU jointly operate. This approach could be extended also to *inter se* patterns of integration by devising the conclusion of *inter se* mixed agreements, i.e. agreements envisaging the participation of the EU and of some of its Member States in legal venues aimed at fostering the European Integration project.



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## Introduction

The Euro-crisis has urged European policy-makers to address the vulnerabilities of the EU economic integration. The responses to the financial turmoil threatening the economic stability of the single currency were aimed at strengthening the coordination of the Member States' fiscal policies and the supervision over national financial institutions. They also aimed at providing financial assistance to the euro area Member States at risk of insolvency. These responses have been varying and multifaceted and as Armstrong puts it, they "illustrate the plurality of, and interplay between, sites of normativity, rather than the monopoly of the EU legal order typically implied by the Community method"<sup>1</sup>.

This complex net of normative pluralism emerges especially when taking into account the conclusion of *inter se* treaties by some Member States alongside the EU framework on which the focus of this research will be put. These responses, however, have generated "constitutional conundrum"<sup>2</sup>, and have evoked worrisome prospects of an EU *Ausnahmezustand* in the Schmittian significance<sup>3</sup>. I share the view that the Schmittian perspective shall be tempered<sup>4</sup>. It seems, however, that new *Union method*<sup>5</sup>, characterized by the "minimization of the role of the Community channels and a reinforcement of intergovernmental instruments"<sup>6</sup>, has emerged in the negotiations of the ESM, the TSCG, in the SRF and the Four Presidents' Report. Chiti and Teixeira, in particular, are critical on the challenges to the EU unitary construction posed by *inter se* treaties and alert against the

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<sup>1</sup> K. Armstrong, 'The New Governance of EU Fiscal Discipline', *European Law Review*, Vol. 38(5), p.602.

<sup>2</sup> S. Fabbrini, 'After the Euro Crisis: A New Paradigm on the Integration of Europe', ARENA Working Papers N. 5, 2014, p.11.

<sup>3</sup> E.W. Böckenförde; 'Kennt die europäische Not kein Gebot?', *Neue Züricher Zeitung*, 21 June 2010; See also: C. Joerges, 'Europas Wirtschaftsverfassung in der Krise', *Der Staat*, 2012, Vol. 51, pp. 357-385.

<sup>4</sup> P. Craig, "Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications" in M Adams, F Fabbrini and P Larouche (eds), *The Constitutionalization of European Budgetary Constraints*, Hart Publishing 2014, p. 37.

<sup>5</sup> Speech by Federal Chancellor Angela Merkel at the opening ceremony of the 61st academic year of the College of Europe in Bruges on 2 Nov. 2010, available online.

<sup>6</sup> E. Chiti, P.G. Teixeira, "The constitutional implications of the European responses to the financial and public debt crisis" *Common Market Law Review*, 2013, Vol. 50(3), p.685.

disruptive force of fragmentation deriving from the composite arrangements, partly within and partly outside the EU framework, which might lead to a loss of coherence of the overall EU system. Moreover, they consider the rise of intergovernmentalism as a factor leading to the exhaustion “of the democratic sources of legitimacy of the EU polity”<sup>7</sup>. De Witte, instead suggests more caution in the analysis of the composite measures adopted during the Euro crisis and does not consider them as an expression of “an ‘intergovernmental plot’ through which the Euro area governments sought to escape from the constraints of EU law”<sup>8</sup>. As it will be shown in the first chapter of this thesis, the interplay between supranationalism and intergovernmentalism, in the way prospected by the EMU agreements, is far from being a novel phenomenon of the EU legal construction.

Legal scholarship has not only described the effects of Euro crisis measures in the EU legal order but has also advocated the need of an overhaul of the governance of the Euro area entailing significant constitutional implications. Fabbrini maintains that a new ‘political compact’ for the euro area member states is needed. This should define the values and the aims of the Union, the competences and the resources allocated to the supranational and national levels and the separation- of-powers architecture to organize its functioning at the supranational level, the power of the judiciary in protecting citizens’ rights and Member States’ prerogatives<sup>9</sup>. Piris advocates the foundation of a ‘Two-speed Europe’ to be developed by means of an additional Treaty with a distinct institutional apparatus. In particular, the euro area Member States should foster their cooperation on economic matters and other policy areas<sup>10</sup>. The idea proposed is different from the one of a multi-speed Europe since no subject matter of cooperation envisioned by the additional treaty could be subject to opt-out.

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<sup>7</sup> Ibid., p. 706.

<sup>8</sup> B. De Witte, “Using International Law in the Euro Crisis: Causes and Consequences”, *ARENA Working Paper*, 4/2013 Oslo: ARENA Centre for European Studies, p.23.

<sup>9</sup> S. Fabbrini, “After the Euro Crisis”, 2014, p .15.

<sup>10</sup> J.C. Piris, *The Future of Europe : Towards a Two-Speed EU?*, Cambridge: Cambridge University Press, 2012.

The need to make a full use of the instruments of enhanced cooperation and to integrate the “ESM-like financial assistance into the framework of the EU legal order” is maintained by Schwarz who considers enhanced cooperation as the legal instrument that can enable to “resolve the federal ‘unity in diversity’ conundrum”<sup>11</sup>. Beukers explores the possibilities of using article 352 TFEU together with the provisions of enhanced cooperation in order to attain closer integration among the euro area Member States<sup>12</sup>.

The exposure to this literature convinced me that the current and the forthcoming mechanisms regulating the governance of the Euro area will have a strong impact on the future of the EU integration project. I was particularly fascinated by the “plurality of sites of normativity” characterizing the complex workings of the governance of the Monetary Union and I decided to focus my attention on the interrelation between supranational structures<sup>13</sup> and intergovernmental modes of cooperation as manifested in the conclusion of inter se agreements between Member States.

A major source of inspiration for my research has been the Pringle Judgment in which the CJEU tackled crucial issues on the interrelation between Member States’ agreements and EU law. I considered the judgment to be rather controversial and I was not entirely persuaded by the characterization of the Court’s reasoning as ‘methodologically founded’ and as dispelling the myths of the “déclin de la communauté de droit”<sup>14</sup>. I was more sympathetic with the view that the judgment represented “a good mixture of legal principle and political pragmatism”<sup>15</sup>, however I

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<sup>11</sup> M. Schwarz, 'A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation' *Common Market Law Review*, Vol. 51 (2), quotations p.389 and 423.

<sup>12</sup> T. Beukers, “The Eurozone Crisis and the Legitimacy of Differentiated Integration”, in B. de Witte, A. Héritier and A. H. Trechsel (eds), “The Eurocrisis and the state of the European Democracy”, European University Institute- EUDO, 2013, pp. 7-30

<sup>13</sup> Cf. Pierre Pescatore’s definition of the European Community as a ‘system of structures’, in P. Pescatore, “International Law and Community Law—a Comparative Analysis”, *Common Market Law Review*, Vol.7, p.170.

<sup>14</sup> D. Thym, M. Wendel, “Preserver le respect du droit dans la crise: La Court de Justice le Mes et le mythe du déclin de la Communauté de droit”, *Cahiers de droit européen*, 2012, p. 733.

<sup>15</sup> B. de Witte and T. Beukers, “The Court of Justice Approves the Creation of the European Stability Mechanism: Pringle”, *Common Market Law Review*, 2013, Vol. 50, p. 848.

considered that it was worthy further exploring the underlying meaning and the legal consequences entailed in some of the Court's more cursory passages such as the extension of the supervening exclusivity principle enshrined in Article 3(2) TFEU and the sanctioning of the legality of the use of the EU Institutions outside the formal contours of EU law.

The most inspiring literature which has laid the foundations for this research have been Craig's perceptive contribution on the use of EU institutions in Member States' venues and Azoulai's thoughtful inquiry on the reasoning of the Court of Justice in the external relations law. The former has unmasked the flaws of the Court's reasoning which does not distinguish between substantive and decisional compatibility and has underlined how legal rules, crafted in very specific circumstances, are inappropriately extended to major cases of greater constitutional significance<sup>16</sup>. The latter reinforced my belief that External Relations law practice was the appropriate playing field where some solutions for the composition of the supranational-intergovernmental divide could be found in the light of the simultaneous operation of the Union and Member States' treaty-making powers.

This work will thus move from the recently concluded EMU treaties to engage in a broader discourse on the EU constitutional dynamics resulting from the interaction between EU supranational structures and Member States' intergovernmental cooperation conducted outside the Treaties framework. The contextualization of the EMU with the old practice of the conclusion of *inter se* agreements between the Member States will be the first step of this work. It will serve as a basis for drawing some conclusions on the legal nature of *inter se* agreements and for defining their relation with EU law.

Once having established that *inter se* treaties may be located within the broad category of EU law *lato sensu*, the restraints imposed by EU law for the conclusion

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<sup>16</sup> P. Craig, "Pringle and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance". *European Constitutional Law Review*, 2013, Vol.9, pp. 273-5.

of these treaties will be investigated. In this regard, the teleological proximity of *inter se* agreements with EU law, i.e. the fact that EU law and Member States' *inter se* treaties pursue the same integration objectives, will be regarded as a factor suggesting stricter restraints than those imposed on Member States for the adoption of national law. Thus, the extension of the 3(2) TFEU supervening exclusivity principle to Member States' agreements, as suggested by the Court of Justice in its landmark *Pringle* case, will be critically discussed. Moreover, it will be shown that both competence-based restraints and procedural compatibility with EU law have to be taken into account when assessing the limits imposed by EU law to *inter se* Member States' agreements. These restraints should aim at impeding not only the substantive breach of EU law but also the circumvention of the procedural framework established by the Treaties.

The significance of the EU law decision-making rules will be not only considered in light of the probable integration of *inter se* treaties in the EU legal framework, but also in light of the relevance of the EU procedural framework for specific nature of EU institutionalism. In fact, the use of EU institutions outside of the Treaties' framework, as resulting from the EMU *inter se* agreements, questions the institutional conception of the EU legal order and reanimates a contractual vision of Europe premised on the characterization of the EU institutions as "common organs" at disposal of Member States in their international-law cooperation venues.

This work of thesis puts forward a solution for recomposing the supranational-intergovernmental divide within the specific characteristics of the EU institutionalism. Drawing inspiration from the EU external relations law practice and from Loic Azoulay's seminal findings on Associative Institutionalism, the conclusion of *inter se mixed agreements* will be explored. It will be shown that these agreements, concluded by the EU and its Member States, could present several advantages. The Treaties procedural framework in which they are embedded will guarantee the safeguard of the peculiar features of EU institutionalism and the specific characteristics of EU law. At the same time, they would endow the

participating Member States' governments and institutions with a greater political ownership of the EU integration project pursued by means of these integration venues.



## Chapter I

### **Euro-crisis *inter se* agreements in context:**

#### **General features of euro-crisis law and the legal discourse on the intermediate sphere.**

*The first chapter of this thesis will give an overview of the inter se treaties adopted along side the EU measures intended to overhaul the coordination-based governance of the Economic and Monetary Union. After describing the main features of the euro crisis law in the light of the EU-Member States supranational-intergovernmental divide, it will be offered an overview of the substantive reach of these agreements together with their institutional linkage with the EU legal order. The third section will be devoted to show how this recent recourse to intergovernmental channels of cooperation is far from being a novelty in the history of European Integration. Drawing inspiration from the old Member States' praxis of concluding international agreements between themselves in areas proximate to subject matters already covered by EU norms, the divide between EU law proper and Member States' agreements' law will be explored. Finally, some factors liable to reduce this divide will be examined.*

#### **1. Euro- crisis law light of the supranational-intergovernmental divide**

Since its inception, the European Communities' integration project has been characterized by the interplay between supranational structures defining the autonomous legal order of the Community and the persistence of intergovernmental channels of cooperation through which the EU Member States contributed to shape the legislative and the decision-making process of the European polity. This resulted in "a tension between the whole and the parts, centrifugal and centripetal forces, central Community forces and Member States"<sup>17</sup>. In fact, as illustrated by Weiler, the Community legal order developed around an equilibrium established between two forces both deviating from the original letter of the EC Treaty, albeit in different directions. On the one hand the "strong constitutional integrative process", with

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<sup>17</sup> J. Weiler, "The Community System: the Dual Character of Supranationalism", *Yearbook of European Law*, 1981, Vol 1, p.268.

federal ambitions, and on the other hand the confederal impulse of the Member States exercising their decision-making powers “acting jointly and severally”<sup>18</sup>.

The dialectic and the interaction between supranational modes of integration and intergovernmental type of cooperation has been particularly evident in policy areas more sensitive to the traditional sovereign powers of Member States. The Economic and Monetary Union policy area (EMU) has been certainly one of these. Furthermore, in these policy areas, and the EMU is once again a prominent example, the supranational-intergovernmental divide has been accompanied by an evolution in the patterns of differentiated integration. In fact, the centripetal forces leading to the deepening of integration especially in the monetary domain has been counterbalanced by centrifugal forces promoted by Member States with a derogation or which opted-out of the EMU.

The outbreak of the Euro-Crisis highlighted the threats to the single currency due to the divergences characterising different Member State economic policies. The coordination of Member States’ fiscal policies, and especially of those sharing the single currency, was strengthened as was the supervision over national financial institutions. Some of the measures adopted for the overhaul of the coordination of Member States’ economic policies were adopted pursuant to the Community Method, and in particular the co-decision procedure was used. Since supranational institutions act as the main players in the definition and in the enforcement of the relevant legislation<sup>19</sup>, it can be maintained that the measures at issue contributed to the strengthening of the supranational component of the EMU<sup>20</sup>. In fact, a major reform of the Economic and Monetary Union governance was brought about by the

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<sup>18</sup> J. Weiler, “The Transformation of Europe”, *The Yale Law Journal*, 1991, Vol. 100( 8), Symposium: International Law, 2403-2483, (quot.) p. 2428. For a different characterization of the history of the European Integration and in particular, for a critiques to the supranational theories see L. Azoulay, E. Jaeger, 'The Passage to Europe trans. from Dutch, by L.Waters. Luuk van Middelaar. (New Haven: Yale University Press, 2013)', 2014, *Common Market Law Review*, Vol 51(1), pp. 311–313.

<sup>19</sup> R. Dehousse, ‘The Community Method at Sixty’ in R. Dehousse (ed.) *The Community Method. Obstinate or Obsolete?*, Basingstoke: Palgrave, 2011, pp. 3-15.

<sup>20</sup> S. Fabbrini, “Intergovernmentalism and Its Limits: Assessing the European Union’s Answer to the Euro Crisis”, *Comparative Political Studies*, 2013, Vol 46( 9), 2013, pp. 1003-1029., p. 1016.

adoption of the ‘six-pack’, consisting in five regulations<sup>21</sup> and a directive<sup>22</sup> based on Articles 121, 126 and 136 TFEU.

This legislative package strengthened both the preventative and the corrective arms of the Stability and Growth Pact (SGP), a complex instrument which well epitomizes the interaction between hard law and soft law in the coordination-based governance of the EMU<sup>23</sup>. In particular, as far as the preventative arm concerned, significant changes have been introduced with respect to the surveillance mechanisms requiring Member States to respect their medium term budgetary objectives regarding their budgetary balances<sup>24</sup>. An additional tool for the monitoring of the Member States’ budget probity was introduced with the Excessive Imbalance Procedure (EIP)<sup>25</sup> which aims at avoiding macroeconomic divergences between Member States. Moreover, the ‘six-pack’ also renders more stringent the sanctions regime of the Excessive Deficit Procedure (EDP)<sup>26</sup>.

The ‘two-pack’ regulations<sup>27</sup>, adopted pursuant to Article 136 TFEU and thus applicable only to the Eurozone Member States, complement the system of

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<sup>21</sup> Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure [2011] OJ L306/33; 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 [2011] OJ L306/1; 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 [2011] OJ L306/25; 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 [2011] OJ L306/8.

<sup>22</sup> Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

<sup>23</sup> Cf. Trubek, M. Cottrell and M.Nance, “‘Soft Law,’ ‘Hard Law,’ and European Integration: Toward a Theory of Hybridity”, pp.82-87; in J. Scott and G. de Burca (eds) *Governance and Constitutionalism in Europe and the US*, Oxford University Press, 2006, pp.65-94.

<sup>24</sup> Reg 1175/2011, Art 1(5) and Reg 1173/2011, Art 4.

<sup>25</sup> Reg 1176/2011.

<sup>26</sup> Reg 1173/2011 Artt. 5 and 6.

<sup>27</sup> Regulation (EU) No 473/2013 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, and, Regulation (EU) No 472/2013 of the European Parliament and of the Council on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability).

monitoring and surveillance resulting from the SGP as amended by the ‘six-pack’. They are specifically crafted for the Euro area and were inspired by the need of stronger mechanisms of budgetary consolidation for the Member States sharing the single currency and especially for those threatened by severe financial difficulties. The ‘two-pack’ regulations also aims at ensuring consistency between the budgetary policy and other economic policies<sup>28</sup>.

The reinforcement of the sanctions regime, resulting from the overhaul of the governance of the economic policies coordination, was not the only aspect of the reform undertaken in order to counteract the financial crisis. The strengthening of ‘hard law’ sanctions went hand in hand with the enhancement of soft law and coordination based governance. This was well exemplified by the requirements of the newly introduced European Semester<sup>29</sup> inspired by the ‘need to synchronize the timetables of [the economic coordination] procedures in order to streamline the process and to better align the goals of national budgetary, growth and employment policies, while taking into account the objectives they have set at the EU level’<sup>30</sup>. The soft law Country-Specific Recommendations, as formalised through the directive 1175/2011, epitomise the interplay between soft and hard law, since the failure to comply with the above-mentioned recommendations may trigger the sanctions envisaged by the operation of the excessive deficit procedures<sup>31</sup>. As emphasized by Armstrong, the strengthening of the procedures for achieving budgetary consolidation in the Member States is not a zero-sum game in which formal sanction-based rules and coordination-based governance are alternative scenarios. The response to the economic crisis was, in fact, a manifestation of broader trends towards pluralisation and differentiation in the forms and instruments of EU governance<sup>32</sup>.

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<sup>28</sup> Memo of the European Commission, 27 May 2013 Two-Pack’ enters into force, completing budgetary surveillance cycle and further improving economic governance for the euro area.

<sup>29</sup> The details of it can be found in Reg 1175/2011, and in particular in Art 1(3).

<sup>30</sup> European Council and Council of the European Union, *Why the European Semester was Created?*, at <http://www.consilium.europa.eu/en/policies/european-semester/>. Last accessed on 29/09/2015.

<sup>31</sup> Regulation 1466/97 Art.2a (3) as amended by Regulation 1175/2011.

<sup>32</sup> K. Armstrong, “The New Governance of EU Fiscal Discipline”, p.603.

This pluralization of EMU law instruments has gone hand in hand with the deepening of tensions between supranational structures and intergovernmental channels of cooperation. This becomes particularly apparent when one considers the additional layer of source of law created during the euro crisis, namely the *inter se* agreements concluded by some Member States outside the confines of the EU Treaties framework. These agreements have been concluded on the basis of Member States treaty-making powers and do not envision the formal participation of the Union. Notwithstanding this, given their substantive proximity with Union law of the subject matter they cover, some of the Union institutions were asked to perform certain tasks in these Member States' venues. The resulting plurality of sources of law has been positively welcomed by some scholars thanks to its alleged function of increase and enhancement of the governance capacity of the European Union<sup>33</sup>. Others commentators, however, have denounced the pitfalls arising from this *intergovernmental bricolage*<sup>34</sup> and from the fact that the procedures deriving from the different law sources intertwined with each other leading to a lack of legal transparency and legal certainty<sup>35</sup>.

## **2. The main thrust of EMU *inter se* agreements**

Various intergovernmental treaties have been adopted by some Member States in order to counteract the financial crisis which affected Europe. The treaties currently in force are the Treaty on Stability, Coordination and Growth in the Economic and Monetary Union (TSCG or more commonly referred to as Fiscal Compact), the European Stability Mechanism (ESM) and the Single Resolution Fund (SRF).

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<sup>33</sup> Ibid.

<sup>34</sup> See J Pisani-Ferry 'Assurance mutuelle ou fédéralisme: la zone euro entre deux mode 'les'. *Bruegel*, 2012, Brussels, 8 October, p 1.

<sup>35</sup> R. Lastra, J. Louis, "European Economic and Monetary Union: History, Trends and Prospects", *Yearbook of European Law*, 2013, Vol. 32 (1), p.196 ; See similarly M. Ruffert, "The European Debt Crisis and European Union Law", *Common Market Law Review*, 2011, Vol. 48(6) p. 1789.

The Fiscal Compact was signed on March 2, 2012 by twenty-five of the then twenty seven Member States of the European Union committed to strengthen the constraints imposed on their budgets and to consolidate their fiscal policies.

The major substantive innovation brought about by the Agreement, with respect to the existing primary and secondary Union rules, is the imposition on the Member States to commit to the so-called ‘golden rule’ in their national legal orders. By agreeing to adopt the ‘golden-rule’ the contracting parties undertake to maintain their annual budgets in balance or in surplus<sup>36</sup>.

It is a shared opinion that the additional requirements for the consolidation of Member States budgets could have been enacted by a modification of Protocol N 12 attached to the Treaty of Lisbon concerning the Excessive Deficit Procedure and by the adoption of a directive based on the provisions of enhanced cooperation<sup>37</sup>. However, since the heads of governments of some influential Member States preferred a Treaty change to introduce these innovations, after the UK veto on Treaty amendment during the negotiations of December 2011, they considered that the import of the commitments to be undertaken required “nothing less than a Treaty”<sup>38</sup>, and hence decided to adopt a treaty based on international law.

The ESM is the latest output of a series of attempts to endow the Union with a mechanism of financial assistance to set up and to manage loans addressed to Countries experiencing severe sovereign debt crisis. The Member States and EU Institutions firstly chose a “bifurcated approach” for the creation of the mechanism. In fact, a temporary EU law instrument, the European Financial Stability Mechanism (ESFM) established by means of a Regulation based on article 122(2) TFEU was coupled with a peculiar private law company whose shareholder were the Member States of the Euro area (EFSF). The latter instrument was deemed to be

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<sup>36</sup> Article 3(1a) TSCG.

<sup>37</sup> J. Ziller, “The Reform of the Political and Economic Architecture of the Eurozone’s Governance, a Legal Perspective”; B. 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*, 2012, FIC Press, pp. 139-16.

<sup>38</sup> B. De Witte, “Using International Law in the Euro Crisis: Causes and Consequences”, *ARENA Working Paper*, 4/2013 Oslo: ARENA Centre for European Studies, p.8.

necessary in the light of the limited resources of the EU budget which were insufficient to give the necessary financial support to the countries in crisis. In fact, while the upper limit of loans to be granted by the EFSM was set up to 60 billion euro, the EFSF, being based on the national budgets of the participating Member States<sup>39</sup>, could rely on a significantly greater amount of resources.

The two previous mechanisms were replaced by a permanent mechanism, the European Stability Mechanism (ESM), established by means of an international treaty. The ESM Treaty was signed in September 2012 by the Euro area Member States and begun its operations in October 2012. The ESM, as stated in Article 3 of the ESMT, aimed at mobilising funding and at providing “stability support under strict conditionality [...] to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems if indispensable to safeguard the financial stability of the Euro area as a whole and of its Member States”. The reasons for the adoption of the ESM outside the Treaty Framework are to be found in the fact that Article 122 TFEU, on which the EFSM was based, was not suitable for the adoption of a permanent instrument as the ESM and the fact that the ‘fire-power’ limitations of the EU budget rendered the backing of Member States’ budgets indispensable<sup>40</sup>.

An explicit reference to this agreement was made in an amended version of the TFEU. Some doubts were raised regarding the compatibility of such a mechanism with EU law and in particular with the so-called ‘no bail-out clause’ enshrined in Article 125 TFEU. Indeed, this clause provides that a Member State “shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings

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<sup>39</sup> The financial guarantees given by the Euro zone Member States on the basis of their shares in the paid-up capital of the ECB.

<sup>40</sup> See B. De Witte, “Using International Law in the Euro Crisis”, and B. de Witte, ‘Treaty Games- Law as Instrument and Constraint in the Euro Crisis Policy’, in F. Allen, E. Carletti and S. Simonelli (eds.), *Governance for the Eurozone: Integration or Disintegration*, 2012, Philadelphia, FIC Press.

of another Member State”. This led to the adoption of a European Council decision<sup>41</sup> amending the treaties with a simplified revision procedure on 25 March 2011. Article 136 was amended with the insertion of an additional paragraph referring to the possibility that the Euro area Member States may establish a stability mechanism to safeguard the stability of the Euro area as a whole, provided that the granting of financial assistance was subject to strict conditionality. As noticed by de Witte, this expedient allowed for the no-bail out clause to be neutralised by a provision having the same treaty-rank<sup>42</sup>.

Lastly, the SRF is a fund set up under a resolution mechanism (the Single Resolution Mechanism- SRM) in order to ensure the orderly resolutions of failing banks. It is part of a broader initiative aimed at establishing a European Banking Union. It is a shared opinion that the EMU consisting in a price- stability-oriented monetary pillar and a fiscal pillar based on the coordination of national economic policies lacked a viable financial policy component<sup>43</sup> which previously only consisted in regulations and directives framing the operations of banking institutions within the European Economic Area (EEA).

In order to address the vulnerabilities deriving from the lack of a common financial policy, in 2012 the Commission advocated the need of mitigating the risks of negative spill-overs effects of banking crisis and of preventing the vicious spiral between sovereign debts and banking debts. A comprehensive legislative package was hence envisaged in order to foster the integration of the European financial institutions. The Commission proposed in fact the establishment of a European Banking Union based on a Single Supervisory Mechanism, as a central prudential supervisor of the financial institutions of the Euro area, a Single Resolution

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<sup>41</sup> 2011/199/EU: European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro.

<sup>42</sup> De Witte, “Using International Law in the Euro Crisis”, 2013, pp. 6-7; The Treaty amendment, however, entered into force on 1 May 2013, more than half a year after the start of the mechanism’s operations

<sup>43</sup> J. Pisani-Ferry, A. Sapir, N. Veron & G. Wolff, “What Kind of European Banking Union?”, *Bruegel Policy Contribution* 2012/12.



Mechanism for the effective resolution of failing banks and a Single Rulebook defining the norms which financial institutions have to comply with<sup>44</sup>.

The Single Resolution Fund, the vital component of the Single Resolution Mechanism as devised by the EU Regulation No. 806/2014<sup>45</sup>, was adopted as an international agreement signed by all the EU Member States, except Sweden and the United Kingdom, on 21 May 2014.

The reasons for the establishment of this fund by means of an international agreement are to be mainly found in the reluctance of some German policy-makers to accept that the Commission would be in charge of managing a fund likely to have repercussions on the finances of Member States. Moreover, these policy makers also maintained that a Single Resolution Fund was not envisaged by the Treaties and its adoption within the EU framework would have required Treaty changes<sup>46</sup>. Despite a strong opposition by the European Parliament<sup>47</sup>, the German position also supported by the Council, prevailed.

The substantive linkages between these agreements and the EU law are readily apparent: the Fiscal Compact obliges the participating Member States to adopt fiscal rules which largely parallel those envisaged by EU law<sup>48</sup>, albeit being stricter. As far as the ESM is concerned, the preamble of the ESMT describes that the coordination of Member States economic policies deriving from EU law and from the Fiscal Compact as ‘the first line of defence against confidence crises affecting the stability of the Euro area’<sup>49</sup> which the ESM has to complement. Article 13 of the ESMT further clarifies that the Memoranda of Understanding detailing the conditionality attached to the granting of financial assistance should be consistent

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<sup>44</sup> European Commission, Communication ‘A Roadmap towards Banking Union’, 12 September 2012 COM (2012) 510 final.

<sup>45</sup> The set up and the functioning of the ESM is devised by EU Regulation No. 806/2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms.

<sup>46</sup> Cf. D.Howart and L. Quaglia “The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism” *Journal of Common Market Studies*, 2014, Vol. 52 (4), pp.132-37.

<sup>47</sup> See Financial Times, ‘European Parliament challenges plan for €55bn bank rescue fund’, 16 January 2014.

<sup>48</sup> For the overlapping obligations resulting from the Fiscal Compact and the six-pack and two pack regulations see P. Craig, “Economic Governance and the Euro Crisis: Constitutional Architecture and Constitutional Implications”, p.30.

<sup>49</sup> Recital 4 of the Preamble of the ESMT.

with the measures of economic policy coordination envisaged by the TFEU. Also, the Single Resolution fund is inextricably linked with EU law. This is clarified in recital 121 of the Preamble of the agreement. Evidently, the proper functioning of the SSM, established by EU Regulation No. 806/2014, depends on the contributions set up by the fund.

The linkages with the EU legal order are not only substantive but also institutional: as it will be further discussed, supranational institutions are assigned new tasks not expressly envisaged by the Treaties. An exception to this phenomenon is the EUCJ jurisdiction over disputes between MS for obligations arising outside the EU law framework connected to the subject matters of the treaties already contemplated in Article 273 TFEU. As held by De Gregorio Merino, “the intergovernmental universe of assistance has not been construed to the detriment of the EU Treaties. A number of substantial, institutional and budgetary links show that the intergovernmental sphere of assistance is not alien to the EU legal order nor is it an attempt to deconstruct it”<sup>50</sup>. This holds true also for the other *inter se* agreements concluded in the EMU field. However, the fact that they are not *alien* to the EU legal order does not help to explain their ultimate legal nature and their precise location in the EU Treaties Framework.

### **3. An old legal phenomenon: the ‘intermediate sphere’**

The motives justifying the use of *inter se* agreements to pursue EU- related objectives are manifold and they are mainly related to the greater flexibility they offer with respect to the EU legal framework. Indeed, the governments of the participating Member States are in control of the decision-making process which leads to the adoption of substantive rules. At the same time, they can agree upon requirements for the entering into force of the agreement alternative to the

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<sup>50</sup> A. De Gregorio Merino, “Legal developments in the Economic and Monetary Union during the debt crisis: The mechanisms of financial assistance”, 2012, *Common Market Law Review*, Vol 49(5), p.1645.

ratification of all the signatory states<sup>51</sup>. This allows for more flexibility in crafting legal norms and in defining the scope of their application since the complex institutional balance, and decision-making procedure, applying to the adoption of EU law proper may be set aside<sup>52</sup> while maintaining a form of supranational control in the enforcement of the legal norms, thanks to the tasks assigned to the EU Institutions. During the history of European Integration, these advantages led the Member States to create forms of flexible international cooperation outside the Treaty framework especially in those subject matters in which the Community had no power to act<sup>53</sup>.

The ‘new’ EMU *inter se* agreements displaying a significant substantive and institutional linkage with the EU legal order are thus not an isolated or recent legal phenomenon in the history of the EU integration project. For instance, former Article 293 of the EC Treaty (ex- Article 220 EC)<sup>54</sup>, repealed with the entering into force of the Treaty of Lisbon, expressly envisaged the conclusion of international agreements between all Member States. They were the so-called ‘Community Conventions’, which envisioned the action of Member States in fields whereby a legal cooperation between the Member States was deemed capable of facilitating the smooth function of the Common Market<sup>55</sup>. These special agreements were regarded as contributing to the filling of the legal *lacunae* of the Treaty especially when the realization of Community objectives needed the establishment of uniform legal norms whose scope went partially or entirely beyond the competences of the institutions and when the functioning of the common market resulted impaired by the normative divergences arising from the application of different national laws.<sup>56</sup>

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<sup>51</sup> The Fiscal Compact is an example of this phenomenon since its entering into force was subject only to its ratification by 12 of the 25 contracting member states, provided that they were euro zone countries

<sup>52</sup> De Witte, “Using International Law in the Euro Crisis”, 2013, p.10.

<sup>53</sup> B. De Witte, “Old-Fashioned Flexibility: International Agreements between Member States of the European Union”, in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility*, 2010, Oxford: Hart Publishing.

<sup>54</sup> This Article has been repealed with the entering into force of the Treaty of Lisbon.

<sup>55</sup> P. Fois, “Commento all’Art 220” in R.Quadri, R.Monaco, A.Trabucchi (eds) *Trattato Istitutivo della Comunità economica europea- Commentario*, 1965, Milano: Giuffré.

<sup>56</sup> W.M. Haushild, “L’Importance des Conventions Communautaires pour la création d’un droit Communautaire”, *Revue Trimestrielle de Droit Européen*, 1975, Vol.11, p. 6.

In light of this need for a uniform application of norms which were strictly complementary to the Community law, *ad hoc* protocols attributed specific competences to the Court of Justice. They empowered the Court to interpret those conventions which extended far beyond its arbitral jurisdiction as envisaged in Article 182 CE (now 273 TFEU) and concerning disputes between Member States relating to the subject matter of the Treaty. The 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters<sup>57</sup> was the first of the Community Convention to enter into force, and soon became “the prism and the battleground on which most of the theoretical debates on the nature of the Community Conventions were fought”<sup>58</sup>.

The text of Article 293 did not indicate whether the conventions should be concluded by all or by some Member States. In practice, all the Member States concluded the Community Conventions which were not thus used as “*instrument[s] of flexibility* in the ‘Amsterdam’s sense’”, or in other words, as instruments which allowed for the participation of only some Member States to the exclusion of others<sup>59</sup>. However, peculiar forms of differentiation occurred because of the later accession of some Member States which signed the conventions only some years after the acquisitions of the status of Community Members<sup>60</sup>.

Other agreements in areas closely linked to the completion of the Single Market and to the attainment of EU objectives, instead, were concluded by some Member States albeit their conclusion was not expressly envisaged in any Treaty articles. The Schengen Agreement and the Prüm Convention were prominent examples of this

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<sup>57</sup> Convention on jurisdiction and the enforcement of judgments in civil and commercial matters; consolidated version, OJ 1998 C 27/1.

<sup>58</sup> R. Schütze, “European law and Member State agreements” in R. Schütze *Foreign Affairs and the EU Constitution Selected Essays*, 2014 Cambridge University Press, p. 147.

<sup>59</sup> B. de Witte, “Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements”, in B. de Witte, D. Hanf, E. Vos (eds), *The Many Faces of Differentiation in EU Law*, 2001, Antwerpen: Intersentia (quot) p. 248.

<sup>60</sup> For instance, Denmark, Ireland and the United Kingdom acceded to the EC in 1972, but signed the Brussels Convention and to the ‘1971 Protocol’ only in 1978. See the Council Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed on 9 October 1978) (78/884/EEC).

phenomenon. The Schengen Agreement, signed only by five Member States<sup>61</sup> could be located in the framework of the objective of the EC Treaty if one considers its substantive linkage with the four freedoms established by the Common Market.

The Agreement aimed at the progressive abolition of border checks at the contracting parties' common borders and could thus be located in the broader EC Treaty aim of abolishing obstacles to the free movement of persons between the Member States. The attainment of this objective became even more apparent with the adoption of the Single European Act which forwarded the ambitious project of the completion in four years of an area without internal frontiers guaranteeing the free movement of goods, persons, services and capital<sup>62</sup>. It was the Agreements' detachment from the institutional machinery of the Union and the absence of the Court of Justice's jurisdiction over it which left the Schengen system to be *de facto* a foreign body to the Union legal order. This was one of the factors triggering severe criticism of the Agreement from the side of the European Parliament<sup>63</sup>, of academics and practitioners<sup>64</sup> and even of the governments of some of the Member States participating in the initiative<sup>65</sup>. The critiques mainly concerned the democratic deficit exacerbated by the lack of check and balances restraining the governments of Member States adopting measures directly affecting the legal position of individuals. Similar critiques were made towards the Prüm Convention<sup>66</sup> dealing with cross-border co-operation, particularly in combating terrorism, cross-border crime and illegal migration and signed in May 2005 by five Member States. Also the

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<sup>61</sup> Belgium, France, Luxembourg, the Netherlands, and West Germany; several EU Member States joined Schengen in later years: Italy, Greece, Denmark, Austria, and Sweden), as did two non-Member States: Norway and Iceland.

<sup>62</sup> COM (85)310, "Completing the internal market", White Paper from the Commission to the European Council (Milan 28–29 June 1985), Brussels 14 June 1985.

<sup>63</sup> Resolution on the harmonization of policies on entry to the territories of the EC Member States with a view to the free movement of persons (Art 8a of the EEC Treaty) and the drawing-up of an intergovernmental Convention among the 12 Member States of the EC, OJ 1991 C 72/213.

<sup>64</sup> Cf. D. Curtin, H. Meijers, "The principle of open government in Schengen and the European Union: Democratic retrogression?" *Common Market Law Review*, 1995, Vol 32, pp 391-442.

<sup>65</sup> The Dutch Government. In particular, advocated the need for a judicial control mechanism attributing jurisdiction to the Court of Justice by means of a separate protocol and the need of a greater parliamentary scrutiny of the measures adopted by the Schengen Executive Committee. These proposals, however, came to nothing.

<sup>66</sup> T. Balzacq, D. Bigo, S. Carrera and E. Guild, "Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats", CEPS Working Document No. 234, Centre for European Policy Studies, Brussels, January 2006.

Prüm Convention pursued EU related objectives, as showed by the fact that the Council itself published the Treaty<sup>67</sup>. Interestingly, both the Treaties, as it had already happened with some Community Conventions, were later integrated in the EU legal order.

Legal scholarship has offered detailed, albeit diverse, accounts on the legal nature of the agreements concluded by the Member States. Initially the doctrine focused on the Community Conventions. A first vivid account of their legal nature was offered by Fois who qualified them “as moving into the orbit of the Community legal system and as exerting a development and verification function of [the viability] of that system”<sup>68</sup>. Then, two schools of thought emerged: a first school underlying their international-law nature, a second submitting that the Conventions could be regarded as part of the Community system. Among the authors belonging to the second school of thought, Carbone maintained that the Brussels Convention found its legal foundation not only in Article 220 EC but especially in the general principles of the Community legal order: as the Convention facilitated the juridical and the economic integration envisaged by the Treaties, it was fully part of the Community system<sup>69</sup>. The conventions were also considered as an extension of primary Community law<sup>70</sup>, as a second generation of Community law<sup>71</sup> or as acts of execution of the Treaties<sup>72</sup>.

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<sup>67</sup> Council Secretariat, Brussels, 7 July 2005, 10900/05.

<sup>68</sup> P. Fois, *Gli accordi degli Stati membri delle Comunità europee*, 1968, Milano, Giuffrè, p. 168 [...] Non ci pare azzardato parlare di una interdipendenza fra Trattati ed accordi degli Stati membri. Interdipendenza che da un lato, per quanto riguarda i Trattati, va posta in relazione alla funzione di «sviluppo» o di «verifica» dell'intero sistema, che gli accordi degli Stati membri esplicano, mentre nel caso di questi ultimi è da collegarsi all'esistenza di questo sistema, nella cui orbita gli stessi, di fatto si muovono. This conception re-emerged more recently in the legal scholarship, see D. Thym, “The Evolution of Supranational Differentiation”, 2009, WHI- Paper 03/09 pp. 8-9 who refers to *inter se* agreement as ‘satellite treaties’.

<sup>69</sup> S. Carbone, “Lo spazio giudiziario europeo: le Convenzioni di Bruxelles e di Lugano”, 1997, Torino : Giappichelli, p.29

<sup>70</sup> P. Schlosser, “Neues Primärrecht der EG”, Vol. 28 *Neue Juristische Wochenschrift* 1975, pp.2132, 2133.

<sup>71</sup> H. Rasmussen, “A New Generation of Community Law? Reflections on the Handling by the Court of Justice of the Protocol of 1971 Relating to the Interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments”, *Common Market Law Review*, 1978, Vol. 15. p.249.

<sup>72</sup> A. Huet, « Commentaire article 220 » in V. Constantinesco, J-P. Jacqué, R. Kovar et D. Simon *Commentaire article par article du traité instituant la CEE*, 1992, Paris : Economica, p.1379.

Among the authors belonging to the first school of thought, the voice of Capotorti is particularly persuasive. He maintained that the Conventions at issue were not to be listed among the Community measures since that category coincided with the “catalogue of acts adopted by the Community Institutions and does not therefore include agreements concluded by the Member States among themselves”.<sup>73</sup> Similarly, it was noticed that Conventions under article 220 EC found their legal source not in the article itself but from the pre-existing treaty-making powers of the Member States and hence were not part of Community law<sup>74</sup>.

The analysis of Pescatore is more critical. While recognizing the supplementary nature of the conventions to the Community legal order, he denounced the creation of a “new body of European law” lacking “the guarantees of uniformity and effectiveness, which in the case of Community Law proper, result from the institutional system of the Community” and warned against “the danger to the unity of the European legal system arising from the establishment of new rules which, precisely because of their international origin, are not subject to the system of institutional and, more especially, legal guarantees provided by the Treaty”<sup>75</sup>.

Moving from similar assumptions, Community Conventions have been also defined as “a curious legal phenomenon that fits oddly with the vision of the European Union as an autonomous legal order with its own legal instruments, its own system of decision-making, enforcement and judicial control”.<sup>76</sup>

One of the legal elements informing the International law – Community law debate on Community Conventions was the institutional links with the EC legal order, i.e. the participation of EC institutions in the patterns of integrations set up by Member

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<sup>73</sup> F. Capotorti, “The Tasks of the Court of Justice and the System of the Brussels Convention”, in D. Tebbens *et al* (eds) *Civil Jurisdictions and Judgments in Europe*, 1992, London: Butterworths, p.15.

<sup>74</sup> L.E. Schwartz: I. E. Schwartz, ‘Übereinkommen zwischen den EG-Staaten: Völkerrecht oder Gemeinschaftsrecht?’ in F. J. Kroneck and T. Oppermann (eds.), *Im Dienste Deutschlands und des Rechtes*, 1981, Baden-Baden: Nomos: ‘Grund für die Geltung von Übereinkommen und Protokollen zwischen den Mitgliedstaaten ist nicht wie bei Verordnungen und Richtlinien ein Befehl des EWG-Vertrages, sondern der Abschluß eines Vertrages zwischen Staaten ... Die Übereinkommen und Protokolle sind nicht vom EWG-Vertrag abgeleitetes Organrecht, sondern autonomes Vertragsrecht’. Similarly see R. Schütze, “European law and Member State agreements” p.148.

<sup>75</sup> P. Pescatore, “International Law and Community Law—a Comparative Analysis”, p.180.

<sup>76</sup> Cf. B. de Witte, “Using International Law for the European Union’s Domestic Affairs, p.143.

States outside the formal contours of EC law. In the case of the Brussels Convention the decisive factor emancipating the Convention from traditional international law and advancing it into the path of the law of “solidarity and integration”<sup>77</sup> characterizing the Community legal order was the Protocol signed in Luxembourg in 1971 attributing to the Court of Justice the jurisdiction to give preliminary rulings concerning the interpretation of the Convention. The Protocol was regarded as having brought about a “partial supranationalization of the Convention”<sup>78</sup> in spite of the international origin of the agreement<sup>79</sup>. In fact, thanks to the functional and teleological interpretation criterion<sup>80</sup> adopted by the Court of Justice and applied to the Brussels Convention, the latter was embedded in ‘the Community logic’ and into the “unitary values of the Community” and was thus liberated from a ‘strictly international interpretation’<sup>81</sup>.

The interest in the nature and in the mechanics of these Member States actions in pursuance of EU-related objectives, albeit formally outside the EU framework, has recently regained momentum. In an analysis devoted to grasp the dynamics and the tensions shaping the European Union from its very origins, Van Middelaar vividly identifies an ‘intermediate sphere’ of European policy-making. This sphere is located between the ‘outer sphere’ and the ‘inner sphere’. The former is the sphere of the sovereign states shaping their relations by means of power politics and international law in what was once the Concert of Europe<sup>82</sup>. The latter is the sphere of the Community, of a *Gemeinschaft* governed by a treaty and guided by a vision of the

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<sup>77</sup> P. Pescatore, “International Law and Community Law—a Comparative Analysis”.

<sup>78</sup> R. Schütze, “European law and Member State agreements” p.149.

<sup>79</sup> Cf also Rasmussen, “A New Generation of Community Law?”: “The legal qualification of a convention may [...] be substantially altered when a power to ensure a uniform interpretation of the Convention in question is vested in the EEC Court. In that case a definite qualification cannot be made by a simple reference to the origin of the treaty”, p.257.

<sup>80</sup> S. Carbone, *Lo spazio giudiziario europeo in materia civile e commerciale: da Bruxelles I al regolamento CE n. 805/2004*, 2006, Torino: Giappichelli, p.19.

<sup>81</sup> F. Salerno, “The Brussels Jurisdiction and Enforcement Convention. The Judicial Outlook” in B. von Hoffmann (ed), *European Private International Law*, 1998, Nijmegen, p.155.

<sup>82</sup> See R. Albrecht-Carrie, *The Concert of Europe*, 1968, New York : Harper & Row.



future: the ‘European project’ to be realised by means of common institutions taking decisions in the name of shared European interests<sup>83</sup>.

The intermediate sphere is the space of action of the Member States pursuing common interests in the light of mutual membership and often develops regardless of the formal division of powers between the Union and its Member States<sup>84</sup>. This is the reason why Van Middelhaar qualifies this sphere as ‘not fully captured in legal terms’ and vividly defines it as the ‘purgatory’ of the European Politics.<sup>85</sup> Even though the intermediate sphere is a phenomenon which is challenging to fully comprehend in legal terms, some works of prominent scholar of the EU integration law may pave the way for providing a legal account of the phenomenon at issue. Among the attempts to legally grasp the nature of this intermediate sphere, the contributions of Giardina, Dashwood and Torrent feature prominently.

Giardina drew a distinction between the “Community-organization” and the “Community *lato sensu*”. The Community-organization is what will be later defined a “system of structures”<sup>86</sup>, ‘a structured, organized and finalized whole’<sup>87</sup> with its autonomous decision-making processes and inter-institutional balance as defined by the treaties. The Community *lato sensu* is a broader juridical entity encompassing also the Member States, mutually bound to comply with the Union rules, acting either through the coordinated actions of their national organs or throughout the actions of the Union as an organization<sup>88</sup>.

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<sup>83</sup> L. van Middelhaar, *The passage to Europe : how a continent became a union*, 2013, New Haven : Yale University Press, pp.12-16.

<sup>84</sup> Cfr also L. Azoulai, E. Jaeger, ‘The Passage to Europe’ p.312.

<sup>85</sup> Cf L. van Middelhaar, *The passage to Europe*, pp 31-33. The appropriateness of this qualification emerges in particular if one takes into account the legal path eventually undergone by the inter se agreements. Concluded by the Member States outside the EU framework in matters closely related to EU law-making, these ‘redeemable sins’ could be easily atoned. The process of redemption consists in their incorporation within the EU law, a process already occurred in the case of the Brussels Convention and of the Schengen Agreement. Besides, clauses of reincorporation are also present in more recent agreements, namely in the Fiscal Compact and in the Single Resolution Fund.

<sup>86</sup> P. Pescatore, “International Law and Community Law—a Comparative Analysis”, p.170.

<sup>87</sup> P. Pescatore, *The law of integration : emergence of a new phenomenon in international relations, based on the experience of the European Communities*, 1974, Leiden : Sijthoff, p. 41.

<sup>88</sup> A.Giardina, *Comunità Euroopee e Stati terzi*, 1964 Napoli: Jovene, fn 58 p.47 Per Comunità-organizzazioni si intendono quindi le strutture organizzative istituite in esecuzione dei Trattati comunitari, in quanto entità che, fornite di proprie ed autonome competenze, si distinguono e talvolta si contrappongono (al livello intercomunitario)

Borrowing the metaphoric language introduced by the Treaty of Maastricht, Torrent singled out the presence of a “fourth pillar” of the Union law defined as the joint and coordinated exercise of the Member States’ competences inside the EU’s institutional framework, albeit outside the formal pillars structure. He, in fact, pinpointed two constituents of the European Union: the Community on the one hand and the Member States acting jointly on the other. He maintained that “there [was] no precise demarcation line between (more or less joint) action by the Member States outside the institutional framework and the more or less joint action they develop within this framework”. And he advocated that legal experts found the means by which the “action by-the Community-and-by-the-Member-States-acting-jointly can evolve in conformity with the law”<sup>89</sup>.

Finally, Dashwood, distinguishes between the scope of Union competences and the scope of Union law. He differentiates the scope of Community powers from the scope of the Treaty’s application since the ‘objectives of the Treaties are not exclusively pursued through actions of the Community’ but also through the Member States when they exercise, or when they refrain from exercising, ‘powers that would normally be available to them as incidents of sovereignty’<sup>90</sup>. In this case, the collective action of all or some Member States is not necessary for the scope of EU law to outreach the scope of the Union competences. Rather differently from the other two categories proposed, in fact, Dashwood’s framework of analysis also applies when a Member State acts individually.

The Member States’ *inter se* treaties, could hence be easily ascribed to the category of “Union Law *lato sensu*”, to the category of the “fourth pillar” or to be considered to fall within the “scope of Union law”. In the multifarious taxonomy of the

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agli Stati membri individualmente considerati. Con il termine Comunità in senso lato si intende invece fare riferimento ad una figura più ampia costituita dal gruppo di sei stati, in quanto vincolati reciprocamente al rispetto delle norme comunitarie ed agenti, in adempimento dei loro obblighi, o attraverso l’opera coordinata dei loro organi nazionali, o attraverso l’opera delle Comunità-organizzazioni.

<sup>89</sup> R. Torrent, “The ‘Fourth Pillar’ of the European Union after the Amsterdam Treaty”, in A. Dashwood, C. Hillion (eds) *The General Law of E.C. External Relations*, 2000, Sweet & Maxwell.

<sup>90</sup> A. Dashwood, “The Limits of the European Community Powers”, *European Law Review*, Vol. 21, 1996, p.114.

coordinated Member States' actions in EU-related subjects, the most updated category seems to be that of 'semi-intergovernmentalism'<sup>91</sup>. According to Keppenne this new method of action is intergovernmental "in the sense that it takes place outside the institutional framework of the Union, using instruments of private (EFSF) or public international law (ESM, TSCG)", while at the same time displaying "strong link and even interdependence with Union law" especially because of the participation of EU institutions in intergovernmental actions<sup>92</sup>. The principal merit of this category is the significance it assigns to the institutional involvement of the EU Institutions in the Member States' venues, which is a characteristic of the intermediate sphere particularly manifest in the case of the Community Conventions and in the recently concluded EMU *inter se* agreements.

#### **4. The divide between EU law and the law of Member States' agreements**

The intermediate sphere, given its formal international-law nature, does not generally possess the inherent characteristics of EU law. One of the differences between EU law and the law of *inter se* agreements observed in the previous chapter was the peculiarity of the EU institutional decision-making procedures, which differs from the intergovernmental bargain-type of negotiations characterizing the adoption of intergovernmental agreements pursuant to international law rules. In fact, in spite of its international law roots, EU law displays inherent features defining its 'sui generis' nature and differentiating it from classic international law<sup>93</sup>. The specific qualities of EU law do not inform the law of the *inter se* treaties which hence do not share the EU "relatively democratic and transparent mode of decision-making, [...], and the capacity to make the rules 'stick' by means of a relatively efficient judicial enforcement system"<sup>94</sup>.

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<sup>91</sup> J.P. Keppene, "Institutional Report" in The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU (Report (XXVI FIDE Congress, Vol. 1).

<sup>92</sup> J.P. Keppenne, "Institutional Report" p.203.

<sup>93</sup> C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen*, for a thorough analysis of the EU law specificities with respect to classic international law, see J. Ziller, *The Nature of EU Law* and Timmermans, EU and Public International Law.

<sup>94</sup> B. De Witte, "Treaty Games – Law as Instrument and as Constraint in the Euro Crisis Policy", pp.154-55.

In particular, as far as transparency is concerned, the principles of openness and the right of access to documents enshrined in Articles 15 TFEU and Article 42 of the EU Charter of Fundamental Rights do not extend to Member States' agreements. As recently affirmed by the Court in the *Pringle* Judgment<sup>95</sup>, the Member States are not implementing EU law when *inter se* agreements and hence the EU Charter does not apply<sup>96</sup>. Moreover, the ESMT envisages additional confidentiality requirements which are detrimental to the transparency of the acts adopted for the implementation of the mechanism. In this regard, Article 34 ESMT specifically prohibits the Members or former Members of the Board of Governors and of the Board of Directors and any other persons working with the ESM from disclosing information that is subject to professional secrecy. In addition to this, Article 35 ESMT establishes the immunity for the ESM Governors, Director and Staff members from legal proceedings with respect to acts performed by them in their official capacity and the inviolability of their official papers and documents.

In addition to this, it is unclear in which to which extent the EU institutions would be subject to the Charter of Fundamental rights when performing tasks in pursuance to the *inter se* treaties. Even though AG Kokott, in her *View*<sup>97</sup> to the *Pringle* Judgment, affirmed that the EU institution should be 'bound by the full extent of European Union law, including the Charter of Fundamental Rights'<sup>98</sup>, it is questionable whether and how this would apply in practice. In particular, the possibility to address a Charter claim against the Institutions seems difficult to recognize in the light of the Court's findings that 'the duties conferred on the Commission and ECB within the ESM Treaty, important as they are, do not entail any power to make decisions of their own'<sup>99</sup>. Even though the Institutions are formally bound by the Charter and will significantly influence the decisions relating

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<sup>95</sup> Case C-370/12 *Pringle v. Government of Ireland, Ireland and the Attorney General*, Judgment of 27 November 2012, para. 180.

<sup>96</sup> CFR Article 51(1) of the EU Charter of EU fundamental rights.

<sup>97</sup> Since the *Pringle* Judgment was delivered in pursuance of the expedite procedure envisaged by Article 105 of the Rules of Procedures of the Court of Justice, AG Kokott did not formally provide an *Opinion*.

<sup>98</sup> AG Kokott, *View* to Case C-370/12 *Pringle* para.176

<sup>99</sup> *Pringle*, para.161.

to the operation of the ESM, the decisions will be formally taken by the Member States<sup>100</sup> and then it is unlikely that Institutions would incur in responsibilities deriving from the EU Charters of Fundamental Rights.

The lack of transparency is not the only drawback characterizing the EMU intergovernmental agreements. The democratic control on EU-related norms is also hindered by the complexity and the plurality of sources of law signalled in the first chapter of this work. Intergovernmental agreements, in fact, have contributed to add an additional layer of norms in an already “dense and opaque jungle of rules where but few specialists are able to orient themselves”<sup>101</sup>. Moreover, “stability mechanisms, such as the EFSF and the ESM, operate as separate financial institutions outside the Treaty framework, with their own intergovernmental decision-making bodies and behind the shield of far-going immunity and confidentiality. [...]. Such an institutional development makes any control by the European parliament or national parliaments, not to mention civil society and the citizenry, extremely difficult”<sup>102</sup>.

Perhaps more importantly, international-law based *inter se* treaties, albeit often pursuing a *telos* common to the Union and to some or all of its Member States, may be not subjects to the qualifying principles of EU law. As affirmed by the Court in a case dealing with the Statute of the European Schools<sup>103</sup>, an *inter se* agreement to which originally the EU was not a party, the provision of the Treaties do not apply Member States agreements:

“[T]he Statute of the European School [...] [is] to be viewed in the context of a whole series of agreements, decisions and other acts by which the Member State collaborate and coordinate their activities so as to contribute to the proper functioning of the Community institutions and to facilitate the achievement of the tasks of those institutions”. [...]“However such cooperation between the Member State and the rules relating thereto do not have their legal basis in the Treaties establishing the European Communities and derived from the Treaties. The provisions of the Treaty

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<sup>100</sup> P. Craig, ‘Pringle and Use of EU Institutions outside the EU Legal Framework’, p.282.

<sup>101</sup> K. Tuori “The Eurozone crisis as a constitutional crisis”, in M. Fichera et al (eds.) *Polity and crisis : reflections on the European odyssey*, 2014 Farnham ; Burlington, VT, USA : Ashgate, p.22.

<sup>102</sup> K. Tuori, “The European Financial Crisis – Constitutional Aspects and Implications”, EUI Working Papers, LAW 2012/28, p. 47.

<sup>103</sup> The Treaty on the Statute of the European Schools, concluded in 1957 by the six member states of the Community.

do not therefore apply to the Statute of European School or to decision adopted on the basis of that instrument”<sup>104</sup>.

In addition to this, *inter se* agreements lack the specific mechanisms of judicial review characterizing EU law. In the first place, it should be noticed that “the Court does not have jurisdiction to rule on the lawfulness of an international agreement concluded by Member States”<sup>105</sup>. Article 273 TFEU, in fact, only grants to the Court the “jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties”<sup>106</sup>. This Article thus extends the scope of Article 344 TFEU, which attributes to the CJEU the exclusive jurisdiction over disputes concerning the interpretation or application of the Treaties, to special agreements between Member States related to EU law. Pursuant to Article 273 TFEU, however, the CJEU does not have jurisdiction over the action of the institutions outside the EU framework<sup>107</sup>. Besides, in Article 273 TFEU there is no complementary role for any other EU institutions envisaged. In particular, the lack of involvement of the Commission as the ‘watchdog’ of the Treaties and as an institution capable of depoliticizing the disputes is particularly apparent.<sup>108</sup> Most notably, the absence of the Commission’s role to start infringement procedures pursuant to Articles 258 and 260 TFEU is an evident drawback regarding the quality of the law of *inter se* agreements. As it will be discussed in the next chapter, the attempt to emulate this enforcement mechanisms in the *inter se* treaties<sup>109</sup> has resulted in a decision making procedure not entirely compatible with the ones envisaged by the Treaties.

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<sup>104</sup> Case C-44/84, *Hurd vs Jhones* [1986] ECR 29 paras. 36-37.

<sup>105</sup> Case C/146-13, *Spain v Parliament and Council*, para. 103.

<sup>106</sup> Article 273 TFEU.

<sup>107</sup> A. Dimopoulos, ‘The Use of International Law as a Tool for Enhancing Governance. in the Eurozone and its Impact on EU Institutional Integrity’ in M. Adams and F. Fabbrini, P. Larouche (eds), *The Constitutionalisation of European Budgetary Constraints*, 2014, Oxford: Hart, p.50.

<sup>108</sup> L. Prete, B. Smulders, ‘The Coming of Age of Infringement Proceedings’ *Common Market Law Review*, 2010, Vol 47 (1) pp.9-61.

<sup>109</sup> Cfr Article 7 TSCG.

## 5. Some factors liable of reducing the divide between EU law and the law of inter se agreements.

The above described isolation from the EU legal principles was not the destiny of all the *inter se* agreements. The case of the Brussels Convention is once again revealing. The Protocol to the Convention signed in Luxembourg in 1971<sup>110</sup>, in particular, enabled the Court to extend to the Brussels Convention the functional and teleological interpretation criteria usually applied for the interpretation of Community law<sup>111</sup>. This was facilitated by the similarities of the mechanisms for preliminary rulings provided for by the Protocol and by the Treaty (former Article 177 EC; now Article 267 TFEU). In particular, the preliminary ruling mechanism of the Protocol, albeit not being available for the courts of first instance<sup>112</sup>, allowed a Member State of the Community and the Commission to intervene in proceedings<sup>113</sup>. The institutional links with the Community legal order through the 1971 Protocol thus facilitated the extension of essential Community law principles to the Brussels Convention. In particular, in the *Eurocontrol Bavaria* case<sup>114</sup>, the Court extended to the Brussels Convention the principle of uniform application. Indeed, it found that ‘the principle of legal certainty in the Community legal system and the objectives of the Brussels Convention in accordance with Article 220 of the EEC Treaty require[d] in all Member States a uniform application of the legal concepts and legal classification developed by the Court in the context of the Brussels Convention’<sup>115</sup>. The “partial supranationalization of the Convention”<sup>116</sup> was further developed in the landmark *Duijnste* case whereby the Court established that, similarly to what happens with Community law, also the provisions of the Convention should be granted primacy over conflicting national laws. It referred again to the principle of

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<sup>110</sup> The Protocol attributed to the Court of Justice the jurisdiction to give preliminary rulings concerning the interpretation of the Convention

<sup>111</sup> S. Carbone, *Lo spazio giudiziario europeo in materia civile e commerciale: da Bruxelles I al regolamento CE n. 805/2004*, 2006, Torino: Giappichelli, p.19

<sup>112</sup> Case C 56/84 *Von Gallera* [1984] ECR-1769 .

<sup>113</sup> Case C 12/72 *Industrie Tessili Italiana v Dunlop AG* [1974] ECR-1473.

<sup>114</sup> Joined Cases 9-10/77 [1977] ECR-1517.

<sup>115</sup> *Ibid.*, para. 4.

<sup>116</sup> R. Schütze, “European law and Member State agreements” p.149.

legal certainty together with the equality and uniformity of rights and obligations arising from the Convention. It found that:

According to the Preamble of the Convention, the Contracting States, ‘anxious to strengthen in the Community the legal protection of persons therein established’ considered that it was necessary for that purpose ‘to determine the international jurisdiction of their Courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic Instruments and Court Settlements’

Both of the provisions on jurisdiction and those on the recognition and enforcement of judgments are therefore aimed at strengthening the legal protection of persons established in the Community. The principle of legal certainty in the Community legal order and the aims pursued by the Convention in accordance with Article 220 of the Treaty, on which it is based, require that the equality and uniformity of rights and obligations arising from the Convention for the Contracting States and the persons concerned must be ensured, regardless of the rules laid down in that regard in the laws of those States. It must be concluded that the Convention, which seeks to determine the jurisdiction of the courts of the Contracting States in civil matters, *must override national provisions which are incompatible with it*.<sup>117</sup>

The example of the Brussels Convention indicates that the divide between EU law and *inter se* agreements may be reduced in the presence of a strong institutional linkage with the EU framework and when the agreements are expressly envisaged by the Treaties. Moreover, the Brussels Convention also indicates that Treaty articles expressly envisaging the conclusion of Member States agreements may be considered to be a factor capable of reducing the divide between Member States agreements and EU law. Here, this issue will be further explored and it will be shown that, albeit being relevant for reducing the divide between the law of the *inter se* agreements and EU law, the capacity of these provisions to render the *inter se* agreements they envisage as part of EU law proper has been overestimated. Wuermeling, in particular, submitted that Article 220 EEC attributed to the Community a competence which would be exercised not by the its Institutions but by the Member States acting collectively as officials of the Community. The Member States thus acted in virtue of a Community competence and not of their retained international or national external competences<sup>118</sup>.

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<sup>117</sup> Case 288/82, Ferdinand M.J. Duijnste v. Lodewijk Goderbauer [1983] ECR 3663, paras. 11-14 (emphasis added)

<sup>118</sup> J. Wuermeling, *Kooperatives Gemeinschaftsrecht : die Rechtsakte der Gesamtheit der EG-Mitgliedstaaten, insbesondere die Gemeinschaftskonventionen nach Art. 220 EWG*, 1988, Kehl: Engel, p.68: “Art 220 EWGV der Gemeinschaft eine Kompetenz verleiht, die zwar nicht von Ihren Institutionen, aber von der Gesamtheit der Mitgliedstaaten, die als *gemeinschaftsrechtlicher Funktionsträger* agieren, wahrgenommen wird. Die Mitgliedstaaten handeln im Falle des Art. 220 EWGV also ausschließlich kraft gemeinschaftlicher Kompetenz und Zuständigkeitsverteilung, nicht in Ausübung verbliebener völkerrechtlich-nationaler Außenkompetenz“.



The Community Conventions were thus regarded as acts whereby the Member States could exercise a Community competence as trustee of the Community interest<sup>119</sup>. Closer scrutiny, however, shows that the provision at issue departs largely from the situation in which the Member States act as trustee of the Union interest. This happens when Member States alone are party to an international agreement falling within exclusive Union competence, after being authorized by the Union<sup>120</sup> and acting under the supervision of the Commission<sup>121</sup>. Contrarily to the situations described above, for the Conventions concluded pursuant to article 220 EC there could not be identified neither an exclusive Community competence nor an authorization to act by the Community. Neither the Treaty, nor the Union legislation at the time could lead, in fact, to regard the areas covered by Article 220 EEC as domain of Community competence. Moreover, the wording of the Article at issue does not entail an authorization to act on the part of the Member States. It seems hence appropriate to share the view according to which since the provision did not bestow upon the Community any particular competence to act in the areas it envisaged, the Member States' powers derived from their pre-existent treaty-making powers<sup>122</sup> and not from an authorization by the Community. Moving from similar premises, in their counterfactual analysis of the *Pringle* Judgment, Eeckhout and Waibel submitted that the Court could have maintained that the ESM was concluded under the Union's exclusive monetary policy competences. According to these authors, in fact, the amended Article 136(3) TFEU could be interpreted as an

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<sup>119</sup> This is Schütze's reading of Wermeling's view, R. Schütze, "European law and Member State agreements" p. 147. See also M. Cremona, "Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union" in A. Arnulf et al. (eds.), *A Constitutional Order of States: Essays in Honour of Alan Dashwood*, 2011 Oxford: Hart Publishing.

<sup>120</sup> See Council Decision (EC) 2002/762 of 19 September 2002 authorizing the Member States in the interest of the Community, to sign, ratify or accede to International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001, (the Bunkers Convention), [2002] OJ L256/7; see also Council Decision (EC) 2004/246 of March 2 2004 authorizing the Member States to sign, ratify or accede to, in the interest of the European Community, the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, and authorizing Austria and Luxembourg, in the interest of the European Community, to accede to the underlying instruments, [2004], OJ L78/22.

<sup>121</sup> See Case 804/79 Commission v United Kingdom [1981] ECR 1045, especially para. 30.

<sup>122</sup> E. Schwartz: I. E. Schwartz, "Übereinkommen zwischen den EG-Staaten: Völkerrecht oder Gemeinschaftsrecht?" p.606 : 'Grund für die Geltung von Übereinkommen und Protokollen zwischen den Mitgliedstaaten ist nicht wie bei Verordnungen und Richtlinien ein Befehl des EWG-Vertrages, sondern der Abschluß eines Vertrages zwischen Staaten ... Die Übereinkommen und Protokolle sind nicht vom EWG-Vertrag abgeleitetes Organrecht, sondern autonomes Vertragsrecht'.

authorizing the Member States to act in an area of Union exclusive competence<sup>123</sup>. The objective of the stability of the Euro area as a whole would have been achieved by means of an international agreement implementing EU law<sup>124</sup>. This would increase the quality of the law of the stability instrument, which would have been subject to the Charter of Fundamental Rights, and would enable the EU to “develop its monetary and economic policies in a more coherent and enabling, primary law governed set-up”<sup>125</sup>.

Once again a closer scrutiny reveals that the potential of the treaty Article, envisaging the conclusion of the inter se agreement, has been overestimated. In my view, the Court could not go so far. Even though the adoption of the ESM could have been seen as an exercise of the Union exclusive competence, the authorization to act granted to the Member States should have been adopted by the Council pursuant to article 136(3) TFEU as a substantive legal basis and to Article 238 (3a) TFEU as a procedural legal basis<sup>126</sup>. To be sure, as maintained by Eeckhout and Waibel, the understanding of the ESM as falling under EU exclusive monetary policy would not have rendered unlawful the amendment of Article 136 TFEU by means of the simplified revision procedure as contemplated in Article 48(6) TFEU. Indeed, the empowerment of the Member States to act by means of primary law in an area of EU exclusive competence cannot be excluded. As noticed by AG Kokott, in fact, an “empowerment by the proposed Article 136(3) TFEU of Member States to act in an area where the Union has exclusive competence would [...] [not entail] any substantive alteration of the provisions relating to the Union’s exclusive competence under Article 2(1) and Article 3(1)(c) TFEU. The existing force of those provisions is unaffected.”<sup>127</sup>

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<sup>123</sup> Similarly, AG Kokott, View in Pringle, paras. 50-52.

<sup>124</sup> P. Eeckhout and M. Waibel, UK National Report, *Fide Report 2014*, (paper available on-line) [http://www.ukael.org/associates\\_60\\_931463614.pdf](http://www.ukael.org/associates_60_931463614.pdf)

<sup>125</sup> *Ibid.*, p.5.

<sup>126</sup> Article 238(3a) TFEU as a procedural legal basis is the same envisaged by Article 163(2) TFEU.

<sup>127</sup> Para 53 of AG Kokott’s View.

Notwithstanding this, since it is blatant from Article 48(6) TEU that the decision adopted by the European Council amending the provisions of Part Three of the Treaty shall not increase the competences conferred on the Union in the Treaties, it should be given an explanation of the very existence of the Union competence to establish the mechanism in the first place. And such an explanation is difficult to find in the Treaty text. Hence, although the provisions of the Treaty expressly envisioning the conclusion of *inter se* agreements may contribute to reduce the divide separating them from EU law, they do not render *per se* the agreements at issue part of EU law and their capacity to approximating the agreements they envisage to the EU law is often overestimated by the literature. Instead, the institutional linkage with the EU legal order, i.e. the participation of Union Institutions in the workings of Member States' agreements, displays more grounded potential to elicit their partial supranationalization of the latter. However, how it will be shown in the last chapter of this work, the type of institutional linkages between Member States' cooperation venues and the EU legal order is not devoid of effects for the autonomy of the latter since it has consequences on the type of institutionalism on which EU law is premised.

## 6. Concluding Remarks

The dialectic between supranational structures and intergovernmental channels has been a constant feature of the history of European Integration. The recent surge in the recourse to *inter se* agreements has brought once again to the forefront of the legal inquiry compelling legal questions on the relationship existing between EU law and the law of *inter se* agreements concluded in areas substantively and teleologically proximate to the EU integration project. This chapter has offered an overview of the various legal categories utilised by the literature to provide for an account of the legal relationship of EU proper and the law orbiting around it. The overview ranged from Giardina's distinction between the "Community Organization" and the "Community *lato sensu*" to the most updated category of Keppenne's "semi-intergovernmentalism". Furthermore, this chapter has emphasized that the international law nature of *inter se* agreements determines the lack of many of the

inherent characteristics qualifying EU law which contributed to the viability of the EU integration project. Finally, the analysis of previous Member States' agreements, most notably the Brussels Convention, has been used as a laboratory to explore the factors liable of reducing the divide between the law of Member States agreements and EU law. In this respect, it has been shown that the alleged potential of Treaties' articles envisaging the conclusion of Member States' agreements has been usually overestimated by the literature. Institutional linkages between Member States' agreements and the EU framework, instead, have been underscored as an element capable of eliciting the "partial supranationalization" of the *inter se* agreements<sup>128</sup>.

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<sup>128</sup> Cf. R. Schütze, "European law and Member State agreements" p.149 who refers to the partial 'supranationalization' of some Community Conventions.

## Chapter II

### EU Law and the Restraints on the Member States' Inter Se Treaty- Making Powers.

*This chapter will explore scrutinise the treaty-making restraints established under EU law that Member States face when concluding inter se agreements. It will start off by highlighting the differences in nature and objectives of inter se treaties and national law. The second section will be devoted to a competence-based assessment of the possible scope of application of Article 3(2) TFEU to inter se agreements. Firstly, it will offer an account of the ERTA doctrine, which is codified in Article 3(2) TFEU. Then, considering the nature of the EU competences in subject areas that are covered by the Member States' agreements, the joint operation of supervening exclusivity and pre-emption will be examined. Moving from the analysis of the competence-based treaty-making restraints, the treaty-making restraints derived from the principle of primacy of EU law will be scrutinized. Here, the emphasis will be on the procedural compatibility of inter se treaties with the EU legal order. The final section will offer a more comprehensive reading of the treaty-making restraints which the Member States derive from their EU Membership based on the interconnections between supervening exclusivity and procedural compatibility.*

#### 1. Legal Restraints on the Conclusion of *Inter Se* Agreements

The Treaty of Rome, laying the foundation of the EC legal order, did not dissolve the Member States treaty-making powers. These were even maintained by the Member States within the substantive scope of the EC law<sup>129</sup>. The Treaty of Amsterdam, even though institutionalising enhanced cooperation, also did not establish the exclusivity of the Union channels. Indeed, Member States remained capable of using their treaty-making powers under EC and International Law to achieve the objectives of the European integration project. Member States were thus able

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<sup>129</sup> R. Schütze, "European law and Member State agreements" p.135.

advance the European integration outside the formal contours of the EC legal order. The Prüm Convention, and the latest *inter se* agreements concluded in the field of the EMU, provide for significant evidence supporting this fact. To be sure, the aforementioned outcome was not the one expected by those legal scholars who perceived the Amsterdam regime of enhanced cooperation as a solution which would have dispelled the risks of a “schism” emerging “from instances of intergovernmental co-operation developing outside the common institutional framework”<sup>130</sup>.

However, it soon became apparent that Member States were still able to conclude treaties among themselves in matters related to EU law, even after the institutional changes brought about by the Treaty of Amsterdam<sup>131</sup>. In fact, given the strict procedural requirements introduced by the Amsterdam regime of closer cooperation, the Member States could paradoxically favour the “old-fashioned flexibility” outside the EU Treaties framework<sup>132</sup>. Indeed, the International Law-style cooperation remained less burdensome in terms of decision-making procedures and allowed the Member States to maintain control over the negotiation procedure of the agreement, as well as over its the implementation and enforcement<sup>133</sup>.

Although the possibility for the Member States to proceed outside the EU channels was not precluded in the post-Amsterdam scenario, the presence of the EU legal order did not leave the Member States treaty-making powers entirely unfettered. The limits to the *inter se* treaty-making powers and the compelling legal questions of the normative yardsticks governing the conclusion of *inter se* agreements continue to animate the debate between academics and practitioners.

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<sup>130</sup> H. Kortenbergh, “Closer Cooperation in the Treaty of Amsterdam”, *Common Market Law Review*, 1998 Vol 35, p.835.

<sup>131</sup> S. Griller, D.P. Droustas, G. Falkner, K. Forgo and M. Nentwich, *The Treaty of Amsterdam. Facts, Analysis, Prospects*, 2000, Wien: Springer, p. 234.

<sup>132</sup> B. de Witte, “Old-Fashioned Flexibility: International Agreements between Member States of the European Union” in G. de Burca and J. Scott, *Constitutional Change in the EU Law. From Uniformity to Flexibility?*

<sup>133</sup> B. de Witte, “Chameleonic Member States: Differentiation by Means of Partial and Parallel International Agreements”, in B. de Witte, D. Hanf, E. Vos (eds), *The Many Faces of Differentiation in EU Law*, 2001, Antwerpen: Intersentia p.239.

It is generally accepted that the EU Member States cannot conclude treaties between themselves in areas of exclusive EU competence. This includes both (1) *a priori* exclusivity, which is now defined in Article 3(1) TFEU and (2) exclusivity by exercise<sup>134</sup>, i.e. where the EU has exercised its shared competence within the meaning of Article 2(2) TFEU. Furthermore, the *inter se* treaties have to comply with the principle of primacy of EU law, since their substantive compatibility with EU law is a necessary condition for their conclusion and application<sup>135</sup>.

The prevailing literature maintains that the restraints on treaty-making powers governing *inter se* treaties are not different from the limitations that Member States face with respect to the enactment and implementation of national law. This means that pre-emption and primacy standards should not be stricter than those applying to national law<sup>136</sup>. This idea was proposed by Beukers and De Witte, according to whom:

[...] In certain areas, the very fact that an *inter se* agreement is concluded is in breach of the European Union's exclusive competence; in other areas – those outside the EU's exclusive competence – *inter se* agreements are permissible in principle. Indeed, if Member States have preserved the competence to make domestic law in a given area, they can logically also exercise that competence together, by concluding an international agreement between themselves<sup>137</sup>.

This was not the approach adopted by the Court in a recent judgment where numerous issues on the legality of the ESM in the light of EU law were raised. The CJEU posed additional restraints on the Member States *inter se* treaty-making powers to those widely recognized by the relevant literature. The CJEU, in fact, extended the treaty-restraints that the Member States usually observe in their international relations with third countries to the international relations they

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<sup>134</sup> S. Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework', *European Constitutional Law Review*, Vol 9(1). Note, however, that Peers himself in 2011 held that "Member states are not prevented from entering into treaties between each other, even in areas where EU competence is exclusive by exercise, unless they infringe the principle of primacy of EU law (by contradicting their EU obligations) or the principle of loyal co-operation (now set out in Article 4(3) TEU)." S. Peers, "The Constitutional Implications of the EU Patent", *European Constitutional Law Review*, Vol 7(2), p.263.

<sup>135</sup> B. de Witte, "Chameleonic Member States", p.243 and ff. See also A. Dimopoulos, "The Use of International Law as a Tool for Enhancing Governance. in the Eurozone and its Impact on EU Institutional Integrity' in M. Adams and F. Fabbrini, P. Larouche (eds), *The Constitutionalisation of European Budgetary Constraints*, 2014, Oxford: Hart Publishing.

<sup>136</sup> B. de Witte, "Chameleonic Member States", pp.240 and ff.

<sup>137</sup> B. de Witte and T. Beukers, "The Court of Justice Approves the Creation of the European Stability Mechanism: Pringle", *Common Market Law Review*, 2013, Vol. 50, p. 829.

undertake *inter se*. In particular, the Court prior to formulating an answer to the referring Court on the issue whether the operation ESM Treaty, concluded as an international agreement, could affect the common rules on economic and monetary policy found that:

[U]nder Article 3(2) TFEU, the Union is to have ‘exclusive competence for the conclusion of an international agreement when its conclusion ... may affect common rules or alter their scope’. It follows also from that provision that Member States are prohibited from concluding an agreement between themselves which might affect common rules or alter their scope<sup>138</sup>.

This passage has faced a significant amount of criticism in the academic literature, arguing that the Court here misinterpreted the Treaty provision and instead siding with Advocate General Kokott’s Opinion<sup>139</sup>. Advocate General Kokott maintained that the Article 3(2) TFEU should be read together with Article 216 TFEU since it “solely governs the exclusive competence of the Union for agreements with third countries and international organisations”<sup>140</sup>. Hence, according to AG Kokott, this provision read together with Article 2(1) TFEU, only prohibits Member States from concluding international agreements with third countries, but does not apply to agreements concluded with other Member States<sup>141</sup>.

Similarly, Eeckhout and Waibel contend that the extension of the Article 3(2) TFEU principle to *inter se* agreements was “[f]rom a purely textual perspective, a remarkable shortcut”<sup>142</sup>. Article 3(2), in fact, refers to the *Union’s* exclusive competence to conclude international agreements with third countries if they are capable of affecting common rules or altering their scope. According to these authors, the extension of the supervening exclusivity principle could only be textually conceivable if the Treaty explicitly provided that the *Member States* are precluded to conclude international agreements in areas of supervening exclusivity.

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<sup>138</sup> *Pringle*, paras 100 and 101.

<sup>139</sup> B. de Witte and T. Beukers, “Pringle”, p.834.

<sup>140</sup> AG Kokott, View in *Pringle*, para. 98.

<sup>141</sup> *Ibid.*

<sup>142</sup> P. Eeckhout and M. Waibel, UK National Report, *Fide Report 2014*, (paper available on-line) [http://www.ukael.org/associates\\_60\\_931463614.pdf](http://www.ukael.org/associates_60_931463614.pdf) pp.8-9.



The authors point out that the Union cannot conclude agreements with itself and thus that the EU's exclusive competence in Article 3(2) TFEU can only possibly refer to agreements involving third countries<sup>143</sup>.

Although being aware of the textual challenges posed by Article 3(2) TFEU and of the further justifications needed to extend the principle of supervening exclusivity to *inter se* agreements, I do not share the view that the constraints governing the conclusion of *inter se* treaties between Member States should be the same as those that apply to national law. Indeed, I believe that even partial *inter se* agreements share a teleological proximity with the EU legal order, which makes them remarkably different from national law. This proximity between the *finalité* of EU law and that of *inter se* agreements pursuing EU-related objectives has been recognised, *inter alia*, in the domain of the Community Conventions. In *Kleinwort Benson*<sup>144</sup>, AG Tesauro maintained that the mechanism of centralised interpretation envisaged by the 1971 Protocol of the Brussels Convention<sup>145</sup> responded to the need of complementarity between the free movement of judgments within the common market and the fundamental freedoms that characterise it. Both the free movement of judgments and its fundamental freedoms were, in AG Tesauro's words, *functional* to the same *integration design*<sup>146</sup>.

The common *finalité* between EU law and *inter se* agreements that are concluded within the scope of EU law already points to the difference between *inter se* agreements and national law. In contrast with national law, *inter se* agreements concluded between Member States normally aim to achieve closer integration and

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<sup>143</sup> Ibid.

<sup>144</sup> Case C-346/93 [1995] ECR I-00615.

<sup>145</sup> Protocol of 1971 Relating to the Interpretation of the Brussels Convention on Jurisdiction and Enforcement of Judgments, *OJ C 027*, 26/01/1998.

<sup>146</sup> Case C-346/93 [1995], Opinion of AG G. Tesauro, para. 20: "[...] il meccanismo dell' interpretazione "centralizzata" in capo al giudice comunitario risponde alla ben nota esigenza di un' applicazione delle regole di conflitto e di riconoscimento delle sentenze uniforme in tutti i Paesi aderenti alla Convenzione e alla Comunità. A sua volta, l'uniformità risponde all' esigenza di complementarità della circolazione delle sentenze all' interno del mercato comune rispetto alle libertà fondamentali che lo caratterizzano, l'una e le altre funzionali all' unico disegno di integrazione." In the official English translation emphasize even more the identity of objectives: the 'unico disegno di integrazione', which here means the same integration design or vision, is translated as the 'sole objective pursued [...]'.

hence also pursue EU integration related objectives, inspired by a *telos* common to the Union and its Member States. This is not only true for when there are no specific competences to allow for EU action, but also when Member States explicitly choose not to follow the EU law route to advance the European integration process<sup>147</sup>. The possibility that the Member States may be willing to pursue the same integration objectives of the EU Treaties while circumventing, for contingent political reasons, the procedures envisaged by them, should advise in favour of the establishment of stricter legal restraints on Member States' *inter se* treaty-making powers.

## **2. The distribution of Competences between the Union and its Member States: the Meanderings of Articles 2(2) and 3(2) TFEU in the EMU area.**

After having shed light on the reasons which induce sympathy towards the establishment of stricter legal restraints on the Member States *inter se* treaty-making powers, the present section will investigate the implications entailed in the extension of the 3(2) TFEU principle on *inter se* agreements.

Some considerations will be made on the legal context which informed the drafting of the provision enshrining the principle at issue. Article 3(2) TFEU appears to codify the doctrine emerging from the ERTA line of case law<sup>148</sup>. The landmark *ERTA-case*<sup>149</sup> laid down the core foundations of the scope and of the nature of the EC external powers<sup>150</sup>. In this crucial judgment, the Court firstly vested the Community with implied powers, then it affirmed the exclusivity of Community channels to pursue EC objectives in areas covered by EC legislation<sup>151</sup>. In this latter respect, it established that: “to the extent to which Community rules are

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<sup>147</sup> An example could be the Treaty of Schengen as complementary to the objectives to be achieved in pursuance of the Single European Act.

<sup>148</sup> Cf in this respect AG Kokott's *Opinion* in Case C-137/12 paras. 111-117

<sup>149</sup> Case C-22/70 Commission v. Council [1971] ECR 263

<sup>150</sup> For a detailed analysis on the Case see P. Eeckhout, *EU External Relations Law*, Oxford University Press 2011, pp. 71-76.

<sup>151</sup> M. Cremona, “EU External Relations: Unity and Conferral of Powers” in L. Azoulay (ed) *The Question of Competence in the European Union*, 2014, Oxford University Press, p.68.

promulgated for the attainment of the *objectives* of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations which might affect those rules or alter their scope”<sup>152</sup>. In his examination of this Court’s pronouncement, Weiler perceptively singled out the gray area in which the kind of exclusivity emerging from the Court’s findings in ERTA would entail for the constitutional relationship between the Union and the Member States powers:

“[T]he theoretical basis for [ERTA-type] exclusivity moves in a gray area between supremacy and pre-emption, [...]. If the Court were to apply a simple principle of supremacy the consequence would be that the Member States would be precluded from making only those international agreements which were in direct conflict with the Community obligation. If the Court were to apply fully fledged pre-emption the consequence would be that Member States would be precluded from any international agreement in the area in question. Instead, the Court stands midway between these two concepts, prohibiting those international obligations which might affect those rules or alter their scope. This is more than supremacy but less than pre-emption”<sup>153</sup>.

The case at issue has been qualified as “seminal” and “innovative”<sup>154</sup>, especially because the Court departed from a merely textual interpretation, and instead favoured a teleological approach ‘drawn from the book of constitutional interpretation’<sup>155</sup>. The decision marked the beginning of a new era of Community external competences and promoted the exclusivity of the institutional channels for their exercise. However, the indefinite nature of this type of exclusivity makes the actual application of the so-called *ERTA* doctrine rather controversial<sup>156</sup>. It is not clear what the doctrine established in exact terms<sup>157</sup> and therefore remains the “subject of both academic discussion, institutional debate and new case law”<sup>158</sup>.

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<sup>152</sup> Case C-22/70 Commission v. Council [1971] ECR 263, Para. 22 (emphasis added)

<sup>153</sup> J. Weiler, “The external legal relations of non-unitary actors: Mixity and the federal principle”, in J. Weiler, *The Constitution of Europe*, Cambridge University Press, pp. 130–87, p. 173.

<sup>154</sup> T. Tridimas and P. Eeckhout, “The external competence of the Community and the Case Law of the Court of Justice: Principle vs Pragmatism”, *Yearbook of European Law*, 1995, p. 149.

<sup>155</sup> J. Weiler, “The Transformation of Europe”, *The Yale Law Journal*, 1991, Vol. 100(8), p.2416.

<sup>156</sup> C. Hillion, “ERTA, ECHR and Open Skies: Laying the Grounds of the EU System of External Relations” in L. Azoulai and M. Maduro (eds), *The Past and Future of EU Law*, p.225.

<sup>157</sup> AG Sharpston, Opinion to the Case C- 114/12, para. 85. See also F. Hoffmeister, Case note on *Open Skies*, *The American Journal of International Law*, Vol. 98, No. 3 (Jul., 2004), pp. 567-572, p.569.

<sup>158</sup> M. Cremona “Defining Competence in EU External Relations: Lessons from the Treaty Reform Process” in A. Dashwood and M. Maresceau (eds) *Law and Practice of EU External Relations: Salient Features of a Changing Landscape*, Cambridge University Press, 2008, p. 50.

To be sure, the doctrine underwent significant changes in the course of its application. At its inception, the EC external competence was considered as a zero-sum game: the competence of the Community precluded the competence of the Member States<sup>159</sup>. Indeed, if in the initial phase shared powers were perceived to be provisional and to become exclusive as soon as the EC legislated, during more mature phases of the Community history exclusivity “came to be seen as the exception rather than the rule for external competence”<sup>160</sup>. And this became especially apparent in the findings of the Lugano Opinion<sup>161</sup> where the Court clarified the test that the international agreements should pass in order for supervening exclusivity to occur. Basing itself on its previous decision in the *Open Skies* Case<sup>162</sup>, the Court of Justice specified that the effect of an international agreement on EU law should not only be tested with a “quantitative”<sup>163</sup> assessment based on the scope of the EU legislation on the field, but also on its nature, content and on its future development<sup>164</sup>. Such an affectation test is clearly premised on wide margins of discretion.

Thus, the gray area in which the Article 3(2) TFEU principle operates makes it difficult to ascertain the specific legal implications of the principle of EU supervening exclusivity in its original context, i.e. in the legal relationship between the Union and third countries. It is however even more arduous to understand the implication of the extension of the 3(2) TFEU *ERTA*-principle to *inter se* agreements. Any legal inquiry cannot ignore the textual inaccuracies of the Article 3(2) TFEU. AG Sharpston addressed these in her Opinion in *C-114/12*<sup>165</sup>. She recognized that the “substance of the agreement, rather than the identity of the contracting parties”, were the cornerstone of the Article 3(2) test:

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<sup>159</sup> M. Cremona, “EU External Relations: Unity and Conferral of Powers”, p.68.

<sup>160</sup> *Ibid.*

<sup>161</sup> Opinion 1/03 *Competence of the Community to conclude the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2006] ECR I-1145

<sup>162</sup> *Open Skies* cases, para. 67. Case C-476/98 *Commission v. Germany* [2002] ECR I-9855.

<sup>163</sup> F. Hoffmeister, Case note on *Open Skies*, *The American Journal of International Law*, 2004, Vol. 98(3).

<sup>164</sup> *Lugano Opinion* 1/03 para. 126.

<sup>165</sup> Case C-114/ 12 on the Negotiation of a Convention of the Council of Europe on the protection of the rights of broadcasting organizations.

It is probably of little consequence that Article 3(2) TFEU does not expressly state whether it is the conclusion of an international agreement ‘by the European Union’ or ‘by the Member States’ of which it must be established that it ‘may affect common rules or alter their scope’. It is the substance of the international agreement rather than the identity of the contracting party(ies) that will affect common rules or alter their scope<sup>166</sup>.

A more systemic reading of the TFEU leads one to conclude that in Article 3(2) TFEU the international agreements capable of affecting common rules or altering their scope are agreements concluded by *Member States*, even if this is not textually explicit. In fact, pursuant to Article 216(1) TFEU any international agreement concluded by the Union becomes part of the EU legal order and is binding upon the institutions<sup>167</sup>. Therefore, an agreement concluded by the Union would *ipso facto* affect common rules and alter their scope<sup>168</sup>. It appears thus that the ‘textual shortcut’ denounced by Eeckhout and Waibel may have sound legal justifications which renders the extension of the supervening exclusivity principle to *inter se* agreements more reasonable than it may appear at a first sight.

Having clarified this, the puzzling issue of the practical operation of the Article 3(2) TFEU principle will now be addressed. The ‘affectation’ of the scope of the common rules very much depends on the previous exercise of the EU competences which are regulated by the pre-emption clause enshrined in Article 2(2) TFEU. This Article establishes that “[w]hen the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area”.

The joint reading of the Article 2(2) TFEU pre-emption related to shared competence and the Article 3(2) TFEU supervening exclusivity has generated some confusion<sup>169</sup>. This convoluted picture was also not clarified in *C-114/12* where the Court scrutinized the joint operation of the pre-emption principle applying in the case of shared competences and the supervening exclusivity regulated by Article 3(2)

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<sup>166</sup> AG Sharpston, Opinion to the Case C-114/12.

<sup>167</sup> Cf, Case C-181/73, *Haegman*. [1974] E.C.R. 449.

<sup>168</sup> I am grateful to Professor Cremona for having clarified this to me.

<sup>169</sup> M. Cremona, “EU External Relations: Unity and Conferral of Powers”, p. 72.

TFEU. In order to explain the possible intersection of the different scopes of the two Articles, the Court looked at Protocol No. 25 attached to the Treaties on the exercise of shared competences and stated that:

Protocol (No 25) on the exercise of shared competence, [...], the sole article of which states that, ‘when the Union has taken action in a certain area, the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area’, concerns, as is evident from its wording, only Article 2(2) TFEU and not Article 3(2) TFEU. It therefore seeks to define the scope of the exercise by the European Union of a shared competence with the Member States which was conferred on it by the Treaties, and not to limit the scope of the exclusive external competence of the European Union in the cases referred to in Article 3(2) TFEU<sup>170</sup>.

The premise and consequences of this Court’s finding which created a divide between Article 3(2) and Article 2(2) TFEU should have been further qualified. In particular, confusion remains regarding the scope of the EU exercise of shared competences that allegedly would not limit the scope of exclusive external competences. The supervening exclusivity is, in fact, based on the previous exercise of those Community competences which may be affected or whose scope may be altered. Did the Court want to confirm that the scope of supervening community competences can exceed the scope of the shared community competences defined by Article 4(1) TFEU<sup>171</sup>? In other words, does the double negative resulting from the joint reading of Article 4(1) TFEU and the aforementioned Court finding mean that that the supervening exclusivity of Article 3(2) applies also to the supportive and complementary competences referred to in Article 6 TFEU to which the pre-emptive effects of Articles 2(2) TFEU do not apply? This assumption is however hard to maintain in the light of the case law which Article 3(2) TFEU seems to codify. Quite certainly this was not the expected outcome in *C-114/12*. It is more likely that the Court referred to the possibility of an EU competence that is shared internally whilst being exclusive externally<sup>172</sup>.

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<sup>170</sup> Case C-114/12, para. 3.

<sup>171</sup> Article 4(1) of the Treaty defines it as a competence conferred on the Union which does not relate to the areas referred to in Articles 3 and 6.

<sup>172</sup> As AG Sharpston maintained in her Opinion to the Case C-114/12 that “If a competence is exclusive within the meaning of Article 3(2) TFEU, then by definition Article 2(2) cannot apply. The fact that the internal market is a shared competence does not mean that the external competence to conclude an international agreement on intellectual property is also shared.” (para. 63) See, similarly the Court in Case C-114/11 *Daiichi Sankyo*, para.59. Cf. also M. Cremona, A Constitutional Basis for Effective External Action?, p.32, EUI paper. It should also be noticed that the

This mismatch (that according to the Court's analysis in *Pringle* could be also extended to *inter se* agreements) between Article 3(2) TFEU-type EU external exclusive competence and Article 2(2) TFEU is unlikely to be recognized for all EU competences. Particularly, in the case of complementary or supporting competences it cannot be maintained that the scope of Article 3(2) TFEU exclusivity can exceed the scope of Article 2(2) TFEU pre-emption. These competences, in fact, resist a characterization based on restraints imposed to the Member States as those deriving by the two provisions at issue.

The rationale behind the establishment of the different categories of complementary and coordinating competences was the introduction of a constitutional limit to the overarching EU competences. It was inspired by a vision different from the one which intends a supranational organization as the expression of a zero sum game dual federalism whereby either the Organization or the Member States should act. The Treaty of Maastricht, by introducing the complementary and supporting function of Community to the actions of the Member States, hence constitutionalized a variant of the cooperative federalism in the Community legal order based on supporting and coordinating competences. These competences were considered as constitutional limitations to the preventive effect of EU law<sup>173</sup> which allows the EU and its Member States to cooperate and to act outside a zero-sum game logic<sup>174</sup>. The evolution of the EU legal order towards a constitutional order based on the cooperation of the Union and its Member States also informed also the framing of the Lisbon Treaty. In this regard, the competence typology introduced at Lisbon was intended to define a spectrum of apportionment of legislative responsibility between the Union and the Member States which range from EU exclusive competences defined in Article 3 TFEU to the complementary and supporting competences

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Article 2(2) TFEU and the Article 3(2) TFEU tests are different. The pre-emptive effects of Article 2(2) TFEU are based only on previous legislative activity. Article 3(2) TFEU-type exclusivity also requires the element of "affectation" of the Union legislation. It would also be theoretically possible for Article 2(2) to apply internally while the conditions of supervening exclusivity are not met.

<sup>173</sup> R. Schütze, Cooperative federalism constitutionalised: the emergence of complementary competences in the EC legal order, *European Law Review* Vol. 31(2) p.168.

<sup>174</sup> *Ibid.*

defined in Article 6 TFEU. In the light of the foregoing considerations, it emerges that an assessment of the nature of the EU competences in the orbits of which *inter se* treaties are concluded is preliminary to the understanding of the possible affectation of the EU rules by the abovementioned agreements.

The field of EU competences in which the TSCG was concluded pertains to the economic coordination of Member States policies as provided for in Articles 5(1) and 121 TFEU since it reformed the law of the multilateral surveillance system provided by EU law<sup>175</sup>. Similarly, the ESM is also linked to the coordination of the Member States' economic policies, by means of the Memoranda of Understanding detailing the conditions attached to the granting of financial assistance. These coordinating competences in the domain of economic policy were placed within the competence catalogue established in the Lisbon Treaty with the aim of having an "effect on national policy making without a transfer of power to the EU"<sup>176</sup>. Thus, even though the category of ordinary shared competences is supposed to be a residual category encompassing all the competences conferred upon the Union which are not listed in Articles 3 and 6 TFEU, economic coordination cannot be considered to be part of it. It constitutes a completely separate category of shared competences. The rationale behind the differentiation between economic policy coordination and the ordinary shared competences referred to in Article 4 TFEU is to 'emancipate' the economic policy coordination from pre-emption<sup>177</sup>. As Craig pointed out:

The real explanation for the separate category was political. There would have been significant opposition to the inclusion of these areas within the head of shared competence. The very depiction of economic policy as an area of shared competence, with the consequence of pre-emption of State action when the EU had exercised power within this area, would have been potentially explosive in

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<sup>175</sup> T. Beukers, 'The Eurozone Crisis and the Legitimacy of Differentiated Integration', in B. de Witte, A. Héritier and A. H. Trechsel (eds), 'The Eurocrisis and the state of the European Democracy, European University Institute- EUDO, 2013. See also M. Ruffert, "The European Debt Crisis and the European Union law", *Common Market Law Review*, 2011, Vol. 48, pp. 1777–1806.

<sup>176</sup> A. Hinarejos Parga, *The Euro area crisis in constitutional perspective*, Oxford University Press, 2015, p. 74.

<sup>177</sup> Contra, see Antoniadis, 'Debt Crisis as a Global Emergency. The European Economic Constitution and Other Greek Fables, in A. Atonaidis, R. Schütze, E. Spaventa (eds) *The European Union and Global Emergencies: A Law and Policy Analysis*, Oxford: Hart Publishing, pp.182-183, See also the more nuanced approach of C. Timmermans, "ECJ doctrines on competences in L. Azoulai (ed), *The question of competence in the European Union*, who does not exclude the possibility of the 2(2) TFEU pre-emption in the case of economic coordination since he reads the list of supportive competences provided in Art. 6 TFEU as exhaustive, pp.162-164.



some quarters at least. It is equally clear that there were those who felt that the category of supporting, coordinating, and supplementary action was too weak.<sup>178</sup>

This therefore means that a much simpler test could have been used in *Pringle* to assess whether the Stability Mechanism was likely to affect common rules and alter their scope. Then the outcome could have been that the ESM falls under the policy area of economic coordination<sup>179</sup>, which is a coordination-complementary competence. The constitutional limits of EU powers characterising these specific areas of EU action, would not permit the extension of the scope of Article 3(2) TFEU beyond the scope of the pre-emption clause envisaged in Article 2(2) TFEU<sup>180</sup>. Such an approach would have clarified that in the case of the ESM, same as the TSCG, the Member States could act because neither pre-emption, nor supervening exclusivity applies in the field of the EU coordination of Member States economic policies.

However, in *Pringle*, the CJEU did not use the latter test on the nature of the EU competences, and therefore did not consider it necessary to investigate whether the EU law concept of shared competence applies to the area of economic coordination<sup>181</sup>. The Court, instead, found that the operation of the ESM did not affect EU law and, more specifically, the previous EU financial mechanism, the EFSM. As stated by the Court “neither Article 122(2) TFEU nor any other provision of the EU and FEU Treaties confer[red] a specific power on the Union to establish a permanent stability mechanism such as the ESM [...], the Member States [were] entitled, in the light of Articles 4(1) TEU and 5(2) TEU, to act in this area”<sup>182</sup>. Perhaps this Court’s reasoning could be impliedly premised on the fact that the

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<sup>178</sup> P. Craig, *The Lisbon Treaty: Law, Politics and Treaty Reform*, 2013, Oxford University Press, p. 179.

<sup>179</sup> K. Tuori, K. Touori, *The Euro zone Crisis: a Constitutional Analysis*, 2014 Cambridge University Press, pp. 156 singled out how the Court reasoning according to which “the conditionality prescribed [by the Mechanism] does not constitute an instrument for the coordination of the economic policies of the Member States” [para.111]. As the Finnish authors maintain, in fact, “certainly, financial assistance falls under economic policy and certainly the Member States coordinate their economic policies when establishing a joint mechanism for providing such assistance through an international agreement.”

<sup>180</sup> Similarly K. Tuori, K. Touori, *The Euro zone Crisis* pp. 154-156.

<sup>181</sup> *Ibid*, p.154.

<sup>182</sup> *Pringle*, para. 105.

relevant powers of the Union and Member States are complementary and they do not ‘affect’ each other, however the Court is not clear in explicating the competence-based foundations of the finding at issue. Nevertheless, the Court does not explain the competence-based foundations of its decision very clearly.

The case of the Single Resolution Fund is even more convoluted. Article 127(6) TFEU allows the Council, acting unanimously and only after having consulted the European Central Bank and the Parliament, to confer specific tasks to the ECB relating to the supervision of credit institutions and other financial institutions with the exception of insurance undertakings. The framework of banking supervision, however, does not only concern monetary policy, but it also entails the implementation of substantive rules relevant for the smooth functioning of the internal market and justifies a sort of ‘opt-in’ for Member States who are not party to the monetary Union<sup>183</sup>. De Gregorio Merino argues that the Banking Union Package is two-faced, as it concerns both monetary policy and the harmonisation of the internal market. The SSM is based on Article 127(6) TFEU and therefore falls under EU exclusive monetary policy. The twin instrument of the SRF, the SRM, was established under Article 114 TFEU, which pertains to “the approximation of provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.”

Some legal controversies have been highlighted here. For example, the use of Article 114 TFEU disguises the fact that no specific power was vested in the Union to resolve failing banks, nor to establish an EU fund that entails a sort of fiscal transfer between Member States<sup>184</sup>. An inter-institutional battle was fought on whether the fund supporting the SRM, i.e. the SRF, should be an instrument of EU

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<sup>183</sup> A. De Gregorio Merino, “Reflexiones preliminares sobre la unión bancaria” (nota editorial), *Revista General de Derecho Europeo*, 2014, Vol. 33.

<sup>184</sup> *Ibid.*

law or whether it should be the direct responsibility of the Member States<sup>185</sup>. This battle was won by the Council which devised plans for a 'Resolution Fund' to be established by an intergovernmental agreement between the Member States party to the SRM. The Council also affirmed the necessity, during the transitional period<sup>186</sup>, to raise contributions to the fund at a national level and then to allocate these to compartments corresponding to each Contracting Parties in view of the future progressive mutualisation. The Parliament, instead, had unsuccessfully advocated for the necessity to adopt a single resolution fund within the EU legal order.

The SRF, concluded as an international agreement, is not likely to substantially encroach on the common rules established by EU legislation, and particularly on the SRM regulation. Nevertheless, given the fact that the EU competences pertaining to the banking Union are not supposed to be of a complementary or supporting nature to those of the Member States, the limitations deriving from Articles 2(2) and 3(2) TFEU should apply to the agreement under scrutiny. Indeed, the common rules could be affected by the operation of the SRM, which is an EU law instrument and largely dependent on an international treaty signed by some Member States *inter se*<sup>187</sup>. These considerations, on the one hand, highlight the doubtfulness of the legality of the SRF both in the light of Article 3(2) TFEU and in the light of the autonomy of the European legal order. On the other hand, they also highlight another important aspect of EMU *inter se* agreements, namely their complementarity with the EU norms and their location in the broader category of the Union law *lato sensu*. They are, in fact, essential for attaining a *telos* common to the EU and its Member States.

The question which arises pertains to the legal consequences entailed by the fact that the complementary character of the Member States' action to that of the Union

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<sup>185</sup> J.V. Louis, "La difficile naissance du Mécanisme Européen de Résolution des Banques", *Cahiers de droit européen*, 2014, pp-15-16 see also D. Howarth and L. Quaglia, "The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism", *Journal of Common Market Studies*, 2014, pp.125-140.

<sup>186</sup> This shall be no longer than eight years.

<sup>187</sup> J.V. Louis, *La difficile naissance du Mécanisme Européen de Résolution des Banques*, pp-15-16.

cannot be paralleled by the complementarity in the nature of the EU competences around which the *inter se* agreements orbit. As in the case of the SRF, there may be circumstances where the *inter se* agreement is inextricably linked to EU legislation (the SRM regulation *de facto* creates the SRF and establishes the procedures for its operation<sup>188</sup>), while the relevant EU norms (the SRM) are not based on complementary competences, but instead on ordinary shared competences. In the areas of EU ordinary shared competences, the enactment of EU legislation may preempt the Member States to act internally as the result of Article 2(2) TFEU. In addition to this, the Union can enter into international agreements in that subject area as set out in Article 3(2) TFEU whenever there is the risk of affecting common rules. As it will be shown in the next chapter, the Union's participation in Member States international agreements is conceivable. The conclusion of *inter se mixed agreements* will be presented as a solution for the conundrum created by the apportioning of competences analysed in this section.

### **3. The compatibility of inter se treaties with EU norms: the emphasis on procedural compatibility**

*Inter se* treaties generally include primacy clauses which establish the primacy of EU rules over them. The deference of *inter se* agreements to the EU legal order was an important characteristic of classic *inter se* agreements. This was the case for the Community Conventions, the Schengen Agreement and Convention, the Prüm Convention<sup>189</sup> and also for the Fiscal Compact and the Resolution Fund. Indeed, Article 2(2) of the TSCG provides that it “shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with European Union law. It shall not encroach upon the competence of the Union to act in the area of the economic union”. The Treaty establishing the Single Resolution Fund contains a

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<sup>188</sup> F.Fabbrini, “On Banks, Courts and International Law: The Intergovernmental Agreement on the Single Resolution Fund in Context”, *Maastricht Journal of European and Comparative Law*, 2014, Vol. 21, p. 451.

<sup>189</sup> Cf. L. Rossi, *Le convenzioni fra gli Stati membri dell'Unione europea*, 2000, Milano: Giuffrè.

similarly worded provision in Article 2(2)<sup>190</sup>. In like manner, even though there is no explicit primacy clause in the ESMT, Article 13(3) ESMT provides for mechanisms to ensure the compliance of the operation of the mechanism with EU law. In fact, the Article reads: “the MoU shall be fully consistent with the measures of economic policy coordination provided for in the TFEU, in particular with any act of European Union law, including any opinion, warning, recommendation or decision addressed to the ESM Member concerned”. The subsequent paragraph of the Article assigns the duty as the guardian of this consistency to the Commission.

An assessment solely based on substantive compatibility, however, is not sufficient to establish the conformity of *inter se* agreements with the EU legal order. In particular, when EU institutions are disengaged from the Treaties framework, the crucial role of procedural compatibility emerges. The procedural rules established by the Treaty, in fact, embody the constitutional principle of the division of powers and of inter-institutional balance. They reflect the distribution of powers between the institutions and indicate the role that the Masters of the Treaties wanted to attribute to each of them to pursue the objectives they assigned to the Union. Against this backdrop, the mission of the Court is “to ensure that this system is maintained, in order to prevent the compromises made at the time of the drafting of the treaties being called into question again”<sup>191</sup>. The Court recognised in *Meroni* that “in the *balance of powers which is characteristic of the institutional structure* of the Community” is a fundamental guarantee granted by the Treaty<sup>192</sup>. In fact, as emphasised by Craig: “[i]nstitutional action is normally premised on a rule specifying the manner in which the action must be taken, and if the decisional rules are not met the action will usually be invalid. These rules are important and embody substantive values”<sup>193</sup>.

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<sup>190</sup> Article 2(2) of the SRF reads :“This Agreement shall apply insofar as it is compatible with the Treaties on which the European Union is founded and with the Union law. It shall not encroach upon the competences of the Union to act in the field of the internal market.”

<sup>191</sup> J.P.I. Jacqué, “The principle of institutional balance” *Common Market Law Review*, Vol.41( 2), , p.384.

<sup>192</sup> Case C-9/56, *Meroni v High Authority* [1957 and 1958] para.152 (emphasis added).

<sup>193</sup> P. Craig, “Pringle and Use of EU Institutions outside the EU Legal Framework”, p. 269.

The procedures envisaged by the Treaty framework to defend the guarantees of the EU institutionalism have constantly been subject to consideration in the case-law of the Court of Justice. In *Defrenne*, the Court found that the Treaties could only be modified by means of the amendment procedure as set out in the Treaties themselves<sup>194</sup>. Indeed, the development of the unique features of the Union legal order are better understood if one reads the innovative decisions by the CJEU in *Van Gen den Loos*, *Costa v. ENEL* and *Joined Cases 90 and 91/63*, which define the specific characteristics of EU law<sup>195</sup>. Here, the Court affirmed that the Treaties are not limited to establishing a new legal order creating the powers, rights and obligations for natural and legal persons but that they establish a framework which governs the “necessary procedures” for exercising these powers<sup>196</sup>.

Among the critiques addressed to Member States’ *inter se* agreements, the circumvention of the institutional decision-making procedures envisaged by the EU Treaty framework<sup>197</sup> features prominently. In order to better isolate the cases in which this circumvention may occur, the established legal doctrine on *inter se* agreements draws a distinction between parallel and partial agreements: the former are concluded by all the Member States, the latter are concluded by some Member States only. Partial *inter se* agreements thus constitute a way to recreate the ‘old-fashioned flexibility’<sup>198</sup> that was common in the pre-Amsterdam framework of closer cooperation. The parallel agreements are considered to be more problematic with regards to the circumvention of the EU procedures since they could involve so-called “instrumental differentiation”:

The choice for an international law instrument, rather than an EU or EC law instrument, implies that the constitutional principles of EU law are by-passed by the States. The *institutional balance* between the Council, the Commission and the European Parliament is swept aside, and both the elaboration of the instrument and its subsequent implementation are left entirely in the hands of the Member State government (unless they decide, of their own free will, to involve the EU

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<sup>194</sup> Case C- 43/75, *Defrenne v. Société anonyme belge de navigation aérienne*(Sabena) [1976] ECR 455, p.455.

<sup>195</sup> Editorial Comments, “Union membership in times of crisis”, *Common Market Law Review*, 2014, Vol. 51(1).

<sup>196</sup> *Joined Cases 90 & 91/63, Commission v. Luxembourg and Belgium*, [1964] ECR 961.

<sup>197</sup> A. Rosas, “The Status in EU law of International Agreements concluded by EU Member States”, (2011) *Fordham International Law Review*, Vol. 34(5), p. 1304.

<sup>198</sup> B. de Witte, “Old-Fashioned Flexibility”.

institutions in the implementation). The EU regimes for the protection of *fundamental rights* and for *access to information* do not apply to these agreements<sup>199</sup>.

Such an instrumental differentiation may pose a threat to the European integration project since the Member States may be able to switch ‘to the international law track’ and thus undermining the characteristic of the EU law as initially defined in *Van Gen den Loos* and *Costa Enel*<sup>200</sup>. While the distinction between partial and parallel agreements was more pregnant in the early days of the Community when the uniformity of the European integration project was, at least formally, unquestioned, such a distinction may now lose some of its explanatory potential if one takes into account the various other patterns of differentiation already institutionalised within the EU legal framework. In particular, if a partial agreement parallels the geographic and substantive differentiation of a given policy area envisaged by the EU, the distinction between partial and parallel agreements becomes more blurred and thus less significant. In other words, if a partial agreement in the field of EMU is signed by the Member States sharing the single currency<sup>201</sup>, its legal consequences may be the same as the ones of a parallel agreement and the instrumental differentiation is the most evident. In this case, the patterns of differentiated integrations envisaged by the Treaties are mirrored in partial agreements.

To be sure, for instrumental differentiation in the case of partial agreements to apply, also the condition of a possibility of choice of the EU track instead of the international law track should be available<sup>202</sup> and this is not always the case given the limited capacity of the EU in various policy fields and its lack of specific powers to act<sup>203</sup>. However, this distinction between the EU track and the classic international law track is becoming more indistinct since the nature of the norms in question is not always clear-cut: the new intergovernmental agreements are, in fact,

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<sup>199</sup> B. de Witte, “Chameleonic Member States”, pp. 260-61.

<sup>200</sup> Ibid. See also R. Schütze, “European law and Member State agreements” p.145, fn 89.

<sup>201</sup> This, for instance, is the case of the ESM treaty.

<sup>202</sup> I am grateful to Thibault Martinelli for clarifying this to me.

<sup>203</sup> *Pringle*, para. 64.

strictly intertwined with EU norms and it is increasingly difficult to distinguish one from the other.<sup>204</sup>

It is of little comfort that the provisions of the EMU *inter se* treaties also recognise a ‘procedural primacy’ to the EU legal order<sup>205</sup>. As it will be shown, many concerns can be raised about the EU law compatibility of the procedural mechanisms envisaged by these *inter se* treaties. For instance, pursuant to Article 7 TSCG, the Contracting Parties assume the obligation to automatically support the recommendation of the Commission when the latter finds that an EU Member State whose currency is the euro is in breach of the deficit criterion in the framework of an excessive deficit procedure. It is clear that this provision is hardly compatible with the framework of the EDP as envisaged by the TFEU. According to Article 126(6) TFEU, in fact, the responsibility to ascertain whether an excessive deficit exists rests with the Council<sup>206</sup>. In addition to this, the reversed qualified majority vote (RQMV) set out in Article 7 TSCG, instead of the ordinary qualified majority in Article 126 TFEU, seems to contradict the Treaty’s choice of making the test for the existence of an excessive deficit a non-automatic procedure<sup>207</sup>. The TSCG provision at issue establishes that the Commission’s proposal or recommendation on the existence of an excessive deficit enters into force whenever there is no qualified majority of Member States opposing it and not, as set out in the TFEU, when it is backed by a qualified majority of all Member States. The reverse-qualified majority vote was later introduced in the EU secondary norms, particularly in the Six-Pack. The fact that these procedural rules have also been incorporated in EU secondary

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<sup>204</sup> D’Sa, “The legal and constitutional nature of the new international treaties on economic and monetary union from the perspective of EU law”, *European Current Law Issue*, 2012, xi-xxv, p.xv. In particular Articles 3(2) and 13 of the Fiscal Compact explicitly refer to EU law and to the Stability and Growth Pact. At the same time Regulation 472/2013 adopted within the framework of the two-pack make constant references to the financial assistance programmes of the ESM. See on this point J.P. Keppenne, “Institutional Report”, p.205 and fn.78.

<sup>205</sup> See, in this respect, Articles 2(2) and 7 TSCG and Recital 25 on the SRF Treaty.

<sup>206</sup> A. Dashwood, “The United Kingdom in a re-formed European Union”, 2013, *European Law Review*, Vol 38(6) pp. 743-44. This was also clarified by the Court in *In Commission v Council* (C-27/04) [2004] E.C.R. I-6649. In particular, the Court found that “responsibility for making the Member States observe budgetary discipline lies evidently with the Council”, para. 76, noticing soon after the “discretion” of the Council, para. 80.

<sup>207</sup> Interestingly, Palmstorfer considers the RQMV as such, and hence also the RQMV as envisaged in secondary EU norms (six-pack) as contravening the legal framework of the Treaties. R. Palmstorfer, “The Reverse Majority Voting under the ‘Six Pack’: A Bad Turn for the Union?,” 2014, *European Law Journal*, Vol. 20.



law does not dispel their incompatibility with primary EU law. This automatic procedure reinforces the critiques of the shift in the balance of powers towards the supranational institutions in distributive policies areas, instead of towards the Member States<sup>208</sup>.

Similarly, also the EU institutions' involvement in the ESM raises some concerns on procedural compatibility with the EU law use of the institutions outside the Treaties' framework as envisaged in the ESM. In particular, as signalled in recital 16 of the ESMT and pursuant to Article 273 TFEU, disputes concerning the interpretation and application of the ESMT arising between the Contracting Parties or between the Contracting Parties and the ESM should be submitted to the jurisdiction of the CJEU. It is worth noting that Article 273 TFEU only concerns disputes between Member States and that there is no mention of another legal entity that could be party to the dispute. The Court, however, disregarding that the ESM is a mechanism with its own legal personality<sup>209</sup>, cursorily overcame the issue by stating that "since the membership of the ESM consists solely of Member States, a dispute to which the ESM is party may be considered to be a dispute between Member States within the meaning of Article 273 TFEU"<sup>210</sup>. Moreover, AG Kokott addressed the crucial issue of undermining the ECB's independence when Member States assign additional tasks to it. Article 130 TFEU grants the ECB a reinforced safeguard of independence with respect to its decision-making bodies. The AG argued that there was, no threat to the ECB's independence in this case as it was under no obligation to perform the tasks envisaged by the ESMT. It is clear, however, that '[e]xternal influences which the enhanced independence aims to fence off are not exhausted by legal obligations<sup>211</sup>'.

Severe doubts about the procedural compatibility of the voting mechanisms envisaged by the *inter se* treaties with the EU legal order also arise if one considers

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<sup>208</sup> Cf. M. Dawson, F. De Witte, 'Constitutional Balance in the European Union After the Euro Crisis', *Modern Law Review*, 2013, Vol. 5.

<sup>209</sup> Article 32(2) ESMT.

<sup>210</sup> *Pringle*, para.175.

<sup>211</sup> K.Tuori, K. Tuori, *The Euro zone Crisis* p.161.

the size of different Member States' contributions to the fund, established by the ESM and the SRF, and their legal power. For instance, the emergency voting procedure of the ESM, as established in Article 4(4) ESMT, provides that by way of "derogation from paragraph 3<sup>212</sup>, an emergency voting procedure shall be used where the Commission and the ECB both conclude that a failure to urgently adopt a decision to grant or implement financial assistance [...] would threaten the economic and financial sustainability of the euro area." That emergency procedure requires a qualified majority of 85% of the votes cast. Furthermore, as Article 4(7) ESM provides, the voting rights of each Member State shall be equal to the number of shares allocated to it in the authorised capital stock of the ESM. Since Germany, France and Italy have a share over 15% of the ESM capital, they hold a *de facto* a *veto* power. Greater decision-making powers of the bigger contributors are also envisaged in the voting procedures of the SRF<sup>213</sup>. This phenomenon of increased decision-making powers of some Member States at the expenses of others upsets the equilibrium established by the original institutional architecture of the EU. The European supranational project, in fact, recomposed the tension between "State power and State equality"<sup>214</sup> by means of complex voting arrangements which provided a balance between the economic, political and demographic asymmetries of Member States and which premised the project of European integration on the equal standing of all the Member States<sup>215</sup>.

#### **4. The interrelations between supervening exclusivity and procedural compatibility**

The EU's supervening exclusivity and the procedural compatibility of the *inter se* agreements with EU law have been presented as separate yardsticks to assess the legality of *inter se* agreements. It is now worth analysing the interrelations between them. Supervening exclusivity may be read, *inter alia*, as a principle intended to

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<sup>212</sup> Article 4(3) TESM envisages a voting procedure based on unanimity.

<sup>213</sup> Cf, for instance, Article 5a(4) and 8(2) SFR Agreements.

<sup>214</sup> See F. Fabbrini, "States' Equality v States' Power: the Euro-crisis, Inter-state Relations and the Paradox of Domination", *Cambridge Yearbook of European Legal Studies*, 2015, Vol 17.

<sup>215</sup> *Ibid.*

safeguard the specific characteristics of EU law and its autonomous decision-making process both in the present and the future. In fact, the operation of the supervening exclusivity principle deriving from the *ERTA* line of case law, rests on the “two-fold dimension of affect and prospect”<sup>216</sup>. This is particularly apparent from the consolidation of the *ERTA* principle applied in the *Lugano* Opinion, where the Court underlined the importance of the future evolution of EU law to analyse the application of the supervening exclusivity principle. In the case of agreements with third countries, the exclusivity of EU channels was seen as a way to avoid future restraints on EU actions in the wider world which might arise from the previous action of the Member States. In the case of *inter se* agreements the ‘prospect’ component of the test proposed in the *Lugano* Opinion, could be developed in a similar, albeit subtler way. The prospect of EU legislation is only secondarily an issue of distribution of competences and is primarily an issue of path dependency.

Path dependency emerges when the integration of *inter se* agreements in the EU legal order is taken into account. As it has been noted for the Schengen and the Prüm Conventions, the initial shortcomings of the adoption of substantive law pursuing the objectives of European integration without the involvement of EU institutions and outside of the Union framework<sup>217</sup> remain even after the reintegration of the agreements into the Treaties framework<sup>218</sup>. In particular, once the *inter se* treaties are incorporated in the EU legal order, there will hardly be any re-engagement in the deliberation process which would allow the relevant EU institutional actors and societal stakeholders to have a say in the reconfiguration of norms originating from intergovernmental bargain before their transposal into the

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<sup>216</sup> L. Azoulai, ‘The Many Visions of Europe. Insights from the Reasoning of the European Court of Justice in External Relations Law’ in M. Cremona (ed), *The European Court of Justice and External Relations: constitutional challenges*, 2014 Oxford: Hart Publishing, p.173.

<sup>217</sup> See, T. Balzacq, “The Treaty of Prüm and the Principle of Loyalty”, *European Parliament Briefing Paper*, Brussels, 2006; D. Curtin, H. Meijers, “Democratic retrogression?”.

<sup>218</sup> Cf. E. Wagner, “The Integration of Schengen into the Framework of the European Union”, *Legal Issues of Economic Integration*, 1998, Vol. 2, pp. 1–60, p.11. Note that reintegration clauses are explicitly provided for the SRF and in the Fiscal Compact. Article 16 TSCG reads: “Within five years, at most, of the date of entry into force of this Treaty, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken, in accordance with the Treaty on the European Union and the Treaty on the Functioning of the European Union, with the aim of incorporating the substance of this Treaty into the legal framework of the European Union”. A similarly worded provision may be found in Article 16(2) of the SRF agreement.

EU legal order. The same holds true for the introduction of decision-making procedures firstly devised in *inter se* treaties and then introduced in EU secondary law, as in the case of RQMV.

This leads one to ask whether the maturity of the EU order allows its autonomy to be safeguarded devising new legal patterns for composing the inputs coming from Member States to the European integration through law. The framing of these patterns would be inspired by the consideration that even though Member State action may affect common rules and alter their scope, the lack of the Union's specific powers could render Member State action indispensable for pursuing a *telos* common to the Union and its Member States<sup>219</sup>. These new patterns of integration, hence, albeit being premised on less strict competence-based restraints, would be counterbalanced by more stringent institutional and decision-making-based requirements which would make the integration of these agreements into the EU legal order smoother and would increase the safeguards granted to EU institutionalism.

## 5. Concluding Remarks

The teleological proximity between *inter se* agreements which pursue European integration objectives, and EU law has called for further investigation of the treaty-making restraints in EU law on the conclusion of *inter se* agreements. Different constraint dynamics should apply to these agreements than those that apply to national laws of the Member States, as those do not have EU integration objectives as their main *telos*. In light of the foregoing considerations, the extension of the supervening exclusivity principle enshrined in Article 3(2) TFEU which was first established in the CJEU's controversial *Pringle* judgment, has been scrutinised. This chapter argues that the limited constitutional reach of the EU's supplementary and complementary competences cannot activate the joint operation of Articles 3(2) and 2(2) TFEU. In fact, since the Fiscal Compact and the ESM can be considered as falling under the EU competences of economic coordination, neither pre-emption nor

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<sup>219</sup> Cf. Article 12(1) ESMT: 'If indispensable to safeguard the financial stability of the euro area as a whole and of its Member States, the ESM may provide stability support [...]'.

supervening exclusivity can apply. The case of the SRF is more confusing: its twin EU law instrument, the SRM, has been adopted on the basis of Article 114 TFEU within the category of ordinary shared competences, namely harmonisation measures within the common market. Thus, following Article 3(2) TFEU one could be led to conclude that the participation of the Union in this agreement is necessary.

After the investigation of the competence-based restraints, the chapter moved on to the constraints that are derived from the principle of primacy of EU law. In addition to the *substantive* compatibility of the *inter se* treaties provisions with EU norms, the importance of *procedural* compatibility of the EU involvement in these agreements with the procedural rules set out in the EU Treaties was highlighted. These procedural rules are based on the idea of the balance of powers between the EU and its Member States and among EU institutions. In particular, the compatibility of *inter se* agreements with the procedural rules devised by the EU framework plays a significant role in preserving, albeit *ex post*, the quality of EU rules. The decision-making procedures provided in the EU Treaties, in fact, usually provide for greater participation and contribution of the EU institutional actors in drafting the legislation. Once incorporated in the EU legal order, the *inter se* treaties norms adopted disregarding the decision making procedures envisaged by the Treaties and with an unregulated involvement of EU institutions may affect the quality of future EU law. Indeed, it is the combined operation of ‘affect and prospect’ of EU law which singles out the interrelations between competence-based and procedural-based treaty-making restraints of Member States’ *inter se* agreements.



### Chapter III

#### **The Various visions of the EU Institutionalism and a proposal of *inter se* mixed agreements**

*In the first chapter of this work the institutional linkage between Member States agreements and the EU framework has been highlighted as an element liable to reduce the divide between the law of inter se agreements and EU law. In particular, the 1971 Protocol extending the Community jurisdictional system to the Brussels Convention was identified as the main factor liable for extending some of the essential characteristics and principles of EU law to the agreements concluded by Member States pursuant to international law. As singled out in the second chapter of this work, however, the use of the institutions outside the Treaty framework in Member States' venues may give rise to issues of procedural incompatibility with EU law. The first section of this chapter will illustrate how the type of institutional linkages between the Member States agreements and the EU mirrors the type of institutionalism on which the EU legal order is premised. The analysis will move from an examination of the case law utilised by the Court in the Pringle case in order to assess the legality of the use of the EU institutions outside of the Treaty framework. This case law will be then set against the background of the competing institutional and contractual theories of international organizations recently re-emerging in the EU legal scholarship. Azoulai's findings on the possible emergence of an associative type of institutionalism, inspired by the practice of mixed agreements in external relations law, will be then used as a basis to create a proposal for the conclusion of inter se mixed agreements as an additional venue? of integration capable of combining some of the flexibility inherent in the conclusion of Member States agreements with the specific characteristics of EU law.*

## **1. The use of EU institutions outside the Treaty Framework.**

The Court in *Pringle* adopted a permissive approach on the matter of the use of EU institutions outside the Treaty Framework. It held that: “the Member States are entitled, in areas which do not fall under the exclusive competence of the Union, to entrust tasks to the institutions, outside the framework of the Union, such as the task of coordinating a collective action undertaken by the Member States or managing financial assistance [...], provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties”<sup>220</sup>. The abovementioned finding relies on two strands of EU external relations case law. The first pertains to humanitarian aid and development and cooperation policy<sup>221</sup>; the second pertains to the geographic extension of the EU acquis and to the consequent broadening of the market access to third Countries<sup>222</sup>. The analysis carried out below will highlight that the Court’s findings in the development and cooperation judgments feature rather atypically in the prevailing case law on the nature of the EU institutionalism. The analysis, moreover, will question the appropriateness of juxtaposing the two strands of case law in the light of their very different legal circumstances on which the extension of the EU institutional involvement outside the Treaties framework was respectively premised.

### **1.1 The development and cooperation case law: the contractual paradigm**

The legality of the use of the institution outside the Treaty framework as envisaged by the ESM was assessed by the CJEU primarily in the light of Joined Cases C-181 & 248/91, commonly referred to as the *Bangladesh* case. Here, the Court upheld the possibility of assigning to the Commission the task of managing the financial aid to

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<sup>220</sup> *Pringle*, para.158.

<sup>221</sup> Joined Cases C-181 & 248/91, (*Bangladesh*), Parliament v. Council and Parliament v. Commission, [1993] ECR I-3685, and Case C-316/91, Parliament v. Council, (*Lomé*) [1994] ECR I-625.

<sup>222</sup> Opinion 1/92 [1992] ECR I-2821; Opinion 1/00 [2002] ECR I-3493, paragraph 20; and Opinion 1/09 [2011] ECR I-0000.



Bangladesh established by the EC Member States meeting within the Council after a cyclone had devastated the country. The Court grounded its finding on an analysis of the nature of Community competences in development and cooperation policy. It stated that since the Community did not have exclusive competence in the field of humanitarian aid, the Member States were not precluded from exercising their competence in that regard collectively in the Council or outside it<sup>223</sup>. In particular, it stated that Community law did not “prevent the Member States from entrusting the Commission with the task of coordinating a collective action undertaken by them on the basis of an act of their representatives meeting in the Council”<sup>224</sup>. Such a ruling indicates that “Community Institutions, procedures and forms of action [were] available to Member States in addition to the intergovernmental forms of cooperation to which they [might] decide to have recourse”<sup>225</sup>.

Similar findings resulted from the other development and cooperation judgment referred to in *Pringle* by the CJEU is the *Lomé* case. Here, the Court found that the Member States could act *qua* Council to administer the financial provisions of the fourth ACP-EEC Convention concluded at Lomé in 1989. The financial instrument of the development aid was implemented by means of a European Development Fund set up by an internal agreement between the Member States outside the Community framework<sup>226</sup> and, in this respect, the Court found that: ‘no provisions of the Treaty prevents Member States from using outside its framework, procedural steps drawing on the rules applicable to Community expenditure and from associating the Community institutions with the procedure thus set up’<sup>227</sup>. The assessment on the nature of the Community competences were once again crucial in the development of the Court’s reasoning:

The Community Competence in that field is not exclusive. The Member States are accordingly entitled to enter into commitments themselves vis-à-vis non Member States, either collectively or individually or even jointly with the Community<sup>228</sup>.

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<sup>223</sup> *Bangladesh*, para. 16.

<sup>224</sup> *Bangladesh*, para. 20.

<sup>225</sup> P. Koutrakos, *EU International Relations Law*, 2006, Oxford: Hart Publishing, p.158.

<sup>226</sup> *Opinion of the AG Jacobs to the Lomé Case*, para. 13.

<sup>227</sup> *Ibid.* para. 41.

<sup>228</sup> *Lomé*, para. 26.

These competence-based Court's findings may be considered consistent with the general EU legal framework as amended by the Maastricht Treaty which envisaged a mere coordination of the actions of the Union and of its Member States in the policy area of development aid<sup>229</sup>. However, the Court's institutional-based reasoning in the development and cooperation case law is premised on a particular vision of Europe which fits oddly with the provisions of Article 13(2) TEU, affirming that "[e]ach institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them". It is readily apparent that the Court could have chosen another route more respectful of the autonomy of the EU legal order and of the EU institutionalism. In fact, the Court's reasoning in the development and cooperation case law does not seem to be entirely convincing. The non-exclusive nature of the Community competences in the cases at issue did not imply that Member States shall remain free to conclude inter se agreements in whatever venue they choose. As pointed out by Schütze:

The prohibition of this mode of cooperation [...] will not turn a shared or complementary competence into an exclusive Union competence. [...]. The Court may wish to reconsider its choice in the future and outlaw the 'chameleonic' behaviour of Member States. The exclusivity of the Union channels, triggering the involvement of the Union institutions, would indeed seem justified for this form of inter se cooperation: where all Member States get involved, the matter will doubtlessly have a 'European' dimension and therefore should bring the European Commission and/or the European Parliament onto the scene<sup>230</sup>.

The Court's findings in the *Bangladesh* and *Lomé* cases, as confirmed in *Pringle*, have been justified in the light of Article 13(2) TFEU if one draws a distinction between powers and tasks conferred upon the EU institutions. In particular, Member States concluding an *inter se* agreement may entrust the EU Institutions with extra tasks provided that they fit with the existing competences and the other

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<sup>229</sup> P. Koutrakos, EU International Relations Law, 2006, p.159.

<sup>230</sup> R. Schütze, "European law and Member State agreements", p.145.

Member States agree to this institutional borrowing<sup>231</sup>. In this regard, De Witte draws a parallel with the extra tasks assigned to the Commission to further implement a piece of EU secondary legislation even though this was not expressly envisaged by the wording of the Treaties. Normally this task does not encroach upon the apportioning of competences established by the Treaties, or with the EU institutional balance<sup>232</sup>. Even though this explanation may seem conclusive, the fact that the extra tasks to the EU Institutions are not assigned within the EU framework but within a Member States' legal venue, which although it manifests itself as a "European Dimension"<sup>233</sup>, develops outside the formal contours of EU law and provokes reflection on which kind of institutionalism informs the EU institutional action.

Originally, the debate on the nature of the EU legal order and of EU institutionalism revolved around the competing institutional theory and contractual theory of international organizations<sup>234</sup>. The former considers the International Organization as enjoying an autonomous legal personality and thus characterizes the legal acts of the Organization as emanating from a distinct entity which cannot be equated with the parties signing the constitutive agreement. The latter, instead, regards the Organization as an instrument of cooperation between the contracting parties which may give rise to a network of agreements between the signatories<sup>235</sup>. According to this theory, developed first by Anzilotti, the institutions of an international organization were considered to be common organs in the hands of the contracting parties<sup>236</sup>. In the light of the foregoing, the case law utilised in *Pringle* to uphold the use of the institutions outside the Treaty framework, is evidently based on a contractual paradigm: Member States required the assistance of a Community

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<sup>231</sup> B. De Witte, "Using International Law in the Euro Crisis: Causes and Consequences, p.20.

<sup>232</sup> Ibid.

<sup>233</sup> This "European dimension" in the passage from Schütze referred to above is another way of expressing what I previously called the teleological proximity between EU law and inter se Member States agreements pursuing European integration objectives.

<sup>234</sup> See A. Giardina, *Comunità Europee e Stati Terzi*, Napoli: Jovene, 1964, pp.155-162 and specifically fn. 46.

<sup>235</sup> C. Sandulli, « Retour à la théorie de l'organe commun, réflexions sur la nature juridique de l'ALBA et de la CELAC », *Revue générale de droit international public*, 2012, Vol. 116(3), pp. 555-6.

<sup>236</sup> D. Anzilotti, *Cours de droit international*, vol.1, Sirey, Paris 1929, p.153 and ff., p. 283 and ff.

Institution in domains of ‘non-exclusive competences’; it was then for the Institution itself to decide whether to accept such a mission. The only caveat to this acceptance was that it acted in a way “compatible with its duties under the Community Treaties”<sup>237</sup>. Hence, according to this paradigm the Union Institutions are entitled to act on a mandate of Member States<sup>238</sup>.

During the course of European integration, the Council has been the institution more liable to be considered a common organ in the hands of Member States. The composition of this institution which could resemble that of an intergovernmental conference seemed to allow for more indulgence towards the so-called *dédoublement fonctionnel* of the Council. The Council had been considered as both an Institution of the Union and as a common organ of the Member States. In this respect, one could recall the “mini-intergovernmental conferences” taking place “in the logistical framework of the Council”<sup>239</sup> which was often regarded as “a convenient platform and meeting place”<sup>240</sup> to adopt intergovernmental acts within the framework of Community-related objectives. As singled out by Pescatore, in those circumstances, even though acting “*lato sensu* in the framework of Community law”<sup>241</sup>, the Council did not act properly as a Community Institution but rather as a diplomatic meeting of the Representatives of the Member States<sup>242</sup>. The decisions of the Representatives of the Member States meeting within the Council thus constitute an early model of *inter se* agreements and their peculiar legal nature at the crossroads between EU law and international law epitomise the characteristics

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<sup>237</sup> *Opinion* AG Jacobs *Bangladesh*, para. 27. Cfr also P. Craig, ‘Pringle and the Use of EU Institutions’, 2013.

<sup>238</sup> *Opinion* of the AG Jacobs to the *Lomé* case, paras. 80-82.

<sup>239</sup> B. de Witte, “Chameleonic Member States”, p.246

<sup>240</sup> G. Bebr, “Acts of Representatives of the Governments of the Member States” *Sociaal-Economische Wetgeving*, 1966, p.533.

<sup>241</sup> P. Pescatore, “Remarques sur la nature juridique des ‘décisions des Représentants des Etats membres réunis au sein du Conseil’”, *Sociaal-Economische Wetgeving*, 1966, p.584 This characterization seems to recall, albeit unwittingly, the earlier distinction drawn by Giardina between Community Organization and Community *lato sensu* as defined in the first chapter.

<sup>242</sup> *Ibid*, p.582. As maintained by Pescatore, in fact, « la bonne application des traites et la réalisation des leurs objectives pourrait requérir, en dehors des actes institutionnels proprement dits, un ensemble de mesures adventices et complémentaires qui auraient leur origine non pas dans l’action des institutions mais bien dans l’action des Etats Membres” and qualified the law resulting from these decisions taken within the Council as ‘un droit pas modificatif mais complémentaire des traitées’; p.583.

of the intermediate sphere in the process of European Integration and the difficulty to fully grasp many instances of European Integration in strict legal terms<sup>243</sup>.

The uncertainties of the competing contractual and institutional visions of Europe did not only characterize only the internal evolution of the Union integration process, but also its actions in the external relations domain. One of the most striking instances underscoring the ambiguity of the role of the Council is the Agreement concluded by the Council of the European Union, the Republic of Iceland and the Kingdom of Norway on the association of these two states to the implementation, application and development of the *acquis* of Schengen<sup>244</sup>. Here, it was not evident whether the agreement had been concluded by the Council on behalf of the European Union or on behalf of those Member States which were parties to the Schengen system. To be sure, the Council of the European Union, which is not an autonomous subject of international law, lacks legal personality and thus the capacity to conclude treaties.

The underlying ambiguity informing the adoption of this unconventional solution for the conclusion of the agreement at issue may be traced back to the disputes concerning the existence of the European Union's legal personality and on its relationship with those of the Community and of the Member States<sup>245</sup>. These disputes, predominantly animated by fears of power shifting from the Member States to the Union that the existence of the Union's full international capacity could entail, lead to an unconvincing political compromise. Pursuant to this compromise, the Council acted as a 'common organ' in the hands of the Member States and of a treaty-maker on their behalf. The flaws of the "artificial construction" arising from the fact that the Council was considered as an institution of the Union for all the acts coming under the provisions of the former second and third pillars and as a 'common organ' in the hands of the Member States for the

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<sup>243</sup> Cf. L. van Middelbaar, *The passage to Europe*.

<sup>244</sup> OJ L176, 10/07/1999, p. 36.

<sup>245</sup> A. Tizzano, "La personalità internazionale dell'Unione Europea", *Diritto dell'Unione Europea*, 1998, Vol. 3.

conclusion of this agreement, have already been singled out<sup>246</sup>. Suffice it here to underscore that this conception seems to deviate from the establishment of the Union single institutional framework devised at Maastricht in order to ensure coherence and continuity of the various forms of cooperation within the framework of the Union's objectives<sup>247</sup>.

With the exception of the *Pringle* judgment and of the previous *Bangladesh* and *Lomé* cases, the Court has been the most active defendant of the institutional conception of the EU. In fact, the Court has usually rejected the view emerging from this peculiar reading of the role of the Community Institutions<sup>248</sup>. In particular, it rejected the possibility of regarding the Council as an intergovernmental venue where each Member State could defend its own interests<sup>249</sup>. Similarly, the Kirchberg Judges underscored that also in the framework of the flexibility clause (now enshrined in Article 352 TFEU), the Council acts in its capacity as a Community Institution and not as a platform convening the various interests of the Member States: "the power to take measures envisaged by [Article 235 EC (now Article 352 TFEU)] is conferred, not on the Member States acting together, but on the Council in its capacity as a Community Institution. [...]. Although the effect of the measures taken in this manner by the Council is in some respects to supplement the Treaty, they are adopted within the context of the objectives of the Community."<sup>250</sup> More recently, in the context of a decision of the representatives of the Member States meeting within the Council, the CJEU has upheld once again the specific institutional conception underpinning the development of EU law. In particular, it affirmed that:

[T]he founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the Member States have limited their sovereign rights [...]. Furthermore, the Member States have, by reason of their membership of the European Union, accepted that relations between them as regards the matters covered by the transfer of powers from the Member States to the European Union are governed by

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<sup>246</sup> A. Tizzano, "A proposito dell'inserzione dell'*acquis* di Schengen nei trattati comunitari, l'accordo 'del Consiglio' con l'Islanda e la Norvegia", *Diritto dell'Unione Europea*, 1999, p. 525.

<sup>247</sup> A. Tizzano, "La personalità internazionale", p.397.

<sup>248</sup> Editorial Comments, "Union membership in times of crisis", *Common Market Law Review*, 2014, Vol. 51(1).

<sup>249</sup> Case C-63/90, *Portugal and Spain v. Council*, [1992] ECR I-5073, para 53.

<sup>250</sup> Case C- 38/69, *Commission v. Italy*, [1970] ECR 47, para 10.

EU law, to the exclusion, if EU law so requires, of any other law. As provided in Article 13(2) TEU, each institution must act within the limits of the powers conferred on it by the Treaties, and in conformity with the procedures, conditions and objectives set out in them.

It should be recalled, in this regard, that the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not at the disposal of the Member States or of the institutions themselves<sup>251</sup>.

In the light of the foregoing, the Court's findings and the practice of the EU institutional actors do not seem to give a definitive answer to the kind of institutionalism on which the EU legal order is premised. Indeed, the hardly viable compromises deriving from the unclear location of the EU between the competing contractual and institutional visions of the EU are liable to generate legal uncertainty and political confusion.

## **1.2 The *EEA* and *ECAA* case law: an appropriate juxtaposition with the *Bangladesh* and *Lomé* cases?**

Once again relying on the external relations case-law, the Kirchberg judges added another restraint to the principle crafted in the development and cooperation field: the tasks entrusted by the Member States to the institutions outside the Treaty framework could be fulfilled “provided that those tasks do not alter the essential character of the power conferred on those institutions by the EU and the FEU Treaties”<sup>252</sup>. The case-law cited here concerns the extension of the *acquis communautaire* to third countries which were party to the European Economic Area (EEA) Treaty<sup>253</sup> and the European Common Aviation area (ECAA) Treaty<sup>254</sup>. In these circumstances, the role of the Community Institutions was extended in order to ensure that EC competition rules were complied with throughout the area of

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<sup>251</sup> C-28/12 - *Commission v Council* paras. 39- 42 (emphasis added); see also *Parliament v Council*, C-133/06, para. 54

<sup>252</sup> *Pringle*, para. 158.

<sup>253</sup> *Opinion 1/92* Revised Draft Agreement on the European Economic Area [1992] ECR I-2821.

<sup>254</sup> *Opinion 1/00 Proposed Agreement Between the European Community and non Member States on the Establishment of a Common Aviation Area*[2002] ECR I-3493.

application of the agreements at issue<sup>255</sup> which, in accordance with the intentions of the Contracting Parties, retained the general characteristics of Community law<sup>256</sup>.

In *Pringle*, the Court, instrumentally used these previous findings to assess whether the new tasks conferred upon the Institutions were not only comparable but also similar in character to those assigned to them by the Treaties. It unsurprisingly reached a positive conclusion<sup>257</sup>.

It is interesting to recall the context in which this additional restraint on the use of the EU institutions was established. The Court of Justice was asked to assess the compatibility with the Treaties of international agreements aimed at widening the scope of the *acquis communautaire* to third Countries in a broader economic area. This compatibility assessment was carried out moving from the need to preserve the autonomy of the Community legal order as an “*ordre juridique propre, issue d’une force autonome*”<sup>258</sup>. In fact, the Court moved from the principle of autonomy to clarify the conditions under which delegations of authority to and from the Community may be possible<sup>259</sup> and to ensure that the application of identically worded provisions stemming from different sources would not lead to the muddling of the different legal orders.<sup>260</sup>

In fact, in Opinion 1/91 concerning the EEA agreement, the Court held that the EEA was “to be established on the basis of an international treaty which, essentially, merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up”. On the Contrary, “the EEC Treaty, albeit concluded in the form of an international agreement, [...] constitute[d] the constitutional charter of a

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<sup>255</sup> Ibid. para. 8.

<sup>256</sup> Ibid. para. 29.

<sup>257</sup> *Pringle*, para. 177.

<sup>258</sup> Cfr Case C 6/64, *Flaminio Costa v. ENEL* [1964] ECR-585.

<sup>259</sup> R. Holdgaard, *External relations law of the European Community: legal reasoning and legal discourses*, Kluwer Law International, 2008, p.87.

<sup>260</sup> see F. Castillo de la Torre, 'Opinion 1/00, Proposed Agreement on the Establishment of a European Common Aviation Area' *Common Market Law Review*, 2002, Vol. 39 Issue 6, pp. 1373–1393 p.1392.



Community based on the rule of law”. Moreover, referring to *Van Gend en Loos*<sup>261</sup>, the Court emphasized the original nature of this new legal order of international law opposing it to the EEA treaty: “the diversity of aims and context between EC and EEA would render legal homogeneity an unattainable objective”<sup>262</sup>.

The autonomy of the EC legal order was also a key issue in the reasoning of Opinion 1/00. Here, relying on its previous findings, the Court carried out a twofold analysis to ascertain whether the autonomy of the Community legal order was preserved. First, it established whether the allocation of powers between the EC and the member states was not affected, then it determined whether the new tasks conferred upon the institutions did not alter the function they performed under Community law. In particular, the vertical division of powers was preserved because the Member States were not party to the agreement and there was no “risk that a Court would interpret the terms ‘Contracting Parties’ in such a way as to define the respective powers of the Member States and the Community”<sup>263</sup>. Moreover, the circumstance that the Member States were not parties to the ECAA Agreement “ensured that disputes between the Member States, or between those States and the Community institutions, concerning interpretation of the rules of Community law applicable to air transport [would] continue to be dealt with exclusively by the machinery provided for by the Treaty”<sup>264</sup>. In addition to this, the Court recognized that an international agreement “entered into by the Community with non- Member States, may affect the powers of the Community Institutions, without, however, being regarded incompatible with the treaty”<sup>265</sup>. Even though “the ECAA agreement affect[ed] the powers of the Community institutions, it [did] not alter the essential character of those powers and thus it [did] not undermine the autonomy of the Community legal order”<sup>266</sup>.

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<sup>261</sup> Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>262</sup> *Opinion 1/91*, First Draft Agreement on the establishment of a European Economic Area, [1991] ECR I-6079, paras

<sup>263</sup> *Opinion 1/00*, para. 16.

<sup>264</sup> *Ibid*, para.17.

<sup>265</sup> *Ibid*, para. 20.

<sup>266</sup> *Ibid*, para. 21.

In *Pringle*, the CJEU was rather cursory in detailing the conditions to be fulfilled in order for these tasks to pass the “essential character” test. As a matter of fact, the Court did not indicate any “formal requirements concerning the decision-making process; [...] the form of the institutional decision; consultation with other institutional actors; or agreement of other institutions”<sup>267</sup>.

Perhaps more importantly, it should be noted that in the EEA and ECAA agreements, the extension of the scope of Community law was enacted by the Community itself by means of an international agreement. Even though the EEA and ECAA agreements did not provide for a transfer of powers to the institutions it set up, the Community participation to the agreement rendered it binding upon the institutions pursuant to Article 216(2) TFEU<sup>268</sup>. The institutions thus derived the powers to ensure homogeneity and the enforcement of the geographically widened community *acquis* from a specific source of EU law. Contrarily, in the ESM, the EU institutions are not bounded by the ESMT and may accept the tasks conferred upon them at their discretion since they are borrowed outside the conventional sources of EU law as it was the case for the development and cooperation case law.

The juxtaposition of the EEA and ECAA case law with the *Bangladesh* and *Lomé* cases could thus be questioned: while in the EEA and ECAA case the Institutions derived their powers from an EU law source, in the case of the ESM as it happened in the development and cooperation case law, the Institutions derive their powers from a mandate of the Member States acting through international law. In the light of the foregoing considerations, it seems hence hard to reconcile the role of the EU institutions as institutional actors of a new legal order of international law *issue d'une source autonome* with the role resulting from the contractual paradigm, i.e. common organs in the hands of some Member States.

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<sup>267</sup> P. Craig, “Pringle and Use of EU Institutions outside the EU Legal Framework”, p.270.

<sup>268</sup> See, Case C-181/73, *Haegman*. [1974] E.C.R. 449.

## 2. Mixed agreements and associative institutionalism

The inquiries carried out hitherto have highlighted different visions of the EU institutional set up ranging from the most restrained AETR conception defending the exclusivity of the Union channels to the departure from institutionalism in favour of contractual arrangements suggested by the Court's findings in the *Pringle* judgment. According to the integrationist view of EU institutionalism, only the Community Institutions are capable of representing the Community interest and hence the action of Member States should be limited and pre-empted; pursuant to the latter conception, the role of EU institutions is reduced to that of common organs in the hands of Member States.

There is an alternative vision of the EU institutionalism suggested by Azoulai. Such a vision, which would represent a safeguard from the “withdrawal from institutionalism”<sup>269</sup> as emerging from *Pringle*, is inspired by the evolution of the EU institutionalism in the external relations field which, through the course of the European integration project, underwent significant changes. It departed, in fact, from the early doctrinal imperatives premised on the exclusivity of the Union's channels as advocated in the *ERTA* judgment<sup>270</sup>.

Indeed, the restrictive AETR conception of EU institutionalism requiring exclusive action by Community Institutions has evolved allowing for a ‘greater acceptance that the external solidarity and the principle of unity in the international representation does not necessarily require exclusivity but can be consistent with shared competences operating subject to the duty of sincere cooperation’<sup>271</sup>.

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<sup>269</sup> L. Azoulai, “The Many Visions of Europe. Insights from the Reasoning of the European Court of Justice in External Relations Law” in M. Cremona (ed), *The European Court of Justice and external relations: constitutional challenges*, 2014, Oxford: Hart Publishing.

<sup>270</sup> It should be noticed, however, that as far as the specific circumstances of the case is concerned, the ruling, albeit innovative in matter of principle was substantially conservative of the *status quo*: it considered the common position adopted by the Council to guide the conduct of the Member States' actions to be sufficient to defend the Community's interests and the Member States were allowed to continue the negotiations of the international agreement.

<sup>271</sup> M. Cremona, “EU External Relations: Unity and Conferral of Powers” p. 69.

This type of institutionalism described by the French scholar would “manifest itself through rules of conduct imposed on Member States as well as on European institutions” <sup>272</sup> based on the duty of loyal cooperation which compels the Member States to operate in concerted action within the EU institutional framework<sup>273</sup>. More than on a strict apportioning of competences between the EU and the Member States and on the relevant prerogatives of the EU Institutions, Associative Institutionalism would be founded on “procedures of cooperation” and on a “set of institutional relations” governing the joint action of national and supranational actors involved in the development of the EU integration project<sup>274</sup>.

Associative institutionalism is thus located midway between the integrationist and the contractual conception. According to this alternative strategy “[the institutional mechanisms agreed in practice between the European institutions and the Member States regarding the allocation of their respective responsibilities and their cooperation, even if not strictly speaking compliant with the [T]reaties, would be confirmed. The Court would take the initiative and develop the basic procedural framework set out in relation to mixed agreements”<sup>275</sup>.

Mixed agreements, in fact, could constitute an interesting model inspiring the conclusion of what could be called *inter se mixed agreements*, i.e. *inter se* agreements to which the Union is party. These *inter se* mixed agreements are expected to recompose the divide between the law of the *inter se* agreements and EU law proper, extending to the former the specific qualities of the latter and circumscribing the risks of withdrawal from institutionalism which would put into question the very foundations of the EU as an autonomous legal order.

Before delineating the juridical framework for the above proposed *inter se mixed agreements*, it is worthy emphasizing the distinctive features of classic mixed

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<sup>272</sup> L. Azoulay, “The Many Visions of Europe, p. 179.

<sup>273</sup> This is inspired by the Court’s reasoning in the PFOS case. Case C-246/07 *Commission v Sweden* (PFOS) [2010] ECR I-3317

<sup>274</sup> L. Azoulay, “The Many Visions of Europe, p. 180.

<sup>275</sup> *Ibid.*, p.181.

agreements. They are international agreements concluded by the European Union and its Member States of the one part and by third countries on the other part. As powerfully highlighted by Hoffmeister, mixed agreements are the place where “complicated issue of international and European law come to a crossroad, inspiring original legal thinking in uncharted waters”<sup>276</sup>. They constitute a peculiar feature of the EU law practice characterized by the “freedom from defined models” and by the uninterrupted exercise of “institutional engineering” which informed the original path followed by the European Integration process<sup>277</sup>. They are a practical and inventive solution to manage the joint and coordinated action of the EU and its Member States in the wider world. The legal justification for the recourse to *mixity* is that the scope of the agreement exceeds the EU specific competence and therefore its conclusion necessitates joint action by the EU and its Member States, with the latter “complementing the insufficient powers”<sup>278</sup> of the former. Moreover, a second and equally important reason justifying the recourse to mixed agreements, as emerging from the established case law<sup>279</sup>, is the fact that even when the Union competence covers the whole scope of an agreement, this does not automatically exclude the exercise of shared competences on the part of the Member States<sup>280</sup>.

Mixed agreements thus constitute a viable solution for the conclusion of agreements concerning a subject matter in which the areas of competences of the Union and of the Member States are closely interrelated<sup>281</sup> and in which the respective apportioning of competences is hard to determine. Such a hardship in defining a precise allocation of competences between the EU and its Member States may partly derive from the infelicitous drafting of Article 3(2) TFEU and its relationship

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<sup>276</sup> F. Hoffmeister, “Curse or Blessing? Mixed Agreements in the Recent Practice of the European Union and its Member States” in C. Hillion and P.Koutrakos (eds.) *Mixed Agreements Revisited: the EU and its Member States in the World*, 2010, Oxford: Hart Publishing, p.249.

<sup>277</sup> A. Tizzano, “Note in tema di Relazioni esterne”, in L. Daniele (ed), *Le Relazioni esterne dell’UE nel nuovo millennio*, Giuffr : Milano, p.67.

<sup>278</sup> P. Eeckhout, *EU External Relations Law*, pp. 212-213.

<sup>279</sup> See Opinion 1/94 [1994] ECR I-5267; Opinion 2/92 [1995] ECR I-525.

<sup>280</sup> J. Heliskoski, “Adoption of Positions under Mixed Agreements”, in C. Hillion and P.Koutrakos (eds.) *Mixed Agreements Revisited: the EU and its Member States in the World*, 2010, Oxford: Hart Publishing, p. 140.

<sup>281</sup> Case C-459/03 *Commission v Ireland* (MOX Plant) [2006] ECR I-4635, para. 176.

with Article 2(2) TFEU<sup>282</sup> and partly from the dynamic evolution of the EU legal order which continuously modifies the competence distribution between the EU and the Member States. Even though no provision of the Founding Treaties expressly envisages their conclusion, the CJEU's case-law contributed to define their relevant legal framework clarifying the mutual obligation of the Union and of the Member States in pursuance of the duty of loyal cooperation.

In the context of mixed agreements, the vision of Europe based on associative institutionalism is epitomised by the partial eclipsing of the exact allocation of competences between the EU and its Member States in favour of the advancement of the cooperation between the institutional players of the two in order to achieve consistency and coherence of the overall EU external action. The evolution of the case law concerning mixed agreements develops, in fact, according to this pattern. There is, in fact, an “increasing jurisprudential emphasis on cooperation as contribution to consistency and coherence in the EU external relations [which] counter- balances the traditional competence-distribution case law” and which “signal[s] lesser judicial apprehension, and perhaps more acceptance of the plurality which characterizes the EU posture on the international stage”<sup>283</sup>. Notwithstanding that the Union legal order is characterized by the concomitant application of provisions of a different nature, the intent of the institutional actors is that of composing the plurality of the EU posture on the international stage with a unified *modus operandi*. To say it in Tizzano's words:

The Community legal system is characterized by the simultaneous application of provisions of various origins, international, Community and national; but it nevertheless seeks to function and to represent itself to the outside world as a unified system. That is, one might say, the inherent nature of the system which, while guaranteeing the maintenance of the realities of States and of individual interests of all kinds, also seeks to achieve a unified *modus operandi*<sup>284</sup>.

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<sup>282</sup> A.Dashwood, “Mixity in the era of the Treaty of Lisbon”, in C. Hillion and P.Koutrakos (eds.) *Mixed Agreements Revisited*, p.365.

<sup>283</sup> C.Hillion, “Mixity and Coherence in EU External Relations: The Significance of the 'Duty of Cooperation'” in n C. Hillion and P.Koutrakos (eds.) *Mixed Agreements Revisited: the EU and its Member States in the World*, Oxford: Hart Publishing, 2010 , p. 114.

<sup>284</sup> AG Tesaurò, Opinion on Case C- 53/96 *Hermès International v FHT Marketing* [1988] ECR I- 3603; para. 21.

Mixed agreements well embody the search for this unified *modus operandi* and the attempt to find a synthesis for the action of the various institutional players of the Community. It is against this backdrop that the associative institutionalism and the *inter se mixed agreements* could gain ground. This type of institutionalism informing the internal integration process will be, as happened in the external relations domains, rely less on considerations based on competence distribution and will be more attentive to the procedural framework in which the joint action of the Union and of its Member States is carried out in pursuance of a common telos.

### **3. The law of *inter se mixed agreements***

*Inter se mixed agreements*, as classic mixed agreements, do not possess an explicit legal basis in the Treaties. However, they should derive their legal force and operational functioning from the Treaties framework. In particular, since the EU shall be party to those agreements, the question of a suitable legal basis for their conclusion arises. The cardinal role of the legal basis in the EU legal order has been repeatedly highlighted by the Court. Most notably, in Opinion 2/00, the Court singled out the constitutional significance attached to the choice of the appropriate legal basis<sup>285</sup>. And in recent case, the Court annulled the decision of the Council of the European Union of 24 May 2007 establishing the position to be adopted on behalf of the European Community at the 14th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) by reason of the failure to indicate the legal basis on which it was founded<sup>286</sup>.

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<sup>285</sup> "The choice of the appropriate legal basis has constitutional significance. Since the Community has conferred powers only, it must tie the Protocol to a Treaty provision which empowers it to approve such a measure. To proceed on an incorrect legal basis is therefore liable to invalidate the act concluding the agreement and so vitiate the Community's consent to be bound by the agreement it has signed. That is so in particular where the Treaty does not confer on the Community sufficient competence to ratify the agreement in its entirety, a situation which entails examining the allocation as between the Community and the Member States of the powers to conclude the agreement that is envisaged with non-member countries, or where the appropriate legal basis for the measure concluding the agreement lays down a legislative procedure different from that which has in fact been followed by the Community institutions".

<sup>286</sup> Case C-370/07 *Commission vs Council* ECR- I 8917.

To be sure, among the reasons inducing the Member States to go outside the Treaty framework, the lack of EU specific powers to act features prominently. Notwithstanding this, among the elements capable of giving guidance on the choice of the suitable legal basis for the *inter se* mixed agreements, the telos they pursue common to the Member States and to the Union feature prominently. The telos pursued by the *inter se* agreements which is common to the Member States and to the EU may give guidance on the choice of the suitable for the *inter se* mixed agreements. In the EU Treaties, a “flexibility clause” was envisioned to bridge the gap between the Treaties’ objectives and the specific powers assigned to the Union. This clause is enshrined in Article 352 TFEU. In Schwarz’s reading the article at issue serves to reduce the divide between the Union’s jurisdiction, defined by its aims, and the specific powers conferred to it<sup>287</sup>. The Article at issue which is commonly referred to as “the flexibility clause”, provides, in fact, that:

If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, 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.

In light of the foregoing considerations, it is easier to regard the function of Article 352 TFEU as a gap-filling provision liable to reduce the divide between the scope of the Union law and the scope of the Union’s competences, or, in other words, between the Union *lato sensu* and the Union as an Organization<sup>288</sup>. The fact that the provision comes into play when the Treaties have not provided the necessary powers for the action of the Union leads to the qualification of the flexibility clause as a provision which while complementing the scope of the Treaty, is placed to some extent outside it<sup>289</sup>. In this respect, Article 352 could also be qualified as a temporal bridge between the various stages of European Integration since it “stands

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<sup>287</sup> I.E. Schwartz, 'Artikel 235', in H. von der Groeben, J. Thiesing, and C.-D. Ehlermann (ed.), *Kommentar zum EU-/EG-Vertrag*, 1997, Baden: Nomos.

<sup>288</sup> Cf the definitions provided in section 3 of the first chapter.

<sup>289</sup> R. Schütze, “Organized Change towards an 'Ever Closer Union': Article 308 EC and the Limits to the Community's Legislative Competence”, *Yearbook of European Law*, 2003, Volume 22(1) p.102, fn.100. Cfr also D. Dorn, *Art. 235 EWGV-Prinzipien der Auslegung-Die Generalermächtigung zur Rechtsetzung im Verfassungssystem der Gemeinschaften*, 1986, Kehl, pp. 40-1.



somewhere between the codified Treaty text and the future of the European [Union]”<sup>290</sup>.

The reforms undertaken at Maastricht, thanks to which the EU legal order has been granted a multitude of specific legal bases, has limited the recourse to the flexibility clause. The preservation of this provision in the post-Lisbon set up, however, ‘shows that the Treaty is still a framework to be filled and complemented’<sup>291</sup>. The gap-filling and complementarity role of the article at issue does not allow for detachment the provision from the system of conferred powers, provided for in Article 5 (2) TFEU on which the EU law is based. In fact, the EU is not a self-authenticating legal order enjoying the *Kompetenz-Kompetenz*<sup>292</sup> power. In other words, the EU does not enjoy the competence to determine its own competence. The specific location of the flexibility clause in the EU institutional system was addressed by the Court, which, while analyzing the scope of the flexibility clause, clarified that the Article 352 TFEU provision is part of a legal system defined by the principle of conferred powers. In particular, in Opinion 2/94 the Court held that:

Article 235 [now Article 352 TFEU] is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.<sup>293</sup>

The relationship between the enumeration principle and the flexibility clause underwent significant changes in the post-Lisbon era. In particular, in the pre-Lisbon version of the principle of conferral the distinction between the powers conferred upon the Community by the Treaty and the objectives assigned to it

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<sup>290</sup> R. Schütze, “Organized Change”, p.102.

<sup>291</sup> T. 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, Vol 31, p.228.

<sup>292</sup> A. Dashwood, “The Relationship between the Member States and the European Union/European Community” *Common Market Law Review* Vol 41, 2004, pp. 355–381, p. 357.

<sup>293</sup> *Opinion 2/94 re Accession to the ECHR* [1996] ECR I-1759 paras 29-30.

therein<sup>294</sup> allowed for a “dual conception of the enumeration principle”<sup>295</sup>. The aforementioned distinction, in fact, seemed to indicate a jurisdictional sphere defined by the Union objectives wider than the powers assigned to it<sup>296</sup>. The post-Lisbon formulation of the principle of conferral reads: “under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein”. Hence, the aforementioned “dual conception of the enumeration principle” does not seem to apply anymore: the wording of Article 5 TEU suggests, if not an identity of scope between the Union’s powers and its objectives, at least a predominance of the former over the latter. Notwithstanding this, the role played by the method of teleological interpretation in the case law of the CJEU, the reference to the Union objectives in the formulation of the principle of conferral and the very preservation of the flexibility clause in the Treaties framework allow the consideration of Article 352 TFEU as a gap-filling provision which may reduce the divide between the Union *lato sensu* and the Union as an Organization and thus could act as a suitable legal basis for the conclusion of *inter se* mixed agreements.

In particular, contrarily to what happens to the autonomous acts of the Union adopted pursuant to the flexibility clause, the use of Article 352 TFEU as a legal basis for *inter se* mixed agreements would not constitute yet another legal justification for creeping competences. As in the case of classic mixed agreements, the presence of the Member States alongside the Union for their negotiation, conclusion and implementation would serve, rather, to complement the action of the Union in the circumstances in which it has not the specific powers to act alone. As in classic mixed agreements, in fact, far from being a “necessary evil”<sup>297</sup>, this peculiar formula of joint action of the Union and of its Member States represents an

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<sup>294</sup> Article 5 TEC read: “The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.”

<sup>295</sup> R. Schütze, “Organized Change towards an 'Ever Closer Union'”, p. 106.

<sup>296</sup> Cf. R. Schütze, “European law and Member State agreements”, p.106.

<sup>297</sup> A. Barav, “The Division of External Relation Powers between the European Economic Community and the Member States in the Case-law of the Court of Justice”, in C. Timmermans and E. Volker (eds), *Division of Powers Between the European Communities and their Member States in the field of external relations*, 1981, Deventer: Kluwer, p.144.

innovative way to compose the plurality of non-unitary actors which allows the Union to act in areas where it has no specific powers notwithstanding these are essential for the viability of the integration project<sup>298</sup>.

The Union used Article 352 TFEU as legal basis to enter into an international agreement previously concluded by all of its then Member States. This was the case of the Treaty on the Statute of the European School in 1957. The Community acceded to the Statute by means of an amending Treaty and the legal basis for its participation was Article 352 TFEU (then Article 235 EC)<sup>299</sup>. On the substantive plane, article 352 TFEU could be used in conjunction with other legal basis, i.e. those defining the EU action in the fields in which the agreements are concluded, such as the provision of economic coordination in the case of the ESM and the TSCG. The use of the article at issue for the Union participation in *inter se* mixed agreements is also desirable on the procedural level. It requires, in fact, the unanimous decision of the Council on a proposal from the Commission and the consent of the Parliament. These requirements may appear burdensome due to the unanimity of the Council, yet they would appear to be adequate to allow Union participation and the use of its Institutions in the agreements for which the Union would not necessarily have sufficient powers to act alone. These requirements also constitute guarantees and safeguards against the use of the institutions outside the Treaty framework without the explicit consent of all the Member States and against the instrumental differentiation entailed in the pursuance of patterns of integration (or differentiated integration) outside the formal contours of EU law.

The Treaty on the Statute of the European Schools was not the sole instance of agreements concluded between the EU and its Member States. Interesting examples in this respect are provided by the agreements concluded between the EU and Denmark. The necessity to conclude an agreement between the EU and one of its Member States stemmed from Denmark's choice not to participate into the Union's

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<sup>298</sup> Cfr J. Weiler, "The External Legal Relations of Non-unitary Actors: Mixity and the Federal Principle" in D. O'Keefe and H. G. Schermers (eds.), , *Mixed Agreements*, 1983, Deventer: Kluwer.

<sup>299</sup> See Treaty of 21 June 1994, (1994) OJ L 212/3.

actions pertaining to migration, asylum and civil justice cooperation, included in the former Title IV of the EC Treaty. This choice was substantiated by means of a Protocol on Denmark attached to the Treaty of Amsterdam granting an opt-out to the country. Since the Brussels Convention, to which Denmark was party, was transposed by an EU measure based on the new Title IV, the Brussels-I regulation hence determined the exclusion of Denmark from a relatively well functioning system of judicial cooperation. Thus, in order to extend the application of the crucial regulation to Denmark, an international agreement between the EC and Denmark pursuant to Article 300 EC (now 218 TFEU) was signed<sup>300</sup>.

At the time in which the agreement was signed, Article 300 EC referred to the conclusion of an international agreement between “the Community and one or more States or international organisations”. The Article 218 TFEU now in force refers, instead, only to the “agreements between the Union and third countries or international organisations”. The previous wording was thus more open-ended since it did not specify that the agreement had to be concluded with *third* countries and Article 300 EC could be hence used alone as a procedural legal basis to conclude treaties between the EC and its Member States. The use of Article 218 TFEU, which is the ordinary measure regulating the interaction between the EU and international law measures<sup>301</sup>, seems nonetheless appropriate as a procedural legal basis for the conclusion of *inter se* mixed agreements. In particular, the reference to the CJEU as contemplated in Article 218(11) TFEU would constitute a powerful tool for assessing *ex-ante* the legality of the envisaged *inter se* mixed agreement. The textual limitations of Article 218 TFEU could be overcome by using Article 352 to extend *ratione personae* the scope of Article 218 TFEU to agreements between the

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<sup>300</sup> Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2005, L 299/62. A similar agreement was later concluded for the same reasons in order to extend to Denmark the Dublin-II Regulation and the Eurodac Regulation (dealing with the control of asylum applicants). Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention, OJ 2006, L 66/38. Cfr B. de Witte, “Using International Law for the European Union’s Domestic Affairs”, in E. Cannizzaro, P. Palchetti, R. Wessels, *International Law as Law of the European Union*, 2012, Boston : Martinus Nijhoff Publishers, p.150.

<sup>301</sup> See AG Sharpston’s *Opinion* to Joined Cases C-103/12 and C-165/12.

EU and its Member States as already happened in other circumstances<sup>302</sup>. It is worth underlining that since the EU is party to the agreement, pursuant to the *Haegman* doctrine, the agreements “becomes an integral part of EU law”<sup>303</sup>. This means that even though the agreements creates an international law-type of relationship between the EU and the contracting Member States, such a relationship is enhanced by the specific qualities of EU supranational law, such as the full application of the EU Charter of Fundamental Rights and effective judicial enforcement mechanisms. Moreover, the extension of the role of the Institutions “outside the Treaty framework” will be legitimised by a source of EU law and this will dispel the prospects of the reduction of the EU legal order to contractual arrangements liable to induce a withdrawal from institutionalism and to undermine the autonomy of EU law. And it is the above described supranational enhancement which marks the difference between *inter se* agreements and *inter se* mixed agreements.

The *inter se* mixed agreements will be binding upon the institutions of the Union and on its Member States as provided for in Article 216(2) TFEU. As evidently apparent from the agreements concluded between some Member States during the Euro crisis, *inter se* agreements are also used as a tool for attaining differentiated patterns of integration by means of international law. The *inter se* mixed agreements proposed in this section respond to this necessity. In this respect, a clause could provide that *inter se* mixed agreements are binding only on those Member States ratifying the agreement. Moreover, an additional clause could provide that “the expenditure resulting from implementation of the agreement, other than administrative costs incurred by the institutions, shall be borne by the ratifying Member States, unless all members of the Council, acting unanimously after consulting the European Parliament, decide otherwise”<sup>304</sup>.

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<sup>302</sup> For a previous use of the use of the flexibility clause to extend *ratione personae* the scope of other Treaty articles, namely Articles 60 and 101 TEC, see Regulation No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaeda network and the Taliban. Cfr also C-402/05 *P Kadi and Al Barakaat v Council and Commission* [2008] ECR I-6351.

<sup>303</sup> Case 181/73 *Haegeman* [1974] ECR 449.

<sup>304</sup> This provision is inspired by Article 332 TFEU regarding the provisions of enhanced cooperation.

The *inter se* mixed agreements hereby proposed will be complementary and will not replace the framework of enhanced cooperation as established by the treaties. Enhanced cooperation, in fact, could be activated only within the sphere of the Union competences and, contrary to the *inter se* mixed agreements, the lack of participation of the Member States would render the possible use of Article 352 TFEU more liable to evoke a “competence creep” in the cases of mismatch between the EU and EU powers. The case of *inter se* mixed agreements would be different since in addition to the unanimous consent by all Member States required by Article 352 TFEU in the Council, the ratifying Member States, to which the agreements *de facto* apply, would share with the Union the ownership of the joint action. Indeed, a significant advantage for the Member States to conclude an *inter se* mixed agreement, compared with straightforward EU law (whether or not via enhanced cooperation), would consist in a greater political ownership by the national political institutions of the EU integration project pursued by means of these integration venues. Moreover, contrary to the enhanced cooperation procedure, the *inter se* mixed agreements will not require any minimum threshold as far as the participating Member States is concerned.

The *inter se* mixed agreements would hence represent an alternative pattern of integration which on the one hand would enjoy the flexibility characterizing mixed agreements and the associative institutionalist vision of Europe which they entail. On the other hand they would represent a safeguard against the threats posed by contractual arrangements and would extend to this inventive venue of integration the specific qualities of EU law.

#### **4. Concluding Remarks**

In Pringle, the CJEU has adopted a rather permissive approach regarding the use of institutions in *inter se* agreements. This chapter has shown that the type of institutional linkage between *inter se* agreements and EU law mirrors the institutional paradigm on which the EU legal order is founded.

In particular, extending its previous findings of the Bangladesh and *Lomé* cases to the ESM, the Court seemed to endorse the possibility that the relationship between the EU Institutions and the Member States might be defined by contractual arrangements. These arrangements are liable to undermine the autonomy of EU law since they may confine the EU institutions to the role of common organs in the hands of Member States. Moving from Azoulay's findings on Associative Institutionalism, this chapter has offered an alternative pattern of integration located midway between the integrationist vision of institutionalism, resulting in the exclusivity of the Union's channels, and the withdrawal from institutionalism as emerging from the contractual use of EU Institutions in Member States venues.

This chapter, in particular, has proposed *inter se* mixed agreements as an alternative tool for EU integration and differentiated integration. As classic mixed agreements, *inter se* mixed agreements resolve the convoluted issues of the apportioning of competence between the Union and the Member States thanks to the joint ownership of their negotiation, conclusion and implementation. Moreover, in light of the fact that they form an integral part of EU law, they could represent an effective instrument for mending the divide between EU law proper and the law of *inter se* agreements.





## Conclusions

This work of thesis has provided a constitutional analysis of the recently concluded *inter se* treaties in the EMU area. These *inter se* treaties have been used as a testing field to investigate a specific manifestation of what Robert Schütze, inspired by an earlier journal article of Pierre Pescatore, has defined as the “second infant disease” of the European Union<sup>305</sup>. This “infant disease” concerns the problematic relationship between the EU legal order and the treaty-making powers of its Member States. In particular, the manifestation of this relationship which has been addressed in this work is the use of the Member States treaty making powers to conclude intergovernmental agreements outside the formal contours of EU law in order to pursue European Integration-related objectives.

In the first chapter, it has been underlined that, in the EMU area, the supranational- intergovernmental tensions deriving from the use of intergovernmental patterns of cooperation alongside the supranational structures of integration goes along with the complex interplay between ‘hard’ and ‘soft’ law measures. After having located the EMU *inter se* treaties devised to contribute to the “stability of the euro area as a whole” in the broader picture of the Euro crisis law, their substantive and institutional linkages with the EU legal order have been singled out. In the light of De Gregorio Merino’s considerations expressed in his analysis of the ESM where he maintained that “the intergovernmental universe of assistance has not been construed to the detriment of the EU Treaties” and that “the intergovernmental sphere of assistance is not alien to the EU legal order nor is it an attempt to deconstruct it”<sup>306</sup>, an attempt of locating these *inter se* treaties in the EU framework has been carried out. In order to do this, earlier doctrinal analyses of *inter se* treaties previously concluded by Member States have been taken into account with a particular emphasis on the debate revolving around the Community

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<sup>305</sup> R. Schütze, “European law and Member State agreements”, p.123. The work of P. Pescatore he referred to is ‘The Doctrine of “Direct Effect”: an Infant Disease of Community Law’, 1983, *European Law Review*, Vol. 8.

<sup>306</sup> A. De Gregorio Merino, “Legal developments in the Economic and Monetary Union during the debt crisis”, p. 1645.

Conventions. The investigation on the legal nature of some of the earlier *inter se* agreements has shown that the intergovernmental channels of cooperation have constituted a constant complement of the Community supranational structures.

Moving from van Middelaar's captivating description of the so-called "intermediate sphere"<sup>307</sup> of the European policy-making, which he qualified as a key dimension of the history of the EU integration project, some legal categories borrowed from prominent EU law scholars have been utilised to grasp the legal nature of the phenomenon of *inter se* agreements. Even though these categories were not originally devised to describe these agreements, Giardina's distinction between the Community *lato sensu*, and the Community Organization, Dashwood's analysis on the scope of the Union Competences and the scope of Union law and Torrent's qualification of the "fourth pillar" of EU law have been considered as adequate to describe the peculiar nature of intergovernmental agreements orbiting around EU law proper. The foregoing categories together with the most updated Keppenne's category of "semi-intergovernmentalism" well emphasize, in fact, the strict interrelation between EU law system of structures and the complementary norms introduced by means of intergovernmental agreements between Member States envisaging tasks for the EU supranational institutions. It has been highlighted how the substantive and institutional interrelations between the EMU *inter se* treaties and the EU legal order could not conceal the international law origin of the former. It has been showed that the international law nature of the *inter se* agreements marks a divide between them and EU law. In fact, *inter se* agreements normally display lower standards of transparency and democratic accountability of the decision-making process, do not share the constituent principles applying to EU law and are out of the reach of the application of the EU Charter of Fundamental Rights. As demonstrated by the case of the Brussels Convention, if the institutional linkages between Member States' agreements and the EU legal order are envisaged, the divide between the law of *inter se* agreements and EU law proper is to some extent reduced.

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<sup>307</sup> L. van Middelaar, *The passage to Europe*.

Once having ascertained that the EU legal order has not obliterated the pre-existing Member States' treaty-making powers, the second chapter has analysed the treaty-making restraints imposed by the EU legal order on Member States in the light of their Union membership. The approach adopted in this work has departed from that of the prevailing literature according to which the restraints on the conclusion of *inter se* agreements should be the same as those imposed on Member States for the adoption of national law measures. It has been shown that even partial *inter se* agreements share with the EU legal order a teleological proximity which renders them significantly different from national law. Such an affinity of purposes should render the agreements subject to different constraints dynamics from those governing the limits imposed on the national law of the Member States. Both the competence-based restraints and the compatibility-based restraints have been taken into consideration. The analysis on the competence-based restraints has moved from the extension to *inter se* agreements of the supervening exclusivity principle enshrined in Article 3(2) TFEU as ventilated by the Court in *Pringle*. It has been shown that the "grey area" between exclusivity and pre-emption in which the supervening exclusivity principle operates<sup>308</sup>, the poor drafting of the Article at issue and the Court and Advocate General's opaqueness in the attempts to clarify the joint operation of Articles 3(2) and 2(2) TFEU (i.e. the interrelation between the EU exercise of a shared competence and the scope of application of the supervening exclusivity principle) render it problematic to establish what the 3(2) TFEU principles entails in the first place. The aforementioned factors do render even more challenging to establish the effects of the principle at issue to *inter se* agreements in general terms. As far as the TSCG and the ESM is concerned, a closer scrutiny at the competence purview of the EU legislation strictly interlinked to *inter se* agreements has revealed that the agreements at issue pertain to the competence domain of the coordination of the economic policy. This competence area is outside the reach of the category of EU ordinary shared competences to which pre-emption and supervening exclusivity normally apply. The absence of pre-emption thus renders the complementary intergovernmental action of the Member States legally

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<sup>308</sup> J. Weiler, "The external legal relations of non-unitary actors: Mixity and the federal principle", p. 173.

viable. The foregoing consideration are not relevant for the SRF, since the EU instrument to which it is strictly interrelated has been concluded pursuant to the EU ordinary shared competences. In this respect, the doubtfulness of the legality of the SRF both in the light of Article 3(2) TFEU and in the light of the autonomy of the EU legal order has been underscored.

The focus of the attention has then shifted to the procedural-based restraints imposed by the EU legal order. In the light of the Court's defence of the legal framework governing the necessary procedures for the exercise of EU powers as resulting from the landmark judgments *Defrenne* and *Joined Cases 90 and 91/63*, the threats posed to the EU decision making framework by the intergovernmental *inter se* instruments making use of EU institutions have been addressed. In this regard, various instances of doubtful procedural compatibility of *inter se* agreements with EU law have been singled out together with the resulting alteration of the EU institutional balance which these incompatibilities may entail. In particular the compatibility of Article 7 TSCG with Article 126(6) has been questioned. Moreover, as far as the ESMT is concerned, some doubts have been raised with regard to the possibility the TSEM envisages, upheld by the Court, that the ESM could be party to the disputes as foreseen by Article 273 TFEU. Furthermore, some concerns have been manifested on the peculiar position of the ECB in the ESM in the light of the reinforced independences envisaged for it by the Treaties. In addition to this, the threats to the EU legal structure posed by the parallelism between the amount of financial contribution and voting powers of some Member States have been addressed. Although the competence-based and compatibility-based restraints have been separately tackled, the last section of the chapter has offered a more comprehensive reading of these two types of legal limits which inspired by a broad understanding of the Member States' treaty-making restraints as devised by the Court in the topical ERTA judgment. In fact, the ERTA-type restraints resting on the "two-fold dimension of affect and prospect"<sup>309</sup> indicate that the affectation of EU law should be tested also against the possible future evolution of EU law. Indeed,

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<sup>309</sup> L. Azoulay, "the many visions of Europe", p.173.

the future component of the ERTA-based test suggests that an ascertainment of the treaty-making restraints of the Member States should be grounded not only with a static affectation test of EU law based on the apportioning of competences as resulting in that particular moment of the time should be carried out. The restraints shall be evaluated also in the light of the dynamic evolution of EU law. It is here that the importance of procedural compatibility emerges. The possible integration in the EU law of *inter se* treaties as expressly envisaged by some of them invites, in fact, to accurately consider their procedural compatibility with EU law.

The third chapter carried out a more fundamental analysis of the implicit assumption entailed in the sanctioning of the legality of the patterns of integration devised by the *inter se* agreements as done by the Court in *Pringle*. Even though the institutional linkage of *inter se* agreements with the EU legal order has been qualified as capable to reduce the divide between EU law and the law of *inter se* agreements, the way in which the linkage operates mirrors the institutional conception on which the EU is premised. A major section of the chapter has been dedicated to the analysis of the Court's findings in *Pringle* in the light of the case law used to substantiate its findings, most notably the Bangladesh and Lomé cases and the EEA and ECAA case law. In particular, the Court's pronouncements have been set against the background of the competing contractual and institutional theories of the International Organizations. It has been shown that the rather exceptional *Pringle* findings, grounded on the similarly atypical *Bangladesh* and *Lomé* case, entail a contractual conception of the EU legal order. The underlying rationale behind the passages of the *Pringle* judgment dealing with the use of the EU Institutions outside the Treaties framework is the possibility of considering the EU Institutions as common organs in the hands of the Member States. As it has been shown, this conception fits oddly with the letter of the Treaties, particularly with Article 13(2) TEU and it departs from the usual defence of the EU institutionalism undertaken by the Court.

Relying on Azoulai's seminal findings on Associative Institutionalism, a third way placed halfway between the integrationist and the contractual visions of Europe has been explored. The abovementioned vision inspired by the EU external relations law practice of mixed agreements, presents an opportunity to compose the plurality of the EU institutional actors and to resolve the plurality of the institutional actors and to resolve the tensions between supranational structures and intergovernmental modes of cooperation. Against this backdrop, the proposal of EU *inter se* mixed agreements has been forwarded. The proposed *inter se* mixed agreements envisage the presence of the EU alongside that of the Member States. They would resolve the dialectics and the tensions of the European integration project in favour of the procedural framework characterizing the EU legal order. At the same time, these agreements would allow the Member States to share the ownership of the negotiation, conclusion and implementation of the agreement and to fully exercise their competences they did not intend to pool to the EU. This would partially simplify the convoluted picture emerging from the opaqueness of the mechanics of the joint operation of Article 2(2) TFEU and 3(2) TFEU.

A scrutiny of the aims and content of the flexibility clause enshrined in Article 352 TFEU has led to maintain that this Article, which intends to fill the gap between the powers attributed to the EU and its objectives, is a suitable legal basis for the conclusion of the *inter se* mixed agreements. Being embedded in the framework of conferred powers, in fact, this clause has been found appropriate to reduce the divide between the EU *lato sensu* and the EU as an organization. Moreover, the scrutiny of other agreements concluded by the EU with its Member States, most notably those with Denmark in the areas of the former Title IV of the EC Treaty, has led to conclude that notwithstanding the procedural guarantees offered by the flexibility clause, Article 218 TFEU would constitute the appropriate procedural legal basis for the conclusions of *inter se* mixed agreement. Article 218 TFEU is, in fact, the procedural legal basis which the EU Treaties framework envisages for the interface of the EU with international law instruments. Besides, the possible utilization of Article 218(9) TFEU to ask to the Court of justice the *ex ante* scrutiny

of the agreements' legality would constitute a powerful tool to increase legal certainty and to reduce burdensome inter-institutional turf wars.

*Inter se* mixed agreements, albeit being concluded by the EU and its Member States by means of their respective international law treaty-making powers, by means of Article 216 (2) TFEU would be binding on the institutions and form an integral part of EU law. This would thus dispel the risks of the “withdrawal from institutionalism”<sup>310</sup> put forward by the Court's findings in *Pringle*. A prominent advantage displayed by *inter se* mixed agreements is that they retain the general characteristics and qualities of EU law, most notably the democratic and transparent procedural rules, effective enforcement mechanisms<sup>311</sup> and the guarantees deriving from the full application of the EU Charter of Fundamental Rights. In addition to this, as it has been shown the *inter se* mixed agreements would also constitute a viable instrument of differentiated integration complementing the Treaties' enhanced cooperation framework. To be sure, the advantages of *inter se* mixed agreements, as described above, would not display their full potential if simply used to reintegrate already adopted classic *inter se* agreements as those concluded in the EMU area. The content of these agreements, in fact, would hardly be overhauled in the light of the EU participation to them. The fact that the Treaties are already in force would discourage major amendments or to re-engage in the deliberation process envisaging the participation of the EU institutions in the decision-making process. Indeed, as happened with Schengen system, the norms deriving from intergovernmental bargaining are likely to be integrated in the EU legal order as they are. In this case, the risks of introducing of an international law foreign body, or “Trojan horse” in the EU legal order would not necessarily constitute a victory for EU law and for the EU institutional conception.

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<sup>310</sup> L. Azoulay, “The Many visions of Europe”, p.108.

<sup>311</sup> B. de Witte, “Treaty Games”, p.154.





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