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# Multi-tier governance in the EU: A dynamic and efficient response to the economic crisis?

**Summary.** This paper attempts to reconstruct the main developments in the European Union since the onset of the financial and sovereign debt crisis, with the emphasis on the measures undertaken by the key actors to tackle it. The main objective of the contribution is to evaluate the efficiency of the multi-tier governance in the increasingly heterogeneous political economies of the eurozone and the EU at large. Some critical remarks are developed also with regard to the risks inherent in the too far-reaching encroachment into national policies. The concluding part offers a limited outlook on the possible architecture of the post-crisis EU, including such bold projects as the transfer union.

**Key words:** financial and sovereign debt crisis, Economic and Monetary Union, multi-tier governance

## Introduction: Between *governance* and *government*

The major theme of this contribution is the economic governance in the European Union, notably of the euro area, in the face of the financial crisis. However tempting it may be to try to define *governance*, it is too broad a concept to be put in simple terms. As rightly remarked by Jaques Delors,[1] even if scanning numerous bookshelves in search of a few lines defining governance, we will very likely come empty-handed. Therefore, let us remain by the formulation proposed by Delors who states that the concept "encompasses our thoughts on decision-

[1] J. Delors, *Economic Governance in the European Union: Past, Present and Future, JCMS 50th Anniversary Lecture*, "Journal of Common Market Studies" 2013, vol. 51, no. 2, p. 169.

making institutions; operational modes and even the ethics of governance; and, [...] not [to] forget, questions of democratic accountability."[2] All these aspects, to a smaller or greater extent, will be addressed in this paper.

As a system for making and implementing collectively binding decisions, economic governance is not restricted to the political decision-making and administration within the European Union.[3] On the contrary, it also involves action to be taken by national governments just as frequently as at the transnational (European, global) level. Consequently, governance should not be regarded as an alternative concept to democratic government,[4] but rather as a means to better organise complex decision-making (e.g. between different levels of authority), whereby public intervention is rendered more efficient.

It is noteworthy that whilst administrative governance is a concept applicable to both national and supranational (EU) level, the notion of *government* is conventionally reserved for the national political systems. The European Commission may at times be referred to as the "economic government" of the Union, albeit the term is never used in its *sensu stricto* meaning. Incidentally, Paul F. Kjaer[5] conceives of the EU as a hybrid encompassing *governing* structures and *governance* structures. The former are characterised by legal and organizational hierarchy – the Commission, the Council and the European Parliament, whereas the latter are characterised by legal and organizational heterarchy. Kjaer further differentiates between three forms of governance structures in the EU context, namely comitology, (regulatory) agencies and the Open Method of Coordination.[6] However, for the purpose of this paper EU governance should be construed as any political or legislative decision-making or administrative action within the Union, notwithstanding the institution or body being in charge of it, which corresponds to the general use of the term in EU practice.

In the sections which follow the author endeavours to outline the most significant measures and policies which were undertaken both through the EU (Community method) and intergovernmental channels with a view to strengthening the economic governance within the Union, and in particular amongst the 17 member states of the euro area. To state that the EU has been undertaking a historic step forward in of its economic governance is, in the author's opinion, not exaggerated. To what extent this view is justified and where it leads the Union as a whole is yet to be determined.

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[2] Ibidem.

[3] J. Přibáň, *Legal Flexibility, Governance and Differentiated Integration: On Functional Differentiation of EU Law and Politics*, in: *Which Europe? The Politics of Differentiated Integration*, eds. K. Dyson, A. Sepos, Macmillan, Palgrave 2010, p. 32.

[4] Ibidem.

[5] P.F. Kjaer, *Between Governing and Governance. On the Emergence, Function and Form of Europe's Post-National Constellation*, Heart Publishing, Oxford – Portland 2010, p. 163.

[6] Ibidem, notably Chapter 3.

## 1. Weak architecture of EMU *vis-à-vis* the crisis

By virtue of Article 3(4) of the Treaty on European Union (TEU), the Union shall establish an Economic and Monetary Union (hereinafter referred to as EMU) whose currency is the euro. The idea of the common European currency was conceived in the very first years of the European Community[7] and institutionalized under the Treaty of Maastricht, concluded in February 1992.

As aptly formulated by Philippe de Schoutheete and Stefano Micossi[8], EU member states fall into one of the three categories, namely: 'ins', 'pre-ins' (that is those committed to join EMU, albeit not yet able or ready to do it) and 'others'(that is those not intending to join EMU). As claimed by the authors, "[b]ecause of the 'pre-ins', the Union is a multi-speed system (EMU as a shared objective, but in a different time frame); because of the 'others', the Union is also a multi-level[9] system (EMU not a shared objective, in any time frame)."[10] Irrespective of whether EU member states are committed to join or not, or even remain or withdraw from EMU[11], by virtue of Article 121(1) of the Treaty on the Functioning of the European Union (TFEU) all "Member States shall regard their economic policies as a *matter of common concern*" [emphasis by the author].

The establishment of the EMU and the inception of the common currency *euro* were beyond doubt milestones of European integration. Common currency provided for an efficient means to reduce transaction costs within the eurozone, thus facilitating trade and promoting investment between its member states. However, the onset of the financial crisis, followed by the sovereign debt crisis in the euro area, unveiled serious flaws in the original institutional setup of the EMU. The Maastricht Treaty established a monetary union, but did not provide for a sound system to govern its economic policies and the subsequent treaties, including the Treaty of Lisbon, have brought about no significant improvements.[12]

[7] For a detailed account of the developments which accompanied the introduction of the *European Currency Unit* and subsequently *euro*. See e.g. *Der lange Weg zum euro*, Referat Archiv- und Dokumentationszentrum (CARDOC), Generaldirektion Präsidentschaft, Europäisches Parlament, No. 8, February 2012.

[8] Ph. de Schoutheete, S. Micossi, *On Political Union in Europe: The changing landscape of decision-making and political accountability*, "Centre for European Political Studies' Essay" 2013, no. 4 (21), p. 3.

[9] In this context it would appear more appropriate to use the term "mulit-tier", as "multi-level" pertains to the distinction: regional-national-transnational-global.

[10] Ibidem.

[11] For a more exhaustive discussion of this theme, see *infra*.

[12] In this sense also P. Schiffauer, *Konstitutionelle Aspekte der Europäischen Wirtschaftsregierung. Gefahr oder Chance für europäische Sympoliteia?* Beitrag zum Gedenksymposion für Dimitris Th. Tsatsos, 6.-7. Mai 2011.

Consequently, under the EU law in force there were no adequate instruments to ensure financial stability and address mounting macroeconomic imbalances.

Whilst 2008 marked the break of the financial crisis, the imbalances within the eurozone, just as private and public debt or loss of competitiveness) were accumulated for over a decade and stirred to a great extent by a global credit boom, notably the "sub-prime" practices in the United States. One of the symptoms and simultaneously causes of the deepening recession consisted in the sudden and massive withdrawal of foreign capital which benefited the South of the eurozone and financed branches such as construction (mainly Spain), but also consumption (with Greece being its most infamous "beneficiary"). Also the risks inherent in the unforeseeable financial markets were by and large underestimated, thus allowing for moral hazard of *Casino-Kapitalismus*[13] devoid of any reliable regulatory framework.

On the subject of macroeconomic imbalances: they pertain to the existence of disequilibria in the external position, that is the current account of member states vis-à-vis one another, and not to the position of the entire euro area vis-à-vis other world economies.[14] In his report outlining the action plan required to ensure the stability and integrity of the EMU, President of the European Council Herman Van Rompuy stated the following: "The euro area is confronted with a rapidly evolving international environment characterised by the rise of large emerging economies. A more resilient and integrated EMU would buffer euro area countries against external economic shocks, preserve the European model of social cohesion and maintain Europe's influence at the global level."[15]

It is often argued that the measures undertaken as part of the crisis management have been showing rather chaotic efforts than a well-thought plan of intervention, with quantitative tools outweighing the qualitative ones. It is hardly surprising, though, given the necessity to deliver a dynamic and efficient crisis response in the absence of adequate authorities (such as e.g. supervisory and resolution bodies for the financial sector), rules and policies, not to mention the limited readiness of the member states to accept a further pooling of sovereign rights at the EU level.

In this context the following aspect deserves attention: what makes the EMU unique among modern monetary unions is that it combines centralised monetary

[13] U. Bullmann, M. Roth, Th. Schäfer-Gümbel, *Von der Krisenunion zur Solidaritätsunion. Mehr Mut. Mehr Politik. Mehr Europa*, Friedrich Ebert Stiftung 2012.

[14] D. Gross, *Macroeconomic Imbalances in the Euro Area: Symptom or cause of the crisis?*, "CEPS Policy Brief" 2012, no. 266, based on a Note entitled: *How to deal with macroeconomic imbalances?* prepared by the author in April 2012 at the request of the European Parliament's Committee on Economic and Monetary Affairs.

[15] H. van Rompuy, *Towards a genuine economic and monetary union, 5 December 2012, in collaboration with the President of the Commission, the President of the Eurogroup and the president of the European Central Bank*, available also at www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/134069.pdf.

policy with decentralised responsibility for most economic policies.[16] While the pace of financial markets integration was accelerating, a financial stability architecture remained nationally segmented. It is this peculiar asymmetry that is largely to blame for the weak and inefficient coordination among the relevant authorities in crisis management.[17] In addition, governments which fail to observe the agreed rules underpinning EMU as laid down in the Stability and Growth Pact (SGP)[18] may hardly be expected to perform well when it comes to prudential supervision of economic policies, unless subjected to peer pressure.

## 2. Bail out mechanisms

The escalation of the liquidity crisis for the banks had a contagious effect on the budgetary condition of the EU member states, most of which by 2010 had shown excessive deficit. Greece was bailed out by euro area states and the International Monetary Fund (IMF) in May 2010 and (for the second time) in October 2012.[19] The expansion and aggravation of the sovereign debt crisis posed a serious risk for the common currency. One of the steps to try to keep the euro-System functioning, as well as ensure instruments for the bail-outs which were to followed (Ireland and Portugal in December 2010 and May 2011, respectively) consisted in the establishment of the temporary crisis resolution mechanisms, namely the European Financial Stabilisation Mechanism (EFSM)[20] and the European Financial Stability Facility (EFSF).

EFSM was established on the basis of Article 122(2) TFEU which permits financial assistance to be granted to an EU member state which is "in difficulties or is seriously threatened with severe difficulties caused by natural disasters or *exceptional occurrences beyond its control*" [emphasis by the author]. Notwith-

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[16] Communication from the Commission: A blueprint for a deep and genuine economic and monetary union. Launching a European Debate, Brussels 28.11.2012, COM(2012) 777 final, p. 2.

[17] Ibidem, p. 3.

[18] Under the Stability and Growth Pact, the EU disposes of the preventive and corrective mechanism vis-à-vis its Member States' budgets. The former entails provision of information by states and its evaluation by the European Commission. If need there is, the Commission issues relevant recommendations (the most important aspect being the assessment whether the states have not "excessive deficit," which is the case if their outcomes are not below the reference values of 3% of GDP with regard to a general government budget deficit and 60% of GDP with regard to a general government debt burden).

[19] Interestingly article 125(1) TFEU is widely understood as opposing 'bail out'. One may consider that the financial assistance to Greece (and other states) was nevertheless a bail-out, since the provision in question could rather be understood as opposing any mandatory bail-out or prior commitment to proceed to a bail-out, in which sense one might perhaps understand the European Court of Justice judgement in the *Pringle* case, as cited *infra.*

[20] Council Regulation (EU) No 407/2010 of 11 May 2010 establishing a European financial stabilisation mechanism.

standing the debatable reservations as to whether the financial collapse of Greece and of other states under the bail-out procedure may be interpreted as “beyond their control”[21], this €60 billion worth financial support instrument has been activated for Ireland and Portugal, for a total amount up to €48.5 billion (with the ceiling of €22.5 billion for Ireland and €26 billion for Portugal).

The EFSM was conceived as a part of the wider safety net comprising the European Financial Stability Facility (EFSF) and, most importantly, a new permanent crisis resolution mechanism, i.e. the European Stability Mechanism (ESM, see *infra*). As to the EFSF, it is a supplementary instrument established on the basis of a treaty under international law (intergovernmental agreement) separately from the founding Treaties of the EU. Its lending capacity is guaranteed by the participating states i.e. all euro area states plus the prospective members – Poland and Sweden (€440 billion) and additional funding from the IMF (€250 billion), and accessible for eurozone states alone.

## 3. Enhanced surveillance and coordination of national fiscal and growth policies

One of the instruments aimed at safeguarding stronger surveillance of national fiscal policies as well as deeper coordination of growth policies is known as a *European Semester*. It is a yearly cycle of economic policy coordination which is based on the Stability and Growth Pact, an early instrument of economic governance which accompanied the introduction of the Euro. The semester starts in January when the European Commission presents an Annual Growth Survey and sets out Union’s priorities for the coming year oriented at enhancing growth and job creation. In March, on the basis of the Annual Growth Survey the European Council issues guidance for challenges awaiting member states. They, in turn, submit their plans for sound public finances (Stability or Convergence Programmes) and reforms and measures aiming at boosting growth in areas such as employment, research and innovation, energy or social inclusion (National Reform Programmes). The submitted programmes are assessed by the Commission and the Council before the start of the annual round of national budget making. The formal adoption of the country-specific recommendations by the Council takes place in June/ early July.

Given that the first full run of the European Semester eventuated in 2012, it is premature to judge as to its long-term efficiency, albeit is constitutes a major innovation which has all the chances to become successful. Its large-scale objective is motivating member states to work towards the accomplishment of the Europe

[21] In this sense e.g. A. Duff, *On Governing Europe*, “Policy Network” 2012, p. 27.

2020[22] flagship initiatives, namely (employment, research and development/ innovation, climate change/ energy, education and poverty/ social exclusion). Finally, meetings at the ministerial level within the European Semester constitute an excellent opportunity for peer review on specific policy matters.

## 4. New EU fiscal governance: Six-Pack, Two-Pack and Fiscal Compact

In autumn 2010 the European Commission proposed a package of measures aimed at economic and budgetary surveillance, commonly known as the *Six-Pack*[23], which was seen as the most significant reinforcement of economic governance in the EU since the establishment of the EMU.[24] Six-Pack comprises three Regulations and one Directive strengthening the budgetary surveillance framework, and two Regulations launching a new surveillance procedure for states with excessive macroeconomic imbalances. The said package of legislation was finally overhauled in December 2011 and it radically strengthened the corrective arm of the Stability and Growth Pact among others by way of launching the Excessive Deficit Procedure (EDP) whenever a member state exceeds the debt threshold of 60% GDP at the defined rate of 1/20$^{th}$ per annum.[25] Moreover, member states will now face the levy of an interest-bearing deposit if their budgetary position is not strong enough and a non-interest bearing deposit optionally convertible to a fine, with both deposits amounting to 0.2% of GDP and serving as a preventive and corrective measure, respectively.[26]

As to the Directive constituting part of the Six-Pack, it defined the minimum requirements for national budgetary frameworks with an objective of safeguarding that the national level decision-making is set up so as to deliver policy which is in line with the EU rules (this objective being also endorsed in the intergovernmental Fiscal Treaty, see *infra*).

Finally, a very important step consists in introducing the reverse qualified majority rule to impose sanctions on errant eurozone states. Whereas previously such decisions required the support of the Council expressed by qualified majority vote (QMV), under the present regulation qualified majority in the Council will be

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[22] Europe 2020 strategy was launched by President Barroso (COM(2009)647) and aimed at boosting economic recovery.

[23] OJ, L 306, 23.11.2011.

[24] J.-M. Barroso, *La gouvernance européenne et la méthode communautaire, discours d'ouverture par le président de la Commission européenne, Séminaire sur la méthode communautaire organisé par Notre Europe et le Bureau des conseillers de politique européenne (BEPA)*, in: *Éléments de synthèse*, eds. Y. Bertoncini, V. Kreilinger, Brussels, 28 February 2012, p. 42.

[25] COM(2010)522.

[26] COM(2010)524.

required to halt the sanction imposed by the Commission, thus substantially reinforcing the latter institution's decision-making power in this regard.

A further step towards strengthening the budgetary surveillance framework was made due to the adoption of *Two-Pack.*[27] It is a mini-package consisting of two regulations, the legal basis of which is Article 136 TFEU, put forth by the Commission in November 2011. Its objective is to further strengthen budgetary surveillance and coordination with a view to more effective preventive and corrective action in case of deviations from the European budgetary policy requirements/benchmarks (as set out in the European budgetary surveillance framework, SGP). More precisely, all euro-states will be obliged to submit ahead of parliamentary adoption and according to a common timetable their draft national budgets to the Commission and their eurozone partners. Two-Pack also strengthens the Commission's powers to intervene in the fiscal policies of member states experiencing severe difficulties regarding their financial stability or officially under a bail-out programme. Thus the Two-Pack has a far-reaching legal implications, since, in effect, the EU becomes "the external supervisor of the national budget making."[28]

## 5. Treaties outside the Treaties: Lack of Treaty-based instruments or of political will in the moment of the crisis?

Both Six-Pack and Two-Pack have proved useful, albeit not sufficient instruments to safeguard fully credible fiscal discipline within the eurozone. The initial idea was to introduce a fundamental reform of the fiscal rules and commitments by revising Protocol 12 of the EU Treaties on the excessive deficit procedure. However, given the UK government's veto[29] the rest of the European Council agreed on 9 December 2011 to proceed to further fiscal integration on the basis of a new intergovernmental treaty.

The *Treaty on Stability, Coordination and Governance* in the Economic and Monetary Union (commonly referred to *Fiscal Compact*, albeit it is the fiscal part of the Treaty; henceforth TSCG or Fiscal Treaty) was signed on 2nd March 2012 by heads of state or government of 25 Member States (the Czech Republic and the United Kingdom were not among the signatories).[30] In accordance to its Article 1(1), the Fiscal compact Treaty was concluded with a view to:

[27] OJ, L 140, 27.05.2013.

[28] A. Duff, op. cit., p. 33.

[29] David Cameron had de facto presented a document featuring seven demands which other heads of state and government refused to succumb to.

[30] From the normative standpoint, it is noteworthy that the entry into force of this Treaty is not subject to unanimity constraints required normally for the EU Treaties and entered into force when ratified by twelve out of the seventeen Eurozone states.

"– strengthen the economic pillar of the Economic and Monetary Union" by adopting a set of rules intended to foster budgetary discipline,

– strengthen the coordination of the participating states' economic policies

– improve the governance of the euro area.

Pursuant to Article 3(2) of the TSCG, the Contracting Parties are obliged to transpose the rules of balanced budgets into their national legal order no later than one year after the entry into force of the Treaty and preferably trough provisions of constitutional nature. Poland is among the states which have already incorporated such a rule in their budgets (other states include Austria, Germany, Hungary and Spain, incidentally the rules of the German budget are more stringent than that imposed by the Treaty).

The Fiscal Compact does not contradict the Six-Pack and will run parallel to it. Some provisions of the TSCG mirror concepts enshrined in the Stability and Growth Pact as reformed by the Six-Pack, such as medium-term objectives (MTOs), significant deviation, exceptional circumstances.[31] On the other hand, some provisions of the TSCG are operating more severe constraints on the States than that of the Six-Pack. By way of example, the TSCG imposes on the contracting parties to establish debt breaks in national law; this measure goes clearly further than the provisions which the Union was legally capable to adopt in the Six Pack. Moreover, it stipulates that at each stage of the Excessive Deficit Procedure (EDP) the Commission's proposals or recommendations concerning a "euro-area Member State" which is in breach of the deficit criterion will be deemed as enjoying the support of the eurozone countries in the Council, unless a qualified majority of them is against it. In practice it means that a reverse qualified majority voting (RQMV) applies to all stages of the EDP, even if not foreseen in the six-pack, whenever a "euro-area Member State" is in breach of the deficit criterion.[32]

It is noteworthy that the ratification of the Fiscal Treaty was made a condition *sine qua non* of receiving financial assistance from the ESM. The Treaty establishing European Stability Mechanism was concluded by the euro area Member States on 2nd February 2012.[33] The modalities of the entry into force of the ESM Treaty constitute a certain curiosity, namely pursuant to Article 48(1) it will take effect once ratified by the signatories representing 90 per cent of the capital subscription.

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[31] www.ec.europa.eu/economy_finance/articles/governance/2012-03-14_six_pack_en.htm [10.9.2013].

[32] Ibidem.

[33] The ESM Treaty was originally signed on 11th July 2011, but subsequently modified to endorse the improvements agreed on by the heads of state and government of the euro area in July and December 2011 aimed at *inter alia* enhanced effectiveness and flexibility of the mechanism, timing of the capital contributions and providing for urgency decision-making procedures.

The establishment of the ESM was initially considered to be conditional on the amendment of Article 136(3)[34] which was supplemented by the following provision: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality."

As is the case with the Fiscal Treaty, the operation of the ESM relies on the involvement of the EU institutions. Based on the assessment of the Commission and the ECB, the Board of Governors of the ESM makes a decision whether or not to grant stability support to a state in distress (see Article 5). Under both treaties the ECJ is assigned an arbitration role, as can be provided for by virtue of Article 272 TFEU.

The ESM was inaugurated in October 2012 and is now fully operational. According to the European Commission[35], it is "the world's most capitalised international financial institution and the world's biggest regional firewall (€500 bn). Its creation is a key step for ensuring that the euro area has the capacity needed for rescuing Member States experiencing financial difficulties from default." In its role as a fiscal backstop for eurozone countries, and possibly also their banking systems[36], the ESM plays a crucial role in setting up a safety net.

The above discussed intergovernmental treaties serve as a perfect exemplification of the fact that this level of cooperation and decision-making is a growing trend in the context of the crisis management. The increase of intergovernmentalism is, however, subject to strong criticism by those favouring the *Community method*, that is decision-making involving EU institutions, notably the European Commission and the European Parliament. Since the discussion of the benefits of Community method to the democratic process is beyond the scope of this paper[37] suffice it to say here that the practice of intergovernmental agreements being concluded outside the treaties and only subsequently incorporated into the body of the primary EU law is by no means a new phenomenon, of which the Schengen Agreement and Prüm Treaty are perfect examples. In the similar manner Article 16 of the Fiscal Treaty explicitly foresees its provisions shall be incorporated into the legal framework of the EU no later than five years following its entry into force.

[34] In the *Pringle* case discussed *infra* the ECJ clarified that the entry into force of the Decision 2011/199 introducing the provision in question is not a precondition for concluding and ratifying the ESM Treaty because the proposed amendment merely confirms the existence of the competence already possessed by the member states. This de facto means that the Treaty change was not necessary under EU-law for putting the ESM into place.

[35] Commission's blueprint of 28.11.2012.

[36] D. Schoenmaker, D. Gros, *A European Deposit Insurance and Resolution Fund – An Update*, "CEPS Policy Brief" 2012, no. 283, p. 2.

[37] I. Jędrzejowska, *A reshaped Economic and Monetary Union – still attractive, but hardly legitimate?*, "Zeszyty Naukowe WSB" 2014, no. 3(41).

Interestingly, as argued by Janis A. Emmanouilidis[38], for any cooperation outside the Treaties, an *Intergovernmental Avantgarde* is a preferable form since its clear objective is to integrate the legal norms adopted under intergovernmental agreement into the body of the EU Treaties at the soonest possible moment. In turn, a loose long-lasting cooperation by a smaller group of member states established on the basis of *inter se* agreements poses numerous risks, from exacerbating the coordination between different policy areas to the weakening the EU's supranational institutional architecture by the creation of parallel institutional structure.[39] One more noteworthy characteristic of intergovernmental cooperation is that, as a matter of principle, it remains open for other states to join at a later stage when ready or after having fulfilled the necessary criteria, as is the case with the EU Treaty based form of differentiated integration, namely enhanced cooperation (see Article 20 TEU). At any rate, international agreements outside the Treaties the aim of which is to realise the objectives of the Treaties should be used as absolute *ultima ratio* instrument of differentiated integration. It may not be denied that different levels of cooperation and integration have become an inherent characteristic of the EU's architecture, with the degree of differentiation being on the rise, of late in particular in the economic field. Nevertheless, such differentiated integration must respect the unity, effectiveness and coherence of the European legal order and, as emphasised above, remain open for all Member States willing to join.[40]

## 6. Compatibility of the ESM and Fiscal Treaty with the primary EU law

The ESM and the Fiscal Treaty have been challenged before the European Court of Justice (ECJ) *inter alia* for being in breach of the "no bail-out clause" laid down in Article 125 TFEU which de facto prohibits any financial liability of the Union as well as its member states for the debts of an individual member state.[41]

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[38] J.A. Emmanouilidis, *Institutional Consequences of Differentiated Integration*, Discussion Paper, Centre for Applied Policy Research, Munich 2007, pp. 7f, 16.

[39] Ibidem, p. 16.

[40] See recital E in: R. Gualtieri, R. Trzaskowski, *Report on constitutional problems of a multi--tier governance in the European Union A7-0372/2013*, AFCO, European Parliament.

[41] Article 125(1) TFEU stipulates that "[t]he Union 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 of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. 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 of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project."

In its judgment of 27 November 2012[42] the ECJ ruled that the quoted Treaty Article is not intended to prohibit either the Union or the Member States from granting all forms of financial assistance to a Member State."[43] Article 125 TFEU was drafted with a view to ensure that member states formulate and adhere to a prudent budgetary policy by subjecting them to the logic of the market should they enter into debt. Thus the cited provision may be construed as a kind of incentive for member states to pursue a sound budgetary policy and does not preclude that euro area member states provide voluntary financial assistance to a fellow euro-state in distress.

The ECJ grounds its interpretation as to the compatibility of financial assistance with Article 125 TFEU on the following criteria:

– liability for commitments remains on the part of the recipient member state and is not assumed by the ESM[44];

– ESM assistance remains subject to strict conditionality, i.e. it is granted as a last resort and to the extent which is indispensable to ensure the financial stability of fellow euro-states and the euro area at large; ultimately it aims at prompting the recipient state to implement a sound budgetary line.[45]

In respect of the modification of Article 136 TFEU, the ECJ ruled that the European Council was justified in applying the simplified revision procedure of Article 48(6) TEU as means of introducing a new provision (par. 3) into Article 136 TFEU.[46] Moreover, the Court concluded that the entry into force of the provision in question is not a precondition for concluding and ratifying the ESM Treaty.

Last but not least, the ECJ deemed the allocation of tasks by the ESM Treaty to the EU institutions (the European Commission, the ECB and the ECJ) as lawfully made. The Court's stance is 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."[47] Incidentally, it is arguable that the association of EU institutions in the cooperation between governments outside the Union may facilitate integration of a relevant legal *acquis* into the body of the EU Treaties.[48]

[42] Case C-370/12 – *Pringle* (reference for a preliminary ruling from the Supreme Court of Ireland).

[43] Par. 130 of the judgement.

[44] See par. 138-141 of the judgment.

[45] Par. 142-143.

[46] European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 TFEU with regard to a stability mechanism for member states whose currency is the euro.

[47] Par. 158 of the judgement.

[48] J.A. Emmanouilidis, op. cit., pp. 16-17.

## 7. Paths towards a "genuine Economic and Monetary Union"

As part of the ongoing efforts to lift Europe out of the crisis and following the mandate given by the European Council, the President of the European Council Herman van Rompuy, in close collaboration with José Manuel Barroso, President of the European Commission, Jean-Claude Juncker, President of the Eurogroup and Mario Draghi, President of the European Central Bank, on 25 June 2012 published a report entitled "Towards a genuine Economic and Monetary Union." The report identified four key building blocks for improving EMU, namely: integrated financial, budgetary and economic framework, as well ensuring democratic legitimacy of decision-making within the EMU.

In a revised version of the report of 5 December 2012 the President of the European Council points to three stages which the process towards a genuine Economic and Monetary Union could rest on, namely:

– Stage 1 (End 2012-2013) – ensuring fiscal sustainability and breaking the link between banks and sovereigns,

– Stage 2 (2013-2014) – completing the integrated financial framework and promoting sound structural policies,

– Stage 3 (post 2014) – improving the resilience of EMU through the creation of a shock-absorption function at the central level.[49]

As regards the first stage, apart from thorough implementation of a stronger framework for fiscal governance it entails establishing the operational framework for direct bank recapitalisation through the ESM, harmonisation of national resolution and deposit guarantee frameworks, setting up of a Single Supervisory Mechanism (SSM) for the banking sector and the entry into force of the Capital Requirements Regulation and Directive (CRR/CRDIV).

A first step towards creating the Banking Union, which is considered as a major building block of the genuine EMU, was conferring supervisory authority for all eurozone banks on the European Central Bank (ECB). A crucial element of the Banking Union is a new Single Supervisory Mechanism (SSM). Incidentally, the majority of EU member states supervisory structures follow the single supervisor model, with (i) Central Bank acting as financial sector supervisor (e.g Czech Republic), (ii) Central Bank supervising only banking sector (Germany), (iii) supervision of financial sector by an independent body (e.g. Poland – Komisja Nadzoru Finansowego, Sweden – Finansinspektionen). The SSM transfers the responsibility for prudential financial supervision from national supervisors to the ECB, which will have to separate its new supervisory activities from those pertaining to monetary policy. Whilst SSM membership is reserved for euro area countries,

[49] H. van Rompuy, op. cit., p. 4f.

it allows for the option of a supervisory cooperation with non-eurozone member states, which could "opt-in" to the SSM providing they carry out ECB's instructions. Under the new supervision framework the European Banking Authority (EBA) will continue its supervisory mission applying to all member states.

The successful completion of the first stage is regarded as the means to stop the development of negative feedback loops between banks and sovereigns, which phenomenon is rightly identified as one of the causes of the sovereign debt crisis.

In turn, the completion of the integrated financial framework as foreseen in the second stage would involve above all the establishment of a common resolution authority and appropriate backstop to safeguard that failing banks restructuring or resolution decisions are taken "swiftly, impartially and in the best interest of all."[50] The single resolution mechanism would cover all banks supervised by the SSM and complement its activity in that the single resolution authority would ensure efficient resolution of banks which the SSM assessed as needing to be resolved. The overall objective is to ensure that the private sector bears the primary burden of bank resolution costs and thus limiting the cost of bank failures to taxpayers.[51]

The last stage on the "Roadmap" towards the genuine Economic and Monetary Union involves the establishment of the fiscal capacity for EMU. The official documents published by the EU decision-makers allow for two possible interpretations of the additional EMU fiscal capacity. The first is "an incentive-based enforcement instrument for country-specific recommendations under Article 121."[52] It would be based on contractual arrangements[53] between Member States and EU institutions. Such fiscal capacity would be mandatory for euro area member states and voluntary for the other EU members wishing to participate. Alternatively, the additional fiscal capacity can also be construed as "an insurance-type [solidarity]

[50] Ibidem, p. 4. Cf. also the recent Commission proposal for the single resolution mechanism COM(2013)0520.

[51] At the time of drafting this paper (September 2013) the legislative negotiations concerning the SSM should have been completed (special legislative procedure – consultation) and a vote on the elements was taken by the EP on 12.09.2013, see: European Parliament legislative resolution of 12 September 2013 on the proposal for a Council regulation conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (COM(2012)0511 – C7-0314/2012 – 2012/0242(CNS)) and Position of the European Parliament adopted on 12 September 2013 with a view to the adoption of Council Regulation (EU) 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions P7_TC1-CNS(2012)0242.

[52] R. Repasi, *Legal options for an additional EMU fiscal capacity, European Parliament's Directorate General for Internal Policies*, Policy Department C, 2013, p. 28, available also at www.europarl.europa.eu/studies.

[53] Very critically on the possible "contractualisation" of the relationship between the EU and its member states of the Draft report on constitutional problems of a multi-tier governance in the EU, (2012/2078(INI)), Rapporteurs: R. Gualtieri and R. Trzaskowski, point 18.

mechanism[54] between euro area countries to buffer large country-specific economic shocks."[55] This model of fiscal capacity requires an own central budget, which automatically raises a question concerning the possible sources of revenue. It is noteworthy that such revenue may be realised under the existing EU law as long as it would be generated from member states' contributions or a share of member states' taxes (e.g. a national financial transaction tax). Yielding of own revenue on the basis of a tax levied by the European Union or loans (the current EU budget has no ability to borrow) would require a Treaty change.[56] According to the European Council President's report, the resources could take the form of national contributions, own resources, or a combination of both.[57] Moreover, "contributions from, and disbursements to, national budgets would fluctuate according to each country's position over the economic cycle."[58] Finally, a more elaborate option for the fiscal capacity would entail the establishment of a Treasury function with clearly defined responsibilities (EMU Treasury is mentioned both in the Van Rompuy's report[59] and the Commission's blueprint.[60]

## Conclusions: Not an easy way forward

Despite the bitter experience of the economic recession and still somewhat gloomy prognosis for time to come, one could argue that the crisis per se became a stimulus for the correction of the existing flaws in the construction of EMU. From this perspective the crisis may be regarded as an opportunity the lessons of which should not be wasted. One of them is that the interdependence of member states in the EU and notably EMU has reached such intensity that any decision regarding economic or fiscal policy taken at the level of an individual state has potentially considerable impact upon other member states. The weakness of the euro architecture is an inevitable consequence of the fact that when it was established, the option that financial difficulties of one member state could pose a direct threat for the whole euro system was not taken into account.[61]

The extent to which sovereign states have allowed the "intrusion" in their domestic affairs, of which budget may justifiably be considered as one of the most sensitive fields, is beyond doubt to be attributed to the emergency of the economic

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[54] In its conclusions of 14 December 2012, the European Council refers to the additional EMU fiscal capacity in terms of "solidarity mechanisms."

[55] Ibidem, p. 9.

[56] Ibidem, pp. 24, 28.

[57] H. van Rompuy, op. cit., p. 4f.

[58] Ibidem, p. 11.

[59] Ibidem, p. 12.

[60] See the Commission's blueprint, pp. 33, 38, 40.

[61] Ibidem, p. 14.

crisis. The far-reaching transfer of competences to the European economic executive level had been unthinkable preceding the outbreak of the crisis. Stronger surveillance and coordination of national fiscal and growth policies are believed to be essential instruments for the purpose of ensuring "the proper functioning of economic and monetary union", with both the said measures as well as the cited objective being laid down *expressis verbis* in Article 136(10) TFEU.

Six-Pack, Two-Pack and the Fiscal Treaty constitute a new governance framework designed to provide for *ex ante* coordination of annual budgets of euro-countries and enhance the surveillance of member states experiencing financial difficulties. Jointly with the ESM they amount to a critical step towards viability of the euro and the Single Market. In March 2013 the Commission proposed putting in place a new mechanism of 'ex ante coordination'. It would compel member states to submit detailed information about a reform which they are about to undertake. The Commission would provide the Council with an assessment of the reform's effectiveness and of its potential spill-overs on the functioning of the euro area.

However, there are also grounds for scepticism vis-à-vis the prospect of ever increasing EU's interference into national policy-making. By way of example, it is arguable that mechanisms such as the new 'ex ante coordination' compelling member states to submit to the Commission detailed information about a reform which they are intending to undertake (regarding e.g. structural policies on products, labour and pensions) may be useful from a collective standpoint, albeit constitutes limited incentive for member states to initiate any radical reforms, if not a real deterrent.[62]

A less spectacular, albeit not irrelevant step undertaken by the European Commission in the crisis management consists in safeguarding financing for SMEs (small and medium sized enterprises) which are crucial for the revitalizing of the EU economy, but which suffer under lack of funding due to the credit crunch. Moreover, the European Commission sees an opportunity of improving governance of the European Single Market in the timely transposition of relevant directives, notably those concerning sectors with the highest growth potential, for the years 2012-2013 these being identified as network industries (such as energy and telecommunications) and key services sectors (trade, transport, business services and financial intermediation).[63] Given that practically no member state reaches the target of 0% for late and/ or incorrect transposition of directives, the Commission not infrequently resorts to decisive actions such as infringements procedures. It also called for the enforcement of the compliance with the judgments of the Court of Justice through penalty payment procedures.

[62] R. Thillaye, *Coordination in place of integration? Economic governance in a non-federal EU*, Working Paper 2013, no 32, Policy Network, p. 9, available also at www.foreurope.eu.

[63] Commission's Communication on governance adopted in June 2012.

Despite the *grosso modo* visible shift from a narrow focus on fiscal discipline to the very bold and comprehensive project of fiscal solidarity, until now there is no consensus on the pooling of risk through Eurobonds. It is clear that for several EU governments the sign up to debt mutualisation is out of question. The debate in Germany which, as the prime EU contributor remains by and large a trend setter in this respect, shows that authorities repudiate any presuppositions to the effect that green light by the *Bundesverfassungsgericht* for the ESM and Fiscal Compact[64] could be interpreted as the way forward to the Eurobonds and generally to the "transfer union."[65]

It seems that the very first mistakes of the crisis management are slowly being recognized, with even the IMF authorities admitting that excessive austerity policy to a great extent turned out counterproductive. Selected policies for smart, sustainable and inclusive growth must be revisited, or at least not completely overshadowed by the implementation of the new fiscal regulatory framework, as has largely been the case with the Europe 2020 Strategy. As rightly perceived by some economists, a well-thought social policy and even state assistance to the most disadvantaged may boost the economy.[66]

Certain mistakes in the crisis management resulted from the misguided assumption that the resilient economic formula of the North may be applicable with the same positive effect for the South. False diagnosis always translates into in-

[64] The Judgement of the German Federal Constitutional Court of 12 September 2012.

[65] See e.g. the interview with the German Finance Minister Wolfgang Schäuble (Staat und Recht, September 2011, no. 221, p. 8) who denied the existence of any pan-European "Haftungsgemeinschaft" (liability community). When commenting on the judgment of the Bundesverfassungsgericht (German Federal Constitutional Court) Schäuble stated: "Die EFSF ist weder der Weg zu Eurobonds noch zur Transferunion [...] Karlsruhe hat enschieden, dass der Euro-Rettungsschirm nicht dem Grunddesetz wiederspricht. Er dient der Verteidigung der Wärung und schafft Stabilität. [The EFSF opens neither the way to Eurobonds not to transfer union. The [German Federal Court in] Karlsruhe has decided that the euro rescue umbrella is not unconstitutional. It is aimed at the protection of the currency and restoring stability; translation I. J.].

[66] P. Krugman, *Sortez-nous de cette crise… maintenant!*, Flammarion, Paris 2012, p. 257. The author states that "il existe encore au moins un domaine dans lequel la dépense publique pourrait assez vite apporter un coup de pouce à l'économie : l'aide aux personnes en difficulté, à travers l'augmentation temporaire des allocation chômage et d'autres programmes de couverture sociale [...] Si vous placez de l'argententre les mains des individus en situation de précarité, il y a toutes les chances qu'ils le dépensent, et s'est précisément de cela que nous avons besoin" [there is still at least one area in which public spending could quickly bring a boost to the economy: aid to those in need, through the temporary increase in unemployment benefits and other social insurance programs [...]. If one puts money in the hands of individuals who find themselves in a precarious situation, there is every chance they will spend it, and this is precisely what we need, transl. I. J.]. For a very interesting account on smart and inclusive growth based on a more equitable (to be distinguished from equal) distribution of income according to the value that different economic actors create, see W. Lazonick, M. Mazzucato, *The Risk-Reword Nexus. Innovation, Finance and Inclusive Growth*, „Policy Network" November 2012.

adequate therapy. Even if the judgment may seem too severe, it is always illusive to believe that one solution could remedy the problems of the entire euro area. Adjustments of undertaken measures to the country specificities are indispensable and a natural consequence of discrepancies between individual economies arising among others from different growth and production systems, financial and labour market profiles, fiscal and social policies, etc.

In short, however weary one may be of the financial crisis on the European continent, it determines the trajectory of the future economic integration in the EU. Divided, united or multi-speed and multi-tier will Europe emerge of the economic downturn? The architecture of the post-crisis EU is still far from clear.

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## Wieloszczeblowe sprawowanie rządów w UE: dynamiczna i efektywna opowiedź na kryzys gospodarczy?

**Streszczenie.** Artykuł stanowi próbę rekonstrukcji najważniejszych wydarzeń w Unii Europejskiej od rozpoczęcia kryzysu finansowego i gospodarczego, ze szczególnym uwzględnieniem zarządzania kryzysowego w strefie euro. Nadrzędnym celem artykułu jest ocena skuteczności wieloszczeblowego sprawowania rządów w coraz bardziej zróżnicowanej pod względem gospodarczym strefie euro oraz całej Unii Europejskiej. Autorka formułuje krytyczne uwagi w przedmiocie ryzyka, jakie pociąga za sobą zbyt daleko idąca ingerencja w politykę suwerennych państw. Część podsumowująca stanowi swoistą prognozę co do ewentualnej architektury pokryzysowej Unii, w tym tak daleko idących projektów jak solidarne uwspólnienie długu (*transfer union*).

**Słowa kluczowe:** kryzys finansowy, dług publiczny, unia gospodarcza i walutowa, wieloszczeblowe sprawowanie rządów