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Prof. Dr. Christian Calliess, LL.M. Eur
Freie Universität Berlin

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Christian Calliess:

A New Institutional Design for the Governance of the Eurozone and the European Union? Deficits and Proposals

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Prof. Dr. Christian Calliess, LL.M.Eur*

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I. Introduction

"Crisis, what Crisis?" an album of the pop group Supertramp asked in the Seventies, showing a picture of a man enjoying the sun between waste on a dump. This might remind us of the actual situation in the Eurozone: Politicians and people lay back and relax in the sunbeams of the Outright Monetary Transactions program (OMT) of the European Central Bank (ECB). But, apart from the fact, that the OMT program is challenged by a preliminary ruling of the German Federal Constitutional Court to the ECJ,[1] the crises in the Eurozone is still far from being solved. Not least, because the current institutional framework of the Eurozone has proven to be insufficient in order to prevent or to resolve the financial and economic crises in a sustainable manner. The constitutional setting of the European Treaties was not capable of dealing efficiently and legitimately with the three fundamental issues of the current crisis: the banking crisis, the sovereign debt crisis and the competitiveness crisis, that led after all to a crisis of European democracy. All three facets of the current crisis mutually reinforced each other and therefore are closely interlinked with each other.

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* Prof. Dr. *Christian Calliess*, LL.M. Eur., M.A.E.S. (College of Europe Bruges) holds the Chair for Public and European Law at the Law Faculty of the Free University Berlin as well as an Ad Personam Jean Monnet Chair. He is an adviser of the German Parliament on questions concerning European Law, especially in the context of the crisis in the Eurozone. Moreover he is a member of the Glienicker Gruppe (see: www.glienickergruppe.de).
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[1] Federal Constitutional Court (FCC), case 2 BvR 2728/13 (14 January 2014), the preliminary reference is pending at the ECJ as Case C-62/14 *Gauweiler et al*. See also the contributions in the special issue of the *German Law Journal* 15 (2014), Issue Number 2. On the approach of the FCC towards European Integration in general see W Heun, *The Constitution of Germany* (Oxford, Hart Publishing, 2011), 186 ff.

II. Deficits in the Governance Framework of the Eurozone

1. Technical Deficits

In the course of the financial and European sovereign debt crisis the weaknesses in the structure of the European Economic and Monetary Union (EMU), which were repeatedly identified in theory, became apparent. The primary law framework - consisting of a 'communitarised' monetary policy (Article 127 seq. TFEU), but at the same time lacking a genuine common economic policy (Article 120 seq. TFEU) - sets expectations which have been met neither by the financial markets nor by the Member States.[2]

Of course, according to Article 3 (3) sent. 2 TEU, the European Union (EU) and its Member States are expected to achieve and to guarantee price stability. According to Article 127 (1) sent. 1 TFEU, this is first of all a task of the 'communitarised' monetary policy by the European System of Central Banks; the Member States are supposed to contribute to the maintenance of price stability by avoiding excessive government deficits (Article 126 (1) TFEU) within the context of their economic, financial and budgetary policy.[3]

But since the Maastricht Treaty of 1992 did not establish a supranational European economic and fiscal policy, compatible with the common European monetary policy, Member States can only *coordinate* their own economic policies within the Council framework (Article 121 TFEU).[4] To bridge this institutional gap Member States agreed on two instruments to defend the stability of the Euro:[5] As a first ring of defense they established the excessive deficit procedure (Article 126 TFEU). And as a second ring of defense they established the so called "No-Bail-Out-Clause" in Article 125 TFEU as a signal to the financial markets.

With regard to the excessive deficit procedure as provided in Article 126 TFEU, doubts have always existed concerning the question as to whether it can in fact take care of budgetary

[2] In detail C Calliess, 'Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' (2012) 71 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 113, 129 ff.
[3] M Herdegen, 'Price stability and budgetary restraints in the Economic and Monetary Union: the law as a guardian of economic wisdom' (1998) 35 *Common Market Law Review* 9.
[4] F Snyder, 'EMU-Integration and Differentiation: Metaphor for European Union' in P Craig/G de Burca (eds), *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011), 687, 694 ff.
[5] U Häde, 'Die europäische Währungsunion in der internationalen Finanzkrise – An den Grenzen europäischer Solidarität' (2010), 45 *Europarecht* 854, 856.

discipline in the Member States in political practice.[6] The weakening of the Stability and Growth Pact (SGP) at the instigation of Germany and France in 2005, confirmed this skepticism.[7]

Article 125 (1) sent. 2 TFEU basically aims to preclude the liability of a member state for financial commitments of another member state. The intention of this clause – together with Article 123 and 124 TFEU – is to secure in case of an increasing government debt that member states of the euro area are sanctioned via the financial markets by higher interest rates on their government bonds. That is why by all means no member state is obliged to be liable for the government debt of any other member state. Apart from that, the interpretation of the "No-Bail-Out-Clause" is highly controversial between legal scholars.[8] Especially voluntary financial facilities and the allocation of credits are often regarded as not being covered by the "No-Bail-Out-Clause". One may put forward that the wording of the "No-Bail-Out-Clause" is anything but clear. But apart from a situation, in which the stability of the Euro as a whole is threatened, the ratio of Article 125 TFEU requires a strict interpretation: Only if financial facilities for a Member State are prohibited comprehensively the "No-Bail-Out-Clause" can serve its purpose to incite member states to avoid excessive government deficits via higher interest rates on their government bonds. It is as well this interpretation the European Court of Justice (ECJ) gave Article 125 TFEU in its Pringle decision.[9]

Nevertheless the sovereign debt crisis as well as the competitiveness crisis in the Eurozone showed, that the financial markets reaction in the case of Greece and Portugal came much too late. The preventive intention of Article 125 TFEU failed, because financial markets with regard to the systemic interdependencies between the members of the Eurozone were betting

[6] C Konow, *Der Stabilitäts- und Wachstumspakt* (Baden Baden, Nomos 2002) 32 ff.
[7] See C Tomuschat, 'The Euro – A Fortress Threatened from Within' in Ligustro/Sacerdoti (eds), *Problemi e Tendenze del Diritto Internazionale dell'Economia. Liber Amicorum in Onore di Paolo Picone* (Napoli 2011) 275, 282 ff.
[8] In detail C Calliess, 'Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms' (2011) 14 *Zeitschrift für europarechtliche Studien* 213, 256 ff; M Selmayr, 'Die „Euro-Rettung" und das Unionsprimärrecht: Von putativen, unnötigen und bisher versäumten Vertragsänderungen zur Stabilisierung der Wirtschafts- und Währungsunion' (2013) 68 *Zeitschrift für öffentliches Recht* 259, 263 ff.; A de Gregorio Merino, 'Legal Developments in the Economic and Monetary Union during the Debt Crisis: the Machanisms of Financial Assistance' (2012) 49 *Common Market Law Review* 1613, 1625 ff.
[9] ECJ, Case C-370/12 *Pringle v Government of Ireland, Ireland and The Attorney General*, judgment of 27 November 2012, not yet reported, para 129 ff; in detail C Calliess, 'Der ESM zwischen Luxemburg und Karlsruhe" (2013) *Neue Zeitschrift für Verwaltungsrecht* 97, 101 f.; see also B de Witte/T Beukers, 'The European Court of Justice approves the creation of the European Stability Mechanism outside the EU legal order: *Pringle*' (2013) 50 *Common Market Law Review* 805.

on a Bail-Out. Not least, the lack of efficient banking supervision has led to a situation where member states were forced to "bail out" their national banks and ran even more into deficits.

Against this background it has become obvious, that the incentive structures in primary law intending to safeguard the Member States' discipline in budget policy — on the one hand the disciplining via the financial markets as laid down in Article 125 (1) TFEU and on the other hand the mutual monitoring in the excessive deficit procedure (Article 126 TFEU) — were incapable of fulfilling their intended function, which was to prevent a systematically relevant excess indebtedness of Eurozone Member States. Furthermore, the mere coordination of the national economic policies was incapable of achieving the — due to the existing monetary and economic interdependencies — in a monetary union by all means necessary policy adaptation with regard to the common monetary policy of the ECB.[10]

2. The Democratic Deficit

The European Council, and therefore the Heads of State and Government of the Member States have become key players in the Eurozone's government debt crisis. One reason for this is the already mentioned political decision not to establish an efficient – and with the common European monetary policy integrated – European economic and fiscal policy. As a result, Member States can only coordinate their own economic policies within the Council framework (Article 121 TFEU). This mere coordination is going along with a relatively low level of participation of the European Parliament, which does not make joint decisions – as in other areas – but is only informed of decisions made. Therefore the institutional framework suffers as well from a democratic deficit, to which I will come back later again.

Regardless of this contractually agreed coordination, a pure intergovernmental form of coordination developed during the financial and debt crisis – for example, with the rescue packages, the European Financial Stability Facility (EFSF) and the European Stability Mechanism (ESM), but also with the Fiscal Compact.[11] This intergovernmental form of coordination stands far apart from the Treaties due to the lack of European powers involved.

[10] In detail D Adamski, 'National Power Games and Structural Failures in the European Macroeconomic Governance' (2012) 49 *Common Market Law Review* 1319, 1320 ff.

[11] E Chiti/PG Teixeira, 'The Constitutional Implications of the European Responses to the Financial and Public Debt Crisis' (2013) 50 *Common Market Law Review* 683, 685 ff.; K Tuori/K Tuori, *The Eurozone Crisis: A Constitutional Analysis* (Cambridge, Cambridge University Press, 2014); see also in general M Ruffert, 'Personality under EU Law: A Conceptual Answer towards the Pluralisation of the EU', (2014) 20 *European Law Journal* 346.

Although it might be born pragmatically out of necessity, it is problematic in terms of democratic legitimacy if, within its framework, far-reaching decisions are made which create a quasi liability through the Heads of State and Government unified under the European Council without the European Parliament having to be involved.

The domineering role of the European Council when it comes to the financial and debt crisis could be interpreted as a sign of rejecting the "Community method" characterising European integration[12] and the specific "institutional balance"[13] set out in the European treaties. This "standard form" of European legislation is based on the sole right of initiative of the Commission, qualified majority voting in the Council, the joint decision-making of the European Parliament and full judicial control by the European Court of Justice.[14]

Based on the European principle of democracy (Article 10 (2) TEU), the Community method reflects the dual legitimacy concept set out in the treaty; according to this concept, the European Parliament as a representative of the Union and the Council as a representative of the Member States, legitimised by the national parliaments, are equally involved in adopting acts. [15] At the same time, the Community method represents the difference between international law and union law known as supranationalism, defined by primacy of application and direct effect compared with national law in the Member States.[16]

If the Union takes action based on the Community method, this fully corresponds to the concept of dual legitimacy typical of the European principle of democracy. Insofar as the Member States however coordinate their policies in the European Council, the line of legitimacy is lacking through the European Parliament because this is not involved in the decision-making process. Pursuant to the limitation on legitimacy stated in Article 10 (2) of the TEU, national parliaments must then offset this and ensure a sufficient level of legitimacy.

[12] cf. R Dehousse (Ed.), The 'Community Method'. Obstinate or Obsolete? (Palgrave Macmillan 2011).
[13] In detail JP Jacqué, 'The Principle of Institutional Balance' (2004) 41 *Common Market Law Review* 383 ff.
[14] See the description in: European Commission, European Governance – A White Paper, COM (2001) 428 final [2001] OJ C287/6.
[15] K Lenaerts/P van Nuffel, *European Union Law*, 3rd edn (London, Sweet and Maxwell 2011) para 20-005; see also Dann, 'The Political Institutions' in A von Bogdandy/J Bast (ed), *Principles of European Constitutional Law* 2nd edn (Oxford, Hart Publishing 2010) 237, 267 ff.
[16] R Dehousse, 'The 'Community Method' at Sixty' in R Dehousse (ed), *The 'Community Method'. Obstinate or Obsolete?* (Palgrave Macmillan 2011), 3, 4 ff.

Although the political decisions on establishing the "rescue packages" were made in European Union institutions, both the EFSF and the permanent ESM operate on formal intergovernmental agreements outside the European treaties. As a result the European Parliament did not contribute in establishing ESM legitimacy. Therefore, it is not only a necessity of the constitutional principle of democracy, but also one of the dual legitimacy set out in Article 10 (2) TEU, that national parliaments – in Germany, the Bundestag and the Bundesrat – make the decisive contribution to legitimacy.[17]

3. Conclusions

In order to resolve the current crisis and not least to prevent future crisis, the economic, political and democratic integration of the Eurozone has to be deepened. Addressing all three elements of the current crisis, a renewed European Economic and Monetary Union requires a **Fiscal Union, a Banking Union and a genuine Economic Union**. In an institutional perspective this means, that the Eurozone would need a powerful **Economic Government** which is democratic accountable to a **Euro-Parliament**. If the necessary Treaty amendments do not find the consensus of all Member States of the EU, a "Europe of Two Speeds" bringing together a "Coalition of the Willing" should be an option. In this case the Eurozone would need a new contractual basis of its own, a **Euro-Treaty**.[18] A starting point could be the Fiscal Treaty.

III. Fiscal Union

The concept of the Maastricht Treaty assumed that common debt rules as well as the No-Bail-Out-Clause of Art. 125 would solve the problem of the irresponsible building up of debt. Not only had the case of Greece showed this to be a delusion. Therefore, it was a first step to toughen sovereign debt rules with the "six-pack", the "two pack" and the Fiscal Treaty.

1. First Steps and Deficits

a. Secondary Legislation

[17] In detail C Calliess, 'Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' (2012) 71 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 113, 160 ff.
[18] Parts of the following proposals are part of our proposels in the Glienicker Gruppe, *Towards a Euro-Union* (2013), available at: http://www.glienickergruppe.de/english.html (last visited at 3 September 2013).

The 2011 package of secondary legislation (the so called "Six Pack"),[19] consisting of five regulations and one directive reforming and amending the SGP, is intended to counter the deficits and strengthen the discipline in budget policy in the Member States.[20] The realignment of the SGP predominantly tries to maintain budgetary discipline through tightened supervision and sanction possibilities regarding the Member States of the Eurozone. With regard to Member States having already infringed the SGP or being in a crisis another package of secondary legislation (the so called "Two Pack") was decided.[21]

However, those instruments, which are additionally based on Article 136 TFEU, push at the legal limits of current primary law. It is therefore crucial to consider the extent to which Article 136 TFEU permits such a deepened surveillance or sanctioning of the Eurozone Member States among themselves.[22] The main purpose of Article 136 TFEU is to intensify the coordination of the Economic Policy of the Member States in the Eurozone. By stating in Article 121 (1) TFEU that the Member States of the Union regard their economic policy as a matter of common concern, they acknowledge the actual economical interdependencies existing between them. Hence a substantive principle of mutual consideration regarding this interdependency, reflecting the general principle of sincere cooperation (Article 4 (3) TEU), is added to the procedural concept of coordination.[23] The intensified economic interdependencies between the Eurozone Member States, resulting from the common

[19] 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 1174/2011 of the European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8; Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; 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; 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; Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41.

[20] See H J Blanke, 'The European Economic and Monetary Union – between vulnerability and reform' (2011) 1 *International Journal of Public Law and Policy* 402, 408 ff.; D Adamski, 'National Power Games and Structural Failures in the European Macroeconomic Governance' (2012) 49 *Common Market Law Review* 1319, 1336 ff.

[21] Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 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 [2013] OJ L140/1; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 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 [2013] OJ L140/11.

[22] In detail M Ruffert, 'The European Debt Crisis and European Union Law' (2011) 48 *Common Market Law Review* 1777, 1793 ff; U Häde, 'Article 136 AEUV – eine neue Generalklausel für die Wirtschafts- und Währungsunion?' (2011) 66 *Juristenzeitung* 333 ff.

[23] cf. M Schulze-Steinen, *Rechtsfragen zur Wirtschaftsunion* (Baden Baden, Nomos 1998) 137 ff.

monetary policy, are reflected in Article 136 TFEU, as this Article increases the level of required consideration for the Eurozone. It thereby clarifies that the methods of cooperation, covered by the concept of coordination, such as information or consultation,[24] are to be enhanced. However, as its wording already clearly shows, the limit of the regulatory intent of Article 136 TFEU is reached when it is used to introduce monitoring systems or sanction provisions, for which Article 121 and Article 126 TFEU do not provide any legal basis.[25] As a consequence, the envisaged sanctioning of preemptive monitoring in Article 121 TFEU, the macro-economical monitoring, the need to address statistical data, as well as the possibilities of imposing sanctions in the excessive deficit procedure, remain in a legal 'limbo'. As a consequence a reform of primary law (within the framework of the simplified procedure according to Article 48 (6) TEU), seemed reasonable.

b. The Fiscal Treaty

However, after the option of a reform of the EU-Treaties, which existed prior to the European Council of 9 December 2011, was politically prevented by the British veto, the 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' (TSCG), also known as fiscal compact, steps beside the primary law of the EU as an autonomous international treaty.[26] The contracting parties are at least the members of the Eurozone, whereas the treaty is open for all Members of the Union (Article 15 TSCG). This 'emergency solution' is indeed unfortunate. However, such an option in the field of the Monetary Union has already been debated before, even prior to the SGP.[27] Just as then,[28] the current treaty also caused controversial legal debates.

[24] In detail B Braams, *Koordinierung als Kompetenzkategorie* (Tübingen, Mohr Siebeck 2013) 105 f.
[25] C Ohler, 'Die zweite Reform des Stabilitäts- und Wachstumspaktes' (2010) 25 *Zeitschrift für Gesetzgebung* 330, 338; U Häde, 'Artikel 136 AEUV – eine neue Generalklausel für die Wirtschafts- und Währungsunion?' (2011) 66 *Juristenzeitung* 333, 334 ff.
[26] P Craig, 'The Stability, Coordination and Governance Treaty: Principle, Politics and Pragmatism' (2012) 37 *European Law Review* 231; S Peers, 'The Stability Treaty: Permanent Austerity or Gesture Politics?' (2012) 8 *European Constitutional Law Review* 404.
[27] cf. C Konow, *Der Stabilitäts- und Wachstumspakt* (Baden Baden, Nomos 2002) 36 ff.; see in general C Herrmann, *Währungshoheit, Währungsverfassung und subjektive Rechte* (Tübingen, Mohr Siebeck 2010) 202 ff.; M Selmayr, *Das Recht der Wirtschafts- und Währungsunion, Erster Band: Die Vergemeinschaftung der Währung* (Baden Baden, Nomos 2002) 157 ff.
[28] U Häde, 'Ein Stabilitätspakt für Europa?' (1996) 7 *Europäische Zeitschrift für Wirtschaftsrecht* 138, 140 ff.; H J Hahn, 'Der Stabilitätspakt für die Europäische Währungsunion' (1997) 52 *Juristenzeitung* 1133, 1135; U Hartmann, 'Öffentliche Finanzpolitik in der EU' (1996) 7 *Europäische Zeitschrift für Wirtschaftsrecht* 133, 136.

aa. The New Budgetary Rule: A Debt Break?

Title III of the TSCG, which is headed 'fiscal compact', envisages in Article 3 (1) (a) that the budgetary position of the general government of the Contracting Parties shall be balanced or in surplus.[29] In concrete terms, the annual structural budget balance has to be in accordance with the country-specific medium-term budgetary objectives, with a lower limit of a structural deficit of 0.5 % of the GDP, as provided for in the revised SGP (Article 3 (1) (b) sent. 1 TSCG). This reference to the SGP reveals that the content of the budgetary rule largely resorts to the country-specific medium-term budgetary objectives already provided in secondary legislation (see Articles 2 (a) and 5 of Regulation 1175/2011). Along with this, Article 5 ff. of Directive 2011/85/EU obliges the Member States to introduce national budgetary rules which guarantee the compliance with the reference levels in Article 126 TFEU. The Member States must provide for consequences in case of non-compliance, as Article 6 (1) (c) of Directive 2011/85/EU determines. Now according to Article 5 of Regulation 473/2013 Member States shall establish independent bodies for monitoring compliance with the aforementioned fiscal rules. However, with its 0.5 % criterion, Article 3 (1) (b) sent. 1 TSCG determines a stricter target for the medium-term budgetary objective, since Article 2 (a) of Regulation 1175/2011 leaves greater scope for action of the Member States concerning this matter. The medium-term budgetary objective is therefore not allowed to exceed an annual cyclically adjusted deficit of 0.5 % of the GDP.

In the event of significant deviations from the medium-term objective or the adjustment path towards it, a correction mechanism is provided (Article 3 (1) (e) TSCG). This mechanism is based on common principles proposed by the European Commission,[30] concerning the nature, size and time-frame of the corrective action to be undertaken (Article 3(2) TSCG). The correction mechanism complements the Council recommendations under the revised SGP.[31] A

[29] See also in detail F Fabbrini, 'The Fiscal Compact, the 'Golden Rule' and the Paradox of European Federalism' (2013) 36 *Boston College International and Comparative Law Review* 1, 4 ff.; A de Streel, 'EU Fiscal Governance and the Effectiveness of its Reform' in M Adams/F Fabbrini/P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart Publishing 2014) 85, 88 ff.

[30] European Commission Communication, 'Common Principles on National Fiscal Correction mechanisms' COM (2012) 342 final.

[31] cf. Article 6 Regulation (EU) No 1175/2011 of the European Parliament and of the Council of 16 November 2011 amending Council Regulation (EC) No 1466/97 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies [2011] OJ L306/12; Article 4 (1), (2)

deviation from the rule of Article 3 (1) (b) TSCG may only occur in the exceptional case of an unusual event outside the control of the Contracting Party or in periods of severe economic downturn (Article 3 (1) (c) in conjunction with (3) (b) TSCG).

The Contracting Parties commit themselves in Article 3 (2) TSCG to enshrine the budgetary rule, together with the correction mechanism (the so-called debt brake) in their national legal order, at the latest one year after the entry into force of the Treaty. This shall take place preferably on the constitutional level. However, with regard to referenda necessary for constitutional amendments, especially in Ireland,[32] other provisions are sufficient, provided that their unrestricted, permanent observance and compliance is guaranteed throughout the entire national budgetary process.

bb. An Automated Excessive Deficit Procedure?

Article 7 TSCG strengthens the process of the excessive deficit procedure for the Member States of the Eurozone. The statement of the Heads of State and Government of the Eurozone of 9 December 2011 adopted an ambitious approach, aiming to establish a fully-automated excessive deficit procedure: if the Commission assesses that a state does exceed the 3 % criterion the consequences shall be triggered automatically, unless a qualified majority in the Council votes to the contrary.[33] Now the Contracting Parties commit themselves in Article 7 TSCG only to support proposals and recommendations by the Commission, where they consider that a Eurozone Member is in breach of the deficit criterion. However, this obligation does not apply when a qualified majority of the Contracting Parties whose currency is the Euro is opposed to the decision made by the Commission. In concrete terms, two different interpretations of this clause seem possible.[34] In view of the statement by the heads of state and government, Article 7 TSCG could be interpreted in a way that grants the Commission's recommendations legally binding effect, unless a qualified majority votes to

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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.

[32] For details of the Irish Implementation see R O'Gorman, 'An Analysis of the Method and Efficacy of Ireland's Incorporation of the Fiscal Compact' in M Adams/F Fabbrini/P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart Publishing 2014) 273.

[33] See Statement by the Euro Area Heads of State or Government, Brussels 9 December 2011, p 4: "As soon as a Member State is recognised to be in breach of the 3% ceiling by the Commission, there will be automatic consequences unless a qualified majority of euro area Member States is opposed."

[34] I Pernice, 'International Agreement on a reinforced Economic Union', Legal Opinion of 8 Jan. 2012, 10 ff., available at: http://www.whi-berlin.eu/EU-Reform_2012.html (last visited 28 August 2014). Note that the legal opinion is based on the outdated wording of Article 7 of the treaty ('*undertake to support')*. The final version is '*commit to supporting*'.

the contrary. Such an interpretation would have a significant impact on the excessive deficit procedure in Article 126 TFEU, particularly since the Council would no longer have to constitutively state the existence of an excessive deficit in advance (as is the case in the current legal status).[35] By contrast, the coherence-clause of Article 2 TSCG expresses the will of the Contracting Parties to apply the provision only in accordance with the procedural steps of the contractual excessive deficit procedure. Against this background, Article 7 TSCG cannot intend more than binding the Contracting Parties in respect of their voting behaviour in the Council.[36] The reverse qualified majority can then repeal this obligation.

Moreover, the scope of Article 7 TSCG is limited in two respects: First, the wording itself only concerns those votes in the Council, which follow the proposal of the Commission, where a Member State of the Eurozone is held to be in breach of the *deficit criterion* and therefore to determine an excessive deficit. So the intention of the revised SGP, which was meant to upgrade the *debt criterion* putting it on one level with the deficit criterion, is not realised in Article 7 TSCG. Second, the provision does not affect the subsequent stages of the excessive deficit procedure, [37] particularly not regarding the imposition of sanctions according to Article 126 (11) TFEU.

Article 7 TSCG therefore contributes to the streamlining of the excessive deficit procedure in a rather modest manner and for this reason falls far short from an automatic procedure. Nevertheless, the provision is still consistent with the realisation of the objectives of the Union and therefore does not contradict the coherence-clause and the principle of sincere cooperation (Article 4 (3) TEU).

cc. Conclusions

Contrary to the public perception, the new TSCG does not imply a European 'Fiscal Union'. A common EU shaped economic, financial and budgetary policy is at most rudimentary. In particular there are no new competences established at the European level. Also the

[35] I Pernice, 'International Agreement on a reinforced Economic Union', Legal Opinion of 8 Jan. 2012, 11.
[36] See also A Dimopoulos, ‚The Use of International Law as a Tool for Enhancing Governance in the Eurozone and its Impact an EU Institutional Integrity' in M Adams/F Fabbrini/P Larouche (eds), *The Constitutionalization of European Budgetary Constraints* (Oxford, Hart Publishing 2014) 41, 53.
[37] But here the Reverse Majority Voting under the "Six-Pack" does apply, see in detail R Palmstorfer, 'The Reverse Majority Voting under the 'Six Pack': A Bad Turn for the Union?' (2014) 20 *European Law Journal* 186; H Rathke, '„Umgekehrte Abstimmung" in der Fiskalunion: neue Stabilitätskultur oder halbautomatischer Vertragsbruch?' (2012) 65 *Die Öffentliche Verwaltung* 751.

provisions on the economic policy coordination (Article 9 TSCG) have a rather limited ability to meet the existing economical interdependencies within the Monetary Union. In the end the fiscal treaty predominantly operates with the same instruments as the secondary law, notably the "Six Pack" and the "Two-Pack". The TSCG also demonstrates the limits of the 'emergency solution' using international law, which — because of the non-application of Article 48 TEU and the non-participation of all EU Member States — cannot lead to a modification of primary law.[38] Consequently the Union principle of sincere cooperation (Article 4 (3) TEU) as well as the primacy and unity of Union law set necessary limits to the TSCG in the interest of EU law and the so called Community method.[39]

The TSCG could therefore not initiate the great leap forward in the direction of a 'Fiscal Union', which removes the asymmetrical distribution of competences within the framework of the EMU. As a result, it has a rather symbolic significance.

However, it cannot be excluded that it may become the initial point for a deepened integration of the Eurozone towards a 'Fiscal Union', because the TSCG expresses the strong will of the Member States to preserve and to strengthen the Eurozone, despite all of its deficiencies. With the treaty, necessary attempts are made to secure the monetary stability of the union ("*Stabilitätsunion*") demanded by European and constitutional law.[40] These are in turn compulsory requirements for the solidarity practised in the context of the ESM within the Eurozone.[41] This solidarity cannot and may not represent a one-way street.[42] This is emphasised by the wording of Article 136 (3) TFEU, which explicitly allows emergency aids as an exception to the No-Bail-Out-Clause in Article 125 TFEU only on condition that reforms are implemented in the recipient country which in return has to bring its budget back in line with the EU guidelines on stability.

[38] F Schorkopf, 'Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' (2012) 71 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 183, 208 ff.
[39] D Thym, 'Einheit in Vielfalt: Binnendifferenzierung der EU-Integration' in A Hatje/P-C Müller-Graff (eds), *Enzyklopädie Europarecht, Band 1: Europäisches Organisations- und Verfassungsrecht* (Baden Baden, Nomos 2014), para 5, recital 87 ff.
[40] FCC, case BVerfGE 89, 155 Maastricht, judgment of 12 October 1993, para 148.
[41] See generally V Borger, 'How the Debt Crisis Exposes the Development of Solidarity in the Euro Area' (2013) 9 *European Constitutional Law Review* 7.
[42] In detail C Calliess, 'Perspektiven des Euro zwischen Solidarität und Recht – Eine rechtliche Analyse der Griechenlandhilfe und des Rettungsschirms' (2011) 14 *Zeitschrift für europarechtliche Studien* 213.

2. Further Steps towards a Fiscal Union by Treaty Reform

Against this background it still remains doubtful if all these measures increase the effectiveness of the surveillance of the existing budgetary commitments, especially the prevention of excessive general government deficits in a sufficient and sustainable manner. Therefore the above reforms might not be the final answer to the financial and debt crisis,[43] since the completion of the SGP through secondary legislation, with its more severe sanctioning of the deficit-monitoring together with the reverse majority voting procedure, lies on the outer edge of what is legally possible on the basis of current primary law, even in light of Article 136 TFEU.[44] And the Fiscal Treaty as a 'Treaty on Stability, Coordination and Governance in the Economic and Monetary Union' sets expectations of which it has substantially fallen short.

Apart from the crisis mechanisms the necessary amendment of the Monetary Union through a Fiscal Union requires a European shaped national economic, financial and budgetary policy. In the multilevel constitutionalism of the European Union this implies that the national competences will remain, but need to be vastly better interlocked with binding European guidelines combined with a more effective monitoring and surveillance resulting from this.[45] The latter especially applies with regard to those Eurozone Member States, whose budgetary policy is failing the stability criteria to such an extent that financial assistance from the ESM becomes necessary.

A starting point for this reform could be the so called "European Semester".[46] But as shown above, neither the relevant secondary legislation nor the Fiscal Treaty establish the possibility of legally binding interventions in national budgets. Although the "Two-Pack" has given the

[43] See the proposals in President of the European Council, 'Towards a Genuine Economic and Monetary Union', report issued 5 December 2012; European Commission Communication, 'A blueprint for a deep and genuine economic and monetary union. Launching a European Debate', 28 November 2012, COM(2012) 777 final; see also M Ruffert, 'Mehr Europa – eine rechtswissenschaftliche Perspektive' (2013) 28 *Zeitschrift für Gesetzgebung* 1.

[44] cf. C Antpöhler, 'Emergenz der europäischen Wirtschaftsregierung. Das Six Pack als Zeichen supranationaler Leistungsfähigkeit (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 354, 369 ff.; J Bast/F Rödl, 'Jenseits der Koordinierung? Zu den Grenzen der EU-Verträge für eine Europäische Wirtschaftsregierung' (2012) 39 *Europäische Grundrechte-Zeitschrift* 269.

[45] See also H Geeroms/W Moesen/S De Corte, 'The EU at a Crossroads: An Action Plan', Centre for European Studies, Policy Brief, October 2011.

[46] K A Armstrong, 'The New Governance of EU Fiscal Discipline' (2013) 38 *European Law Review* 501.

Commission the right to ask for a revision of the draft budgetary plan,[47] the review of the Commission still is not legally enforceable. Therefore a **European concept of intervention in the national budget** has to be established.[48] Given the fact that such legally enforceable instruments of intervention possibly interfere with the budgetary autonomy of national parliaments,[49] they have to be arranged with view to the principle of proportionality.[50] Therefore graduated rights of intervention in the national budgetary autonomy may be possible:

- As long as Member States comply with their obligations under the common debt rules, only legally non-binding recommendations are possible (as it is the case *de lege lata*).
- If a Member State, however, violates the stability criteria, it must be possible to make legally enforceable stipulations of how much the state has to save – but the state will keep the specific decision where to save.
- Only if a Member State is dependent on financial assistance of the ESM concrete legally enforceable recommendations would be possible. In a case like this it is only fair to ask, to what extent a Eurozone Member State that receives money from the ESM (or a future EMF) has already lost its budget autonomy: An over-indebted Member State ultimately can only choose between a sovereign default or the recourse to financial assistance of the ESM. The recipient state therefore autonomously agrees to a limitation of its budgetary sovereignty, when deciding to receive financial assistance from the ESM. This is even more true, when the conditions serve the objective of guaranteeing compliance with the (legally binding) stability criteria. Against this background, a legally enforceable budgetary veto right on the EU level regarding the respective national draft budget can hardly be assessed as an interference with the parliament's budget sovereignty, when the only alternative is a sovereign default. In this case national budget autonomy is already lost. Therefore legally enforceable EU rights of intervention cannot infringe budgetary sovereignty. In such a situation, specific European provisions regarding the national draft budget, particularly the expenditure and the revenue side are imaginable. This approach corresponds the conditionality established by virtue of the

[47] cf. Art. 7 Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 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 [2013] OJ L140/11.
[48] cf. European Commission Communication, 'A blueprint for a deep and genuine economic and monetary union. Launching a European Debate', 28 November 2012, COM(2012) 777 final, p. 26 f.
[49] For Germany see the case law of the FCC case BVerfGE 123, 267 Lisbon, judgment of 30 June 2009, para 256; case BVerfGE 129, 124 EFSF, judgment of 7 September 2011, para 125 ff.
[50] In detail C Calliess, 'Die Reform der Wirtschafts- und Währungsunion als Herausforderung für die Integrationsarchitektur der EU' (2013) 66 *Die Öffentliche Verwaltung* 785, 788 f.

new Article 136 (3) TFEU, enshrined into the Treaties with regard to the ESM, but as well the Pringle decision of the ECJ with regard to the legal conformity of EFSF and ESM in view to the No-Bail-Out-Clause of Article 125 TFEU. [51]

IV. Banking Union: With or Without Treaty Reform?

But it is also true that the crisis would not have been prevented by the Fiscal Treaty itself in countries like Spain and Ireland. The fiscal risks that piled up in those countries were ultimately caused by excessive private sector debt.[52] Whether the indebtedness is public or private, it becomes a problem for the monetary union only if private creditors do not write off their losses on their own account, but socialise them. But that is exactly what happened: the debts of financial institutions and of banks in particular, were socialised. The banks were able to do so, because they knew that their systemic importance would give the European taxpayer no choice but to save them.

To put a stop to this game once and for all, the Eurozone needs a robust banking union. A **single banking supervisor** must ensure that the banking sector has a solid capital base. And a **common bank restructuring and resolution mechanism** must make creditors accountable: if banks suffer large losses, first shareholders must fill the gap, then subordinated bondholders, thereafter senior creditors and lastly the bank funds financed by the banks themselves. Only when these options have been exhausted, should there be resort to the European taxpayer.

These aspects were part of a complex reform agenda beginning with the establishment of the European System of Financial Supervision (EFSF).[53] The main task of the new created European supervisory agencies is the coordination of the national authorities in order to ensure consistent supervisory practices. Regarding systematically relevant banks the EFSF has now been complemented by a Single Supervisory Mechanism (SSM) which is situated at

[51] On conditionality see also M Ioannidis, 'EU Financial Assistance Conditionality after „Two Pack"' (2014) 74 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 61; M Schwarz, 'A Memorandum of Misunderstanding – The doomed road of the European Stability Mechanism and a possible way out: Enhanced cooperation' (2014), 51 *Common Market Law Review* 389.
[52] Sachverständigenrat zur Begutachtung der gesamtwirtschaftlichen Entwicklung, 'Chancen für einen stabilen Aufschwung' (2010) Jahresgutachten 2010/2011, para 126.
[53] N Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union* (Tübingen, Mohr Siebeck, 2012).

the European Central Bank.[54] The SSM was established by a Regulation based on Article 127 (6) TFEU.[55] The latest political compromise was reached in December 2013 concerning the Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF).[56] The Financing of the SRF was not only political highly controversial, it also caused serious legal doubts if Article 114 TFEU as the proposed legal basis is sufficient in order to establish the fund. In the end, the decision was reached to create an Intergovernmental Agreement (IGA) as a legal basis for the Fund complementing the SRM-Regulation which is based on Article 114 TFEU. In case of the SRM – contrary to the ESM or the Fiscal Treaty – Union Law is complemented by International Law in an area of shared competences, the internal market (Article 4 (2) lit. a) TFEU). The scope of the competences of the EU is therefore crucial for the legality of using International Law. Only if Article 114 TFEU (maybe in conjunction with Article 352 TFEU) does not provide a sufficient legal basis for the establishment of the SRF, member states are free to use International Law. Otherwise the envisaged co-decision of the European Parliament could be circumvented. In the light of the previous considerations, the judiciary of the ECJ indeed does confirm the establishment and financing of independent agencies based on Article 114 TFEU.[57] But probably the intended financing of the estimated €55 billion SRF via nationally raised contributions is qualitative and quantitative beyond the scope of this judiciary. Therefore from a legal point of view it may have been advisable to either apply Article 114 TFEU in conjunction with Article 352 TFEU or even Article 352 TFEU alone.[58] However, this was politically rejected.

V. Economic Union

In a renewed Eurozone national budgetary responsibility as established by the Fiscal Union and European solidarity should go hand in hand. Situations in which a Member State suffers

[54] In detail E Ferran and V Babis, 'The European Single Supervisory Mechanism' (2013) 13 *Journal of Corporate Law Studies* 255; A Thiele, *Finanzaufsicht. Der Staat und die Finanzmärkte* (Tübingen, Mohr Siebeck, 2014) 519 ff.; JA Kämmerer/P Starski, 'Die Europäische Zentralbank in der Bankenunion oder: Vor Risiken und Nebenwirkungen wird gewarnt' (2013) 28 *Zeitschrift für Gesetzgebung* 318.

[55] Since Article 127 (6) TFEU only permits to confer "specific tasks" upon the ECB this was highly criticized, for details see B Wolfers/T Voland, 'Europäische Zentralbank und Bankenaufsicht – Rechtsgrundlage und demokratische Kontrolle des Single Supervisory Mechanism' (2014) 14 *Zeitschrift für Bank- und Kapitalmarktrecht* 177.

[56] For the political debate see D Howarth/L Quaglia, 'The Steep Road to European Banking Union: Constructing the Single Resolution Mechanism' (2014) 52 *Journal of Common Market Studies* 125.

[57] ECJ, case C-217/04 *United Kingdom v Parliament and Council* [2006] ECR I-3771; case C-270/12 *United Kingdom v Parliament and Council*, judgment of 22 January 2014, not yet reported.

[58] In legal scholarship it is controversial whether in fact Art. 352 TFEU should be applied in conjunction with another competence norm, see M Rossi, in C Calliess/M Ruffert (eds), EUV/AEUV. Das Verfassungsrecht der Union mit Europäischer Grundrechtecharta, 4th edn (München, C.H. Beck, 2011), Article 352 AEUV, para 68.

an acute liquidity emergency and is forced to enact so called "austerity measures" on its population should remain exceptional. A genuine Economic Union should therefore aim to prevent such developments. A possible way to prevent such extremes might be a Eurozone Insurance Mechanism to cushion the fiscal consequences of a dramatic economic downturn. The Eurozone could for example establish **a common unemployment insurance system, to complement national systems**.[59] All Member States, which organize their labour markets in line with the needs of the Monetary Union and the Fiscal Union could be eligible for participation. This would create a mechanism to counteract deep recessions with automatic European stabilisers. Thus, the macro-economic cohesion of the euro area could be strengthened and the integration of the European labour market accelerated.

Complementary to the No-Bail-Out-Clause in Article 125 TFEU, relying only on the corrective of the financial markets by the so called spreads,[60] more efficient precautionary measures with regard to prevent a crisis must be introduced. In view of a sovereign default with all its systemic consequences for the Eurozone and the international financial markets, it is of particular importance to provide an instrument, which has a deterrent effect beforehand and at the same time a stabilising effect in the worst-case scenario. With that aim, the ESM could be developed to a European Monetary Fund (EMF),[61] which — together with the EU institutions (especially the Commission) — could be equipped with the aforementioned rights of intervention in the national budgets. Moreover the EMF should be enabled to initiate the insolvency of a bankrupt Eurozone Member State. Following this, an institutionalised sovereign default should be added to the Monetary Union.[62] On that basis, an EMF could grant time-limited credits in the case of the absence of debt sustainability, in order to secure, with regard to the financial stability, a structured insolvency of the Eurozone Member State concerned.

[59] See L Andor, 'Basic European Unemployment Insurance – The Best Way Forward in Strengthening the EMU's Resilience and Europe's Recovery' (2014) 49 *Intereconomics* 184; H Enderlein, 'Solidarität in der Europäischen Union – Die ökonomische Perspektive' in C Calliess (ed), *Europäische Solidarität und nationale Identität* (Tübingen, Mohr Siebeck, 2013), 83.

[60] Regarding the market failures see C Calliess, 'Finanzkrisen als Herausforderung der internationalen, europäischen und nationalen Rechtsetzung' (2012) 71 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 113, 129 ff.

[61] See D Gros/T Mayer, 'How to deal with sovereign default in Europe: Create the European Monetary Fund now!', CEPS Policy Brief No. 202/February 2010, updated 17 May 2010; U Häde, 'Legal Evaluation of a European Monetary Fund' (2010) 45 *Intereconomics* 69.

[62] See in general A Krueger, *A New Approach to Sovereign Debt Restructuring*, (Washington, International Monetary Fund, 2002); A von Bogdandy/M Goldmann, 'Sovereign Debt Restructurings as Exercises of International Public Authority: Towards a Decentralized Sovereign Insolvency Law' in C Espósito/Y Li/J P Bohoslavsky (eds) *Sovereign Financing and International Law* (Oxford, Oxford University Press, 2013) 39.

VI. Institutional Reforms leading to a New Treaty

In dealing with the crisis, the Heads of State and Government played so far the leading role. Not at least against this background it is not surprising, that the institutional setting of the Fiscal Treaty is arranged around the (European) Council.

1. The Fiscal Treaty as a Starting Point?

In the course of the international financial and debt crisis a new political body, the so called **Euro Summit**, emerged at the European level. Apart from the Heads of State and Government of the Eurozone, the President of the Commission as well as the President of the ECB at invitation, attend the meetings that take place at least twice a year. This former de-facto-body became increasingly institutionalized, first based on political statements[63] and now formally recognized by the Fiscal Treaty (see Article 12 TSCG). The European Parliament as well as those Contracting Parties whose currency is not the euro, are informed about these meetings (Article 12 (5), (6) TSCG). The non-Eurozone Member States, which have ratified the treaty, however do take part in those summits that are dedicated to fundamental issues regarding the competitiveness of the Contracting Parties or the global architecture of the Eurozone. Furthermore, they are to be invited to debates on specific issues of the implementation of the Fiscal Treaty at least once a year (Article 12 (3) TSCG). Despite the fact that the Euro Summit has given itself formal Rules of Procedure,[64] it is considered by the contracting parties to be an informal meeting (Article 12 (1) TSCG). Its ambivalent status resembles that of the so-called Euro Group, the meeting of the Euro finance ministers, which although formally affirmed by Article 137 TFEU has likewise remained an informal meeting.[65]

Although the Heads of State and Government of the Eurozone are free to meet informally, the effects of these meetings on the institutional set-up of the European Union are hardly predictable. In this respect the history of the European Council serves as a vivid example of

[63] European Council – 23 October 2011 – Conclusions, EUCO 52/1/11, REV 1, CO EUR 17, CONCL 5, Brussels 30 Nov 2011, p 5; Euro Summit Statement, Brussels 26 October 2011, Annex 1.
[64] Available at http://www.eurozone.europa.eu/summits (last visited 28 August 2014).
[65] See U Puetter, 'Informal Circles of Ministers: A Way Out of the EU's Institutional Dilemmas?'(2003) 9 *European Law Journal* 109.

how informal bodies evolve[66] and their influence on the contractually provided decision-making procedures ('Community method').[67] The participation of the President of the ECB in the meetings of the Euro Summit could also raise problems with regard to the independence of the Central Bank (Article 130 TFEU).

The Fiscal Treaty institutionally does also involve the **Commission.** According to previous practice member states can make use of EU Institutions outside the legal framework of the EU provided that all member states of the EU do agree.[68] In case of the Fiscal Treaty such consensus of all member states was lacking because of the British veto. But with view to the parallel "Six Pack" and "Two Pack" legislation it is questionable, whether the Fiscal Treaty confers any new competences on the Commission at all. In fact, one can say that the powers provided in the Fiscal Treaty largely correspond with the Commission's Role under EU primary and secondary law.[69] Besides of that, in its Pringle decision the ECJ acknowledged the usage of EU Institutions outside the legal framework of the EU regarding the involvement of the Commission and the ECB under the ESM treaty.[70] The Court stated that "[…] 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, […] provided that those tasks do not alter the essential character of the powers conferred on those institutions by the EU and FEU Treaties".[71] Applying this doctrine to the Fiscal Treaty one can hardly notice an alteration of the *essential character* of the Commission's powers. The Fiscal Treaty rather does confirm the Role of the Commission under the "Six Pack" and "Two Pack" Legislation.

[66] cf. C Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (Tübingen, Mohr Siebeck, 2010) 118 ff.; P Dann, 'The Political Institutions' in A von Bogdandy/J Bast (eds), *Principles of European Constitutional Law*, 2nd edn (Oxford, Hart Publishing, 2010) 237, 261 ff.

[67] See already C Calliess, 'Der Kampf um den Euro: Eine „Angelegenheit der Europäischen Union" zwischen Regierung, Parlament und Volk' (2012) 31 *Neue Zeitschrift für Verwaltungsrecht* 1; see in general D Schwarzer, 'The euro area crisis, shifting power relations and institutional change in the EU', Paper prepared for the Dahrendorf Symposium, 9-10 Nov. 2011 (on file with author).

[68] In detail D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Baden Baden, Nomos, 2004) 194 ff.

[69] In detail C Calliess, 'From Fiscal Compact to Fiscal Union? New Rules for the Eurozone' (2012) 14 *Cambridge Yearbook of European Legal Studies* 101.

[70] See also S Peers, 'Towards a New Form of EU Law?: The Use of EU Institutions outside the EU Legal Framework' (2013) 9 *European Constitutional Law Review* 37; P Craig, '*Pringle* and Use of EU Institutions outside the EU Legal Framework: Foundations, Procedure and Substance (2013) 9 *European Constitutional Law Review* 263.

[71] ECJ, Case C-370/12 *Pringle v Government of Ireland, Ireland and The Attorney General*, judgment of 27 November 2012, not yet reported, para 158.

Interesting is as well the role of the **ECJ**, which is based on Art. 273 TFEU. The plan to make the Luxemburg Court responsible for the compliance-control of the budgetary rules[72] would not only have been problematic with regard to Article 126 (10) TFEU but also minimally effective given the limited role of courts in such complex processes. Therefore the ECJ was only entrusted to pass judgments on the implementation of the budgetary rule and debt brake (Article 3 (2) TSCG) within the national legal orders. Article 8 (1) TSCG provides that the Commission is invited to report on the provisions adopted by each of the Member States in compliance with their duties in Article 3 (2) TSCG. If the European Commission, after having given the Contracting Party concerned the opportunity to submit its observations, concludes that an infringement has occurred, the matter will be brought to the ECJ by one or more Contracting Parties. However, the formulation of Article 8 (1) sent. 2 TSCG itself does not give an answer to the question of who has to exercise this duty in a specific case. Only a protocol to the treaty, which was concluded on 2 March 2012 on the occasion of the signing of the contract, lays down the details. According to the protocol the action must generally be filed by the Council Presidency (Article 16 (9) TEU) within a period of three months after the submission of the Commission's report. According to Article 8 (2) TSCG, if the Commission or the Contracting Parties are convinced that another Contracting Party has not complied with the judgment of the ECJ, the Contracting Parties may bring the case again before the ECJ and request the imposition of financial sanctions.

2. A New Institutional Design for the Eurozone by a Treaty Reform

The Fiscal Treaty made interesting steps into a special governance of the Eurozone outside the EU-Treaty. It is a first step into a new institutional arrangement between a possible Euro-Treaty and the EU. Apart from the fact, that it shows as well the legal and practical problems of a Two-Speed Europe,[73] its institutional design is not up to the tasks that need to be done in a Fiscal and Economic Union.

The Eurozone – inside or outside the Union Treaty – needs a European executive capable of acting. An **Economic Government** should not have an intergovernmental character based on the model of the ECOFIN or the Euro-Summit. Instead it should be established as part of the

[72] cf. Statement of Chancellor Merkel prior to the European Council of 8-9 Dec. 2011, German Federal Parliament, Pl.Prot. 17/147, 2 December 2011, 17570.
[73] For details see JC Piris, *The Future of Europe: Towards a Two-Speed EU?* (Cambridge, Cambridge University Press, 2012); D Thym, *Ungleichzeitigkeit und europäisches Verfassungsrecht* (Baden Baden, Nomos, 2004)

European Commission. It could be comprised by it´s President and 5 Commissioners, that deal with the relevant policy fields (e.g. the Commissioners for the Monetary Union, the Internal Market, for Trade and Financial Stability). The Economic Government should have the competence to negotiate reform packages and conclude bilateral agreements with Member States undertaking structural reforms,[74] it should decide on bank closures and its should ensure the provision of public goods by proposing legislation with regard to the Fiscal- and Economic Union. Together with the above mentioned European Monetary Fund (EMF) it could be equipped with the above described graduated instruments of intervention in national budgets.

Moreover the Economic Government needs a **budget to finance a growth fund**, by which it can support structural reform processes in those Member States, that concluded a bilateral agreement. In principle, it would be possible to finance this budget through taxation. But compared to the present rather limited tax-raising competence of the EU[75] a financing via taxation would not only alter the EU's own resource system but also the political character of the EU itself. Therefore and with regard to political and constitutional constraints in the Member States[76] it might be preferable not to give the Economic Government extensive access to the European tax base. Instead it makes sense to finance the budget through a membership fee, in the amount of about 0.5 per cent of the gross domestic product.

With view to democratic accountability the Economic Government has to be elected and scrutinised by a special **Parliament**.[77] One possibility is to staff this body with deputies from the European Parliament representing Member States of the Eurozone, since its purpose is the provision of public goods in the Euro area. This approach may run counter to the normative perspective of Article 10 (2) TEU according to which the European Parliament is the representative body of EU citizens not of EU member states.[78] Since the new parliaments

[74] Towards this direction, see Communication from the Commission to the European Parliament and the Council, 'Towards a Deep and Genuine Economic and Monetary Union. The introduction of a Convergence and Competitiveness Instrument' COM(2013) 165 final.

[75] See in detail F Fabbrini, 'Taxing and Spending in the Euro Zone: Legal and Political Challenges Related to the Adoption of the Financial Transaction Tax' (2014) 39 *European Law Review* 155.

[76] Within german scholarship it is often assumed that the power to tax turns the EU into a Federal State, see C Waldhoff, in C Calliess/M Ruffert (eds), EUV/AEUV. Das Verfassungsrecht der Union mit Europäischer Grundrechtecharta, 4th edn (München, C.H. Beck, 2011), Article 311 AEUV, para 16; see also the restrictive case law of the FCC case BVerfGE 123, 267 Lisbon, judgment of 30 June 2009, para 256.

[77] See also I Pernice et al, *A Democratic Solution to the Crisis. Reform Steps towards a Democratically Based Economic and Financial Constitution for Europe* (Baden Baden, Nomos, 2012) 122 f.

[78] C Fasone, 'European Economic Governance and Parliamentary Representation. What Place for the European Parliament? (2014) 20 *European Law Journal* 164, 181 ff.

responsibility would also be to pass framework-legislation (together with the Council) on matters, that touch such sensitive policy fields as economic, fiscal, budget and social policy, it might be preferable to establish a new kind of Euro-Parliament consisting of members of national parliaments. This third chamber beside the European Parliament and the Council would have special competences, to ensure that control over these, from a national point of view very sensitive policy fields, remain in their hands.[79] Arguably, it is likely that such an additional institution makes the European decision-making even more complex. But such a third chamber would evolve the role of the national parliaments as it is currently funded in Article 10 (2), 12 TEU and Article 13 TSCG into a further integrated multi-level parliamentarism.[80]

Another possibility would be to establish a veto right (red card) of national parliaments with view to these sensitive policy fields. In order to ensure, that one national veto cannot block the whole European decision-making-process for an unlimited time, the veto might be of a suspending character. The European institutions would have to consider and to take into account the reasons of the national parliament. If a compromise can´t be found, after a time period of six month, there could be two possibilities: Either a minimum of one third of the other national parliaments does support the veto, then the proposal is taken from the agenda. Or, if this minimum is not reached, the European institutions could go on with the decision-making-process. In doing so, in the Council then a unanimity decision would be necessary. Such an "emergency break" is not only a well known approach in sensitive policy areas just like the judicial cooperation in criminal matters (cf. Article 82 (3), 83 (3) TFEU).[81] Its basic idea also corresponds to the right of national parliaments to raise a subsidiarity complaint (cf. Article 12 lit b) TEU).

VII. First Conclusions

In order to avoid a general shift from the community method to the intergovernmental method already the ESM Treaty, the Fiscal Treaty as well as the latest IGA as part of the Banking Union call for a Treaty Reform. Moreover the proper functioning of the Monetary Union speaks in favour of a europeanisation of national fiscal, economic and social policies in the

[79] For a similar approach see S Kadelbach, 'Lehren aus der Finanzkrise – Ein Vorschlag zur Reform der Politischen Institutionen der Europäischen Union' (2013) 48 *Europarecht* 489, 500 f.
[80] For other proposals see F Fabbrini, D Keleman and U Puetter in this volume.
[81] See C Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon* (Tübingen, Mohr Siebeck, 2010), 435 f.

framework of a real Political Union. This, as well as the necessary institutional changes, make a Treaty reform inevitable. If there is no consensus between the Member States, the Fiscal Treaty might become the starting point for a "Europe of Two Speeds" with some Member States going ahead and with the opportunity for the other Member States to join this „Coalition of the Willing" whenever they want.